Case No: CR-2022-002195

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

Neutral Citation Number [2024] EWHC 2242 (Ch)

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

Date: 30th August 2024

Before :

ICC JUDGE MULLEN

- -

In the Matter of Just Recruit Group Limited (in administration)

And in the Matter of the Insolvency Act 1986

Between :

MANOLETE PARTNERS PLC	**Claimant/ Applicant**
- and –	
(1) NORMAN FREED **(2) KEY PEOPLE LIMITED** **(3) ACHIEVA GROUP LIMITED**	**Defendants/ Respondents**

- -

Mr William Willson (instructed by **HCR Legal LLP**) for the **Claimant/Applicant**
The First Defendant/Respondent appeared in person
Mr Jeremy Garson (solicitor, **Rise Legal (STB) Limited**) for the **Second and Third Defendants/Respondents**
Mr Daniel Lewis (instructed pro bono by **Rise Legal (STB) Limited**) for the **Defendants/Respondents** for the purpose of closing submissions on limitation to shortfall only

Hearing dates: 19th to 22nd March 2024

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Approved Judgment

This judgment was handed down remotely at 11am on 30th August 2024 by circulation to the parties or their representatives by e-mail.

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ICC JUDGE MULLEN

ICC JUDGE MULLEN :

1. On 19th July 2022 Manolete Partners plc ("Manolete") issued two sets of proceedings, the first being an application under the Insolvency Act 1986 ("IA 1986") in the Insolvency and Companies List (ChD) and the second being a Part 7 claim in the Business List (ChD). Each set of proceedings named as respondents (in the case of the application) or defendants (in the case of the claim):

   i) Mr Norman Freed ("Mr Freed");

   ii) Key People Limited ("KPL"); and

   iii) Achieva Group Limited ("AGL")

   (collectively "the Defendants").

2. Manolete claims as the assignee of Mr Miles Needham and Mr Simon Carvill-Biggs, the joint administrators of Just Recruit Group Limited ("JRGL"), which entered administration on 29th January 2021. The relevant causes of action were assigned to Manolete on 26th November 2021.

3. The two sets of proceedings have been consolidated and are supported by a single particulars of claim ("the Particulars"). There does not appear to be an order that the Particulars stand as points of claim in the Insolvency Act application but the parties appear to have treated it as so doing and the Defendants have filed a defence to which Manolete has filed a Reply.

4. The Particulars allege that Mr Freed, as director of JRGL, caused payments to be made by JRGL between 9th October 2020 and 24th December 2020 as follows –

   i) Payments were made to KPL

      a) on 9th October 2020, in the sum of £120,000; and

      b) 14th December 2020, again in the sum of £120,000,

      totalling £240,000 ("the KPL Payments").

   ii) Payments were made to AGL:

      a) on 17th December 2020, in the sums of £600,000, $37,000 (£29,395.14) and €5,000 (£4,253.02);

      b) on 18th December 2020 in the sum of CHF2,500 (£2,042.42); and

      c) on 24th December 2020 in the sum of US$54,000 (£42,899.60),

      totalling £678,590.18 at the exchange rates given in the Particulars ("the AGL Payments").

5. Those payments are said to have been made in breach of the duties that Mr Freed owed to JRGL under sections 170 to 179 of Companies Act 2006 ("CA 2006") and, in

particular, in breach of his duty to consider or act in the interests of JRGL's creditors at a time when he knew, or ought to have known, that the company was, or was likely to become, insolvent. The Particulars allege that the company was in fact unable to pay its debts for the purposes of section 123 IA 1986 by 9th October 2020 or, alternatively, 11th December 2020.

6. The latter date is when JRGL contacted Mr Needham, an insolvency practitioner at FRP Advisory Trading Limited ("FRP"). A meeting was held on 18th December 2020 when, it seems, Mr Needham confirmed that the company was insolvent. The company went into a pre-pack administration a little over a month after the meeting. Its assets and business were sold to AGL under a sale and purchase agreement dated 29th January 2021 ("the SPA"), negotiated between JRGL, the proposed administrators and AGL between the meeting with Mr Needham and filing of the notice of appointment of the administrators.

7. The SPA provided that JRGL's business and assets would be transferred to AGL for £50,000. This was price was made up of £30,000 by way of what was described as "Initial Consideration" and £20,000, described as the "Preferential Debt Payment", to cover assumed liabilities to HM Revenue and Customs ("HMRC"), which were to remain with the company, along with other non-crystallised, contingent or uncertain liabilities. A debt said to be due to KPL was also to remain with the company.

8. Following their appointment, the joint administrators say that they became aware of the KPL Payments and the AGL Payments and also discovered that JRGL had further liabilities that were not assumed by AGL under the SPA. These included liability under proceedings in the Employment Tribunal, brought by Mr Scott Neto, a minority shareholder in JRGL, which led to a judgment being entered against the company in the sum of £100,442 on 16th March 2021, and a liability of £125,254.17 to HMRC. The estimated deficiency to creditors, according to the joint administrators, is £1,216,529.54, though this is denied by the Defendants.

9. The proceedings seek equitable compensation against Mr Freed for £918,590 for breach of duty in causing the payments to be made. The Particulars also set out claims against KPL and AGL, first contending that the payments made to those companies were transactions at an undervalue for the purposes of section 238 IA 1986, having been made for no consideration within two years of JRGL entering into administration and at a time when it was unable to pay its debts or became so as a result of the payments. In this regard, Manolete says that KPL and AGL were "connected with" JRGL for the purposes of section 240(2) so that the insolvency of JRGL is presumed unless the contrary is shown.

10. To the extent that KPL and AGL were creditors of JRGL and the payments represent the payment of debts, it is alleged that the payments constituted preferences within the meaning of section 239 IA 1986. In such a case, Manolete must show that the payments were made within the prescribed statutory period at a time when JRGL was unable to pay its debts, or became so as a result of the payments and that, in making the payments:

    i) JRGL put KPL and/or AGL into a better position than they otherwise would have been in had JRGL gone into administration without making the payments; and

ii) in doing so, JRGL was influenced by the desire to have that effect.

Manolete again relies upon its allegation that KPL and AGL were "connected with" JRGL so as to give rise to the presumption provided for in section 239(6) IA 1986 that JRGL was so influenced. Further or alternatively, it is alleged that the KPL and AGL are liable for knowing receipt of the sums that Mr Freed caused to be transferred in breach of duty.

11. The defence in relation to the KPL Payments is that KPL supported JRGL by making payments to JRGL's creditors when JRGL could not and JRGL would reimburse KPL either directly or, at KPL's instruction, by making a payment to AGL. It is also said that there was an arrangement whereby JRGL was invoiced by KPL on a quarterly basis for £100,000, plus VAT, made up of administration fees charged by KPL and fees for its directors, Mr Atherton and Mr Donavan. The Defendants maintain that they are unable to evidence or further particularise these payments without sight of JRGL's documents, which are alleged to be in the hands of the joint administrators. The extent of the records delivered to the joint administrators is one of the issues to be resolved.

12. In relation to the AGL Payments it is said that these payment were made at the direction of Mr Moshe Freed, Mr Freed's nephew and the finance director of the group, on behalf of KPL, either by way of repayment of sums paid by KPL to JRGL's creditors or to support AGL to pay JRGL's former employees' salaries and to meet JRGL's contingent liabilities, including those under its lease. Again, it is said that these cannot be evidenced or particularised without access to JRGL's records.

13. Thus the Defendants say that the payments were made for consideration because they were genuine liabilities of JRGL arising from KPL meeting its obligations when JRGL could not. There was no intention to prefer because the company did not have any creditors other than a debt owed to KPL in the sum of £474,103.33, which was not intended to be called in and a small debt to HMRC, which was covered by the Preferential Debt Payment and would in any event reduce when the joint administrators reclaimed input tax. Indeed, the Defendants say that it was made clear to Mr Needham from the outset that all creditors were to be paid and Mr Needham was content on this basis for creditors to be paid from various sources, referring to the payments as a "melange". The payments to KPL and AGL were therefore neither at an undervalue nor were they preferences. Any further deficiency is said to be the result of the joint administrators failing to:

i) defend a claim brought in the Employment Tribunal by a Mr Scott Neto, a minority shareholder in JRGL, which led to a judgment being entered against the company in the sum of £100,442 on 16th March 2021; and

ii) reclaim input VAT from HMRC.

14. In respect of Mr Freed, it is further said that any breach of duty by him was ratified by JRGL's shareholders and, in any event, he acted honestly and reasonably and ought fairly to be excused under section 1157 CA 2006. In the event that those arguments are not successful, the Defendants argue that recovery by Manolete should be limited to the sums necessary to meet the shortfall in the administration, insofar as the shortfall arises from sums owed to unconnected creditors, which they estimate at £350,000.

Legal principles

15. I shall deal with the question of whether any recovery that I might order should be limited to the shortfall in the administration at the end of this judgment. For present purposes I need only set out the principles relating to directors' duties, knowing receipt, transactions at an undervalue and preferences. These were not contentious between the parties.

The general duties of directors

16. The general duties owed by a director of a company are set out in Chapter 2 of Part 10 CA 2006. Section 172 CA 2006 provides the duty to promote the success of the company:

> "(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
>
> (a) the likely consequences of any decision in the long term,
>
> (b) the interests of the company's employees,
>
> (c) the need to foster the company's business relationships with suppliers, customers and others,
>
> (d) the impact of the company's operations on the community and the environment,
>
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
>
> (f) the need to act fairly as between members of the company.
>
> …
>
> (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

The duty to creditors is engaged where the directors know, or ought to know, that insolvency is imminent or that it is probable that the company will enter into an insolvency process (*BTI v Sequana* [2022] UKSC 25).

17. Whether a director has acted in accordance with his or her duties is ordinarily approached subjectively, that is to say by reference to what the director believed. In *Regentcrest plc (in liq) v Cohen & Anor.* [2001] BCC 494, Jonathan Parker J (as he then was) said, at paragraph 120:

> "The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in

> the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test."

18. The exceptions to this subjective approach were set out by Mr John Randall QC, sitting as a deputy High Court Judge, in *HLC Environmental Projects Ltd (in liq.)* [2013] EWHC 2876 (Ch) at paragraph 92:

> "However, this general principle of subjectivity is subject to three qualifications of potential relevance in this case:
>
> (a) Where the duty extends to consideration of the interests of creditors, their interests must be considered as 'paramount' when taken into account in the directors' exercise of discretion (per Mr Leslie Kosmin QC in the *Colin Gwyer* case (above) at [74]). Although I note the contrary view expressed by Owen J.in the Supreme Court of Western Australia that although 'the directors must "take into account" the interests of creditors [i]t does not necessarily follow from this that the interests of creditors are determinative' (*Bell Group Ltd v Westpac Banking Corp* [2008] WASC 239 at [4438]–[4439], applying the judgment of Mason J. in *Walker v Wimborne* [1976] HCA 7; (1976) 137 C.L.R. 1), so far as English law is concerned I respectfully agree with Mr Kosmin QC that his use of 'paramount' was consistent with the judgment of Nourse L.J. in *Brady v Brady* (1987) 3 B.C.C. 535 (CA) at 552, where he observed that 'where the company is insolvent, or even doubtfully solvent, the interests of the company are in reality the interests of existing creditors alone'. I also note that this passage from Mr Kosmin QC's judgment was cited with apparent approval by Norris J. in *Roberts (Liquidator of Onslow Ditchling Ltd) v Frohlich* [2011] EWHC 257 (Ch); [2012] B.C.C. 407 at [85].
>
> (b) As Miss Leahy submitted, the subjective test only applies where there is evidence of actual consideration of the best interests of the company. Where there is no such evidence, the proper test is objective, namely whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company (*Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch. 62 at 74E–F, (*obiter*), *per* Pennycuick J.*; Extrasure*

> *Travel Insurances Ltd v Scattergood* [2003] 1 B.C.L.C. 598 at [138] *per* Mr Jonathan Crow).
>
> (c) Building on (b), I consider that it also follows that where a very material interest, such as that of a large creditor (in a company of doubtful solvency, where creditors' interests must be taken into account), is unreasonably (i.e. without objective justification) overlooked and not taken into account, the objective test must equally be applied. Failing to take into account a material factor is something which goes to the validity of the directors' decision-making process. This is not the court substituting its own judgment on the relevant facts (with the inevitable element of hindsight) for that of the directors made at the time; rather it is the court making an (objective) judgment taking into account all the relevant facts known or which ought to have been known at the time, the directors not having made such a judgment in the first place. I reject the respondent's contrary submission of law."

Ratification of a breach of a director's duty by members

19. Conduct of a director which would amount a breach of duty owed to the company may be ratified by the members of the company, either by a formal resolution or the informal consent of them all under the principle in *Re Duomatic* [1969] 2 Ch. 365. In relation to the latter, there must be sufficient material from which the court may discern that the shareholders had applied their minds to a decision to ratify the conduct. The power of members is limited however: it is not open to them to ratify a breach of the duty to consider the interests of creditors – see *BTI v Sequana* [2022] UK SC 25, *per* Lord Reed at paragraph 91 and *per* Lord Briggs at paragraph 149. I need only quote the latter for present purposes:

> "It is now settled that the ratification principle does not apply to a decision by shareholders which is either (i) made at a time when the company is already insolvent or (ii) the implementation of which would render the company insolvent: see *Bowthorpe Holdings Ltd v Hills* [2003] 1 BCLC 226, at paras 51 to 54 per Sir Andrew Morritt V-C after a review of the authorities on the ratification principle. The respondents submit, correctly, that the *Bowthorpe* case and other authorities to the same effect such as *Official Receiver v Stern (No 2)* [2002] 1 BCLC 119, para 32 are themselves dependent upon both the *Kinsela* and *West Mercia* cases, but that misses the point, for two reasons. First they show how the ratification principle can (if necessary) readily adapt to the creditor duty on a principled basis. Secondly, and perhaps more importantly, close study of the leading cases on the ratification principle prior to the *West Mercia* case, from the *Salomon* case onwards, shows how careful the courts have been to apply the principle only to a solvent company. Thus in the *Salomon* case the evidence established that the business being acquired by the newly formed company was perfectly solvent: see [1897] AC 22, 25. In *In re Horsley & Weight*

> *Ltd* [1982] Ch 442 the ratification principle was applied to the decision of shareholders in a solvent company. At p 455, Templeman LJ said:
>
> "If the company had been doubtfully solvent at the date of the grant to the knowledge of the directors, the grant would have been both a misfeasance and a fraud on the creditors for which the directors would remain liable."
>
> In the *West Mercia* case [1988] BCLC 250, 252, Dillon LJ distinguished the *Multinational Gas* case (in which the ratification principle had been applied) on the basis that the company in question had been "amply solvent". A conclusion that the ratification principle is not irreconcilable with the creditor duty is provided, albeit for slightly different reasons, in both the *Permakraft* and *Kinsela* cases."

Relief from breach of duty under the Companies Act 2006

20. Where a director is in breach of duty, he or she may seek relief under section 1157(1) CA 2006 which provides:

> "(1) If in proceedings for negligence, default, breach of duty or breach of trust against
>
> (a) an officer of the company…….
>
> it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case… he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it sees fit"

The burden of proof of establishing (i) honesty (ii) reasonableness and (iii) that the director ought fairly to be excused lies on the director.

Transactions at an undervalue and preferences

21. Section 238 IA 1986 provides:

> "(1) This section applies in the case of a company where—
>
> (a) the company enters administration,
>
> …
>
> and 'the office-holder' means the administrator or the liquidator, as the case may be.
>
> (2) Where the company has at a relevant time (defined in section 240) entered into a transaction with any person at an undervalue,

> 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 entered into that transaction.
>
> (4) For the purposes of this section and section 241, a company enters into a transaction with a person at an undervalue if—
>
> > (a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or
> >
> > (b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.
>
> (5) The court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied—
>
> > (a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and
> >
> > (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company."

The word "transaction" for the purposes of section 238(4) is defined widely in section 436 IA 1986 as "a gift, agreement or arrangement".

22. Section 239 IA 1986 Act provides:

> "(1) This section applies as does section 238.
>
> (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).
>
> (7) The fact that something has been done in pursuance of the order of a court does not, without more, prevent the doing or suffering of that thing from constituting the giving of a preference."

23. The "relevant time" for the purpose of both of these sections is set out in section 240 IA 1986:

> "(1) Subject to the next subsection, the time at which a company enters into a transaction at an undervalue or gives a preference is a relevant time if the transaction is entered into, or the preference given—
>
> (a) in the case of a transaction at an undervalue or of a preference which is given to a person who is connected with the company (otherwise than by reason only of being its employee), at a time in the period of 2 years ending with the onset of insolvency (which expression is defined below),
>
> (b) in the case of a preference which is not such a transaction and is not so given, at a time in the period of 6 months ending with the onset of insolvency.
>
> …
>
> (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;
>
> but the requirements of this subsection are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by a company with a person who is connected with the company.
>
> (3) For the purposes of subsection (1), the onset of insolvency is—
>
> …
>
> (b) in a case where section 238 or 239 applies by reason of an administrator of a company being appointed under paragraph 14 or 22 of Schedule B1 following filing with the court of a copy of a notice of intention to appoint under that paragraph, the date on which the copy of the notice is filed…"

A person is connected with a company if he is a director or an "associate" of a director or of the company by reason of section 249 IA 1986. In the case of such a connected person, inability to pay debts is presumed in the case of transactions challenged under section 238 and the desire to prefer is presumed in the case of transactions challenged under section 239.

24. An associate of an individual is defined by section 435 of the Act to include a relative of the individual, which includes a nephew. By reason of section 435(6) a company is an associate of another company if:

> "(a) if the same person has control of both, or a person has control of one and persons who are his associates, or he and persons who are his associates, have control of the other, or
>
> (b) if a group of two or more persons has control of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he is an associate."

Section 435(7) then provides:

> "A company is an associate of another person if that person has control of it or if that person and persons who are his associates together have control of it."

Section 435(10) defines "control" as follows:

> "For the purposes of this section a person is to be taken as having control of a company if—

> (a) the directors of the company or of another company which has control of it (or any of them) are accustomed to act in accordance with his directions or instructions, or
>
> (b) he is entitled to exercise, or control the exercise of, one third or more of the voting power at any general meeting of the company of or another company which has control of it;
>
> and where two or more persons together satisfy either of the above conditions, they are to be taken as having control of the company."

25. The orders that a court can make are set out at section 241 IA 1986:

> "(1) Without prejudice to the generality of sections 238(3) and 239(3), an order under either of those sections with respect to a transaction or preference entered into or given by a company may (subject to the next subsection)—
>
> (a) require any property transferred as part of the transaction, or in connection with the giving of the preference, to be vested in the company,
>
> (b) require any property to be so vested if it represents in any person's hands the application either of the proceeds of sale of property so transferred or of money so transferred,
>
> …
>
> (d) require any person to pay, in respect of benefits received by him from the company, such sums to the office-holder as the court may direct,
>
> …
>
> (2) An order under section 238 or 239 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the company in question entered into the transaction or (as the case may be) the person to whom the preference was given; but such an order—
>
> (a) shall not prejudice any interest in property which was acquired from a person other than the company and was acquired in good faith and for value, or prejudice any interest deriving from such an interest, and
>
> (b) shall not require a person who received a benefit from the transaction or preference in good faith and for value to pay a sum to the office-holder, except where that person was a party to the transaction or the payment is to be in respect of a preference given to that person at a time when he was a creditor of the company.

(2A) Where a person has acquired an interest in property from a person other than the company in question, or has received a benefit from the transaction or preference, and at the time of that acquisition or receipt—

(a) he had notice of the relevant surrounding circumstances and of the relevant proceedings, or

(b) he was connected with, or was an associate of, either the company in question or the person with whom that company entered into the transaction or to whom that company gave the preference,

then, unless the contrary is shown, it shall be presumed for the purposes of paragraph (a) or (as the case may be) paragraph (b) of subsection (2) that the interest was acquired or the benefit was received otherwise than in good faith.

(3) For the purposes of subsection (2A)(a), the relevant surrounding circumstances are (as the case may require)—

(a) the fact that the company in question entered into the transaction at an undervalue; or

(b) the circumstances which amounted to the giving of the preference by the company in question;

and subsections (3A) to (3C) have effect to determine whether, for those purposes, a person has notice of the relevant proceedings.

(3A) Where section 238 or 239 applies by reason of a company's entering administration, a person has notice of the relevant proceedings if he has notice that—

(a) an administration application has been made,

(b) an administration order has been made,

(c) a copy of a notice of intention to appoint an administrator under paragraph 14 or 22 of Schedule B1 has been filed, or

(d) notice of the appointment of an administrator has been filed under paragraph 18 or 29 of that Schedule.

…

(4) The provisions of sections 238 to 241 apply without prejudice to the availability of any other remedy, even in relation to a transaction or preference which the company had no power to enter into or give."

Knowing receipt

26. A third party who receives property as a consequence of a director's breach of duty may be liable to pay compensation to the company on the basis of knowing receipt. This is a personal liability which is dependent upon receipt of the relevant property. It must be established that:

    i) there was a disposal of assets by the company in breach of fiduciary duty;

    ii) there was beneficial receipt by the defendant of assets which are traceable as representing the assets of the company; and

    iii) the defendant had knowledge that the assets are traceable to a breach of fiduciary duty.

    (see *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 and *BCCI v Akindele* [2000] EWCA Civ 502 as discussed in *Byers v Saudi National Bank* [2023] UKSC 51).

The course of the trial

27. Manolete was represented at trial by Mr William Willson of counsel. Shortly before trial the solicitors for the Defendants, Rise Legal (STB) Limited ("Rise Legal"), came off the record and it seems it was contemplated that Mr Freed would appear in person on his own behalf and also represent KPL and AGL, save for the purposes of instructing counsel to argue a discrete point. He is however currently a director or employee of neither company and therefore could not do so. I dealt with that question in a judgment at the outset of trial.

28. Rise Legal therefore came back on the record for the two companies, while Mr Freed continued to represent himself. Mr Freed did, however, file a very professionally prepared skeleton argument said to be prepared on behalf of the Defendants. He conducted the entirety of the cross-examination of the claimant's witness and made submissions, to which Mr Garson, the solicitor appearing for the companies, had nothing to add. I intend no criticism by that – Mr Freed dealt with the matters in issue thoroughly and there was nothing to add. Following Mr Freed's closing submissions however, Rise Legal came back on the record for all of the Defendants, instructing Mr Daniel Lewis of counsel to make submissions on the question of whether any recovery that I were to order should be limited to the deficiency in the administration.

The witnesses

Mr Miles Needham

29. Mr Miles Needham, one of the joint administrators, made three witness statements on behalf of the claimant and was cross-examined by Mr Freed methodically and robustly; indeed abrasively on occasion. He struck me as an honest witness and professional witness seeking to assist the court within the confines of his memory. I accept his evidence.

30. I do not consider that there is anything suspicious in a failure to disclose earlier an email of 18th December 2020 sent following the meeting with FRP and some other documents from at around that time in response to the Defendants' requests for notes or working

papers. He explained that, when initially searching for such documents, a word search was carried out including the word "notes", which was not present in the email, which he explained was a summary of the meeting intended for comment and to agree a way forward.

31. That email was however identified belatedly and, quite properly, disclosed. It is regrettable that these documents were not identified sooner but the defendants were able to deal with them and I am satisfied that they were not withheld deliberately. Nor, as I shall explain, do I consider that there is anything suspicious about the failure to include Mr Neto's Employment Tribunal claim as a contingent liability in the statement of affairs prepared for the administration. Mr Needham accepted that Mr Neto's claim had probably been discussed at the meeting on 18th December 2020, and indeed was referenced in an email of 15th January 2021 sent to him by Mr Freed, but the statement of affairs, which was produced in March 2021, was compiled on the basis of information provided by Mr Freed as JRGL's director. It might have been better if the omission had been queried but it is clear that the December 2020 meeting was conducted at a relatively high-level so it is not at all apparent to me that Mr Neto's claim is something that should have been recorded by Mr Needham or recalled by him some months later. It is also true to say that Mr Needham was in large measure dependent upon Mr Freed for information.

Mr Norman Freed

32. Mr Freed made three witness statements in these proceedings. He is a chartered accountant and he accepted that he is familiar with the preparation of accounts. He has also been a director of a number of companies, though he said that he was not so confident that he was familiar with the duties of directors under the Companies Acts. He said that that was why a person employed lawyers. He certainly has familiarity with litigation, having appeared in employment proceedings and having been joined as a respondent to two sets of unfair prejudice proceedings, the first having been brought by Mr Paul Donovan in relation to KPL and the second having been brought by Mr Jason Atherton in relation to JRGL. Indeed, he signed a statement of truth to the points of defence in the KPL unfair prejudice petition on behalf of himself, CMC Investments Limited "(CMC Investments") and KPL on 21st August 2021.

33. He is, if I may say so, a charismatic and forceful individual, who assertively cross-examined Mr Needham and was not in the least cowed by cross-examination on his own evidence. He was quick to interrupt Mr Willson when he felt he had not finished his answer. I find it difficult to accept that Mr Freed was, as he repeatedly sought to suggest, subordinate in the decision-making process to his nephew, Moshe Freed, or others. He was however often equivocal and avoided answering questions directly.

34. He took a somewhat broadbrush approach to the companies' respective liabilities, seemingly content that any inconsistencies between the Defendants' case and the contemporaneous documents could be delt with more or less at the stroke of a pen by adjusting intercompany balances. He resorted to this because, troublingly, his evidence was often impossible to reconcile with contemporaneous documents or the defence in the KPL unfair prejudice proceedings, the statement of truth on which he had signed. I will address these in more detail in due course but I shall for present purposes highlight one particularly striking example. His contentions in these proceedings as to the merits of the employment proceedings brought by Mr Neto, which he says should have been

defended by the administrators, are so completely at odds with the advice that he was receiving at the time that there is no basis, that I can see, that he can honestly have believed his evidence on this in these proceedings to be true. This, and other instances where there are flat-out contradictions between what he says now and what he has said in the past lead me to conclude that I cannot rely on his evidence. Where his evidence is not corroborated or otherwise inherently probable, I reject it.

35. I should say specifically that I reject the insinuations made by Mr Freed (and they were no more than insinuations) that the administration was being conducted in some way dishonestly. For example, it was put to Mr Freed that he had given the figure for the sum owed to KPL as £433,637.33 in an email to Mr Needham dated 15th January 2021. The debt is, however, given as £989,832.98 in the statement of affairs of 10th March 2021, signed by Mr Freed. There is no explanation for this sudden increase. Mr Freed seemed to accept that the figure was wrong but said that there was "a stink about what FRP have done" and that it "smells of fabrication". I have to say that I regard this as another example of Mr Freed seeking to blame others for the inconsistencies in the documents that he had either created or for which he provided the underlying information.

Ms Holly Thompson

36. Ms Thompson made a short witness statement of five paragraphs, explaining that she was a director of JRGL between 23rd November 2018 and 26th February 2020 and again between 21st September 2020 and 2nd December 2020. She was also a director of KPL between 11th September 2020 and 24th March 2021. She became a director of AGL on 23rd November 2020 and remained so as at the date she signed her statement on 4th March 2024. Her evidence is that she dealt with the day-to-day administrative matters regarding the running of JRGL, KPL and AGL. She contends that it was Moshe Freed who was the finance director and ultimate controller of JRGL and, from 21st September 2020, he held the controlling interest in KPL. She states that Norman Freed was not a shareholder of JRGL and all "financial and payment instructions" came from Moshe Freed.

37. Ms Thompson did not attend to give evidence and was therefore not cross-examined. There was no satisfactory explanation for her failure to attend, other than being out of the country. Her witness statement is of limited probative value in any event, in that it consists entirely of assertions, and I can give it no real weight.

Other matters

38. By way of conclusion on the question of witness evidence I should say that Moshe Freed did not give evidence and has not made a statement in these proceedings. A consistent theme of Mr Freed's evidence was that he sought to distance himself from the decision-making for the companies in these proceedings by painting his nephew as the driving force behind them. It would have been open to him to call Moshe Freed to make good this case but he did not. There is in fact no evidence to show that Moshe Freed was in practice a decision-maker in relation to the companies.

Availability of documents

39. Mr Freed maintains that the defence of the claim has been hampered by the absence of documents. His first witness statement says:

> "12. This is due, first, to the fact that Manolete has not provided full disclosure of all of the companies' books and records and email correspondence which might enable me to provide more detailed explanations for the transactions which were entered into.
>
> 13. Secondly, a large number of the Company's records were destroyed by water damage when the landlord's builders at AGL's old premises cut through a mains water pipe a damaged all the computers beyond repair. This took place on 8th April 2021 and was reported to KPL's/AGL's insurers.
>
> 14 Notwithstanding this, I have recovered many records from AGL's, which have enabled me to demonstrate the purpose of the payments that were made. However the majority of the information is in the records held by FRP which has not been disclosed to us."

40. There are a number of difficulties with these contentions. The SPA entered into between JRGL and AGL, at clause 12, places the obligation on AGL as buyer to maintain the records of the seller, JRGL, in good condition and in a single location within the United Kingdom, providing access to them to JRGL and the joint administrators when requested. Those records are defined as:

> "all books, documents, files, bought and sold ledgers, purchases and sales day books and invoices and other records of the Seller relating to the Business as at the Transfer Date other than the Excluded Records".

On the face of it therefore the custodian of JRGL's records was AGL, not the administrators.

41. Moreover, Mr Freed's contention that FRP hold JRGL's records is in large measure based on his assertion that he provided the company's hard copy records to FRP. The timeline of contemporaneous documents is at odds with this claim.

42. Mr Freed was asked by the administrators for records by a letter of 2nd February 2021. Mr Needham wrote to Mr Freed as follows:

> "I write further to my appointment as Joint Administrator of the Company. As previously advised, I am required to obtain copies of the Company's books and records together with an electronic backup of the Company's financial software package in order to assist with my statutory investigations, in light of this, please can you kindly deliver to me (physically or electronically) the below records:

> 1. HMRC files;
>
> 2. Employee records;
>
> 3. Pension records;
>
> 4. Sales invoices (together with remittance advices where applicable);
>
> 5. Purchase invoices (together with purchase orders where applicable);
>
> 6. Insurance records;
>
> 7. Health and safety records;
>
> 8. Bank records;
>
> 9. A copy of the financial software package back up (together with usernames and passwords); and
>
> 10. Copies of the last three sets of full accounts.
>
> I should be grateful if you would kindly provide the requested information/records within 21 days."

Mr Freed did not respond to that letter. His evidence in cross-examination was that he had thought that this letter simply to be "a standard letter that goes out". I assume by this that he treated it as a mere formality. This is simply not credible. The letter asks for delivery up of ten categories of documents, that were specifically identified, within 21 days. It was plainly not a mere formality but a request for documents to be provided within a set time frame. Mr Freed's explanation is entirely implausible and I reject it.

43. More extraordinarily still, in his third statement of 15th December 2023, Mr Freed's position is that he did in fact deliver up the company's documents in January 2021. He does not say this in his first statement, dated 28th July 2023. However that may be, his position by the time of his third statement was as follows:

> "I handed the Company's hardcopy files to the administrators on either 12th or 13th January 2021. The delivery was made by me to FRP's office in St Albans. It was delivered after receiving a request for information from Miles Needham on 8 and 11th January 2021 by email copies of which are annexed"

There is no evidence of this, which is particularly surprising given the date. The United Kingdom was still subject to very significant restrictions arising from the COVID-19 pandemic. It was, I think, during the third national lockdown. Nonetheless, Mr Freed does not seem to have taken the precaution of sending an email or telephoning to ask FRP if their offices were in fact open. He simply drove to their offices and says he handed the records over to a woman who came to down in answer to his attendance at the offices. He did not identify her and he did not obtain a receipt for them.

44. Again, I do not accept Mr Freed's account. Mr Needham's emails of 8th and 11th January 2021 are limited requests for information required for the preparation of the SPA. They are not requests for the company's records more generally. This is unsurprising as the company was not yet in administration and its business had not been sold. There would simply have been no need for Mr Needham to request the company's records in February 2021 if they had in fact been delivered in January 2021. Had they been delivered I have no doubt that Mr Freed would not have ignored the letter of 2nd February 2021 but responded to query why the request was being made when the records had already been provided. I am satisfied that Mr Freed did not provide JRGL's records to FRP and that his account is untrue.

45. I do not accept that the Defendants' defence of this claim has been hampered by a lack of disclosure of relevant records by the administrators. While it may be that a flood damaged records held by AGL one would anticipate that much of the relevant records would be held by KPL. It is KPL that is said to have paid JRGL's creditors, to have provided services to JRGL for which it billed £100,000 a quarter and to have directed payment by JRGL to AGL on its behalf. There is no adequate explanation as to why there is not a complete set of records that would explain the transactions at least as far as they concerned KPL. Insofar as it is contended that there are lost documents that would vindicate the Defendants' defence, I reject that contention.

Control of the companies

JRG

46. Mr Freed was a director of JRGL from 23rd November 2018, having been appointed as the company secretary earlier that year. Ms Holly Thompson, according to the records filed with the Registrar of Companies, was appointed as a director of JRGL on 23rd November 2018 and resigned on 26th February 2020. She was reappointed on 21st September 2020 and is shown to have resigned once more on 2nd December 2020 on the form TM01 filed. Mr Freed said this was incorrect and that she resigned at around the time of the meeting with Mr Needham on 18th December 2020. This is not what Ms Thompson says in her own witness statement.

47. Moshe Freed was appointed as a director on 21st September 2020 and is shown to have resigned as a director of JRGL on 2nd December 2020 according to the form TM01 filed. Again, Mr Freed thought Moshe Freed had resigned later, on the 17th or 18th of December 2020, when the notice of resignation was filed with the Registrar. Mr Freed said that he believed Moshe Freed to have backdated the form, though this was the first time that he had made that allegation.

48. It is of course entirely usual for the required forms to be filed at Companies House some while after the termination of the appointment as director. I do not accept that the forms were backdated or that the resignations took place on any other dates than the dates that the forms bear. Mr Freed's contentions in this regard are pure assertion and are, in my judgment, designed to distance himself from the decision making at the end of the company's life in December 2020 when he was in truth the sole director.

49. As to the shareholdings in JRGL, by 2018, KPL was the holder of 60% of the issued share capital in JRGL, with the remaining shares being held as to 20% by Mr Jason

Atherton, 10% by Mr Scott Neto and 10% by Mrs Louise Neto. I will now turn to the control and ownership of KPL.

KPL

50. The original shareholders of KPL were Mr Mark Atherton and Mr Paul Donavan. In 2016 F&M (Investment Holdings) Limited, a company registered in the British Virgin Islands ("F&M BVI"), became the holder of 20 of the 100 issued shares, while Mr Atherton and Mr Donavan held the balance. The single shareholder of F&M BVI is Saffron Management Limited, and it holds the share in trust for the Fennel Trust, which Mr Freed described as a discretionary trust for his grandchildren. The directors of F&M BVI were family members, through a corporate vehicle called Saffron Directors, but Mr Freed accepted that, while he was not a director or shareholder of F&M BVI, he was involved in the management of it and its investments, including KPL. On 4th September 2020 Mr Atherton sold his 40% shareholding in KPL to CMC Investments, a company incorporated in England in August 2020, the director and shareholder of which at the time was Moshe Freed. Thus F&M BVI held 20% of the shares, CMC Investments held 40% of the shares and remaining 40% was held by Mr Donovan.

51. On 21st September 2020 there was a meeting of the directors of F&M BVI at which Moshe Freed was authorised to represent F&M BVI in respect of its shareholding in KPL and to sign documents on F&M BVI's behalf. That appears to have been in order to deal with the removal of Mr Donavan as a director of KPL. Mr Freed was at least aware of the meeting. On the same day there was a meeting of KPL attended by Mr Freed, Ms Thompson and Moshe Freed. At that meeting, Moshe Freed was not only representing F&M BVI but also CMC Investments as its director. Mr Donavan's directorship terminated on the same day.

52. The filings at Companies House show that Moshe Freed's share in CMC Investments was transferred to Mr Freed on 30th October 2020, although, again, Mr Freed thought that this was a case of backdating and that, in fact, this took place on 20th January 2021, when the confirmation statement was filed. Again, there is no reason to believe that any such backdating took place and, indeed, a particular reason to reject that contention. On 14th June 2021, Mr Donavan presented a petition under section 994 CA 2006 in respect of KPL on the basis that he had been excluded from its management. The defence to that petition bears a statement of truth signed by Mr Freed on 23rd August 2021 on his own behalf and on behalf of CMC Investments and AGL. At paragraph 11 it is pleaded:

> "Norman Freed was not a director of or shareholder in CMC as at the date it purchased a shareholding in KPL. At that time, Moshe Freed was the company's sole registered shareholder and sole director. The share in CMC was transferred into the name of Norman Freed with effect from 30 October 2020. On the same date Norman Freed became a director of CMC. Norman Freed has at all times since the incorporation of CMC been its ultimate beneficial owner."

Mr Freed maintained in cross-examination that this paragraph was wrong and that he had overlooked the error in these points of defence. He also denied that he had at all times been the ultimate beneficial owner of CMC Investments, saying that the whole paragraph was wrong. I have to say that I do not find that remotely credible. Mr Freed

is an intelligent, astute man and a chartered accountant with experience of corporate governance. I have no doubt that if this paragraph was wrong Mr Freed would have identified the error and corrected it. I am satisfied that Mr Freed was the beneficial owner of CMC Investments prior to 30th October 2020, with Moshe Freed as his nominee.

53. Mr Freed accepted that he became secretary of KPL on 29th September 2018 and a director on 1st October 2018. He was shown as one of two directors in the financial statements for the year 31st December 2019 and signed the directors' report on behalf of the board on 10th August 2020. Mr Freed said that it did not follow that he was very closely involved in KPL's affairs, despite signing the financial statements and strategic reports, being one of two directors and the company secretary. He denied that he was at the "nerve centre" of both companies. He said that the shareholders were Mr Atherton and Mr Donavan and the decisions came through them. That is hard to reconcile with Mr Atherton having sold his shares at the beginning of 2020.

54. Mr Freed also denied that he acquired his interest in KPL as a commercial investment and maintained that he had acquired it for Moshe Freed. Again this is inconsistent with Mr Freed's pleaded case in the unfair prejudice petition. This says at paragraph 16(2):

> "As pleaded below, Norman Freed acquired his indirect interest in KPL as a commercial investment."

It continues at paragraph 23(1):

> "Mr Atherton had been in poor health since around 2017. In the circumstances, he did not wish to remain actively involved in KPL, and sought to sell his shares to Norman Freed. Norman Freed was content to purchase Mr Atherton's shareholding, via CMC. As a longstanding friend of Mr Atherton, he was prepared to do so without due diligence. A price of £1 million was agreed for the shares held by Mr and Mrs Atherton. As matters turned out, this was very much more than the shares were worth, given the financial position of KPL".

Again, Mr Freed said that it had been a long time since he had reviewed these pleadings and that they must be inaccurate. Paragraph 23(3) goes on:

> "as a condition of investing (via CMC) in KPL, Norman Freed told the petitioner that he wished to take an active role in the day-to-day management of KPL. The petitioner assented, saying 'that's no problem, Norman, I can handle you.'"

Mr Freed nonetheless maintained that it was Moshe Freed who wanted to make the investment. He denied that he himself had purchased and paid for Mr Atherton's shares and that Moshe was his nominee. He maintained that Moshe Freed was the finance director, though he was not formally described as such, and that Moshe Freed was the controlling shareholder.

55. Again, I reject this contention. Mr Freed's wholesale attempt to divert responsibility for KPL to Moshe Freed is inconsistent with the defence in the unfair prejudice

proceedings, which is carefully set out in detail. I have no doubt that, had the position now advanced by Mr Freed been true, it would have been set out in the earlier proceedings.

AGL

56. AGL was incorporated on 9th September 2020, a few days after Mr Atherton's shares in KPL were sold to CMC. Mr Freed, Moshe Freed and Ms Thompson were its directors. Mr Freed held the entirety of the shares until they were transferred to CMC Investments on 29th October 2020, according to the filings at Companies House. Again Mr Freed said that this filing could have been backdated and he believed that the transfer was later, on 20th January 2021.

Conclusion on control of the companies at the relevant times

57. I am satisfied that at the time of the KPL Payments and the AGL Payments, both KPL and AGL were "connected" with JRGL pursuant to section 249 IA 1986 by reason of being "associates" within section 435 IA 1986.

58. KPL was a 60% shareholder in JRGL. Mr Freed acquired his 40% interest in KPL, via CMC Investments, and meets the definition of control in section 435(10)(b) IA 1986. He acquired that interest on the basis that he would be involved in the management of the company. This is the reason, in my judgment, that he signed the strategic reports of the company and I am similarly satisfied that he was involved in its financial management. I note in this regard that the bank statements of KPL were addressed to "The Secretary", who was, from September 2020, Mr Freed. Mr Freed was the sole shareholder of AGL until he transferred his shares to CMC Investments, of which he was the beneficial owner, on 30th October 2021. He was also a director at all material times. I am satisfied that Mr Freed was the controlling mind, or principal controlling mind of the three companies.

59. I reject his evidence that it was Moshe Freed who was the decision-maker, whether as finance director or otherwise, and in particular that he was responsible for directing the payments made by JRGL. He appears to have had little involvement in the affairs of the companies in late 2020 and early 2021 on the basis of the documents that I have seen. Insofar as his role is made clear it is merely as nominee for Mr Freed. As I shall explain, there is no evidence of any dealings between Moshe Freed and FRP whether on behalf of the company or KPL. He was not, for example, copied into correspondence about the SPA. Mr Freed said that Moshe shared an office with him and he was involved with everything. While I am prepared to accept that Mr Freed shared an office with his nephew, it seems to me to be highly improbable that Moshe would have had such a negligible role in the communications concerning the administration or the SPA had he been part of the decision-making process of JRGL.

The administration and the pre-pack sale of JRGL's assets and business

60. The parties accept that JRGL was in financial difficulties by December 2020, though Mr Freed was somewhat equivocal about this. At paragraph 19 of his statement Mr Freed said:

> "In December 2020 it was clear to me that it was unlikely that the Company could survive as Covid 19 had taken its toll. JRG's turnover had collapsed and its previous directors had taken its pharmaceutical business. I therefore took steps to consult insolvency practitioners."

He said that his view at the time was that something had to be done and he had sought advice, which might have been that the company could continue to, as he put it, "soldier on".

61. However that may be, JRGL consulted FRP to seek advice regarding JRGL in December 2020. On 18th December 2020 there was a meeting between Mr Freed, Moshe Freed, Mr Needham of FRP, Mr Harrison and Ms Laura Coad of Keidan Harrison LLP, for the purposes of discussing the financial position of JRGL and its possible administration.

62. Mr Freed emailed management accounts to Mr Needham to 17th December 2020 on the afternoon before their meeting. These show that the company was trading at a loss and balance sheet insolvent. Mr Freed said that those had been prepared by Moshe Freed, though Mr Freed forwarded these management accounts to Mr Needham, without caveat, at a time when he was the sole director of the company. I am satisfied that these accounts must have been prepared by him or on his instruction. He also said that the company was only balance sheet insolvent by reason of the debt owed by KPL and it was never intended that that debt would be paid, as he explained to Mr Needham at the meeting. When that was removed, the company was not insolvent. This is simply incredible because, as I shall explain, (a) the offer to purchase JRGL's business included a proposal to pay KPL and (b) the debt was in fact called in.

63. Mr Freed's position as set out in his third witness statement was that Moshe Freed attended the meeting because, as controlling shareholder of KPL, FRP required his confirmation to proceed with the administration of the company. That does not make sense. This was an appointment by the director of the company. Mr Needham's evidence, which I accept, was that it was not clear to him what role, if any, Moshe Freed played in relation to the company or KPL. His only dealing with him subsequently was in relation to the completion of his director's questionnaire. It is notable that, in that questionnaire, Moshe Freed says, of his involvement in JRGL:

> "I had no formal role during my time as a director or before. In 2019, Mr Norman Freed asked me to send a 2019 order to counsel HMRC. I do not believe any queries were raised."

He said that he was asked to resign by Mr Freed at a board meeting on 2nd December 2020. Mr Freed denied the account given by his nephew in this questionnaire. While Moshe Freed has not given evidence in this case, the questionnaire is at least consistent with him having limited involvement in the company and Mr Needham's experience of him. It certainly does not suggest that he was the finance director of the group of companies.

64. There are no minutes of the meeting in evidence, although apparently notes were taken by Keidan Harrison that have not been provided as a result of a lien being exercised over them by that firm as a result of a fee dispute. Mr Freed raised this point for the

first time while giving evidence. An email was however sent by Mr Needham after the meeting on the same day. It was addressed to Mr Freed and Mr Harrison. Mr Needham said:

> "I write further to our meeting of earlier.
>
> To summarise the outcome of our discussions: JRGL is insolvent and it is necessary to appoint Administrators to JRGL. The business provides recruitment services, focussing on the pharmaceutical, health and safety and occupational health sectors. Trade relies on both contractual and commercial relationships and the strong sense is that the appointment of Administrators to sell the business and assets, under the umbrella of Administration, would cause damage to the business's key relationships and reduce the value of goodwill, as well as risk disputes against invoices. It is therefore proposed that the business and assets be marketed, a buyer identified and terms agreed ahead of an Administration appointment (termed a 'prepack sale') to minimise any associated damage and maximise the outcome to creditors.
>
> Please find attached our engagement letter, which I should be obliged if you would sign and return (page 6 only).
>
> I draw your attention to appendix 4, which summarises key considerations for directors during the hiatus pending an insolvency appointment. In summary, directors should maintain a status quo and importantly, minimise cash outflows, where possible. In the case of JRGL, it would seem commercially sensible to continue to pay: staff (net salaries); contractors; and key suppliers such as IT providers. This can often be a moving feast and so, please feel free to call or email with any queries on this point as payments can often fall into this grey area and it is often useful to talk through the commercial rationale.
>
> Timing wise, we will look to commence work on Monday. I am out of the office Monday morning but back in from lunchtime. Please therefore copy in my colleagues Excella and Jordan.
>
> @Luke Harrison
>
> If you would kindly share KYC documents so that we may verify Norman's identity as part of our client take-on procedures."

It appears from this email that the meeting had been relatively high-level. It was the first meeting that the parties had together and, as it suggests, a prelude to more detailed work being carried out thereafter.

65. Mr Freed however says in his first statement that the following was agreed at the meeting:

> "It was made clear at the meeting that KPL had been meeting any and all JRG liabilities up to that time and that any administration would only be approved if a) all creditors were paid in full, which KPL would undertake, b) the only creditor remaining would be KPL the debt of which was to be waived. There was a pending employment tribunal claim which was explained to FRP. Their advice was to ignore it because it was not an agreed debt and would be entered as a liability for £1. The administration went ahead on that basis. KPL paid the FRP fee and the Business was sold for £50,000 after being marketed by FRP and referred to the independent panel."

There is a dispute as to this. Mr Needham accepted that creditors had been discussed and that Mr Neto's claim in the employment tribunal had been raised, but it does not appear to have been raised in such a way that Mr Needham felt he needed to address it in his email. Nor did Mr Freed reply to add to Mr Needham's account of what was discussed. That does not suggest that Mr Neto's claim was considered in any detail at the meeting.

66. Mr Freed's evidence was that Mr Needham also suggested that creditors could be paid from wherever monies were available and joked that this was a "melange". This again does not appear in Mr Needham's email of 18th December 2020. It is true to say that he refers to the question of the payment of essential creditors as something of a "moving feast" but this is plainly intended to convey that there might be some doubt as to what constitutes a debt that may properly be paid, not that there should be a use of funds from associated companies that JRGL could pay in full. What the email certainly does not show is that Mr Needham accepted that all non-connected creditors would be paid and, on this basis, intercompany payments could be made without regard for the insolvency. Indeed, Mr Needham notes in his first witness statement that he treated the intention to pay unconnected creditors with "some scepticism". It is quite clear that he was aware that there might be other creditors and that the company's account of its circumstances might be incorrect. On 22nd January 2021, for example, he wrote to Bibby Financial Services [UK] Limited in response to Bibby's query as to whether, as it had been told, KPL was the only creditor of JRGL. Mr Needham replied:

> "Yes, HMRC are estimated to be repaid in full, leaving Key People Limited as the only creditor. This is obviously based on the company's records and subject to any unknown or contingent creditors of which we are not aware."

I am satisfied that Mr Needham did not give any "blessing" to the payments. I do not accept that he would have said any such thing at the meeting on 18th December 2020 or otherwise. Had he done so, Mr Freed would no doubt have responded to the email of 18th December 2020 to point out this oversight in Mr Needham's summary and ensure that this was made clear.

67. Keidan Harrison wrote to Mr Needham on 8th January 2021 on behalf of KPL and AGL and proposed the purchase of JRGL's business and assets on the basis that AGL would:

i) make a cash payment on completion of £30,000;

ii) make a further payment on completion equivalent to the amount owed to HMRC as a preferential creditor;

iii) discharge all trade creditors of JRGL directly in full, including KPL, to be addressed by way of a schedule in an asset purchase agreement;

iv) accept a TUPE transfer of all of the employees of JRGL.

68. Mr Needham emailed Mr Freed on the same date to ask him for the current amounts outstanding as follows:

> "We have received one offer for the business and assets and we expect to receive at least one further offer.
>
> To allow us assess the offers, would you please provide us with the following information:
>
> • Current amounts owing to HMRC.
>
> • Current screenshot of Bibby system or confirmation of gross receivables ledger and balance owing to Bibby.
>
> If you would let us have this information asap.
>
> As previously discussed, we will need to approach Bibby next week for their agreement to a prepack sale. I would recommend that you first speak to Bibby but if you would please let us have contact details for your relationship manager."

69. He followed up on 11th January 2021 and said:

> "Will you be able to forward the information from my email of Friday today?
>
> Looking forward we will also need to the following information, in readiness of the administration:
>
> • Creditors - Name, address, reference and amounts owed.
>
> • HMRC - UTR, PAYE reference and VAT registration no (we assume that JRGL isn't part of a VAT group?).
>
> • Bank - sort code, account number and balance.
>
> • Pension - details of any stakeholder pension scheme operated for employees."

70. Mr Freed replied on 15th January 2021 and said as follows:

> "I confirm that Key People Ltd is a creditor of Just Recruit Group Ltd in the sum of £433,637.33 as at 31st December 2020.

> In view of the ongoing shareholder dispute and Employment Tribunal proceedings, Key People Ltd has withdrawn its financial support and called in the above debt, which is repayable on demand.
>
> As such, I believe Just Recruit Group Ltd needs to go into administration."

As Mr Willson put to Mr Freed, this shows that KPL was calling in the debt, not waiving it as claimed in Mr Freed's witness statement. Mr Freed said, for the first time, that Mr Needham had asked him to write this email. Mr Freed did not in fact accept that JRGL was insolvent by reason of the debt due to KPL. He said that the debt could simply be dealt with by "journal entry" but Mr Needham had said that this was required to justify what he, Mr Needham, was doing. I reject this evidence. It is clear that Mr Freed consulted Mr Needham because he believed the JRGL to be insolvent, as Mr Needham confirmed it to be. There is no reason why Mr Needham should need to request this email. I note too that Moshe Freed is not copied into these emails as one might have expected had he been the finance director of the group. Again, the evidence shows that it was Mr Freed who was the decision-maker for both JRGL and KPL.

71. On the same day, Ms Coad of Keidan Harrison emailed Mr Grubb of Pre-Pack Pool Ltd to set out the circumstances of the company. Her email said, insofar as is relevant:

> "**Summary of events leading up to the current situation**
>
> • Former directors of the Company, Messrs Atherton and Neto breached employment covenants and solicited customers to leave JRGL, resulting in a material drop in turnover and losses in FY18 and FY19. This was the subject to high court litigation leading to a Consent Order [attach]. Mr Atherton was ordered to pay costs but entered into an IVA and little will be recovered.
>
> • Key People Limited (KPL), as majority shareholder, has supported JRGL's losses through intercompany losses. KPL has suffered losses of approx. £433k
>
> • KPL has withdrawn financial support to JRGL and demanded repayment.
>
> • JRGL has suffered further losses due to impact of COVID-19 and KPL is not prepared to continue to provide financial support via current structure.
>
> **Steps taken to avoid administration and pre-pack**
>
> • KPL is in a position to apply to the Court as a creditor to appoint administrators. The Directors have considered raising further funding and do not consider that it will be possible to raise alternative funding to repay KPL and provide the necessary working capital.

> • JRGL reduced costs with staff numbers as staff numbers were reduced to 4 but Covi-19 [*sic*] has impacted the turnover and contributed to further losses.
>
> • KPL is not prepared to fund any further losses
>
> …
>
> **Supporting Evidence:**
>
> We will not be providing a cash flow forecast given [AGL]'s projections and cash at bank as set out below:
>
> • Viability study/statement
>
> [AGL] currently holds circa £700K in its bank for this transaction. [AGL] has given its undertaking to reimburse the KPL debt from separate funds."

It seems clear from this email that JRGL had been loss-making since its financial years ending in 2018 and 2019.

72. The draft SPA went through a number of iterations. The first draft was sent from Mr Wild of HCR Legal LLP, the proposed administrators' solicitors, on 18th January 2021. It does not appear that Mr Freed was copied into this email. The draft identified JRGL as "the Seller" and AGL as "the Buyer". The definitions section included

> "'Assumed Liabilities'" means all debts, claims, liabilities and obligations of the Seller whether actual or contingent including but not limited to those as set out in Schedule 5;
>
> …
>
> 'Initial Consideration' means the sum of £[TBC] ([ ] thousand pounds only);
>
> 'Liabilities' means all and any actions, proceedings, claims, demands, legal and other costs, expenses, penalties and liabilities including consequential losses whatsoever brought against or incurred directly or indirectly by the Seller and the Administrators or any of them;
>
> …
>
> 'Preferential Debt Payment' means the sum of £[40,466] as estimated on the Transfer Date, or such other sum as is calculated as due to HMRC in respect of the Preferential Debt".

The figure in square brackets in that last definition is highlighted in yellow, no doubt indicating that this figure was subject to confirmation when the sum due to HMRC had been established.

73. Clause 3.4 provided:

> "3.4 If for any reason the Preferential Debt Payment is subsequently insufficient to satisfy the Preferential Debt:
>
> 3.4.1 the difference between the Preferential Debt and the Preferential Debt Payment paid shall be payable by the Buyer to the Seller within five business days of written demand by the Seller; and
>
> 3.4.2 the Buyer shall fully indemnify the Seller and the Administrators in respect of
>
> the Preferential Debt together with all and any associated Liabilities incurred by the Seller and/or the Administrators."

Thus AGL was to indemnify JRGL if the Preferential Debt Payment proved to be insufficient. This clause did not find its way into the SPA as executed. It would have required AGL to pay a further sum in the event that the liability to HMRC exceeded the provision made by way of the Preferential Debt Payment.

74. Clause 10 provided:

> "10 ASSUMED LIABILITIES AND PAYMENTS
>
> 10.1 In further consideration of the sale the Buyer shall with effect from the Transfer Date:
>
> 10.1.1 assume responsibility for and pay, satisfy or perform the Assumed Liabilities; and
>
> 10.1.2 pay all expenses, outgoings and Liabilities accruing or incurred in respect of the Business after the Transfer Date;
>
> and in both cases shall indemnify and keep indemnified the Seller and the Administrators on a full indemnity basis from and against all such Liabilities and Assumed Liabilities.
>
> 10.2 All periodical payments received in respect of the Business up to and including the Transfer Date and accruing after the Transfer Date shall belong to and be payable to the Buyer. If the Seller receives any periodical payment after the Transfer Date, it shall hold the payment on trust for the benefit of the Buyer until such time as it remits the apportioned part to the Buyer."

75. A later draft provided for initial consideration of £30,000 and specified the Preferential Debt Payment to be £20,000. It removed the indemnity provision at clause 3.4 so that in the event of a shortfall AGL would have no further liability. It was put to Mr Freed that this was at his insistence. He said that it was JRGL's position that there should have been a refund payable by HMRC and, although he equivocated as to whether he had required the removal of this clause, he eventually said that the indemnity had been deleted as it was "not necessary". In my judgment it was deleted at the request of Mr

Freed. The revised draft SPA appears to have been sent to the administrators by Mr Wild, who highlighted the removal of the clause in his covering email. The only beneficiary of the removal of the clause in the event that the Preferential Debt Payment was inadequate to meet HMRC's claim was AGL and Mr Freed. In that event, AGL would have no further liability under the SPA.

76. On 26th January 2021 Mr Freed emailed Mr Needham and Mr Harrison. He accepted that Mr Harrison was probably copied in for the purposes of finalising the drafting of the SPA. The email is headed "FW: JRG/AG" and so it does seem likely that it was for the purposes of the transaction between them. Mr Freed said:

> "Hi Miles
>
> VAT Calculation
>
> Outputs
>
> 10/20 - £43,445.84
>
> 11/20 -£47,924.97
>
> 12/20 - £30,489.05
>
> Foreign - £8,214.04
>
> Inputs
>
> 10/20 -£23,775.76
>
> 11/20 -£23,124.69
>
> 12/20 - £42,490.97
>
> Foreign -£216.12
>
> Tax Point 12/20 (paid 01/21) - 15,869.06
>
> Totals
>
> Out - £130,073.90
>
> Ins - £105,476.60
>
> Balance due to HMRC £24,597.30.
>
> Please see attached Bibby debtor and ageing
>
> Gross debtors schedule shown below
>
> Sterling = £111,421.92 + VAT £22,284.38 - see attached re ageing
>
> Euro = Euro20, 602.00 + VAT Euro700.40 - see attached re ageing
>
> CHF = CHF12,593.76 + VAT CHF2,
>
> 518.78 - All October '20 invoices
>
> US$ = $22,000.00 = VAT $4,400.00

> Bibby are owed circa £70K
>
> The bank balances total approx £4K and I am paying the wages and PAYE through Achieva tomorrow amounting to circa £20K
>
> I shall email the exact amounts in the morning."

77. On 27th January 2021 Mr Freed wrote to Mr Wild and Mr Harrison, copying in Mr Needham and others. He said:

> "Sorry Guys
>
> These numbers are still wrong.
>
> You have valued the Swiss franc debt which are invoices that need crediting. They date from last October.
>
> The value of the preferential debt is £24,597.30. There is therefore a shortfall in the value of the debtors however
>
> [AGL] will pay the amount of the preferential debt in spite of the debtors not having sufficient value.
>
> I have discussed the £30,000.00 with Miles. There is a question of the £11,275.00 already paid to be sorted.
>
> I have agreed with Miles that if necessary it can be paid but that the £11,275.00 duplicated payment can be repaid to either [KPL]. or [AGL]."

It was put to Mr Freed that it is clear from these two emails that Mr Freed was calculating the preferential debt for the purposes of the SPA. Mr Freed maintained that this was the information for the purposes of allowing the administrators to complete the company's VAT return. It is quite clear that the purpose of these exchanges was to calculate the figure for the SPA. Had it been for the purpose of the VAT return I accept Mr Needham's evidence that he would have required sight of the underlying documents.

78. The company entered administration on 29th January 2021 and the finalised SPA was signed on the same day. As entered into, the material terms of the SPA were –

i) At clause 3, the consideration for JRGL's business and assets was £50,000. This was divided into the "Initial Consideration" in the sum of £30,000 and the "Preferential Debt Payment" in the sum of £20,000. The Initial Consideration reflected the value of JRGL's business and assets and the Preferential Debt Payment reflected the assessment of the amounts due to HMRC. The provision for payment of a balance should the Preferential Debt Payment prove insufficient had been deleted.

ii) At clause 10 AGL agreed from the Transfer Date to assume responsibility for and to pay all the "Assumed Liabilities", which were defined as:

> "all debts that have crystallised as specified sums at the date of the agreement, but excluding the KPL Debt and any contingent, uncertain, or unspecified liabilities, employee liabilities which don't fall within clause 13.5"
>
> and, secondly, to pay to pay all expenses, outgoings and liabilities accruing or incurred in respect of the business at the Transfer Date.

iii) At clause 12 AGL's undertook to safeguard JRGL's books and records, as I have already mentioned.

iv) At clause 13 the parties agreed:

a) that the agreement constituted the sale of the business as a going concern to which TUPE applied and that JRGL's rights and obligations transferred in accordance with TUPE.

b) AGL would be responsible for paying all payments to the Employees due to be made on or after the Transfer Date whether such payments had accrued on or after the Transfer Date.

The other liabilities of JRGL

The Employment Tribunal Proceedings

79. In 2019 Mr Neto had commenced proceedings against JRGL in the Employment Tribunal for unfair dismissal and/or breach of contract and/or holiday pay. I have already referred to Mr Freed's written evidence that Mr Needham's advice was to ignore this and it would be entered with a value of one pound in the statement of affairs. It was put to Mr Freed by Mr Willson that he could not have been advised to ignore the Employment Tribunal claim. An insolvency practitioner simply could not ignore a contingent claim and it was not, in fact, entered with a value of a pound on the statement of affairs. Mr Freed said that it was not ignored but it was his certain recollection that it was to be entered at a pound.

80. The trial took place in March 2020 but was adjourned because of the COVID-19 pandemic. It recommenced in February 2021. Mr Freed maintains that the joint administrators should have defended the claim. He said in his written evidence:

> "164 After the Company entered administration, the hearing commenced of the Employment Tribunal proceedings brought by Mr Neto against the Company of which Mr Needham had already been made aware. The First Defendant spoke to Mr Needham advising him that this claim was disputed, was without merit and should be defended (the Company had received advice to this effect from its solicitors, Sherrards). Mr Needham told the First Defendant that the claim was of no consequence because the business had been sold and there were now no funds in the administration to make payment. In the event, Mr Needham did not defend the proceedings and an award was made in Mr Neto's favour of £100,442.

…

> 166(3) There are none of the documents relating to Mr Neto's claim in the Employment Tribunal, which were held by Sherrards, and to which the Company (and therefore Administrators) have privilege."

81. It seems that Sherrards had been instructed by KPL, which made it difficult for the administrators to obtain the file, but it is now in evidence. It includes correspondence with Mr Freed as the person with the conduct of the claim. This further reinforces the impression that it was Mr Freed who was the principal controlling mind of the companies. From that correspondence it is abundantly clear that Mr Freed could not honestly have told Mr Needham that the proceedings were without merit. An email of 28th November 2018 from Mr Fellowes, a partner and head of employment at Sherrards, included draft letters to the opposing parties. The covering email said:

> "You may feel they lack the same bite as Barney's letters – the simple reason for this is that we are a little on the back foot because, as discussed, we have in strict legal terms unfairly dismissed [redacted] (and Scott). So, the letters from their legal representative make numerous references to a failure to follow due process and I cannot, with the best will in the world, challenge these points with any real credibility because the representative's assertions around process are valid."

82. It was put to Mr Freed that this was clear advice that JRGL was facing a strong claim. Mr Freed said that it was clear advice that due process was not followed but said that there was strong mitigation, in the sense that the company contended that Mr Neto had competed with the business and that would have been brought to the attention of the tribunal. Mr Freed simply avoided the point that was being put to him which was that, whatever he may have felt about the rights and wrongs of the situation, the company was receiving unambiguous advice that it was facing a strong claim. This could not have been made clearer by Sherrards. The covering email said:

> "[Mr Neto] will likely be awarded compensation in the region of £86k because we had no fair reason to terminate his employment."

Mr Freed maintained that Mr Barnaby Laurence, the "Barney" referred to in the email, had expressed the view that the company would have "great mitigation" if expressed properly. Whether or not that was true at an earlier stage, the advice that he was receiving from Sherrards by November 2018 was clear. By February 2019 it was unequivocal. An email of 26th February 2019 from Mr Fellows reiterated:

> "As stated in my advice note, <u>he will succeed</u> with his claim and will likely be awarded the maximum amount from a Tribunal. With unpaid notice on top, he will be awarded compensation of circa £90,000" [emphasis added].

He went on:

> "Beyond the submission of the defence(s), I would typically be recommending that you aim to dispose of these cases at the earliest opportunity, for the simple fact that you could incur legal fees in this process which are not recoverable, and, as we discussed, we already know that you will have a finding of liability in all 3 cases.
>
> …
>
> In addition, because [Mr Neto] will succeed, and awarded the maximum compensation anyway, I am not sure we derive as much benefit if his case is heard separately."

83. There is no basis for Mr Freed to say that the proceedings were "without merit". On the contrary the advice received was that the proceedings would succeed and that beyond the submission of a defence should be settled as soon as possible, rather than incur the costs of trial. Mr Freed was prepared to accept that there was merit in Mr Neto's case but maintained that there was mitigation. There is no mention of such mitigation in these advice emails. Mr Freed's account in his evidence in these proceedings is wholly misleading, at the very least by omission.

84. Mr Freed's witness statement goes on:

> "Some months after the administration, the judgement was handed down by the Employment Tribunal. I called FRP who informed that it made no difference because the administration was effectively over and that I should not worry myself."

Mr Freed in fact had attended the hearing, and the administrators had given their consent for the proceedings to continue, notwithstanding the administration. Mr Freed apparently attended on behalf of the company and KPL. It appears that the parties in those proceedings had in fact agreed, at an earlier stage, that Mr Neto had been unfairly dismissed.

85. I reject Mr Freed's evidence as to the extent to which he informed FRP of the claim. I am satisfied that had he informed Mr Needham of the advice received from Sherrards the absence of this liability in the information provided for the purposes of the statement of affairs would have been queried at the time. I am similar satisfied that the joint administrators did not advise him that "it would make no difference". What is abundantly clear is that there is no basis on which the joint administrators could have defended the proceedings. The award of the tribunal was in accordance with the unequivocal advice of Sherrards as to the amount that would be awarded.

The debt due to HMRC

86. Mr Freed's first witness statement addresses the question of the liability for VAT at paragraph 27 as follows:

> "At the time of the administration there was a VAT liability of circa £40K according to the company records. I explained that with all the payments being made to clear creditors the input

> taxes would far exceed any liability to HMRC. FRP agreed that the liability, if any, would be negligible and would in any event be covered by the £50,000 paid for the pre-pack."

87. His third witness statement says:

> "20. The last VAT return made before administration was up to 30.09.20. The draft figures to 31.12.20 were given to Mr Needham for him to file the VAT return."
>
> 21. As at 31.12.20 the Company's VAT liability was approximately £40K. From that point only input tax could have arisen as there were no further sales. That should have reduced the Company's VAT liability but instead it rose to approximately £125K. That could only be on the basis of assessments by HMRC which they would have made on the basis of previous sales which of course did not take place. Had input tax been appropriately claimed, the HMRC debt would have been reduced to nil."

Thus, again, Mr Freed blames the administrators for the VAT liability and contends that, had they submitted a VAT return, the liability would have reduced or extinguished.

88. The management accounts to 17th December 2020 sent to Mr Needham in advance of the meeting on 18th December 2020 show VAT due in the sum of is £119,292.52. Mr Freed said that it was very difficult to do accounts in the middle of a period and he could not say how accurate they were given that they were not at the end of the period. He said that he could have produced the management accounts to the end of the period, that is to say as at 31st December 2020, if asked. I find this incredible. Mr Freed produced some 6,700 documents and yet this essential document does not seem to be among them.

89. Mr Freed's position nonetheless is that Mr Needham would have had the relevant VAT information but neglected to file a tax return. Mr Freed said that that, as there were no outputs the VAT liability could only decrease once the input tax paid to KPL was reclaimed. He maintained that trading had ceased and no invoices had been issued after 31st December 2020, and thus no output tax had been charged. It does appear that Bibby paid the company some £50,000 on 12th January 2021. Mr Freed reasonably suggested that these were payments drawn against invoices issued in December 2020. Bibby's statement addressed to JRGL, dated 26th January 2021, suggests an opening balance of £262,785.41 as at 1st January 2021 and invoices of £29,792.27. Mr Freed said, again plausibly, that these may have reflected invoices in December, there being a time lag between the raising of the invoice and the Bibby statement.

90. Although Mr Freed maintained that payments made to KPL would have reduced the VAT due, he has unable to identify any invoices to show such tax being charged to JRGL. This is despite his case that that these were produced every quarter and sent from KPL to JRGL. He said that he might have these in computer format but he did not know. Again I find this incredible. I have no doubt that Mr Freed would have been able to identify and produce these documents, or at least some evidence of their existence, had they ever existed.

91. Mr Needham's evidence was that he would not file a return unless it would lead to a reclaim and he did not have the documents to put in a return. In this regard, Mr Freed relied upon his email of 26th January 2021 as providing Mr Needham with the information necessary to file the return. It is quite clear to me that that email was provided for the purposes of producing the figure for inclusion as the Preferential Debt Payment. I accept Mr Needham's evidence that he could not properly lodge a VAT return without sight of the underlying documents to demonstrate that the company was entitled to reclaim input tax.

92. As to the allegation that FRP agreed that the VAT liability would be negligible. Mr Freed was referred again to the SPA which defined the "Preferential Debt Payment" as the sum of "£20,000 as estimated on the transfer date". Mr Freed agreed that the agreement itself regarded the payment due to be an estimate. That figure varied over the drafts – other estimates were £40,466 and £56,254,70. The reason for this is obvious, the VAT figure was not yet settled prior to entry into administration. Prior to the entry into administration the figure fluctuated and FRP were dependent on Mr Freed for the figure owed by the company. FRP could not have "agreed" that the figure was negligible.

93. There is no evidence of Mr Needham or any representatives of FRP being advised of a potential VAT reclaim in the documents to which I was referred. The best Mr Freed could say was that it was implicit. Indeed, if Mr Freed were right that there was a VAT reclaim that would wipe out the company's VAT liability it is difficult to see why the SPA would have been drafted on the basis of a payment being made for this at all. The SPA is premised on there being a VAT liability. I find it improbable in the extreme that Mr Freed would have agreed to pay a fixed sum of £20,000 to cover HMRC liabilities had he considered that those liabilities would have been significantly reduced.

94. I am not at all satisfied that Mr Needham was in a position to file a VAT return or that the return would have reduced JRGL's VAT liability. Even if there was the potential for such reduction, had Mr Needham had the relevant information, it remains the case that HMRC's proof of debt also discloses a debt due for the period ending 31st March 2020 in the sum of £60,169.65 on the basis of JRGL's own return. The company had a substantial liability for VAT in any event.

Conclusion as to the company's other liabilities

95. I am satisfied at the time at which the KPL and AGL payments were made, the company had a contingent, although almost inevitable, liability to Mr Neto of at least £90,000 and at least £60,169.65 to HMRC for VAT due under a return. I am similarly satisfied that these liabilities were not disclosed to the proposed joint administrators prior to the administration and the SPA. I reject the contention that these liabilities should or could have been reduced by the administrators.

The payments to KPL

96. The KPL Payments are the payments made on 9th October 2020 and 14th December 2020, totalling £240,000. The Defence deals with these as follows:

> "12. Under a long-standing arrangement, the Company was invoiced on a quarterly basis by the Second Defendant for

> £100,000 plus VAT (comprising the Second Defendant's administration fee, and directors' fees for Mark Atherton and Paul Donovan).
>
> 13. The two payments of £240,000 to the Second Defendant, referred to in Table A at paragraph 10, were in respect of the Second Defendant's and directors' fees as set out above.
>
> 14. By reason of the payments to the Second Defendant the Company was entitled to reclaim the VAT on its invoices in respect of the two payments of £120,000. The Company was therefore entitled to reclaim (and set off against its liability to HMRC) the sum of £40,000, thereby extinguishing its debt to HMRC."

97. Mr Freed was asked about the "long-standing arrangement" in a Part 18 request and replied as follows:

> "**7.1. What are or were the terms of the "long-standing arrangement"?**
>
> The arrangement was in place before the First Defendant became a director of the Company from at least 2018. The Company would be invoiced and pay for the services identified in the response to request 7.2 below. The fee of £100,000 plus VAT was fixed before the First Defendant became a director of the Company.
>
> **7.2. What services were provided by the Second Defendant in return for payment?**
>
> The services provided by the Second Defendant included:
>
> (1) The work of the directors of the Second Defendant for the Company.
>
> (2) Agreeing sales contracts with clients, employment contracts with contractors, administering payments to contractors and other administrative expenses, collecting payments from clients (including chasing of late payments), reconciling the factoring accounts and agreeing credit limits.
>
> (3) All bookkeeping/accounting of the Company.
>
> (4) All employment law compliance of the Company.
>
> (5) All client/contractor financial compliance of the Company.
>
> **7.3. For what was the second Defendant charging an "administration fee"?**
>
> See response to request 7.2.

> **7.4. When was the "long-standing arrangement" entered into?**
>
> At least 2018. See response to request 7.1.
>
> **7.5. Is the "long-standing arrangement" said to have had contractual force?**
>
> Yes.
>
> **7.6. Who entered into the "long-standing arrangement" and in what capacity?**
>
> Mark Atherton, Paul Donovan, Jason Atherton at the Company and Scott Neto at the Second Defendant.
>
> **7.7. Was the "long-standing arrangement" an oral or written agreement? If the latter, please provide a copy of the written agreement pursuant to paragraph 21 of CPR PD57AD and/or CPR r.31.14.**
>
> Oral.
>
> **7.8. Over what period did the Company pay £100,000 plus VAT per quarter to the second Defendant?**
>
> Since at least 2018. The First Defendant was not involved in agreeing this figure, and did not increase or reduce it during the currency of his directorship.
>
> **7.9. Did the directors or shareholders of the Company approve directors' remuneration pursuant to the "long-standing arrangement"? If so, when and how?**
>
> Agreed by the individuals in the response to request 7.6 above.
>
> **7.10. Mr Atherton resigned as a director on 31 December 2019. Mr Donovan resigned as a director on 21 September 2020. Given their resignations, why were payments made in October and December 2020?**
>
> The payments were for the services of the Second Defendant's directors for the Company (not for the Company's directors).
>
> **8. As to paragraph 14, what services were being provided that were subject to VAT?**
>
> See response to request 7.2."

98. In respect of the allegation of preference, the Defence pleads:

> "36. The payments to the Second Defendant were not preferences for the purposes of section 239 of the IA86 because:
>
> (1) The Second Defendant was the only unsecured creditor of the Company on administration and the payments were not made in preference to any other creditors.
>
> (2) The payments were part of the ongoing administrative and financial support given by the Second Defendant to the Company. As described above in paragraphs 3 to 15 above, the Second Defendant supported the Company by making payments when the Company was unable to do so, and by providing administrative services to the Company for which the Second Defendant submitted invoices to the Company. The Company made paid the Second Defendant when it was able to do so. Had the payments not been made the Second Defendant would have ceased to provide support to the Company.
>
> (3) The Company received more from the Second Defendant in the relevant period as part of these ongoing arrangements than the Second Defendant received from the Company.
>
> (4) The Company was able to pay the debts to its creditors as they fell due, by reason of the Second Defendant's support, so that it was not unable to pay its debts for the purpose of section 240(2) of the IA86. It is the Second Defendant's case that the debt to it (which it did not seek to enforce) is to be disregarded for the purposes of section 240(2) of the IA86.
>
> (5) The Company was not influenced by any desire to prefer the Second Defendant. Instead, the First Defendant as a director of the Company intended that all of the Company's creditors be paid in full so that the Second Defendant was its only creditor."

99. There are no invoices before the court. Mr Freed said that these were provided to Mr Needham. I reject that contention for the reasons I have already given. I do not accept that any such documents were delivered up. Nor has KPL produced evidence of these services being provided. The following KPL bank statements have been disclosed –

i) the Sterling account statements run from 2nd July 2020 to 20th August 2020;

ii) the Euro account statements run from 1st July 2020 to 31st December 2020;

iii) the Swiss Franc account statements run from 31st July 2020 to 31st December 2020;

iv) the US Dollar account statements run from 1st July 2020 to 31st December 2020.

None of these statements show quarterly payments of £100,000, although there is a payment of €100,000 shown into the Euro account on 4th December 2020 coming from JRGL. No statements have been provided in respect of the period in which the KPL payments were made. Mr Freed said he had told the office to send everything but he did not know what was being sent and he did not check for omissions. The JRGL statements do however show two payments of £60,000 to KPL in June 2020.

100. The only document said to evidence the alleged arrangements in respect of the KPL Payments are the management accounts for JRGL to 17th December 2020. These record "bookkeeping charges" of £120,000, which Mr Freed said had been paid to KPL for services rendered. "Directors' salaries" are shown to be £60,000, though Mr Freed said that again they were in fact payments to the KPL's directors for management services. "Professional fees" are shown at £120,055.49. Again, Mr Freed said that these were payments to KPL by way of professional fees. Mr Freed described KPL as having provided JRGL's "entire back office". At no point does he seem to have explained these opaque descriptions to the administrators. Nor are such descriptions used in the KPL accounts, where legal and professional fees as might conventionally be described are set out. KPL's accounts show "other operating income" of £455,385. Mr Freed said that £400,000 of that some represented the management fee. I do not accept these explanations. It would have been perfectly straightforward to evidence the provision of these services. I am not satisfied that there were any such services provided or any arrangement between KPL and JRGL.

101. I am therefore not satisfied that there was any consideration for these payments. They were made within the period provided for by section 238 IA 1986 to a connected company and the company's inability to pay its debts is presumed. There is nothing to displace that presumption. Indeed, the third witness statement of Mr Needham is clear that the company was trading at a loss and balance sheet insolvent. It faced an inevitable liability in the Employment Tribunal proceedings and existing liability to tax that had gone unpaid, in addition to a liability to KPL.

102. If I am wrong as to that, there is a plain preference. The payments were again made to a connected person during the period provided for by section 239 IA 1986 at time when the company was plainly insolvent. Although the claimant cannot rely on a presumption of insolvency I am satisfied on the balance of probabilities on the evidence that I have seen that it was insolvent at the beginning of October 2020 –

    i) The last publicly available accounts for the company record that, as at 31st December 2019, the company had net assets of £233,139, a very significant decline from the previous year.

    ii) The company is said to have suffered a further downturn as a result of the COVID-19 pandemic, which began at the start of 2020, leading to a loss of £452,003 according to the management accounts emailed to Mr Needham on 17th December 2020.

    iii) The management accounts also show the company to be balance sheet insolvent in the sum of over £200,000. I acknowledge that these accounts post-date the first of the KPL Payments but they provide an indication of the state of the company's finances towards the end of 2020 (save that it makes no provision for the Employment Tribunal claim) and it was not alleged that there was any

significant change in the circumstances between October 2020 and December 2020.

iv) A liability of £60,169.65 due to HMRC had gone unpaid since April 2020.

v) Insolvency advice was sought shortly within two months of the first of the KPL Payments, on 11th December 2020.

Overall, the picture is of a company which had made a substantial loss over the year, more than extinguishing its net assets at the conclusion of the preceding financial year, and was not meeting its liabilities as they fell due. I am satisfied that the company was unable to pay its debts.

103. The desire to prefer is presumed. Even if that presumption were not engaged, I would be satisfied that the payments were influenced by a desire to prefer. There was a substantial liability to Mr Neto, which had not crystallised but which was plainly going to do so following the trial in the tribunal. There was similarly a substantial liability to tax. There is no other basis on which they can conceivably have been made. Entities connected to Mr Freed received substantial sums while unconnected creditors did not.

AGL Payments

104. These are the payments totalling £678,590.18 between 17th December 2020 (the day before the meeting with Mr Needham) and 24th December 2020. The Defence explains these payments as follows:

> "15. The payments to the Third Defendant, referred to in Table B at paragraph 10, were made:
>
> (1) On the instructions of Moshe Freed on behalf of the Second Defendant, in repayment of sums paid to the Company's creditors by the Second Defendant; and
>
> (2) To support the Third Defendant in continuing to pay the Company's former employees' salaries and taxes, and to meet the Company's contingent liabilities such as its lease.
>
> …
>
> 22 In summary the Defendants deny any liability to the Claimant because:
>
> (1) The payments to the Second and Third Defendants were made for consideration. The payments were made in respect of the Company's liabilities which the Second Defendant had discharged. The payments were not transactions at an undervalue for the purposes of section 238 of the IA86.
>
> …
>
> 39. Paragraph 21 is denied. The payments to the Third Defendant were not transactions at an undervalue for the purposes of section

> 238 of the IA86. The payments were made for consideration because they were made to the Third Defendant on the Second Defendant's instructions, to repay the debt owed by the Company to the Second Defendant.
>
> 40. As to paragraph 22, the payments to the Third Defendant were made in repayment of the Company's indebtedness to the Second Defendant. The payments were not preferences for the purposes of section 239 of the IA86. Paragraph 36 above is repeated."

105. The making of the payments to AGL is not denied. Such payments are plainly transactions for the purposes of section 238 IA 1986. The basis of the defence is that they were made on the instructions of Moshe Freed (acting on behalf of KPL) for two purposes, being, first, repayment of sums paid by KPL to JRGL's creditors, thus discharging JRGL's debts, and, secondly, to pay the company's former employees salaries and other expenses. There is, however, no evidence of such arrangements, whether by way of documents showing any principal and agent relationship between KPL and AGL or of payments being made in a way which is consistent with such arrangements. Mr Freed's position that an agency arrangement could arise by reason of common ownership is obviously ill-founded and I reject it.

106. The payments made to AGL by way of repayment of debts due to KPL on the instructions of Moshe Freed is addressed in Mr Freed's evidence as follows:

> "8. After the initial meeting with FRP, JRG went into administration and was purchased by way of a 'pre-pack' by AGL. KPL agreed to pay off all JRG's debts and then to write off the amounts due to it from JRG. KPL arranged payments and money transfers from JRG to KPL directly and to AGL, as KPL's agent, to pay off all creditors as and when these were due. This took place generally between November 2020 and December 2020 by KPL directly and then was continued by AGL on behalf of KPL after 15th January 2021. Any surpluses were to be treated as reductions in the KPL debt. Because there were no other creditors this could not be preferential. AGL acted as agent for KPL from 1st January 2021 when KPL ceased trading."

Thus there appear to be two periods in which creditors were being paid off. During November and December 2020 payments were being made by KPL. AGL acted as agent for KPL from 1st January 2021 and then met liabilities directly from 15th January 2021 up until the point at which it assumed these liabilities under the SPA on 29th January 2021.

107. Mr Freed's first statement goes on:

> "16. The Company would account to [KPL] for the sums paid on its behalf. It would do so either by making payments to Key People directly or making payments to [AGL] to make payments on behalf of the company or [KPL]. Instructions for all payments

> were made by Moshe, finance director of [KPL]. Manolete's claim for £240,000 from [KPL] does not relate to these payments. This specifically is 6 months of payments to [KPL] of £200,000 plus £40,000 VAT which should be reclaimed and not offset against [KPL]. These payments have been made since the incorporation of the company and are for [KPL]'s director's time, all bookkeeping, accounting, administration, contract preparation etc.
>
> 17. [AGL] made payments similarly post l January 2021 and was also responsible for the salary payments. PAYE, NI and all ongoing redundancy liabilities. These activities were all on the instructions of [KPL] until about June 2021."

The obligation of AGL to pay employees arose under the SPA. From 29th January 2021 these were not liabilities of JRGL. It was no part of the bargain that any payments would be made by JRGL to cover these payments.

108. During the course of these proceedings Mr Freed was asked by way of Part 18 request to particularise those creditors of JRGL that were paid by KPL, which gave rise to a debt that fell to be repaid either to KPL itself or, at KPL's direction, to AGL. The response, which bears a statement of truth, refers to a table that lists payments after 31st December 2020 totalling £426,797.15, and states that, in addition, KPL paid JRGL's liability with Bibby Factors. Mr Freed said Moshe Freed prepared this schedule.

109. A comparison with a schedule accompanying the defence in the KPL unfair prejudice proceedings is instructive. The figures are the same as in the table accompanying the Part 18 response and the second half is very similar. The defence in the KPL petition says this:

> "60. In these circumstances, Norman Freed, Moshe Freed and Ms Thompson arranged for [AGL] to make payments in respect of certain debts owed by JRG (from 1 December 2020) and in respect of certain debts owed by KPL (from 4 January 2021). [AGL] was repaid, or on occasion prepaid, in respect of the payments it made on behalf of JRG and KPL, as and when those companies were in funds. This arrangement was in substance a revolving credit facility made available by [AGL] to JRG and to KPL. [AGL] knew through its directors that both JRG and KPL were in financial difficulty, and advanced the money on the understanding that it would be repaid as soon as JRG or KPL had funds available.
>
> 61. A schedule of the payments made and received by [AGL] in the context of this revolving credit facility is provided with these points of defence."

Thus the same payments, or very many of them, that are now said to have been made by KPL were relied upon as having been paid by AGL on JRGL or KPL's behalf in the defence to KPL unfair prejudice petition. Mr Freed was taken to the transactions said to have been paid by AGL (in the unfair prejudice proceedings) from 1st December

2020 to 4th December 2020. Despite having been said to have been paid by AGL, the JRGL statements show these to have been paid by JRGL. Here, Mr Freed shifted his ground, saying that the cases were completely consistent. The payments were to come from "wherever".

110. It is quite clear, as Mr Willson put to Mr Freed, that the response to the request for further information, bearing a statement of truth signed by Mr Freed, is completely inaccurate. I regret to say that Mr Willson was also right to say that Mr Freed appeared to be saying whatever suited his case at the time. An accountant and, indeed, an intelligent man, as Mr Freed plainly is, could not seriously maintain that the cases advanced in the defence to the unfair prejudice proceedings and the Part 18 response were consistent, or that they were consistent with the bank statements.

111. None of the documents suggest that AGL was making payments on KPL or JRGL's behalf. On the contrary, one can see from these documents that, on 22nd December 2020 AGL received £600,000 from JRG. On the 11th and 21st January 2021 there are payments to Keidan Harrison of £5,000. A further £50,000 was paid on 28th January 2021. It was put to Mr Freed that this represented the consideration for the SPA, the money for such payment having ultimately come from the £600,000 paid by JRGL to AGL on 22nd December 2020. Mr Freed said that he did not authorise the payments but Keidan Harrison were instructed on a number of matters so the payments did not necessarily relate to the SPA. There is no evidence of this and the timing of the payment of £50,000 satisfies me that it was the payment of the consideration due under the SPA. It is fair to say that there were some other limited payments into the account totalling around £58,000 and around £12,000 had been paid out, so at least some of the consideration was derived from monies paid into AGL's account by JRGL. Mr Freed once again resorted to a blurring of the lines between the companies' finances and said that it had all been "done in the round" and the source of the money was KPL. JRGL's own bank statements however clearly show this payment of £600,000 out and there is no corresponding payment in to suggest that it acted as a conduit for the monies from KPL.

112. I reject the contention that the AGL Payments were made to discharge liabilities of JRGL to KPL. There is no evidence of any such liability and Mr Freed's account of the basis on which these payments were made has been wholly inconsistent. I similarly reject the contention that payments were made at the direction of Moshe Freed on behalf of KPL. Mr Freed was the controlling mind of KPL.

113. In relation to the contention that the payments were made in order to meet salaries and ongoing staff liabilities up to June 2021 there is again no evidence of this. Moreover, clause 13.2 of the SPA, as executed however said:

> "13.2 Notwithstanding the provisions of clause **Error! Reference source not found.** [*sic*], the Buyer shall be responsible for paying all payments to the Employees due to be made on or after the Transfer Date whether such payments have accrued in respect of the period before or after the Transfer Date and shall not be entitled to any rebate, claim or apportionment in respect of any such payment."

The transfer date was the date of the SPA, that is to say 29th January 2021. Thus is was AGL that was to pay employees whose salaries had accrued by the date of transfer. It was not part of the bargain that JRGL would pay AGL. One might ask why JRGL would pay AGL for AGL to fulfil its own obligations. I reject this explanation.

114. There is nothing to suggest any agency relationship between KPL and AGL. There is no evidence of a pre-existing debt between JRGL and AGL nor any evidence that the payments discharged any such debt owed by JRGL to KPL (or for that matter to AGL). Mr Freed again resorted to saying that one had to "take it globally", but there is no evidence of any pre-existing agreement to allocate debt in any particular way, no evidence that AGL or KPL discharged debts of JRGL or evidence of a relationship of principal and agent between AGL and KPL.

115. I am, again, satisfied that there was no consideration for these payments. They were made within the period provided for by section 238 IA 1986 to a connected company, JRGL's inability to pay its debts is presumed and the presumption has not been displaced. In any event, I am satisfied that the company was insolvent. I have already given my reasons for concluding that the company was insolvent by October 2020 in relation to the KPL Payments, but the case is even clearer by the time of the AGL Payments. Even if it were to be argued that JRGL was solvent as at the date the first of the AGL Payments (which in fact left the account on 22nd December 2020) the payment had the effect of denuding the company of nearly the whole of the monies in its account, leaving it with some £39,000, at a time when it its management accounts showed that it was balance sheet insolvent and it had been confirmed by a insolvency practitioner that it was indeed insolvent.

116. If I am wrong as to transactions at an undervalue, the payments would amount to preferences, having been made to a connected person during the period provided for by section 239 IA 1986 at time when JRGL was plainly insolvent. The desire to prefer is presumed. Again, were that presumption not engaged, I would nonetheless be satisfied that the payments were influenced by a desire to prefer by reason of the fact that entities connected to Mr Freed received payments while unconnected creditors did not. The conclusion that there was an intention to prefer is inescapable.

Remedy pursuant to sections 238 and 239 IA 1986

117. Subject to the question of whether recovery should be limited to the shortfall in the administration, it seems to me that the proper order is that KPL and AGL should repay the entirety of the claimed sums to the claimant. There are no countervailing factors that would persuade me otherwise. KPL and AGL were connected to, if not wholly controlled, by Mr Freed. The liabilities to which JRGL is subject are not the result of any failure on the part of the administrators. Rather they are liabilities that Mr Freed failed properly to disclose. It is conceivable that there are other liabilities. The proper order is to require the sums to be repaid and for the administrators' portion of the proceeds of the litigation to be administered in accordance with the Insolvency Rules.

Breach of duty

118. The payments had the effect of transferring substantial monies to KPL and AGL with no resulting benefit to the company or its creditors. Not only did this confer a benefit on KPL and AGL but also on Mr Freed by virtue of his interest in those companies. I

am satisfied that there was no proper purpose for the transfers and they were made in breach of his duty to consider and act in the interests of creditors preserved by section 172(3) CA 2006. The company was insolvent by October 2020, or at the very least it was probable that the company was about to go into an insolvency procedure shortly, and those interests were paramount. The irresistible conclusion is that Mr Freed deliberately sought to transfer assets from a company that he knew to be an insolvent company or, at the very least, a company on the verge of insolvency, to others with which he was associated knowing that the result would be that other creditors would not be paid. Were that not the case, and he gave no consideration to those interests in making the payments at a time when the company was insolvent or on the verge of insolvency, I am satisfied that he knew that there were creditors, at least in the form of Mr Neto who would be prejudiced by the payments. The decision to make the payments cannot be justified, looked at objectively, given the insolvency of JRGL. I am satisfied that Mr Needham did not give him any advice that he would make the payments in these circumstances.

119. The ratification defence cannot succeed. There is no evidence that the shareholders of JRGL ever turned their mind to the breach. Moreover, the Company was insolvent at the time of the payments, and if not, undoubtedly became so as a result of the payments. It is not open to shareholders to ratify breaches in such circumstances.

120. Nor is Mr Freed entitled to relief under section 1157 CA 2006. He has not satisfied me that he has behaved honestly or reasonably. On the contrary, he has shown, to put it at its lowest, a lack of candour both in his dealings with the joint administrators and his evidence in this court. The only conclusion that can be formed from the evidence that I have seen is that the payments were, at best, made without proper consideration of the interests of creditors and, at worst, a cynical scheme to abstract funds from JRGL and leave the debts of unconnected creditors in the company.

Knowing receipt

121. I have already determined KPL and AGL's liability under the Insolvency Act. For the sake of completeness I record that further or in the alternative I consider them liable on the basis of knowing receipt. The payments to those companies were made for no consideration and/or in preference to other creditors. They are companies were are owned and/or controlled by Mr Freed – in the case of KPL by reason of his ownership of CMC International, his management role in F&M BVI and his directorship; and, in the case of AGL, his ultimate beneficial ownership of the entirety of its issued share capital and his directorship. Indeed I am satisfied that Mr Freed was the controlling mind of those entities. I am satisfied that Mr Freed breached his duty to consider and act in the interests of creditors by transferring monies to his associated companies in order to try and remove those monies from the ambit of an insolvency process. Mr Freed's knowledge of that breach of duty can be imputed to the recipient companies which he also controlled.

Limitation to shortfall and "circularity"

122. The Defence pleads that the Defendants' liability to should be limited to the shortfall in the administration as follows:

> (5) Further, the Defendants have no liability to the Claimant since:
>
> > (a) They had no liability to the Company before the assignment of their claims to it, the liability of the Defendants is limited to the deficiency in the administration, and there was no deficiency save for the debt owed to the Second Defendant.
> >
> > ...
> >
> > (d) To the extent that the Claimant seeks to rely upon the decision in *Manolete Partners PLC v Hope* [2022] EWHC 1801 (Ch) to claim that the deficiency in the administration does not limit the claims:
> >
> > > (i) It cannot be relied upon as precedent. It was decided without any attendance or representation from the respondents to the appeal.
> > >
> > > (ii) It was decided by a Court of co-ordinate jurisdiction and is not binding precedent."

It concludes at paragraph 52:

> "These proceedings are circular, in that the only (alternatively, only significant) creditor of the Company is the Second Defendant. Any order requiring the Defendants to pay any sum should be limited to the true deficiency in the administration. The Defendants repeat paragraph 22(5) above."

123. The Reply addresses these contentions as follows:

> "10. Third, contrary to what is said in paragraphs 22(5) and 52 of the defence, there is no "circularity" to this claim. If the second Defendant can demonstrate that it is a creditor of the Company, then it will be entitled to prove in the liquidation and, in those circumstances, may benefit from a distribution to creditors. That does not affect its liability in these proceedings. The Claimant will seek to rely on *Manolete Partners PLC v Hope* [2022] EWHC 1801 (Ch), which is obviously correct."

124. Mr Lewis's submission was that unconnected third party claims amount to £226,696.37, being the debt due to HMRC in the sum of £127,254.37 and to Mr Neto in the sum of £100,442 pursuant to the Employment Tribunal judgment. Taken with the costs and expenses of the administration, estimated as at 28th January 2024 to be £96,827, the shortfall in the administration is something in the region of £350,000. Recovery should therefore be limited to the shortfall sum, which is significantly less than that claimed in the proceedings. Any greater recovery would be, as the Defence puts it, "circular" in that the excess would be returned to KPL as a creditor in the sum of £474,103.33.

125. As anticipated in pleadings, much of the argument turned on the decision in *Manolete Partners PLC v Hope* [2022] EWHC 1801 (Ch). That claim was made against the respondents who were the directors and shareholders of a company called PGD Ltd. It related to the sale of the respondents' shares using company funds and the payment of unlawful dividends which cleared the directors' loan accounts. Following PGD Ltd's liquidation, the claims of the liquidator and the company itself against the respondents were, as here, assigned to Manolete. At first instance, the respondents were found liable but recovery was limited by a proviso to the judge's order ("the Proviso") to:

> "the amount required to pay off all liquidation debts, fees, remuneration and expenses, together with applicable interest, in full and without return being made to the members of the Company as such".

126. The purpose of the Proviso was to prevent a distribution to be made to the buyers of the shares, who had participated in the wrongful sale. In imposing the Proviso, the ICC Judge also noted that the respondents should not be required to pay more than they would likely have had to pay if the claim had been brought by the liquidator, rather than having being assigned to and brought by Manolete. Where that left Manolete and the liquidator was a matter of the commercially negotiated agreement between them.

127. Manolete appealed the imposition of the Proviso and that appeal was allowed by Zacaroli J. He was of the view that the only jurisdictional basis for imposing the Proviso was section 212 IA 1986 and that it was not available in the case of an assignment of the claims to a third party. He noted however that the Proviso was wrongly imposed for reasons other than want of jurisdiction:

> "27. I recognise, however, that I have not heard argument from those who would stand to gain from the Proviso (the respondents, who did not seek it before the judge), or from those who would principally be prejudiced by it (the Buyers, qua shareholders of the Company, who are not parties at all). For reasons which I set out below, I conclude that the Proviso was wrongly imposed because it prejudiced the interests of MPP for reasons other than that there was no jurisdiction to order any limitation on recoveries at all. In these circumstances, I do not need to, and do not, reach any conclusion on the broader question of jurisdiction. The question whether, following an assignment of a claim by a liquidator, the possibility still exists of limiting the recoveries made by reference to or by analogy with s.212 is something that is best determined in the context of a case where it is essential to do so and the relevant parties on either side of the argument are before the court".

128. The judge considered that there were practical difficulties in the operation of the Proviso too. It was to be construed as capping recovery to the amount required to satisfy all debts, costs and expenses and that amount would be unknown at the point at which the judgment was to be enforced against the respondents.

129. Nor did Zacaroli J consider it correct to limit recovery on the basis of the likely recovery had the claim been brought by the office-holder. He said:

> "34. The judge's reason for imposing the Proviso, notwithstanding the difficulties pointed out by counsel, was that it was in principle wrong for the respondents to have to pay more – as a result of the claim being brought by an assignee – than they would have to have paid if the claim had been brought by the liquidator: "An assignee stands in the shoes of the assignor: a change in the identity of the claimant party ought not to result in any different recoveries."
>
> 35. That reasoning does not, in my judgment, justify his conclusion. While it is true that an assignee stands in the shoes of the assignor, that only means that the assignee can assert no better cause of action than the assignor. The discretion which the judge purported to exercise here, however, is not an element of (or defect in) the causes of action which were vested in the Company and the liquidator, and thus assigned to MPP. If it exists at all, it relates only to the proceeds of the cause of action, in that it limits the recoveries to be made because of where they would end up.
>
> 36. Moreover, the rationale for the discretion to be exercised is solely to deprive persons who are tainted by the wrongdoing which gave rise to the cause of action from receiving part of those proceeds. I accept Mr Curl's submission that it should not be exercised so as to prejudice innocent third parties to whom a part of the proceeds of the action would otherwise be paid.
>
> 37. Accordingly if, as here, a liquidator has, quite properly and in order to benefit the insolvent estate, assigned a cause of action on terms that require the proceeds to be divided with the assignee, then I consider it is wrong in principle to deprive the assignee of any part of those proceeds by the exercise of a discretion intended to prevent proceeds reaching someone tainted with the same wrongdoing as the defendants to the action.
>
> 38. Put another way, the price to the insolvent estate for recovering any proceeds from the causes of action is that a proportion of the proceeds are retained by the assignee. It could not be suggested that the discretion could be exercised so as to deprive the insolvent estate of the funds necessary to pay a debt or expense incurred in favour of someone innocent of the defendants' wrongdoing. I consider, equally, that the discretion cannot be exercised so as to deprive a similarly innocent third party of a right to share in the proceeds of the cause of action."

130. Mr Lewis rightly submitted that a judgment of a High Court Judge exercising an appellate jurisdiction is binding on me, by analogy with the observations of Mr David Foxton QC, as he then was, sitting as a Deputy High Court Judge in *Coral Reef Ltd v Silverbond Enterprises Ltd* [2018] 4 W.L.R. 104 at paragraph 61. Those observations were *obiter* but, if I may respectfully say so, plainly right. Mr Lewis however noted that Mr Foxton had noted the qualification to that principle at paragraph 67 in which he said:

> "…the decision of a High Court judge in terms of its clear ratio is binding on a master, absent either conflicting decisions of another judge at the same level of the High Court judge, or obviously of superior courts."

131. Mr Lewis says that there are such decisions that were not cited to Zacaroli J. He referred first to *Dawson v Great Northern and City Railway Company* [1905] 1 KB 260, a decision of the Court of Appeal. There a Mr Blake had sold freehold land to a Mrs Dawson. Before the sale, Mrs Blake had granted an easement to the defendant railway company to conduct tunnelling works on the land. Mr Blake then assigned his right to compensation from the defendant to Mrs Dawson. Mrs Dawson brought a claim for compensation against the railway company in her own name. The claim was for structural damage to the property situated on the land and for "damage to trade stock", arising because, unlike Mr Blake, she had a drapery business carried on upon the land. The Court of Appeal allowed recovery for the structural damage but not the trade stock. Stirling LJ said at 272:

> "Now the amount of compensation awarded in respect of this portion of the property consists of two sums—namely, 666l. 13s. 4d. in respect of what is termed 'structural damage,' and 700l. in respect of 'damage to trade stock.' The former sum we understand to be the amount which would have to be spent on the property in order to reinstate it in the condition in which it was before the defendants' works were executed; and we are unable to see that there ought to be any difference in this amount whether the property was in the occupation of Blake, or of the plaintiff, or whether the proceedings were taken in Blake's name or the plaintiff's. Further, it appears to us that every word of Ridley J.'s summing-up, so far as it deals with this part of the case, would have been just as applicable if Blake had been the plaintiff before him instead of Mrs. Dawson. We think, therefore, that so far as this item is concerned the defendants have not had any greater burden imposed on them than they would have had to bear if the proceedings had actually been taken in Blake's name. The second sum was awarded in respect of 'damage to trade stock,' and is the sum which it was estimated would be sufficient to recoup to the plaintiff loss occasioned to her by disturbance of her drapery business carried on upon the property, and by damage caused, or likely to be caused, to stock during the period occupied in the reinstatement of the buildings. The amount has been arrived at on the assumption that the plaintiff was the person in occupation of the property, and it is contended that it ought to have been ascertained on the basis that Blake was the occupier. In our opinion the plaintiff cannot, consistently with the principle of *Mercer v. Liverpool, St. Helen's and South Lancashire Ry. Co.*, recover a greater amount of compensation than Blake could have got."

132. Mr Lewis submitted that the principle was followed in subsequent cases. In *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68 it was conceded before

the Court of Appeal that the assignee of the cause of action could not recover greater damages for defective building works than the assignor, which had contracted with the defendant construction company. In *In Re Lehman Bros International (Europe) (in administration) (No. 6)* [2017] Bus L.R. 1475, it was argued that greater damages might be recovered by an assignee than by the assignor where the original agreement contained a mechanism for assessing damages or interest that was liable to vary from time to time and depending upon the circumstances. It was held that the rate was to be determined according to that available to the transferor as at the time immediately before the transfer, measured according to the position of the transferor. Hildyard J said:

> "242. Mr Zacaroli referred me in this context to text books (*Snell's Equity* 33rd ed. (2015) para 3-027 and *Chitty on Contracts*, 31st ed. (2012) para 19-074) and various authorities, including *Dawson v Great Northern & City Railway Co* [1905] 1 KB 260, *Offer-Hoare v Larkstone Ltd* [2006] EWCA Civ 1079, *Linden Gardens Trust Limited v Lenesta Sludge Disposals* Limited 57 BLR 57 (in the Court of Appeal) and *Equitas Limited, v Walsham Brothers & Company Limited* [2013] EWHC 3264 (Comm) at [127]-[133].
>
> 243. The summary in Snell's Equity, 33rd ed. (2015) para 3-027 suffices for present purposes:
>
> "In general, an assignee cannot recover more from the debtor than the assignor would have. The purpose of the principle is to prevent the assignment from prejudicing the debtor. This would happen if, for example, he had to pay damages to the assignee that he would not have had to pay to the assignor if the assignment had not taken place."
>
> 244. Although Mr Zacaroli accepted that this principle of law is necessarily subject to express contrary contractual agreement, he submitted that there is no language, let alone clear language, to that effect in the ISDA Master Agreements; and that in the absence of clear language to contrary effect, the general principle of law provides strong support for the conclusion that 'relevant payee' in the definition of default rate does not include an assignee of the right to payment under section 6(e). He submitted that is because the general law provides an essential part of the background circumstances against which the contract is to be construed…
>
> 261. In my judgment, and in agreement with Wentworth, the better construction is that section 7, in both versions of the Master Agreements, restricted the right of transfer to the amounts which had become payable and would become payable to the transferor as at the time immediately before the transfer, in each case measured according to the position of the transferor. Put figuratively, the transferee is entitled to the tree planted by the transferor and such fruit as had grown and would grow on it

> when transferred, and not to fruit of a different variety or quantity which might have grown had the transferee planted the tree."

133. As Mr Willson noted, *Dawson* concerned compensation under the statutory scheme for the construction of railways and the heads of loss that could be added to such a claim, *Darlington Borough Council* was based on a concession in that particular case and *Re Lehman Bros* turned on construction of the contract. He submitted, on instruction, that the relevant passages of *Guest on the Law Assignment,* now relied upon by Mr Lewis, which refer to these cases, were cited to Zacaroli J in *Hope*. However that may be, it seems to me that, given the identity of counsel in *In Re Lehman Bros*, referred to in paragraph 242, it is inconceivable that Zacaroli J was unaware of the principles.

134. It does not seem to me that the decision of Zacaroli J was inconsistent with prior or higher authorities. He expressly declined to decide that there was no jurisdiction to impose the Proviso imposed by the ICC Judge. He did however decide that the principle that an assignee stands in the shoes of the assignor did not justify the imposition of a cap on recovery in circumstances where an office-holder had assigned his or her claims to a third party. The question was not one of the extent of the cause of action, but whether it was right to exercise a discretion to limit recovery. It was wrong in principle to deprive an assignee of any part of the proceeds by exercising a discretion intended to prevent proceeds from reaching persons tainted by wrong-doing.

135. Here the claimant is not seeking to "tack on" a cause of action or head of loss other than that assigned to it. It is pursuing nothing more than the statutory and other causes of action assigned by the joint administrators. The question is whether, in framing relief, the court should restrict its recovery. Mr Willson is right to say that, aside from pointing to the cases on assignment and the broad principle that an assignee cannot claim more than his assignor, which is not in fact of application here, the respondents have pointed to nothing to identify a principle that recovery should be so capped in these circumstances. Indeed, as Mr Willson submitted, the scheme of the Small Business, Enterprise and Employment Act 2015, which introduced the right to assign statutory causes of action, would suggest that it should not.

136. In this regard he referred me to the judgment of Snowden J, as he then was, in *Re Totalbrand Ltd (in liquidation)* [2020] EWHC 2917 (Ch). The question there was whether a power of assignment of a cause of action by a liquidator could be exercised in such a way as to provide for the assignee to take the whole of the proceeds of the action. In other words, the recovery would not benefit the company at all. Indeed, in that case the company had been dissolved. Snowden J said as follows:

> "12. The explanatory notes to the 2015 Act in relation to s. 246ZD read as follows:
>
> 'Section 118: Power for liquidator or administrator to assign causes of action
>
> 712. This section amends the Insolvency Act 1986 to allow a liquidator or administrator ("the officer-holder") to assign causes of action that arise on a company going into liquidation or administration.

> 713. The causes of action to which the section relates are actions which already exist within insolvency law … whereby liquidators and administrators can take action on behalf of the body of creditors to recover monies or reverse certain transactions where the directors and others have acted in a way that has caused harm to creditors.
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> 714. The section allows the office-holder to assign not only the right to bring the action itself but also the proceeds of such an action.'
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> 13. The legislative policy behind s. 246ZD is also clear from the Economic Impact Assessment (IA No. BIS INSS007) produced by the Insolvency Service on behalf of the Department for Business Innovation and Skills on 16 April 2014, which accompanied the proposals for what became s. 118 of the 2015 Act (the "EIA"). I was referred to the EIA by the Applicants.
>
> 14. The EIA identified that there was a problem that not many claims for fraudulent or wrongful trading, transactions at an undervalue or preferences had been brought against 'miscreant directors' between 1986 and 2013. It suggested that this might be due to insufficient funds in the insolvency estate to fund such actions, a reluctance on the part of creditors generally to fund such claims, a high evidential bar in fraudulent trading claims, coupled with a lack of director's assets against which to enforce a successful claim.

137. He rejected the contention that the references in sections 238 and 239 IA 1986 to "restoring the position" of the company meant that the company must be the recipient of the proceeds. He said:

> 26. Fourthly, Mr. McGarry's interpretation would deprive s. 246ZD of its practical utility for office-holders and thereby frustrate the clear legislative purpose. If Mr. McGarry were right and an assignee could only pursue a claim for the purposes of obtaining an order that the proceeds should be paid to the company, the assignee would presumably have to bear all the costs of pursuing the claim, it would not stand to obtain any direct benefit but would be dependent upon receiving a distribution of part of the proceeds in some way via the insolvency, and it would be at risk of a full adverse costs order if the claim were to fail. It is unlikely that such a prospect would appeal to many prospective purchasers of claims. Thus the changes made in 2015 would not achieve the purpose of providing an alternative mechanism by which creditors could benefit from the proceeds of sale of such claims, and the number of claims brought against miscreant directors (so as to bring about long-term improvements in the behaviour of directors generally) would not be increased.

> 27. Further, after the right of action was assigned by a liquidator or administrator, the company would have to be kept artificially alive and the insolvency proceeding kept open whilst the claim was on foot so as to provide a vehicle and mechanism for receipt and distribution to creditors of any proceeds of the action pursued by the assignee. That would be a speculative exercise, would likely lead to a delay in bringing the insolvency to a conclusion, and would result in further costs being incurred to the detriment of creditors. I see no reason to attribute such an impractical and unlikely intention to Parliament.

138. Thus, says Mr Willson, the 2015 Act must be understood as intending that an assignee could pursue an assigned cause of action without it being restricted to recovery for the benefit of the company. Moreover, he says that there are no grounds for restricting recovery as suggested here. If the cap were imposed the effect would be as follows:

i) Manolete and JRGL would be entitled to share net recoveries on a 50:50 basis under the arrangements between themselves;

ii) JRGL's assumed deficiency is £350,000;

iii) if judgment were entered on the basis proposed by the defendants it would be limited to that deficiency plus costs.

iv) costs are currently in the region of £250,000 and will be subject to assessment, perhaps leading to recovery of 60% or £150,000

v) the net proceeds from the litigation would thus be £250,000 (£350,000 - £250,000 costs charged + £150,000 costs recovered).

vi) the return for JRGL is therefore 50% of the above net proceeds, or £125,000;

vii) this would lead to creditors recovering 36 pence in the pound.

In this illustration of recoveries, creditors would thus be prejudiced while KPL and AGL would retain a greater share of payments that should not have been made. Mr Freed would be relieved from liability for allowing those payments to be made, to the detriment of creditors, from which he benefits by virtue of his shareholdings.

139. Mr Willson further submitted that there is no circularity here. True circularity was seen in cases such as *Re Care Community Limited* [2020] EWHC 3360 (Ch). In that case, ICC Judge Burton said:

> "2. On 23 November 2020 I gave judgment for the Liquidator, holding that the First and Second Respondents be jointly and severally liable to pay the Liquidator £804,530.64 ('Judgment Debt'). This sum represented unexplained transfers from the Company's account to the First Respondent's personal bank account. I further held that the order should not be enforced to the extent that it exceeds the value of the "Shortfall" in the liquidation. The term 'Shortfall', I explained, referred to the

> amount necessary to meet the Liquidator's costs and expenses and the total value of Third Party Creditor claims which she admits to proof. The term 'Third Party Creditors' refers to the claims of creditors other than those of the First and Second Respondents and their family members, there being an unhelpful circularity in requiring the Respondents to pay sums that they claim on their own behalf and on behalf of their adult children in their capacity as creditors of the Company.
>
> …
>
> 19. I commented in my judgment, delivered in open court, that the uncommon feature throughout this case, is that beyond relatively small amounts which appear to be due to third party creditors, the only parties who claim to be significant, unpaid creditors of the company are the Respondents…"

Where, as in that case, there is an almost complete identity between the respondents and the creditors there is the risk of a "money-go-round", where the recovered monies simply end up back in the pockets of the paying parties. That is not the case here. Neither Mr Freed nor AGL claims to be a creditor of JRGL. KPL has not proved in the administration but might have a claim to the surplus in its capacity as a shareholder. It is accepted to be a shareholder but there are three others, being Mr Atherton and Mr and Mrs Neto.

140. In my judgment Mr Willson is correct in his submissions. Assuming that I have a discretion to limit recovery as suggested by the Defendants I would decline to do so. The payments ought not to have been made and my starting point is that the Defendants should meet the loss caused in full. Certainly in the case of the claims under section 238 and 239 IA 1986 the purpose is to permit recovery of property that should not have been paid away. Similarly, in the case of the breach of duty the court must consider what the consequence of the breach of duty would be. This is a misappropriation case and the general principle is that the aim is to restore the property wrongly paid away (see *Davies v Ford* [2021] EWHC 2550 (Ch) at paragraphs 106 to 107, per David Holland QC). The consequence of the breach of duty is that payments that should not have been made were made. Again, on the face of it the starting point is that Mr Freed is liable for the whole loss caused.

141. In this case there been a lack of candour on the part of the director and controlling mind of the recipient companies as to the insolvent company's affairs. In the case of a claim brought by an office-holder the repayment of the monies in full would allow the monies to be dealt with in the course of administration and distributed when the affairs of the company are fully investigated and the extent of its assets and liabilities are known. That may, or may not, result in a return being made to a defendant as creditor or shareholder. That is, after all, what would have happened if the improper payments had not been made in the first place. I can see that in a clear cut case where there is no doubt as to the assets and liabilities of the company and one can say with some certainty that the defendant will simply receive back a proportion of a sum that they might otherwise be ordered to repay it might be appropriate to restrict recovery so as to prevent a "money-go-round" if there is no prejudice to other creditors. This is not such a case.

142. Where the office-holder has assigned a cause of action such a restriction will cause prejudice to creditors while allowing the Defendants to retain a greater proportion of the proceeds of the wrongdoing. It also would prejudice the claimant, as an innocent third party purchaser of the claim, and has the potential more generally to discourage potential purchasers of claims from doing so. As noted in *Totalbrand* there is a public interest in wrong-doers being pursued and standards of corporate governance upheld. To place a limitation on recovery in the form proposed by the Defendants would discourage the pursuit of claims that the 2015 Act was intended to facilitate, as well as reducing the sums available for other creditors. In the circumstances I decline to impose such a limitation. I will direct that the sums be paid in full. If any part of them does fall in due time to be repaid to a defendant, that will be a question for the office-holder at the conclusion of the administration of the company's affairs.

Disposition

143. In the result I find that Mr Freed is liable to pay compensation for the loss caused to the company occasioned by his breach of duty. KPL and AGL are liable to pay a sum equivalent to the monies received by them under section 238 or 239 IA 1986 or by reason of knowing receipt the monies transferred to them by reason of Mr Freed's breach of duty. That extends to the full sum claimed. Thus:

    i) Mr Freed is liable to pay equitable compensation in the sum of £918,590;

    ii) KPL is jointly and severally liable with Mr Freed for the sum of £240,000;

    iii) AGL is jointly and severally liable with Mr Freed for the sum of £678,590.

144. I will invite the parties' representatives on circulation of the draft to seek to agree a form of order, including as to interest and costs.