



Neutral Citation Number: [2022] EWHC 2873 (Ch)

Case No: CR-2012-007914

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

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

Date: 17/11/2022

**Before:**

**MRS JUSTICE FALK DBE**

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**Between:**

**GEOFFREY CARTON-KELLY**  
**(as liquidator of CGL Realisations Limited)**

**Applicant**

**- and -**

**DARTY HOLDINGS SAS**  
**(as successor to Kesa International Limited)**

**Respondent**

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**Andreas Gledhill KC & Tiran Nersessian** (instructed by **Jones Day**) for the **Applicant**  
**Tom Smith KC & Henry Phillips** (instructed by **Sidley Austin LLP**) for the **Respondent**

Hearing dates: 11-14, 17, 18, 20 & 21 October 2022  
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**APPROVED JUDGMENT**

**This judgment was handed down remotely at 16.45 on 17 November 2022 by circulation to the parties or their representatives by email and by release to The National Archives.**

**Mrs Justice Falk:**

## **INTRODUCTION**

1. On 2 November 2012 Comet Group plc, now known as CGL Realisations Limited (“Comet”), entered administration. The administration was converted to a creditors’ voluntary liquidation on 3 October 2013, with the same individuals who had acted as administrators, three partners of Deloitte LLP, being the initial liquidators.
2. The insolvency attracted scrutiny, including an investigation by the Insolvency Service and a disciplinary investigation by the Institute of Chartered Accountants in England and Wales (“ICAEW”) related to concerns about the impartiality of Deloitte. The ICAEW’s actions led to an application by the liquidators for directions, the outcome of which was that Mr Carton-Kelly, the Applicant in these proceedings, was appointed as an additional liquidator: see the judgment of Sir Nicholas Warren in *Kahn v ICAEW* [2018] EWHC 1378 (Ch). For convenience, I will refer to Mr Carton-Kelly as the “Liquidator” and the proceedings involving the ICAEW as the “ICAEW proceedings”.
3. On 3 February 2012, around nine months before it collapsed, Comet had been sold by a listed group headed by Kesa Electricals plc (the “Kesa” group and “KEP” respectively) to vehicles established by OpCapita LLP (“OpCapita”), a private investment partnership specialising in distressed retail sector opportunities (the “Disposal”). The Liquidator’s role was to investigate, and if appropriate, pursue claims connected with the Disposal and the associated arrangements in respect of Comet’s debt.
4. These proceedings were issued on 26 October 2018. They seek relief under s.239 Insolvency Act 1986 (“IA 1986”) in respect of what is alleged to have been a preference given by Comet when it repaid approximately £115.4m of intra-group debt to Kesa International Limited (“KIL”) as part of the completion arrangements for the Disposal. The Respondent (“Darty”) is the successor to KIL, following a cross-border merger in early 2018.
5. Darty’s initial defence raised a preliminary issue, namely whether KIL was connected with Comet at the time of the Disposal. If it was not, as Darty then alleged, then it was clear that the claim would fail because the alleged preference occurred more than six months before the administration, as compared to the two year period that applies to transactions between connected parties (see s. 240(1)(a) and (b) IA 1986). This point was concluded in favour of the Liquidator by Deputy ICC Judge Agnello, whose decision was upheld by Miles J on appeal (*Darty v Carton-Kelly* [2021] EWHC 1018 (Ch)).
6. The structure of this judgment is as follows:
  - a) I first set out the factual background and the structure and terms of the Disposal, at [7] to [59].
  - b) I then comment on the evidence and witnesses, at [60] to [91].

- c) There follows summaries of applicable legal principles and the areas of dispute, at [92] to [131].
- d) I then determine whether Comet was insolvent on 3 February 2012, at [132] to [188].
- e) At [189] to [200] I consider whether there was a preference in fact, and its extent.
- f) The issue of desire to prefer is considered at [201] to [274].
- g) Finally, the question of remedy is considered at [275] to [293].

## **THE FACTUAL BACKGROUND AND DISPOSAL TERMS**

### **Kesa, Comet and the decision to sell**

7. Comet was founded in 1933. By 2011 it had 249 stores and was one of the UK's largest electrical retailers. It was part of the Kesa group. Kesa had been formed following a demerger from Kingfisher plc in June 2003. KEP's shares were listed on the London Stock Exchange, with a secondary listing in Paris. The bulk of Kesa's profits were generated from businesses in continental Europe, in particular the French electrical retailer Darty.
8. At material times prior to the Disposal, the relevant corporate structure was as follows. Comet was owned by KEP through an intermediate holding company, Kesa Holdings Limited ("KHL"). KHL additionally owned Triptych Insurance NV ("Triptych"), a Curacao incorporated but UK tax resident captive insurer. Triptych provided extended warranties to Comet customers.
9. Comet's Board comprised Thierry Falque-Pierrotin, Dominic Platt, Simon Enoch, Patrick Terrier and Robert Darke. Mr Falque-Pierrotin was Kesa's CEO. Mr Platt was Kesa's CFO. Mr Enoch was Kesa's General Counsel and the company secretary of each of KEP, KHL and KIL. Mr Terrier was an employee of Kesa's French business. Mr Darke had joined Comet in 2000 and became its CEO in May 2011. Comet's own Head of Finance, Michael Walters, was not a Comet Board member. Mr Darke was therefore the only member of the Comet Board whose executive role was confined to Comet rather than the wider Kesa group.
10. KIL was Kesa's group treasury company. It was an indirect subsidiary of KHL. Comet was financed through the provision by KIL of a £300m revolving capital facility, which had been entered into at around the time of the demerger from Kingfisher (the "KIL RCF"). The interest rate on the KIL RCF was equal to KIL's costs of funds plus 1.27%. Conversely, at a similar time the cash-rich Triptych had entered into an intra-group loan facility with KIL, agreeing to lend it up to £70m. Both loans were repayable on demand.
11. Comet started to run into difficulties, with increased competition and declining footfall. It made a £3.8m loss on ordinary activities in the year to April 2010 (FY2010), rising to £31.8m in the year to April 2011 (FY2011). (In the rest of

this judgment I will refer to financial years in the manner just shown, meaning the financial year ended in the April of the year stated.) Although a turnaround plan was devised with a view to streamlining the product range and improving productivity and efficiency, a concern developed that Comet was becoming a “drag” on KEP’s earnings and share price, and an activist shareholder (Knight Vinke Asset Management) started agitating for Comet to be demerged.

12. OpCapita first expressed interest in purchasing Comet in around April 2011, when Henry Jackson, its managing partner, contacted Mr Enoch. OpCapita was known to Kesa from a previous transaction when it had acquired the French furniture retailer BUT from Kesa and subsequently sold it at a profit. A formal expression of interest was sent on 15 April 2011, in which OpCapita stressed its “experience in operationally driven turnarounds”.
13. After initially taking strategic advice from Lazard, Kesa then turned to Bank of America Merrill Lynch (“BAML”), who by June 2011 were recommending a sale as the best option. Kesa announced on 22 June 2011 that it was examining strategic alternatives for Comet. Shortly thereafter an information memorandum was issued to interested parties, with first round offers being invited for Comet and Triptych by 20 July 2011, on a “debt-free cash-free basis”. I pause here to note that all this means is that pricing should be on a basis that ignores existing debt and/or cash in the business: the idea is to obtain an “enterprise value” for the business. It says nothing about what the financial structure will actually be.
14. Also during this period, steps were taken to provide assurances to Comet Trustee Company Limited (“CTCL”), the trustee of Comet’s defined benefit pension scheme (the “DB Scheme”). As at 31 March 2010 the DB Scheme had an estimated deficit of around £307m. In early 2011 a recovery plan had been agreed to address the deficit, under which Comet had agreed to contribute £6.1m per annum. In June 2011 KEP entered into a formal deed of support in favour of CTCL, replacing an earlier letter of support. The deed effectively guaranteed the funding of any deficit derived from the original transfer in to the DB Scheme at the time of the demerger. I understand that this covered around 80% of the total exposure. The chairman of CTCL, Ian Edwards, also received an assurance from Kesa that “a closure of the business is not on the agenda”.
15. Kesa’s announcement that it was exploring options for Comet also raised concerns with credit insurers. These are entities that provide insurance to manufacturers in respect of credit they supply to customers. Although the insurers’ legal relationship would be with the manufacturer, their willingness to provide cover was commercially important not only to Comet but to Kesa’s wider business, because without it manufacturers would not offer credit, or at least not on such favourable terms. The absence of such credit had a material effect on working capital requirements. It was clear from Mr Platt’s evidence that he spent a lot of time both in the ordinary course of business, and in particular during the negotiations for the Disposal, working closely with credit insurers.
16. The evidence shows that, in the aftermath of the announcement in June 2011, Kesa provided direct assurances to Samsung’s insurer Atradius, and to another insurer, that while it remained in Kesa’s ownership Kesa would ensure that Comet would be financially supported to pay trade suppliers in full.

17. On 26 July 2011 KEP also provided a letter of support to Comet. It read:

“We are pleased to confirm that Kesa Electricals PLC (“Kesa”) will provide financial support to Comet Group plc (“Comet”) in order that Comet meets its commitments as they fall due for so long as it remains a part of the Kesa Group.

The Kesa Group is currently evaluating some strategic structure options which include the possible sale of Comet. Should Comet be sold, it is the current intention of Kesa that Comet be sold as a going concern. Therefore, at this point in time, Kesa expects Comet to remain a going concern for a period of not less than 12 months from the date of this letter.

We also confirm that, whilst Comet is part of the Group, we will not demand repayment of any amount owed by Comet to any other companies within the Kesa Group within the next 12 months.”

It was not disputed that this letter was provided in connection with the audit of Comet’s statutory accounts for FY2011, which were signed the following day. A letter had also been provided the previous year, but without any caveat about Comet remaining part of the group.

18. Six potential bidders submitted first round offers for Comet, which were considered by the KEP Board on 26 July 2011. Three bids were discounted, one of which because it was based on putting Comet into administration, and the following day second round bids were invited from the remaining three bidders. One of those subsequently pulled out, leaving two remaining, namely OpCapita and Valco Capital Partners LP (“Valco”), the private equity arm of the restructuring specialist Hilco. OpCapita offered £60m in its first round bid but, contrary to what BAML had specified, declined to take on any exposure to the DB Scheme. Second round bids were requested to be provided by the remaining bidders by 2 September 2011.
19. During this period, further issues clearly arose in relation to trade credit. The documentary evidence indicates that OpCapita suggested among other things that Kesa act as a buying agent for a transitional period. A Kesa paper dating from August 2011 recognised that this would mean that it was Comet’s largest creditor, which “could leave Kesa with a significant cash loss” in the event of a “further deterioration in Comet’s performance including possible bankruptcy”.
20. OpCapita’s second round bid envisaged an acquisition for nominal consideration, with Comet having working capital of £110m funded by £20m from OpCapita, a £40m asset-backed loan facility (“ABL facility”) from a third party and £50m cash on the balance sheet at the point of acquisition, with the DB Scheme still remaining with Kesa. The offer letter indicated that OpCapita’s plans did not contemplate material store closures, and referred to its proposal for a “robust capitalisation of [Comet’s] balance sheet and reinforcement of its liquidity position” to address concerns about the ongoing support of suppliers. Valco’s bid also envisaged nominal consideration, but it required a £145m “dowry”, or alternatively a form of joint venture involving continued funding from Kesa in return for an equity stake.

21. The KEP Board met on 14 September 2011 and resolved to proceed with a modified version of OpCapita's second round proposal, under which OpCapita would inject £30m and the £50m from Kesa would be a contribution that gave it a minority stake in the new structure. A briefing paper for the Board for which Mr Platt was responsible noted that Comet's prospects had worsened since the turnaround plan had been presented to the Board in June 2011, with tougher market conditions and an increased concern that the plan would not achieve sustainable profitability. The paper commented that, unlike Valco's bid, the OpCapita bid would allow for a "short term clean break, with our downside capped and a potential upside should [they] sell on the business in due course". It explained that the alternatives of demerger and closure were less attractive than a sale, with a demerger requiring a £200m-£330m contribution and closure involving a cost of £270m-£470m, in each case excluding the cost of the DB Scheme. In contrast a sale could provide "certainty on downside risk".

22. The paper included the following comments about the detail of OpCapita's bid:

"Putting aside the level of our contribution, the key question for the OpCapita bid is the adequacy of their financing proposal for the business (£120m capital) to support the working capital of Comet. Under our ownership, Comet has seen working capital swings of £100m through the peak season. The risk we see is that suppliers and more importantly credit insurers do not consider Comet to be adequately capitalised and take actions which would result in materially worse payment terms for Comet than its current 48 days - a 1 day worsening in terms costs £5m in working capital. Our discussions with credit insurers over the summer have highlighted how concerned they are about their exposure, particularly in an environment where a financial buyer may be more ready or able to put the business into administration than we are perceived to be, but on the other hand they are willing to support financial buyers with a clear long term plan for business supported by adequate capital.

[Some further detail of the discussions with OpCapita then follows, including work they planned to do to improve working capital, and the proposed £50 contribution from Kesa.]

This arrangement would provide a short term clean break, with our downside capped and a potential upside should [they] sell on the business in due course."

23. BAML also produced a paper for the Board meeting, which indicated that by this stage only OpCapita was actively engaged in the process, and retention by Kesa was the "most credible competition". The paper commented that OpCapita planned to run the Comet business with substantially all the existing store portfolio and had no plans to put it into administration. In contrast, there were "significant obstacles" to Comet executing a successful turnaround plan under Kesa's ownership. The plan involved significant risk, with "very significant lease, personnel and other costs associated with closing the business" in the event that it was unsuccessful. Research analysts had ascribed a negative value to Comet's

operating business of between (minus) £27m and £250m. The £50m cost of OpCapita's proposal was at the low end of the range and would remove the downside risk regarding closure.

24. The Board minutes for 14 September 2011 echo the advice about the risks of the turnaround plan and refer to an adverse change in management's view about the longer term sustainability of Comet, in part driven by the deteriorating economic environment. They also record an agreement that it was important that any financial buyer (such as OpCapita) had adequate working capital facilities to run the business, particularly through the peak Christmas trading period, given that Comet's intra-week working capital requirements could be around £100m during that time. The view was also expressed that a financial buyer would have the ability to be much tougher in its management of working capital.
25. Heads of terms were agreed with OpCapita on 13 October 2011. In summary, these envisaged a sale of Comet and Triptych for £1. OpCapita would ensure that the purchasing vehicle (Newco) was capitalised with at least £30m of share capital and a committed £40m ABL facility. Kesa would retain the DB Scheme and provide £50m of share capital to Newco. A form of "locked box" mechanism was envisaged by reference to the 30 April 2011 balance sheet (as to which see further below), with forecast net debt owed by Comet of £26.9m, the calculation of which included £42.5m owed to Kesa. The target date for completion was 3 February 2012, a date chosen to ensure that OpCapita took over immediately after the peak trading season, at a point when working capital requirements were at their lowest, rather than the originally planned earlier date which would have involved a change of ownership during the peak period. (This point is also reflected in the minutes of the 14 September meeting, which note that completion in late January would allow the buyer nine months to improve working capital usage before the next peak period.) There was also an undertaking from OpCapita to conduct the business of Comet as a going concern for at least 18 months from completion.
26. The debt figures in the heads of terms reflected the way in which Comet's figures were presented internally, namely on a consolidated basis with its sister entity Triptych. As discussed further below, it became apparent from an explanation given by Mr Walters at a due diligence meeting on 18 October 2011 that, in addition to Comet being indebted to KIL, KIL was indebted to Triptych, with only the net figure appearing on consolidation.
27. The share purchase agreement ("SPA") was entered into on 9 November 2011. Its terms are discussed further below. Two days earlier, on 7 November 2011, the sale was approved by KEP's Board. The briefing paper presented to the Board broadly reflected the paper for the September Board meeting in terms of the options available, and summarised the proposed transaction terms. It includes revised forecast numbers for the turnaround plan, with the "high case" returning to modest positive cash flow in FY2014 and the "low case" remaining loss making through to 2017 and beyond.
28. The draft Board minutes that are available record that market conditions were "increasingly tough and likely to remain so", that the turnaround had a "very high execution risk resulting in a high risk of incurring substantial losses" and that the

purchaser would be running Comet “for cash, rather than profit”. It was noted that if the deal failed then “Plan B” would be to “continue implementing the existing turnaround plan”. There was also a reference to meetings with credit insurers and planned meetings with suppliers.

29. One of the workstreams arising from the proposed Disposal related to the steps that needed to be taken for Comet to withdraw as principal employer of the DB Scheme. This raised the issue of the comparative strength of the covenant that KEP could offer as compared to Comet, due to the structural subordination involved in having a claim only against a holding company rather than a trading entity. Ultimately the issue was resolved by an arrangement, cleared by the Pensions Regulator, under which KEP took on responsibility for the DB Scheme on terms that required increased deficit contributions of £10m per annum, and support from KIL and KHL.
30. Of particular relevance for present purposes is that one part of the process that led to the pensions issue being resolved involved a covenant review by Ernst & Young (“EY”). The final draft of their report, dated 15 December 2011, suggested that the DB Scheme would receive a dividend of between 3.3p/£ and 13p/£ as an unsecured creditor in a Comet insolvency, based on a claim of £307m.
31. Another workstream related to credit insurers. Shortly before the SPA was signed a presentation was made to a number of credit insurers, at which Kesa (and in particular Mr Platt) introduced OpCapita and its plans for Comet. Mr Darke was also involved, along with John Clare, whose role is discussed below. Mr Platt explained in his evidence that the idea was to give OpCapita a “long runway” before completion, and before the next peak trading period, to build up their relationship with the credit insurers.
32. The presentation document states that the parties had “devoted considerable resources” to addressing issues of “ample liquidity”, timing and “stability and support”. It states that Comet would have £120m of liquidity available, comprising contributions by Kesa and OpCapita of £50m and £30m respectively, and a £40m ABL facility. An “indicative deal structure” chart shows the £80m from Kesa and OpCapita being injected into Comet by the purchasing vehicle as a revolving facility to fund day-to-day working capital requirements, as well as supplemental liquidity available to Comet directly via the ABL facility.
33. In the event, Comet’s credit insurers ceased to provide cover in respect of Comet in late January 2012. Mr Platt’s evidence was that, on the assumption that the £120m of capital was in place – a point about which Kesa had been clear in negotiations and which was reflected in the transaction documents – this did not impact solvency because the peak trading period was then over.
34. Kesa also had to seek shareholder approval, which it obtained on 15 December 2011. The circular states that:

“[t]he Board believes that the proposed capital structure of Hailey 2 LP [the parent acquisition vehicle, see below] gives Comet the funding capacity to operate in the current trading environment. It is



the Purchasers' current intention to conduct the business of Comet as a going concern for at least 18 months from the Completion Date.”

35. In December 2011 Alvarez & Marsal began working with Comet's management on the development of a “100 day” restructuring plan and a financial plan for the first 18 months post-acquisition, including cash-flow projections.
36. Up to the point that the SPA was signed, Mr Darke and Mr Walters had very little involvement in the Disposal. Mr Darke had been involved at an earlier stage in the information memorandum process, and Mr Walters had attended a couple of meetings, one between Kesa and its advisers where the DB Scheme was discussed, and the due diligence meeting referred to at [26] above. They only received copies of the SPA once it was signed.

### **The structure and terms of the Disposal**

#### *OpCapita's structure*

37. A three tier structure was established to make the acquisition. At the top was a limited partnership, Hailey 2 LP (“H2L”). H2L owned Hailey Holdings Limited (“HHL”), and HHL in turn owned Hailey Acquisitions Limited (“HAL”). Kesa's investment was to be at the top of the structure, in H2L, alongside OpCapita, or more accurately an investor or investors procured by it (the “Investors”).

#### *The SPA*

38. The parties to the SPA were KHL as seller of the shares, KEP, and HHL and HAL as the purchasing entities.
39. The SPA provided for the sale of the shares of Comet to HAL and Triptych to HHL, in each case for £1, subject to the satisfaction of certain conditions, the major ones being KEP shareholder approval and the removal of Comet from exposure to the DB Scheme. There was a locked box mechanism by reference to the date of the last statutory accounts, 30 April 2011. The basic idea of a locked box mechanism is that the purchaser buys by reference to the balance sheet at the locked box date and takes the benefit of profit, or the burden of losses, from that point, with no “leakage”, such as dividends or other unanticipated extractions of value, being permitted.
40. In this case, the locked box mechanism was modified, no doubt reflecting the anticipated need for KIL to continue to provide working capital to Comet over the peak period. The SPA envisaged that net debt would be determined as at 31 January 2012. Clause 7.5 provided that the purchasers (HAL and HHL) would procure that intercompany balances owed by Comet and Triptych, as determined at that date, would be repaid at completion, and the seller (KHL) would procure that intercompany balances owed by the retained Kesa group would be paid to Comet and Triptych.
41. The SPA went on to set out further detail about how this would be achieved. In particular, clause 8 required all of the following to occur “prior to” completion (although in fact, and rather inconsistently, Schedule 2 provided that any cash

amounts would transfer only at completion and Board appointments would take effect immediately thereafter):

- a) Kesa was required to capitalise debt owed by Comet insofar as net debt would otherwise exceed £(32.275m), being the target of £(26.9m) plus an additional amount to which the purchasing group agreed to be exposed. In the event the amount outstanding under the KIL RCF was approximately £129m, and just under £13.6m was capitalised, leaving £115,415,524 owed by Comet to KIL.
  - b) There was specific provision for a Board meeting of Comet to be held at which all directors other than Mr Darke would resign and the purchasers' nominees would be appointed. Clause 8.3 provided that the newly constituted Board "shall review the financial position of the Company" in the light of a business plan for a minimum of 18 months, the ABL facility and the revolving credit facility to be provided by HAL (the "HAL RCF").
  - c) The KIL RCF was dealt with in three tranches, Tranche A, Tranche B and Tranche C, representing three tranches of the proposed HAL RCF. Tranche A of the HAL RCF was £35m, corresponding to capital injections of that amount by the Investors into H2L, and then via HHL to HAL. Tranche B was equal to the amount owed by KIL to Triptych (the "Triptych Amount"). Tranche C covered the balancing amount owed by Comet to KIL plus additional headroom.
  - d) Clauses 8.9 and 8.10 provided for the Tranche A element to be repaid by Comet drawing down £35m under the HAL RCF (i.e. Tranche A) and a corresponding amount being demanded by the Kesa group (in practice KIL), whereupon Comet "shall agree to repay such amount". Clause 7.6 contemplated that cash would move directly from HAL to the Kesa group.
  - e) Clauses 8.11-8.15 contemplated Triptych being repaid the Triptych Amount by KIL, Triptych lending the same amount to HHL and HHL lending it on to HAL. Comet would then draw an amount equal to the Triptych Amount under the HAL RCF (Tranche B), with a further demand from the Kesa group in that amount and Comet again agreeing to repay it. Clause 7.6(A) contemplated that this would all be achieved "by way of set-off".
  - f) Clauses 8.16-8.21 dealt with Tranche C. It provided for KIL to make a £50m capital contribution to H2L, together with an agreed additional amount of £22.66m plus a further pensions related amount of £5.8m, a total of £78.46m. This amount would be passed down to HAL via HHL. There would then be a further demand for the balance owed to Kesa, with Comet again agreeing to repay it, using funds drawn from Tranche C. Clause 7.6(C) contemplated a net payment mechanism in respect of this tranche.
42. Clause 11.6 replaced the undertaking that had been included in the heads of terms to run Comet as a going concern with a much weaker statement of intent under which HHL and HAL confirmed that, on the basis of their current business plans, projections and related assumptions, it was their "current intention" to conduct

the business as a going concern for at least 18 months from completion, and to consult with KHL if it was proposed to commence insolvency proceedings within that period.

43. It is also worth noting that one of the purchasers' completion obligations was to provide a fully executed copy of the ABL facility. Clause 2.4 provided that unless that document was provided, executed by all parties other than Comet, by the day before the proposed completion date then Kesa was entitled to terminate the SPA and demand £30m in liquidated damages. This provision was included at the last minute, the previously proposed lender under the ABL facility having dropped out on 8 November 2011. In the event the required ABL facility was provided by a vehicle controlled by the US hedge fund Elliott, which it transpired was also the Investor. Elliott was an activist investor whose name had previously come up in a KEP Board discussion as possibly looking at taking a position in KEP shares.
44. Finally, the SPA also expressly contemplated that the HAL RCF would be secured by a debenture.

#### *The Completion Agreement*

45. The SPA dealt with the mechanics of the funding and debt repayments only at a relatively high level. Further detail was set out in a Completion Agreement entered into on the date the sale completed, 3 February 2012. Unlike the SPA, both Comet and Triptych were parties to this agreement.
46. In summary, this provided for the following:
  - a) The £35m and £78.46m to be invested by the Investors and Kesa respectively would be passed to Macfarlanes, the solicitors acting for the purchasers. A series of payment instruction letters in prescribed forms would also be provided to Macfarlanes.
  - b) Under clause 5, via a series of payment instructions, the £35m would be held by Macfarlanes in turn for HHL, HAL, Comet and KIL, reflecting that amount being passed down the structure to HAL, lent by it to Comet under Tranche A of the HAL RCF, and Comet repaying £35m of the KIL RCF. These steps were stated to take effect prior to completion.
  - c) Under clause 6.1, the Triptych Amount was agreed in the sum of £73,136,412. Clause 6.2 provided as follows ("Bidco" being HAL, "Topco" being HHL and "the Company" being Comet):

"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 to 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.”

The effect of this provision is discussed later in this judgment.

- d) Clauses 6.3 and 6.4 spelt out that the set-off provided for in paragraph (D) of clause 6.2 was to constitute a “full and final discharge and settlement” of the payment obligations provided for in the preceding paragraphs, and that those steps should occur prior to completion and in the order set out.
  - e) Under clause 7.1 the remaining balance on the KIL RCF was agreed at £7,279,112. Clause 7.2 provided for a further set of payment instructions to Macfarlanes under which the £78.46m from Kesa would be passed down through H2L and HHL to HAL, and £7,279,112 would be passed on to Comet and applied in repaying the balance of the KIL RCF. Again, these steps were stated to occur prior to completion and in the order set out.
  - f) This left two “final payments”. Pursuant to clause 8, Macfarlanes was instructed to transfer £42,279,112 to KIL and £71,180,888 to HAL.
47. It will be observed that the total of these last two amounts is £113.46m, the same as the total of the amounts invested in the structure by the Investors and Kesa (£35m and £78.46m). The overall effect was that in cash terms KIL ended up injecting net cash of £36.18m into HAL (£78.46m-£42.28m). That £36.18m also corresponded to the undrawn portion of Tranche C of the HAL RCF, the total amount available under Tranche C being £43.46m. (The HAL RCF also provided for a fourth tranche of £35m, Tranche D, although it was never used.) HAL had injected £35m sourced from the Investors but had ended up with £36.18m more than that (£71.18m-£35m). None of the cash ended up with Comet.
48. In addition to the £36.18m, HAL also obtained security, in the form of fixed and floating charges, over Comet’s assets, in respect of a debt which totalled approximately £115.4m at completion. In view of the nature of its assets the value of the security was predominantly in Comet’s stock, a floating charge asset. It follows that HAL was effectively guaranteed a sizeable profit even if Comet failed, subject only to the potential erosion of that profit through the injection of additional funds.

*The HAL RCF*

49. As already indicated, the HAL RCF comprised four tranches, Tranche A of £35m, Tranche B of approximately £73.14m, Tranche C of £43.46m and Tranche D of £35m, in total around £186.6m. The total amount drawn down during the Disposal process was around £115.4m, equal to the amount required to repay the KIL RCF.
50. Among other provisions, the terms of the HAL RCF required excess cash to be applied weekly in payment of amounts owed, and required H2L's consent for any subsequent drawdown. There was also a "clean down" provision requiring net borrowings to return to zero for at least five successive business days each year. The final maturity date was the fifth anniversary, although HAL could call in the loan at any time. The events of default included insolvency.
51. Comet also executed a Governance Agreement which, among other things, required it to obtain HAL's consent to any drawdown under the ABL facility.

*The Completion Minutes*

52. As already noted, Comet was not a party to the SPA, but the process envisaged by it required it to take a number of steps. As well as the further detail in the Completion Agreement, those steps are reflected in detailed, and obviously previously drafted and agreed, minutes of a Board meeting held at 2.30pm on the date of completion, 3 February 2012 (the "Completion Minutes"). For present purposes the following summary will suffice:
  - a) The existing Board dealt with the capitalisation of £13.6m of the KIL RCF and the approval of the transfer of the shares in Comet to HAL.
  - b) All except Mr Darke then resigned as directors, and John Clare and Carl Cowling were appointed (together with Mr Darke, the "New Board"). The Completion Minutes emphasise that none of the resigning directors took any part in the decisions that followed.
  - c) Section 16 of the Completion Minutes records that the New Board then reviewed Comet's financial position by reference to an 18 month business plan. This is likely to have been the plan produced by Alvarez & Marsal (see [35] above). Section 17 contains a discussion of the financing documents and Comet's cash flow forecast. I will return to the detail of these later.
  - d) The New Board then approved the entry of Comet into the Completion Agreement, the HAL RCF and debenture and the ABL facility and related debenture, together with the drawings on the HAL RCF and repayment of the KIL RCF in the three tranches already discussed. Various other documents were also approved.
  - e) Section 21 recognises the net effect of the transactions, namely that Comet would be indebted to HAL in the sum of £115,415,523, but would have used all those funds in repaying existing debt, and that it would be free of

unsecured liabilities to KIL and to the DB Scheme but HAL would have security over all of its assets, which it would be able to enforce on the occurrence of an event of default. It was also noted that Comet's ability to meet its debts as they fell due would in part depend on consent being given to the draw down of further funds, that the value of its assets might not exceed the secured debt bearing in mind, among other things, that much of the stock would be subject to retention of title and leases would be unlikely to carry any premium value, and that there was a risk that the ultimate investors could engineer a transfer of the enterprise value by a sale in an amount up to the secured debt, leaving unsecured creditors with little or nothing. Again, I will return to this later.

### **Events following completion**

53. In the first few months after completion, Comet's management appeared to be relatively positive about the outlook. The "100 day" plan was implemented and cash-flow forecasts indicated that Comet should be able to trade through the peak Christmas season within its borrowing facilities. Comet also replaced the onerous ABL facility that had been agreed at completion with a more reasonable £30m facility from an established third party inventory lender, PNC Business Credit ("PNC"). Although a withdrawal of credit insurance shortly before the Disposal (see [33] above) caused problems, these were addressed in various ways including retention of title or cash deposits. Limited credit insurance was also provided for a couple of suppliers, one being Panasonic.
54. However, sales weakened in August and September 2012. Further, Comet had a greater need for credit from suppliers as it approached the peak trading season, in order to build up stock. Nevertheless, in mid October the directors continued to consider that they could trade through the peak season with the headroom available on the HAL RCF. They reached the same view in late October notwithstanding the withdrawal of a credit facility that had been arranged by Samsung and a lower level of cover being provided by Panasonic's insurer.
55. In late October HAL indicated that it would no longer support a previously proposed increase in the ABL facility, and shortly thereafter both declined a request to increase the Tranche C borrowing under the HAL RCF and indicated that it was preparing to demand repayment of the full amount outstanding. HAL also acquired PNC's rights under the ABL facility. Comet went into administration on 2 November 2012, and then into a creditors' voluntary liquidation on 3 October 2013.
56. A report prepared by Mr Walters in December 2012 set out his view that the key consideration in HAL withdrawing support when it did was the ratio of inventory to creditors. With less credit available from suppliers, the ratio would deteriorate over time. In essence, there would be proportionately less stock that had not been paid for. Mr Walters' report refers to a Deloitte report for OpCapita dating from January 2012 ("Project Venice") that showed that the optimum realisations for secured creditors were in November or December, when stock had built up for the peak period. Obviously, if stock had to be paid for through additional drawings on the HAL RCF, this benefit would reduce. In contrast, if stock could

be obtained on (unsecured) credit, then a secured creditor such as HAL could potentially benefit at the expense of unsecured creditors.

57. The most recent liquidators' report indicates that, of c.£140m owed to HAL as a secured creditor, it has received £58.7m during the administration and a further £4.6m in the liquidation. Unsecured creditors have so far received just 0.18p/£, representing their statutory entitlement to the "prescribed part" of floating charge realisations (s.176A IA 1986).
58. Although a claim was issued to set aside HAL's debenture, the Liquidator reached a settlement with HAL. This involved HAL releasing £3m from its floating charge to fund the pursuit of the present claim, which the Liquidator otherwise had no funds to pursue, in return for the Liquidator releasing the estate's claims against HAL and against Comet's directors. Privilege was not waived in the relevant legal advice behind this settlement, but relevant factors included that HAL and HHL were special purpose vehicles, with HAL having long since paid away the realisations it had received, and that the directors did not have insurance in place that would cover any claims against them.
59. Darty points to the fact that, as part of the settlement, the Liquidator also agreed not to object to the admission of a proof of debt by HAL in the sum of £76.6m, with the result that it is by far the largest unsecured creditor, and would be the largest beneficiary of any recoveries made by the Liquidator in these proceedings.

## **THE EVIDENCE**

60. I heard oral evidence from six witnesses of fact, four for Darty and two for the Liquidator. Darty's witnesses were Mr Enoch, Mr Darke, Mr Clare and Mr Platt. The Liquidator's witnesses were Jeremy Goldring, at the time a partner at SJ Berwin, and Mr Walters. All six provided witness statements for these proceedings, and the trial bundle also included three witness statements that Mr Walters had produced in the ICAEW proceedings. There was also an unchallenged witness statement for the Liquidator from Richard Annett, who had been Comet's General Counsel at the relevant time.
61. Both parties also appointed accountancy experts, John Ellison for the Liquidator and Stephen Lewis for Darty. Each produced an expert report, and there was a joint statement setting out areas of agreement and disagreement.
62. As might be expected for a trial of this nature, the documentary evidence was relatively extensive. However, there was a potentially material limitation. It transpired that following the acquisition of KEP (by then renamed as Darty plc) by Groupe FNAC SA in 2016, the emails of UK employees of Kesa had been deleted without a back up. This was considered at a CMC before George Bompas QC, sitting as a deputy judge of the High Court, who delivered a reserved judgment ([2021] EWHC 2395 (Ch)). He expressed some reservations about the explanations that had been provided but declined to make the order the Liquidator requested requiring a comprehensive account of the document deletion, as well as rejecting an application for Model E extended disclosure on the issue of desire to prefer. In doing so he referred at [31.3] to the burden that would be on Darty

at the trial in view of the presumption in s.239(6) IA 1986 and to the court being “unlikely to treat the loss of documents as involving a loss of material which, if preserved, could have supported [Darty’s] case or adversely affected the [Liquidator’s]”.

63. The result of the deletion is that relatively few emails between the “core deal team” of Mr Enoch, Mr Platt and Kesa’s Director of Corporate Finance, Andrew Stoodley, survive. Those that do are generally ones that were also sent to, or included within a chain sent to, Kesa’s solicitors Slaughter and May. (I should clarify that privilege was not waived in Slaughter and May’s advice.) Limited documents were also available from a private Dropbox account of Simon Enoch which contained certain documents that he had selected for retention, and from further data transferred by Mr Enoch to Pierre Koch, who became the head of legal affairs at Darty, in 2016.

### **Factual witnesses**

#### *Simon Enoch*

64. Mr Enoch is a solicitor who, as already noted, was at the relevant time Kesa’s General Counsel. He was also the company secretary of KEP and KIL and was a director of Comet (until 3 February 2012) and CTCL (the trustee of the DB Scheme). He left Darty in 2016 and has held various other positions since.
65. No allegation of dishonesty was made against Mr Enoch, although Mr Smith for Darty criticised certain allegations made by Mr Gledhill on behalf of the Liquidator as amounting to that in substance. I should emphasise that I make no such findings. However, I did get the impression that Mr Enoch came to court very keen to defend Darty’s position and his own actions. That resulted in a somewhat combative approach and, unfortunately, an impression that questions were not always answered in a wholly open and straightforward manner.
66. It was clear from the evidence that Mr Enoch took the leading role in negotiating the detailed terms of the Disposal on the Kesa side. Further, it was very apparent that Mr Enoch did so very much with KEP’s interests in mind (or those of Kesa excluding Comet) rather than Comet’s interests. The overriding objective was to achieve a “clean break” which capped Kesa’s exposure to Comet. At least at the time the SPA was negotiated and signed, Mr Enoch appears not to have focused on the fact that Comet’s interests might diverge from those of Kesa’s, particularly in relation to the proposed financing arrangements, including the provision of security to HAL. Indeed, as discussed below he gave positive evidence that he could not see a conflict between them. Given Mr Enoch’s roles as a director of Comet and group General Counsel, this apparent lack of focus stands out.
67. Mr Enoch referred in one of his witness statements to the fact that Comet had separate internal legal assistance available from Mr Annett, and relied on the fact that Mr Annett had raised no concerns. However, it was clear from Mr Annett’s evidence that he had had an extremely limited involvement in the Disposal and indeed had no knowledge at the time that it involved Comet repaying debt. His witness statement refers to him being “effectively kept away from the transaction”. Rather, Mr Annett’s role largely involved dealing with commercial



contracts and he did not advise the Comet Board on any strategic matters, or attend Board meetings. His understanding was that Mr Enoch essentially acted as General Counsel to the Comet Board and provided any Board level advice that was required. I accept that unchallenged evidence.

68. My overall impression is that Mr Enoch took a somewhat blinkered approach to the transaction, concentrating on Kesa's position and the objective of a clean break, and seeking to ensure that Kesa was distanced from the formal decisions that the Comet Board would be required to make to allow the Disposal to complete. As discussed further below, I also do not accept that Mr Enoch's recollection of a lack of involvement in the debt repayment mechanics reflects the full picture of what occurred.

*Robert Darke*

69. As already noted, Mr Darke was Comet's CEO at the time of the Disposal. He remained in that role until shortly after Comet went into administration. He has since held various other senior management roles.
70. Mr Darke's witness statement, along with that of Mr Clare, was provided only relatively shortly before the trial, in August 2022. Both Mr Darke and Mr Clare have received separate legal advice in respect of these proceedings.
71. Overall I found Mr Darke to be an impressive, straightforward and clear witness. There was however one area of importance where I found Mr Darke's evidence more difficult to follow, related to the alternative(s) available if the New Board did not approve the Disposal. As discussed further below, the Completion Minutes record the only alternative to approving the Disposal as being an imminent administration of Comet. There is no consideration of whether Kesa would in fact allow that to occur under its ownership, which in fact (and unsurprisingly as a listed group with other retail business operations) it would be highly unlikely to do.
72. Mr Darke had clearly formed the view that if the New Board refused to approve the Disposal and related steps, then they would simply be replaced by a more amenable Board that would. Having reflected on it, my assessment of his evidence is that he had therefore concluded that the chances of the Disposal not proceeding were remote, and as a result did not take time to consider and challenge whether it was really right that there was no other option except an administration. I should emphasise that this is not a criticism of Mr Darke, who had undoubtedly been placed in a highly pressurised situation with very little time to give the matter proper consideration.

*John Clare*

73. Mr Clare was appointed as a director and part-time chairman of Comet on 3 February 2012, and remained in that role until it went into administration. He first became involved with Comet when OpCapita sought his advice on their plan to take it over. Prior to that, he was at Dixons for a lengthy period, becoming its CEO, before taking a number of non-executive roles. He is now retired.

74. It was clear from Mr Clare's evidence that he both had a very limited recollection of relevant events, and had not focused on the details of the financial structure, taking the lead from others on that, in particular OpCapita and advisers, and Mr Darke at Board level. (I note that Carl Cowling, the other member of the New Board, took the role of Chief Operating Officer. There was no indication that he had scrutinised the details of the financial structuring to any material extent either.)
75. Mr Clare described himself as an operational retailer, leaving specialists to deal with financial structuring and concentrating on the business turnaround plan and the cashflow from the business. He wanted to get the Disposal done and move on to turning the business around. He explained that it was necessary to be an optimist to be a successful retailer. He clearly brought some of that optimism to bear at the time.
76. Given these points, it is not surprising that I found Mr Clare's evidence to be of little assistance, apart from providing support for the view that the New Board's substantive consideration of the merits or otherwise of the Disposal from Comet's perspective was, at best, limited.
77. Mr Clare was cross-examined in some detail about his incentive arrangements, in particular the fact that he received a return on his equity incentives despite Comet's failure. I accept his evidence that he had focused on the success of the business and had not expected to be rewarded for failure. He described the withdrawal of support by HAL as the most shattering experience he had had in business.

*Dominic Platt*

78. Mr Platt was Kesa's Chief Financial Officer between 2010 and 2015, having joined from Cable and Wireless, where he was the group's Financial Controller. He was a director of each of KEP, KHL, KIL and (until 3 February 2012) Comet. He now holds another CFO role in a financial services business.
79. Like Mr Darke I found Mr Platt to be an impressive witness. His evidence was straightforward and helpful. He was of particular assistance in explaining the position in relation to credit insurance, the fact that an insolvency process was not a viable option under Kesa's ownership and the position in respect of Comet's deferred tax asset, where he candidly accepted that he had made an error in his witness statement.

*Jeremy Goldring*

80. Jeremy Goldring is a solicitor with lengthy experience in restructuring and insolvency. At the time he was a partner of SJ Berwin, and is now at Gunnercooke.
81. SJ Berwin had originally become involved in late October 2011 when Mr Goldring's corporate partner Andrew Wingfield had been engaged to advise the proposed New Board personally on their incentive arrangements and employment contracts. The contact arose because Mr Wingfield knew Mr Darke socially.

82. Mr Goldring's involvement started on or shortly before 11 January 2012, when Mr Wingfield realised that directors' duties issues also arose related to concerns over solvency. This resulted in a second engagement letter, dated 19 January 2012, sent by Mr Wingfield as the responsible partner but addressed to Comet itself rather than the directors in their personal capacities. The scope of work covered advice to the New Board in their capacity as directors on their statutory and fiduciary duties, and advice to Comet on "any other advisory matters" in relation to the Disposal.
83. Mr Goldring's long experience was very apparent from his evidence. He was an understandably careful witness but his evidence was consistent and clear. He clearly felt strongly about the position that he perceived Comet and its New Board to have been placed in, particularly as regards the grant of new security without (as he saw it) new money, but his priority and focus in the short time available was on minimising the New Board's exposure to any claim for breach of duty. His understanding at the time was that a preference was unlikely to give rise to a claim for breach of duty.

*Michael Walters*

84. Mr Walters is a chartered accountant and a fellow of the ICAEW. He has had significant experience in finance-related roles. He joined Comet in 2007 and became its Head of Finance in January 2011. He also acted as its company secretary until 3 February 2012. In the period leading up to the Disposal he reported to Mr Darke, and then for a limited period to Scott Pinfield, a partner at Alvarez & Marsal who was seconded to Comet to act as CFO. Mr Walters was made redundant from Comet in December 2012. He is now the chief financial officer at Invensys Pension Trustee Limited.
85. In 2014 Mr Walters gave evidence against Comet on behalf of Comet employees in proceedings in the Employment Tribunal connected with the redundancy process. It was after that that Mr Walters made a complaint to the ICAEW about the conduct of the joint administrators.
86. Although Mr Walters was called as a witness for the Liquidator, it is worth pointing out that Darty had also served hearsay notices in respect of parts of his evidence in the ICAEW proceedings, on which it wished to rely.
87. Mr Walters' evidence was measured, careful and clear. He was astute to any lack of clarity in the questions he was asked. I had no hesitation about his evidence.

**Expert witnesses**

*John Ellison*

88. Mr Ellison, the liquidator's expert, was formerly a senior partner of KPMG and is now a senior director at FTI Consulting. He is a fellow of the ICAEW and has 50 years' experience in the accounting profession, including significant experience as an expert witness.

89. I found Mr Ellison to be an impressive witness, with a good awareness of his role as an expert to assist the court. His evidence was clear and helpful, and it demonstrated his extensive knowledge and experience. He dealt well with questions from Mr Smith about long-term liabilities that had not been trailed as issues prior to the commencement of the trial.

*Stephen Lewis*

90. Mr Lewis is a partner at Mazars and a fellow of the ICAEW. He has specialised in forensic accountancy for over 20 years. He also has significant experience as an expert witness.
91. Overall I found Mr Lewis’s evidence to be somewhat less helpful than Mr Ellison’s. I infer that this was at least in part because of the way in which he was instructed. In particular, in assessing solvency Mr Lewis appeared to have placed material reliance on the New Board’s conclusion that Comet was solvent on 3 February 2012, even though supporting documentation appeared to be lacking. He formed no definitive view in relation to Comet’s deferred tax asset despite describing it as “pivotal” to the Liquidator’s assessment that Comet was balance sheet insolvent. Further, in assessing the creditor dividend on a hypothetical liquidation he focused in his own report mainly on the Liquidator’s pleaded claim rather than on the question at large (which is the question he was asked), and although at the stage of the joint statement he accepted that some of Mr Ellison’s allowances for costs were appropriate in principle, he made limited allowance for them on the grounds of lack of information.

**APPLICABLE LEGAL PRINCIPLES AND AREAS OF DISPUTE**

92. This section summarises the applicable legal principles, which with one potentially material exception were not contentious, and the key areas in dispute in their application to the facts.

**Section 239 IA 1986**

93. Section 239 IA 1986 relevantly provides as follows:

**“239. Preferences (England and Wales)**

...

(2) Where the company has at a relevant time (defined in the next section) given a preference to any person, the office-holder may apply to the court for an order under this section.

(3) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference.

(4) For the purposes of this section and section 241, a company gives a preference to a person if—

(a) that person is one of the company’s creditors or a surety or guarantor for any of the company’s debts or other liabilities, 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 he would have been in if that thing had not been done.

(5) The court shall not make an order under this section in respect of a preference given to any person unless the company which gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (4)(b).

(6) A company which has given a preference to a person connected with the company (otherwise than by reason only of being its employee) at the time the preference was given is presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (5).

...”

94. Section 240(1)(a) has the effect that a preference given to a connected person within two years of (broadly) the commencement of an administration is given at a relevant time. Section 240(2) also relevantly provides as follows:

“(2) Where a company enters into a transaction at an undervalue or gives a preference at a time mentioned in subsection (1)(a) or (b), that time is not a relevant time for the purposes of section 238 or 239 unless the company—

(a) is at that time unable to pay its debts within the meaning of section 123 in Chapter VI of Part IV, or

(b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction or preference;

...”

95. As already indicated, Darty previously disputed that the necessary connection existed. In its written opening submissions it disputed all other aspects of the claim, namely:

- a) whether there was a preference in fact, and if so its extent;
- b) whether there was the necessary desire for the purposes of s.239(5) (“desire to prefer”);
- c) whether Comet was insolvent at the time the preference was given, or in consequence of it; and
- d) whether, even if all the requirements for s.239 to apply were satisfied, the court should exercise its discretion to make no order to restore the position.

It is fair to say, however, that Darty placed particular emphasis on the issue of desire to prefer, and continued to do so in closing submissions.

### **Preference in fact**

96. It was not disputed that both the existence and the extent of any preference should be determined by reference to a hypothetical liquidation of Comet on 3 February 2012, with the extent of any preference being determined by reference to the

counterfactual dividend that KIL would have received in such a liquidation on the hypothesis that the preference had not been conferred. It also became common ground that any counterfactual dividend should be calculated by reference to a proof of £129m, rather than the post-capitalisation figure of £115.4m.

97. As to the existence of a preference, the Liquidator's case at trial was relatively simple, namely that KIL received £115.4m, equating to a return of 89p/£, whereas it would have received less in a hypothetical liquidation.
98. Darty's case on this point, as put in written opening submissions, was that KIL received no preferential treatment. Rather, the transaction involved a net provision of £36.18m. However, in oral opening this point was not pursued by Mr Smith. In my view he was right not to pursue it. The net "dowry" of £36.18m provided by KIL was simply not received by Comet, and so did nothing to address the vice at which s.239 is aimed, namely the harm to other creditors resulting from a subversion of the *pari passu* principle: see *Goode on Principles of Corporate Insolvency Law*, 5<sup>th</sup> ed. at 13-75, 13-78 and 13-85.
99. In oral submissions, Darty confined its case on factual preference to:
  - a) a submission that, in determining the extent of the preference, the Tranche B element, representing the Triptych Amount, should be ignored essentially because it involved Triptych giving up value, rather than any transfer of value from Comet to KIL; and
  - b) reliance on Mr Lewis's evidence about the calculation of the counterfactual dividend.

### Desire to prefer

100. The key authority on the concept of desire to prefer remains Millett J's seminal judgment in *Re MC Bacon Ltd (No. 1)* [1990] BCC 78 ("*Re MC Bacon*"), the first reported case on s.239 after the reforms resulting from the Cork Review Committee Report on Insolvency Law and Practice 1982 (Cmnd 8558) (the "Cork Report"), of which Millett J was a member. The case concerned an application to set aside a debenture. Millett J explained at pp.87-88 that the predecessor provision had been completely recast, such that cases decided under the old law (which referred to a "dominant intention to prefer") could not assist. He said that s.239:

"... is a completely different test. It involves at least two radical departures from the old law. It is no longer necessary to establish a *dominant* intention to prefer. It is sufficient that the decision was *influenced* by the requisite desire. That is the first change. The second is that it is no longer sufficient to establish an *intention* to prefer. There must be a *desire* to produce the effect mentioned in the subsection.

This second change is made necessary by the first, for without it it would be virtually impossible to uphold the validity of a security taken in exchange for the injection of fresh funds into a company in financial difficulties. A man is taken to intend the necessary

consequences of his actions, so that an intention to grant a security to a creditor necessarily involves an intention to prefer that creditor in the event of insolvency. The need to establish that such intention was dominant was essential under the old law to prevent perfectly proper transactions from being struck down. With the abolition of that requirement intention could not remain the relevant test. Desire has been substituted. That is a very different matter. Intention is objective, desire is subjective. A man can choose the lesser of two evils without desiring either.

It is not, however, sufficient to establish a desire to make the payment or grant the security which it is sought to avoid. There must have been a desire to produce the effect mentioned in the subsection, that is to say, to improve the creditor's position in the event of an insolvent liquidation. A man is not to be taken as *desiring* all the necessary consequences of his actions. Some consequences may be of advantage to him and be desired by him; others may not affect him and be matters of indifference to him; while still others may be positively disadvantageous to him and not be desired by him, but be regarded by him as the unavoidable price of obtaining the desired advantages. It will still be possible to provide assistance to a company in financial difficulties provided that the company is actuated only by proper commercial considerations. Under the new regime a transaction will not be set aside as a voidable preference unless the company positively wished to improve the creditor's position in the event of its own insolvent liquidation.

There is, of course, no need for there to be direct evidence of the requisite desire. Its existence may be inferred from the circumstances of the case just as the dominant intention could be inferred under the old law. But the mere presence of the requisite desire will not be sufficient by itself. It must have influenced the decision to enter into the transaction. It was submitted on behalf of the bank that it must have been the factor which "tipped the scales". I disagree. That is not what subsec. (5) says; it requires only that the desire should have influenced the decision. That requirement is satisfied if it was one of the factors which operated on the minds of those who made the decision. It need not have been the only factor or even the decisive one. In my judgment, it is not necessary to prove that, if the requisite desire had not been present, the company would not have entered into the transaction. That would be too high a test.

It was also submitted that the relevant time was the time when the debenture was created. That cannot be right. The relevant time was the time when the decision to grant it was made."

101. In summary:

- a) "Desire" incorporates a subjective test, distinct from intention. A person may be taken to intend all the necessary consequences of his actions, but he is not to be taken as desiring them.

- b) The desire in question is a desire to produce the effect referred to in s.239 (4)(b), namely to improve the creditor's position in the event of an insolvent liquidation. It is not enough for there to be a desire to do the act that creates the preference.
- c) Rather, the company must have "positively wished to improve" the creditor's position in the event of its insolvent liquidation.
- d) Mere presence of that desire is not enough unless it influenced the decision to enter into the transaction, in the sense of being one of the factors which operated on the minds of those who made the decision. However, it need not be a decisive factor.
- e) The test must be applied at the time when the decision to grant the preference was made.

*Inferring desire*

102. Millett J also referred to the potential for desire to be inferred. The Liquidator relied on a discussion of that concept by Leggatt LJ in *JSC BTA Bank v Ablyazov* [2019] BCC 96 (CA) ("*Ablyazov*"), a case that concerned an alleged transaction at an undervalue within s.423 IA 1986, in the form of a transfer by Mr Ablyazov of £1m to his student son which Mr Ablyazov claimed was done to enable the son to obtain a Tier 1 visa, even though Mr Ablyazov knew that he was facing very substantial claims for theft. Section 423 refers to purpose rather than desire, but Mr Gledhill relied on the comments of Sir Anthony Mann in *Deposit Guarantee Fund v Bank Frick & Co. AG* [2022] EWHC 2221 (Ch) at [42]-[43] where he noted that it was common ground in that case that "purpose" in s.423 connoted a subjective state of mind, referred to *Re MC Bacon* and said that the concept has "very similar subjective connotations" to "desire" in s.239.

103. In *Ablyazov* Leggatt LJ explained at [15] and [16] that:

"15. ... it is not enough to bring a transaction at an undervalue within s.423 that the transaction had the consequence of putting assets of the debtor beyond the reach of creditors. That is so even if the consequence was foreseeable or was actually foreseen by the debtor at the time of entering into the transaction. Evidence that the debtor believed that the transaction would result in putting assets beyond the reach of creditors may support an inference that the transaction was entered into for the purpose of doing so, but the two things are not the same. To illustrate the distinction using a less homely example than that given by Arden LJ, a commander may order a missile strike on a military target knowing that it will almost certainly cause some civilian casualties. But this does not mean that the missile strike is being carried out for the purpose of causing such casualties.

16. When judging a person's intentions, we are generally more inclined to accept that an action was not done for the purpose of bringing about a particular consequence, even if the consequence was foreseen, if there is reason to believe that the consequence was something which the actor wished to avoid or at least had no wish to



bring about. Hence, in the example just given, where the missile strike had a clear strategic purpose, we may readily accept that it was not ordered for the purpose of causing civilian casualties—particularly if, for example, there is evidence that the commander gave anxious consideration to how many civilians were likely to be in the target area and planned the strike for a time when the number was expected to be low. By contrast, a consequence is more likely to be perceived as positively intended if there is reason to think that it is something which the actor desired. Thus, evidence that a person who has entered into a transaction at an undervalue foresaw that the result would be to put assets out of reach of creditors and desired that result might lead the court to infer that the transaction was entered into for that purpose. But such a conclusion is not a logical or legal necessity. It is a judgment which has to be based on an evaluation of all the relevant facts of the particular case.”

*The presumption in s.239(6)*

104. In this case, given that KIL and Comet were connected, it is also necessary to consider the effect of the presumption in s.239(6). Darty’s position is that the presumption has little practical significance in this case because the court has the relevant evidence, so this is not one of the rare cases that turns on the burden of proof. Rather, as Flaux LJ said in *E3 v Secretary of State for the Home Department* [2020] 1 WLR 1098 at [69]:

“...the court...simply considers the evidence in the round and decides a particular issue on the balance of probabilities.”

105. In essence, Darty says that the relevant decision was taken by the New Board at the meeting on 3 February 2012 and it was clear from the evidence, including evidence from members of the New Board, that there was no desire to prefer.

106. The Liquidator’s response to this is that Darty is missing the point. The presumption is in effect a deeming provision, and in determining how easy it is to displace it a close regard should be had to the function it is there to perform, the underlying concern being that where certain types of relationship exist then transactional independence may have been compromised in ways too subtle to detect. The burden on Darty was a real one, and it needed to show that the decision was not tainted by a desire to prefer in any relevant way: see for example *Re Oxford Pharmaceuticals Ltd* [2010] BCC 834 at [76], which refers to “acting solely by reference to proper commercial considerations”.

107. Mr Smith pointed out that statements of this kind must be treated with some caution, because the statutory test is the presence and influence of an “improper” desire, rather than the absence of a “proper” one: *Abdulali v Finnegan* [2018] BPIR 1547 at [39], per Birss J.

*Contemplation of insolvent liquidation*

108. A further point relied on by Darty was the requirement that the requisite desire must be one to improve the creditor’s position in the event of an insolvent

liquidation. It was not disputed that, on the facts of this case, this meant that the person with the desire in question must have been aware of at least the possibility of an insolvent liquidation. However, this is not inconsistent with a belief that the company in question is currently solvent: *Re Exchange Travel Ltd* [1996] BCC 933 at 947D, per Rattee J.

*Whose desire?*

109. A particular area of dispute related to the person or persons whose desire is relevant. Darty's case was simple: the desire must be that of the company's decision makers, who were usually – and were in this case – its directors, namely the New Board. This followed from the fact that statute requires that the company must have been influenced by the relevant desire in deciding to give the preference. It was also reflected in the authorities (as well as leading textbooks), including Millett J's reference to the company having "positively wished" to confer the preference, and the statement by David Richards J in *Re Stealth Construction* [2012] 1 BCLC 297 at [67] that:

"Section 239 focusses not on the conduct or the state of mind of the creditor concerned, but on that of the directors or others acting for the company."

110. It is fair to say that the Liquidator's case on this point altered somewhat. As originally pleaded in the reply the Liquidator relied on the statutory presumption, and in addition on:

- a) Comet's decision having been influenced by a desire of KHL, KEP and KIL to achieve a better outcome for KIL, combined with a denial that the decision was confined to that taken by the New Board on 3 February 2012 and a claim that the resolution passed then simply gave effect to a decision that had already been taken; or
- b) alternatively, if the decision was taken solely by the New Board, a claim that its deliberations were influenced by KHL/KEP/KIL's desire.

The latter part of this pleading added that the Liquidator would rely on Mr Darke's membership of the Board both before and after the Disposal and on the incentives offered to the New Board.

111. In Mr Gledhill's opening submissions, and no doubt in the light of Mr Darke's witness statement (which as previously mentioned was provided only relatively shortly before the trial), it was made clear that the final point about Mr Darke would not be pursued, such that he was not cross-examined on the question of desire to prefer. Instead the case as ultimately put, reflected in an amended reply, can be summarised as follows:

- a) KHL and KEP (as parties to the SPA), their subsidiary KIL and Mr Enoch, being "both a director of Comet, and an officer of KEP and KIL, and an employee of KEP", desired to achieve a better outcome for KIL in its capacity as a creditor of Comet than would have been the case in an insolvent liquidation, via repayment of the KIL RCF immediately before

completion. The desire of KHL, KEP, KIL and Mr Enoch to achieve a better outcome influenced Comet's decision, the resolution passed by the New Board simply giving effect to a decision which had already been taken "on or around 9 November 2011 by KHL, KEP and (on behalf of Comet) Mr Enoch", as reflected in clauses 8.6-8.20 of the SPA.

- b) Alternatively, if the relevant decision was taken solely by the New Board on 3 February 2012, its deliberations were influenced by Mr Enoch's desire, "which desire is imputable to Comet, by virtue of Mr Enoch's Comet directorship".
112. As discussed further below, the legal question to which the alternative at [111b]) gives rise is essentially whether it is sufficient, as Mr Gledhill submitted, for a desire to influence a decision if that desire is held by someone other than the company's decision-making body and has the (causative) effect of influencing the decision, provided that the desire in question was held by someone who was a director, or other agent, of the company. The same point may arise to some extent under [111a]) above, though the pleading there refers to Mr Enoch acting "on behalf of Comet".
113. Mr Gledhill relied heavily on *In re Drabble Bros.* [1930] 2 Ch 211 (CA) ("*Re Drabble*"). In that case a partner of a firm signed cheques drawn by an agent, Tiley, in circumstances where Tiley was aware of the firm's financial difficulties and intended to prefer the relevant creditors (from whom he obtained commission) by early payment. However, the partner who signed the cheques had delegated all the decision making about payments to Tiley and had no knowledge that payments were being made early. The Court of Appeal held that Tiley's knowledge should be imputed to the partner. Mr Gledhill submitted that, in a similar way, Mr Enoch was an agent of Comet because he was one of its directors.

#### *Identifying the date of the decision*

114. As the foregoing discussion indicates, it may also be important to identify when the relevant decision was made. In *Re Stealth Construction* David Richards J commented at [63] that this was a question of fact in each case, and that an existing contractual obligation to perform the act that amounts to a preference was neither necessary nor sufficient.
115. Darty relied on *Re Stealth Construction* and *Wills v Corfe Joinery Ltd* [1997] BCC 511 to support the proposition that, even if Comet had made a decision in November 2011 when the SPA was signed (which was denied), by February 2012 it needed to make a further decision, and that was the only relevant one because the test focused on the actual decision to effect payment. *Re Stealth Construction* concerned the grant of a debenture, purportedly agreed to in October 2007 but only executed in December 2008. David Richards J concluded that there was no enforceable obligation to grant the security in October 2007, but commented at [61] that even if there had been:

"... there would in ordinary circumstances after a delay of 12 months or so be a further decision to comply with the obligation, just as in the

case of a debt there would be a further decision to comply with the obligation to pay the debt.”

116. In the earlier case of *Wills v Corfe Joinery Ltd*, a company agreed at a board meeting in January 1994 to repay two directors’ loans in January 1995. The loans were repaid in early February 1995 by drawing cheques in favour of the directors, at a time when the company had run into financial difficulties. It ceased trading very shortly afterwards. Lloyd J found that the decision was made only when the cheques were signed.

## **Insolvency**

117. Section 240(2) applies the test in s.123 IA 1986, which relevantly provides:

“(1) A company is deemed unable to pay its debts—

...

(e) if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due.

(2) A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company’s assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.”

118. For convenience I will use the labels “cash flow” insolvency in respect of s.123(1)(e) and “balance sheet” insolvency in relation to s.123(2).

119. The leading authority is *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc* [2013] BCC 397 (“*Eurosail*”). The relevant principles were helpfully summarised by Lewison LJ in *Bucci v Carman* [2014] BCC 269 at [27]-[28], as follows:

“27. In my judgment the following points emerge from the decision of the Supreme Court in *Eurosail* (and in particular the judgment of Lord Walker):

(i) The tests of insolvency in s.123(1)(e) and 123(2) were not intended to make a significant change in the law as it existed before the Insolvency Act 1986: [37].

(ii) The cash-flow test looks to the future as well as to the present: [25]. The future in question is the reasonably near future; and what is the reasonably near future will depend on all the circumstances, especially the nature of the company’s business: [37]. The test is flexible and fact-sensitive: [34].

(iii) The cash-flow test and the balance-sheet test stand side by side: [35]. The balance sheet test, especially when applied to contingent and prospective liabilities is not a mechanical test: [30]. The express reference to assets and liabilities is a practical recognition that once the court has to move beyond the reasonably near future any attempt to apply a cash-flow test will become completely speculative and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test: [37].

(iv) But it is very far from an exact test: [37]. Whether the balance sheet test is satisfied depends on the available evidence as to the circumstances of the particular case: [38]. It requires the court to make a judgment whether it has been established that, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to meet those liabilities. If so, it will be deemed insolvent even though it is currently able to pay its debts as they fall due: [42].

28. In the course of his judgment in *Eurosail* Lord Walker approved what he described as the "perceptive judgment" of Briggs J in *Re Cheyne Finance Plc* [2007] EWHC 2402 (Ch); [2008] BCC 182. Two of the points that Briggs J made bear on our case:

(i) Cash-flow solvency or insolvency is not to be ascertained by a blinkered focus on debts due at the relevant date. Such an approach will in some cases fail to see that a momentary inability to pay is only the result of temporary illiquidity. In other cases it will fail to see that an endemic shortage of working capital means that a company is on any commercial view insolvent, even though it may continue to pay its debts for the next few days, weeks, or even months: [51].

(ii) Even if a company is not cash-flow insolvent, the alternative balance-sheet test will afford a petitioner for winding up a convenient alternative means of proof of a deemed insolvency: [57]."

120. As Lewison LJ went on to say at [29], the cash flow and balance sheet insolvency tests are alternatives, although "the two tests feature as part of a single exercise, namely to determine whether a company is unable to pay its debts". He added at [31] that it seemed:

"... counter-intuitive ... that a company that manages to stave off cash-flow insolvency by going deeper and deeper into long-term debt is not insolvent. It may be able to trade its way out of insolvency, and thus avoid going into insolvent liquidation, but that is a different matter."

121. There are a few additional points that I would add at this stage in relation to the test for balance sheet insolvency.

122. First, although s.123(2) is conventionally referred to as the balance sheet test, it is worth emphasising that "that expression is not to be taken literally", and that there is no statutory provision linking s.123(2) to the Companies Act provisions that specify the form and content of a company's accounts (see *Eurosail* at [1]).

123. Secondly, it is necessary to compare assets with liabilities, but "taking into account" contingent and prospective liabilities. That involves discounting for contingencies and deferment. In *Eurosail* at [42] Lord Walker approved a statement by Toulson LJ in the Court of Appeal in that case ([2011] BCC 399) when he said at [119]:

“Essentially, s.123(2) requires the court to make a judgment whether it has been established that, looking at the company’s assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to be able to meet those liabilities. If so, it will be deemed insolvent although it is currently able to pay its debts as they fall due. The more distant the liabilities, the harder this will be to establish.”

124. Lord Walker added that in that case, where liabilities stood to be deferred for over 30 years, the court “should proceed with the greatest caution” in deciding that the company was insolvent under s.123(2). On the facts the court could not be satisfied that there would eventually be a deficiency (see at [49]).
125. Earlier, at [30], Lord Walker had also cited a passage from Nourse J’s judgment in *Re a Company* [1986] BCLC 261, where he said that the requirement (in the predecessor legislation) to take into account contingent and prospective liabilities cannot mean simply adding them up and striking a balance against assets, adding that as regards prospective liabilities “I must principally consider whether, and if so when, they are likely to become present liabilities”.
126. Thirdly, the assets referred to in s.123(2) are the company’s present assets: *Eurosail* at [37] and *Re Rococo Developments Ltd* [2017] Ch 1 (“*Rococo*”) at [19] and [20]. I pause to note that, while that is clearly correct as a matter of statutory construction, in order to apply the provision in a commercially realistic manner as *Eurosail* enjoins us to do (see *Rococo* at [24]), an enquiry into the nature of the present assets, and in particular their future profit (or loss) generating potential, must also be relevant to the assessment of how prospective or contingent liabilities should be taken into account. Otherwise we risk losing sight of the key issue for determination, which is whether the company is unable to pay its debts.
127. Fourthly, the Liquidator relied on *Bucci v Carmen* at [38], where Lewison LJ noted at [38] that the experts agreed that the company in question was balance sheet insolvent if a particular loan was given no value, and that whilst that might not be a complete answer to the question of insolvency within s.123(2):

“... it is difficult to see how it could not lead to that conclusion in the case of a trading company unless there was credible evidence that the balance sheet would improve in the near future.”

128. The Liquidator contended that Comet was balance sheet insolvent both before and after the KIL RCF was repaid, and that it was cash flow insolvent in consequence of it. Darty’s position is that Comet was solvent on 3 February 2012 and remained so following the Disposal.

## Remedy

129. If the other requirements of s.239 are established, s.239(3) requires the court to make “such order as it thinks fit for restoring the position to what it would have been if the company had not given [the] preference”.

130. In summary, the Liquidator’s claim is for the difference between the amount actually received (being £115.4m of a pre-existing debt of £129m, or 89p/£) and the counterfactual dividend that would have been paid on a liquidation on a proof of £129m (£14.7m or 11.4p/£, as discussed below at [193] to [200]). In contrast, Darty relies on the court’s discretion being wide enough to make no order at all if justice so requires: *Re Paramount Airways* [1993] Ch 223, 239, on the basis that “exceptional circumstances” exist. (The concept of exceptional circumstances was discussed further by Mann J in *Stonham v Ramrattan* [2010] BPIR 1210 at [40], and more recently by Trower J in *Re Fowlds* [2022] 1 WLR 61.)
131. Darty says that where, as here, the preference took place in the context of a wider transaction it “would not be fair or appropriate to leave that wider context out of account when considering what order the court should make in the exercise of its discretion”: *Re Claridge* [2011] BPIR 1429 at [42]. It points out that the court is not permitted to reconstruct the position to what it would have been if an entirely different transaction had been entered into: *Re MDA Investment Management* [2005] BCC 783 at [123]. Further, Darty says that it would be wrong in principle to make any remedial order in circumstances where the real issue was the grant of the debenture to HAL, and that entity would be the main beneficiary of any recovery by the Liquidator.

### WAS COMET INSOLVENT ON 3 FEBRUARY 2012?

132. I deal first with the question of whether Comet was in fact insolvent at the relevant time.
133. The Completion Minutes recorded the following consideration and determination by the New Board:

**“16. Assessment of the current financial position of the Company**

16.1 A copy of the Company’s business plan, for the period of 18 months from the Completion Date, was produced to the meeting (the “Business Plan”).

16.2 The Continuing Directors reviewed the financial position of the Company in light of:

16.2.1 the Business Plan, including the assumptions underlying it;

16.2.2 the availability, and terms and conditions, of the ABL Facility Agreement; and

16.2.3 the availability, and terms and conditions, of the RCF Agreement.

16.3 The Continuing Directors noted that, given the fact that, without additional funding; the Company would inevitably run out of cash in the foreseeable future, the Continuing Directors have been advised that they must consider the interests of creditors of the Company as a whole.

16.4 On the basis of the Continuing Directors’ knowledge of the Company’s financial position, the Continuing Directors considered whether the Company was presently unable to pay its debts, or would be so unable immediately following completion of the Completion

and Finance Documents and the Post-Completion Documents, for the purposes of section 123 of the Insolvency Act 1986. The Continuing Directors considered in particular whether:

16.4.1 any creditor to whom the Company owed over £750 had served on the Company a statutory demand for the sum due which the Company had failed to pay within three weeks or otherwise deal with;

16.4.2 any creditor had obtained a judgment against the Company which had not been satisfied;

16.4.3 the Company was presently unable to pay its debts as they fell due; and

16.4.4 the value of the Company's assets (valued for these purposes at their real, rather than simply their book, values) is presently less than the amount of its liabilities, taking into account for these purposes the Company's contingent and prospective liabilities.

16.5 Having considered all of the above, and having concluded in particular that the answer to each of the questions set out in paragraphs 16.4.1 to 16.4.4 was in the negative, the meeting concluded that the Company was not unable to pay its debts for the purposes of section 123 of the Insolvency Act 1986 and immediately following the date on which the Completion and Finance Documents and the Post-Completion Documents are signed, there would be no ground on which the Company could then be found to be unable to pay its debts for the purposes of section 123 of the Insolvency Act 1986.”

134. Both experts were asked to opine on Comet's balance sheet solvency within s.123(2) IA 1986 on 3 February 2012. Mr Lewis was also asked to opine on cash flow solvency within s.123(1)(e). Mr Ellison's opinion was not sought on cash flow insolvency on the basis that it turned on an evaluation of the evidence. I will address balance sheet insolvency first.

### **Balance sheet insolvency**

135. By far the most significant debate between the experts in relation to balance sheet solvency related to whether Comet's assets should include a material deferred tax asset (“DTA”) that had been included in the FY2011 statutory accounts, with Mr Ellison opining that it should not and Mr Lewis concluding that he was unable to draw a definitive conclusion in the absence of long term forecasts from around the date of the transaction. There was also some debate about the impact of the statements about solvency in the Completion Minutes, the revolving facilities and the likelihood of parental support.
136. Despite being asked to opine by reference to the statutory test and referring to *Eurosail*, Mr Lewis gave no indication in his report that there were any other major issues that the court should consider. Rather, he devoted some 15 pages specifically to the DTA issue and fewer than four pages to the more general question of balance sheet solvency and the solvency assessment in the Completion Minutes.



137. In written opening submissions Darty criticised the Liquidator and Mr Ellison for doing exactly what should not be done, namely to approach the balance sheet in a mechanical way rather than to consider whether Comet could reasonably be expected to meet its liabilities. Darty also pointed out that the Disposal led to a significant improvement in Comet's balance sheet.
138. Darty took a different approach at trial, maintaining by the time of closing submissions that the DTA was effectively beside the point because it was not a present asset. Rather, Darty said that the Liquidator had incorrectly assessed long-term liabilities and net debt for the purposes of s.123(2), such that he had not established insolvency.
139. I will return to the subject of the DTA below, but to explain it briefly, in the case of Comet it represented tax benefits in the form of carried forward losses and unclaimed capital allowances that were available to offset future taxable profits of Comet's trade. Such tax benefits are of value only if and to the extent that future taxable profits actually arise, such that a tax saving can be made. Under International Financial Reporting Standards ("IFRS"), a DTA of this nature is recognised only to the extent that it is "probable" that future taxable profits will be available against which the benefits can be offset. Under UK Generally accepted accounting principles ("UK GAAP") the test is "more likely than not" rather than "probable", but for present purposes the tests are effectively synonymous.
140. I also refer below to the draft statutory accounts for FY2012. The FY2012 accounts were never finalised because the auditors were waiting for a letter of support from HAL which did not materialise. The evidence indicates that, in the absence of such a letter, the auditors PwC were proposing that an "emphasis of matter" section be included in the auditors' report. The draft that PwC provided was along the lines of Comet being reliant on continued support from investors and suppliers, but the directors being of the view that such support would continue to be provided while Comet continued to meet its financial targets. However, it also warned that if Comet fell short of expectations "as a consequence of the challenging trading environment" or the support of suppliers diminished, then that could cast "significant doubt" over Comet's ability to continue as a going concern.

*Mr Ellison's report*

141. Mr Ellison's starting point was Comet's unaudited management accounts to 31 January 2012. However, he also considered other financial information from around that date, including opening balance sheets prepared by management relating to the position immediately after the Disposal and reports prepared by Deloitte, as well as the FY2011 statutory accounts and draft audited accounts for FY2012.
142. The management accounts included a DTA of £44.9m, which in Mr Ellison's view should have been written off because it did not meet the test of it being probable that Comet would have sufficient taxable profits available in future periods to allow it to be used. In reaching this conclusion he pointed to the fact that Comet had incurred losses in FY2009, FY2010 and FY2011, and was

incurring further losses in the year to date. In his view the position was getting worse rather than better. In cross-examination Mr Ellison drew a graphic analogy between Comet's increasing losses and "...falling off a cliff, and as happens when you do fall off a cliff, you fall faster and faster".

143. Without the DTA, Comet's balance sheet prior to the Disposal showed substantial negative net assets under both an IFRS and UK GAAP basis. Mr Ellison commented that he appreciated that the balance sheet test should not be applied mechanically, and that (for example) the prospect of an injection of further share capital would need to be taken into account, but he had seen no evidence of anything of that nature.
144. In total Mr Ellison reviewed 11 balance sheets for the period between 31 January and 28 April 2012 produced for various purposes, including a key supplier update and a balance sheet prepared for a Board meeting on 10 February 2012. Nine of these, including the two just mentioned, showed net liabilities, and the tenth would have done if the DTA had been written off. The balance sheet for the 10 February Board meeting showed a deficit of £9.9m and incorporated a write off of most of the DTA, but also showed a pre-Disposal deficit of £6.7m without the DTA write off.
145. Mr Ellison also noted that a Deloitte report dated 20 January 2012 projected balance sheet insolvency from February 2012 onwards even with the DTA, as well as net liabilities in January 2012 without it. A further Deloitte report in March 2012 showed net liabilities in January 2012 and continued deterioration thereafter. The draft statutory accounts for FY2012 showed a balance sheet deficit of £53.2m.
146. Mr Ellison calculated net liabilities of £51.6m immediately prior to the Disposal on an IFRS basis, and £22.2m on a UK GAAP basis. The position immediately after the Disposal was different, with his calculation showing positive net assets of £19.4m on a UK GAAP basis but net liabilities of £10m on an IFRS basis. The material reason for the difference related to the treatment of landlord incentives (largely reverse premiums and rent free periods). Under IFRS, incentives must be allocated over the term of the lease, whereas under UK GAAP they are allocated over a period to the next rent review date, if shorter. The result is to recognise a larger deferred income liability in a balance sheet prepared under IFRS.
147. The FY2011 accounts had been prepared under UK GAAP, but the draft accounts for FY2012 show that the directors had decided to adopt IFRS. Mr Ellison also formed the view that the relevant management accounts had been prepared in accordance with IFRS, and pointed out that a "Key Supplier Update" produced in March 2012 also produced a balance sheet which was said to be "based on IFRS and consistent with the internal management reporting". He noted that, if IFRS had not been adopted, then new UK GAAP rules applicable from January 2015 (with a facility for early adoption from January 2013) would also make the treatment of lease incentives consistent with that under IFRS.
148. As regards the DTA, Mr Ellison's clear opinion was that it did not meet the criterion for recognition either under IFRS or UK GAAP. He considered the analysis that supported the inclusion of the DTA in the FY2011 accounts to be

superficial, and not borne out by events. Rather, trading performance and market conditions deteriorated in the 10 months prior to the Disposal, and the figures predicted increasing losses. Mr Ellison considered his conclusion to be reinforced by the fact that the DTA was written off in the management accounts after the Disposal, and within the draft FY2012 statutory accounts.

*Mr Lewis's report*

149. Mr Lewis relied on both the FY2011 and FY2012 financial statements having been prepared on a going concern basis, with the FY2012 accounts having been approved at a Board meeting in September 2012, and on the New Board's conclusion recorded at paragraph 16.5 of the Completion Minutes.
150. In relation to balance sheet solvency, Mr Lewis focused on four balance sheets referred to in the Liquidators' pleadings, and as already noted commented that the recoverability of the DTA was "pivotal" to the Liquidator's assessment of balance sheet solvency. Mr Lewis speculated about how the directors reached the conclusion that they did about balance sheet solvency at the 3 February 2012 meeting, suggesting that they may have been looking at different figures from those relied on by the Liquidator, that they may have taken a less pessimistic view about the DTA, or that their conclusion may have been formed taking into consideration a long-term view.
151. Mr Lewis also noted that without the revolving credit facility owed to KIL or HAL, which was a debt to a related party, there would be net assets irrespective of the position with the DTA. It was relevant to determine whether the directors believed that that debt would actually need to be repaid. The conclusion in the FY2011 and FY2012 financial statements that Comet was a going concern supported the position that they did not consider that repayment of either the KIL RCF or the HAL RCF would be demanded within 12 months of the signing of the relevant financial statements. Further, Darty's witness evidence supported the conclusion that Comet would continue as a going concern. However, there was no clear expression of the directors' views on the likelihood of the HAL RCF being called.
152. In relation to the DTA, Mr Lewis referred to the conclusion reflected in the FY2011 accounts that the DTA, then £27m, could be utilised. The short supporting document referred to a return to retail profit in FY2014 and modest taxable profit in FY2015. The slightly longer document produced in July 2012 to support the decision to write the DTA off the following year also suggested a return to modest taxable profits in FY2015, but with the DTA continuing to increase to FY2017 due to increasing capital allowances, such that it was appropriate to write it off.
153. Mr Lewis noted that he had only been provided with short-term forecasts, rather than the longer-term forecasts he would have expected to see. He considered other available information, including Comet's management accounts which included the DTA up to April 2012 and relevant correspondence, pointing out that Comet's Board only made a formal decision to write off the DTA on 24 September 2012.

154. Having referred to the New Board's assessment of solvency on 3 February 2012 and what Mr Lewis considered to be a reasonable assumption that OpCapita acquired Comet on the basis that it could be returned to profit, Mr Lewis concluded that without long-term forecasts he could not reach a firm conclusion about whether the DTA was recoverable either in full or in part at the date of the Disposal.

*Long-term liabilities and net debt*

155. Darty did not dispute that the balance sheet was an appropriate starting point for determining balance sheet solvency but, in a case developed for the first time in cross-examination of Mr Ellison, it maintained that irrespective of the DTA position Comet was solvent on a balance sheet basis because (using IFRS figures at 31 January 2012) (a) current assets exceeded current liabilities by a reasonable margin, indicating an ability to pay debts over the following 12 months; and (b) the deficit only arose as a result of creditors over one year of £85.2m and net debt of £116.1m. Mr Smith submitted that most of the £85.2m should not be taken into account, and the balance (if at all) only on a discounted basis. He also submitted that the major component of net debt, being the KIL RCF, should not be included at face value.
156. I deal with the individual points raised below. But I first need to comment on the element of ambush that Darty's approach involved. It is not a proper answer to this simply to refer to the burden of proof being on the Liquidator on the solvency issue. Both experts were asked to opine on solvency for the purposes of s.123 and these points were not raised. Of course the issue of solvency is ultimately one for the court and not experts, but the effect of Darty's approach is that not only was the court unable to obtain any assistance in relation to matters that experts could have addressed, in particular in relation to the discounting of prospective liabilities, but Darty's approach at trial conflicted with that of its own expert. The proper time to ensure that the point was raised was through the expert report process.
157. A further initial point to make is that Mr Ellison was clear in his evidence that he had excluded contingent liabilities from his assessment. He was referring here to liabilities that are treated as contingent in an accounting sense, and are typically disclosed in the notes to the accounts. Mr Ellison explained that the accounting concept applies to liabilities where there is uncertainty as to whether they will crystallise. Such liabilities are usually only provided for in the accounts, as opposed to being disclosed in the notes, where they were more likely than not to crystallise. As I understood his evidence, he had entirely excluded contingent liabilities that were disclosed, as opposed to provided, in the accounts.
158. Turning to the long-term liabilities that were taken into account by Mr Ellison, of the £85.2m, £38.45m was attributable to landlord incentives in the form of reverse premiums, rent free periods and (in respect of around £2.2m) capital contributions. Mr Smith submitted that these did not represent liabilities at all, but were simply a reflection of an accounting requirement to spread the benefit of the relevant incentive.

159. In my assessment Mr Ellison dealt with this effectively in cross-examination. He was given an example of a five year lease at a rent of £1m per annum, with the first year rent free. Ignoring rent reviews for simplicity, the correct P&L treatment is to record an annual expense of £800,000, corresponding to the total of £4m rent actually payable over the lease term.
160. In the first year there is obviously no cash outlay because no rent is actually charged. So, rather than a reduction in cash or an increase in borrowings, the corresponding balance sheet entry is a liability of £800,000. That amount then reduces by £200,000 per year over the following four years, matching the excess of the £1m rent paid in each of those years over the £800,000 charged to P&L.
161. Mr Ellison explained the liability as reflecting the fact that the tenant was committed to paying “over the odds” in years two to five. I agree and would make two points. First, the £800,000 of liability on the balance sheet corresponds to actual rent that the tenant will be obliged to pay over the term of the lease. Secondly, it reflects that £1m per annum *is* an excessive rent as compared to what an incoming tenant would be prepared to pay. The fact that the tenant has agreed to pay only £4m over five years demonstrates this. Contrary to Mr Smith’s submission, in my view it makes no difference that the liability is recorded pursuant to an accounting standard that specifically addresses landlord incentives rather than one that deals explicitly with onerous leases.
162. I accept that Mr Ellison has not applied discounting, as required for the purposes of s.123(2) in respect of contingent and prospective liabilities. I will return to that, but in circumstances where the issue was not raised in time to allow it to be properly addressed, I have very limited tools to approach that question and will need to take a broad brush approach. In the circumstances I am not prepared to accede to Mr Smith’s submission that I should simply exclude figures that Mr Ellison has not attempted to discount.
163. I also recognise the oddity of concluding that Comet was balance sheet insolvent on a IFRS but not GAAP basis (because of the different treatment of lease incentives, see [146] above), but point out that on either basis Mr Ellison’s calculations showed balance sheet insolvency prior to the Disposal.
164. Long-term liabilities also include a DB Scheme adjustment of £26.6m. Mr Smith criticised Mr Ellison for including this at face value without interrogating it. He submitted that it was likely to be an estimate of the present value of the DB Scheme deficit, but was not an estimate of what Comet would in fact expect to pay if it continued as a going concern, which had been agreed at £6.1m. The estimate was in any event highly contingent.
165. I disagree. In the absence of more detailed information I have no reason to question the provision in respect of the DB Scheme. The notes to the FY2011 accounts indicate that it is calculated in accordance with FRS17 and on a present value basis, so discounting is incorporated. The currently agreed annual deficit contribution level is not determinative of the overall liability.
166. A further component of long-term liabilities were provisions described as “exceptional idle” and “idle provision”. Mr Smith criticised the fact that Mr

Ellison had not interrogated these and did not know what they were. In fact, I can see from the FY2011 and FY2012 accounts that they are provisions for future liabilities in respect of rent, rates and service charges for unused (idle) properties and those sublet at a shortfall. Relevant to discounting, the accounts also indicate that the majority of the provision was expected to be used within 5 years.

167. Finally, long-term liabilities included an onerous lease provision of around £4m and a “rent fixed uplift” of around £6.6m, which Mr Smith submitted should be excluded in the absence of a sensible discount being applied by Mr Ellison. My understanding from the notes to the FY2012 accounts is that, as the name suggests, the latter relates to a fixed increase in rent following a period in which the rent was below market (or nil) and that, as with other landlord incentives, IFRS requires a spreading over the remaining period of the lease, whereas UK GAAP required spreading over the period to the next rent review date. As I have said, I am not prepared simply to exclude altogether liabilities that undoubtedly existed.
168. Turning to net debt, Mr Smith submitted that the KIL RCF should not have been taken into account at face value because Comet’s liability to repay only accrued if a demand was made. No attempt had been made to assess the likelihood of that occurring, and there is no basis for thinking that it would in fact be demanded at all given that Kesa was unlikely to put Comet into liquidation and had provided a comfort letter (see [17] above). As regards the position following the Disposal, the transaction improved Comet’s balance sheet and there was no basis for thinking that the HAL RCF was likely to be demanded in the reasonably near future or at all, bearing in mind the assurances given by OpCapita. The statement of intention in the SPA was functionally equivalent to a comfort letter. Rather, it was more likely that the decision to place Comet into administration was caused by reduction in facilities by suppliers and an impact on the ratio of inventory to creditors (see [56] above).
169. I agree with Mr Gledhill that it would be wrong to regard an on demand loan facility as a contingent liability. It is clearly an actual liability. Further, it is important to bear in mind that the ability of a company to pay its debts as they fall due, looking at the reasonably near future (that is, cash flow solvency), is not determinative of balance sheet solvency, a test which stands “side by side” with the cash flow solvency test.
170. However, the likelihood of continued support by the lender, in the form of an absence of a demand, is also relevant to a determination of whether a company is able to pay its debts. Kesa would continue to support Comet while it owned it, but only while it did so. It had been clear for some months prior to the Disposal that it wanted to cease to own Comet on terms that it provided no further support.

*DTA*

171. In my view the DTA should not be reflected as an asset in determining Comet’s balance sheet solvency. Irrespective of whether it is or is not capable of being characterised as a present asset for the purposes of s.123(2) IA 1986, I prefer Mr Ellison’s evidence that it should in any event be ignored.

172. As Mr Ellison said, the consideration of the DTA in relation to the FY2011 accounts looks superficial. But by the end of January 2012 the level of the DTA had materially increased and the indications were that Comet's performance had continued to deteriorate.
173. When Kesa announced its half-year results on 7 December 2011 it stated that it had written off the group's UK deferred tax asset because management had concluded that "future UK taxable profits are unlikely". Mr Walters' evidence, also supported by a PwC report and a letter of representation to PwC, was that the practice was for Kesa to determine such adjustments at a group level, with adjustments at local level occurring subsequently. Although the proposed disposal of Comet may well also have been a relevant factor in the write-off, Mr Platt accepted in cross-examination that the increasing concern that Comet would not return to profit would have been an indicator that the DTA should be written off.
174. In my view the fact that the DTA continued to be reflected in management accounts of Comet for January 2012 and for a period thereafter indicates no more than it had not been properly reviewed. As Mr Lewis fairly pointed out, email evidence indicated that the normal process for reviewing deferred tax changes was at the year end, a point also supported by a statement in the FY2012 accounts, the PwC documentation just referred to and by Mr Walters' evidence. But it is also clear from the correspondence that in fact a write off was being considered within Comet by no later than January 2012, there also being reference in February 2012 to a review on deferred tax recoverability being work in progress. Further, by March 2012 figures presented to suppliers incorporated a full DTA write-off. As the Liquidator submitted, given the significance of the relationships with the suppliers, that is unlikely to have occurred unless it was regarded as necessary.
175. My assessment of the evidence is that the fact that a formal decision to write off the DTA was deferred and only made on 24 September 2012 is attributable to (a) a review only being commenced in early 2012 and not completed for a period; and then (b) the impact that an earlier write off would have had on Comet's balance sheet solvency covenant under the HAL RCF, a problem that was only resolved when the terms were amended on 17 September 2012. There is also no evidence to indicate that the New Board considered the recoverability of the DTA for the purposes of the Board meeting on 3 February 2012.

*Overall assessment*

176. My overall assessment of the evidence is that Comet was balance sheet insolvent within s.123(2) immediately before the Disposal, notwithstanding the New Board's determination that it was not. There is no evidence of a detailed scrutiny of the position by the New Board, and realistically it is likely that they focused on cash flow solvency rather than balance sheet solvency. I have determined that the DTA should not be taken into account but that the KIL RCF should. Although certain of the long-term liabilities, in particular in respect of lease-related items, should be discounted to some extent for delay in crystallisation, I am satisfied that it is more likely than not that any discounting would have been insufficient to have resulted in positive net assets.

177. In reaching this conclusion I have sought to stand back and take a realistic view. In particular, I have taken into account Comet's trend of operating losses in the period leading up to the Disposal and Kesa's own increasingly negative assessment of the prospects for the business. I have had regard to the limited interest that there was from potential purchasers, none of whom were prepared to take the business on as a going concern without a substantial dowry. Indeed, one had proposed an immediate administration. Those expressing interest in Comet recognised, in effect, that the business could not operate in the longer term without access to significantly more capital, because it was not generating profits – rather, it was generating increasing losses – and the outlook for profitability was at best very uncertain. There was no clear evidence that the balance sheet was going to improve (compare Lewison LJ's comments in *Bucci v Carmen* at [38] set out at [127] above). Although there was a hope that Comet could return to at least a break-even position, it seems unlikely that it would (at least in the medium term) generate material profits that would offset the significant losses that had been incurred or were projected to occur. In other words, Comet did not have the means, in terms of present assets and their profit generating potential, to pay its debts. Further, while prepared to support Comet while it remained its owner, Kesa wanted a clean break.
178. Whilst not essential to my decision on this point, I also note that Mr Ellison's calculations excluded contingent liabilities that were not provided for in the accounts entirely, whereas I should take account of them. I have little available information, and also bear in mind that the assessment should be carried out on a going concern basis. But for example, the potential liability in respect of the DB Scheme was clearly much higher than the £26.6m taken into account by Mr Ellison, and when considering the alternative of closure Kesa estimated Comet's lease exit costs as ranging between £253m and £422m, suggesting leases that, in reality, had substantial negative value.
179. I have not reached a concluded view on the alternative question of whether Comet was balance sheet insolvent in consequence of the Disposal. That question casts the issue about the use of IFRS or GAAP into sharper relief, because in accounting terms Comet was balance sheet insolvent on the former but not the latter basis. In circumstances where it is unnecessary to reach a concluded view on that issue I would prefer to leave it for another occasion. I would however note that, if it was necessary to identify a balance sheet as a starting point for applying s.123(2), then on the facts of this case it appears to me to be more reasonable to start with IFRS, which Comet in fact adopted during the relevant period and was using for presentations to suppliers and internal management reporting (see [147] above).

### **Cash flow insolvency**

180. The Liquidator's case was that Comet was cash flow insolvent immediately after the KIL RCF was repaid. Darty's position was that Comet was solvent on a cash flow basis both before and after the Disposal. Mr Lewis also reached that view. Again, it is not necessary for me to reach a conclusion on this issue so I will confine myself to some relatively limited observations.



181. It was not disputed that the “reasonably near future” referred to in *Eurosail* should at least cover the next peak trading period. Mr Lewis suggested a period to the end of the following financial year in April 2013. The period of 18 months referred to in the heads of terms and SPA also indicates that, in the context of this (highly cyclical) business, the appropriate period to consider must be at least a year. I am prepared to adopt Mr Lewis’s suggestion.
182. It was also uncontroversial that it is not fatal to cash flow solvency that debts can only be paid with the use of borrowed funds: *Re a Company* [1986] BCLC 261 at 262e, per Nourse J.
183. The Liquidator relied on *Mac Plant Services Ltd. v Contract Lifting Services (Scotland) Ltd.* [2009] SC 125, a decision of the Outer House of the Court of Session, where Lord Hodge said at [76]:
- “... in order for borrowed funds to be a factor in the assessment of cash flow insolvency the funds must be available or there must be a significant probability that they would be available in time for the debts to be paid.”
184. However, as is made clear in the earlier part of that paragraph, the context there was an attempt to rely on cash balances available to a parent entity where there was no history of assistance being provided, and the court was being “invited to speculate” on whether assistance might have been forthcoming. Lord Hodge went on to determine that there was no significant probability of that occurring.
185. On the facts of this case, whether Comet was cash flow insolvent immediately after the KIL RCF was repaid turns entirely on whether the future availability of funds under the HAL RCF, and/or the ABL facility, was sufficiently assured to justify the conclusion that Comet was able to pay its debts as they fell due, and would continue to do so for the reasonably near future.
186. In each case drawings depended on H2L or HAL’s consent (see [50] and [51] above). Comet’s vulnerability was made worse by the weekly cash sweep provision in the HAL RCF, by the withdrawal of credit insurance at the end of January 2012 and by onerous terms in the HAL RCF such as the “clean down” provision. OpCapita had refused to provide an undertaking to Kesa that Comet would continue to be operated as a going concern, instead giving a much weaker statement of present intention. Rather than losing money by allowing Comet to fail, HAL (and H2L) had already benefited to the tune of £36.18m plus the value of HAL’s security over Comet’s assets. Unlike Kesa its new owners did not have to worry about the impact of failure on their share price or on their broader relationships with suppliers or credit insurers. Deloitte had also advised that the optimum time to enforce security was November or December, when stock had built up for the peak period (see [56] above).
187. Further, there is at least some evidence that even if further drawings under Tranche C would be permitted, any drawing under Tranche D was unlikely. Mr Walters recalled Mr Darke telling him that he had been informed that the “D” stood for “do not use”, and a cash flow forecast from late January or early February 2012 had entries suggesting that Tranche D might need to be deducted

in calculating available funds, in contrast to Mr Lewis's assumption that it was available. That is entirely plausible: the undrawn portion of Tranche C corresponded to the £36.18m held by HAL following completion. Unless Comet had by then generated additional net cash, any drawing under Tranche D would require further funding to HAL. The forecast just referred to indicates that, when it was prepared, it was anticipated that Tranche D would need to be called upon at some points.

188. Nonetheless, I would not have been readily persuaded on the evidence that it would be right to conclude that Comet was unable to pay its debts as they fell due immediately after repayment of the KIL RCF. The New Board had received some form of verbal assurances from OpCapita prior to completion about the availability of funding, and of course that was borne out by events for a period following completion. A representation as to current intention had also been given to Kesa, and a presentation had been made to credit insurers which covered OpCapita's plans to improve the business. New management were brought in along with Alvarez & Marsal, and effort was put into implementing the "100 day" plan. The work done by Deloitte could be viewed as "downside planning".

### **WAS THERE PREFERENCE IN FACT?**

189. As already explained, Darty ultimately confined its case on factual preference to a submission that the Tranche B element, representing the Triptych Amount, should be ignored, and to submissions about the counterfactual dividend in a hypothetical liquidation.

### **The Triptych Amount**

190. I do not accept that the Triptych Amount should be ignored in determining the extent of the factual preference. The documentation is clear and should be respected for what it provides. Just as with Tranche A and Tranche C, where payments were made without cash actually moving out of Macfarlanes' client account, what was done in relation to the Triptych Amount was in effect no different to a series of cash payments, set offs being equivalent to cash. In order to repay the portion of the KIL RCF equal to the Triptych Amount element, Comet had to take on the burden of a secured borrowing, being Tranche B of the HAL RCF, just as if cash had moved from HAL to Comet and been used by it to repay KIL.
191. Another way of looking at this is to say that Comet permitted KIL to satisfy the debt that KIL owed to Triptych (which KIL had been directed to pay successively to HHL and HAL) by set off against an amount that Comet owed KIL under the RCF, but this was at the cost of incurring a secured debt to HAL. This is because HAL gave a further direction to KIL to pay Comet, so permitting a set off, only in exchange for Comet agreeing to incur that debt.
192. It is not correct to characterise the arrangement as Triptych rather than Comet giving up value (or indeed KIL or HAL doing so). Triptych had a real asset in the form of a debt owed by KIL, which it replaced with a debt owed by HHL to it. Equally, KIL had a real liability to Triptych which the arrangements allowed it to

satisfy. The arrangements also meant that HAL effected the advance of Tranche B without having to resort to other cash resources, but in return it got the benefit of Comet's secured obligation to repay that tranche. But that is all really beside the point. Comet repaid the Triptych Amount element of the KIL RCF just as it repaid the remainder.

### **The counterfactual dividend**

193. In order to determine the extent of the preference, it is necessary to determine the counterfactual dividend that KIL would have received in a hypothetical liquidation of Comet on 3 February 2012 (see [96]) above. Both experts were instructed on this topic.
194. Mr Lewis concentrated on a critique of the Liquidator's pleaded claim and effectively re-performed the Liquidator's calculations. In contrast, Mr Ellison's approach was to work from first principles to produce an "estimated outcome statement" which incorporated figures for asset realisations largely based on actual receipts in the administration and liquidation that in fact followed around nine months later, which he considered to be the best available proxy.
195. This approach involved dividing the realisation values actually achieved by net book values so as to arrive at a realisation percentage for each class of asset. Mr Ellison then applied those percentages to the figures in the management accounts for the period to 31 January 2012. He also made certain other adjustments that were intended to reflect the fact that the business would have ceased to trade on a hypothetical liquidation (that is, for the purpose of calculating the counterfactual dividend he was considering a "break-up" rather than going concern basis of valuation). In particular, Mr Ellison took the pension deficit number from an independent actuarial review, at £307m rather than £26.6m.
196. Mr Ellison presented a "high" case and a "low" case, the low case reflecting a seasonality adjustment for the likelihood that stock realisations would have been lower in February than in the actual insolvency in November, because February is a quiet month and recoveries in November would have benefited from the fact that November falls in the run-up to Christmas (that is, the peak trading season). He also estimated costs of liquidation by applying actual costs from the November 2012 administration and liquidation with some adjustments, in particular in respect of the costs of litigation against the original administrators and liquidators. His figures were 13.8p/£ for the high case and of 11.4p/£ for the low case, equivalent to a dividend of £17.9m and £14.7m respectively.
197. Mr Lewis did not disagree that a break-up basis was the correct approach or that costs of an insolvency process should be allowed for. The major differences related to quantum. In particular, Mr Lewis did not allow for costs of stock realisations whereas Mr Ellison allowed a total of £79.6m, arriving at a stock realisation percentage of 31.8%. In the joint statement Mr Lewis did not dispute £30.3m of these costs. Of the balance, the major items were retention of title payments, agents' fees and costs shown as incurred between 2 May and 2 October 2013, a period during which sales were negligible.

198. I am satisfied that Mr Ellison’s approach on stock realisations is reasonable, and further that the “low” case (being 11.4p/£, or £14.7m), which was not specifically challenged and the adjustments made in which were based on a report produced by a third party for OpCapita in January 2012, is to be preferred. I further accept Mr Ellison’s evidence that retention of title holders would not typically receive amounts corresponding to their entitlement as unsecured creditors, but rather that in practice they would achieve settlements much closer to 100% recovery. A material adjustment is therefore necessary to ensure that the recoverable value of stock is not inflated by ignoring that a part of it would have been subject to retention of title claims. In the absence of better information it is not unreasonable to apply the same ratio of retention of title claims to stock as existed in the actual insolvency.
199. Similarly, the allowance for agents’ fees reflects the costs of engaging a third party agent to manage stock realisations. There is no reason to assume that such costs would not need to be incurred. As for the costs incurred between May and October 2013, Mr Ellison pointed out that the receipts and payments shown were accounted for on a cash basis, such that the costs would be very unlikely to relate simply to the very limited sales made in that period. I accept this evidence.
200. Turning to the costs of liquidation, Mr Ellison allowed for £24m of costs, based on actual costs of the administration/liquidation with adjustments. In the joint statement Mr Lewis stated that there was insufficient information to provide an accurate estimate, but applied a 50% discount to Mr Ellison’s figure for “illustrative purposes”. I agree with Mr Ellison. The court must do the best it can with the evidence. Mr Ellison’s approach is reasonable and I adopt it.

## **DESIRE TO PREFER**

201. The Liquidator’s primary case relies on an alleged desire on the part of KHL, KEP, KIL and Mr Enoch. It is convenient to consider that first. For these purposes, I see no relevant distinction between any of KHL, KEP, KIL and Mr Enoch.
202. As already noted, there was a “core” deal team comprising Mr Enoch, Mr Platt and Mr Stoodley, and Mr Enoch took the key role in negotiating the detailed terms of the transaction on the Kesa side. Mr Platt was obviously closely involved in the financial aspects, including contacts with suppliers and credit insurers. I have seen nothing in the witness evidence or in the limited documentary evidence that survives to indicate any relevant difference in views between these three individuals, or between them and the Boards of any of KHL, KEP and KIL. For convenience I will refer to Kesa’s thought process, desires and/or objectives below, meaning those of Mr Platt, Mr Enoch and any other individuals involved in the key decision making process on the Kesa side. However, first I will say something about the relevance of the presumption in s.239(6) IA 1986.

## **The relevance of the presumption**

203. As explained at [62] and [63] above, what is likely to have been a material body of emails of Kesa employees were deleted in 2016, such that relatively few emails

between the core deal team survive. I agree with the Deputy Judge that the presumption in s.239(6) IA 1986 has the effect that I should make no assumptions that any such material would have assisted Darty's case or adversely affected the Liquidator's as far as concerns Kesa employees.

204. However, whilst this is relevant to any views formed by Kesa executives prior to or at the time that the SPA was signed, the position is different in relation to the New Board's thinking around the time the Disposal was completed. To the extent the case turns on that, evidence about the thought processes of the New Board – which is what Darty says exists – must in principle be capable of forming the basis of a conclusion that there was no desire to prefer.
205. The basic point is of course that the presumption is a rebuttable one. It is open to Darty to demonstrate that any relevant decision was not tainted by a desire to prefer.
206. Nevertheless, I agree to some extent with Mr Gledhill's submissions about the function of the presumption. As he said, motives are often unexpressed and may be transient, and it can be very difficult to pin down and determine their effect years after the events in question. I would add that it is important to bear in mind that the statutory test only requires a desire to prefer to be one of the factors which operated on the minds of those who made the decision. It is this element that has undoubtedly led judges to make comments along the lines of that made in *Re Oxford Pharmaceuticals Ltd* (see [106] above) about acting solely by reference to proper commercial considerations. Indeed that very point was made by Millett J in *Re MC Bacon* at p.87H. In practice, the presumption has the effect of imposing a burden on the creditor to prove that the factors that operated on the minds of the decision-makers did not include a desire to prefer. I also agree with Mr Gledhill that the comments of Leggatt LJ in *Ablyazov* in relation to inferences (see [103] above) are of some assistance.

### **Kesa's thought process and objectives**

207. Kesa's overriding objective was to achieve a clean break from Comet, with its downside risk capped. However, in order to achieve that without damage to Kesa's wider reputation and business, it was also regarded as critical that Comet was sold as a going concern, with at least no immediate prospect of an insolvency process. The acquirer's financing structure was regarded as critical to this. As the briefing paper for the 14 September 2011 Board meeting referred to at above [22] states, the "key question" for the OpCapita bid was the "adequacy of their financing proposal for the business".
208. As the briefing paper explains, that financing proposal was £120m in the form of working capital. The way in which this was anticipated to work was explained to credit insurers at the presentation referred to at [31] and [32] above. The fundamental components were £50m and £30m respectively from Kesa and OpCapita, plus a £40m ABL facility. The significance of the overall package to Kesa is underlined by the extremely unusual provision for £30m liquidated damages if the ABL facility was not in place at completion (see [43] above).

209. Leaving Comet's funding position to one side, the SPA and completion arrangements could have been structured in a number of different ways to achieve the same overall economic result as between Kesa and OpCapita. The most obvious thing to do in a "dowry" sale where debt is clearly "under water" would be to capitalise or waive all debt owed to the selling group, and transfer the shares for a nominal sum with the agreed dowry of £36.18m being paid to the buying group (option 1). An alternative would be to assign the debt for a nominal sum, rather than waive or capitalise it, but otherwise take the same steps (option 2). I note that Valco's first round offer and at least one of the alternatives offered in the second round were premised on an assignment of debt, and OpCapita's first expression of interest referred to the "acquisition" of intercompany receivables owed by Comet.
210. However, this was not what was done. If it had been then the presentation to credit insurers would have looked different. In particular, the structure chart depicting £80m being injected into Comet by the purchasing vehicle as a revolving facility would have been manifestly incorrect, obviously so under option 1 but in effect also under option 2. That structure chart necessarily involved repayment of the KIL RCF. To adopt the language of Leggatt LJ in *Ablyazov* at [16], that repayment was not something that Kesa would have wished to avoid or had no wish to bring about. Rather, given the economics, I must infer that it is something that Kesa desired. Otherwise, using the figures in the structure chart, it would have been left with a net payment by it of £80m rather than the much lower dowry that it intended to pay.
211. It follows that I do not accept Darty's case that it was OpCapita and the Investors who were solely responsible for the structure, with Kesa just going along with what they proposed. The capital structure of Comet immediately following the Disposal was of critical significance to Kesa. The structure was agreed by both parties and was reflected both in the joint presentation to credit insurers and in the agreed documents. The repayment of the KIL RCF was part of this, and was something that I conclude that Kesa positively desired to achieve. The structure was not a matter of indifference to it, or just a necessary consequence of agreeing to an OpCapita proposal.
212. I accept that work on the detailed mechanics of the structure was led by OpCapita. This work obviously progressed in earnest following the meeting on 18 October 2011 referred to at [26] above at which Mr Walters explained that the debt figure that OpCapita had previously been working with was a net number produced by consolidating the results of Comet and Triptych, because in addition to Comet being indebted to KIL, KIL was indebted to Triptych. A draft structure chart was sent by Macfarlanes to Slaughter and May for discussion the following day, showing among other things £69m of debt owed to Triptych being repaid and on-lent into the structure (£69m presumably being the latest available figure for the amount outstanding). This was followed by a more detailed structure paper which Macfarlanes sent to Slaughter and May on 28 October.
213. Darty relied on Mr Walters' description of the reaction by Joshua Spoerri of OpCapita to his presentation of unconsolidated debt figures as being like a light coming on, with Mr Spoerri telling Mr Jackson that he now knew how they were going to structure the deal. In my view the significance of this was over-

emphasised. The particular significance of the fact that Comet's unconsolidated debt was a much higher number than OpCapita had previously thought was that (a) it allowed OpCapita to take security over a much higher level of debt than could otherwise be achieved (specifically, extending to an amount equal to the Triptych Amount); and (b) it also allowed Comet's capital position to be presented to suppliers in the manner that it was, with a revolving facility of at least £80m as insisted on by Kesa (rather than the lower amount implicit in the net debt figure that OpCapita had been working with), in each case without Comet actually receiving further cash resources. So it allowed both parties' objectives to be achieved, and indeed in OpCapita's case with an additional bonus of extra security with no concomitant exposure. I am not surprised that Mr Spoerri became animated.

214. I have no doubt that Mr Enoch was clear throughout the discussions that, apart from the modest level of capitalisation agreed, inter-company debts would all be settled at completion. The impression he gave in his witness evidence was that he really gave no thought to this, simply assuming that they would be repaid in the way he understood was absolutely routine on any disposal of a subsidiary, and leaving all the financial details to PwC Transaction Services, who were assisting Kesa with the financial aspects of the sale.
215. However, Mr Enoch is a lawyer with obvious experience of corporate finance transactions, including buying and selling subsidiaries. He must have been well aware that this was far from a routine sale where intragroup debt repayments to the selling group form part of the value received. He clearly understood the example I put to him of a company valued at £100 on a debt-free cash-free basis, which has £99 of intragroup debt owed to the selling group, where the seller could choose to sell the shares for £1 and have the debt repaid, or waive or capitalise the debt and sell the shares for £100. In either case the seller receives £100 of value, whereas in this case the commercial deal involved a net transfer of value to the buying group, making a repayment of the debt – something that in reality transfers as much real value to the seller as consideration for the sale of shares – surprising.
216. I do not accept that Mr Enoch left everything to PwC. I agree that the evidence indicates that PwC took the lead in relation to points of detail, such as commenting on the precise drafting mechanics, but Mr Enoch was clearly involved in and agreed the fundamentals, and in particular that the various intragroup debts would be repaid. For example, an email dated 20 October 2011 from Mr Enoch to Mr Walters and Barbara Bailey (Kesa's group treasurer) about whether the loan agreement between KIL and Triptych should go in the data room makes clear that all OpCapita should worry about is that "the loan will be cancelled and repaid", and goes on to suggest that "someone sets out how we see the cash flowing on completion and how we will unwind the various intercompanies", so stopping "a lot of unnecessary time being spent by all parties as all they need to be certain of is that they are getting the cash etc they think they are entitled to, and we have the certainty we are retaining the cash etc we think we are entitled to...".
217. The Liquidator placed significant reliance on evidence of debt repayment mechanics having been discussed at a much earlier stage on the Kesa side,

between Mr Enoch, Slaughter and May and PwC. This was evidenced by an email sent by an associate at Slaughter and May, Amy Hutchings, to Mr Enoch and two representatives of PwC on 17 August 2011. The email referred to a call the previous day and attached a draft amendment to the SPA (in the form of three riders) to reflect the discussion “that provisions should be added to the SPA to ensure that Inter-Company Balances are repaid at Completion”.

218. This occurred at a point in the process when Kesa had invited second-round bids, but had not yet received them. A draft SPA had been sent on 27 July 2011 with the letters inviting second round bids, but it is unclear from the evidence whether a revised draft was circulated before revised bids were received on 2 September 2011. Before second-round bids were received it would not have been apparent that this was going to be a “dowry” sale rather than one where Comet derived at least some element of positive consideration. Drafts produced before that became clear might have been very different, and indeed this is reflected in OpCapita not providing the requested mark-up of the SPA when it submitted its second-round bid, stating instead that it was seeking a “...short and simple share purchase agreement with limited representations and warranties...”.
219. Whilst the email sent by Ms Hutchings does reflect an expectation on the Kesa side that debt would be repaid, in reality I think it occurred at too early a stage in the process to bear the weight attributed to it by the Liquidator. What is more significant are the conclusions I draw from the discussions that obviously occurred between OpCapita and Kesa following OpCapita’s second-round bid, as reflected in the briefing paper for the Kesa Board on 14 September and the Board minutes, the heads of terms and the later presentation to credit insurers.

### **Whether Kesa had the desire to improve KIL’s position**

220. As already discussed, a desire to make a payment is not enough. What is required is a desire to improve KIL’s position in the event of an insolvent liquidation of Comet.
221. I do not accept that Mr Enoch and others at Kesa did not contemplate the possibility of an insolvent liquidation. Whether or not they formed the view that Comet was solvent at the point of Disposal, they undoubtedly knew that there was a risk of an insolvency process. This is amply demonstrated by the attempt to obtain an undertaking that OpCapita would run Comet as a going concern, an undertaking that was in the heads of terms but which Mr Enoch explained became a “dealbreaker” for OpCapita as signing approached, until it was watered down to a much weaker statement of intent. Kesa’s recognition of the risk is also evidenced by the reference in the 14 September briefing paper to a financial buyer (such as OpCapita) potentially being “more ready or able to put the business into administration”: see [22] above.
222. Comet’s own FY2011 accounts had only received a “clean” audit with the benefit of a letter of support, and Comet had also provided direct assurances to some credit insurers (see [16] above). Furthermore, EY’s covenant review in relation to the DB Scheme, of which Mr Enoch was well aware, also pointed to limited recoveries by unsecured creditors in an insolvency process. One bidder had explicitly proposed an administration, and at an earlier stage advice from Lazard



had also considered that possibility. Kesa's consideration of OpCapita's proposal that Kesa act as buying agent (see [19] above) also recognised the potential for insolvency.

223. The fact that Kesa had no wish for Comet to go into an insolvency process, and indeed was seeking to put in place a capital structure that it perceived would reduce the risk of that (at least in the short term), as well as seeking to obtain an assurance from OpCapita as to its plans, does not mean that the possibility of an insolvent liquidation was not in its contemplation.
224. A further point raised by Mr Gledhill was that, despite Kesa's hope that OpCapita could perform a successful turnaround that kept Comet in business as it had done with BUT, Elliott's involvement as an aggressive investor would have raised additional concerns. I am not wholly persuaded by Mr Enoch's evidence that he only recalled becoming aware of Elliott's involvement following the Disposal. The documentary evidence indicates that Kesa's advisers Slaughter and May are likely to have become aware before the SPA was signed (because Elliott was named in an email chain forwarded to members of the Slaughter and May team), and if they did it seems highly likely that they would have informed their main contact at Kesa, Mr Enoch. But even if Mr Enoch's recollection is correct, the lack of interest that displays in understanding who the Investors were, in the context of a major transaction where Kesa was also taking a stake in the acquirer, stands out. I was left with somewhat of an impression of choosing not to ask, rather than taking steps to get a real understanding of whom Kesa was dealing with.
225. I accept that no one at Kesa seriously contemplated an insolvent liquidation of Comet while it remained part of the Kesa group. Mr Smith submitted that that meant that the Liquidator's case could not work, because it would never have been contemplated that there could have been an insolvent liquidation at a point when KIL remained a creditor. The KIL RCF would always have been unwound on any disposal.
226. I do not consider that this is fatal. If the submission was correct then that would materially undermine the effectiveness of s.239. It would really amount to saying that it cannot apply in any situation where a debtor is prepared to do whatever it takes to immunise a particular creditor from an insolvency process, by paying them off before there is a real risk of any such process commencing. It makes no difference to this that paying the debt off may be part of a broader transaction in which shares are also transferred.
227. In the absence of the Disposal no repayment of the KIL RCF would have occurred, and KIL would have remained – with other creditors – as an unsecured creditor. Instead, the Disposal allowed Kesa to extract itself with its exposure firmly capped, well below the cost that it anticipated that it would otherwise have incurred in seeking to turn Comet around or close it down, and on financial terms that included the repayment of most of the KIL RCF. At the least, any alternative course of action involved the potential for material additional loss, and certainly not the repayment of most of the KIL RCF.

228. It is no answer to this to say that Kesa would not have agreed to a transaction in which intercompany debts were not unwound. It is clear that the intercompany debts needed to be dealt with on any “clean break” exit (although not in some of the alternative transactions that interested parties had proposed) but, absent both parties’ requirements for Comet’s future funding structure, the KIL RCF would not have been repaid. Any of the much more obvious alternatives of assignment, waiver or capitalisation would not have had the effect of conferring a preference, but would still have allowed a “clean break”.
229. Darty relied on Mr Enoch’s witness evidence as demonstrating that he (and others at Kesa) had no subjective desire to put KIL in a better position, and in particular the following passage in Mr Enoch’s first witness statement:

“I think that any of us who were involved in the [Disposal] would have found the idea that KIL or Kesa was gaining a financial advantage at the expense of other creditors to be laughable. The overall terms of the [Disposal] meant that KIL was giving up a huge amount, as it was contributing £50 million plus an additional amount of approximately £28.5 million to the OpCapita structure (the overall net cost to KIL of the [Disposal] was approximately £36.2 million). Kesa was also taking on the whole of the pension scheme liability.”

230. I have already made some comments about my assessment of Mr Enoch’s evidence: see in particular [65] above. In my view, Mr Enoch, Mr Platt and others would have been well aware that the passage just referred to does not reflect the complete picture. In any alternative scenario that was contemplated, including an insolvency, KIL would not have been repaid as it was. As Millett J explained in *Re MC Bacon*, the existence of a desire to prefer can be inferred from the circumstances of the case. The Disposal was deliberately structured to have the effect that the KIL RCF was repaid, and I have found that Kesa positively desired to achieve that result.

### ***Re Drabble* and Mr Enoch’s role as a director of Comet**

231. Mr Smith sought to dismiss Mr Gledhill’s reliance on *Re Drabble* (see [113] above) by reference to Millett J’s warning in *Re MC Bacon* that cases decided under the old law do not assist. I agree with Mr Gledhill that *Re Drabble* remains relevant for its discussion of the role of agents in assessing whether the relevant mental element (then a dominant intention, now a desire) is established. What that case is authority for is that an intention (desire) on the part of an employee or agent can be imputed to their principal. That must be right. Otherwise it would be difficult for the legislation to operate effectively not only in any larger organisation, where decisions as to whom to pay and when would typically be delegated (and indeed with different aspects of the process potentially being dealt with by different people), but also on the facts of *Re Drabble* itself where the relevant partner simply signed cheques presented to him. As Lawrence LJ said at p.237, the door would otherwise be opened to fraudulent preferences by traders shutting their eyes to what their employees are doing on their behalf.
232. What I find much more difficult is Mr Gledhill’s submission that it was enough for Mr Enoch to happen to be a director, and therefore agent, of Comet (see [112]

above). *Re Drabble* was a case where the agent, Tiley, was acting in the course of his role as the person in charge of the financial side of the business. As Lord Hanworth MR said at p.232, the payments were “within the scope of his employment”. The Master of the Rolls went on at p.234 to refer to the following statements by Lord Halsbury in *Blackburn, Low & Co. v Vigors* 12 App. Cas. 531, 537, 538:

“Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal,” and

“where the employment of the agent is such that in respect of the particular matter in question he really does represent the principal, the formula that the knowledge of the agent is his knowledge is I think correct.”

233. At p.234-5 the Master of the Rolls then applied “that principle” to the present case. He decided that Mr Drabble had:

“... so far delegated his authority as to make the act and intention and the knowledge of Tiley his own, because Tiley, on those details of the finance, represented his principal, and thus made his, Tiley’s, intentions, the intentions of his principal.

On the facts of this case it appears to me quite clear that the actions of Tiley and the intentions of Tiley can be and ought to be imputed to the principal, for Tiley was delegated by the principal to represent him, F. Drabble, in carrying out all this very necessary part of the business.”

234. Both Lawrence LJ and Romer LJ agreed. Romer LJ referred twice in his judgment (at p.238) to the criterion of an agent acting within the scope of his authority, and to the fact that Tiley was an agent who was entrusted to make decisions about the selection of creditors for payment.

235. In my view *Re Drabble* is authority for the proposition that a desire to prefer held by an employee or agent of the debtor acting in their capacity as such may be attributed to their principal where that desire influences the relevant decision. It does not support a proposition that desires of an individual can be attributed to a company simply because they happen to be an agent or employee, if they are not acting in that capacity.

236. That such a proposition does not represent the law can be tested in the following way. It is well established and uncontroversial that paying a creditor in response to pressure from the creditor should not result in a preference: the Cork Report recommended at paragraph 1256 that genuine pressure from a creditor should continue to afford a defence. If it was sufficient that a creditor exerting pressure happened to be an employee or agent, rather than someone involved in the debtor’s decision-making process, then this principle would be undermined.

237. In other words, a desire to prefer must have been held by a person or persons involved in the debtor’s decision making process, such that it was capable of

being a factor which (adopting Millett J's words) "operated on the mind" of the decision maker or makers.

### **Whether Comet took a decision on or around 9 November 2011**

238. It follows from this that it is insufficient that Mr Enoch happened to be a director of Comet and possessed the requisite desire. However, that is not the end of the matter. The Liquidator's primary argument, summarised at [111a)] above, was that Comet's decision was in reality taken "on or around 9 November 2011 by KHL, KEP and (on behalf of Comet) Mr Enoch", and the New Board simply gave effect to that decision.
239. As a formal matter, no decision was required to be taken by Comet before or at the time that the SPA was entered into on 9 November 2011, because Comet was not a party to that document. However, the SPA was explicit about what Comet would be required to do on or prior to completion of the SPA. This included entering into new secured borrowings, capitalising debt and repaying all remaining intercompany balances using funds drawn on the HAL RCF. Although the SPA contemplated that the New Board would "review the financial position of the Company" prior to completion, no provision was included to cover the possibility that it might find it to be unsatisfactory. Given the care usually taken in detailed documentation to cover risks of anticipated events not occurring, I infer that the possibility of the New Board not falling into line was not considered to be a real risk.
240. The position can be contrasted with the conditions to completion identified in the SPA, and the provision in respect of the ABL facility. As to the former, there were specific provisions imposing "reasonable endeavours" obligations on the relevant parties to ensure fulfilment of the various conditions, subject in the case of KEP shareholder consent to a caveat about directors' fiduciary duties, and provisions covering the possibility that one or more of the conditions was not fulfilled by a long stop date. As to the latter, as already mentioned there was a specific termination provision if the ABL facility document was not provided executed by all parties other than Comet, with a liquidated damages provision (see [43] above).
241. In contrast, there was no specific provision covering a failure by Comet to do what was expected of it. Whilst it was apparently the case that a failure to repay the KIL RCF would have amounted to a breach of OpCapita's procuring obligation under clause 7.5 of the SPA (see [40] above), in reality the manner in which intragroup debts was to be dealt with was prescribed in detail in clause 8, and required the full participation of both Kesa and OpCapita, as well as Comet. Clause 8 also required the relevant steps to be taken prior to completion, whereas clause 7.5 imposed obligations at completion. In practice it would never actually operate. As far as the ABL facility was concerned, the liquidated damages provision did not cover a refusal by Comet to execute it, although it is the case that one of HAL and HHL's completion obligations was to procure the provision of a fully executed ABL.
242. Of the five directors Comet had at the time (see [9] above), both Mr Enoch and Mr Platt were heavily involved in the process of agreeing the terms of the

Disposal. It is clear from the evidence that the other Comet director who also had a KEP role, Mr Falque-Pierrotin, was content to leave the details to them. As between Mr Platt and Mr Enoch, it was Mr Enoch who dealt with the documentary detail. Mr Terrier, the fourth director, appears to have had no material involvement in the Disposal at all. The fifth director, Mr Darke, clearly had a real interest as part of the proposed New Board, but he was not involved in agreeing the terms of the SPA and did not even see it before it was signed. Rather, Mr Enoch's evidence was that during the negotiations Kesa did not want to "distract Comet's management team from their day job and from implementing the turnaround plan". Mr Enoch used Mr Darke as a source of information when he needed it, but did not otherwise involve him in the process.

243. Mr Enoch's first witness statement referred to a conflict between his role at Kesa and his role as a director of CTCL (the DB Scheme trustee), and explained that as a result he had recused himself from the latter. When asked in cross-examination how he had managed the conflict between his duties to Kesa and his duties to Comet, his response was that he did not perceive there to be a potential conflict. He explained that "there never would have been a transaction" if KIL had not been repaid, and that Kesa wanted a clean break.
244. I found this illuminating. Individuals comprising the majority of Comet's Board, being Mr Falque-Pierrotin, Mr Platt and Mr Enoch, were clearly content, either consciously or by leaving the details to Mr Enoch, to enter into a transaction which contemplated Comet taking actions that, left to its own devices, might well be perceived as not being in its own interest. Neither Mr Terrier nor Mr Darke were "in the loop" when the SPA was entered into. Kesa was driven entirely by the desire for a clean break, whilst meeting its objective of leaving Comet with a capital structure that could allow it to continue as a going concern. No separate interest of Comet was perceived to exist. Further, as far as the structure for repaying the KIL RCF was concerned, OpCapita's and Kesa's interests were aligned: see [213] above.
245. In the very particular circumstances of this case I consider that it would be too narrow an approach, and effectively a triumph of form over substance, to find that there was no decision by or on behalf of Comet at the time that the SPA was entered into because it was not formally a party to that document. I am not satisfied on the evidence that Mr Enoch was acting solely in his role as Kesa's General Counsel and not on behalf of Comet. Mr Enoch was a director of Comet, as well as its effective General Counsel at Board level (see [67] above), and he did not see a conflict between that role and his role as Kesa's General Counsel. He was acting in a Kesa "group" capacity, a group that at that time included Comet, an entity in respect of which he saw no separate interest from that of the rest of the group. The SPA, which Mr Enoch had been heavily involved in negotiating, was prescriptive about what Comet would be required to do and no provision was made to cover the possibility that it would fail to take the actions contemplated. The contrast with the condition related to KEP shareholder consent, with its caveat about directors' fiduciary duties, is stark.
246. Mr Darke's assessment was that, if Comet's directors had refused to take the actions required of them to allow the Disposal to complete, Kesa would have replaced them with more amenable directors. He was taken in cross-examination

to a passage in Mr Walters' witness statement where Mr Walters reported Mr Darke telling him at a later stage that the New Board had considered resigning as directors and had also considered what would happen if they refused to sign the relevant completion documents, "and their conclusion was that Kesa would have found other directors to replace them, and so the outcome would have been identical". Mr Darke could not recall the specific conversation but confirmed that it was consistent with his evidence, and he could fully believe that he might have said that to Mr Walters. He also said in his witness statement that, following KEP shareholder approval being obtained, a sale was inevitable.

247. I agree with Mr Darke's assessment. By the time it got to 3 February 2012 the New Board's hands were tied. It was theoretically open to them to refuse to pass the necessary formal resolutions, but in reality it would have been extremely difficult to do so, and they would have been sacked and replaced. Kesa had concluded that it was in its interests to cap its exposure to Comet by disposing of it on the terms that OpCapita was prepared to agree. The alternatives it considered were much less attractive to it, and considerably more expensive. Rather than those alternatives allowing the KIL RCF to be repaid, in reality they would be likely to involve it being left outstanding and potentially substantially increased to allow other creditors to be repaid. If anything KIL would be deferred, rather than preferred.
248. By the stage the Disposal was due to complete KEP had, as the SPA contemplated, undergone the very public process of seeking and obtaining shareholder approval to the Disposal. While the carefully choreographed documentation appears to leave it to the New Board – unusually appointed immediately before rather than at completion – to take the necessary decisions on behalf of Comet, so distancing the process from Kesa, the real decisions were taken much earlier. The New Board were expected to play ball or be sacked and replaced by people who would.
249. In these circumstances Mr Goldring's role was a difficult one, essentially of damage limitation, focusing on the directors' exposure to a breach of duty claim. Comet and its Board had previously received no external legal advice about the Disposal. Comet's own internal legal adviser, Mr Annett, had no real involvement in the process (see [67] above). Mr Enoch was focused on Kesa's objectives, and had seen no conflict. Slaughter and May and Macfarlanes were obviously looking after the interests of their clients, Kesa and OpCapita respectively, and not those of Comet.
250. Mr Goldring was presented with a large amount of documentation, effectively at the last minute and generally on the basis that it was already agreed and could not be altered. He (fairly) got the impression that Comet was being expected simply to comply with the wishes of other transaction parties rather than give its own input on the documents. Although Mr Goldring was allowed to propose changes to the draft Completion Minutes, he only saw them at a relatively late point, after they had been agreed between Macfarlanes, Slaughter and May and Bingham McCutchen, who were acting for the Investors. His proposed changes were scrutinised and not all of them were accepted.

251. Mr Smith submitted that there was no evidence to support the proposition that a decision had been made by Mr Enoch on behalf of Comet at the time the SPA was signed. He submitted that Mr Enoch was only a non-executive director of Comet. However, the majority of Comet's Board was content to leave the details to him, and Mr Darke was positively excluded. To the extent that the "non-executive" label is relevant at all (which I am doubtful about), I do not agree that Mr Enoch should be characterised as such. Mr Enoch was acting very much in an executive capacity, as the group's General Counsel. His job was to get the deal done.
252. It is true that it was not specifically put to Mr Enoch that he was acting for Comet on 9 November 2011, when the SPA was signed. I am prepared to assume that, if asked, he would have sought to deny it, reflecting the fact that he signed the document on behalf of KHL and KEP and not on behalf of Comet. However, in my view that does not make a difference to the result. I accord more weight to my assessment of the contemporaneous documents (in particular, the terms of the SPA: see [239] to [241] above) and the commercial realities at the time, together with Mr Enoch's group-wide role and his failure to identify any difference of interest between Kesa and Comet.
253. Finally on this topic, I need to address Mr Smith's submission that the Liquidator has not pleaded that Comet had a desire to put KIL in a better position. Rather, the amended reply pleaded that Mr Enoch's (or Kesa's) desire to achieve a better outcome influenced Comet's decision.
254. I do not agree that this is problematic. I have concluded that Mr Enoch and others at Kesa (see [202] above) had the requisite desire. Mr Enoch was a director of Comet and was its effective General Counsel at Board level. Other members of the Comet Board were either content for Mr Enoch to proceed as he did, or were effectively excluded from the process. That desire influenced a decision which I have concluded was taken by Mr Enoch on behalf of Comet: see [245] above. In the words of Millett J in *Re MC Bacon*, it was one of the factors operating on the mind of the decision maker.
255. Related to this, Mr Smith submitted that the presumption in s.239(6) did not assist the Liquidator because it is framed as a presumption that the provider of the preference (Comet) was influenced by a desire to prefer, rather than anyone else being so influenced. I am not convinced that this case turns on the presumption, but my response is similar. I have concluded that a decision was taken on behalf of Comet. The presumption must be capable of applying to the thought processes of the individual or individuals who in fact took that decision.

### **The resolutions passed by the New Board on 3 February**

256. The conclusion that a decision was taken on behalf of Comet at the time that the SPA was entered into does not dispose of the issue of desire to prefer in the Liquidator's favour. It is undeniable that, at least formally, the New Board itself took decisions on 3 February 2012. Further, it is clear that members of the New Board, and their adviser Mr Goldring, believed that they had a decision to make, albeit that in reality it was a binary decision as to whether to go ahead and approve the proposed transaction as a whole or refuse to do so. As Mr Darke explained:

“The repayment of the loan to KIL was wrapped up in the deal and we were not in a position to unpick it.”

257. The most relevant passage of the Completion Minutes runs from sections 16 to 21. Most of section 16, which considers solvency, has already been set out (see [133] above). Section 17 records the New Board’s consideration of the terms of the finance documents, noting among other things the weekly cash sweep, “widely drawn” events of default and that attempts to improve certain of the terms had not been fully successful. It goes on to record consideration of a cash flow forecast which showed that Comet was “likely to run out of cash within a few weeks” if drawdown requests were not permitted, noting that no written commitment to permit drawdowns had been provided, that the proposed transactions would not result in Comet being immediately unable to pay its debts within s.123 IA 1986, but that Comet would “inevitably run out of cash in the foreseeable future” without additional funding.
258. Section 18 records the New Board’s approval of the proposed transactions and documents as being for the commercial benefit of Comet and most likely to promote its success “for the benefit of its members and creditors as a whole”. Section 19 deals with the mechanics of repaying the KIL RCF, and section 20 deals with certain post-completion documents, including the Governance Agreement (see [51] above).
259. Section 21 is a general section which considers the “effects and implications” of the Disposal and related documents at section 21.1, and records at 21.2 the New Board’s conclusion that it was in Comet’s best interests to enter into the series of transactions, having regard to the interests of members and creditors as a whole.
260. The effects noted in section 21.1 included the £115.4m of indebtedness to be incurred to HAL, with all the cash being used to repay existing debt, the security that HAL would obtain and its ability to appoint an administrator on the occurrence of an event of default, the point that the ability of Comet to meet its debts as they fell due would depend in part on the willingness of H2L and HAL to permit funds to be drawn down, the risk that on a sale by an administrator the value of the assets may not exceed the secured debt, and the risk that, in the event of an administration, HAL’s ultimate owners might be able to “engineer a transfer of the enterprise value of the Company to themselves, free of unwanted liabilities leaving unsecured creditors with little or nothing”.
261. In reaching the conclusion that the proposal should be approved, section 21.2 records the New Board’s reasons as follows (the “Ultimate Owners” are the Investors):
- “21.2.1 The transaction represents an opportunity for the Company to be divested of a substantial amount of unsecured debt.  
21.2.2 There is no specific reason to believe that the Ultimate Owners will not be prepared to invest in the business of the Company and facilitate the achievement of the Business Plan through permitting further draw downs under the RCF Agreement.



21.2.3 There is no other deal available which might be structured any differently and which would provide any better opportunity for the Company to survive.

21.2.4 OpCapita and the Ultimate Owners have indicated that they intend to support the business of the Company. Although their supportive actions to date are also consistent with those of a party intending to have an interest as a secured creditor, in enhancing the viability and value of the Company's business and assets, the Continuing Directors have no reason to doubt the sincerity of the Ultimate Owners. The Continuing Directors believe that the potential upside in ownership of a revitalised business may exceed any prospect of a short term gain.

21.2.5 The only alternative (absent a different deal with other investors) is an imminent administration, the outcome of which is unlikely to produce a meaningful dividend for unsecured creditors. The Continuing Directors have seen an analysis of a projected outcome on an insolvency which was prepared by Ernst & Young in October 2011 and have no reason to doubt the assumptions underlying that analysis. The analysis indicates a range of dividend for unsecured creditors of between 3% and 13%. Since trading has deteriorated since then and terms with suppliers have hardened, the Continuing Directors are of the view that the lower end of the range is more likely at the present time."

262. A critical part of this reasoning was flawed. It was not the case that the "only alternative" was an imminent administration. If the deal did not proceed then Kesa's "Plan B" was to continue with the turnaround plan (see [28] above). Kesa would not have readily permitted an insolvency process.
263. This wording referring to the only alternative being an imminent administration had derived from one of Mr Goldring's mark ups of the Completion Minutes. Whilst it clearly reflected his understanding of the position at the time, he had failed to appreciate what Kesa's actual fallback position was if the Disposal did not proceed. In doing so he had not been actively misled by Kesa (although there are unanswered questions about how the text ended up remaining in a document that must have been seen by Kesa's advisers, and which Mr Enoch also accepted that he may have read at the completion meeting). Rather, in response to a question from Mr Wingfield at SJ Berwin about the deliberations of the KEP Board and whether the OpCapita offer was the "only viable alternative available", Mr Enoch's carefully drafted response, sent by email on 1 February 2022, had stated that the Board had concluded that the OpCapita proposals were in the best interests of shareholders and "would deliver a more certain outcome than continuing with the turnaround plan". There was no explicit mention of what Kesa would do if the transaction fell through. Contrary to Mr Smith's submission, it does not carry any necessary inference that Kesa would proceed with the turnaround plan in those circumstances.
264. Mr Goldring should not be criticised for not doing more to query the lack of clarity on Kesa's part. The 1 February email made it clear that it contained all that Kesa was prepared to say on the topic. Importantly, Mr Darke also did not

anticipate that retention by Kesa was a real alternative. Notes that he prepared at the time refer to a view that a sale “will definitely occur in the short term” given Kesa’s public statements and the “resounding vote” by shareholders. His witness statement also refers to there being “no other deal on the table” and the only other alternative being imminent administration. His oral evidence was consistent with this. So he had formed the same view as Mr Goldring.

265. There is no indication that either Mr Clare or Mr Cowling, the other member of the New Board, formed an independent view on this point. Neither of them had a previous relationship with Kesa, and nor were they involved in any of the negotiations that led up to the SPA.
266. Nonetheless, a flawed decision is still a decision, and the Liquidator does not now seek to argue that any member of the New Board was motivated by a desire to prefer. So the critical question is whether the decision taken by the New Board on 3 February 2012 to repay the KIL RCF (or, more accurately, its decision to go ahead and approve the proposals as a whole: see above) is the relevant decision, or the only relevant decision, for the purposes of s.239 IA 1986. As already mentioned (see [115] above), Darty relied on *Re Stealth Construction* and *Wills v Corfe Joinery Ltd* to argue that it was.
267. As David Richards J explained in *Re Stealth Construction* at [63], identifying when the decision was made is a question of fact. He pointed out that in *Re MC Bacon* Millett J had found that the decision was made at some time during a period leading up to the execution of the debenture and that in *Re Fairway Magazines Ltd* [1992] BCC 924 (which also concerned a debenture) the decision was made when the loan agreement was signed, a few weeks earlier than the debenture was executed for the company. In contrast, on the “very different facts” of *Wills v Corfe Joinery Ltd* the decision was made long after the loans were made and the obligation to repay them was incurred.
268. It is worth considering *Wills v Corfe Joinery Ltd* in more detail. As already explained, there was a board decision in January 1994 to repay two directors’ loans in January 1995. In fact they were repaid by cheques drawn in early February 1995, by which time the company was in financial difficulties.
269. Lloyd J’s reasoning about the date of the decision is set out in the following passage at p.513:

“... I do not accept that January 1994 was the date by reference to which it is appropriate to consider whether, in giving the preference that undoubtedly was given, the company was influenced by the relevant desire. It seems to me that all that happened in January 1994 at most was that the loans became repayable in January 1995. A lot of debts were payable by the company in January 1995 and a lot of them were not paid. The fact that the directors’ loan accounts were repayable in January 1995 does not lead to the conclusion that there was not a relevant decision to give the preference by actually paying those debts. It seems to me that the relevant decision to make the payments was and could only have been made at the time, or immediately before the time, when the cheques were drawn, that is to

say, on 2 February and 6 February 1995. Even if, as I am prepared to accept for present purposes, what passed in January 1994 meant that there was an obligation on the company to pay the debt in January 1995, it was necessary for the board to review at that time whether to honour that obligation. If the board had known that the company was insolvent or would be insolvent by honouring that obligation, it could not have made the payment.

In my view, only when the cheques were signed by the authorised signatories...did the company decide to make the payment. It is therefore by reference to that process of decision that the statutory provisions have to be applied.”

270. It is important to note Lloyd J’s reference to a lot of debts being payable in January 1995 and a lot not being paid. At p.214 he explained that the company’s financial position was adversely affected by an unforeseen loss in January 1995, which led to the bank not renewing its overdraft facility. A significant number of creditors were also pressing for payment of substantial amounts, some of which had been outstanding for several months. Lloyd J found at p.216 that at the beginning of February the directors knew that the company was in difficulties and there was a serious risk that the company would not be able to carry on trading.
271. It is not surprising that Lloyd J reached the decision he did on these facts. The directors were faced with a serious decline in the company’s fortunes and a situation in which other creditors, whose debts were already overdue, were pressing for payment. Going ahead with an earlier planned repayment of directors’ loans in those circumstances, which were presumably very different to what had been anticipated when the earlier decision was made, clearly involved a fresh decision.
272. In contrast, in this case there had been no material change of circumstances. Comet’s fortunes had continued to decline, but not in an unanticipated way. Comet’s continued absorption of cash over the peak period was expected (the completion date being planned around it), and the loss of credit insurance in January 2012 was not a surprise (see [33] above).
273. I have already referred to the position that Mr Darke and the rest of the New Board were placed in (see [246]-[250] above in particular). This did not mean that Mr Goldring and the New Board did nothing to seek to ameliorate the position. Mr Darke’s evidence, which I accept, was that his focus was on “getting the best outcome for Comet”, concentrating on such matters as the cash sweep and fetters on Comet’s ability to draw down under the HAL RCF. Mr Darke was looking at the Disposal as an event that would occur, and on the terms agreed by Kesa and OpCapita, and was concentrating his efforts on trying to ensure that Comet’s own position was optimised so far as possible within those constraints, in particular by attempting to improve the terms of the HAL RCF (the details of which were a matter for agreement between Comet and HAL). But neither he nor any other member of the New Board considered that there was any option to negotiate the repayment the KIL RCF – which he referred to in cross-examination as a “fundamental part of the deal architecture” – and indeed Mr Darke recalled little discussion about it.

274. In the circumstances of this case, I do not accept that the relevant decision was taken by the New Board on 3 February 2012. The substantive decision to repay the KIL RCF was taken on Comet's behalf when the SPA was signed. What occurred on 3 February was a formal, albeit necessary, step to allow that decision to be implemented. In theory the New Board could have refused to approve the Disposal and/or refused to settle the KIL RCF – just as, for example, an employee or agent asked to take a necessary step in arranging a preferential payment by a decision maker could refuse to do so (and perhaps for entirely justifiable reasons) – but in substance the decision had already been taken. What I have described as careful choreography to distance Kesa from formal decision-making was not effective.

## REMEDY

275. As already explained, Darty's position is that, even if a preference within s.239 is found to exist, no order should be made to restore the position on the basis that exceptional circumstances exist. It says that the real issue relates to the grant of the debenture to HAL, and points out that the Liquidator has not only jettisoned any claim challenging the debenture but has not objected to a proof of debt by HAL that makes it by far the largest unsecured creditor, and therefore the largest beneficiary of any recoveries made by the Liquidator in these proceedings (see [59] above).

276. Darty further claims that there would be no simple way to restore the position to what it would have been had the transaction not been entered into. The discharge of the KIL RCF could not fairly be separated from other elements of the Disposal. In the counterfactual, Comet would not have been sold, a new secured lending from HAL would not have been put in place, HAL would not have received the considerable payments it in fact received from the estate, and Kesa would not have assumed liability for the DB Scheme.

277. There was no dispute that the purpose of s.239 is to prevent a company defeating or undermining the *pari passu* principle, namely that creditors should be entitled to participate on a *pari passu* basis in assets held at the date of the insolvency, and that this should extend to assets that ought to have been held but for ill-motivated transactions putting them out of the liquidator's reach: *Stonham v Ramrattan* at [40]. (The context there was a transaction at an undervalue, but similar principles apply to preferences: see *Re Fowlds* at [39].)

278. Consistently with this, the order that the court is required to make under s.239(3) is one that restores the position to what it would have been if a preference had not been given. As Neuberger J said in *Damon v Widney Plc* [2002] BPIR 465, 470, the intention is to ensure that the creditor is neither better off nor worse off, "and, more importantly, that the Company is not better off nor worse off" than if the alleged preference had not been given.

279. Given the purpose of s.239, I agree that the primary focus must be on the company. This is also consistent with the approach taken by Trower J in *Re Fowlds* at [93], where, in response to a claim of change of position, he concluded that:

“... it will rarely be possible to give weight to a change of position by the preferee or the transferee, while at the same time honouring the policy which is reflected in the statute, the normal operation of the statutory insolvency scheme and the restorative nature of the relief (if any) it is required to grant.”

280. Trower J went on to say at [95]:

“The policy that underpins the statute means that the balance is only likely to come down in favour of the transferee where the circumstances are sufficiently out of the norm to be exceptional.”

281. In order to repay the KIL RCF, Comet drew down £115.4m of secured debt. The fact that that debt was to be secured was agreed between HAL and Kesa, as made clear by the terms of the SPA. The effect was to deprive other unsecured creditors of access to assets that became available only to the secured creditor.

282. I cannot see that it would be right for me to refuse to make an order because the Liquidator might have had a claim against HAL, or because he has not objected to HAL proving as an unsecured creditor. Either approach would amount to accepting an indirect challenge to the Liquidator’s actions. No such challenge is before the court. Darty has also not sought to join HAL to the proceedings to make an order against it under s.239(3), as its defence claimed should have been done.

283. I am also not attracted by the argument that I should make no order because there is no “simple” way of restoring the position. Unless justice requires otherwise, the court must do the best that it can. The starting point under s.239(3) is that the court is required to make an order restoring the position. The fact that doing so might be perceived to be difficult, or the result imperfect, is not a reason to refuse to act. The priority is to restore the company’s position.

284. Further, as Darty points out, the court is not permitted to hypothesise an entirely different transaction: *Re MDA Investment Management* at [123]. In my view the correct counterfactual, if the KIL RCF had not been repaid, must be that the Disposal did not occur.

285. Mr Gledhill submitted that it was necessary to make an order calibrated only to the preference, effectively isolating it from the rest of the overall transaction. He pointed out that cases such as *Re Claridge*, relied on by Mr Smith as authority for considering the wider context (see [131] above), were cases relating to transactions at an undervalue within s.238 IA 1986, which requires the court to make such order as it thinks fit for “restoring the position to what it would have been if the company had not entered into that transaction”, rather than “that preference”, which is the wording used in s.239(3). I disagree. The difference in language simply reflects the fact that s.238 applies to a transaction at an undervalue, and s.239 applies to a preference.

286. It does not follow from this, however, that I should necessarily give credit to Kesa to reflect its other costs associated with the Disposal. To the extent it is relevant to have regard to those costs in assessing what justice requires (bearing in mind

not only the policy aim of s.239 but that not all the costs relied on by Darty were even incurred by the creditor entity, KIL), the reality is that, if the Disposal had not occurred, Kesa's costs would have been much higher. Far from the KIL RCF being repaid, it is clear from the evidence that Kesa, through KIL, would have continued to extend credit and in all likelihood would have suffered material additional losses in attempting to turn the business round or in closing it down. That is why Kesa's management agreed the OpCapita deal. They considered that it represented the best available outcome. The group's shareholders agreed.

287. As to the £78.46m KIL invested in the acquisition structure, that was invested in exchange for an interest in H2L (from which KIL has benefited). The investment did nothing to increase Comet's assets available to unsecured creditors. For that reason no "credit" should be given in respect of it.
288. Further, and to the extent relevant, the arrangements for the discharge of the portion of the KIL RCF corresponding to the Triptych Amount relieved KIL of a real liability to Triptych, whilst burdening Comet with secured debt of that amount owed to HAL.
289. The position is more complex in respect of KEP's assumption of liability under the DB Scheme. In assessing what justice requires, I would note that the cost was borne by KEP and not KIL, and that the deed of support referred to at [14] above in any event resulted in a substantial direct liability for KEP, covering around 80% of the overall liability. And in any event it is clear from the evidence that Kesa would not have permitted Comet to default on its debts under its ownership. That would have included its commitments as an employer under the DB Scheme.
290. However, I think there is a more relevant point related to the impact of KEP's assumption of liability under the DB Scheme on the quantum of Comet's unsecured creditors in its hypothetical liquidation. Mr Ellison's calculation of a counterfactual dividend of 11.4p/£ or £14.7m (see [193] to [200] above) is premised on total unsecured creditors of £712.992m, of which £307m represents the liability under the DB Scheme. It is correct that if the Disposal had not occurred this liability would have remained, but it is equally correct to say that the effect of the Disposal was not only to improve KIL's position as compared to unsecured creditors, but also to reduce the total amount owed to unsecured creditors in the hypothetical liquidation by £307m, without any corresponding reduction in available assets.
291. In the same way that the Liquidator accepts that it would be wrong to disregard the fact that part of the KIL RCF was capitalised on the Disposal, such that the actual recovery was 89p/£ and not 100p/£, I consider that the reduction in unsecured creditors resulting from the transfer of liability under the DB Scheme should not be ignored. On my calculations, if that reduction in unsecured creditors is taken into account the result would be a counterfactual dividend of around 20p/£, or £25.8m.
292. In reaching this conclusion, I bear firmly in mind the policy rationale of s.239, namely to prevent a company defeating or undermining the *pari passu* principle. The transfer of the DB Scheme liability improved the availability of assets as far as other creditors were concerned, and was as much an intrinsic part of the

Disposal as the arrangements for repaying the KIL RCF by taking on a new secured borrowing under the HAL RCF.

293. In summary, and even taking account of the wider context as Darty urges me to do, I do not consider that this is a case where “exceptional circumstances” exist that justify no order being made. Instead, it is appropriate to order the relief sought by the Liquidator, namely the difference between the £115.4m repaid and the counterfactual dividend in a hypothetical liquidation. However, in calculating the counterfactual dividend it is appropriate to make an adjustment to reflect the reduction in unsecured creditors resulting from the transfer of liability under the DB Scheme.

## CONCLUSIONS

294. In conclusion:

- a) Comet was insolvent within s.123(2) IA 1986 immediately before the Disposal.
- b) The repayment of £115.4m of the KIL RCF, including the Triptych Amount, constituted a preference.
- c) Mr Enoch, and others involved in the key decision making process on the Kesa side, had a desire to ensure repayment of the KIL RCF, and had in contemplation the possibility of an insolvent liquidation of Comet.
- d) I am satisfied that, on the particular facts of this case, a decision was taken on behalf of Comet at the time the SPA was entered into on 9 November 2011, which was tainted by a desire to prefer. The relevant decision for the purposes of s.239 was that decision, and not the formal resolutions passed by the New Board on 3 February 2012.
- e) This is not a case where exceptional circumstances exist to justify no order being made by way of remedy. Relief should be granted in an amount equal to the difference between the £115.4m repaid and the counterfactual dividend in a hypothetical liquidation. The counterfactual dividend proposed by the Liquidator of £14.7m, representing 11.4p/£, should be adjusted to reflect the removal of Comet’s liability to the DB Scheme.