Neutral Citation Number: [2021] EWHC 1018 (Ch)

Case No: CH-2020-000190

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

ON APPEAL FROM:
THE ORDER OF DEPUTY ICC JUDGE AGNELLO QC
DATED 10 JULY 2020

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

Date: 23/04/2021

Before :

MR JUSTICE MILES

- -

Between :

DARTY HOLDINGS SAS (AS SUCCESSOR TO KESA INTERNATIONAL LIMITED)	**Appellant**
- and -	
GEOFFREY CARTON-KELLY AS LIQUIDATOR OF CGL REALISATIONS LIMITED (IN LIQUIDATION)	**Respondent**

- -
- -

Tom Smith QC and Alex Barden (instructed by **Sidley Austin LLP**) for the **Appellant**
Andreas Gledhill QC and Tiran Nersessian (instructed by **Jones Day**) for the **Respondent**

Hearing dates: 30 and 31 March 2021

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JUDGMENT

Covid Protocol: this judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii at 10.30am on 23 April 2021.

Mr Justice Miles :

1. This is an appeal from the order of Deputy ICC Judge Agnello QC ("the judge") of 10 July 2020 by which she declared that the Appellant ("KIL") was a connected person of Comet Group Limited ("the Company") for the purposes of an alleged preference under s. 239 of the Insolvency Act 1986 ("the Act").

2. The preference alleged by the liquidator of the Company consists of a number of payments totalling about £115m. These were repayments of intercompany debts made in the context of an acquisition of the shares in the Company which was completed on 3 February 2012. The payments took place that day. The Company went into administration on 2 November 2012 and liquidation on 13 October 2013. The claim is for some £82m (being the difference between £115m and the amount it is said KIL would have recovered in an insolvent liquidation).

3. The viability of the preference claim depends on KIL being connected with the Company at the time of the payments.

4. By sections 239 and 240(1)(a) of the Act a claim may be made in the case of a preference given to a person who is connected with the company where the preference occurred within two years of the onset of insolvency. A claim may be made in the case a preference is given to a person not connected with the company if the onset of insolvency occurs within six months. Here the alleged preference was given on 3 February 2012 and the onset of insolvency was 13 October 2013 – a period of more than six months, but less than two years.

5. There is a second important consequence of the connection issue. By s. 239(5) a court may not make an order for a preference unless the company which gave the preference influenced in deciding to give it by a desire to put the person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done. By s. 239(6) where a preference is given to a person connected with it the company is rebuttably presumed to have been influenced by such a desire.

6. The judge decided, as I have said, that KIL was connected with the Company at the time of the alleged preference. KIL seeks to challenge that decision on two grounds. The first is that, as a matter of fact, there was no proper basis for concluding that the impugned payments happened before the registration of the transfer of the shares in the Company to the purchaser ("the timing point"). The second is that, properly applying the statutory provisions to the linked sequence of transactional steps in this case (which severed the connection between the selling group and the Company) KIL was not connected with the Company at the time of the alleged preference ("the severance of connection point").

The facts

7. The facts were largely agreed before the judge and I take them from her judgment with some adaptions.

8. The Company was a well-known high street electrical retailer. Before the sale transaction of which the intercompany payments were part it was owned by the Kesa

group of which Kesa Electricals plc ("KE") was the parent. KE owned Kesa Holdings Limited ("KHL") which in turn owned the Company. KIL (the party alleged to have received the preference) was also a member of the Kesa group. It sat below KHL (via two wholly owned subsidiaries). So KIL and the Company were under the common control of KHL.

9. The Company was not profitable and the Kesa group decided to sell it together with a (profitable) captive insurance company called Triptych Insurance NV ("Triptych").

10. After a sale process, KHL reached terms with a private equity firm called OpCapita LLP. OpCapita's offer for the shares was on a "cash and debt free" basis.

11. The parties entered heads of terms. OpCapita's acquisition vehicle was called Hailey Acquisitions Limited ("HAL"). A detailed sale and purchase agreement ("the SPA") was executed by KHL, KE, Hailey Holdings Limited ("HHL", the parent of HAL) and HAL on 9 November 2011.

12. The SPA related to the sale and purchase of the entire issued share capital of the Company and Triptych.

13. There were various conditions to completion of the SPA. These were satisfied by the end of January 2012.

14. On 3 February 2012, various parties entered another agreement, called the Completion Agreement ("the CA"). The parties were KE, KHL, KIL, HHL, HAL, Hailey 2 LP (another part of the acquiring group), the Company, Triptych and Macfarlanes LLP (the purchasers' solicitors). The purpose of the CA was to set out how various payments were to be made in relation to the completion of the SPA.

15. The Company and KIL were both parties to the CA but neither was a party to the SPA.

16. As already explained, KIL was a treasury company in the Kesa group. Before the agreed acquisition, there were various intercompany balances owed to and by KIL. The Company was indebted to KIL under a revolving credit facility ("the KIL RCF"). KIL in turn owed substantial amounts to Triptych.

The SPA

17. In outline the SPA worked like this. The shares in the two companies were to be sold by KHL for £2. Part of the net intercompany debt was to be capitalised (effectively written off) before the sale of the shares. HHL was to provide the Company with a new facility of up to £186.6m ("the HAL RCF"). KIL would repay Triptych the £73.1m intercompany balance it owed. This would be lent by Triptych to HAL to fund in part the HAL RCF. The HAL RCF would also be funded by OpCapita investing £35m (via Hailey 2 LP and HHL), (ii) KIL making a capital contribution to Hailey 2 LP (a limited partnership) of £50m, and (iii) the payment by Kesa of a "Net Additional Amount" (ultimately calculated at £28.5m). The Company was to draw down part of the HAL RCF to enable it to repay the KIL RCF, leaving the balance of the facility as working capital. The Kesa group was also to accept pension liabilities estimated at £76.2m.

18. KIL emphasises general features of the SPA. First, it reflected the proposal that the intercompany balances to and from KIL would be paid off at completion. OpCapita was putting in place its own funding arrangements. In essence the Company's unsecured borrowing was replaced by secured borrowing from HAL. Second, the agreement was the result of arm's length negotiations. OpCapita wished to obtain the Company in its best state while giving away as little as possible. It had no reason or incentive to give KIL any beneficial treatment.

19. The SPA included the following terms.

20. KHL was the defined as "the Seller", KE as "the Parent", HHL as "Topco", and HAL as Bidco (together with Topco "the Purchasers").

21. Clause 1 ("Interpretation") gave the following definitions:

    i) "Completion" means "completion of the sale and purchase of the Shares under this Agreement".

    ii) "Completion Date" means "the first Business Day falling after the Effective Time which the parties agree is practicable (taking account of the process described in sub-clauses 7.2 and 7.3) but, in any event, no later than the third Business Day after the Effective Time".

22. Clause 7.5 provided:

> "Subject to sub-clause 7.6, at Completion:
>
> (A) the Purchasers shall procure that there is paid by or on behalf of each relevant member of the Group [*sc. the Company and its subsidiaries and Triptych*] to each relevant member of the Retained Group the amount of the Group Debts which that member of the Group owes to that member of the Retained Group and, to the extent the same is paid to the Seller, the Seller shall hold each such amount as trustee on behalf of each member of the Retained Group which is owed that relevant amount;
>
> (B) the Seller shall procure that there is paid by or on behalf of each relevant member of the Retained Group to each relevant member of the Group the amount of the Retained Group Debts which that member of the Retained Group owes to that member of the Group and, to the extent the same is paid to the Purchasers, the Purchasers shall hold each such amount as trustee on behalf of each member of the Group which is owed that relevant amount; and
>
> (C) the Parent and the Purchasers shall procure (so far as each of them is able) that, to the extent not satisfied as a result of sub-clauses 7.5(A) and 7.5(B), payments are made to ensure that the obligations of KIL, Triptych, Hailey 2 LP, Topco, Bidco and the Company referred to in sub-clauses 8.6 - 8.21 (inclusive) are satisfied."

23. Clause 7.6 provided:

> "The amounts payable pursuant to sub-clause 7.5 shall be satisfied as follows:

(A) in respect of the payment obligations of KIL, Triptych, Topco, Bidco and the Company referred to in sub-clauses 8.11 to 8.15 (inclusive), by way of set-off against one another;

(B) in respect of the payment obligations referred to in sub-clauses 8.9 and 8.10 of Bidco to the Company, and of the Company to the relevant member of the Retained Group, by way of a payment made directly from Bidco to the relevant member of the Retained Group under direction by the Company; and

(C) in respect of the payment obligations of KIL, Hailey 2 LP, Topco, Bidco and the Company referred to in sub-clauses 8.16 to 8.21 (inclusive), to the extent a common amount is owed by and to each such person, by way of set-off against one another, following which, at Completion, the Seller and the Purchasers shall agree the net payment following such set-offs whereby either:

(i) subject to sub-clause 7.7, the Purchasers shall procure that a payment is made by the relevant member of the Group to the entity which, following the set-offs referred to in this sub-clause 7.6 is still owed an amount by that member of the Group or to any person as such entity shall direct (the "OpCapita Inter-Company Amount"); or

(ii) subject to sub-clause 7.7, the Seller shall procure that a payment is made by the relevant member of the Retained Group to the entity which, following the set-offs referred to in this sub-clause 7.6 is still owed an amount by that member of the Retained Group or to any person as such entity shall direct (the "Kesa Inter-Company Amount").

24. Clause 8 provided:

"8. Pre-Completion Steps

8.1 The Parent shall procure that, prior to Completion, the Company is re-registered as a private limited company.

8.2 The Parent shall procure that, prior to Completion but after the step set out in sub-clause 8.1, a board meeting of the Company shall be held at which the Resigning Directors shall resign as directors of the Company and each of the persons nominated by the Purchasers shall be appointed directors of the Company, as the Purchasers shall direct, with such appointments to take effect immediately.

8.3 The board of the Company shall, prior to Completion but after the step set out in sub-clause 8.2 hold a meeting at which the directors (excluding, for the avoidance of doubt, the Resigning Directors) shall review the financial position of the Company in light of (i) the then current business plan for the Group (such business plan to cover a period of at least 18 months from the Completion Date), including the assumptions underlying such business plan, (ii) the availability, and terms and conditions, of the ABL Facility

Agreement, and (iii) the availability, and terms and conditions, of the Revolving Credit Facility.

8.4 The Parent shall procure that, prior to Completion but after the step set out in sub-clause 8.2, KIL shall capitalise such amount of the debt owed to it by the Company as is sufficient to ensure that the Net Debt Amount is not a greater negative amount than negative £32,275,000 or, if the board of the Company is unwilling to do so, then KIL shall waive such amount.

8.5 The Parent shall procure that, should the amount set out in sub-clause 8.4 be capitalised, then prior to Completion but after the step set out in sub-clause 8.3, those shares in the capital of the Company issued to KIL in connection with the capitalisation of the debt referred to in sub-clause 8.4 are transferred to the Seller such that the Seller owns the entire issued share capital of the Company at Completion.

Tranche A

8.6 The Purchasers shall (so far as they are able) procure that, prior to Completion but after the step set out in sub-clause 8.5, Hailey 2 LP shall invest £35,000,000 in Topco by way of equity and/or debt and Topco shall, at that time, accept such investment.

8.7 Topco shall, prior to Completion but after the step set out in sub-clause 8.6, invest £35,000,000 in Bidco by way of equity and/or debt and Bidco shall, at that time, accept such investment.

8.8 Prior to Completion but after the step set out in sub-clause 8.7, the Company shall enter into the Revolving Credit Facility and the Debenture and Bidco shall, at that time, enter into the Revolving Credit Facility and the Debenture.

8.9 Prior to Completion but after the step set out in sub-clause 8.8, the Company shall draw down £35,000,000 under Tranche A of the Revolving Credit Facility.

8.10 The Parent shall procure that, prior to Completion but after the step set out in sub- clause 8.9, the relevant member of the Retained Group shall issue a demand to the Company for the repayment of £35,000,000 of the Group Debts which are owed by the Company (provided that there are sufficient amounts outstanding), and, at that time, the Company shall agree to repay such amount.

Tranche B

8.11 The Parent shall procure that, prior to Completion but after the step set out in sub-clause 8.10, the relevant member or members of the Retained Group shall agree to repay all amounts of the Retained Group Debts which are owed by the Retained Group to Triptych (such amounts being, in aggregate, the "Triptych Amount").

8.12 Prior to Completion but after the step set out in sub-clause 8.11, Triptych shall agree to lend the Triptych Amount to Topco, and Topco shall, at that time, agree to borrow an amount equal to the Triptych Amount from Triptych.

8.13 Topco shall agree to lend to Bidco and Bidco shall agree to borrow from Topco, prior to Completion but after the step set out sub-clause 8.12, an amount equal to the Triptych Amount.

8.14 Prior to Completion but after the step set out in sub-clause 8.13, the Company shall draw down an amount equal to the Triptych Amount under Tranche B of the Revolving Credit Facility.

8.15 The Parent shall procure that, prior to Completion but after the step set out in sub-clause 8.14, the relevant member or members of the Retained Group shall issue a demand for the repayment of an amount of the Group Debts which is equal to the Triptych Amount and which is owed by the Company (provided that there is a sufficient amount outstanding) and, at that time, the Company shall agree to repay such amount.

Tranche C

8.16 The Parent shall procure that, prior to Completion but after the step set out in sub-clause 8.15, KIL shall agree to make the Kesa Subscription and the Purchasers shall (so far as they are able) procure that, at that time, Hailey 2 LP shall agree to accept the Kesa Subscription.

8.17 The Parent shall procure that, prior to Completion but after the step set out in sub-clause 8.16, KIL shall agree to pay to Hailey 2 LP as a capital contribution, and the Purchasers shall (so far as they are able) procure that, at that time, Hailey 2 LP agrees to accept, an amount equal to the Net Additional Amount.

8.18 The Purchasers shall (so far as they are able) procure that, prior to Completion but after the step set out in sub-clause 8.17, Hailey 2 LP shall agree to invest an amount equal to the sum of the Kesa Subscription and the Net Additional Amount in Topco by way of equity and/or debt and Topco shall at that time agree to accept such investment.

8.19 Topco shall, prior to Completion but after the step set out in sub-clause 8.18, agree to invest an amount equal to the sum of the Kesa Subscription and the Net Additional Amount in Bidco by way of equity and/or debt and Bidco shall, at that time, agree to accept such investment.

8.20 Prior to Completion but after the step set out in sub-clause 8.19, the Company shall draw down under Tranche C of the Revolving Credit Facility an amount equal to the balance of the Group Debts (if any) after having deducted £35,000,000 and after having further deducted the Triptych Amount (the "Remaining Amount").

8.21 The Parent shall procure that, prior to Completion but after the step set out in sub-clause 8.20, the relevant member of the Retained Group shall issue to the Company a demand for the repayment of an amount of the Group Debts which is equal to the Remaining Amount and which is owed by the Company and, at that time, the Company shall agree to repay such amount."

25. Clause 9 provided as follows

"9. Completion

9.1 Completion shall take place on the Completion Date at the offices of the Seller's Solicitors at One Bunhill Row, London, EC1Y 8YY.

9.2 At Completion, the Seller shall do those things listed in Part A (Seller's obligations) of Schedule 2 (Completion arrangements) and the Purchasers shall do those things listed in Part B (Purchasers' obligations) of Schedule 2 (Completion arrangements). Completion shall take place in accordance with Part C (General) of Schedule 2 (Completion arrangements).

9.3 Neither the Purchasers nor the Seller shall be obliged to complete the sale and purchase of any of the Shares unless the sale and purchase of all of the Shares is completed simultaneously.

9.4 If each of the Conditions has been satisfied or (as the case may be) waived, but the respective obligations of the Seller and/or the Purchasers under sub-clause 9.2 and Schedule 2 (Completion arrangements) are not complied with on the Completion Date, the Purchasers or, as the case may be, the Seller may:

(A) defer Completion (so that the provisions of this clause 8 shall apply to Completion as so deferred); or

(B) proceed to Completion as far as practicable (without limiting any rights under this Agreement); or

(C) terminate this Agreement by notice in writing to the other parties.

9.5 If this Agreement is terminated in accordance with sub-clause 9.4 (and without limiting any party's right to claim damages), all obligations of the parties under this Agreement shall end (except for the provisions of clauses 27 (Announcements), 28 (Confidentiality) and 29 (Costs and expenses) but, subject to clause 16 (Purchasers' remedies and Seller's limitations on liability), all rights and liabilities of the parties which have accrued before termination shall continue to exist.

9.6 Payment by or on behalf of the Purchasers of the amount stated in clause 5 (Consideration) in accordance with paragraph 11(A) of Part B (Purchasers' obligations) of Schedule 2 (Completion arrangements) shall constitute payment of the Total Consideration for the Shares and shall discharge the obligations of the Purchasers under clause 2 (Sale and purchase).

9.7 With effect from Completion the Parent shall release, and procure that each other member of the Retained Group releases, each member of the Group from any obligations or liabilities which such member of the Group may have in respect of any share options or share awards over the Seller's shares held by employees or former employees of any member of the Group."

26. Schedule 2 to the SPA set out the Completion arrangements as follows:

"Part A (Seller's obligations)

At Completion, the Seller shall:

1. deliver to the Purchasers or the Purchasers' Solicitors:

(A) a duly executed transfer in respect of the Company Shares in favour of Bidco or such person as Bidco may nominate and share certificates for the Company Shares in the name of the Seller and any power of attorney under which any transfer is executed on behalf of the Seller;

(B)-(F) [*various other transaction documents*]

2. deliver to the Purchasers (or make available to the Purchasers at the registered office of the relevant member of the Group):

(A)-(D) [*various statutory books, share certificates, and other transaction documents*]

[…]

4. procure the present directors and secretary (if any) of each member of the Group (other than any director or secretary whom the Purchasers may wish should continue in office) to resign their offices as such, such resignations to be tendered at the board meetings referred to in paragraph 6 of this Schedule 2;

[…]

6. procure board meetings of the Company, each Subsidiary and Triptych (or, in the case of Triptych and where necessary, shareholder meetings) to be held at which:

(A) in the case of the Company, it shall be resolved that the transfers to take effect as at the Completion Date relating to the Company Shares shall be approved for registration and (subject only to the transfer being duly stamped) Bidco, or such person as Bidco shall have nominated in accordance with paragraph 1(A) of this Schedule 2, registered as the holder of the Company Shares concerned in the register of members;

(B) each of the persons nominated by the Purchasers shall be appointed directors and/or secretary, as the Purchasers shall direct, with such appointments to take effect immediately after Completion;

(C) the resignations of the directors and secretary (if any) referred to in paragraph 4 of this Schedule 2 shall be tendered and accepted so as to take effect at the close of the meeting and each of the persons tendering his resignation shall deliver to the relevant member of the Group an acknowledgement executed as a deed that he has no claim against the Company for breach of contract, compensation for loss of office, redundancy or unfair dismissal or on any other account whatsoever; and

(D) all existing instructions to banks shall be revoked and new instructions to such banks in such form as the Purchasers may reasonably direct shall be approved, provided that the Purchasers have supplied such new instructions to the Seller prior to Completion;

7. the Seller shall procure that minutes of each duly held board meeting, certified as correct by a director of the relevant company, and the resignations and acknowledgements referred to above, are delivered to the Purchasers' Solicitors;

8. procure the payment by way of telegraphic transfer (using the CHAPS system) of the cash amounts payable by any member of the Retained Group to any member of the Group, if any, pursuant to clauses 7 (Completion Payments) and 8 (Pre-Completion Steps);

Part B (Purchaser's obligations)

11. At Completion, the Purchasers shall:

(A) pay to the Seller's Solicitors by way of telegraphic transfer (using the CHAPS system) the cash amounts payable by any member of the Group to any member of the Retained Group, if any, pursuant to clauses 7 (Completion Payments) and 8 (Pre-Completion Steps);

[…]

(D) deliver to the Seller or the Seller's Solicitors evidence of completion of the OpCapita Subscription (being, as the case may be, a copy of the shareholder register of Topco as at the Completion Date and/or documentation evidencing the lending of monies by Hailey 2 LP to Topco (in each case, certified as correct by a director of Topco);

[…]

Part C (General)

12. All documents and items delivered at Completion pursuant to this Schedule 2 shall be held by the recipient to the order of the person delivering the same until such time as Completion shall be deemed to have taken place. Simultaneously with:

(A) delivery of all documents and items required to be delivered at Completion in accordance with this Schedule 2 (or waiver of the

delivery of it by the person entitled to receive the relevant document or item); and

(B) the making of all payments due to be made pursuant to this Agreement in accordance with clauses 7 (Completion Payments) and 8 (Pre-Completion Steps),

the documents and items delivered in accordance with this Schedule 2 shall cease to be held to the order of the person delivering them and Completion shall be deemed to have taken place."

27. At Sch 12 to the SPA there was a spreadsheet called "Funds Flow". Under the heading "event", step 4.5 is "[the Company] agrees to repay part of the loan to KIL" and step 5.6 is "[the Company] agrees to repay the balance of the loans to KIL". These are each described as happening "Pre-Completion". The events to take place at Completion include step 6.2 "Bidco acquires shares in [the Company] for £1" and, at steps 6.4. and 6.6., that the obligations in steps 4 and 5 above are satisfied by set off.

Satisfaction of conditions and the events of 3 February 2012

28. By 31 January 2012 the conditions to Completion of the SPA had all been fulfilled.

29. Completion took place on 3 February 2012. Macfarlanes, the Purchasers' solicitors, signed a certificate saying that Completion occurred at 2.59 pm.

30. There are minutes of a meeting of the board of directors of the Company held at 2.30 pm that day. The minutes record that the purpose of the meeting was to take various steps in connection with the acquisition. These included (i) the issue and allotment of the capitalisation shares to KIL in respect of a portion of the existing debt (for £13,586,452); (ii) before Completion the transfer of those shares to HHL; (iii) the registration of the transfer of the entire issued shares in the Company from KHL to HAL at Completion; and (iv) the execution, before Completion, of the CA. The board of the Company passed resolutions authorising these and other steps and authorised any of the directors to execute the necessary documents (including the CA). The board also authorised any of the directors to register at Completion the transfer of the shares in the Company from KHL to HAL. The minutes showed which steps were to take place before Completion (including entering the CA) and which were to take place only at Completion (including registering the transfer of the shares in the Company from KHL to HAL).

The CA

31. As already stated, the parties were Kesa, KHL, KIL, HHL, HAL, Hailey 2 LP, the Company, Triptych, and Macfarlanes.

32. The CA stated on its first page that it related "to the payments to be made on the Completion Date in relation to the sale and purchase of the entire issued share capitals of [the Company] and [Triptych]."

33. The CA included the following terms.

34. The recitals said:

"(A) Pursuant to and in accordance with … the SPA … the Purchasers, the Parent and the Seller have each agreed to make certain payments (or procure that certain payments are made) prior to Completion or, as the case may be, at Completion ("the Completion Steps")

(B) This Agreement sets out the mechanics agreed between the Completion Parties (as defined below) for satisfying the obligations of the Completion Parties in respect of the Completion Steps and the Relevant SPA Provisions (as defined below)"

35. Clause 1.1 included these definitions:

i) "Client account" means a client account at Macfarlanes.

ii) "Completion" has the meaning given to such term in the SPA.

iii) "Completion Steps" has the meaning given in Recital A.

iv) "Hailey 1 Funds" means "the sum of £35,000,000 to be held in the Client Account in accordance with clause 2.1 of this Agreement."

v) "Kesa Final Amount" means "the aggregate amount in the Client Account held by Macfarlanes to the order of KIL at Completion and after completion of the Payments (other than the payments of the Kesa Final Amount and the OpCapita Final Amount) which shall include all interest, if any, accrued on the Kasa Funds whilst held in the Client Account."

vi) "Kesa Funds" means "an amount equal to the amount of the Kesa Subscription and the Net Additional Amount, being £78,460,000".

vii) "OpCapita Final Amount" means "the aggregate amount in the Client Account held by Macfarlanes to the order of Bidco at Completion and after completion of the Payments "Pre-Completion Time" means the time, prior to Completion, on the Completion Date (London time) at which the parties to this Agreement (acting in good faith) agree that the Completion Steps (other than the payments of the Kesa Final Amount and the OpCapita Final Amount) will occur."

viii) "Payments Instructions Letters" means a list of letters giving instructions for a series of payments listed in c. 8 of the SPA, together with the Kesa Final Amount Payment Instruction and the OpCapita Final Amount Payment Instruction. (Neither of these latter two payments are defined in the SPA.)

ix) "Payments" means the payments to be made pursuant to the Payment Instruction Letters.

x) "Pre-Completion Time" means the time prior to Completion, on the Completion Date (London time) at which the parties to this Agreement (acting in good faith) agree that the Completion Steps (other than the

payments of the Kesa Final Amount and the OpCapita Final Amount) will occur.

36. Clause 2.1 and clause 2.3 provided for Macfarlanes to receive the Hailey 1 Funds in the Client Account by the Pre-Completion Time and hold them to the order of Hailey 2.

37. By clause 2.2 and clause 2.4 Macfarlanes confirmed that KIL had paid the Kesa Funds (i.e. £78,460,000) into the Client Account of Macfarlanes, held to the order of KIL.

38. Clause 3 ("Payment Instructions") provided as follows:

> "3.1 Each Completion Party shall provide Macfarlanes with their respective duly executed and completed Payment Instruction Letter(s) as early as possible on the Completion Date (and in any event before the Pre-Completion Time).
>
> 3.2 The Completion Parties hereby irrevocably instruct Macfarlanes (and Macfarlanes hereby agrees):
>
> (A) not to action any of the Payment Instruction Letters unless it has received:
>
> (i) all, but not some only, of the duly executed and completed Payment Instruction Letters; and
>
> (ii) both the Hailey 1 Funds and the Kesa Funds;
>
> (B) only to action all of the Payments, not some only of them; and
>
> (C) if the SPA is terminated in accordance with its terms or if Completion has not occurred within two Business Days of the day on which the Kesa Funds are received into the Client Account (or such later date as the parties may agree in writing):
>
> (i) not to make the Payments;
>
> (ii) to return all Payment Instruction Letters received unactioned to the Completion Parties from whom it received such Payment Instruction Letters; and
>
> (iii) to repay all amounts in the Client Account standing to the credit of any of the Completion Parties to the Completion Party to whose order such money is held in the Client Account (including any interest accrued and held to the order of the Completion Parties in accordance with clauses 2.3 and 2.5 of this Agreement)."

39. Clause 4 of the CA ("Movement of Funds") provided as follows:

> "4.1 Subject to clause 3.2 of this Agreement, the Completion Parties hereby irrevocably instruct Macfarlanes and, subject to clauses 4.2, 4.3 and 4.4 of this Agreement, Macfarlanes hereby agrees to action the Payment Instruction Letters in accordance with clauses 5, 6, 7 and 8 of this Agreement:

(A) on the Completion Date;

(B) at the Pre-Completion Time or, in respect of the Kesa Final Amount Payment Instruction and the OpCapita Final Amount Payment Instruction, at Completion; and

(C) in the order in which they appear in the definition of "Payment Instruction Letters" in clause 1 of this Agreement.

4.2 The obligation of Macfarlanes to action the Payment Instruction Letters shall be conditional on:

(A) the steps set out in clause 2.1 of this Agreement having occurred such that, at the Pre-Completion Time, the Hailey 1 Funds shall be held in the Client Account to the order of Hailey 2 (acting by its general partner, Hailey 2 GP Limited); and

(B) Macfarlanes having received all of the duly executed and completed Payment Instruction Letters in accordance with clause 3.1 of this Agreement.

4.3 In respect of the Payments to be made pursuant to the Kesa Final Amount Payment Instruction and the OpCapita Final Amount Payment Instruction, Macfarlanes shall action such Payments either at Completion or, if Completion occurs outside of London banking hours, as soon as is reasonably practicable after Completion (which, provided that UK banking processes are operating in the normal course, shall be on the first Business Day following the Completion Date).

4.4 If the bank account specified in the OpCapita Final Amount Payment Instruction is not operational at the time at which Macfarlanes is obliged to action the OpCapita Final Amount Payment Instruction, the parties to this Agreement agree that Bidco may, at its sole discretion and without the need to obtain any consent from such parties, nominate, and notify Macfarlanes of the details of, a different bank account to receive the OpCapita Final Amount from Macfarlanes and Macfarlanes shall pay the OpCapita Final Amount to such nominated account.

4.5 The Seller hereby acknowledges receipt of £2 in full satisfaction of the Purchasers' obligation, pursuant to the SPA, to pay the Total Consideration to the Seller, provided that the payment process set out in clauses 5, 6 and 7 of this Agreement commences."

40. Clauses 5 to 7 provided for a number of steps to occur to carry into effect each of the three Tranches of steps identified in clause 8 of the SPA.

41. Clause 5 was as follows:

"5. TRANCHE A

5.1 In each case, subject to clause 4.1 of this Agreement, in satisfaction of the provisions of:

(A) clause 8.6 of the SPA, Hailey 2 shall deliver the duly executed and completed Step 8.6 Payment Instruction to Macfarlanes;

(B) clause 8.7 of the SPA, Topco shall deliver the duly executed and completed Step 8.7 Payment Instruction to Macfarlanes;

(C) clause 8.9 of the SPA, subject to the step set out in clause 8.8 of the SPA having first been completed and notwithstanding the provisions of clause 7.6(B) of the SPA, Bidco shall deliver the duly executed and completed Step 8.9 Payment Instruction to Macfarlanes; and

(D) clause 8.10 of the SPA, notwithstanding the provisions of clause 7.6(B) of the SPA, the Company shall deliver the duly executed and completed Step 8.10 Payment Instruction to Macfarlanes.

5.2 The obligations set out in clauses 5.1(A) to 5.1(D) (inclusive) of this Agreement shall be satisfied at, and shall only take effect from, the Pre-Completion Time, in the order in which they are set out in such clauses, and none of the actions set out in any of clauses 5.1(A) to 5.1(D) shall occur until the actions set out in the immediately preceding clause shall have occurred."

42. Clause 6 was as follows:

"6. TRANCHE B

6.1 The Parent (on its own behalf and on behalf of each relevant member of the Retained Group), KIL, Topco, Bidco, the Company and Triptych agree that the Triptych Amount is in the sum of £73,136,412.

6.2 In each case, subject to clause 6.3 of this Agreement and notwithstanding the provisions of clause 7.6(A) of the SPA, in satisfaction of the provisions of:

(A) clause 8.11 and clause 8.12 of the SPA. Triptych hereby directs KIL to pay to Topco an amount equal to the Triptych Amount, which Triptych is owed by KIL and which the Seller must procure is repaid pursuant to clause 8.11 of the SPA and which Triptych is to lend to Topco pursuant to clause 8.12 of the SPA;

(B) clause 8.13 of the SPA, Topco hereby directs KIL lo pay to Bidco an amount equal to the Triptych Amount, which Topco is to lend to Bidco pursuant to clause 8.13 of the SPA;

(C) clause 8.14 of the SPA, Bidco hereby directs KIL to pay to the Company an amount equal to the Triptych Amount, which Bidco is to lend to the Company pursuant to clause 8.14 of the SPA; and

(D) clause 8.15 of the SPA, KIL shall set off an amount equal to the Triptych Amount owed to it by the Company against an amount equal to the Triptych Amount which KIL has been directed to pay to the Company pursuant to clause 6.2(C) of this Agreement.

6.3 The set-off referred to in clause 6.2(D) of this Agreement shall constitute a full and final discharge and settlement of the payment obligations in clauses 6.2(A) to 6.2(C) of this Agreement.

6.4 The actions set out in clauses 6.2(A) to 6.2(D) (inclusive) of this Agreement shall be satisfied at, and shall only take effect from, the Pre-Completion Time, immediately following completion of the actions set out in clause 5 of this Agreement and in the order in which they are set out in such clauses. Once all of the actions set out in clauses 6.2(A) to 6.2(D) (inclusive) of this Agreement have been completed, all obligations in respect of the amounts equating to the Triptych Amount owing by and to KIL, Topco, Bidco, the Company and Triptych shall have been discharged in full and final settlement of all such amounts owing by and to such parties under the SPA or otherwise."

43. Clause 7 was as follows:

"7. TRANCHE C

7.1 The Parent (on its own behalf and on behalf of each relevant member of the Retained Group), KIL, Hailey 2, Topco, Bidco and the Company agree that the Remaining Amount is the sum of £7,279,112.

7.2 In each case, subject to clause 4.1 of this Agreement and the actions set out in clause 6.2 of this Agreement having been completed (which will be deemed to have been completed for these purposes immediately following completion of the actions set out in clause 5 of this Agreement) and notwithstanding the provisions of clause 7.6(C) of the SPA, in satisfaction of the provisions of:

(A) clause 8.16 of the SPA, KIL shall deliver the duly executed and completed Step 8.16 Payment Instruction to Macfarlanes;

(B) clause 8.17 of the SPA, KIL shall deliver the duly executed and completed Step 8.17 Payment Instruction to Macfarlanes;

(C) clause 8.18 of the SPA, Hailey 2 shall deliver the duly executed and completed Step 8.18 Payment Instruction to Macfarlanes;

(D) clause 8.19 of the SPA, Topco shall deliver the duly executed and completed Step 8.19 Payment Instruction to Macfarlanes;

(E) clause 8.20 of the SPA, Bidco shall deliver the duly executed and completed Step 8.20 Payment Instruction to Macfarlanes;

(F) clause 8.21 of the SPA, the Company shall deliver the duly executed and completed Step 8.21 Payment Instruction to Macfarlanes.

7.3 The actions set out in clauses 7.2(A) to 7.2(F) (inclusive) of this Agreement shall be satisfied at, and shall only take effect from, the Pre-Completion Time, immediately following completion of the actions set out in clause 6 of this Agreement (which shall be deemed to have been completed immediately following completion of the actions set out in clause 5 of this Agreement) and in the order in which they are set out in such clauses.

44. Clause 8, "Final Payments," provided as follows:

> "8. Subject to clauses 4.1, 4.2, 4.3 and 4.4 of this Agreement, Macfarlanes shall, as soon as is reasonably practicable following completion of the steps set out in clause 7.2 of this Agreement, action the Kesa Final Amount Payment Instruction and the OpCapita Final Amount Payment Instruction."

45. Clause 11.3(A) provided that "in the event of any inconsistency between the provisions of this Agreement and clauses 7.5, 7.6, 7.13 and 8 of, and Schedule 12 (the "Payments Summary") to, the SPA (the "Relevant SPA Provisions"), the provisions of this Agreement shall prevail."

46. Sch. 1 to the CA contained the form of payment instructions addressed to Macfarlanes for the relevant steps set out in clauses 5, 6 and 7 of the CA and clause 8 of the SPA. The forms of payment instruction were set out in sequence and, where appropriate, were to occur only on the completion of the immediately preceding step as stipulated in those clauses. An example of two of the instruction letters is given below in relation Steps 8.9 and 8.10 of Tranche A.

> "**Part 3 – Tranche A: Step 8.9 Payment Instruction**
>
> [Addressed to Macfarlanes]
>
> "We hereby irrevocably instruct Macfarlanes, with effect from completion of the step set out in clause 8.8 of the SPA and completion of the step set out in clause 5.1(B) of the Completion Agreement, to cease holding the sum of £35,000,000 (being an amount equal to the Hailey 1 Funds) that Macfarlanes currently holds to our order in the Client Account and instead to hold such sum in the Client Account to the order of the Company.
>
> [Signed by HAL]"
>
> "**Part 4 – Tranche A: Step 8.10 Payment Instruction**
>
> [Addressed to Macfarlanes]
>
> "We hereby irrevocably instruct Macfarlanes, with effect from completion of the step set out in clause 5.1(C) of the Completion Agreement, to cease holding the sum of £35,000,000 (being an amount equal to the Hailey 1 Funds) that Macfarlanes currently holds to our order in the Client Account and instead to hold such sum in the Client Account to the order of KIL.
>
> [Signed by the Company]."

47. There was no other evidence before the Judge about the sequence of events on 3 February 2012.

Procedural history

48. The proceedings were issued on 26 October 2018 (and amended on 13 December 2019). Para 9 of the Particulars of Claim dated 10 January 2020 alleged that the payments of £115m odd said to constitute the preference occurred prior to and in

contemplation of the sale of the shares in the Company to HAL. By para 11 the liquidator alleged that the Company was connected with KIL at the time of the payments.

49. By its Defence KIL denied the claim in its entirety. It pleaded (inter alia) that the impugned payments were part of the wider sale transaction, which was to take place on a debt free basis. It said that there was no desire to prefer KIL and that the terms of the transaction were negotiated at arm's length with OpCapita. It said the steps taken by KIL and Kesa put them in a worse position than they would have been in had the Company gone into liquidation on 3 February 2012. For present purposes the key paragraphs of the Defence are these. By para 19 of the Defence KIL admitted para 9 of the Particulars of Claim. By para 25 of the Defence KIL denied that it was connected with the Company. It admitted that until the transfer of the shares in the Company to HAL the Company was a wholly owned subsidiary of KHL. But it alleged that under the SPA, KHL was not free to exercise the voting power attaching to those shares. It alleged alternatively that the repayment of the KIL RCF was made as an essential component of the transfer of the Company from the ownership of KHL.

50. So KIL admitted that the payments took place before the transfer of the shares in the Company to HAL was completed. It denied that the companies were connected on two grounds: first, that under the SPA KIL was constrained from voting the shares ("the voting power point") and, secondly, that the wider transaction severed the connection.

51. The liquidator of the Company applied by notice dated 22 April 2020 to strike out the relevant parts of para 25 of the Defence (containing the denial that KIL and the Company were connected).

52. By its own application notice dated 12 May 2020 KIL applied that the defences advanced in para 25 of the Defence should be determined as a preliminary issue and that the claim should accordingly be dismissed in its entirety. KIL relied on a witness statement of Mr Shankland of the same date. He set out the history and the transaction documents. He did not advance any evidence about the sequence of events on 3 February 2012 other than the documents I have already summarised. Mr Shankland did not seek to withdraw the admission made in para 19 of the Defence that the payments occurred before completion of the transfer of the Shares. Indeed in para 53(d) of his statement he referred to the meeting of the board of the Company held on 3 February 2012 and said (without further comment) that the steps approved at the meeting included "utilisation of sums drawn down under the HAL RCF to make the KIL Repayment immediately prior to Completion".

53. The liquidator did not object to KIL issuing the preliminary issue application.

54. KIL first raised the argument that the payments did not in fact occur before completion of the transfer of the shares in its skeleton argument for the hearing before the judge. The liquidator did not object to the timing point being argued at the hearing, despite the admission in the pleading (which has never formally been withdrawn). KIL continued to contend that it was appropriate for the issues (including the timing point) to be determined as preliminary issues. KIL did not suggest that there might be further evidence relevant to the sequence of events on 3 February 2012.

55. In a careful and comprehensive judgment the judge found in favour of the liquidator. She held, on the timing point, that the payments had been made before completion of the transfer. She rejected KIL's voting control point and the severance of the connection point. She struck out paragraph 25 of the Defence and declared that the payments alleged to constitute the preference had occurred at a time when KIL and the Company were connected persons.

56. As counsel for the liquidator observed, the judge's decision on this point was, on KIL's invitation, a decision after a trial of a preliminary point and was not merely one about the arguability of the pleaded defence. It was made on the evidence adduced by the parties. That consisted simply of the transaction documents (including the SPA, the CA and the minutes of the board meeting held before Completion on 3 February 2012).

57. On this appeal KIL has not pursued the voting control point. It maintains the timing point and the severance of the connection point. Since these are essentially points of law and construction on which I shall set out my reasons below, I shall not lengthen this judgment by setting out the details of the judge's reasoning.

The statutory test of "connection" for preference claims

58. Whether a person is "connected" with a company for the purposes of ss. 239 to 240 is determined by s. 249. This provides (materially) that a person is connected with a company if he is an "associate" with it; and "associate" has the meaning given in s. 435.

59. Section 435(6) provides (so far as material) that a company is an associate of another company if the same person has control of both.

60. Section 435(10) provides:

> "For the purposes of this section a person is to be taken as having control of a company if –
>
> (a) the directors of the company or of another company which has control of it (or any of them) are accustomed to act in accordance with his directions or instructions, or
>
> (b) he is entitled to exercise, or control the exercise of, one third more of the voting power at any general meeting of the company or of another company which has control of it …"

61. The Court of Appeal considered s. 435 in *Granada UK Rental and Retail Ltd v The Pensions Regulator and anor*. [2019] EWCA Civ 1032 ("*Box Clever*"). At [126] the Court said this:

> "Section 435 IA 1986, by contrast, is an elaborate provision under which a multitude of individuals and companies can potentially be considered to be "associates" simultaneously. Whereas, moreover, a "controlling interest" presumably had to be one commanding a majority of the votes attaching to a company's shares, someone can be "taken as having control" under s.435 with no more than a third of the voting power (see s.435(10)(b)). In fact, it would seem

> that a person could be deemed to have control in the context of IA 1986 if, say, he held just 35% of the shares in a company which in turn held 35% in a company holding 35% in another company with a 35% holding in a yet further company. Plainly, Parliament did not wish s.435(10) (and thus s.435(7)) to bite only on people or entities who control a company in practical terms. It was evidently Parliament's intention that s.435(7), and the term "associate" more generally, should have a wide meaning for the purposes of, for example, the preference and transaction at an undervalue provisions (see, e.g. ss.239(6), 240(1)(a) and 249(b) IA 1986)."

The timing point

62. The first issue is this: did the impugned payments take place before the registration of the transfer of the shares in the Company?

63. It was common ground on the appeal that KHL ceased to be a shareholder of the Company when the transfer of the shares in the Company to HAL was registered in the books of the Company. The liquidator argued that this was also the moment when KIL ceased to be connected with the Company. His case is that the impugned payments happened before this.

64. The liquidator did not seek to argue before me that the parties would have been connected under s. 249 if the payments occurred at the same moment as registration of the share transfer. His position was that the judge was right to hold that the payment had happened before the registration of the share transfer and he rested his argument there. I shall therefore say nothing about how the relevant statutory provisions might work in a case where the two events are simultaneous.

65. KIL says that there was no proper basis for the judge's conclusion that the impugned payments occurred before registration of the share transfer.

66. As explained above, there was no evidence other than the transaction documents and minutes about the sequence of events on 3 February 2012. In *Unidare plc v Cohen* [2005] EWHC 1410 (Ch), Lewison J at [19] recited the principle that where parties to a transaction involving the execution of multiple documents intend them to be executed in a particular order which is necessary to give effect to the intended transaction, the court should be ready to presume that they were executed in the correct order to give effect to the transaction. I shall follow that principle.

67. In her judgment the judge started by analysing the SPA in some detail before turning to the CA. In my view what matters is the CA for four reasons. First, the Company and KIL were not parties to the SPA but were parties to the CA. Secondly, the express purpose of the CA was to set out the parties' agreement about the payments which are the subject of the claim. Thirdly, clause 11.3 of the CA states that where there is an inconsistency between the CA and SPA concerning clauses 7.5, 7.6, 7.13 and 8 of and Schedule 12 to the SPA, the CA prevails. Fourthly, the steps set out in clause 5 to 8 of the CA (which cover Tranches A to C as covered in the SPA and the two final payments in clause 8) contain a number of steps not found in clauses 7 and 8 of the SPA. This shows that during the three months between the SPA and the CA the parties and their lawyers had refined the actions. This is further reason for saying that, in the respects referred to in clause 11.3, the CA superseded and supplanted the SPA.

68. It was indeed common ground at the hearing before me that the CA was the crucial agreement as it embodied the parties' agreement as to the steps to be taken in relation to completion of the SPA. It was also common ground (as is perhaps obvious) that the CA falls to be interpreted in the light of the SPA.

69. I start with two general observations about the CA, before turning to the detailed arguments of the parties.

70. First, the factual context of the CA is that the parties anticipated completing the SPA very soon afterwards. By the time the CA was entered into all of the conditions to Completion specified in the SPA had been met and (as Mr Shankland explained in his statement) the parties were contractually bound to complete the SPA. The board of the Company met shortly before the CA was entered into and approved the CA. It did so in anticipation of Completion occurring very soon afterwards (as indeed happened).

71. Secondly, the parties to the CA stipulated the precise sequence of payments and other steps covered by the CA. This springs off the page:

    (a) Recital A of the CA says that the parties have agreed to make certain payments prior to Completion or as the case may be at Completion. These payments are defined as the Completion Steps.

    (b) The defined term "Pre-Completion Time" is a time on the Completion date prior to Completion. The Completion Steps other than the payments of the Kesa Final Amount and the OpCapita Final Amount are to occur before at the Pre-Completion Time.

    (c) The mechanism for this to happen is found in clause 4 and the Payment Instruction Letters. Clause 4.1 says that Macfarlanes is to action the Payment Instruction Letters in accordance with clauses 5 to 8 of the CA at the Pre-Completion Time or for the Kesa Final Amount and the OpCapita Final Payment at Completion and in the order they appear in the definition of Payment Instruction Letters in clause 1 of the CA. Clause 1 sets out the Payment Instruction Letters in a specified sequence, running from the Step 8.6 Payment Instruction to the Step 8.21 Payment Instruction, followed by the Kesa Final Amount Payment Instruction and the OpCapita Final Amount Payment Instruction.

    (d) The Payment Instructions themselves state that the instruction to Macfarlanes is to take effect from completion of the previous step. So the sequencing is baked into the Payment Instructions.

    (e) The CA also provides for a specific sequencing of the three "Tranches" referred to in clause 8 of the SPA. Tranche A is covered by clause 5 of the CA, Tranche B by clause 6 and Tranche C by clause 7. To the extent that they refer to payment instructions each of the sub-clauses of clause 5 to 7 states the sequence in which the steps are to occur.

    (f) Clauses 5.2, 6.3, and 7.3 state in terms that the various steps shall take place at the Pre-Completion Time and in sequence, with the steps in clause 6 taking effect immediately following completion of the actions set out in clause 5, and

the steps in clause 7 taking effect immediately following completion actions set out in clause 6.

(g) By clause 8 of the Agreement Macfarlanes agreed to pay the OpCapita Final Amount and Kesa Final Amount following the steps set out in clause 7.2. By clause 4.1(B) this was to happen at Completion. The amounts set out in the Payment Instructions for those two final payments were the residue remaining in Macfarlanes' client account after the earlier Payment Instructions had been actioned.

72. The liquidator submits, first, that by the CA the parties agreed that payment of the three Tranches defined in the SPA was to occur at the Pre-Completion Time, and, secondly, that under the terms of the SPA, confirmed by the minutes of the meeting of the Company held on 3 February 2012, registration of the transfer of the shares in the Company occurred no earlier than Completion.

73. KIL does not take issue with the second of these contentions but submits that the payments of the three Tranches could not have occurred before Completion. Its argument runs like this. By Clause 3.2(B) the parties to the CA irrevocably instructed Macfarlanes only to action all of the Payments but not some of them. The Payments included the final payments to be made under clause 8 and these were to take place at Completion. Clause 3.2(C) says that if the SPA is terminated in accordance with its terms or if Completion has not occurred within two Business Days of the date on which the Kesa Funds are received into the Client Account (or such later date as the parties may agree in writing) Macfarlanes was not to make the Payments and was to return all the Payment Instruction Letters received unactioned. KIL says, reading these clauses together, that the SPA might potentially be terminated, or the two-day period might occur after the Pre-Completion Time but before Completion. If that happened Macfarlanes would be in breach of their obligations as they would have made some but not all of the Payments; and they would not be able to return all of the Payment Instruction Letters unopened.

74. KIL accepts that clause 4 on its face requires the Payments other than the final Payments to be made before Completion. But, it says, clause 4.1 is expressly subject to clause 3.2, which includes the requirements of clauses 3.2(B) and (C) (that Macfarlanes make all but not only some of the Payments). Since Macfarlanes could only be certain that Completion would take place when Completion actually occurred clause 3.2 required it await Completion before making any of the Payments.

75. I am unable to accept this submission. The parties could not have spelt out more carefully and precisely than they did their intention that the Payments, other than the two final Payments, were to occur before Completion. The sequencing of the Payments is the chief leitmotif of the CA. KIL's argument is that the carefully constructed sequencing was rendered impossible by the requirement of clause 3.2(B) and (C) that all but not some of the Payments had to be made and that if they did not all happen the Instructions had to be returned unactioned. I do not think that the court is driven to conclude, as KIL suggests, that much of the agreement is inoperable. A court seeks where possible to read contractual terms so that they are effective and capable of performance rather than impossible or redundant. KIL's argument would set at nought the specific provisions of clauses 4 to 8.

76. The court would only reach that radical conclusion if positively driven to it by something else in the agreement. There is nothing of that kind. I can see no difficulty in reading clauses 3.2 and 4 to 7 together in such a way as to give effect to all of the clauses. Clauses 4 to 7 say that the Payments other than the final ones are to happen at the Pre-Completion Time. That is a time on the Completion Date but before Completion itself. Part of the factual context available to the parties to the CA is that the CA was entered into shortly before in contemplation of Completion happening shortly afterwards (see the minutes of the meeting of 3 February 2012). The parties to the CA (including Macfarlanes) knew when the CA was signed that there would be a very short gap between the Pre-Completion Time and Completion and that Completion would happen immediately after the Pre-Completion Time.

77. KIL's argument depends on the notion that Macfarlanes would have anticipated that the sequence of Payments, starting at the Pre-Completion Time and ending with Completion could realistically straddle termination of the SPA or the occurrence of two Business Days after receipt of the Kesa Funds into the Client Account (which receipt had already occurred at the time of the CA). KIL argues that Macfarlanes was therefore paralysed from making any payments before Completion itself. This argument is to my mind unreal. Clause 3.2 says no more than that Macfarlanes had to action all but not some of the Payments and had to return the Payment Instruction Letters if Completion did not occur. But the CA contemplated that the Pre-Completion Time would occur very shortly before Completion. It is indeed obvious from the factual context in which the CA was executed that Macfarlanes (and the other parties) anticipated that the parties were about to proceed to Completion of the SPA. Macfarlanes had received all the Payment Instruction Letters and there was no impediment to it actioning all of the Payments at the times and in the sequence stipulated in the CA (including by actioning the payments by the Company to KIL at the Pre-Completion Time, just before Completion).

78. I therefore reject KIL's argument that clause 3.2 made it impossible for any Payments to take place before Completion. The short answer to the supposed tension between that clause and clauses 4 to 7 was to fix a Pre-Completion Time only when it was clear that Completion was going to happen, and to set a short gap between the two times. This is a business-like interpretation, which gives effect to the careful sequence of payments set out in the CA.

79. There is a further problem for KIL's argument. The steps set out in clause 6 (which cater for the Tranche B payment) do not involve Payment Instructions or any actions on the part of Macfarlanes. The steps in clause 6 are therefore not "Payments" as defined in clause 1. So the argument based on clause 3.2 can have no application to clause 6. By clause 6.4 the parties agreed that these steps were to take effect at the Pre-Completion Time. This seems to me to make KIL's argument still less realistic.

80. I therefore conclude that, as a matter of interpretation of the CA, there is no reason for supposing that the payments and other steps set out in clauses 4 to 7 could not take place at the Pre-Completion Time. As I have said there is no evidence other than the transactional documents about the timing of events on 3 February 2021. I adopt the approach illustrated by *Unidare* at [19] and see no reason for thinking that, having just entered into the CA, the parties would have departed from the sequence set out in the CA. It follows that the impugned payments were made before Completion. KIL did not

seek to argue that the registration of the transfer of the shares in the Company took place before Completion.

81. I also agree with the alternative submission of the liquidator that, in any event, it is more probable than not on the facts that having carefully constructed and agreed the sequencing set out in the CA the parties, including Macfarlanes, would have thought that the steps in clauses 5 to 7 could take place at a time before Completion and that they acted on this basis. Hence, even if with hindsight it might be possible to argue that Macfarlanes would have potentially been in breach by actioning some of the Payments before Completion (an argument I have rejected) it is quite improbable that the parties would have thought that at the time. There was therefore ample material for the judge's conclusion that the payments were made before Completion.

82. KIL also drew my attention to various provisions of the SPA which, so it contended, showed the three Tranches of payments (or set-offs) were to occur at Completion. KIL contended that, while clause 8 of the SPA referred to various "Pre-Completion Steps," these were on a proper analysis no more than instructions (for payments or set offs to be made) which were concerned with the relevant entities assuming an obligation to do or effect certain things on Completion. KIL argued that the operative provisions, under which the obligations assumed in clause 8, were found in clauses 7.5 and 7.6 which referred to the relevant set-offs or payments being made "at Completion". KIL also referred to Sch. 2 to the SPA which referred to payments pursuant to clauses 7 and 8 being made "at Completion" by telegraphic transfer. KIL also relied on Sch. 12 which showed that payments and the transfer of the shares in the Company were to take place on Completion (with the transfer of the shares being listed before the intercompany repayments).

83. These points do not assist. I have already explained (see [67] above) why the focus must be on the CA. Whatever the position might have been under the SPA taken in isolation, on 3 February 2012 the parties (including the Company and KIL) entered the CA and that agreement superseded the SPA. While the CA was designed to facilitate Completion of the SPA and has (of course) to be read together with the SPA, the provisions concerning the timing and sequencing of payments are stated to take priority over those of the SPA (including those contained in Schedule 12 to the SPA).

84. I therefore dismiss the appeal on the timing point. In the light of this conclusion I do not need to consider the liquidator's further argument (raised by a Respondent's notice) that the preference was given at the time when the Payment Instructions were given to Macfarlanes. Nor do I have to consider the liquidator's argument that the share transfer may not have been registered until after Completion.

The "severance of the connection" point

85. KIL's second argument is that the relevant provisions of the Act had to be construed against the background of the overall sale transaction embodied in the SPA. KIL advances this argument as an alternative to the timing point. The argument therefore proceeds on the assumption that the Company made the payment to KIL at a time when KHL remained the legal owner of the shares in the Company.

86. KIL has two related submissions. The first is that where the act or thing said to be a preference is part of a broader overall transaction, all the relevant steps comprising the

transaction should be taken into account when assessing the timing of the connection between the companies. KIL says, specifically, that where the "connection" arises from a shareholding in a company (C) and the purpose of the wider transaction is to transfer that shareholding under an arm's length transaction, there is no reason to treat the outgoing shareholder, or its associated companies, as connected with C.

87. The second submission is that, where the purpose of the broader transaction is to sever the connection between the parties, the statutory provisions should be read accordingly, and the court should conclude that there was no connection between them when one specific step of the transaction (the alleged preferential payment) occurred.

88. I shall start with the second, broader, submission. As I understand the argument it concerns the statutory concept of "connection" between KIL and the Company; the submission is apparently that there was no "connection" where the purpose of the wider transaction was to sever it.

89. KIL referred to paragraphs 1259, 1261 and 1287 of the Report of the Cork Committee (whose wide-ranging recommendations led to the overhaul of the insolvency legislation in 1986). The Committee recommended a longer period between the preference and the onset of insolvency for companies within the same group. The mischief identified was that otherwise parent companies might procure the repayment of intercompany debts by an insolvent subsidiary and then stave off its creditors for six months before allowing it to enter liquidation.

90. Counsel for KIL submitted that that kind of case was entirely different from the present: here the purchasing parties and selling parties were at arm's length and the overall effect of the transaction was that the Company would (from Completion) no longer be under the control of the Kesa group (including KIL). The deal was a commercial transaction, and a key component was the transfer of ownership of the Company.

91. I am unable to accept KIL's broader submission. In the first place, the Cork Committee report and recommendations do not help. The relevant provisions in the Act go well beyond those recommendations and enact a far broader definition of "control" (via the definition of "association" in s. 435) than the Committee envisaged. The legislative technique used was therefore quite different from the recommendations.

92. Secondly, while identifying the purpose of a statutory provision is part of the process of construction, the court's task is to construe the words actually used in the statute rather than to seek to discern a broad rationale and substitute that for the words used.

93. Thirdly, there is nothing in s. 435 to suggest that it should be read restrictively to exclude cases where the association was intended to come to an end shortly after the relevant transaction. Nor is there anything in its wording to suggest that it sensibly be read as excepting cases where the transaction in question was part of a wider arm's length deal. Moreover, KIL's argument does not provide a workable criterion for determining which cases would fall within s. 435 for the purpose of ss. 239-240 and those that would not. What is to count as a relevant "severance" and what would count as arm's length dealings? There is nothing in the wording of the statute to provide workable guidance.

94. Fourthly, as the Court of Appeal said in *Box Clever* at [126] the legislative intent appears to have been to enact a broad concept which does not depend, for instance, on actual, practical control. That is further reason for resisting a restrictive reading based on the ideas of arm's length dealings.

95. Fifthly, the definition of associates in s. 435 is a general provision relevant to a number of other provisions of the Act and not merely to the definition of connection for the purposes of preferences (or other impugnable transactions). It covers a broad range of associations (as the Court pointed out in *Box Clever*). It has to be given a uniform reading for all of its statutory purposes.

96. KIL's submission is that the court should read s. 435 restrictively for the purpose of a preference claim under ss. 239 and 240 where the purpose of the wider transaction is to sever the relevant connection. But s. 435 is not restricted to preference claims and there is nothing in it which suggests that it does not apply in a case such as the present.

97. Sixthly, there is nothing in the wording of s. 249 to suggest any such restriction either. That provision simply redirects the reader to s. 435.

98. KIL's narrower submission is that in construing ss. 239 and 240 the court should take a broad and realistic view of what constitutes the preference and should take into account all parts of a composite transaction. It says that the court should not, when looking at the present facts, pick out and give legal significance to the specific intercompany payments, but should look at the sale as a whole.

99. Counsel for KIL submitted that this realistic approach should inform the interpretation of ss. 239 and 240 of the Act. In its skeleton argument KIL concentrated on s. 239(4). That provides (materially) as follows:

> "(4) For the purposes of this section … a company gives a preference to a person if –
>
> (a) that person is one of the company's creditors …, and
>
> (b) the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position it would have been in if that thing had not been done"

100. KIL submitted that the "thing" which the Company did or suffered to be done was the transfer of its entire issued share capital on terms which included the repayment of a company connected to the seller. KIL submitted that it would be artificial and wrong to isolate one part of the transaction for the purposes of s. 239 because some other part of the transaction could show that it did not in fact receive any net benefit.

101. I cannot accept that submission. The "anything" in s. 239(4) must be something happening between the company and another person: here the Company and KIL. Even if it could be said that the "thing" must cover a related set of pre-ordained steps between a company and another person, on the present facts the only thing that happened between the Company and KIL was the repayment of the KIL RCF. The

shares in the Company were of course sold by its owner KHL. The Company did not transfer them. KIL argued that the directors of the Company registered the transfer of the shares. But that was merely a ministerial or administrative act which the directors were bound in law to carry out and it did not involve any transfer or receipt of economic value by the Company. The shares were sold by its old owners to new owners and the Company had no more than a formal part to play. The Company was not even a party to the SPA under which the sale occurred. The submission that the Company "transferred or suffered to be transferred" the shares in itself is to my mind not legally coherent. I also note that it was not KIL which sold the shares in Company, but KHL (KIL's parent) so it cannot be suggested that KIL took any step in relation to the sale of the shares.

102. In oral submissions KIL changed the focus from s. 239(4) to s. 240(1). That sub-section provides (materially) as follows:

> (1) Subject to the next subsection, the time at which a company enters into a … preference is a relevant time if the … preference is given –
>
> (a) in the case of a preference … which is given to a person who is connected with the company … at a time in the period of 2 years ending with the onset of insolvency."

103. KIL submitted that where there is a composite series of steps making up an overall transaction the court must consider the transaction as a whole and not sever and pick out the individual steps. On the present facts the overall transaction included the sale and transfer of the shares. KIL submitted that when determining the time of the preference one should therefore include the transfer of the shares. So, the argument runs, the preference occurred at a time when the shares had been transferred and the parties were no longer connected.

104. I cannot accept this argument. It suffers from the same flaws as the argument about s. 239. The concept of a preference, as used in s. 240, is defined in s. 239. As already explained, that concerns "things" happening between the company and a person which would put that other person in a better position in an insolvent liquidation of the company. It does not concern things happening between the company and other parties. When s. 240 talks of the "time" of the preference it must therefore be the time when those "things" occurred between the company and the relevant person (here the Company and KIL).

105. On the present facts, as already explained, the sale of the shares was not a "thing" done or suffered to be done by the Company. Nor indeed was it done or suffered to be done by KIL (which did not own the Company). The only "thing" that occurred between these parties was the repayment of the intercompany debt. The time of that event is when the debt was repaid. The fact that there may then have been other dealings between other parties as part of a wider transaction does not to my mind affect this analysis.

106. KIL said that it would be uncommercial and unrealistic to ignore the other steps in the sale transaction and that the court should not wear blinkers. I agree that the court should not blinker itself, but the answer is that arguments of that kind may well be relevant to other provisions of ss. 239 to 241 of the Act. For instance, the liquidator has to show

that the Company was influenced in deciding to give the preference by a desire to put KIL into a better position in an insolvent liquidation. Again, ss. 239(3) and 241 give the court a broad discretionary remedial jurisdiction. It seems to me that, to the extent the elements of the broader transaction are relevant, it is under these provisions rather than the narrow jurisdictional question whether KIL was connected with the Company at the time of the alleged preference.

107. KIL relied on an ex tempore judgment of Neuberger J in *Damon v Widney* (unreported, 28 November 2001). That was a claim under s. 239. A company, C, was a subsidiary of W to which it owed £2.7m. C also had other creditors and had debtors and other assets. E made an arbitration claim against C. The directors of W and C and their advisers came up with a reorganisation plan involving a new company, N. The steps were these. N acquired C's assets and assumed its liabilities other than the loan from W and the claims of E and agreed to pay C £2.8m. C used the purchase price to repay the loan from W. W made a new loan of £2.7m to N. N would then use the proceeds of the loan to pay the purchase price to C. The steps were paper transactions with no actual money changing hands. C ended up with no assets and a potential liability to E. The arbitrator later made an award in in favour of E for some £480,000. E caused C to be wound up and the liquidator made a claim against W alleging that the payment by C to W to repay the outstanding loan was a preference. The liquidator said that when it repaid W, it had only two creditors, W and E and that it used its only asset (the outstanding purchase price payable by N) to repay W. W applied to strike out the claim. Neuberger J said that he did not think that any relief that might be awarded could exceed the amount owed to E (£480,000) and might be limited further to the dividend E would have got in C's liquidation but for the transaction. He then went on to consider W's argument that the transactions had to be looked at as a whole. W argued that the effect of the transactions was that W started as a creditor of C and ended up as a creditor of N, which had assumed all the liabilities other than the claims of E. Only to that extent was W better off. Neuberger J said that when looking at s. 239(4) it appeared that one considered the position as between the company and the person receiving the benefit. But, he said, that subsection had to be read together with s. 239(3) which requires the court to make such order as it thinks fit for restoring the company to the position it would have been in had it not given the preference. It also has to be read with s. 241(1)(d) which refers to the benefits received by the preferred person. Neuberger J refused to strike out the claim but gave directions that the quantum of any recovery would be limited to (at most) the £480,000 (plus costs and interest).

108. *Damon v Widney* was an unreported, ex tempore decision on a strike out application. The decision was that the claim could continue but for a limited amount. The case was not concerned with the issue now before the court and can therefore only be (at most) of persuasive authority. But to the extent it assists, it seems to me to support the conclusions I have already expressed. Neuberger J said (and I agree) that the question was ultimately one of statutory interpretation. He was inclined to accept that s. 239(4) concerns the dealings between the company and the allegedly preferred person. Other steps in the wider transaction were, he thought, relevant to the parts of the Act providing for the relief that the court could realistically be expected to grant to reverse the preference. I agree with that too. But the fact that the Court may take account of the wider commercial transaction under those other provisions does not affect the interpretation of the relevant words, namely, the "time" of the preference under s. 240.

109. To my mind the time of the preference alleged in the present case is the time when the payments were made by the Company to KIL. That was a time when the parties remained associated within s. 435 and therefore connected within s.239. The severance of the connection by the transfer of the shares that occurred just afterwards is in my judgment irrelevant to that conclusion.

110. The judge was therefore right to reject KIL's argument under this head.

Result

111. The appeal is dismissed.