Neutral Citation Number: [2017] EWHC 28 (Ch)

Case No: 3BM30331

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 16/01/2017

Before :

HHJ DAVID COOKE

- -

Between :

Henry George Dickinson	**Claimant**
- and -	
NAL Realisations (Staffordshire) Ltd (1)	**Defendants**
Kevin John Hellard and Gerald Krasner (2)	
(Joint Liquidators of the First Defendant)	
- and -	
Judith Yap Dickinson	**Third Party**
- and -	
Robert Williamson	**Fourth Party**

- -
- -

James Morgan (instructed by **Francis, Wilks & Jones**) for the **Claimant, Third and Fourth Parties**
James Barker (instructed by **Gateley Plc**) for the **Defendants**

Hearing dates: 13,14,17-21 October 2016

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Approved Judgment

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

....

HHJ DAVID COOKE

HHJ David Cooke:

Introduction

1. This case concerns a company called at the material times Norton Aluminium Ltd, which operated an aluminium smelting foundry in Norton Canes in Staffordshire. That company (which I will refer to as "the company" or "Norton Aluminium") went into administration in August 2012 following the circulation of a draft judgment by which HHJ McKenna, sitting as a judge of the Queen's Bench Division in this court, upheld in part claims in nuisance brought against it by a group of local residents. It is now in liquidation and is the first defendant in this claim. Mr. Dickinson, who was the managing director and controlling shareholder of the company, originally brought the claim to recover in the liquidation various sums totalling (for present purposes) just over £1m which he says are due to him and secured by a debenture over the company's assets.

2. The liquidators bring various counterclaims against Mr. Dickinson and claims against the third and fourth parties who were directors of the company, in which:

    i) They seek to avoid a transfer of the company's factory premises to Mr. Dickinson made in 2005, on the basis that it was not properly authorised by the directors and shareholders at that time, and

    ii) They seek, on various grounds, to set aside or recover compensation for transactions entered into in 2010 and thereafter in which

        a) The company bought back most of its shares from Mr. Dickinson and connected parties for £2.5m, which was left outstanding as a secured loan,

        b) The company sold a subsidiary (Norse Castings Ltd or "Norse") to Mr. Dickinson for £1, which is alleged to be an undervalue, and

        c) The company made further investments in and loans and supplies on credit to a related company in India, notwithstanding that Mr. Dickinson had arranged that shares in that company be issued to him (paid for out of the proceeds of the share buy-back) such that he became the majority shareholder.

    These transactions, it is said, formed a scheme by which Mr. Dickinson restructured the affairs of the company when it was threatened with the litigation that eventually brought it down with the object that the claimants in that litigation would receive nothing if they won and he would be in a position to buy the main business from an administrator and continue it under a "phoenix" company, as indeed he eventually did.

    I refer to the bases on which these transactions are attacked in more detail below, but for present purposes it is sufficient to say that the liquidators allege that the directors were in breach of duty to consider the interests of creditors, which they say were engaged at the material times, as well as those of shareholders, that Mr Dickinson in particular preferred his own interests over those of the company, that the share buyback and sale of Norse were transactions at an undervalue intended to put assets beyond the reach of creditors within s 423 Insolvency Act 1986 and/or were void, alternatively voidable, by reason of lack of proper authorisation by directors and/or shareholders and/or failure to comply with formalities required by the Companies Act 2006.

3. As against Mrs Dickinson and Mr. Williamson, the claims against them are, again broadly, of breach of duty in that they either participated in the transactions challenged and so were guilty of the same breaches as are alleged against Mr. Dickinson, or they improperly abdicated their responsibilities as directors by allowing Mr Dickinson to run the company as he saw fit and enter into these transactions without consultation with them. Mr Williamson is not involved in the 2005 property transfer as he was not a director at the time. Both these parties say that, insofar as they allowed Mr Dickinson to take decisions, that was appropriate delegation by them. If they are found in breach of duty they seek relief under Companies Act 2006 s 1157 on the basis that they acted honestly and reasonably and ought fairly to be excused.

4. It is convenient to set out the chronology in more detail at this point before turning to the individual claims.

The factual background

5. The foundry business has been operating on the site at Norton Canes for over 50 years. Mr Dickinson acquired the entire share capital of the company which owned and operated it in 2000. It appears that he transferred some shares soon afterwards to the trustees of the STB Engineering Ltd Directors SSAS (Small Self Administered Scheme, "the pension scheme"). According to a definitive trust deed prepared in 2007 the pension trustees were Mr Dickinson and Mrs Dickinson together with Barnett Waddingham Trustees Ltd which was appointed, as required by statute, as the scheme's professional trustee. Since there are issues about whether transactions were approved or ratified by the holders of the shares owned by the pension scheme, I note that although I was not shown the register of shareholders the company's annual returns record the pension scheme itself as being the shareholder, and I proceed on the basis that the registered member is either named as being the pension scheme, or that all the trustees are registered as joint holders. Mr Dickinson did not make any case that he was the sole registered holder and so, as against the company, entitled to do any act of the member holding such shares.

6. Other shares appear to have been transferred to the trustees of the H Dickinson Discretionary Settlement 2003 ("the settlement"), which was created by Mr Dickinson. Again the company's annual returns show the settlement itself as being the shareholder. Although the liquidators' assumption (and my own) throughout the trial was that Mrs Dickinson was also a trustee of the settlement, Mr. Morgan submitted in closing that this was not actually established by the evidence, and Mr. Barker made the concession that he would accept that Mr Dickinson was able to act on behalf of the settlement as if he had the authority of any other trustee.

7. According to the annual returns, at all material times Mr Dickinson has held 50.6% of the issued ordinary shares, the pension scheme 10.2% and the settlement 39.2%. Mrs Dickinson became a director in 2002. Mr Williamson was appointed a director on 1 January 2008. The company secretary throughout was Mr. Lynn Tranter, who made a witness statement on behalf of Mr Dickinson and attended to give evidence but was taken ill in the witness box before Mr. Barker could complete his cross examination.

Fortunately he recovered, but Mr. Barker in the circumstances did not ask that he be recalled. The company's auditors were Mercer & Hole.

8. In September 2005 the freehold factory premises from which the company traded were transferred by it to Mr Dickinson. A board minute was produced (Bundle E2/p 66) recording a meeting between Mr and Mrs Dickinson as directors and Mr Tranter as company secretary in which the directors resolved that the company should sell the freehold to Mr Dickinson for £224,000 and take a lease back for a period of four years at a rent of £40,000 per annum, contracted out of the security of tenure provisions of the 1954 Landlord and Tenant Act. Mr Tranter is reported as expressing concern that the purchase price may be below market value, although Mr Dickinson disagreed. According to the minute "The price offered also reflected the below-market rate of rent. He [Mr Dickinson] also undertook to enter into a new lease on similar terms at the end of the four-year period, if circumstances reasonably permitted." This is the first of the transactions challenged. At some point in 2010, Mr Dickinson transferred the property into the joint names of himself and his wife.

9. In 2006 Mr Dickinson began investigating the possibility of establishing a subsidiary company to carry on a similar business situated in India. He considered that there was a good potential market in India for metal in ingot form and that it would be advantageous to smelt the metal in India from scrap supplied from the UK because scrap could be imported tariff free but finished ingots would attract a substantial customs duty. Norton Aluminium India Private Limited ("NAI" or "Norton India") was incorporated in India in September 2006 as a wholly-owned subsidiary of the company. It acquired land and equipment in order to establish a foundry in India. In order to comply with Indian exchange control regulations, NAI was funded by a combination of share capital and secured loans, which eventually totalled £1.4 million, made pursuant to a term loan agreement for which consent had to be obtained from the Reserve Bank of India. In addition, scrap was supplied to NAI from the parent company in the UK on credit terms. Mr Dickinson's evidence was that it would not have been possible simply to lend money on an unsecured on demand basis, since that would have been regarded by the Indian authorities as a method of extracting profit and avoiding exchange control.

10. In November 2006 Mr Dickinson became aware that letters had been circulated to a number of local residents by Hugh James, a firm of solicitors (E1/11) in which they said they were investigating the possibility of "pursuing a group legal action against the operators of the Norton Aluminium site claiming compensation for odour, dust and noise pollution as well as an injunction to stop the defendant from continuing the nuisance in the future". It referred to their specialism in environmental group actions and said "we have successfully handled a number of high-profile cases over the years throughout the UK on a 'no win no fee' basis…". Mr Tranter sent a copy of this letter to the company's insurance brokers, asking for confirmation that any claim would be covered by insurance.

11. Hugh James sent a letter of claim dated 14 March 2007 (E1/14) in which they said they acted for 27 potential claimants seeking to pursue a claim for an injunction and damages for nuisance caused by odours, dust and noise. The letter said that the solicitors were of the view that the litigation should be conducted under a Group Litigation Order ("GLO") and that they were acting the terms of a Conditional Fee Agreement, and invited an admission of liability.

12. The next relevant document in the bundle is a letter sent by Hugh James dated 8 January 2008 to Weightmans, solicitors. According to Mr Dickinson, very little had happened to progress the potential claim in the interim, but it appears that since their letter of claim the previous year Hugh James must have been in correspondence at least with Cunningham Lindsay (a firm of loss adjusters presumably instructed by the company's insurers) and Weightmans, who up to that point had been instructed by the insurers. It is apparent from Hugh James' letter that there had been a denial of liability and some discussion about a GLO. At about the time of receipt of this letter however the insurers must have denied liability under the policy (see letter at E1/23), which they did on the basis that claims for pollution were not covered unless caused by a sudden unexpected event. Thereafter, Weightmans were instructed direct by the company.

13. On 8 February 2008, Mr Cottam, a partner in Weightmans, wrote to Mr Dickinson to record that he would now be acting directly for the company. He referred to having previously carried out liability investigations and to an attendance note dealing with that aspect, although that has not been included in the bundle. Mr Cottam says in that letter that he will need to instruct counsel to prepare a defence. He does not say anything directly about his view of the potential merits of the claim, but his letter includes the following:

> "It is very difficult to estimate, with any degree of accuracy, the likely costs in this case. So far as your legal costs are concerned, your insurers have settled those costs to date…
>
> The claimant's solicitors are seeking a Group Litigation Order. These are a notoriously costly way of litigating. If the case were to proceed to a final trial, it is not inconceivable that the claimants' solicitors costs will exceed any damages. For reserve purposes only I would suggest that you allow the following:-
>
> | | |
> |---|---|
> | Damages | £150,000 |
> | Legal costs | <u>£150,000</u> |
> | | £300,000 |
>
> I have not arrived at the above figures by any precise calculation. I understand there are about 100 claimants and I have allowed £1500 damages for each claimant. That is how I arrive at the figure of £150,000. Legal costs is my best estimate at this stage.
>
> Obviously I will keep the valuation of this claim under close consideration and will advise you if the figure increases or decreases for whatever reason. "

14. On 3 June 2008, Ms Dale, an assistant solicitor at Weightmans who by now was dealing with the case, forwarded two letters received from Hugh James. One of these was a without prejudice letter, and in relation to that Ms Dale said (E1/27):

> "It indicates that the 98 claimants are anticipated to claim £2000 each for each year that they have suffered a nuisance.

> That amounts to in excess of £1.2 million. Further, the claimants will be asking the court for an injunction to prevent the nuisance continuing.
>
> At this stage… we should now formally instruct counsel to prepare an advice….
>
> **Costs and Potential Exposure**
>
> Dave Cottam provided you with a costs estimate in his letter of 8 February 2008. At that stage he indicated that £150,000 was his best estimate of the claimant's legal costs. This was based on a guesstimated damages claim of also £150,000…
>
> Since Dave's letter to you we have received Hugh James' letters which indicate that the claim against your company is in excess of £1.2 million in relation to past nuisance. You will appreciate therefore that this in turn will increase the legal costs involved.
>
> … If all 98 (or however many claims are finally brought) claims are tried together under a Group Litigation Order, the likely costs of this litigation will be high. My best estimate of them is somewhere between £300,000-£450,000, plus VAT and disbursements.
>
> I have no reason to believe that the claimants' costs would vary greatly from your own. However because the claimants' solicitors are acting under a CFA, they are entitled to claim from your company up to 100% extra by way of uplift… As a result, the costs payable by your company if you lose the litigation could easily amount to £1.35 million …
>
> … I advise that your potential exposure could be as much as £2.55 million. This of course is the worst case scenario if you were to lose …
>
> I appreciate that the figures above may be quite startling, however it is important that we provide you with the best estimate we can, at this early stage, in terms of the legal costs. ”

15. Mr Dickinson obviously objected strongly to the anticipated level of Weightmans' fees. Ms Dale wrote a further letter dated 15 July 2008, responding to an email which is not in the bundle, explaining why the fees she had estimated were considerably higher than the figures originally given by Mr Cottam. She also said "It is my professional obligation to give you my best estimate of the likely costs of this matter. I understand that you do not like the estimate that I have provided. I also understand that you do not intend to spend £450,000 plus VAT plus disbursements in defending this matter. That is your prerogative. However it does not change either my professional obligations or my cost estimate of £450,000 per party… In addition, the success fee which is applicable to the claimants' costs means that a further £450,000 plus VAT, plus disbursements needs to be included in your exposure." Shortly after that, Mr Dickinson withdrew Weightmans' instructions. From then until December 2009, a period of just under 18 months, he dealt with correspondence himself.

16. Before me Mr. Dickinson maintained that he at all times considered the likely maximum exposure for damages and costs if the claim was lost to be the £300,000 originally estimated by Mr. Cottam, and that this estimate by a partner was more reliable than the subsequent figures, seeking to dismiss Ms Dale's letter as being sent by an assistant solicitor seeking to justify excessive fees. This would not have been a reasonable view of Ms Dale's letter, which makes clear it was written after discussion with Mr. Cottam and the partner then in charge. Nor do I accept this was what Mr. Dickinson in fact thought of it at the time. He did not wish to spend anything like the amounts estimated for his own costs, but I do not believe he thought either that the risk of a costs claim by the other side was limited to Mr. Cottam's figure, or that if he used solicitors to defend the claim his own costs would be similarly limited.

17. In a letter to the auditors dated 5 February 2009 (E1/37) Mr Dickinson proposed making a provision in the accounts of £100,000 in respect of the nuisance claim. He sent the auditor copies of various solicitors letters "to substantiate the provision. You will see that the lawyers advise the total cost to us, if we lose, could be £1.35 million. Would a much larger provision therefore be tax allowable?" Mr Dickinson accepted that this figure had come from Ms Dale's letter, and that he knew the advice had in fact been that the total exposure could be £2.55 million, including damages.

18. On 22 June 2009, Hugh James wrote acknowledging that there had been some delay, but stating that they proposed to proceed with an application for a GLO. Mr Dickinson responded with a long list of questions seeking details of the claim, which he said he had taken from an earlier letter written by Weightmans. Hugh James repeated their enquiry on 7 October, and Mr Dickinson repeated his response on 12 October 2009.

19. From this point onwards, the liquidators say, Mr Dickinson began to develop his plan to protect assets against the risk of losing the claim. On 15 October 2009 (E1/40) Mr Tranter wrote to a tax partner at the auditors saying:

> "**Capital reduction**
>
> Henry wants to re-examine a capital reduction at Norton with the company purchasing its shares back from Henry… Henry's thought was to loan the money back to Norton with a charge over the assets – second to HSBC. Loan would be interest-bearing…
>
> **NA India**
>
> Henry also wishes to explore the removal of NA India from a wholly owned subsidiary of North Aluminium…"

There had been previous discussion of a share buy back from 2003, but it had not been progressed and does not appear to have been under active consideration for some years.

20. On 30 November 2009, Hugh James wrote again sending a draft of their application for a GLO, which they stated would be filed at court on 17 December 2009. They asked to be informed which solicitors the company would instruct, and it seems that this prompted Mr Dickinson to instruct Carter Lemon Camerons LLP ("CLC"), a firm that had previously acted for the company in unrelated matters. CLC wrote to Hugh

James on 10 December 2009 indicating that the GLO would be opposed, and simultaneously to the company's insurers and the loss adjusters, seeking to reopen the question of coverage. That was promptly rebutted.

21. On 5 January 2010, Mr Dickinson sent an email to the tax partner saying:

> “Want to quickly run an idea past you:
>
> I am considering selling 51% of the shares in Norton India to my mother at par and/or inviting her to subscribe to new shares to achieve the same result.
>
> Rationale being fourfold:
>
> Holding should be IHT exempt after two years …
>
> As a 49% subsidiary Norton UK would not have to consolidate India's balance sheet with our own ...
>
> As a minority shareholder, Norton UK or any receiver appointed, would be unable to force the sale of Norton India or otherwise wrest control of Norton India. Indeed a subscription agreement could require a receiver to sell its stake in Norton India on pre-agreed terms to the other shareholders.
>
> Norton India would not be considered under common control for the purposes of small-company tax bands or grant eligibility.”

22. On 4 January 2010, Hugh James wrote stating that they intended to proceed with the application for a GLO. Two days later Mr Dickinson wrote to CLC saying that the company had "an expert already providing us with advice and opinions." He made the point, which he has strongly maintained throughout, that the company's business had planning permission for its operations and had to comply with licence conditions for its operation and emissions, but had not been subject to any action from its regulator except on one occasion in respect of an isolated incident. Residents he said must expect to see hear and smell some evidence of these operations, but it was the regulator's role to set and monitor conditions so as to ensure that no unreasonable nuisance was caused. He concluded "I am not sure how relevant this all is to fighting the GLO. In order to constrain costs (and until we pin the matter on [insurers]) I think we should limit ourselves to opposing the GLO at this juncture… Presumably the merit or otherwise of their claim will not be substantially tested in the GLO application?"

23. On 11 January 2010 (E1/69) CLC wrote to say that they had held an initial discussion with counsel who had been involved in a recent similar case brought by Hugh James on behalf of a large number of local residents complaining of nuisance. "We know from the papers that Hugh James have been involved in over 10 other GLO's. It seems that Hugh James have a history of generating such cases." The advice was that the application for a GLO should be opposed and "there is at least an arguable case – probably 50-50 – that your opposition will succeed" but nevertheless counsel had advised "in the majority of cases it is difficult to persuade a court not to make a GLO."

24. The letter went on to say "… It is likely that to defend the GLO application we shall argue… Secondly, on a brief review of the merits (a court will not consider the merits of the claim in detail at this stage) the claimants' claims are weak and unsubstantiated." There was reference to applying to the court for a cost capping order "to prevent the claimants potentially running up huge legal costs which if the claim is successful (even if only partly so) may potentially be payable by you." It pointed out that compliance with regulation was not a bar to a claim in nuisance, though said it may be relevant in deciding whether the behaviour complained of is sufficient to amount to a nuisance, and said "counsel is confident… that at a full trial a court is unlikely to grant an injunction in circumstances where the factory is compliant with statute and the terms of the licences and the effect of an injunction would be to close or substantially affect the running of the factory." An award of damages was more likely "e.g. payment of a sum of money to compensate the claimants for any actual losses they have incurred. Actual losses are likely to be physical damage (replacement windows and vehicle damage costs have been claimed) and diminution in value/rental value of their properties. We have no details of the likely amounts in relation to these items."

25. A detailed response to the claim was sent by CLC on 14 January 2010 (E1/79). Commenting on the evidence thus far produced they said "your clients' case on causation, actual nuisance and damage incurred is weak and totally unsubstantiated." The claim for an injunction, they said, was "highly likely to fail" and the application for a GLO would be resisted. Hugh James sent an equally detailed response dated 8 February 2010, and the following day emailed to say that they would be issuing the GLO application that week, with a view to hearing in March (E1/86).

26. It appears that on 9 or 10 February Mr Dickinson may have chased up his enquiry about the tax consequences of the share buyback, since on 10 February he was sent a further copy of an email containing tax advice sent the previous November (E1/90). That email warned him of the possibility that changes to the tax regime might be made in the forthcoming budget. He responded to the tax partner the same day saying:

> "I wish to proceed with a share redemption for all but 10,000 of the ordinary shares in the company…
>
> In practice I will loan the redemption proceeds back to the company, except probably the [pension scheme's] portion but secured by charges against the company's assets.
>
> Company reorganisation
>
> I propose to sell Norse Precision Castings Ltd to myself for a nominal sum as it still has a negative net worth. Now that it is generating good profits it should be able to use its portion of the small companies tax band…"

27. At this point, Mr Dickinson evidently asked the auditors to prepare documents to put the share buyback into effect. On 17 February, he told them that he wished to proceed "with all transactions to be completed before budget day and certainly before 5th April". In response, among other things, the auditors raised a query about the value of the shares in Norse, saying "what price do you think you could get for the company if you sold it to a third party? Although it currently has negative net worth, you say it is now making profits, so would it be possible to sell it for more than a nominal sum? If

the answer to this is yes, then please let me know as your tax position will be based on this higher value." There is no evidence in the documents of any response by Mr Dickinson on this point.

28. There was at this time a considerable correspondence between Mr Dickinson and CLC in relation to the potential claim and the application for a GLO. On 11 February 2010, Mr Dickinson informed CLC of an "unwelcome development", ie that the company had received a summons in the magistrates court issued by the local council alleging odour detectable outside the company premises in breach of permit. He took the view (for which there seems to have been some support) that this prosecution out of the blue was probably instigated by Hugh James putting pressure on the local authority because a successful prosecution would bolster the civil claim.

29. On 18 February 2010, CLC wrote following receipt of a witness statement from Hugh James in support of the GLO application. Based on that statement, they informed Mr Dickinson "the number of claimants has reduced to 72. There are details… of how much they are claiming. The amount of general damages ranges from £800,000 to £2.4 million – on top of which they claim actual damage such as repairs and reduction in value to their properties – as yet not quantified. Clearly all the stops must be pulled out to defend this claim… Difficult to estimate a trial date at this stage – a rough estimate would be near the end of this year."

30. On 19 February 2010, CLC made a note of a telephone discussion with counsel in relation to the GLO. This begins with a discussion of expert evidence that the company might assemble (none had been produced to that date although Mr Dickinson had had discussions with potential experts). Counsel is recorded as saying "the expert evidence is probably our best argument for opposing the GLO, on the basis that the claimants' properties vary so much and it is a rubbish claim." Counsel said that she now thought the odds of opposing the GLO were 40% to 60% against. Three days later, CLC sent some further documents to counsel "just received from the client relating to the recent summons for allowing odours beyond the permit… Presumably we will need the client/expert to persuade us how (hopefully) 'insignificant' the breaches referred to are? … I fear the chances of successfully opposing the GLO are again reducing. There seems to now be quite a bit of prima facie expert evidence confirming that odour and noise has escaped so as to constitute a breach of permits. I know that the defendant has to be given a chance to serve expert evidence in response, which our client has not yet done, and breach of permits is not the same as nuisance. However this does potentially weaken our argument that the claim is totally unsubstantiated." This was reported the same day to Mr Dickinson (E1/120) with a request that if possible the proposed expert should "give preliminary evidence to the judge to strengthen our arguments, at this early stage."

31. On 22 February 2010, Mr Dickinson informed CLC that he had reached agreement to buy another company which operated a foundry business. That company was called Procast Ltd, and its business was very similar to that of Norse Castings Ltd. His email (E1/121a) said:

> “Although the world is falling around my ears with regard to the nuisance case… I have just agreed to buy another foundry.
>
> … It is another of those cases where a speedy transaction will enable me to buy the business very advantageously. The

> business is in Hitchin which is convenient… to combine with our Bedford factory."

The intention, which in due course was put into effect, was to transfer the business of Procast to Norse, combining their operations such that, it was hoped, the additional turnover would significantly increase the profitability of Norse.

32. On 24th February 2010, Mr Dickinson sent a further email to the tax partner (E1/121). The liquidators rely on this email to a significant extent as, they say, indicating his state of mind and intentions at the time. He said he intended to proceed with the proposed share buyback, and then:

> "**Sale of Norse**
>
> I bought Norse out of the company as of 1 October 2009 at the same nominal £1 paid for it. Since more than 14 days has passed I do not think we can notify the IR by way of election (?). I would be optimistic any IR challenge to the valuation can be disputed due to the high negative net worth, the short time that had elapsed since it was purchased and at that time the massive Shell gas bill that had just appeared.
>
> **Protection of Norton Aluminium/Group Litigation Proceedings**
>
> It occurs to me that I might usefully protect future profits, as well as providing a vehicle with trading history to possibly Phoenix the Norton business if this case goes badly against us. I am proposing…[to use a Newco] to buy the ingots from Oldco [Norton Aluminium Ltd] at cost or even a small loss, then for Newco to sell the ingots to the customers at the full selling prices.
>
> In this way future profits will reside in Newco and be protected from proceedings against Oldco. It will allow Newco to establish a trading history and cash reserves in case it has to Phoenix the Norton operation.
>
> … We would not be disadvantaging existing creditors as Oldco's asset base is unaffected…
>
> Do you agree it makes sense or have any other suggestions? "

33. The response (E1/127) in relation to the sale of Norse Castings was "As you say there would be a very strong case in arguing the low value given the balance sheet of the company." On the second point, the tax partner clearly (and in my view rightly) interpreted what was being proposed as a scheme to move profits out of the existing company so as to insulate them from the potential claim. He said "We can see tax problems from this approach which is effectively transferring part of the trade and future profits to [Newco] at an undervalue." He suggested an alternative however, evidently seeking to meet what he understood was Mr Dickinson's objective: "the alternative would be to insert a new holding company above NAL… Assets could be transferred up to the new company by dividends in kind leaving just the trade behind.

Any claims would be against the subsidiary only leaving the core of the assets untouched."

34. On 1 March 2010, there was a meeting at the factory involving Mr Dickinson, Katharine Holland QC and Lisa Ginesi, the solicitor at CLC who was dealing with the case. Mr John Grant, an expert on noise, also attended, as did Mr Paul Griffin, formerly an environmental health officer at the local council but now employed by the company. The solicitor's note (E1/122) records that when at the council, Mr Griffin had dealt with about 20 people who had complained about the factory, of whom five were regarded as "hard-core complainants". Mr Dickinson accepted that "there could be some seepage of odours when there are strong winds" and that odours from the foundry may have been noticeable before 2006, but that new machinery had been installed in that year "and odours are barely noticeable now. Even with the best possible equipment, it would be impossible to eliminate all odours."

35. Mr Morgan points to part of the note which said "Counsel referred to the possibility of our making a cross application for summary disposal the claim", and a little later "The expert view, on reading the papers, is that it is a 'try on'. Counsel confirmed that what we are trying to achieve is for him to create an expert report which will give this conclusion." The expert view referred to must be that of Mr Grant, and although it is apparent from the note that he expressed views on areas other than his own (i.e. noise) it is unclear whether this comment is restricted to his area of expertise or intended to be more general. It does not appear that counsel can have expressed any favourable view as to the prospects of applying for summary judgment, since that matter is not referred to again in the note. Certainly no such application was made, or apparently seriously considered thereafter; Mr. Dickinson did make one enquiry as to whether it was still under consideration but cannot have received a positive response.

36. Immediately after the reference to the possibility of a summary judgment application the note goes on to say "A claim relating to odour is more difficult." That may be a reference to the acknowledgement that odour was detectable outside the factory premises, and that it had been more substantial prior to 2006. This note does not, therefore, indicate that Mr Dickinson was receiving advice that the claim was so weak that an application for summary judgment was a realistic possibility. At best it would seem that it was mentioned as a possibility, but never pursued.

37. Mr Morgan also points to a section at the end of the note in which the possible quantum of the claim is discussed. It records:

> “Counsel referred to the Privy Council case of *Alco Minerals 2002*, which related to a smelting process in which £600 general damages were ordered. We are a much smaller organisation, and the £600 was not per year, it was a one-off payment.”

I should mention that Mr. Barker submits that if this note correctly records what was said about *Alco* it is a serious misunderstanding of the facts and result of that case. Mr. Dickinson cannot however be criticised for not enquiring beyond what he was told about it.

38. Mr Dickinson's evidence was that he had taken note of this and relied on it to assume that the downside in respect of damages exposure was of the order of £60,000, on the basis that there were about 100 potential claimants and that £600 was the likely level

of damages they might each recover. I do not, however, believe that he genuinely thought that £60,000 was the likely limit of liability if the claim was lost. There is no reference to any such assumption in any subsequent document. On the same page of the note is what is evidently his own evaluation of the likely result if the claim was lost:

> "The factory currently [makes] profits [of] about £300,000-£500,000 per year. If the claim is successful against the factory, the factory and company will close down. Henry has various other businesses which he is involved in, in different company names, one of which is a foundry in India."

39. Plainly, Mr Dickinson was anticipating a possible exposure so great that it could not be afforded, notwithstanding the significant level of profitability of the business. No doubt the total exposure included costs, but there is no indication in the note that he was approaching the matter on the basis that even if the likely level of damages could be easily afforded, the costs would be so great as to wipe the company out. Nor is there any indication that the risk of closure is not because of the financial effects of an adverse judgment but because of the risk of an injunction. I note also that Mr. Dickinson appears to have been making the point that even if Norton Aluminium Ltd were to close down he had other businesses "in different company names". One of these, no doubt, was Norse Castings, which he had just arranged to sell to himself for £1. He referred specifically to the foundry in India. Although at that time Norton India remained a wholly owned subsidiary of Norton Aluminium Ltd, he had of course previously indicated that he might take steps to arrange for a majority shareholding to be held elsewhere, partly so that any receiver of Norton Aluminium Ltd would not be able to control it.

40. Mr Dickinson continued to have discussion with the tax partners at the auditors about the possibility of the share buyback. He had made various proposals about the way in which this could be implemented, and on 4 March 2010 the auditors sent an email suggesting that in order to settle on a specific plan the tax consequences of which could be identified they should have a meeting. They asked him to let them know "how you would like to proceed so that we can pick up on all your queries and deal positively with all your ideas about the group." They clearly wished to know what Mr Dickinson's objectives were. Mr Dickinson replied (E1/142) "I believe you understand the nub of the matter – I want to reduce the net worth of the company by approx £2.5 million – more if it is easy or straightforward – by extracting funds (which will probably be reinvested as shareholders loans secured against assets, charges registered at Companies House). I want to accomplish this in the most tax efficient manner and before 5th April when we know or expect that tax rates will rise substantially."

41. On 22 March 2010, the auditors advised that the most tax efficient way of proceeding would be to buy back up to 2.5 million shares at nominal value. They sent a note setting out the effects of this and a possible alternative (E1/146), which commenced "Objective to extract £2.5 million from the company in the most tax efficient way." They prepared and sent documentation to Mr Dickinson intended to achieve this proposal, comprising three share purchase agreements (one for each of the selling shareholders) and a notice of, and draft minutes for, an EGM to approve the purchase. In the end, these documents were not signed before the budget and Mr. Dickinson decided to delay the share buyback until after the start of the next tax year. He

eventually signed these documents on 10 May 2010 (see email at E1/153). Mr Dickinson's case is that the buyback took effect on that day.

42. The company did not make actual payment of the purchase price of the shares, in the sense of a transfer of funds to bank or similar accounts of the shareholders. Mr Dickinson's intention, as appears from the earlier emails, was that the funds should be left in the company. He did not however immediately execute any document to record the terms on which this was to happen. His evidence was that he gave instructions on that day to Mr Tranter to make appropriate entries in the company's books. Journal entries were made, dated 31 May 2010, recording transfers from share capital account to loan accounts. Mr Tranter's evidence was that the entries were probably actually made in the books during the first week of June, but dated for convenience on the last day of the previous month. Though his witness statement referred to a "verbal loan agreement" he said he had only had a brief conversation with Mr Dickinson when he was told that the buyback would be going ahead and the money would be left in as a loan. At the time the terms had not been agreed so he assumed it would be "normal commercial terms". He recalled being told it would be interest free.

43. Mr Dickinson began to explore the process of documenting the intended loans afterwards. On 11 May 2010 he sent an email to a solicitor at CLC (E1/151) saying:

> "I have reorganised the balance sheet of Norton, essentially causing the company to buy back most of its share capital from the shareholders to take advantage of the current low rates of CGT. However I will still be leaving most of the cash within the business, but I want to ensure that the monies are as protected as reasonably possible by registering charges (ranking behind HSBC in priority) against the company for the amount of the indebtedness… Presumably separate charges will be required for each shareholder. The initial amounts are as stated although I expect to repay the loans at least in part as profits and cash coming over the next few years… Please advise cost and time scale to put in place "

44. In answer to the solicitor's query as to whether the loans were to be "formally documented... or is this simply by way of ledger entry?" Mr Dickinson said "no formal document is proposed for term of loan or interest". The solicitor prepared a draft debenture, initially limited to securing the loans representing share proceeds. On 13 May Mr Dickinson asked him (E1/160) "I have other shareholder loans in the business and may have in future – can these be protected by this charge also?" The draft debenture was amended so as to secure all monies due from time to time.

45. In relation to the assets charged he said "I am particularly concerned to get control in the event of a receivership of the shareholding in Norton Aluminium India Private Limited (and probably the loans owned by India to the company)." Later the same day he told the solicitor "I certainly would not want a liquidator to be able to challenge this (excepting that such payments shouldn't be made at a time when the company is unable to pay its normal creditors)". I have no doubt, in the circumstances, that what Mr Dickinson considered to be "normal creditors" did not include the potential environmental claimants. In fact of course if an effective security was granted payments could be made to the secured creditors in priority to others, including "normal" creditors.

46. After revision the debenture was executed and sent to the solicitor for registration, probably on or about 9 June, as he received it on 10 June. The document then bore the date 20 May 2010, but the solicitor with Mr Dickinson's authority redated it twice before it was eventually successfully registered on 25 June with the date of creation said to be 3 June 2010 (E1/177). A claim was pleaded that the redating was ineffective and consequently the registration was outside the period of 21 days from the date of creation imposed by (at the time) Companies Act 2006 s870, but Mr Morgan pointed out in his skeleton that s869(6)(b) provided that the certificate of regulation is to be conclusive evidence that the requirements as to regulation have been complied with. The effect is that no evidence may be admitted to the effect that the charge was in fact created more than 21 days before the date of registration, and Mr Barker rightly abandoned that claim.

47. On 20 May 2010, Ms Ginesi sent an email (E1/162a) saying that she had read through a supplemental witness statement served on behalf of the claimants in relation to the application for a GLO. She said:

> "… My initial comments:
>
> 1. Nothing much new in it.
>
> 2. Their references to the complaints received are so totally vague and unspecific… as to carry little weight (how many complaints were there? In what area?).
>
> 3. They refer to rather questionable "evidence" to suggest their claims have merit … The above evidence is weak – particularly as the claimants have had several years to get their case together and this is the best they can come up with?!
>
> 4. Paragraph 34 is very telling. It seems without a GLO there would be no after the event insurance … Query whether the claimants would then have enough confidence in their claims to carry on, knowing that they have to pay the costs of they lose.
>
> I do believe that it is unfair to allow a GLO to be made on the basis of such a weak case. The GLO procedure is being abused as a means by which small individual cases with weak claims can gain disproportionate strength and obtain funding from being grouped together. We really do need to have a robust judge to reject the GLO."

48. Notwithstanding that, the GLO was made by Flaux J at a hearing on 26 May 2010, naming 72 claimants but with the possibility of course that more could apply to register claims and join the group litigation. Following that hearing, Ms Ginesi wrote two letters; the first estimating that costs including VAT and disbursements to a fully contested trial "could be in the region of £500,000" and the second discussing the tactics, but not the possible amount, of a Part 36 offer (E1/164-5). This letter made clear that any such offer would involve payment of the claimants' costs to the date of acceptance.

49. On 2 November 2010, there was a conference with counsel and Mr Buck, an expert witness on issues of odour. Mr Buck opened by saying that he thought reports were being "cobbled into a court case which does not hold up very well". Leading counsel Ms Holland QC is noted as saying "lawyers take that view and certainly where the case is going we seem to be getting more optimistic after last week's hearing. Judge seeing through the other side." The meeting went on to discuss the difficulty of obtaining evidence and making any objective assessment, particularly on issues of odour.

50. On 1 February 2011, Ms Ginesi wrote to discuss the possibility of mediation and making a part 36 offer. In that email (E1/196) she said:

> "As we have said throughout, there is no doubt that we continually need to review the possibility and cost effectiveness of paying some money to the claimants to try and end this claim to avoid the massive costs of a contested trial in which the outcome can never be predicted with any accuracy…
>
> Please note that considering settlement options does not mean we think your defence is weak – rather that there may be a commercial gain in taking steps to end this claim now. We have seen some very supportive witnesses who will contradict the claimants' evidence and be have also had some positive comments from our expert Geoff [Buck]…
>
> It is difficult to get a good grip on how much these claims may be worth and what sort of settlement figures should be offered…
>
> The different possible outcomes in this claim are dramatically wide-ranging from – this claim failing and your recovering the majority of your legal costs under the ATE insurance to – this claim succeeding and you being faced with a £1 million plus claim which may very well destroy the company. No doubt [Hugh James] will be fully aware that any victory at trial will be Pyrrhic if Norton go bust.
>
> Please let me have your views on whether you are prepared to make an offer at this stage and the possible amount…"

51. In response to this, Mr Dickinson said (E1/197) "I think it is highly unlikely we will agree to settle until or unless expert evidence persuades us of their case…. As you say, if HJ were to win on the scale they claim their victory will be Pyrrhic and they will get nothing."

52. A few days later on 11 February 2011 in the course of the discussion about possible evidence, Ms Ginesi noted (E1/200):

> "Henry confirmed that the balance sheet of the company shows net equity of approximately £1.5 million. However if a receiver was appointed and the assets sold, most of the machinery would be sold at far smaller values which would take the equity down considerably, and there will be nothing left for unsecured

> creditors. Henry took the equity in the property (sic) down from £2.6 million to £100,000 a few years ago. He referred to various steps taken to restructure the company last May. There was a buyback at par of shares and £2.5 million worth were converted into shareholders loans. £1.7 million shareholders loans were left in the business, secured by a fixed charge against the company's assets. If a receiver were appointed, the first £2.5 million from any realisation would go to the secured creditors. The next £1.7 million would go to the shareholders' loan, which is effectively Henry. The balance, of which there would be very little, would be for unsecured creditors…
>
> At this stage, it is difficult to know whether the arrangements are bombproof and/or capable of not being set aside by a receiver – liquidator… in the event of an unfavourable judgment.
>
> Henry's view is that he would like to fight this all the way, he thinks he is going to win. He sees no reason to settle….
>
> LG asked whether Henry would like an estimate of costs to trial, Henry said that this would not be necessary. "

53. There was a further conference with counsel on 20 April 2011. It seems that at that point counsel's view of the prospects of success was positive. Discussing the possibility of an amendment to the pleadings and/or an application to revoke the GLO, Ms Holland is noted as saying (E1/212) "they are already worried about that case. We can write some aggressive letters to them. Most likely response to this – desperate attempts to settle. Personal view – we reject and push them to the wire. Huge gamble for them to take… Reality – they have left it too late to try to settle… We should not be going to them with an offer. Wait for them to come to us." In the same conversation, Mr Dickinson is noted as saying "If they were to win – Pyrrhic victory anyway."

54. On 9 June 2011, Ms Ginesi raised the possibility of the company obtaining its own ATE insurance. She said that it was likely that this would only be available if leading counsel could advise that the prospects of successfully defending the claim were at least 60%. In this respect she said (E1/215):

> "60% is a high threshold – I was once told by a barrister, now sitting as a judge, that even the best and simple cases should not be assessed at above 70%.
>
> My understanding is that although Katharine [Holland QC] is prepared to say that your chances of success are currently over 50%, she is unlikely to say they are as high as 60%.
>
> However, it is worth noting that this insurance would only cover the other side's costs if you lose. It would not cover any claim for damages which would have to be met by the company. I recall HJ indicating that the claim for damages is about £2.5 million – although this is obviously their best/best scenario.

> You say that if you get an adverse decision you will probably fold the company. It may therefore be that the damages claim could tip the company over – with or without the additional claim for legal costs which we are trying to insure against. If this were to be the case, there may be little point in taking steps to try and meet the costs order or seek insurance to cover it. "

55. Mr Dickinson responded asking her to pursue the possibility of obtaining insurance. He said "after the Biffa case it seems to me highly unlikely that many of the claimants would be adjudged to have valid claims even if HJ are successful and therefore that the amount of damages awarded would be survivable…". There is no record of advice either by Ms Ginesi or by counsel confirming this view on the part of Mr Dickinson. In his evidence, Mr Dickinson maintained firmly that although he had never been advised that the prospects of success were higher than about 52%, in view of the comment that "the best and simple cases should not be assessed at above 70%" prospects of success, in his mind this figure should be scaled up. If a case that was guaranteed to win was only assessed by lawyers as having a 70% prospect (as he put it "70% means 100%"). If the lawyer said the case had a 52% prospects of success he considered the chances of success should be multiplied up in the same proportion, which would produce a figure of about 75%.

56. Notwithstanding the vigour with which Mr Dickinson repeatedly pressed this point, I do not accept that that was what in fact believed. He is far too intelligent and knowledgeable a businessman to believe that lawyers have some peculiar way of expressing percentages, or that if they do so they give unrealistically low figures out of irrational over-caution. He was, in my view, well aware that what Ms Ginesi meant by this comment was that even a case which appeared to be straightforward when viewed from one party's perspective carried real uncertainties and risks of litigation which had to be factored into any prediction of the likely outcome. Any apparent discounting of the chances of success therefore represented real risks which the client ought to take into account, rather than imaginary ones that he could safely ignore.

57. The "Biffa" case referred to was *Barr and others v Biffa Waste Services Ltd (No3)* [2011] EWHC 1003 (TCC), which was also a group litigation action in which Hugh James represented the claimants who complained of odour, in that case from a waste disposal site. Coulson J held that although the fact that the site operated within the terms of an authorisation the Environmental Agency did not amount to a statutory defence to claims in nuisance, the authorised operation constituted a reasonable use of land such that claims in nuisance could only succeed if negligence was established on the part of the operator. Further, loss was not established on the facts in the majority of claims, and even if it had been would have been limited to £1000 per household per annum. Although this was clearly encouraging from the company's point of view, Ms Holland's advice at the conference on 20 April 2011 had been (E1/202) "the Biffa case is good for us but not end of story; lot of issues to distinguish their case from ours."

58. On 24 June 2011, shortly before the first trial date, Mr Dickinson sent Ms Ginesi a copy of the company's most recent accounts, which he said were to be filed imminently but "whether HJ have the financial acumen to understand them is another matter.". He said (E1/217)

> "The key document is the balance sheet… This shows a net worth of £2.7 million.

> … Receivers would expect to realise 20% of book value from fixed assets, and perhaps 40% from stock, so perhaps £850,000 from a book value of £2.6 million. Receivers usually anticipate recovering about 80% of monies due from trade debtors.
>
> Norton India is a start-up and lost £400,000 in the past year and is heavily indebted to both Norton UK and state bank of India. In a receivership situation the investment [ie the shareholding] is probably valueless and any debts owing would have to be heavily discounted. The realisable value [of the intercompany debt] in receivership is probably less than £500,000, i.e. a discount to book value of £1.5 million.
>
> Norton UK does not own the property from which it operates. The land and buildings shown in the fixed assets relate to buildings erected on the rented land. These have no value in a receivership situation without ownership of the property.
>
> Norton UK has a £2.5 million invoice discounting line, which is fully utilised at times dependent on cash flow during the month….
>
> £2.5 million of share capital was repurchased by the company in May 2010 at par, financed from accumulated reserves. Much of the proceeds of this redemption were retained in the business as shareholder loans secured by a charge over the company's assets.
>
> In the event receivers being appointed Norton, unsecured creditors would be unlikely to receive any distribution at all."

59. Ms Ginesi passed this information onto a colleague, to whom she said "To cover our backs I will remind Henry that we have not advised on this issue as to whether any transactions can be set aside and monies diverted back into the company." She arranged for a conference with specialist counsel, Mr Paul Greenwood, which took place on 25 July 2011. Mr Greenwood was sent a briefing note, (E1/221) prepared by Mr Dickinson, in which he set out brief information about the claim and then a section headed "Financial Background". He gave brief details of the share buyback, and of the transfer of the property to himself in 2005, which he said was still leased back to the company at an annual rent of £40,000 "paid monthly". In relation to Norton India he said "the company now owns 49% of Norton Aluminium India… The balance of 51% of the equity is owned by H Dickinson who used the cash released by the share redemption to subscribe for the increased share capital. Prior to 2010 NA UK owned 100% of NA India until the capital base was substantially enlarged. The shareholders have signed (acting by H Dickinson on behalf of each party) a share subscription agreement obliging each to sell the other their shares in the company in the event of a default and according to an agreed basis for determining the price to be paid." Mr Dickinson set out at the end of this note the questions he wanted Mr Greenwood to advise on:

> "Can any of the above transactions be set aside?

> Can the shareholders continue to extract cash and reserves by way of salary and dividends while the litigation is ongoing? Is there any limit thereto?
>
> Is the Indian subsidiary appropriately structured to protect it from UK creditors should NA lose in the litigation?
>
> Is NA obliged to provide any more than the costs of defending the litigation until such time as judgment and/or an order for costs is made against it?
>
> Do the directors have any liability to the company's current and future creditors for the actions taken to date should the company cease trading?"

The flavour of this note, in my view, is not that Mr Dickinson is concerned that innocent transactions entered into for other reasons might now be accidentally put at risk, but that he was describing steps taken and those he wished to take as a result of which the company would not be able to meet the claim and seeking confirmation they were effective for that purpose.

60. The note of counsel's advice given in conference on 26 July 2011 has been disclosed (E1/223), presumably because the advice was sought on behalf of, and paid for by, the company and so is now an asset available to the liquidators. I do not propose to set out the advice given, but it is relevant to note the following matters:

i) Counsel noted that the effect of the share buyback had been to convert shareholders' equity into secured loans, which would not benefit creditors, and asked what was the purpose behind this transaction. Mr Dickinson said that the government had been about to increase tax rates and the transaction was a way to beat the budget. The company had distributable reserves and was then and had remained solvent, even taking into account the litigation, because of the view he took of the prospects of success.

ii) Counsel advised that it was permissible for Mr Dickinson to remunerate himself at proper commercial rates, including paying a commercial rent for the property he owned. Mr Dickinson acted on this by increasing the rent payable from £40,000 to £120,000 per annum, which he backdated to the beginning of the financial year (1 October 2010).

iii) Mr Dickinson appears to have instructed counsel that the purpose of his own subscription of shares in Norton India was "to avoid the costs of consolidation of the accounts".

iv) Counsel advised that it would be "possible for the company to give suppliers retention of title and to take charges on the company's assets, if this is normal trading terms. This would only apply if there was fresh value or consideration from the suppliers." It does not appear that counsel was told there was any pressure from suppliers for such a change, so it seems that the advice was being sought on the footing that the company would volunteer to improve the position of trade creditors, which in the context must have been with the aim of worsening the position of the environmental claimants, if successful.

61. Offers to settle were made in the months running up to trial, but these were for very much less that the indicated amount of damages, and would have required Hugh James to accept payment of only a proportion of their costs. Mr Dickinson was vitriolic and contemptuous when these offers were not accepted. He continued to regard the litigation as having been generated and pursued by Hugh James solely for the purpose of running up enormous claims for costs for their own benefit. He was angry that they did not seem to share his view that if the claim was dismissed at trial this business model would be ruined because the company would seek payment of most of its costs and any other similar claims would become much less likely to settle. In a series of emails sent to Ms Ginesi in May 2012 (E1/238ff), he said:

> "I think they have not understood and you need to get them to understand:
>
> We are confident their case will fail at trial, however we are prepared… to give them a face-saving way out…4 claims succeed, we pay 4/132 of their costs, they pay 128/132 of our costs…
>
> The reality is they will lose everything at the end of the trial, including probably every other case they are working on once their case is comprehensively defeated…. Even if they were to win (which we think very unlikely, but nonetheless they cling to this belief) they will recover nothing (which I think they now believe).
>
> It is not a question of finding a settlement that is affordable by Norton – I will not agree to any such settlement. Their claim will fail on the facts of the case, and MUST fail for the sake of the entire industry in this country.
>
> They have lost this case long ago in terms of enriching them personally, irrespective of the outcome – they only realised this at the mediation – but are still trying to negotiate a settlement that involves a big payout to them. They seem to think that I would prefer to work for them for years rather than allow my business to go bust. The reality is I will go bust rather than pay them a penny.
>
> I want them to realise there will be no payout for them – win or lose, and no matter what costs order the judge may make (and this I think they have understood) – and given that situation and their need to try and protect their position with regard to the other cases they have underway perhaps they should consider a face-saving way out of this as I have proposed. … They were pretty slow when it came to realising that they would get nothing if they succeeded in securing a massive costs order against us.
>
> To me it is very clear that their business model is to put maximum pressure on achieving a settlement: if it goes to trial their chances of winning are very uncertain and their chances of recovering costs are considerably worse, especially in our case.

> They therefore HAVE to avoid going to court … They will not get costs either way so that is now immaterial.
>
> If you can tactfully convey this in a manner to be understood by a child, just maybe they will see our offer in a different light as a solution to a very real problem. It will have to go well above [the normal fee earner's] head."

62. These emails make clear that Mr Dickinson was determined that there should be no payment of any substantial amount to the claimants in respect of their costs. He would not entertain any settlement, regardless of whether it could be afforded, that resulted in any amount going to Hugh James that would reward them for pursuing the claim or encourage them to bring others. If they were not willing to accept a settlement that left them substantially out of pocket, he would fight on and expected to win. However he intended and expected that the company would go into insolvency in the event of a judgment against it, that the outcome would be that the judgment and any costs order would be unsatisfied, and he had conveyed this to Hugh James at the mediation to persuade them to settle. There is no indication that this was a recently formed approach; indeed the reference to Hugh James having lost the opportunity of reward "long ago" but realised it "only recently" suggests that he considered the steps he had taken to restructure the company had rendered it judgment proof.

63. The trial before HHJ McKenna was protracted. It began on 28 May 2012 but did not conclude until 3 July. In August, the judge circulated a draft judgment in which he dismissed the claims based on noise, smoke and dust, but upheld 15 of the 16 lead claims insofar as based on odour. The damages awarded to those claimants would total some £160,000, and if extrapolated to the other claimants the total was estimated at about £1.2m. In addition there would be a claim for costs, yet to be determined but based on indications given before trial Hugh James would seek several million pounds. The company obtained permission from HHJ McKenna to discuss the draft judgment with an insolvency practitioner, Mr Haslam of Begbies Traynor.

64. Mr Dickinson sent Mr Haslam on 25 August 2012 (E1/243) a statement of the estimated outcome for creditors in an administration. He considered the realisable value of stock and plant to be much less than book value in these circumstances and, estimating the eventual value of the claim for damages and costs at £2m, projected a dividend to unsecured creditors of about 8.8p in the pound, or £176,000 in all. He suggested an offer to compromise before judgment was handed down, with a "starting point" of £150,000, saying "That we could afford in cash subject to continuing credit from our suppliers. Much more would have to be staged." He suggested they should aim for an "endpoint" of £300,000.

65. In the end, Mr Haslam put forward on the company's behalf a series of offers, all of which were rejected. The final offer was to pay a total of £1 million, of which £200,000 would have been payable within 60 days and the balance spread over 44 monthly instalments. Mr Haslam's advice was, apparently, that any greater offer would have led to the company trading whilst insolvent.

66. The company went into administration on 18 September 2012, and the administrators immediately completed a prepack sale of most of its assets to a company controlled by Mr Dickinson for £425,000. These amounts were significantly less than Mr Dickinson had estimated on 25 August. Later, an additional sale of the company's

subsidiary Hytec Castings Ltd and the debt owed to its parent was concluded for a further £75,000.

67. Judgment was formally handed down on 28 September 2012.

The transactions challenged

Transfer of freehold premises in 2005

68. Notwithstanding the board minute produced recording a meeting between Mr Dickinson and Mrs Dickinson on 14 September 2005, both of them accepted in oral evidence that no such meeting had taken place. Mr Dickinson had simply instructed solicitors to produce the sale documents, including the minute, and signed it himself, which he regarded as sufficient. The pleaded case however is not that there was no meeting, but that it was inquorate and ineffective. I should say that there is also no plea either that the sale amounted to a substantial property transaction that would have been voidable unless approved by shareholders, or that it was a transaction at an undervalue, and thus there was no valuation evidence before me.

69. The pleaded case of Mr and Mrs Dickinson, supported by their written evidence, was that there had in fact been such a meeting. This was wholly undermined by their oral evidence, with no satisfactory explanation for the change of position. Mr Morgan accepted that if there had been a meeting there could have been no valid resolution of the directors, because by virtue of regulation 84 of Table A, which is incorporated in the company's Articles of Association, Mr Dickinson was not entitled to vote on the resolution or to be counted in the quorum. Since the quorum was two, Mrs Dickinson could not have passed the resolution herself, even had she been present.

70. It is pleaded, and Mr Morgan accepted in closing, that in consequence the purported agreement for sale was prima facie void and Mr Dickinson held the property on trust for the company. He submits that the members of the company could however have ratified it by their unanimous consent or acquiescence, in accordance with the Duomatic principle *(re Duomatic Limited* [1969] 2 Ch 365) as to which the onus of proof is on Mr Dickinson. His pleaded case (Reply, paragraph 39A) is that the members unanimously informally either approved or acquiesced in Mr Dickinson voting at the meeting and counting in the quorum by virtue of his own presence at that meeting, and similarly either approved or acquiesced in the sale by virtue of Mr Dickinson's own actions in executing it.

71. This plea depends upon Mr Dickinson's actions effectively being the actions of all of the shareholders, or upon his having authority to act on behalf of each of them. Mr Barker was prepared to accept that Mr Dickinson should be treated as having authority to act on behalf of his own settlement. He was not however the sole trustee of the pension scheme and cannot be regarded as being the alter ego of the trustees collectively. There is no plea that he had authority to act on behalf of the other trustees of the pension scheme, nor is there any evidence from which I can conclude that he had such authority.

72. Mr Dickinson said in evidence that he regarded himself as able to act on behalf of the pension scheme in all matters since he had established it and he and his wife are the beneficiaries of it. The best evidence he could produce in support of that however was a letter written by the professional trustee to a firm of stockbrokers confirming that the brokers could act on Mr Dickinson's instructions in relation to individual

purchases and sales of investments. That was very far from a general authority even in relation to handling trust investments; the same letter makes clear that all investment proceeds are to be paid into an account over which the professional trustee has control. A further indication against the existence of any general authority is that when the professional trustee found out that Mr Dickinson had entered into the share buyback agreement on the basis that the purchase price would be left outstanding on loan account, it did not agree to accept those terms and insisted that the proceeds payable to the pension scheme should be actually paid by the company into a separate account over which it had control.

73. There is no evidence that the professional trustee was even told about the property sale, let alone that it actually consented to it or authorised Mr Dickinson to enter into it. Nor is there any pleaded case, or evidence, that the professional trustee came to learn of the property sale and, being aware of its potential invalidity, subsequently consented to it or acquiesced in it.

74. Accordingly I reject the case that the purchase was authorised or ratified by the unanimous approval or acquiescence of the shareholders. Mr Morgan submits that Mr Dickinson ought to be relieved of liability pursuant to section 1157 of the Companies Act 2006, or alternatively s 61 Trustee Act 1025. It would be odd, he submitted, if Mr Dickinson was required to return the property to the company in circumstances where he was the majority shareholder, the professional trustee who might have objected at the time is no longer involved in the case and there was no pleading that the property was transferred at an undervalue.

75. S1157 is potentially applicable "in proceedings for negligence, default, breach of duty or breach of trust against… an officer of a company" and provides that if "it appears to the court… that the officer is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case… he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit." S61 is in similar terms but relates only to personal liability for breach of trust.

76. Assuming that the jurisdictional qualification is satisfied (Mr Barker did not submit otherwise) I am not persuaded that this would be an appropriate set of circumstances in which to grant relief under either section. I do not consider that Mr Dickinson can be said to have acted "honestly and reasonably" in a situation where he has not, in my judgment, sought to act in the best interests of, or even with any proper regard to the interests of, the company as distinct from himself. The provisions of the Articles that he was in breach of existed to ensure that the interests of the company were properly considered either by members or by disinterested directors. It is difficult, in my view, to regard it as appropriate to excuse a director from the consequences of breach of duty to the company if he has not himself given the consideration to the interests of the company, as distinct from his own, that compliance was intended to ensure. Further, insofar as the relief sought would have the effect of validating the transfer it seems to me this would be more than relief from a breach of trust and amount to the discharge of the trust itself. I doubt whether that could be justified (if at all) in any but the most unusual circumstances.

77. There is no indication what benefit the company obtained from selling the site of its premises. There is no evidence that it needed to realise cash (I am not clear from the documents whether the purchase price was actually paid or simply charged to a loan account). There is no evidence that any valuation was obtained, and the sale price was

less than 40% of the book value of the land and buildings (E2/66). It seems the company did not recognise in its accounts the extent of this loss, since it continued to show the buildings (but not the land) as included in its fixed assets even though those buildings must have transferred with the freehold and their value could not be realised separately from that freehold. This indeed was a point Mr Dickinson was keen to make when seeking to show that the company would be unable to satisfy a judgment against it.

78. Although there is no pleading that the transaction was at an undervalue, it seems clear that Mr Tranter at least was concerned that it might have been. It appears from the terms of the board minute that there must have been some discussion about the sale with Mr Tranter, and Mr Dickinson chose or agreed to record those concerns in the minute. His reason for dismissing those concerns was in part his own assessment, not supported by evidence before me, that he regarded the price as consistent with another local property sale. Had Mr Dickinson been acting honestly and reasonably in the interest of the company rather than himself, in my view he would have obtained a professional valuation to support the price being paid and put forward a reason why it was in the company's interests to sell and subsequently pay rent.

79. There is similarly no indication why it was in the company's interests to agree to a lease excluded from the provisions of the 1954 Act. The price is also said to have been justified by the payment of a rent substantially below market value, but there was no guarantee that this rent concession would be maintained after four years (and indeed in this case it is pleaded that the "undertaking" to enter into a further lease on similar terms was no more than a non-binding statement of intent). The rent being paid already represented a substantial yield on the sale price, and that fact, together with the possibility that the yield might increase very substantially if the rent increased in future, is another indication why the price may have been questionable.

80. In his evidence, particularly in relation to the share buyback, Mr Dickinson maintained strongly that whilst the company was solvent, its own interests were to be equated with those of the members. That however can be no justification for the sale of the property to himself, since he was only one of the members and he failed to ensure, or at least to demonstrate, that the interests of the other members were properly protected by ensuring that the sale and lease back were for full value and on commercial terms.

81. I therefore refuse the application for relief. The consequence will be that (inter-alia) Mr Dickinson will be found to have held the property on trust for the company throughout and liable to restore it to the company and to pay compensation equal to the amount of rent paid or credited to him, which is put at £415,000 in the Defence.

82. In the circumstances, it is not necessary for me to deal with the claim alleging breach of duty in backdating the increase of rent. Had it been necessary to do so, I would have held that that decision was a breach of duty on Mr Dickinson's part. He was advised in conference with counsel that would not be improper for him to increase the rent to a market rate, but in my judgment the note of that conference makes clear that his motivation for considering any increase in payments to himself was not to put matters on a normal commercial footing but to ensure that so far as possible arrangements were made to diminish the assets of the company so that they would be unavailable to the environmental claimants if they were successful. Mr Barker did not seek to challenge the payments insofar as they represented periods after the date of that conference, but only the backdated element. Although Mr Dickinson would have

been entitled to follow his own interests as landlord demanding an increased rent for the future, he had no power in that capacity to demand a retrospective increase, and accordingly insofar as such a retrospective increase was agreed, it was by virtue of Mr Dickinson agreeing on behalf of the company to pay such an increase when it was not liable to do so. That agreement was made for an improper purpose and in breach of duty.

83. Finally on this topic, although the Liquidators plead a breach of duty against Mrs Dickinson on the basis that she participated in the meeting authorising the transfer of the property, and notwithstanding that she did not originally deny any such participation, since it is now clear on the evidence that she played no part in the transaction it would be wrong, in my judgment, to hold her liable for breach of duty arising from the transfer itself. She is now a joint owner of the property following the transfer into joint names by Mr Dickinson. If there is any dispute about whether she ought to be ordered to join in a re-conveyance to the company I will hear submissions, but provisionally it appears to me that it would be difficult for her to resist such an order unless she was a bona fide purchaser for value, which is not I think suggested.

The share buy back

84. It is common ground that a limited company may not acquire its own shares except in accordance with part 18 Companies Act 2006; see s 658(1). In default, s 658(2) provides that a criminal offence is committed by the company itself and any officer in default, and that the purported acquisition is void. Further, by s 691(2) "Where a limited company purchases its own shares, the shares must be paid for on purchase." The liquidators' primary argument is that the arrangements, whatever they were, for the purchase price to be left outstanding on loan account at completion do not amount to payment "on purchase", and accordingly the buyback transaction is void.

85. Mr Morgan submitted that the loan arrangements were to be treated as payment. He relies particularly on the decision of Park J in *BDG Roof-Bond Ltd v Douglas* [2000] BCC 770. In that case, a company agreed to buy one of its two issued shares from Mr Douglas for a consideration of £135,000, and simultaneously agreed to sell him a car and a property for £65,000. Only the net amount of £60,000 was paid in cash. The case was decided under the provisions of the Companies Act 1985, which was slightly differently worded; in particular in that it was structured so as to set out provisions applying to the redemption of redeemable shares, which were then stated to apply, mutatis mutandis, to a purchase of shares.

86. One difference of language was that section 159 (3) provided that "the terms of redemption must provide for payment on redemption". Mr Morgan drew my attention to paragraph C 3 of the judgment (page 778) where Park J said "in the case of an own shares purchase I take this to mean that the terms of the purchase agreement must provide for payment on the purchase." He pointed out that the terms of the share purchase agreements signed by Mr Dickinson stated that payment was to be made in full on completion. I doubt however that Park J is to be taken as holding that a provision in the contract for payment on completion was sufficient if payment was not actually made, but in any event the statutory language has now been amended so as to make the point clear, and instead of referring to the terms of the contract it now requires that the shares are "paid for on purchase".

87. It was argued that "payment" meant only a payment in money. Park J said he disagreed, stating (page 779C) that in his view if the company could satisfy its

liability by payment of cash distributed by way of dividend, it would equally do so by a transfer of assets that it could have distributed as a dividend in specie (there was no question in that case of a payment out of capital). He went on to hold that in fact the contract in that case required payment of £135,000 in money, but as part of the wider transaction which Mr Douglas agreed to purchase property and the car, that obligation had been satisfied by set off of the £75,000 payable by Mr Douglas against an equivalent part of the consideration payable to him by the company. There is no suggestion in this case that the consideration was satisfied either by transfer of non-cash assets or set off against any obligation owed to the company.

88. Mr Morgan submits however that it follows from this decision that it is not necessary for payment actually to be made in cash or by movement of money, and that the company discharged its obligation to pay the purchase price by making entries recording the debt in its accounting system and/or entering into an agreement under which that amount was lent back to the company by the selling shareholders, replacing the obligation to pay immediately with one to pay on deferred terms in accordance with the loan agreement.

89. The liquidators take the point that Mr Dickinson had no authority to make any loan agreement, orally or in writing, on behalf of the pension trustees, nor could he validly commit the company to take a loan in a matter in which he was interested without a resolution of shareholders, which was not obtained (and for the reasons given above their approval cannot be taken to have been given informally) or a valid resolution of the directors. A minute was produced of a directors meeting between Mr & Mrs Dickinson purporting to approve the loans, but it was clear from the oral evidence that no such meeting had taken place. Mr Williamson was not given notice of any such meeting and did not participate in it. Mrs Dickinson said she had been generally aware of the buy back as a result of domestic conversations and agreed with it, but had not participated in any meeting, despite her written evidence that she had done so. Such informal conversations between some but not all of the directors cannot be said to amount to a resolution of the board, and even if they could it would be invalid since Mr Dickinson (and probably Mrs Dickinson also) had an interest and were by the Articles excluded from voting. There was thus no valid loan agreement at any stage.

90. I do not in any event agree with Mr Morgan's submission in principle. If the consideration payable under a sale transaction is not actually satisfied at the time of the transaction (whether by payment of cash, transfer of funds, transfer of some other property, set off or in some other way) the result is that a debt automatically arises from the buyer to the seller. Recognition of this debt by making an entry in books of account does not constitute payment but an acknowledgement of the legal consequences of non-payment. Acknowledgement of it by entering into a loan agreement, whether written or oral and whether entered into before or after the due time for completion, does not constitute payment on purchase but making or varying the terms of the arrangement such that payment is to be made at a later date, with the result that those terms do not comply with the statute. It would be wholly artificial to regard such a loan agreement as creating one obligation to pay money to the company by way of loan which was then "set off" against the company's obligation to pay the purchase price.

91. It is true that very similar results could be achieved by structuring the transaction so that money was actually paid by the company at completion and an equivalent amount was very shortly thereafter paid back to the company by way of loan. Alternatively, it

might borrow in advance from a third party and use the funds to pay the selling shareholders. Provided in each case that the two transactions were genuinely separate, such that the arrangement was not a sham, it seems to me that this would satisfy the requirements of the section. Such an arrangement was made in *Customs and Excise Commissioners v West Yorkshire Independent Hospital (Contract Services) Ltd* [1988] STC 443, in which cheques and credits for payment moved round between three parties so that the funds ended up where they started, but were held to have constituted "payment" along the way. Mr Morgan submitted that there was no difference in substance between such arrangements and what had happened in the present case. I do not accept that; the end result may be similar, but the difference of substance is that the company has had to find from some source, albeit temporarily, the funds from which to make payment.

92. If it were otherwise, nothing of substance would remain of the requirement the statute was intended to impose.

93. It follows that on this ground alone, the share buy back was void. I go on consider the alternative cases put, however, in case the matter goes further and because they may make a difference to the positions of Mrs Dickinson and Mr Williamson.

S423 Insolvency Act 1986

94. S 423 provides, so far as relevant, as follows:

> "**423 Transactions defrauding creditors**
>
> (1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—
>
> > (a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration…
>
> (2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—
>
> > (a) restoring the position to what it would have been if the transaction had not been entered into, and
> >
> > (b) protecting the interests of persons who are victims of the transaction.
>
> (3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—
>
> > (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or
> >
> > (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make…"

95. It is common ground that the company is a "victim" in the circumstances of this case and that the "purpose" referred to in subsection (3) need not be the sole purpose of the transaction, nor (if there are more than one) need it be the dominant purpose. It is sufficient that it is "a substantial purpose", and is not "a trivial purpose" or simply the result of the transaction; see *Hashmi v IRC* [2002] EWCA Civ 981, per Arden LJ at para 23 and Simon Brown LJ at para 39. Laws LJ agreed, saying at para 33 that question was whether the person concerned "was substantially motivated by one or other of the aims set out in s 423(3)(a) and (b) in entering into the transaction in question. There may be cases in which, even absent the statutory purpose, the transaction would or might have been entered into anyway. That would not necessarily negate the section's application; but the fact-finding judge on an application made to him under s 423 must be alert to see that he is satisfied that the statutory purpose has in truth substantially motivated the donor if he is to find that the section bites".

96. Mr Morgan raised in his skeleton the question of whose purpose is relevant where a decision is taken by a board of directors. He referred to *Bti 2014 Llc v Sequana SA and others* [2016] EWHC 1686 (Ch) ("*Sequana*") and submitted that Rose J had suggested at para 494 that proof was required that the purpose was shared by a majority of the directors. In fact what Rose J said was "it is accepted that when considering whether [a company] acted with the s 423 purpose it is enough if the majority of the directors acted with that purpose in declaring the dividend." I did not understand him to press this point in closing on the company's behalf, but in relation to the claims against Mrs Dickinson and Mr Williamson he submitted that Mr Williamson played no part at all in the material decisions, which were all effectively taken by Mr Dickinson. Insofar as Mrs Dickinson participated, notwithstanding her witness statement in which she said she had joined in the meetings referred to in the minutes, on the oral evidence of both Mr Dickinson and herself her participation was limited to the domestic discussions referred to above. She did say she was aware of the buy back and agreed with it, but it would be difficult in my judgment to say that she gave it sufficient independent thought to form her own purpose in concurring with it, to the extent she did.

97. In these circumstances I am in no doubt that to the extent the company participated in the buyback transaction it did so because of the decisions and actions of Mr Dickinson, and his purposes are to be considered as also being the purposes of the company. There was in truth no collective decision, but to the extent the other directors lent any support to what Mr Dickinson decided, either by informal concurrence in the case of Mrs Dickinson or non-engagement in the case of Mr Williamson they must be taken to have allowed the company to act with Mr Dickinson's own purposes.

98. Before examining what those purposes were, there is an issue whether the buy back (which is accepted to be a "transaction" for the purposes of the section) was "at an undervalue". Mr Morgan submitted that it took the form of a sale, and that prima facie the value of an asset sold is not less than what a reasonably well informed arms length purchaser would be prepared to pay for it. The onus was on the liquidators to show that the shares sold had no value at the time (no case being pleaded on the basis they were worth more than nil but substantially less than the £2.5m agreed) and they had provided no valuation evidence to that effect.

99. In my judgment however Mr Barker was right to submit that a payment for purchase of a company's own shares is to be regarded as equivalent to a dividend or distribution to shareholders in return for which the company receives no consideration. In *Sequana* Rose J held at para 502 that a dividend was a transaction within s 423 (a) or (c). I understand her conclusion from the preceding paragraphs to have been that the company received no consideration for payment of the dividend, because it was not a payment in satisfaction of existing rights the shareholders held against the company but one that was discretionary in nature and amount.

100. The position on a purchase of own shares is different inasmuch as the rights of the selling shareholder in relation to the shares in question are extinguished by the sale, but those rights are only to participate in dividends if and when declared and to participate in the distribution of assets on a winding up (or an earlier permissible return of capital, if and when made). They are not, in my judgment, to be regarded in the same light as claims enforceable against the company by creditors, the discharge of which amounts to consideration received by the company. Extinguishing the participation rights of one shareholder does not mean that the company is released from its (contingent) obligations to distribute profits or assets, but only that any such distribution is made to those remaining as members. The position of the company is no different, and the contingent benefit produced by paying to buy the shares in goes to the remaining members whose share in subsequent distributions is increased, not to the corporate entity.

101. Further, although the shares sold were property in the hands of the selling shareholders the company does not in any sense acquire that property on the sale, unless it treats the shares acquired as treasury shares under Companies Act 2006 s 724 (which it did not in this case). In other circumstances, by s 706(b) the shares are treated as cancelled and the amount of share capital is diminished accordingly. The result is that the company does not hold the shares as an asset that might be sold for value to a third party purchaser; instead they cease to exist. No doubt the company could in principle issue further shares in itself for money or money's worth, subject to appropriate authorisation, but that would be the case in any event, irrespective in principle of whether it had previously bought in any of its existing shares.

102. Returning to Mr Dickinson's purposes, which were effectively also those of the company, I accept that at the time of the buy back and other transactions in 2010 Mr Dickinson considered that there were good prospects that the company would defeat the claims that were threatened against it. It is difficult to be sure at this remove exactly how he regarded the chances of success because his expression of views to others, at the time and since, has been coloured by his outrage at the claims being brought at all and in particular the way in which they were promoted by Hugh James, and by his anger at the possible consequences for his company and for industry generally if such claims were likely to be brought and, worse still, succeed. Nor do I accept that his evidence now is necessarily an accurate reflection of his views at the time. In particular as I have said I do not accept that he regarded the legal advice he received, which at best insofar as expressed in percentage terms went no higher than 52% prospects of success, was to be interpreted as something more like 75%. He told his own solicitors he was concerned on the facts about claims based on odour, which were those that eventually succeeded.

103. However, the claims at that stage were poorly formulated and not well evidenced, the level of support among residents was patchy such that there was the opportunity to

obtain favourable evidence from residents who were not concerned and so paint the complainants as unreasonable, and the argument that the company operated under and (mostly) in compliance with its regulatory regime was a strong one, if not conclusive. Mr Dickinson could reasonably take the view, as I find he did, that the prospects of an eventual complete or virtually complete victory were good. This was I think more optimistic than the view of his lawyers, but I accept it was genuinely held by him. Later on I consider that his optimism strengthened, as shown by his correspondence shortly before the trial in which he seems (despite leading counsel's caveats) to have regarded the Biffa decision as being virtually a guarantee of success. That decision was successfully appealed against in March 2012, though it is not clear from the documents whether Mr Dickinson was aware of this; he still referred to it as a case "lost" by Hugh James in May of that year (E1/238).

104. Mr Williamson and Mrs Dickinson were not involved in considering the potential claims with lawyers. Mr Williamson was plainly aware about the claims generally and their progress, but they did not directly affect his role in charge of purchasing and he did not participate in decision taking about them. He took his views as to prospects from Mr Dickinson, and I accept his evidence that what Mr Dickinson told him was that the company had good prospects of success. He was realistic enough to acknowledge that he knew there were always risks involved. Mrs Dickinson appears to have been given a rosier picture- her evidence was that her husband "always said we are going to win". He may have done so to reduce her concern. I accept that she believed the company would probably win.

105. Mr Dickinson was however well aware that success was not certain and that there were, at least, significant risks that the claims would succeed. Further, I am satisfied the he knew that the amounts claimed were likely to be very substantial, of the order at least of the £1.2m estimated by Weightmans in February 2009 and that costs on both sides could also amount to a high figure- the same estimate suggested a further £1.35m. By February 2010 CLC had told him the amounts claimed ranged up to £2.4m, excluding "actual damage" and costs. It was not of course inevitable that even if the claims succeeded liability would be as high as that, but I am satisfied that he embarked on the various transactions now challenged in order to ensure that if the worst came to the worst he would be able to retain control of the business and its future profit potential and that little would be available in terms of realisable assets from which an adverse judgment could be satisfied. This, I find, was not merely a substantial purpose but the dominant one in Mr Dickinson's mind.

106. It was suggested that the buy back was something that had been under consideration for many years since 2003 and the motivation for pursuing it in 2010 was to beat the budget or other possible adverse tax changes. However it is in my view clear from the contemporary documents that any previous consideration had effectively petered out by 2009, and to the extent tax risk was a factor when the idea was revived it was a subsidiary consideration- Mr Dickinson wanted to achieve his objective in the most tax efficient way, but that objective was primarily to reduce the net asset value of the company and ensure that his interests (in which I include the interests of the pension scheme and the settlement) ranked ahead of the environmental claimants. I do not accept that the buy back would have been done in any event, even if the claim had not been in the offing.

107. This is in my view the inescapable inference from the fact that the buy back idea (and the other transactions) were embarked upon in a concentrated period just at the time

when the potential claim appeared to be becoming more real and it became apparent that it was unlikely to be covered by insurance, coupled with the contemporary documents referred to above which show his concern to get control of Norton India, which he clearly at the time thought had considerable profit potential, "in the event of a receivership", his proposal for "Protection of Norton Aluminium/Group litigation proceedings" by transferring future profits to a new company which might "phoenix the Norton operation" and his wish to protect the monies lent back to the company by charges, which he also discussed in terms of possible challenge in the event of a receivership.

108. Mr Dickinson explained himself that the "nub of the matter" was that he wanted to "reduce the net worth of the company by approx £2.5m… by extracting funds (which will probably be reinvested as shareholders loans secured against assets…)…I want to accomplish this in the most tax efficient manner…". That in my view encapsulates his priorities. His aim was to reduce the company's net worth, the obvious implication in the context being that this was so that it would not be available to creditors. His objective was not, as he sought to say, to put funds in the hands of the shareholders since he repeatedly stated they would be left in the company, but by taking security to get them out of the assets available to creditors. He evidently conveyed his objective to the auditors, who produced their own suggestion for ensuring that assets and profits were transferred away from the entity facing the claim.

109. Mr Dickinson maintained that these transactions were not intended to prejudice creditors, including the environmental claimants, because the company's accounts showed at all times that it had sufficient net assets to meet the anticipated maximum liability for the claim and costs. He pointed to the management accounts for May 2010 (E2/14-14a) which showed net assets of about £2.7m in all, and said that the company could readily have realised about £4m in cash, because it had cash at bank at that time of about £760,000, the ability to draw down an invoice discounting facility of £2m and could have easily sold £1.5m worth of the £1.8m of raw material stock shown in those accounts.

110. I do not accept that this disproves the s423 purpose, for a number of reasons:

i) I do not accept Mr Dickinson's evidence that the company could readily have realised the amount he claimed and continued to trade without difficulty. As to stock, the company was said to be turning over £1m of stock per month (Mr Dickinson's witness statement said £2m pm, see C/52). The invoice discounting facility was only drawn as to £157,000 in May 2010, but there was no question of paying any claim then. It was much more fully drawn later, presumably to assist cash flow. If as Mr Dickinson suggested the company had sold £1.5m worth of stock and fully drawn the facility, applying all the proceeds to paying the claim, I do not believe it could realistically have generated the funds to replace that stock and service its trade creditors (about £3.6m).

ii) Nor do I believe that Mr Dickinson thought this was possible, since he consistently throughout told his own lawyers, and through them the environmental claimants, as well as the politicians and civil servants he sought to engage, that a successful claim would wipe out the company. Further, when the judgment was known, the company did not in fact consider taking these steps to raise cash and could offer only £200,000 payable within 60 days. No doubt the makeup of the balance sheet had changed in the interim but the management accounts at July 2012 (E2/14b) still show net assets of about £3.3m, rather higher than in May 2010, cash at bank of over £1m, stock of £1.2m and over £1m of headroom in the invoice discounting facility. The fact that Mr Dickinson did not use these routes to raise cash when it was needed, and was apparently advised that the company could not offer more than the £1m it did without becoming insolvent, strongly suggest that it never could have done so.

iii) Further, and whether or not the company could in fact have raised such amounts without causing its own collapse, I am satisfied that Mr Dickinson had no intention at any stage of doing so. This was clear just before trial when he said he had no intention of working in future for the benefit of the environmental claimants, by which he presumably meant working to pay a settlement sum off over time, but I have no doubt his attitude would have been the same or more robust if he had considered incurring debt to pay the claimants and working to repay that. I do not believe this was a recently formed intention; there is no sign at any stage of his having considered paying the claimants and whether that could be afforded. It is true he did make a provision in the accounts and considered a higher one, but this was only because he wished to set it against profits to reduce tax, not because he intended to set aside funds to meet the claim. On the contrary, he said from the outset that if the claim succeeded the company would become insolvent, and the steps he took to ensure a favourable outcome for himself in such an insolvency showed, in my judgment, that this was his intention.

111. Converting the rights of shareholders into claims for secured debt both prejudiced the interests of the environmental claimants by increasing the pool of liabilities competing with their claim and put assets beyond their reach by ensuring that the shareholders' debt had a prior claim on the assets. This, I find, was Mr Dickinson's dominant intention and accordingly the buy back falls within s 423 and the court may order relief under subsection (2).

112. The question was raised whether any such relief should set aside the debentures insofar as they secure debts other than those arising under the buyback. There were previously amounts due to Mr Dickinson on director's loan account, which he was keen to secure at the same time, hence his request for "all monies" security. The buyback, loan and security arrangements are in my judgment to be regarded as one transaction for the purposes of s423, since that is how they were put in place and the purpose I have found extends to all the steps in that composite transaction. It would not be right to regard the granting of security as a separate transaction, which might have been argued not to be at an undervalue (see *re MC Bacon Ltd* [1991] Ch 127). If the transaction is set aside, the security falls with it. Although the court has power to make an order on such terms as it thinks fit, I see no reason in justice to impose a term preserving the security for other debts. It may be true that the company could have granted separate security for such debts without engaging s423 but it did not do so and I see no reason to strain to preserve some benefit in favour of the instigator of the impugned transaction.

Breach of fiduciary duty

113. I take this aspect last though it occupied the greater part of the written and oral submissions. The liquidators' case is that in causing the company to enter into the buyback Mr Dickinson (and the other directors depending on their own participation)

were in breach of the duty, codified in s 172 Companies Act 2006, to act in the way that they consider, in good faith, most likely to promote the success of the company, bearing in mind the common law obligation, preserved by s 172(3) to have regard in certain circumstances to the interests of creditors. That formulation does not clarify in what circumstances the interests of creditors are engaged, but Mr Barker's submission was that the law was correctly set out by Mr Randall QC sitting as a deputy judge of the High Court in *Re HLC Environmental Projects Ltd* [2013]EWHC 2876 (Ch) as follows:

> "88 … it is accepted that s.172 effectively codifies the pre-existing common law position, and that s.172(3) simply preserves the common law position with regard to considering or acting in the interests of creditors, whatever that was and is. As to the test for when these duties extend to the interests of creditors, this has been expressed in different ways in the cases:
>
> (a) "*where a company is insolvent the interests of the creditors intrude ... in a practical sense it is their assets and not the shareholders' assets that, though the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration*": per Street CJ (NSW) in Kinsela v Russell Kinsela Pty Ltd (1986) 4 NSWLR 722 at 730, cited with approval by Dillon LJ in West Mercia Safetywear Ltd v Dodd [1988] BCLC 250 (CA) at 252h-253b;
>
> (b) "*where the company is insolvent, or even doubtfully solvent*": per Nourse LJ in Brady v Brady [1988] BCLC 20 (CA) at 40h-i;
>
> (c) "*given the parlous financial state of the group, the directors had to have regard to the interests of creditors*": per Sir Richard Scott V-C in Facia Footwear Ltd v Hinchcliffe [1998] 1 BCLC 218 at 228f-g;
>
> (d) "*Where a company is insolvent or of doubtful solvency or on the verge of insolvency and it is the creditors' money which is at risk*": per Mr Leslie Kosmin QC in Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd, Eaton Bray Ltd v Palmer [2002] EWHC 2748 (Ch), [2003] 2 BCLC 153 at [74];
>
> (e) "*where to the knowledge of the directors there is a real and not remote risk of insolvency, and of course the risk includes the effect of the dealing in question ... the directors must consider [creditors'] interests if there is a real and not remote risk that they will be prejudiced by the dealing in question*": per Giles JA in Kalls Enterprises Pty Ltd v Baloglow [2007] NSWCA 191, 25 ACLC 1094 at [162].
>
> 89 For my part, I do not detect any difference in principle behind these varying verbal formulations. It is clear that

> established, definite insolvency before the transaction or dealing in question is not a pre-requisite for a duty to consider the interests of creditors to arise. The underlying principle is that directors are not free to take action which puts at real (as opposed to remote) risk the creditors' prospects of being paid, without first having considered their interests rather than those of the company and its shareholders. If, on the other hand, a company is going to be able to pay its creditors in any event, *ex hypothesi* there need be no such constraint on the directors. Exactly when the risk to creditors' interests becomes real for these purposes will ultimately have to be judged on a case by case basis. Different verbal formulations may fit more comfortably with different factual circumstances."

114. The risk of insolvency as a result of the claim was far from remote, Mr Barker submitted, at the time of the buy back. There was a real risk the claim would be lost, that the resulting liability would be high and to the extent Mr Dickinson considered whether if that happened it could be paid, contrary to his case (and for the reasons given above in relation to s 423) he was well aware that an insolvency process was inevitable and that the realisable value of the assets in that process would be insufficient. The extraction of £2.5m of net assets, to Mr Dickinson's knowledge, seriously jeopardised the company's solvency and accordingly the interests of creditors were engaged.

115. Mr Morgan's submission was that so to hold would break new ground, bringing forward to an unprecedented degree the point at which the directors have to give consideration to the interests of creditors and, arguably at least although he also submitted the cases do not yet definitively establish this, treat them as paramount. He points out that in HLC it appears the company was plainly insolvent on a balance sheet basis at all material times, and the director in question knew this (see the judgment at para 94) so the judge did not have to consider how the principle he expressed came to be applied in practice.

116. Some such consideration was however given in *Sequana*. The facts there were that the company faced a liability that was known to exist but uncertain in amount. The directors took detailed steps to make a proper estimate, provided for that amount and then distributed the remaining assets to members. The effect was that they ensured that if the estimate was insufficient (as it turned out to be) the company had no assets to meet the shortfall. Mr Morgan submitted that Rose J had drawn back from the apparent breadth of the principle as expressed in HLC. She said:

> "477 To say that my house is on the verge of burning down seems to me to describe a much more worrying situation compared to one in which there is a risk which is something more than a remote risk of my house burning down. Similarly, giving the words their natural meaning, a test set at the level of 'a real (as opposed) to remote risk of insolvency' would appear to set a much lower threshold than a test set at the level of being 'on the verge of insolvency' or of 'doubtful' or 'marginal' solvency. But I agree with the conclusion of Mr Randall QC in *HLC Environmental* that the authorities appear to treat these and all the other formulations as different expressions of the

same test. Having reviewed the authorities I do not accept that they establish that whenever a company is 'at risk' of becoming insolvent at some indefinite point in the future, then the creditors' interests duty arises unless that risk can be described as 'remote'. That is not what the cases say and there is no case where, on the facts, the company could not also be accurately described in much more pessimistic terms, as actually insolvent or 'on the verge of insolvency', 'precarious', 'in a parlous financial state' etc.

478 The essence of the test is that the directors ought in their conduct of the company's business to be anticipating the insolvency of the company because when that occurs, the creditors have a greater claim to the assets of the company than the shareholders. This case is very different from the other cases in which the triggering of the creditors' interests duty has been considered. AWA's balance sheet showed no deficit of liabilities over assets and there were no unpaid creditors knocking at AWA's door. It was not in the downward spiral of accumulating trading losses, with no income and no prospect of any income that is typical of the companies where the duty has been held to have arisen. I agree with the statement of Norris J in *Frohlich* that the underlying principle is that:

> "The acts which a competent director might justifiably undertake in relation to a solvent company may be wholly inappropriate in relation to a company of doubtful solvency **where a long term view is unrealistic**". (emphasis added)

479 In the instant case, there was a real possibility that AWA would never become insolvent or even close to insolvent. The best estimate of the Fox River liability might turn out to be accurate in which case the company's assets would be sufficient to meet the liability even without the need to rely on proceeds from the Historic Insurance Policies. It cannot be right that whenever a company has on its balance sheet a provision in respect of a long term liability which might turn out to be larger than the provision made, the creditors' interests duty applies for the whole period during which there is a risk that there will be insufficient assets to meet that liability. That would result in directors having to take account of creditors' rather than shareholders' interests when running a business over an extended period. This would be a significant inroad into the normal application of directors' duties. To hold that the creditors' interests duty arises in a situation where the directors make proper provision for a liability in the company's accounts but where there is a real risk that that provision will turn out to be inadequate would be a significant lowering of the threshold as currently described and applied in the cases to which I have referred. I can see no justification in principle for such a change."

117. It is true that in this case the directors, and Mr Dickinson in particular, made no real effort to estimate the potential liability and provide for it. That was principally because, according to Mr Dickinson, they took the view that the claims were unlikely to succeed and consequently it was inappropriate under the relevant accounting standard to make any provision. If so, they were somewhat inconsistent because a relatively small provision was made, with some ambiguous wording in the accounts as to whether the directors considered liability likely or not. It appears from the contemporary documents that Mr Dickinson's only concern in making this provision and fixing the amount of it was to obtain any tax deduction he could, rather than to assess the company's long term solvency.

118. To that extent therefore the situation is different from *Sequana*. But, after some hesitation, I have concluded that Mr Morgan's submission on this issue is to be preferred, and that the authorities do not justify a finding that the general duties of directors require them to give priority to the interests of creditors simply because there is a recognised risk of adverse events that would lead to insolvency. In one sense of course the directors must always have regard to the company's liabilities- they must be satisfied in the course of its business if the business is to continue and prosper. But in ordinary circumstances this does not entail any divergence between the interests of members and creditors. It is only when some potential difference emerges that there may be a problem. This might be so if, say, the directors have to decide whether the company embarks on some long term project or investment that may benefit members in the long term, but carries risks to cash flow in the short term. If the directors must prioritise the interests of creditors, they might not be able to proceed because they must prefer short term cash flow to long term potential benefit. I would be reluctant to hold that such a situation arises where the company faces a disputed claim which, if the directors' assessment of the litigation prospects turns out to be wrong, will or may bring the company down.

119. A more stark difference arises where the directors are considering a distribution or some uncommercial transaction that benefits themselves or members (who may be themselves or connected parties). But those transactions also engage other duties and potential remedies such as s423, which are potentially powerful as is shown in this case and in *Sequana* itself. No doubt they do not cover every situation that a general duty in favour of creditors would, and in particular there would be an increased possibility that a transaction jeopardising creditors might be ratified by shareholder approval when such approval would be ineffective if the duty in favour of creditors was engaged, but that is not in my view sufficient to justify the potentially inhibitory effects of treating that duty as arising much earlier than the cases presently have.

120. Assuming that the buy back had been validly entered into, it did not place the company on the verge of insolvency. The company was trading successfully and had ample capital and liquidity to continue to do so in the ordinary course. It had by then made a large investment in Norton India, including the loan of £1.4m, but I have no evidence to indicate there was any reason at the time to regard that as impaired. There was a real risk of insolvency if the claim was lost and resulted in a large liability, but also a real prospect that it would never become insolvent. The claims may very well have been defeated. Although the amounts sought were very high, it was not an all or nothing situation- there was a real prospect that even if some part of the claims succeeded the liability would be affordable. In that situation, the company would have been solvent in that it could have paid the liability, notwithstanding I have found that Mr Dickinson had no intention of doing so.

121. I hold accordingly that the duty to consider the interests of creditors had not arisen, and accordingly the claim against all the directors for breach of that duty in proceeding with the buyback fails.

Transfer of the shares in Norse Castings Ltd

122. It is clear from the contemporary documents that the transfer of shares in Norse to Mr Dickinson for £1 took place not earlier than 10 February 2010 and not later than 24 February. I find it was probably on or about the latter date. In this case there was not even the pretence of a board meeting. Mr Williamson was told about the original acquisition, but only after the fact. His oral evidence was that he was not consulted about or involved in sanctioning the sale, even saying at one point he was not aware that it had been sold, though he later seemed to accept he may have been aware of the sale, but only after it happened. He had no explanation why his witness statement had said (C/107) that "the proposed [sale] consideration did not seem surprising to the board". Mrs Dickinson did not appear to know anything about either the purchase or sale, and although aware of the existence of Norse she could not say if she became so aware at the time of the purchase or only in the course of the trial. That I think was indicative of her virtually complete lack of involvement in the company's affairs. The decisions to buy and to sell, as with all other substantive decisions, were taken by Mr Dickinson alone.

123. The liquidators' first argument is that Mr Dickinson had no authority on behalf of the company to transfer the shares to himself so that the agreement to transfer is therefore either void, or was voidable and has been avoided by the service of the Defence. Mr Barker points out that if the matter had come to the board Mr Dickinson could not have voted or been counted in the quorum by virtue of Regulation 84. Mr Dickinson's evidence (supported by the written evidence of the other directors) is that the other directors delegated authority to him to buy and sell companies such as Norse acting alone and on such terms as he thought fit. Further it is pleaded in the Reply that the transaction is not void or voidable because

i) The directors by subsequent actions (in particular but not limited to the signing of the 2010 audited accounts) informally but unanimously either approved ratified or acquiesced in the sale, or

ii) As with the buyback, the acts of Mr Dickinson in entering into the sale constituted the unanimous informal approval of the members. I reject that for the same reasons as I have given above. Alternatively

iii) Mr Dickinson dealt with the company in good faith and is entitled to the benefit of s 40 Companies Act 2006. That however was not pursued by Mr Morgan and is plainly wrong; by s 41(2) the effect of s40 in the case of a transaction to which a director is party is at most that the transaction is voidable.

124. As to delegation, there is no document setting out a decision to delegate any authority that might be referred to to determine the existence or scope of any delegated authority. Mrs Dickinson did not participate in any meetings, let alone any decision in which delegation was considered. Neither did Mr Williamson give any evidence of consideration of such an authority. Both of them said, in slightly different terms, that it was simply left to Mr Dickinson to pursue acquisitions as he saw fit. They plainly

knew that he had in the past bought other companies and capital assets from third parties and considered it was his role to do so without consulting them.

125. It is of course common in companies small and large for authority to be delegated to employees and directors to deal with matters arising in the normal course of their duties or roles, so the absence of express consideration of the terms and of any document evidencing the authority are not fatal. But in such cases the question is what authority can be inferred to have been given from the fact the individual has been given the role and the surrounding circumstances. The court will not readily imply an unlimited authority. The limits may be imprecise; for instance they may be expressed in terms such as "in the ordinary course of business".

126. In this case, while it may be appropriate to infer from the other directors acquiescence in previous acquisitions that they impliedly authorised him to do so in future, there is nothing in the evidence to indicate that this extended to selling assets to himself. Even the most supine of directors, it seems to me, would regard this in a different light from arms length dealings with unconnected parties and something for which, if they had any thought at all for the interests of the company, they should not give a blank cheque. The court should be particularly cautious, it seems to me, in inferring authority for self dealing given the importance attached by statute and the Articles to disclosure and independent authorisation in such cases.

127. I reject therefore the case that Mr Dickinson had implied or informal authority in advance to make the sale. Nor in my judgment was there any subsequent action, or even sufficient knowledge of the terms of the sale coupled with inaction, from which ratification or acquiescence sufficient to amount to approval can be inferred. The only specific matter referred to is the signature of the accounts, but that was only by Mr Dickinson " on behalf of the board" and there is no evidence the others participated at all, still less that by doing so they became aware of and impliedly approved the sale. To the extent the other directors were aware of the fact of sale at all, they cannot be seen to have made any enquiry about, or even become aware of, its terms. They thus did not consider whether it could properly take place for £1 and cannot be regarded as having approved the sale willy nilly.

128. On that ground then I hold that the sale was at best voidable and has now been avoided. The liquidators further contend that the value of Norse was considerably more than £1 such that even if the sale had been within Mr Dickinson's authority

i) The shares sold constituted a "substantial non cash asset" for the purposes a Companies Act 2006 s 191. In the absence of approval by resolution of the members the sale is voidable (and has been avoided). Further or alternatively

ii) The sale was a transaction at an undervalue caught by s423, and/or

iii) It was in breach of fiduciary duty on the part of Mr Dickinson, and of the other directors, in their case either because they did participate and authorise it at that value or because they did not and wrongly abrogated their responsibility to Mr Dickinson.

129. In relation to valuation, it will be recalled that Mr Dickinson said he had sold the shares with backdated effect and that Norse still had negative net assets but was now making good profits. I am satisfied that he sought to backdate the sale so as to improve his chances of justifying the price to the tax authorities, in light of the

concern expressed by the auditor in circumstances where the trading performance of Norse had improved such that it was now making good profits. It is also relevant that at the time of the sale Mr Dickinson had agreed in principle to acquire Procast, also for a nominal sum, but with the intention of merging the two operations. That purchase appears to have been negotiated on behalf of Norton Aluminium, but later took place through Norse. If so it is to be inferred that Mr Dickinson passed the opportunity on to Norse at the same time as he transferred the shares of that company to himself. If it was always intended to be a purchase by Norse, the opportunity was an asset of Norse not represented in its accounts. Mr Dickinson evidently considered it a valuable opportunity; he told his solicitor at the time "we believe we can turn it around quite quickly" and later said in his evidence that insofar as Norse had improved its performance since acquisition that was due to the injection of £1m additional turnover from the Procast business (C/80 para 112).

130. I had evidence from Mr Bicknell of Bloomer Heaven, who was instructed as joint expert accountant to value the shares in Norse and prepared an initial report and various supplementary responses to points put to him. He also gave oral evidence. Though he was asked to produce valuations at 30 September 2009 and in February 2010, it is the latter that is relevant since that was the time at which Mr Dickinson decided to transfer the shares.

131. In his addendum report dated 30 January 2015 Mr Bicknell said that Norse had been reorganised and returned to profit in the 6 months to September 2009 and was at that point projected to make profits exceeding £100,000 in the following year, but that by February 2010 the position had improved further such that maintainable profits of £135,000 pa would be expected. He produced three different bases of valuation:

i) Net assets, including goodwill valued at 2x maintainable earnings (£270,000) less an assessed deficiency of tangible assets (£50,000) giving a figure of £220,000.

ii) Price Earnings valuation based on 4x maintainable post tax earnings, less the deficiency in tangible assets- £380,000.

iii) EBITDA valuation based on 2x EBITDA less assessed borrowings, giving a figure of £214,000.

In view of the limited information available he expressed his opinion that the "lower" (I assume he meant lowest) value would be the most appropriate to use.

132. A number of points were put to Mr Bicknell on both sides. Mr Dickinson's solicitors said that his evidence would be that the reorganisation involved significant time being spent at Norse by Mr Dickinson himself, who drew no remuneration from any of the companies, and his foundry manager Mr Woodward who was paid by Norton Aluminium, and invited Mr Bicknell to agree that a purchaser would take account of additional costs of £120,000 pa representing the fair value of these services, including salary and associated costs. Mr Dickinson did indeed give such evidence in his fourth witness statement, though the figures he gave (C/157) are based on a charge of £60,000 for his own services and amounts for part of the costs of Mr Tranter (financial manager) as well as the foundry manager previously referred to. These were said to be based on their time spent between February 2009 and February 2010. No figures were given for any subsequent period. The costs claimed for the 3 individuals amounted to about £115,000 pa.

133. Mr Bicknell's response was that he had not originally been given any information about these costs, the fact there had been no inter company charge raised questions as to whether any allowance was appropriate and it was a matter for the court to find whether such costs would have been incurred in the future by a hypothetical purchaser. If costs of £120,000 were found he agreed the company would have a negative valuation. In his oral evidence he confirmed he had seen no evidence of any actual charge at any time and could not assess the quality of the services said to have been provided so as to evaluate the reasonableness of the amount claimed. He agreed with Mr Barker that Mr Dickinson had acquired a company that had not paid any charge and did not do so thereafter.

134. I am not persuaded that it is appropriate to make any allowance for these costs. To the extent that any services were provided other than by Mr Dickinson himself it appears to have been by way of temporary secondment during the period of reorganisation. It would be expected that this would be the most intensive period of extra work, yet Mr Dickinson's case invites the assumption that services would continue to be required at the same level indefinitely thereafter. He could have, but has not, provided evidence of the extent of actual provision after February 2010, by which time the initial phase of reorganisation (prior to merging in the Procast business) appears to have been substantially achieved. Given the late emergence of the argument and the selective evidence provided, I infer that later figures would not assist his case and therefore that I should not find any substantial services were provided after February 2010.

135. The hypothetical sale is to a reasonably well informed purchaser, and in the context of an actual sale to a connected party who has all the knowledge of the seller, the hypothetical purchaser must be assumed also to have such knowledge, ie all the actual knowledge of Mr Dickinson. Such a purchaser would not therefore assume that because turnround work had been performed in the past it would necessarily be required thereafter. I accept that a purchaser would consider that management had to be provided, and to the extent that was no longer being given by the previous director, consider whether any cost should be deducted from earnings for it.

136. However, the hypothetical purchaser must be taken to buy on the same terms as are offered to the actual purchaser, and as Mr Bicknell said Mr Dickinson bought a company that had not paid any such costs and did not do so thereafter. It was Mr Dickinson's choice that all the costs of the services provided were effectively borne by Norton Aluminium. In the case of actual outgoings by way of salary etc for Mr Tranter and Mr Woodman, these were paid by Norton Aluminium at all times. Even if they continued to be provided after the transfer, no charge was made and realistically in the circumstances it must be assumed that it was always Mr Dickinson's intention that this would be so. His motivation at the time, as I have found, was to reduce the assets available to the claimants in Norton Aluminium and protect wealth held elsewhere. That intention on his part is to be attributed to both sides of the hypothetical sale and so represent the terms of that sale. He cannot be heard to say that although he sold to himself on favourable terms, the value must be assessed on less favourable terms that would have been offered to an outsider.

137. Similarly, to the extent Mr Dickinson himself provided services to Norse that was a continuation of the arrangements that had applied in the group when Norse was a part of it. He was not directly remunerated, but indirectly by salary paid to his wife and by dividends and rent paid by Norton Aluminium. It does not lie in his mouth to say he

should be assumed to have changed these arrangements when he had no intention of doing so.

138. Accordingly I make no adjustment to Mr Bicknell's figures on that account.

139. Secondly, Mr Morgan put it to Mr Bicknell that different valuers might have different opinions as to the appropriate valuation methodology, and suggested alternative conclusions that might reasonably have been reached, in particular:

i) In assessing maintainable profits as at February, a purchaser might look only at the figures to that date rather than including an element of projection, and reach a figure of £91,000 rather than £135,000 pa. Mr Bicknell agreed that view could have been taken, but said he felt his approach was better. Of course the question is not simply what attitude a purchaser might have taken in the hypothetical sale but what would be likely to be agreed, and the vendor, on the assumption of an arms length sale in which it is seeking the best price, would no doubt rely on its most recent and most favourable information as to future prospects.

ii) Mr Bicknell said goodwill tended to be valued at between 1 and 3 times maintainable profits, and he had selected 2 times as a reasonable figure. He agreed another valuer might have chosen a lower figure, which he "would not say was wrong". I did not take him to be changing his own opinion.

iii) In his valuation based on a price/earnings multiple, Mr Bicknell had used a multiplier of 4. Mr Morgan suggested others might have selected a figure between 2 and 3. Mr Bicknell said he "would not rule it totally out of court". Again, he was not changing his own opinion.

iv) It was suggested that instead of an EBITDA multiple of 2 the appropriate figure was between 1 and 1.5. Mr Bicknell said he would not have thought the right figure was lower than 2, but agreed that he "could see the possibility" that another valuer might choose a lower figure.

140. Mr Morgan's overall submission, referring to *Ailyan & Fry v Smith* [2010] EWHC 24 Ch and the authorities there cited was that for the purpose of assessing whether a transfer was at an undervalue the valuation of the asset in question should be taken to be the lowest of a reasonable range of possible values, and accordingly that if each of the lowest figures that Mr Bicknell had conceded were either a reasonable range or figures that another valuer might have chosen without it being able to be said that he was wrong, and if earnings were reduced by the additional costs contended for, I should find that the shares in Norse had no value at the time of transfer. Alternatively, the value might be found to be less than £100,000 such that the transaction did not fall foul of Companies Act 2006 s190. Finally, he submitted that if any of the claims in respect of the Norse shares were made out it would be a windfall to order that they be transferred back since they have grown in value since. The net assets of Norse were £745,000 at the date of administration and now over £1m (that would not necessarily be the value of the shares at either date, of course). His submission was that it would be appropriate to order only payment to the liquidators of the value found at the date of transfer.

141. This submission is to misread what I said in *Ailyan & Fry v Smith*, and *Ramlort v Reid* [2004] EWCA Civ 800 on which it was based. The point there made is that it is not always necessary to find an exact value for an asset if it is clear that whatever the value is, it is substantially more than the consideration given. That is not at all the same as to say that if the court has evidence from which it may determine a value it must always do so taking every assumption or uncertainty in favour of the defendant so that the value found is the lowest possible. If the court engages in the task of finding a value it approaches such evidence, and the inherent uncertainties of valuation, in the same way as in any other case, taking account of the range of reasonable opinion and giving such weight as appears appropriate to expert opinion, which may conflict, in order to reach a conclusion.

142. In this case, Mr Bicknell's own opinion was unshaken as to the most appropriate valuation figure, ie the lowest of the 3 bases he explored, being £214,000. He acknowledged the potential range of opinion, and gave his own opinion as to where in that range it would be appropriate to settle. In my view he was conservative in doing so, but I would accept his opinion and accordingly find that the value at the date of transfer was £214,000.

143. I say Mr Bicknell was conservative not only because in all of his calculations he adopted, with reasons, figures that were not at the extremes of the ranges he acknowledged, and that he based his opinion on the lowest of the three bases canvassed, but also because he declined to allow any increase in value because of the availability of the opportunity to acquire Procast at the time of sale. His opinion was that because that transaction was not completed a purchaser would not be prepared to attribute any value to it. However, as I have said above, in the hypothetical arms length sale the seller must be assumed to put forward all the information it has that will assist in negotiating the best price. The purchaser is also assumed to be reasonably well informed, and in the context of a sale by an insider such as Mr Dickinson whose knowledge was effectively that of the selling company to himself, therefore to have all the information Mr Dickinson actually had. There is no reason therefore why the hypothetical purchaser's view of the potential of the acquisition would be any different from Mr Dickinson's, and he clearly thought it likely to complete and to be of significant value.

144. To put the matter another way, in the (highly unlikely) event that a properly acting board of the company had in fact been negotiating with an arms length purchaser to sell Norse, together with the opportunity to buy Procast but a few days before that opportunity crystallised, it is inconceivable that it would have failed to demand some additional consideration for that opportunity. It is equally inconceivable that a willing purchaser with Mr Dickinson's knowledge and opinion of the potential of that opportunity would not have been prepared to pay something extra for it. I do not seek to determine myself what that would be, but the fact that the opportunity was valuable fortifies me in my conclusion that Mr Bicknell's figure can be accepted as a conservative one.

Norse shares- s 423 Insolvency Act 1986

145. It follows that the transfer of the Norse shares was a transfer at an undervalue for the purposes of s 423. As to the statutory purpose, I am satisfied that it formed part of the overall scheme Mr Dickinson was developing to move assets out of Norton Aluminium in order that they would not be available to the environmental claimants if their claim succeeded. He discussed it at the same time and in the same context as the share buy back, which context was shown by his references to protection of assets and future profits. It is noteworthy in particular that it was announced to the auditors in the

same email (E1/121) as he discussed his proposals for buyback and put forward a scheme to divert future profits from Norton itself to a newco. It is true the last was given a different heading, but I do not believe it was a coincidence that all these matters were raised together.

146. I do not accept that Mr Dickinson genuinely believed the shares were only worth £1, or that the true reason for the transfer was to avoid the costs of consolidating the accounts, as he asserted. His attempt to backdate the purchase to bolster the case for the valuation with Her Majesty's Revenue and Customs indicates he was well aware the value was considerably more at the true date of transfer. I have no doubt he would wish to avoid any avoidable cost, but that was a collateral matter and not his true motivation.

147. The conditions for making an order under s 423 are therefore satisfied. The court has a wide discretion to make such order as it thinks fit for restoring the position to what it would have been if the sale had not taken place and protecting the interests of the victims of the transaction, which in this case are the creditors of Norton Aluminium. An order for payment of the true value as I have found it at the date of sale would not in my view be sufficient for those purposes. It would give the benefit of the upside potential of the transfer to the person who entered into it for his own benefit and with the aim of removing the potential from the company so as to prejudice the persons whose interests the court is to protect.

148. Mr Barker suggested that he would be content if a line were to be drawn at the date of administration. I will in due course hear submissions as to the form of relief, but insofar as it turns on my findings under s423 it seems to me appropriate in principle to approach the matter on the footing that but for the transfer the shares in Norse would have been assets under the control of the administrators and accordingly to make an order either that Mr Dickinson return them or that he should pay an amount equal to their value at that date, when the administrators might have sold them for the benefit of creditors.

Norse shares- Companies Act 2006 s 190

149. It is accepted that if I find the value of the Norse shares was more than £100,000, as I have, they constitute a "substantial non-cash asset" as defined in Companies Act 2006 s 191 and accordingly by s 190 the company may not make any arrangement for them to be acquired by a director without the approval of a resolution of the members.

150. Mr Morgan submits such approval may be given informally by unanimous consent of the members, but that depends on the general point about Mr Dickinson's act in entering into the transaction being taken as the consent of all members. I have rejected that, and it is accepted no other approval was sought or given by members. The consequence of contravention is that the transaction is voidable (s195) and has been avoided by service of the Defence. It is not alleged that restitution is no longer possible.

Norse shares- breach of duty

151. The sale of the Norse shares was pleaded to be in breach of the directors' duties to act in good faith in what they considered to be the best interests of the company, including the alleged duty to consider the interests of creditors. Since I have held that the duty to act in the interests of creditors had not arisen, the last aspect of the claim

falls away. However irrespective of any separate consideration of the interests of creditors, it was plainly not in the interests of the company as a corporate entity to transfer away an asset worth £214,000 for £1 and in doing so Mr Dickinson preferred his own interests over those of the company by transferring that value to himself. In both respects he acted in breach of fiduciary duty.

152. The transaction cannot be justified by saying that the company was solvent and while solvent its interests are to be considered as the same as its shareholders, since (even if that were generally the case) the transfer was to only one of those shareholders. It is not therefore to be considered as comparable to a dividend in specie.

153. Since the transferee, Mr Dickinson, must be taken to have knowledge of his own breach of duty at the time of the transfer, the consequence is that the transfer is void (*GHLM Trading Ltd v Maroo* [2012] EWHC 61 (Ch) at para 171). If it had been merely voidable it would have been avoided by service of the Defence.

Norse shares- relief under Companies Act 2006 s1157

154. This section is potentially applicable insofar as the claim against Mr Dickinson is for breach of fiduciary duty. It is not, in my judgment, applicable insofar as he may be ordered to make restitution or compensation to the company by virtue of the setting aside or avoidance of a transaction under Insolvency Act 1986 s423 or Companies Act 2006 s195. The reason is that in those cases his liability arises because he was party to the transaction that is to be unwound, not because he is a director. It would be illogical to have a power to grant relief in favour of a beneficiary of a transaction who happens to be an officer of the company where no such power would exist in favour of an equally honest outsider.

155. Insofar as the section does apply, the circumstances do not in my judgment justify the grant of relief. My reasons are essentially the same as in relation to the 2005 factory transfer- Mr Dickinson did not act in what he considered to be in the interests of the company, but in his own interest to protect his wealth against the possibility of an adverse judgment. He did not seek to protect the company's interest by obtaining a valuation of the asset, but paid what he knew to be an undervalue while seeking to disguise it by backdating the transfer.

Buyback and Norse shares- position of Mr Williamson and Mrs Dickinson

156. Neither of the other defendants played any positive role in the buyback or the transfer of the Norse shares. Mrs Dickinson said she was told by Mr Dickinson that he intended to buy back some shares and lend the proceeds to the company, but did not know how it would work. She knew very little about it, and that came only from domestic conversations. She knew by the time she was in the witness box that the shares in Norse had been transferred, but could not say when or how she was told. It might only have been in the last few days. As I said above, she had attended no board meetings at any time, because there were none. She simply left everything to Mr Dickinson and knew only what, if anything, he chose to tell her at home. Insofar as her witness statement stated she had any greater role, it was simply untrue.

157. Mr Williamson had been told, he thought in about March 2010, that Mr Dickinson was looking at the possibility of a share buyback and taking advice about it. He had no further conversation about it until after it had happened, when Mr Dickinson had told him and Mr Tranter that he had taken £2.5m out of the company but that they

should not worry because he had left the company solvent. He did not think this concerned him as a director, saying that Mr Dickinson was within his rights. His responsibility was buying scrap for processing. He saw the management accounts and considered the company still cash rich and so was not concerned. He thought it had been done for tax reasons. He was not consulted about the purchase or transfer of Norse shares, though found out about it afterwards. He was not concerned to enquire about it. He thought it had a negative net worth and had not been told it was making profits.

158. Mr Barker's submission was that these directors were in breach of duty by entirely abrogating their responsibility to Mr Dickinson. He referred me to the summary of the law by Popplewell J in *Madoff Securities Intl Ltd v Raven* [2013]EWHC 3147 as follows:

> "191 It is legitimate, and often necessary, for there to be division and delegation of responsibility for particular aspects of the management of a company. Nevertheless each individual director owes inescapable personal responsibilities. He owes duties to the company to inform himself of the company's affairs and join with his fellow directors in supervising them. It is therefore a breach of duty for a director to allow himself to be dominated, bamboozled or manipulated by a dominant fellow director where such involves a total abrogation of this responsibility: see ***Re Westmid Packing Services Ltd; Secretary of State for Trade & Industry v Griffiths (No 3)*** [1998] BCC 836 at 842B-843D; ***Re Barings Plc (No 5)*** [1999] 1 BCLC 433 at486h-489c; ***Lexi Holdings Plc v Luqman No2*** [2008] 2 BCLC 725 per Briggs J at [31], [32] and [2009] BCC 716 per Sir Andrew Morritt C at [37]. Similarly it is the duty of each director to form an independent judgment as to whether acceding to a shareholder's request is in the best interests of the company: ***Lonrho Ltd v Shell Petroleum*** [1980] 1 WLR 627, 634F. The duty to exercise independent judgment is now reflected in s. 173 Companies Act 2006.
>
> 192 Moreover, it has long been established that a trustee who knowingly permits a co-trustee to commit a breach of trust is also in breach of trust. A director who has knowledge of his fellow director's misapplication of company property and stands idly by, taking no steps to prevent it, will thus not only breach the duty of reasonable care and skill (which is not fiduciary in character: ***Ultraframe v Fielding*** [2005] EHWC 1638 (Ch), [1300]-[1302]), but will himself be treated as party to the breach of fiduciary duty by his fellow director in respect of that misapplication by having authorised or permitted it: ***Walker v Stones*** [2001] QB 902, 921D-E; ***Gidman v Barron and Moore*** [2003] EWHC 153 (Ch) at [131]; ***Neville v Krikorian*** [2006] EWCA Civ 943, [49]-[51] and ***Lexi Holdings v Luqman (No. 1)*** [2007] EWHC 2652 (Ch) at [201]-[205]."

159. In my judgment the allegation of breach of duty is in principle made out. Mrs Dickinson in truth played no role in directing or supervising the company's affairs.

She took no steps to inform herself of those affairs and relied only on what her husband told her at home. To the extent she contributed anything to those discussions it was only in a domestic context as a spouse might do whether or not they held any position in the company. Mr Williamson plainly was involved to some extent in business discussions at work that went wider than his direct responsibility as an employee but that too was only to the extent that Mr Dickinson chose to discuss matters with him. He was content to go along with what I have no doubt was Mr Dickinson's way of working, which was that Mr Dickinson alone dealt with any substantial matters such as the transactions in issue here. This was not delegation with supervision, since there was no mechanism or practice of Mr Dickinson reporting to the board or seeking its approval either before or after the event, but a complete failure to engage in any responsibility. Both individuals allowed themselves to be wholly dominated by Mr Dickinson, contrary to the inescapable personal responsibilities Popplewell J referred to.

160. Having said that, it does not automatically follow that this breach of duty was causative of any loss to the company. Insofar as the company has suffered loss the immediate cause of it is that Mr Dickinson caused it to enter into transactions for which he required, but did not obtain, the authority of the board and/or shareholders and which as a consequence were not binding on it. The fact that other directors were disengaged did not cause him to do this, nor did it in any real sense enable him to do what he did. The directors did not stand by knowing of a misapplication of company funds, since they knew little or nothing of these transactions until after they had happened. They cannot thus be made liable as parties to any such misapplication. Further, to the extent they might previously have declined to be as disengaged as they were and sought to impose some system of control on Mr Dickinson, I have little doubt he would simply have engineered their removal so that he could continue to act in the unfettered way he considered was his right. Mr Barker did not put any positive case as to what they might have done that would have led to a different outcome.

161. I find therefore that Mr Williamson and Mrs Dickinson are not liable, notwithstanding the breach of duty by them.

162. In case the matter goes further, had I reached the opposite conclusion I would not have granted relief to either director under Companies Act 2006 s 1157. The circumstances in which a director is found to have been in breach of duty to act in the interests of the company but nevertheless to have acted honestly and reasonably must be rare. No dishonesty is alleged here, but it simply cannot be said that a director with an inescapable duty to join in the management of a company acted reasonably in abandoning any effective role at all in doing so.

Norton India counterclaims

163. The pleaded counterclaims in relation to Norton India begin with the premise that Mr Dickinson caused the company to transfer shares to him and to the family settlement with the intention of diluting its holding and putting assets beyond the reach of creditors. In fact the evidence is that no shares were transferred, though the same effect was achieved by causing Norton India to issue further shares for cash to Mr Dickinson, which Norton Aluminium paid for on his behalf, debiting his loan account. The balance on that loan account substantially arose, of course, from the buyback transaction. I am in no doubt that Mr Dickinson entered these arrangements as part of his overall scheme to protect assets from the potential environmental claims. He used the proceeds of the buy back, which was entered into for that purpose, in order to

create a shareholding for himself at no cost to himself. He made clear in the contemporary emails that he considered Norton India to be potentially very valuable, and that he was anxious to ensure it would not come under the control of a potential receiver of the UK company. He envisaged that a "receiver" would be appointed if the claims were lost.

164. At the same time, and as the emails make clear as part of the same strategy, he caused the UK company to enter into a shareholders agreement with himself so as to give him the right to acquire the shares it held and the debt owed to it by Norton India. It appears from the evidence that he has relied on that agreement to seek transfer of those assets to him at relatively nominal values. I should say that there is no challenge before me to the validity of that agreement.

165. Mr Barker accepts that if there was no transfer of shares by Norton Aluminium to Mr Dickinson, that part of the pleaded case falls away. What is left are allegations that the directors acted in breach of duty in causing the company to subscribe for further shares itself in Norton India at a cost of £139,000 odd at a time when it was no longer the majority shareholder, and in making further unsecured loans to that company amounting to £750,000 odd. This was said to be preferring Mr Dickinson's interest to that of the company and its creditors, and paying away funds so that they would be out of reach of the creditors if the environmental claim succeeded.

166. I agree however with Mr Morgan that these allegations of breach of duty cannot stand if I conclude, as I have, that the duty to consider creditors' interests had not arisen. It is not per se a breach of duty to invest in a minority shareholding or to make loans to a company in which the lender has minority holding. Further, even if I had found that interest to be engaged, there is no allegation that at the time the shares were purchased they were an uncommercial investment, or that the directors should have concluded that the loans would not be repaid. Without that it is hard to see how either amounted to any "preference" of the interests of Mr Dickinson as another shareholder, or was not a bona fide commercial investment for the benefit of the UK company as a corporate entity interested in making a return on its own holding in Norton India.

167. Accordingly I reject the counterclaims relating to Norton India.

Mr Dickinson's own claims

168. I have dealt above with the validity of the debenture. The result is that any claims Mr Dickinson has are unsecured. Of those financial claims, any relating to the lease of the factory (rent and dilapidations) fall away. Claims for £11,500 paid to CLC to discharge the company's legal costs and for reimbursement of £39,690.22 paid under a personal guarantee for counsel's fees for advice to the company were agreed. A claim was made for indemnity by the company pursuant to its Articles against Mr Dickinson's costs in this action, but Mr Morgan abandoned this in closing, accepting that recovery was barred by Companies Act 2006 s232.

169. Of the matters addressed before me there remains a claim for £38,805.28 paid by Mr Dickinson to his own solicitors for acting in an application brought against him personally by the environmental claimants seeking a third party costs order. Article 32 of the company's Articles of Association provides for an indemnity to directors "for the time being acting in relation to any affairs of the company… against any liability incurred by them to the extent permitted by the Statutes". "Any liability" must in the context be a liability incurred because he was "acting in relation to [the] affairs of the

company". The personal costs claim arises out of the defence of the environmental claim, and although no doubt it will be on the basis of some aspect of his personal conduct of that claim or interest in the outcome, it has not been suggested before me that in defending the claim he was doing anything other than acting in the affairs of the company. The claim was put on the basis that he was not acting on behalf of the company in defending the costs claim made against him, but that does not advance the defendants' case- any assertion of liability against which the director seeks indemnity is bound to be a claim made against him. Further, although Companies Act 2006 s 232 prohibits indemnity against liability for "negligence, default, breach of duty or breach of trust in relation to the company" it has not been suggested that whatever aspect of those proceedings is said to justify a third party costs order amounts to a breach of duty to the company. Accordingly, Mr Dickinson is in my judgment entitled to indemnity against those costs.

170. There are other debts claimed as part of the balance on director's loan account, but it was agreed at the start of the trial that these be dealt with by an order for an account in the light of my findings, to the extent they cannot be resolved by agreement.

171. I will list a date for this judgment to be handed down. There need be no attendance on that occasion. No doubt there will be matters arising; I invite the parties to agree a time estimate for a later hearing to deal with them and submit dates of availability accordingly.