Neutral Citation Number: [2013] EWHC 2682 (Ch)

Case No: HC11C03357

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

Date: 6 September 2013

B e f o r e :

MARK CAWSON QC

(sitting as a Deputy Judge of the High Court)

B E T W E E N :-

PETROCAPITAL RESOURCES PLC

Claimant

- and -

MORRISON & FOERSTER (UK) LLP

Defendant

……

Hearing dates: 20, 21, 24-27 June 2013

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Justin Fenwick QC and **Michael Ryan**, instructed by **Memery Crystal LLP**, for the Claimant

Patrick Lawrence QC and **Anneliese Day QC**, instructed by **Clyde & Co LLP**, for the Defendant

……

Approved Judgment

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

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MARK CAWSON QC

A. INTRODUCTION

1. This is a claim brought by the Claimant, Petrocapital Resources Plc ("**Petrocapital**") for damages for professional negligence against Morrison & Foerster (UK) LLP ("**M & F**"), a firm of solicitors.

2. The claim as commenced was commenced not only against M & F, but also against Richard Armstrong ("**Mr Armstrong**"), a former director of, shareholder in and holder of convertible loan notes issued by Petrocapital, and Rudolph de Mendonca ("**Mr de Mendonca**"), a shareholder in and holder of convertible loan notes issued by Petrocapital. However, the claims against Mr Armstrong and Mr de Mendonca are no longer pursued.

3. Central to the claim as pursued against M & F are undertakings given by each of Mr Armstrong and Mr de Mendonca on 31 July 2008 ("**the Undertakings**") not to exercise the conversion rights conferred by the loan notes issued to them, which entitled Mr Armstrong and Mr de Mendonca to convert the loans made by them to Petrocapital into shares therein. On the face of them, the Undertakings were expressed to be irrevocable and, in essence, the case against M & F is that:-
   3.1 Edward Lukins ("**Mr Lukins**"), a solicitor and partner in M & F, acted in breach of retainer and negligently in advising in or about May 2010 that the Undertakings were no longer irrevocable, and that it was in Petrocapital's best interests to compromise with Mr Armstrong and Mr de Mendonca by paying out a total sum of £1.45 million to them in satisfaction of their loan notes;
   3.2 If, contrary to Petrocapital's primary case, the Undertakings had become revocable, and it was open to Mr Armstrong and Mr de Mendonca to exercise their conversion rights under their loan notes in May 2010, then Mr Lukins acted in breach of retainer and negligently in:
      3.2.1 drafting the Undertakings in such terms that they failed to accord with Petrocapital's subjective intention, which is alleged to have been that the Undertakings should remain irrevocable in the circumstances that actually occurred; and/or
      3.2.2 failing to advise the Board of Petrocapital in or about July 2008 that £40,000 required to be paid to Mr Armstrong and Mr de Mendonca prior to 31 July 2009 in order to prevent the latter from exercising their conversion rights thereafter upon the Undertakings ceasing to apply.

4. Petrocapital was represented by Justin Fenwick QC and Michael Ryan, and M & F was represented by Patrick Lawrence QC and Anneliese Day QC. I am grateful to each of them for their helpful written and oral submissions.

5. The factual background is of some complexity, but before reviewing it, it is necessary to identify the various real and corporate personalities involved, and to briefly review the witness evidence.

B. REAL AND CORPORATE PERSONALITIES INVOLVED

6. The principal real and corporate personalities involved were the following:-

6.1 Advice Capital Management AG ("**Advice**"): a German company that has held 10 million ordinary shares (15.38%) in the issued share capital of Petrocapital since 2009. The evidence suggests that Advice has, at all relevant times, been controlled by Mr Kirsch (see below) whose evidence was that he was a *"substantial"* shareholder therein.

6.2 Almas International JSC ("**Almas**"): a Kazakhstan oil trading and exploration company. Almas was a party to a Letter of Intent dated 10 January 2008 with JP Capital (see below) that contemplated the acquisition by JP Capital of a 50% interest in Almas over a period of three years for the sum of US$54 million.

6.3 Mr Armstrong: a retired stockbroker who was responsible for the establishment of Petrocapital as a PLUS listed company. A shareholder and the holder of convertible loan notes issued by Petrocapital, Mr Armstrong was an executive director and the chairman of Petrocapital from 2 March 2006 to 1 August 2008, when he was replaced as chairman by Mr Olympitis. He thereafter remained on the Board of Petrocapital as a non-executive director until August 2010, and was a witness for M & F.

6.4 Jonathan de Mendonca: Mr de Mendonca's son. He was a director of Petrocapital from 2 March 2006 to 3 October 2008.

6.5 Mr de Mendonca: a shareholder in and holder of convertible loan notes issued by Petrocapital.

6.6 Olaf Eick ("**Mr Eick**"): a fund advisor, and a shareholder in Multi-Invest (see below), a Swiss company specialising in institutional fund management. In or around April 2009 Mr Eick advised three funds to invest in Petrocapital through Multi-Invest, these funds having, according to Mr Eick, invested approximately €10 million in return for 12,995,946 ordinary shares (19.92%) in the share capital of Petrocapital. Mr Eick's witness statement dated 1 February 2013 was admitted in evidence on Petrocapital's behalf albeit that Mr Eick did not attend trial for cross-examination.

6.7 Jonathan Evans ("**Mr Evans**"): a director of Petrocapital from 2 March 2006 to 31 July 2008.

6.8 Fisher Corporate Plc ("**Fisher**"): financial advisors who acted as Petrocapital's PLUS advisors as from August 2008.

6.9 Forbes Global Services Ltd ("**Forbes**"): a company holding 5 million ordinary shares (approximately 7.69%) in the issued share capital of Petrocapital from 2009. Apparently controlled by Mr Kirsch whose evidence was that he was the sole shareholder therein.

6.10 Gatcombe Holdings Limited ("**Gatcombe**"): prior to 31 July 2008 the holder of 50% of issued share capital of Petrocapital (the other 50% being held by Mr Armstrong and Mr de Mendonca) and of convertible loan notes issued by Petrocapital.

6.11 Habsburg & Partners Advisory AG ("**Habsburg**"): a company apparently controlled by Mr Ludescher (see below) that holds 12,800,000 ordinary shares (approximately 19.68%) in the issued share capital of Petrocapital.

6.12 Rod Husband ("**Mr Husband**"): a Canadian involved in investment in exploration projects. A director of Petrocapital from 31 August 2010.

6.13 Helen James ("**Ms James**"): the principal at Fisher with overall responsibility for the giving of advice to Petrocapital as the latter's PLUS advisor.

6.14 JP Capital Investment Ltd ("**JP Capital**"): a party to the Letter of Intent dated 10 January 2008 entered into with Almas referred to above. Although not entirely clear, the evidence suggests that JP Capital was at all relevant times controlled by Mr von Schubert (see below). JP Capital holds 3,890,000 (approximately 5.98%) ordinary shares in the issued share capital of Petrocapital.

6.15 Jurby Corporation ("**Jurby**"): a company incorporated in St Vincent with company number 169119 IBC 2008. Although, again, the evidence is not entirely clear, Jurby would appear to have been owned and controlled at all relevant times by Mr Schäfer (see below). Jurby acquired a controlling shareholding in Petrocapital on 31 July 2008 but its shareholding has since reduced as referred to below such that it now holds 4,963,778 ordinary shares, representing approximately 7.63% of the issued share capital of Petrocapital.

6.16 Eckard Kirsch ("**Mr Kirsch**"): from 2009 the holder of 2,000,000 ordinary shares (approximately 3.08%) in the issued share capital of Petrocapital. A director of each of Advice and Forbes and according to his evidence a "substantial" shareholder in the former and the sole shareholder of the latter. Mr Kirsch was the first and main witness for Petrocapital.

6.17 Tom Kristensen ("**Mr Kristensen**"): a former stockbroker, currently self-employed in the private equity and business turnaround sectors. A director of Petrocapital between 19 May 2010 and 31 August 2010. His first witness statement dated 26 October 2011 was served and exchanged by Petrocapital, but he was called as a witness by M & F for whom he made a second witness statement dated 25 June 2013.

6.18 Rolf Landgraf ("**Mr Landgraf**"): a German lawyer, who has acted for Mr Kirsch. A director of Petrocapital from 31 August 2010 to date.

6.19 Tim le Druillenec ("**Mr le Druillenec**"): Finance director and company secretary of Petrocapital from 24 September 2008 to 19 May 2010.

6.20 Herman Ludescher ("**Mr Ludescher**"): a lawyer qualified in Austria and/or Liechtenstein who assisted Jurby in the lead up to the latter's acquisition of a controlling interest in Petrocapital in July 2008. Although the evidence is not entirely clear, Mr Ludescher would appear to control Habsburg.

6.21 Mr Lukins: a solicitor and a partner at M & F and head of the corporate team at M & F's London office. The principal witness for M & F.

6.22 Multi-Invest GmbH ("**Multi-Invest**"): a Swiss company specialising in institutional fund management, and the owner of three funds that invested in Petrocapital on the advice of Mr Eick (a shareholder therein).

6.23 Malcolm Murray ("**Mr Murray**"): a solicitor at Leigh & Thompson who has acted for Advice, Advice Portfolio Management, Forbes and Mr Kirsch.

6.24 Mark O'Donnell ("**Mr O'Donnell**"): a solicitor at M & F who assisted Mr Lukins with the drafting of a number of relevant documents related to the transactions referred to below with which Mr Lukins was concerned.

6.25 Manoli Olympitis ("**Mr Olympitis**"): a director and the chairman of Petrocapital from 1 August 2008 until his resignation on 19 May 2010. A party, together with Petrocapital, to the claim issued against Mr von Schubert on 22 April 2010.

6.26 Merchant Capital Ltd ("**Merchant**"): Petrocapital's PLUS advisor until August 2008.

6.27 Julio Perez ("**Mr Perez**"): an accountant, and a director of Petrocapital from 19 May 2010 to 31 August 2010. A witness for Petrocapital.

6.28 Primeria Services Ltd ("**Primeria**"): a company apparently controlled by Mr Schäfer holding 3,000,000 (4.61%) ordinary shares in the issued share capital of Petrocapital.

6.29 Peter Redmond ("**Mr Redmond**"): Chief Executive Officer ("**CEO**") of Merchant at all relevant times.

6.30 Jochen Schäfer ("**Mr Schäfer**"): the CEO of Petrocapital from 1 August 2008 until 7 September 2009. As referred to above he would appear to have controlled, if not also to have been the sole shareholder in Jurby at all relevant times, and to have also controlled Primeria at all relevant times.

6.31 Jonathan Scott Barratt ("**Mr Scott Barratt**"): a director of Petrocapital from 3 October 2008 to 19 May 2010.

6.32 Axel von Schubert ("**Mr von Schubert**"): the chief operating officer of Petrocapital from August 2008 to May 2010. As referred to above, he would appear to have controlled JP Capital at all relevant times.

6.33 Martin Wood ("**Mr Wood**"): a director of Petrocapital from August 2010 to date.

C. WITNESSES

7. The following witness gave evidence during the course of the trial, in the following order:

7.1 For Petrocapital:-

7.1.1 Mr Kirsch;

7.1.2 Mr Wood; and

7.1.3 Mr Perez.

7.2 For M & F:-

7.2.1 Mr Armstrong;

7.2.2 Mr Lukins; and

7.2.3 Mr Kristensen.

7.3 In addition, I permitted Petrocapital to rely upon Mr Eick's witness statement dated 1 February 2013, notwithstanding that a Notice under CPR 33.2 was only served on 28 May 2013, out of time. The relevant Notice under CPR 33.2 stated that Mr Eick could not give evidence because he was abroad. Notwithstanding, that Petrocapital had obtained a witness statement from him by 1 February 2013, his witness statement was not served on M & F until 12 April 2013. The witness statement of Jennifer Jenkins dated 13 June 2013 relied upon by Petrocapital in support of the latter's application to rely upon Mr Eick's witness statement notwithstanding its late service, and the late service of a Notice under CPR 33.2, does make mention of delays resulting from Mr Eick's business commitments that are said to have contributed to the late service of his witness statement. However, it is not

suggested that Mr Eick was not prepared to give evidence on Petrocapital's behalf. The question of Mr Eick giving evidence over a video-link was raised in correspondence between the parties' solicitors. There is, as I see it, no apparent reason why Mr Eick could not, had Petrocapital been minded to make the appropriate arrangements, have given evidence by video link, which would have allowed for him to be cross-examined. In these circumstances and notwithstanding that I allowed Mr Eick's statement to be admitted in evidence, as M & F have been deprived of the opportunity to cross-examine Mr Eick upon it, I consider that I must give Mr Eick's statement very limited weight indeed. However, I do take into account what Mr Eick has to say about his contemporaneous lack of knowledge of the compromise reached with Mr Armstrong and Mr de Mendonca in May 2010, and what he says he would have had to say about any such compromise at the time, given that this does correspond with Mr Kirsch's evidence, and does therefore provide some limited corroborative support to the latter.

8. Whilst I will comment further in the course of this Judgment about other aspects of their evidence, I would make the following general observations about the witnesses that I heard from.

9. Whilst Petrocapital's case may not ultimately depend upon whether or not I accept Mr Kirsch's evidence, I observe that, notwithstanding my having made all due allowance for the fact that English is not Mr Kirsch's first language, I did not find him to be a satisfactory witness. I would highlight the following matters:-

9.1 Mr Kirsch said that he raised between €10 - €15 million for investment in Petrocapital from some 150 of clients, with some two thirds of this sum having been raised from Mr Eick acting on behalf of Multi-Invest. Mr Kirsch was cross-examined at some length about the very limited due diligence that he and the companies under his control carried out prior thereto. Mr Kirsch was unable to provide any satisfactory explanation for this. It is true that Mr Kirsch may have intended to bring his own expertise to Petrocapital and, as Mr Kirsch put it: *"… to analyse projects, to do basically what our job was in Germany. To make investment decisions, to do research, to do due diligence, to find projects, interesting projects in the mineral business"*. However, one would have thought that Mr Kirsch might have made some fairly detailed enquiries of Mr Schäfer, Mr von Schubert etc before committing his clients' monies in this way.

9.2 Early on during the course of his cross-examination, Mr Kirsch stated that he regarded projects in Kazakhstan as being an *"absolute no go"* area that he *"wouldn't touch"*. However, when later asked to explain Petrocapital having an apparent market capitalisation of €130 million, Mr Kirsch sought to justify this, at least in part, by reference to Kazakhstan, stating: *"We knew that the evaluation of the company at the time was at the levels you just mentioned and Jochen Schäfer was still – the way he set it up, that's how I understood, was based on this Kazakhstan equities and he always said he has an option to still acquire huge exploration in Kazakhstan"*. These observations are difficult if not impossible to reconcile.

9.3 Mr Eick produced an *"Investment audit of Petrocapital Resources Plc (PCR)"* dated 31 March 2009, presumably for the purpose of attracting investment. This was said to be based on information provided by Mr Schäfer, Mr von Schubert and *"Eckard Kirsch, GF Advice Portfolio Management GmbH … as main PCR shareholder"*. This document contained a number of serious inaccuracies including a statement in the first main paragraph thereof that: *"the Company was restructured in 2008 and to date an initial investment has been made in the area of commodities – oil – in Kazakhstan"*. In fact, at no stage did Petrocapital make any investment in Kazakhstan. Despite the fact that it was Mr Kirsch who had been charged with raising funds through, amongst others, Mr Eick/Multi-Invest, Mr Kirsch was unable to provide any satisfactory explanation in respect of these inaccuracies.

9.4 Petrocapital issued a number of press releases, that Mr Kirsch accepted that he would have seen at the time, that contained false information. These included a statement, made in March 2009, to the effect that Petrocapital had €12 million at its disposal. A further press release containing false information that Mr Kirsch accepted that he would have seen was one dated 4 June 2009 announcing that Petrocapital had signed contracts for *"Participation in Investment Projects, Global Hunter Corp and Verona Development Corp"*. Mr Kirsch said that he appreciated the falsity of this press release at the time, and that he and his lawyer took up the matter with Mr Schäfer. However, Mr Kirsch was unable to satisfactorily explain why a subsequent press release dated 16 July 2009 quoted him as stating: *"In my years of experience in the commodity sector, I rarely found such attractive projects. I am proud that our team of experts Global Hunter within a very short period of time to analyse it in detail to give the Board of PCR, a clear and very sound investment to be able to vote"*.

9.5 As we shall see further in due course, on 7 September 2009 Jurby/Mr Schäfer wrote to Mr Olympitis stating that: *"Due to their success Advice have been able to exert an increasing amount of pressure from their management to attempt to influence the investment strategies and corporate affairs of PCR, resulting in an irreparable rift between the two groups"*, i.e. between Jurby and Advice. The letter then goes on to state that Jurby has decided to sell its shares to Advice and to relinquish control and ownership, indicating that Advice would therefore be the majority shareholder in Petrocapital from 11 September 2009 onwards. The letter describes a number of arrangements between Jurby and Advice, including the loan of shares in Petrocapital to Advice. Under cross-examination, Mr Kirsch was asked about this letter, and the arrangements between Jurby and Advice, but the explanation that he gave in respect of those arrangements was at best opaque, and the arrangements were not to my mind satisfactorily explained.

9.6 Earlier under cross-examination, Mr Kirsch accepted the expression *"conman"* as an accurate description of Mr Schäfer. This was against the background of Mr Kirsch's evidence that he had not been allowed to fulfil the role in Petrocapital that he had been led to believe that he would have been allowed to enjoy, namely taking responsibility for investment decisions etc. Mr Kirsch was asked further about the letter dated 7 September 2009,

and about the fact that, according to that letter, he, or rather Advice, was to become the majority shareholder. In response, Mr Kirsch replied: *"Yes, I mean, by the time, we were so concerned and questioning him* [Mr Schäfer] *as a person and with the – with the whole situation that we had a very bad feeling about him and we thought he will – he is forcing and pushing to leave the board to bring himself out of the spot because if – how do you say? – when the shit hit the fan, that he is no more a Board member, that he is or may be out of the fire. So we – we said 'we smell a rat, there's something that starts to stink'"*. There are a number of unsatisfactory features about this:-

9.6.1 Mr Kirsch was unable to satisfactorily explain how it came about that Jurby did come to decide to sell all its shares to Advice and relinquish control and ownership if, in fact, that is what it did.

9.6.2 Notwithstanding the contents of the letter dated 7 September 2009, it would appear that Mr Schäfer, Mr von Schubert, Jurby and others associated with them thereafter continued to maintain significant control and interest in Petrocapital. This is reflected in the shareholdings in Petrocapital retained by Jurby, JP Capital, Habsburg, and Primeria referred to in paragraph 6 above. Further, in giving evidence Mr Kirsch suggested, at one point, that *"Schubert and Schäfer were our contact people"* with the Board of Petrocapital through to May 2010. In addition, it is not without significance that after Mr Kristensen had met Mr Kirsch in Germany on 31 May 2010, he met with Mr Schäfer at Frankfurt Airport the following day having been given Mr Schäfer's telephone number by Mr Kirsch. Again, what exactly had gone on, and what exactly the relationship was, and indeed remains, between Mr Kirsch/Advice, and Mr Schäfer/Jurby and others, remains opaque despite Mr Kirsch having been questioned at some length in relation thereto.

9.7 There are two further points of some concern regarding Mr Kirsch's witness statement:-

9.7.1 In paragraph 10 of his witness statement, Mr Kirsch deals with the meeting with Mr Kristensen on 31 May 2010, and Mr Kristensen having said to him during the course of this meeting that a deal had to be found with Mr Armstrong and Mr de Mendonca. Mr Kirsch there stated: *"I was so angry that I told Mr Kristensen that he could finish his coffee and then leave, but that if he paid out the Claimant's money to the note holders, then there would be consequences"*. Mr Kristensen's recollection is very different. Whilst he accepts that Mr Kirsch indicated that he considered that Mr Armstrong and Mr de Mendonca were *'trying it on'*, he refers to the meeting lasting some two hours, dealing with other matters in relation to Petrocapital, and being followed by dinner. Under cross-examination, Mr Kirsch accepted that Mr Kristensen did stay for dinner, and I unhesitatingly prefer the evidence of Mr Kristensen in relation to this meeting. I do not accept that the meeting was as curt as Mr Kirsch sought to portray in his witness statement, as evidenced further by the fact

that Mr Kirsch should have been keen to try and involve Mr Schäfer in the way that Mr Kristensen referred to.

9.7.2 It emerged under cross-examination that Mr Kirsch had, following on from his involvement with Petrocapital, been investigated by BaFin, the authority in Germany with responsibility for the regulation of financial services, and that this investigation had resulted in the loss of Mr Kirsch's authority to act as a financial advisor. I regarded as unsatisfactory that this was not dealt with by Mr Kirsch in his own witness statement, as opposed to having had to be extracted from him under cross-examination.

10. Mr Wood, who only became a director in August 2010, after the events in question, only really gave evidence in respect of procedural matters on behalf of Petrocapital. Although I do not consider that he provided an entirely satisfactory explanation as to why disclosure has not been provided by Petrocapital of electronic documentation from the hard drives of computers operated by individuals such as Mr Olympitis and Mr le Druillenec, I have no reason to doubt that Mr Wood was providing anything other than an honest version of accounts.

11. Likewise in respect of Mr Perez, who struck me as doing his best to provide an honest recollection of events and explanation of his actions. The general impression that I gained of Mr Perez was that he was a man well able to make up his own mind, and reach his own decision in relation to matters whilst acting as a director of Petrocapital, and not as someone who simply would have been prepared to act as a *"yes man"*.

12. Mr Armstrong was cross-examined at some considerable length by Mr Fenwick QC on behalf of Petrocapital, and it was clear therefrom that there were respects in which Mr Armstrong had acted, during the course of the relevant events, in an inappropriate and unsatisfactory manner. An example was failing to disclose to Gatcombe the full terms of the offer made by Jurby in July 2008. Mr Armstrong admitted under cross-examination that Gatcombe should have been more fully informed, and he was taken to an email that he sent prior to the transaction:

> *"MR FENWICK: … you say to Mr von Schubert in your position as managing director of the company: 'In fact, the less the 50% shareholder knows the better, as he is selling out completely and any news of a positive deal will encourage him to stay on'. In retrospect that is not an approach you should have taken is it?*
>
> *MR ARMSTRONG: I agree"*.

However, this exchange did, in my judgment, typify a candour on the part of Mr Armstrong in giving evidence, and of honestly accepting during the course of his evidence where he might have gone wrong. Despite some differences between his account, and that of Mr Lukins as to the detail of certain of the relevant meetings, I am satisfied that Mr Armstrong was doing his best whilst giving evidence to provide an honest account and recollection of events.

13. I am also satisfied that Mr Lukins was doing his best during the course of giving his evidence to provide an honest account and recollection of events. Whilst this part of evidence is considered and set in context in more detail below, I did have very real concerns about the account given by Mr Lukins of a meeting that took place on 8 July 2008. When first asked about this meeting under cross-examination, he stated in fairly clear terms that he had, in the presence of Mr von Schubert and Mr Olympitis, actually stated that he was going to draft the Undertakings so that they only lasted for a limited period until Petrocapital had had a seven day opportunity to make payment after receiving new funds, or for 12 months, after which the Undertakings would lapse. It was then put to him by Mr Fenwick QC that this was not mentioned in his witness statement, and indeed was inconsistent with an explanation given in his witness statement as to a telephone call that led to the preparation of the Undertakings. Mr Lukins did, in the light thereof, rein back and indeed, the following morning, when he continued his evidence, he indicated that he could not be sure what had been said on 8 July 2008, and appeared to accept that the terms of the Undertakings were not known or agreed until the draft framework agreement was subsequently circulated. There was then the following exchange:

> *"MR FENWICK: Do I understand it to be your evidence now, having thought about it overnight, that you cannot say to this Court that any of the parties and certainly the buyers, were aware of that last term until they received the documentation? Have I understood you correctly?*
>
> *MR LUKINS: My belief is they were but I don't want to create the impression that they definitively were because none of those parties are here to give evidence, and I just don't want the Court to be under any misapprehension as to the facts. So I think it is better that the Court just assumes that no-one actually knew the full terms of that document until the draft was actually circulated to all the parties".*

In course of submissions it was contended on behalf of Petrocapital that this evidence on the part of Mr Lukins was "*extraordinary*". I have given careful consideration as to whether Mr Lukins might, when he first dealt with the meeting on 8 July 2008, have been deliberately seeking to mislead the Court as to what he might have said, but then, when pressed, realised that his evidence was not sustainable, or considered that he had better come clean. However, I have had regard to Mr Lukins' evidence in its entirety, and he again was cross-examined for a considerable period of time. I consider that the more likely explanation is that Mr Lukins, in preparation for the trial, persuaded himself that rather more had been said on 8 July 2008 than had in fact been said, and that when he gave the initial account that he did, that genuinely reflected what he had led himself to believe. However, when confronted with the contrary propositions put to him in cross-examination, he dealt with the questions in the only honest way that he could.

Criticism is also made of Mr Lukins in respect of his decision to backdate the date upon a Deed of Variation that ultimately bore the date 10 June 2010, and also for having on 25 June 2010 provided an updated opinion in the form of a letter bearing the same date of an earlier opinion letter dated 21 May 2010. In written closing

submissions, it is suggested on behalf of Petrocapital that the backdating of the Deed of Variation only became clear in the course of cross-examination. However, I note that Mr Lukins does, in paragraph 149, of his witness statement refer to the Deed of Variation having been backdated, and there seeks to explain the circumstances. Likewise, in paragraph 136 of his witness statement he refers to the backdating of the revised opinion. None of this leads me to reach any different view as to the truthfulness of Mr Lukins' evidence taken as a whole. However, based on his evidence about the meeting on 8 July 2008, I do have a concern that aspects of Mr Lukins' evidence may be tainted by a subconscious ex post facto reconstruction of events in his own mind, and I bear this in mind in considering the overall effect of his evidence.

14. I found Mr Kristensen to be a good and impressive witness. I would not dissent from Mr Lawrence QC's description of him as a *"solid citizen"*. He was able to provide clear and cogent evidence on a number of important matters relevant to the claim. Again, he came across as somebody very much of his own mind, who would not be prepared to act, or take a decision, unless he had reached his own view that that was the right thing to do. Again, he did not come across to me as a *"yes man"*.

15. M & F makes criticism of Petrocapital for not calling as witnesses a number of individuals who might have been expected to deal with a number of key events, such as Mr Olympitis, and to a lesser extent Mr le Druillenec, or even Mr von Schubert, in relation to the events of July 2008. Of course, the circumstances in which it is appropriate to draw adverse inferences are limited – see ***Wisniewski v. Central Manchester Health Authority*** [1998] PIQR P325. In particular, there must be some evidence, adduced by the opposite part on a matter in question, which raises a case to answer, before the Court is entitled to draw the desired inference. Further, if there is some credible explanation given for a witness's absence or silence, even if it is not wholly satisfactory, the potentially detrimental effect may be reduced or nullified.

D. HISTORY OF EVENTS

Setting up of Petrocapital

16. Mr Armstrong began his career as an investment analyst in 1970. In 1990 he acquired a brokering business known as Durlacher West, and in 1995 joined Fiske Plc as a self-employed stockbroker, and began to specialise in raising finance for, and helping to restructure, small public companies. Mr Armstrong remained with Fiske Plc until his recent retirement.

17. Petrocapital, then known as *"Stageworx plc"*, was incorporated or acquired by Mr Armstrong in 2006. Prior thereto the practice of Mr Armstrong had been to identify suitable investment companies in order to create shell companies as vehicles to accommodate businesses requiring a listing on the London market. The intention behind Mr Armstrong's incorporation or acquisition of Petrocapital was to float a shell company as opposed to taking control of a company that had become insolvent.

18. On 2 March 2006 Mr Armstrong, Mr Evans and Jonathan de Mendonca were appointed as directors of Petrocapital, and Mr Armstrong was appointed as chairman. By resolutions dated 13 April 2006, the directors of Petrocapital were authorised pursuant to Sections 80 and 95 of the Companies Act 1985, and Petrocapital adopted new Articles of Association.

19. On or about 8 May 2006 the issued share capital of Petrocapital was admitted to the PLUS exchange (then known as Ofex), and dealings in its ordinary shares commenced on or about 19 May 2006.

20. From May 2006 until 31 July 2008, the issued share capital of Petrocapital of 50 million ordinary shares of 0.2p each were held as to £25,000,000 by Gatcombe, and as to £12.5 million each by Mr Armstrong and Mr de Mendonca.

21. Further, Gatcombe advanced the sum of £62,500 to Petrocapital, and each of Mr Armstrong and Mr de Mendonca advanced the sum of £31,250 to Petrocapital in return for the issue of Convertible Loan Notes ("**the CLNs**"). Under the CLNs, the note holders were granted the right to require Petrocapital to convert some or all of the loan capital into share capital at a rate of 1,000 ordinary shares for every £1 of the loan before a deadline of 31 December 2011. Shares received upon any conversion would rank pari passu in all respects with the existing shares in Petrocapital. Conversion was to be effected by the service of a *"Conversion Notice"*. It should be noted that the CLNs, at clause 5 thereof, contained covenants on the part of Petrocapital designed to preserve the value of the conversion rights provided for.

22. The CLNs were therefore an important aspect of the control of Petrocapital, with the potential shares which could be acquired through the CLNs outnumbering the existing shares by a factor of over 2:1.

Background to the Jurby acquisition

23. Prior to June 2008, Petrocapital had been engaged primarily in opportunities relating to the leisure and entertainment sector. However, in June 2008 a new opportunity arose when Mr Armstrong was introduced by Mr Redmond to Mr Olympitis. Mr Olympitis, who had a wider role than as mere introducer of the opportunity, as evidenced by Mr Olympitis' subsequent appointment as chairman of Petrocapital, introduced Mr Armstrong to a proposal of Mr Schäfer, acting through Jurby, to acquire a substantial majority shareholding in a company quoted on the PLUS exchange as a shell for the acquisition of a substantial interest in Almas. This in turn provided an opportunity to the shareholders in Petrocapital to invest in and take the benefits of a major acquisition. Whilst the introduction might have been affected by Mr Olympitis, Mr von Schubert emerged as the primary contact, acting on Mr Schäfer's behalf, in moving forward a proposal that a substantial majority shareholding in Petrocapital be acquired by Jurby.

24. Mr Armstrong was led to believe that the acquisition of a substantial shareholding in Almas was potentially very lucrative, and, in turn, potentially very lucrative to him should he retain a shareholding in Petrocapital. In an email dated 20 June 2008 to

Mr Redmond, which Mr Redmond forwarded on to Mr Lukins, Mr von Shubert described the position as follows:

> *"We have secured on January 10th 2008 the right to acquire 50% of a highly dynamic oil trading – and exploration company in Kazakhstan, ALMAS INTERNATIONAL JSC. ALMAS is both an oil trading company as well as an aggressive exploration company.*
>
> *As one of Kazakhstan's largest independent oil traders, ALMAS INTERNATIONAL has an unbeatable 14 year track record in the oil business.*
>
> *With longstanding oil processing contracts in place with Kazakhstan and Russian Governments and major oil firms such as Gazprom, Rosneft and TNK-BP, ALMAS is extremely well positioned to succeed in the development of one of Kazakhstan's most promising oil reserves:*
>
> *ALMAS is the owner of a potential US$1 billion + oil field in the oil rich Caspian Region, strategically wedged between three of the largest, producing oil fields in Kazakhstan*
>
> …
>
> *The company has been independently valued at £16 million without the new exploration licence, and at over £600 million at standard discounted rates with the new fields".*

25. JP Capital had entered into the Letter of Intent dated 10 January 2008 with Almas. A *"fresh"* Letter of Intent was subsequently entered into between Almas and JP Capital on 4 July 2008, a copy of which was sent by Mr von Schubert to Mr Armstrong and Mr Redmond attached to an email dated 8 July 2008. This latter document revised the original Letter of Intent to include a provision that JP Capital, seemingly on Jurby's behalf, had exclusivity and a first right of refusal in the acquisition of a 50% stake.

26. However, in order to acquire this 50% stake, it was necessary for some US$54 million to be raised. Against this background, and wanting a listed company for this purpose, Jurby sought to gain control of Petrocapital and ownership of the substantial majority of its issued share capital. In an email dated 8 July 2008 sent to, amongst others, Mr Armstrong and Mr Lukins, Mr von Schubert said this:

> *"The party (Jochen's company) acquiring the 95% is JURBY CORPORATION … We can close the deal and funds can be released from escrow once the shares are available and free for transfer (whether electronically or physically) and with the clear understanding that within 48 hours thereafter the shares will be deposited electronically and transferred electronically to Jochen.*
>
> *This is the "conditio sine qua non" to the deal and was made clear (repeatedly) from the beginning".*

27. The essential mechanism by which Jurby was to acquire control of Petrocapital was confirmed by Mr Armstrong in an email dated 9 July 2008 (07.29) to Mr Lukins. By this email, Mr Armstrong:

27.1 Sought advice from Mr Lukins as to whether Gatcombe would be able to exercise conversion of the convertible loan notes it held in the events as they were likely to unfold;

27.2 Forwarded to Mr Lukins a document headed *"Necessary Actions"* and a document headed *"Route Map"*. The first such document included an item: *"Agreement for Stageworx to buy in £45,500 of conv loan notes from R. Armstrong and R. de Mendonca for £40,000"*. The second such document was in the following terms:

> *"There are currently 50m Ords and £125k of conv loan notes that convert into 125m Ords i.e. fully diluted shares in issue of 175m. Both are held in the following proportions: Gatcombe Holdings (50%); R. de Mendonca (25%); R. Armstrong (25%).*
>
> *In order to be able to give [Jurby] 95% of the fully diluted share capital for a consideration of £35,000, the following steps need to be taken:*
>
> - *RA and R de M contract to sell their remaining £45,000 conv loan notes (see below) to the company for a consideration of £40,000. This reduces the fully diluted share capital to 130m so that to achieved (sic) a 95% holding [Jurby] needs to acquire rights to 123.5m shares*
> - *[Jurby] acquires: from Gatcombe £62,500 of conv loan notes (convert into 62.5m shares)*
> - *25m Ordinary Shares*
> - *from R de M 9.6875m ords*
> - *£875,000 conv loan notes (convert into 8.75m shares)*
> - *from RA 9.6875m ords*
> - *£8,750 conv loan notes (convert into 8.75m shares)*
> - *total diluted 124,375m shares*
> - *this would give [Jurby] (on Day 1) 88.75% of the ords and 95.7% of the fully diluted share capital. In fact, I am going to arrange for [Gatcombe] to exercise conversion of their loan notes so that they deliver only shares to Jochen, which would mean he would have 95.7% from Day 1"*.

28. The *"Route Map"* therefore made it clear that the intent was that Jurby should acquire 95.7% of the issued share capital of Petrocapital. The email sent by Mr Armstrong on 9 July 2008 at 07.29 attaching the *"Necessary Actions"* and *"Route Map"* documents was sent following the meeting at M & F's offices the previous day attended by, amongst others, Mr Olympitis and Mr von Schubert referred to in paragraph 13 above, to which I will return shortly.

The Framework Agreement

29. Against this background, M & F was instructed by Petrocapital to draft an agreement providing for Jurby's acquisition of 95.7% of the issued share capital of Petrocapital. Of course, at that stage, M & F was acting on the instructions of the then Board comprising Mr Armstrong, Mr Evans and Jonathan de Mendonca. The other side to the transaction, i.e. Jurby, had its own lawyer acting on its behalf, a Carlo Colombotti ("**Mr Colombotti**"), a lawyer jointly qualified in Italy, and as a

solicitor in England. In addition, M & F dealt with Mr Ludescher in respect of the execution and return of documents, and Mr von Schubert was known to Mr Lukins as a lawyer given that Mr Lukins had interviewed Mr von Schubert as a potential lateral hire when Mr Lukins was a partner at Simmons & Simmons. Further, for what it is worth, Mr Olympitis is thought to have done a pupillage, albeit not to have actually practised as a barrister.

30. Having been so instructed, and having been reminded by Mr von Schubert of the importance for Jurby to acquire 95% at least of the issued share capital of Petrocapital, M & F, by Mr Lukins and Mr O'Donnell, devised the mechanism of a *"Framework Agreement"* to be executed by Jurby, Petrocapital, Gatcombe, Mr Armstrong and Mr de Mendonca.

31. This Agreement ("**the Framework Agreement**") was duly approved by the Board of Petrocapital on 31 July 2008, and executed so as to bear that date. It is common ground between the parties that the effect of the Framework Agreement was to provide for mutual agreements and undertakings between the parties in order to facilitate Jurby's acquisition of the very substantial majority of the issued share capital of Petrocapital with a view to Petrocapital being used as a vehicle for a successful acquisition of 50% of the share capital of Almas. This mutuality of obligations is reflected in, amongst other things:-
    30.1 Recital (A) referring to the fact that … *"the parties are entering into this Agreement for the purpose of providing to each other undertakings intended to facilitate the implementation of such acquisition"*; and
    30.2 Clause 2.1 providing for *"General obligation of co-operation"*.

32. As executed the Framework Agreement provided, by clause 2.2(f)(ii) for *"Non-Conversion Undertakings"* to be executed by Petrocapital and Mr Armstrong and Mr de Mendonca respectively, the latter being defined as: *"the undertakings in the form set out in Schedule 5 pursuant to which Mr Armstrong and Mr de Mendonca agree not to convert any of the Convertible Notes held by them after conversion of the Retiring Notes, in consideration of the Company agreeing to redeem the balance of the Convertible Notes for the aggregate sum of £40,000 within seven days of raising new capital but in any event within 12 months of the date of this Agreement"*.

33. It is to be noted that the first draft of the Framework Agreement circulated by Mr Lukins to Mr von Schubert, Mr Armstrong, Mr Olympitis, Mr Redmond and Mr Colombotti at 18.08 on 9 July 2008 had contained the following definition of *"Non-Conversion Undertakings"*, namely: *"The undertakings in the form set out in Schedule 5 pursuant to which Mr Armstrong and Mr de Mendonca agree not to convert any of the Convertible Notes held by them after conversion of the Retiring Notes, in consideration of the Company agreeing to redeem the balance of the Convertible Notes for the aggregate sum of £40,000 within 12 months of the date of this Agreement"*.

34. I return to the Undertakings shortly, but the other essential features of the Framework Agreement were that:-

33.1 Gatcombe agreed, for payment of £35,000 from Jurby, to sell its 25 million shares to Jurby and to convert the full value of its convertible loan notes into 62,500 ordinary shares in Petrocapital which were to be allotted to Jurby;

33.2 Mr Armstrong and Mr de Mendonca each agreed for payment of £1 to sell 9,687,500 shares to Jurby and to convert £8,750 of the value of their respective CLNs into 17,500,000 ordinary shares in Petrocapital, to be allotted to Jurby;

33.3 Petrocapital was, within two business days, to receive a transfer in its favour of the Letter of Intent relating to the Almas acquisition; and

33.4 The Board of Petrocapital was required to pass resolutions: (a) halving the number of the shares in Petrocapital (each 0.1p share being replaced by a 0.2p ordinary share); and (b) creating 1,737,500 share warrants to be issued as to 868,750 to each of Mr Armstrong and Mr Redmond.

The Undertakings

35. In accordance with the Framework Agreement, the Undertakings were executed by: (a) Mr Armstrong and Petrocapital; and (b) Mr de Mendonca and Petrocapital. They were each addressed to Jurby and dated 31 July 2008. It is important to set out the full terms thereof:

> *"We write with reference to the Agreement and hereby provide the following irrevocable undertakings.*
>
> *I, [Richard Armstrong/Rudolf de Mendonca], hereby irrevocably agree that, in consideration of the Company agreeing to redeem the balance of the Convertible Notes held by me for the sum of £20,000 within seven days of raising new capital (but in any event within 12 months of the date of the Agreement), I shall not take any steps to convert any of the Convertible Notes held by me after conversion of the Retiring Notes in accordance with the terms of the Agreement.*
>
> *We, the Company, hereby irrevocably agree to redeem the balance of the Convertible Notes held by [Richard Armstrong/Rudolf de Mendonca] for the aggregate sum of £20,000, within seven days of raising new capital, but in any event within 12 months of the date of the Agreement, provided that [Richard Armstrong/Rudolf de Mendonca] has not taken any steps to convert any of the Convertible Notes held by him, after conversion of the Retiring Notes in accordance with the terms of the Agreement".*

36. Having set out the terms of the Undertakings, it is necessary to go back and examine, in a little more detail, the circumstances in which the Framework Agreement came to provide for the giving of the Undertakings. It is necessary to begin with the meeting at the offices of M & F on 8 July 2008 dealt with by Mr Lukins in evidence as referred to in paragraph 13 above. In his witness statement, Mr Armstrong referred to the purpose of the meeting on 8 July 2008 as having been to thrash out the details of the proposed transaction although, at paragraph 45 he suggested that it was at some time during the course of 9 July 2008 that a proposal was put forward that he and Mr de Mendonca would agree to undertake not to convert the CLNs while funds for Almas were being raised. He then suggested that

"at some point during this time, either Mr Lukins or Mr de Mendonca raised the issue of what would happen if Mr Schäfer did not deliver "on his promise in respect of the Almas transaction", and that it was in order to provide some *"downside protection"* that it was suggested that the right of Petrocapital to buy in the CLNs and any undertakings not to convert could be time limited *"on the basis that, if Mr Schäfer had not raised money within 12 months, it was unlikely that he would do so"*. As Mr Armstrong then put it at paragraph 48: *"This would ensure that Mr de Mendonca and I would not have given away our remaining interest in the Company for little value. After 12 months Mr de Mendonca and I would be free to exercise the conversion rights of the Notes in the usual way"*.

He then went on to refer to the first draft of the Framework Agreement having been circulated on 9 July 2008.

37. In giving evidence Mr Armstrong stuck firmly to the point that Petrocapital should have 12 months to raise the necessary funds and buy out himself and Mr de Mendonca, but that if that did not occur, then he and Mr de Mendonca would, again, be in a position to exercise their rights to convert. At one point under cross-examination, the following exchange took place:

> *"MR FENWICK: Forgive me. If you had told me there was a circumstance in which they [i.e. Jurby] would end up with 75% of the equity, they would not have been interested in the deal, would they?*
>
> *MR ARMSTRONG: The people acting for them, Mr Olympitis and Mr von Schubert, I don't – recognise we had the discussion about the non conversion and length of non conversion undertaking and were happy with that"*.

38. In his witness statement Mr Lukins refers to the meeting on 8 July 2008 and to the fact that: *"During the course of the meeting we discussed Almas, the potential deal and the regulatory steps and corporate actions that would be necessary to bring the transaction to completion"* (paragraph 24). However, at paragraph 29 Mr Lukins refers to Mr Armstrong having called him *"at around this time"* in order to explain that Mr Schäfer had not realised that until Petrocapital bought in the CLNs, the note holders had the option to convert to equity, and thus the idea had been floated about Mr Armstrong and Mr de Mendonca *"agreeing not to convert"*, and that it was on the back of this that it was suggested that any undertaking not to convert should be limited in time to a duration of 12 months (paragraph 37).

39. I have already described in paragraph 13 above the course that Mr Lukins' evidence took under cross-examination. I must, in the light of the course that his evidence took, treat Mr Lukins' evidence with caution. Whilst it was ultimately his evidence that there was no specific discussion as to whether or not the Undertakings would lapse, or in respect of a 12 month duration, Mr Lukins did, notwithstanding what he had said in his witness statement, stick to the point that there was some discussion at least with regard to the Undertakings at the meeting on 8 July 2008, and that there was, in the context of the Undertakings, discussion as to the provision of *"downside protection"* for Mr Armstrong and Mr de Mendonca.

40. It is necessary to refer further to email correspondence sent early in the day on 9 July 2009. At 07.14 Mr Armstrong sent an email to Mr Von Schubert and Mr Olympitis, copied in to Mr Lukins and Mr Redmond, referring to the meeting the previous day and to having made a small arithmetical error. He then continued:

> *"Jochen was going to have 95% of the fully diluted share capital (then to be 112.5m shares after the conv loan notes owned by myself and Rudi de Mendonca had been bought in by the Company) and Peter and I would get warrants equivalent to 2% of the share capital i.e. 2.25m shares in aggregate. Because Rudi and I are "gifting" another £17,500 of the loan notes to Jochen so that less loan stock is bought in, the fully diluted share capital will become 130m in order that, when we consolidate on a 1 for 2 basis, we come up with the magic number of 65m shares. Thus, Jochen will now own 124.375m out of 130m fully diluted shares – or 95.7%, up from 95%. In order to equalise things, our warrants need to be slightly greater than 2% since we will have less equity. Thus the warrants need to over (sic) 3.475m shares rather than the 2.6m number (i.e. 2%) that I came up with at the meeting. Could you confirm that you are happy with this before I give Ed Lukins the final shape."*

At 07.48am Mr Olympitis replied by email in the following terms:

> *"Thanks for the road map. Assume your undertaking not to convert and cancel your loan notes subject to 41,000 payment at an appropriate later date stands and will be contained in Escrow Agreement?"*

Mr Armstrong replied to the latter email by an email timed at 07.59am in the following terms:

> *"Rudi and I are going to convert £17,500 of loan notes to deliver an extra 17.5 million shares to Jochen. That will leave us with £45,000 nominal of loan notes. The framework agreement will provide for these to be bought in for £40,000 once new monies are raised for Stageworx"*.

41. In this respect, I consider Mr Olympitis' email timed at 7.48 on 9 July 2008, sent in response to Mr Armstrong's email timed at 7.14, to be of particular significance. It seems to me that the contents of this email are only explicable on the basis that there had, at the meeting on 8 July 2008, rather than for the first time during the course of the day on 9 July 2009, been discussion with regard to the giving by Mr Armstrong and Mr De Mendonca of the Undertakings, and that this discussion had been in the context of the Undertakings being given *"subject to"* payment being made for the CLNs *"at an appropriate later date"*. This does, in my judgment, provide corroborative support for the evidence of Mr Armstrong and Mr Lukins that there was on 8 July 2008 some discussion as to *"downside protection"* in the event that matters did not turn out as anticipated, the requisite monies were not raised and/or Petrocapital did not purchase the CLNs within a defined time period. It does further

lend support to it having been the subjective intention not only of Mr Armstrong, but the others involved, that the Undertakings should be time limited in some way.

42. Mr Lukins then circulated his first draft referred to in paragraph 33 above, and ultimately the precise wording of the definition of *"Non-Conversion Undertakings"* in the Framework Agreement, and the Undertakings themselves, was agreed upon.

Position following the completion of the Framework Agreement

43. Immediately following the execution of the Framework Agreement, the issued share capital of Petrocapital was held as follows:

Shareholder	**Shares**	**Holding (%)**
Jurby	62,187,500	95.67
Mr Armstrong	1,406,250	2.16
Mr de Mendonca	1,406,250	2.16
Total	65,000,000	100

44. In addition to this, as referred to above, the Framework Agreement had provided for the issue to Mr Armstrong and Mr Redmond of 886,750 share warrants, exercisable at a fixed price of 0.2p per ordinary share, and 1,000,000 share options. Additionally, Mr Armstrong and Mr de Mendonca retained the CLNs, subject to the effect and operation of the Undertakings, a matter that I return to in the course of this Judgment. To the extent that the conversion rights provided for by the CLNs retained by Mr Armstrong and Mr de Mendonca remained exercisable, if circumstances were capable of arising in which the Undertakings no longer took effect, it would have been open to them to call for 22.5 million ordinary shares to be issued to them, which, aggregated with their retained shareholding, would have amounted to 28% of the issued share capital.

45. Prior to the execution of the Framework Agreement, Mr Lukins drafted a press release that provided as follows:

> *"*[Petrocapital] *is pleased to announce that Jurby Corporation has reached agreement with the existing shareholders of* [Petrocapital] *to acquire 95.7% of the enlarged issued share capital by acquiring substantially all of the existing issued ordinary shares and a further tranche of ordinary shares resulting from the conversion of the substantial majority of* [Petrocapital's] *outstanding convertible loan notes ("the Share Acquisition").*
>
> …
>
> *As a result of the Share Acquisition, Jurby Corporation now holds 124,375,000 ordinary shares* [NB account had erroneously not been taken of the consolidation of the share capital whereby the number of shares was halved] *in the capital of* [Petrocapital], *representing 95.7% of the entire issued ordinary share capital. Mr Richard Armstrong and Mr Rudi de*

Mendonca each retain 2,812,500 ordinary shares and 22,500 of convertible loan notes. Each of Mr Armstrong and Mr de Mendonca have agreed that they will not exercise the balance of their convertible loan notes and [Petrocapital] *has agreed to redeem them all for the aggregate sum of £40,000 within the next 12 months or, if earlier, out of any material new fundraising that the company may undertake"*.

An amended form of this press release was approved by the Board at a meeting on 31 July 2008.

Waiver required by the Takeover Panel

46. Contrary to General Principle 1 of the Takeover Code, the Framework Agreement did not treat all the existing shareholders equally in Jurby's acquisition in that the terms offered to Mr Armstrong and Mr de Mendonca differed from those offered to Gatcombe.

47. In these circumstances, Mr Lukins advised that it was necessary to seek a waiver of General Principle 1 in respect thereof, and by letter dated 10 July 2008 Mr Lukins wrote to the Takeover Panel seeking the appropriate waiver. The letter noted that Mr Armstrong and Mr de Mendonca agreed to the arrangement and stated that: *"Mr Armstrong and Mr de Mendonca decided they would prefer to retain a small part of the original investment and are prepared to take the risk that the company might not be able to redeem the remaining convertible notes for some time, if at all"*.

48. The Takeover Panel's consent to the waiver was granted prior to the execution of the Framework Agreement.

Petrocapital's annual report and financial statements for the year ended 28 February 2009

49. The annual report and financial statements of Petrocapital for the year ended 28 February 2009 contained a Chairman's Statement signed by Mr Olympitis, a Chief Executive's Statement signed by Mr Schäfer as *"President and CEO"*, and a Director's Report signed by Mr le Druillenec dated 18 June 2009. The CLNs retained by Mr Armstrong and Mr de Mendonca appear within the balance sheet under *"loans and other payables"*, and are commented upon at note 10 to the Financial Statements. This includes the following commentary:

"The convertible loan notes are convertible into ordinary shares of the company at any time between the date of issue of the notes on 5 May 2006 and their conversion date of 31 December 2011. On issue the shares were convertible at 1,000 ordinary shares per £1 loan note.

On 31 July 2008 80,000 convertible loan notes 2011 were converted into 18,000,000 new ordinary shares in the company.

Following the share consolidation on 31 July 2008 (Note 11), the loan notes are now convertible at 500 ordinary shares per £1 loan note.

The net proceeds received from the issue of the convertible loan notes have been split between the liability element and an equity component representing the fair value of the embedded option to convert the liability into equity of the company as follows".

The figures then refer to a nominal value of convertible loan notes issued of £125,000, a deduction of £80,000 in respect of the conversion to ordinary shares, leaving a balance of £45,000 that is then split between an equity component of £15,530, and a *"net liability component"* of £29,470. It is to be noted that this does not reflect a simple liability of Petrocapital to pay £40,000 for the CLNs retained by Mr Armstrong and Mr de Mendonca, and nor is it suggestive of any permanent loss by Mr Armstrong or Me de Mendonca of their rights to convert.

50. The balance sheet includes a further item described as *"equity reserve"* in an amount of £1,142,316. This represents a significant element of the total net assets of £816,614 shown within the balance sheet. This *"equity reserve"* is commented upon in Note 12 to the Financial Statements. The most significant element of the £1,142,316 is an amount of £1,126,786 referred to as *"proceeds from equity instruments"*. Other *"equity instruments"* are then said to *"relate to funds received during the year from Jurby Corporation, the terms of which are as follows:*

- *The obligation for repayment arises only in the event of a liquidation where there is an obligation to deliver to Jurby Corporation a pro rata share of the Company's net assets*
- *Other repayments are at the discretion of the Company based on its profits*
- *There are no other obligations on the Company*
- *In the event of a winding up the instrument will be subordinated to all other classes of instruments that entitle a holder to share of the Company's net assets*

On this basis the Directors have recognised the funds as an equity instrument under IAS 32 (Amended)".

51. Mr Schäfer's Chairman's Statement makes reference to the failure of the proposed Almas venture, commenting as follows:

> *"When in mid 2008 we decided to implement our venture to create an opportunistic natural resources company, we also decided to focus on oil investments in Kazakhstan. Oil prices were peaking at US$140 a barrel, the global economy was overheating, Kazakhstan appeared as the best performing of all Central Asian emerging markets and our timing seemed perfect.*
>
> *The subsequent downturn in oil prices alongside a nose diving world economy then shattered most aspirations at that time in this sector"*.

Failure to meet the deadline provided for by the Undertakings

52. Whilst further funds were received in the subsequent financial year ending 28 February 2010, as reflected in the fact that the balance sheet as at that date showed total net assets of £6,506,400, represented as to £6,377,692 by *"Equity Reserves"* being substantially *"proceeds of equity instruments"* of the nature described in paragraph 50 above, Petrocapital failed, in any event, to raise the level of funds that would have been required to proceed with the Almas venture. What remains entirely unclear is a to what became of the balance of the funds that are said to have been raised by Mr Kirsch as referred to in paragraph 9.1 above.

53. Notwithstanding having the cash funds to do so, Petrocapital did not pay the sum of £20,000 to either of Mr Armstrong or Mr de Mendonca in respect of their CLNs within the period of 12 month period referred to in the Undertakings, i.e. by 31 July 2008.

Apparent change of control in Petrocapital

54. I have already referred to Jurby's letter dated 7 September 2009 informing Petrocapital that it had decided to sell all its shares in Petrocapital to Advice and relinquish control and ownership. The letter also stated that Advice had *"asked the current Management Board to resign from their current positions with immediate effect at latest on September 11"*, and went on to specify the composition of a *"planned new Board and Management"*.

55. The letter dated 7 September 2009 was forwarded by Mr le Druillenec to Mr Lukins, and also copied to Mr Armstrong. Mr Armstrong then sent an email, again dated 7 September 2009, to Mr Lukins in which he stated:

> *"I have done a draft of a letter to send to Manoli* [Olympitis]. *This would enable a response to Jurby which states that the Company has received notice regarding conversion of the loan notes, as a result of which Jurby would no longer hold a majority of the shares! Yours (sic) thoughts on the drafting?"*.

56. The draft letter attached to Mr Armstrong's email stated that Mr Armstrong was writing on behalf of himself and Mr de Mendonca to inform Mr Olympitis that they intended to effect conversion of their outstanding CLNs *"with the result that we would be entitled to 22,500,000 new Ordinary Shares in the Company …"*.

57. Again, on the same day, 7 September 2009, Mr le Druillenec wrote by email to Mr Lukins seeking advice, on behalf of Petrocapital, from Mr Lukins in respect of Jurby's letter. Mr le Druillenec asked Mr Lukins to call Mr Olympitis *"urgently this afternoon in order that you may offer him your advice"*.

58. Later the same day Mr Lukins emailed both Mr Olympitis and Mr Armstrong advising that because Jurby will be transferring more than 30% of the current issued share capital of Petrocapital to Advice, this would trigger Rule 9 of the Takeover Code, requiring Advice to make a mandatory bid for the entire share capital of Petrocapital, but that it might well be up to the Takeover Panel to determine the price at which any bid should be made. The email dealt with the position of the CLNs, saying this:

> *"Obviously there is additionally the issue of the convertible notes which it appears to me are now once again exercisable, the Company not having exercised its rights to redeem the sale as per the signed agreement entered into last year"*.

59. This led to Mr Lukins being instructed to write on behalf of Petrocapital to the Takeover Panel on 17 September 2009 complaining of a breach of Rule 9. Of course, if Mr Lukins was right in respect of the advice that he gave in his email dated 7 September 2009 with regard to the exercisability of the CLNs, then it would

have been open to Mr Armstrong and Mr de Mendonca to exercise their conversion rights, and reap the benefit of any mandatory bid that Advice was required to make, quite possibly at a substantial premium per share.

60. In the event, irrespective of what might actually have occurred as between Jurby/Mr Schäfer and Advice/Mr Kirsch, and as I have said the position remains opaque, no steps were in fact taken by Advice at this point to introduce a new management and board. Further, the idea of Mr Armstrong and Mr de Mendonca exercising their conversion rights under the CLNs was not further progressed at that stage. What, however, does happen in the meantime is that on 4 February 2010, Petrocapital's shares are suspended from trading on the PLUS exchange, against the background of the Takeover Panel's consideration of the issues raised by Mr Lukins in his letter dated 17 September 2009.

61. In addition, by early 2010 Petrocapital (at the direction of its board) and Mr Olympitis were engaged in hostile litigation with Mr von Schubert.

March 2010

62. By letter dated 24 March 2010, Mr de Mendonca wrote to Mr Lukins stating that he was writing to him rather than the Board of Petrocapital because *"in the current climate, the Board will inevitably seek your opinion"*. Mr de Mendonca mentioned that he had met and spoken to Mr Olympitis when Mr Olympitis had indicated that his preference was to encourage a bid, which the Board saw at somewhere between 50¢ and 70¢ per share. Mr de Mendonca indicated that should an offer be made, voluntarily or otherwise, he would *"of course"* convert his convertibles to take advantage of the offer price, meaning that he would receive some 11.25 million ordinary shares which would mean, based on the above prices, that the offeror would have to find an additional €5-7 million. Mr de Mendonca thus suggested that *"to take away this problem"* and to *"encourage a bid"* he would be prepared to allow Petrocapital to buy in his conversion rights, subject to contract, at a price below the fully diluted net asset value per share.

63. Mr Lukins forwarded Mr de Mendonca's letter, which he had received by fax, to Mr Olympitis by an email dated 24 March 2010. In response, Mr Olympitis emailed Mr Lukins the same day stating that: *"I think you should tell him you are not allowed to talk to him directly and that you will pass on the letter to the Board"*. Mr Olympitis further stated that he would talk to Mr Armstrong, and expressed the view that Mr de Mendonca was *"an unguided missile that Richard will have to control until the Panel rule"*. He continued in his email: *"We surely don't want to change the share structure before this, and the Germans have forgotten about the notes. It will complicate everything unnecessarily"*.

Meeting on 20 April 2010

64. At Mr Armstrong's request, Mr Lukins met with Mr Armstrong and Mr de Mendonca on 20 April 2010. There is no contemporaneous note of this meeting, although Mr Armstrong did prepare a note describing the events at this meeting that was forwarded to Mr Lukins on 26 May 2010, with a view to being provided to Fisher. This note refers to Mr de Mendonca and Mr Armstrong arranging to meet

Mr Lukins in their capacity as two of the holders of Petrocapital's outstanding CLNs who were in a position to convert into equity, and therefore able to make it difficult for Petrocapital to progress, irrespective of the composition of the Board, given their ability to sell down the shareholding. As Mr Armstrong put it: *"The purpose of the meeting was to run through the scenario, and we asked Ed whether he considered a proposal to buy in the loan notes on value enhancing terms was in the Company's best interests. His view was that this was the case"*. I note that in an email dated 27 May 2010 (09.21) to Mr Armstrong, Mr Lukins commented on this note as follows – *"Looks a fair summary to me"*.

65. In paragraph 95 of his witness statement, Mr Armstrong refers to Mr Lukins having stated at the meeting on 20 April 2010 that: … *"In his view (a view which I have no reason to doubt was shared by Mr Olympitis) the Notes were convertible"*.

66. Under cross-examination, Mr Armstrong was taken to a letter dated 13 May 2010 sent by Mr de Mendonca to Petrocapital in which he had referred to his understanding that: *"The Company has received legal advice to the effect that such a transaction* [i.e. one under which Petrocapital bought in the loan notes at a discount on net asset value per share] *is in the interests of the Company and its shareholders"*. He accepted that it would be wrong for any director of Petrocapital or any lawyer acting on behalf of Petrocapital to disclose to Mr de Mendonca the advice that had been given to Petrocapital. He expressed a belief that what Mr de Mendonca had said in his letter dated 13 May 2010 was based on an assumption *"made by the answer Mr Lukins gave to a question at the meeting on 20 April"*.

67. Under cross-examination himself, Mr Lukins accepted that at the meeting on 20 April 2010, he had told Mr de Mendonca that it was his view that Mr de Mendonca holding back from exercising his rights until after the Takeover Panel had made a ruling in respect of Rule 9 would not affect his rights adversely. It was put to him that he had therefore advised Mr de Mendonca at the meeting, to which he replied: *"I suppose it's advice effectively, but its more a statement of fact in light of the fact that the Company's shares were suspended"*.

68. Mr Lukins was then taken to a letter dated 28 May 2010 that he had written to Fisher. In this letter, Mr Lukins referred to having listened to the comments made by Mr de Mendonca at the meeting on 20 April 2010, and to the fact that he *"gave no advice to Mr de Mendonca or Mr Armstrong, but suggested that Mr de Mendonca put forward a written proposal to Mr Olympitis"*. Earlier in the letter, Mr Lukins had referred to the fact that Mr de Mendonca had asked to see Mr Lukins *"on the basis that he wished to have a without prejudice conversation with Mr Lukins which would be relayed to the Board, as Mr de Mendonca's view was that he felt that a meeting with Mr Olympitis, the Chairman … would in any event merely lead to an open argument"*, and that Mr Lukins agreed to attend the meeting on that basis, Mr de Mendonca at the meeting then having levelled a number of criticisms at the Board.

69. Commenting under cross-examination upon what he had said in the letter dated 28 May 2010, Mr Lukins commented: *"I wouldn't have categorised – well I don't think*

it was detailed by; it was a statement of I think essentially fact that him – I think everyone – no-one wanted him to do anything prematurely at that particular point in time. Certainly everyone was of the opinion that if the loan monies were to be exercised for the advantage of the Board of the Company, then that needed to be done as part of a strategy. So I don't think anyone wanted him going off and exercising them unilaterally. I don't think his position is prejudiced by waiting, so I think my intent was to encourage him to wait".

70. The impression that I get of the meeting on 20 April 2010 is that Mr Armstrong had arranged it in order that Mr de Mendonca could ventilate his concerns, and Mr Lukins could be sounded out as to whether a solution might be, in respect of those concerns and Mr Armstrong's and Mr de Mendonca's position as holders of the CLNs, for Mr de Mendonca and Mr Armstrong to make an offer under which Petrocapital would buy out their conversion rights at a discount on that value (based on net asset value) of the shares that Mr Armstrong and Me de Mondonca would be entitled to if entitled to exercise their conversion rights. It seems clear to me that, without really giving it a second thought, Mr Lukins' assumption was that the CLNs were convertible notwithstanding the terms of the Undertakings, given that the 12 months had elapsed, and Mr Lukins' primary concern was that Mr de Mendonca in particular did not act precipitately, hence suggesting that it would do him no harm to wait. In these circumstances, I do not consider that it could be properly said that Mr Lukins provided advice to Mr de Mendonca at this meeting, or that Mr de Mendonca was party to advice given to Petrocapital, although Mr de Mendonca may very well have gleaned from Mr Lukins what his view was in relation to matters. Further, I consider it unlikely that Mr Lukins specifically said at this meeting that a proposal to buy in the loan notes on value enhancing terms was in Petrocapital's best interests, although he may have indicated that this was an offer well worth formally putting to the Board.

Takeover Panel ruling

71. The Takeover Panel's *"minded to rule position"*, i.e. the intended basis and substance of its proposed ruling, was communicated to Petrocapital on 14 April 2010, and to other parties from 28 April 2010 onwards. The ruling itself was disclosed to Petrocapital on 18 May 2010, and to other parties on 21 May 2010. In essence, whilst finding that the suggestion of a *"concert party"* had been made out in relation to the circumstances behind the letter dated 7 September 2009, the Takeover Panel did not find that there should be a mandatory bid.

Further correspondence from Mr de Mendonca

72. Following on from the meeting on 20 April 2010, on 23 April 2010, Mr de Mendonca wrote to Petrocapital offering it the opportunity to purchase his CLNs at a discount to fully diluted net asset value, Mr de Mendonca suggesting that the price paid by Petrocapital should represent the price per share equivalent to 85-90% of Petrocapital's fully diluted assets per share. Early in the letter, Mr de Mendonca had raised concerns, in particular in relation to the conduct of Mr Schäfer. He referred to Mr Olympitis having personally approached Mr Armstrong and Mr de Mendonca on behalf of Mr Schäfer offering to place out in the region of 500,000 of their shares for a consideration of £0.45 million, subject to cancellation of warrants

and a 12 month standstill agreement. Mr de Mendonca alleged that a "*verbal contract*" had been concluded which Mr Schäfer had failed to perform. Further concerns were raised as to the investment strategy of Petrocapital from after Mr Schäfer became CEO. The letter concluded:

> "*Based on the foregoing I think that you can see my concerns. I am certainly not prepared to countenance under any circumstances any prospect of the Board managing Petrocap on a care and maintenance basis to eventually hand over the Company and all its assets to investors who integrity and motivation is highly questionable and in whom the Board has serious concerns ….*
>
> *Under that scenario, the Board will have failed to protect the convertible note holders and failed to act in the best interests of all the ordinary shareholders, all of whom would benefit from the proposal I am making to you. The Board must give very serious consideration to my proposal.*
>
> *If it is not clear of its duties, it should consult its advisors*".

A copy of this letter was sent to Mr Lukins.

73. Mr de Mendonca followed up this letter with an email to Mr Olympitis and Mr Armstrong, copied in to Mr Lukins, dated 26 April 2010. Mr de Mendonca's concerns are repeated in short terms, and Mr de Mendonca stated that: "*My only aim is to ensure that the value I (and other investors) have in the company is protected*". He complained that his offer had been ignored.

74. The next correspondence from Mr de Mendonca was his letter dated 13 May 2010 in which he referred to his understanding that Petrocapital had received legal advice to the effect that a purchase of the CLNs at a discount to fully diluted net asset per share was in the interests of Petrocapital. This letter made an offer that Petrocapital should purchase the CLNs at a price 7.5% less than fully diluted net assets per share.

75. Mr Olympitis replied to Mr de Mendonca's letter dated 13 May 2010 by an email dated 17 May 2010 in which he referred to the fact that other priorities had intervened, and that he had not personally been involved in any specific discussions, and nor had he asked for, nor seen any legal advice. However Mr Olympitis indicated that he was <u>not</u> "*inherently comfortable*" with the concept of the CLNs being purchased at a discount as proposed. Mr Olympitis went on to say that he anticipated that he would probably step down from his position in the course of the next few days "*to allow a new Chairman of the Board to take the company through its next phase of development*".

Changes to the composition of the Board

76. The impression that one gains is that Mr Olympitis had placed great store on the Takeover Panel directing a mandatory bid in that that would have ensured that his own shares were bought out at an attractive price, and that he was mindful that if he left the Board he ought to have been entitled to compensation in view of the terms of his service contract. Consequently, once the decision of the Takeover Panel was known, Mr Olympitis had little interest in staying, provided that severance terms could be agreed.

77. One sees from Mr Armstrong's email to Mr Lukins dated 9 May 2010, and the attachment thereto headed *"Petrocapital Resources Plc … Board changes, etc"*, that by that date Mr Armstrong had lined up Mr Kristensen and Mr Perez to join the Board upon the resignation of Mr Olympitis and the other two Board members (apart from Mr Armstrong). The email to Mr Lukins noted that *"Manoli* [Olympitis] *seems to feel that we need to progress matters asap, in other words before the final Panel Ruling and before an EGM is called"*. The email also stated: *"Would it be sensible for you to talk to Malcolm Murray (at some time to be discussed) re what the German shareholders might want re future Board changes, and saying we will come back to them re an orderly handover. We would want to see if they would place out our shares, and we would want to see CVs of the proposed directors. This is all about playing for time. I am more comfortable with the Board being able to take sensible steps even if an EGM has been convened….but I welcome your thoughts."*

78. A Board meeting was held on 19 May 2010 at which Mr Olympitis, Mr le Druillenec, and Mr Armstrong were present. Mr Kristensen and Mr Perez were in attendance, as was Mr Lukins. The minutes note that Mr Kristensen and Mr Perez were appointed as directors of Petrocapital, and that each of Mr Olympitis, Mr le Druillenec and Mr Scott-Barratt were to stand down as Directors with effect from the close of the meeting. It has not been suggested otherwise than this was a valid and effective appointment of Mr Kristensen and Mr Perez as directors in place of two of the directors who had resigned. Petrocapital's Articles of Association contained provisions allowing the Board to fill casual vacancies amongst their number.

79. The minutes of the meeting of 19 May 2010 also record compromise agreements having been reached with each of Mr Olympitis, Mr le Druillenec and Mr Scott-Barratt, and to a letter of agreement and indemnity having been entered into in relation to the litigation in which Mr Olympitis and Petrocapital were involved, being presumably that with Mr von Schubert.

Agreement to purchase the CLNs and advice given by Mr Lukins in relation thereto

80. On 20 May 2010, the Board of Petrocapital resolved to purchase the CLNs from Mr de Mendonca and Mr Armstrong. The relevant minute records those present as being Mr Kristensen (by telephone), Mr Armstrong and Mr Perez. The minutes note Mr Armstrong having declared his interest, and that, in view of the fact that he was conflicted, he would not be voting.

81. The minutes refer to the offer made by Mr de Mendonca on 13 May 2010, and then refer to advice having been received from M & F as follows:

> *"The Directors had received comfort from Morrison & Forrester, the Company's lawyers, that (a) the Company was in default of its obligations with respect to the loan notes (such agreement being expressed as a non-conversion undertaking concluded on 31 July 2008); and (b) a transaction of this nature was in the best interests of the Company's shareholders, representing a route to enhanced value with*

no risk subject to the parties concerned entering into a full settlement deed".

The minutes then continued:
"Further to their appointment, Mr Kristensen and Mr Perez entered into discussions with Mr de Mendonca and proposed a discount of 12.5%. After some negotiation, it was agreed that the Company would buy in all the outstanding convertible loan notes for a consideration of £1,450,000, which represented a discount of 10% to the fully diluted net assets. This has resulted in an increase in net assets per share from 7.28p to 7.57p".

The minutes were signed by Mr Kristensen as Chairman.

82. Mr Lukins provided a letter of advice addressed to *"the Directors"* of Petrocapital dated 21 May 2010. The letter of advice proceeds on the basis that under the terms of the Framework Agreement and Undertakings, the balance of the outstanding loan notes should have been redeemed by no later than 31 July 2009. The letter then continued as follows:

"We understand that Mr de Mendonca and Mr Armstrong did not actively pursue their remedies when the 12 month period expired, on the basis that Jurby Corporation was then in discussions with them about placing out the shares held by each of them in the capital of the Company.
For some months Mr de Mendonca has been pressing the Company and indeed had written to the Chairman on several occasions, putting forward proposals that the Company deal with the outstanding loan notes. The communications from Mr de Mendonca have largely been deferred and Mr de Mendonca recently threatened the Company with legal action. The Directors have produced to us certain calculations showing the effect of a redemption of the loan notes and the effect that this will have on the Company's net asset value. Whilst we cannot comment from a financial perspective on these proposals, we can confirm that the breach by the Company of its obligations pursuant to the non conversion agreement would give the note holders the right to convert the notes pursuant to their original terms and whilst the economic impact would seem to be significant, this must be viewed in the context that the conversion methodology is no different from that when Jurby Corporation acquired its initial stake in the share capital of the Company and that a large proportion of the original loan notes were exercised and ordinary shares acquired on exactly this basis by Jurby Corporation.
On this basis, it is our opinion that: (a) the non conversion undertaken has been breached by the Company; (b) the conversion methodology put forward by Mr de Mendonca appears to be a correct interpretation of the terms of the loan notes, and the redemption of the loan notes is in the best interests of the Company, particularly if the Directors are able to secure a 10% discount to the actual conversion value of the notes".

83. The gist of the advice was later repeated by Mr Lukins in an email to Mr Kristensen of 26 May 2010 in which Mr Lukins stated that: "*Given the default* [of Petrocapital in not paying the £40,000 prior to 31 July 2009], *Mr Armstrong and Mr de Mendonca are entitled to unilaterally exercise the loan notes which would have a significant dilutary effect on the existing equity shareholders"*.

84. It was on this basis that a Deed of Redemption of Settlement between Petrocapital (1) Mr Armstrong (2) and Mr de Mendonca (3) was entered into on 21 May 2010. This document provided for the payment of the sum of £1,450,000 by the Company to Mr Armstrong and Mr de Mendonca on or before 25 May 2010, contains a release and indemnity and agreement not to sue, but curiously does not in terms provide for the discharge of the CLNs, or their transfer to Petrocapital. However, that must have been the plain effect of the document.

85. The actual decision to pay Mr Armstrong and Mr de Mendonca £1.45 million was therefore made by Mr Kristensen and Mr Perez as the two non conflicted members of the Board of Petrocapital entitled to vote. Whilst they were known to Mr Armstrong prior to their appointment, and whilst the circumstances of the resignation of Mr Olympitis and the other two directors have not, to my mind, been fully explained, I am satisfied that Mr Olympitis and the other two directors did resign of their own volition, and that Mr Kristensen and Mr Perez were appointed as directors in circumstances in which it was open to them to, and in which they did exercise an independent judgment in respect of the relevant decision.

86. However, their decision was one informed by the legal advice provided by Mr Lukins to the effect that his view was that the CLNs were convertible and that that the Undertakings no longer prevented conversion with the consequences, so far as the dilution of other shareholdings were concerned that would follow on therefrom, and also by advice given by Mr Lukins to the effect that Mr de Mendonca might well have a significant claim for substantial damages, and thus that what was proposed was, in his view, in Petrocapital's best interests.

87. In paragraph 28 of his witness statement, Mr Perez said that he had: … "*No doubt that the settlement, agreed at the Board Meeting on 20 May 2010, was in the best interests of the Claimant, considering the potential legal claims against the company for not having paid the £40,000 within the 12 month deadline. The Claimant had been advised that the claims could be very substantial, and the settlement involving a discount to net asset value of equity that would otherwise have been granted, avoided dilution of the shareholders"*.

88. Mr Perez was asked about this thinking in the course of his cross-examination by Mr Lawrence QC on behalf of M & F. The question of a claim in misrepresentation against Petrocapital based upon representations that Mr Schäfer might have made having induced Mr de Mendonca at least not to transfer shares was raised with Mr Perez, but he replied that he did not know about this. However, he did accept that much of the thinking behind the settlement was to avoid litigation.

89. Mr Kristensen was asked by Mr Fenwick QC, on behalf of Petrocapital, about paragraph 21 of his first witness statement in which Mr Kristensen had said: *"Mr Lukins told me [at one meeting I had with him] that the Claimant was in default, that the Loan Note holders had a strong case, not for a nominal value but a substantial sum, based on lost opportunity"*. Mr Kristensen was asked to comment thereon in the light of evidence that had been given by Mr Lukins somewhat downplaying what might have been said about a potential claim by Mr de Mendonca. Mr Kristensen replied: *"Perhaps the word 'strong' was introduced by myself but it was certainly – I was left in no doubt that there was a case"*, by which he accepted that he meant *"a good viable case for a very substantial sum of money"*.

90. Mr Kristensen explained the reference to *"lost opportunity"* as being: … *"The inability to basically be able to sell the shares at a significantly higher level than the one at the time (sic)"*.

91. In paragraph 17 of his second witness statement, Mr Kristensen referred to a discussion that he had had, himself, with Mr de Mendonca prior to the relevant board meeting where Mr de Mendonca had explained to him that:

> *"He was aggrieved because Mr Schäfer had promised to place out some stock for him but had not done so and the share price of the Company had subsequently plummeted. Mr de Mendonca said he felt that he had been deliberately misled and prevented from being able to realise all or part of his investment"*.

92. As to when Mr Lukins gave advice to Mr Kristensen, Mr Kristensen commented, under cross-examination, that it was: *"… over a period of time. It wasn't on a specific day in a specific meeting. There were a number of phone calls, as I said earlier, and it was really, you know, sort of surmised into the advice that was finally put on paper"*.

93. Mr Kristensen confirmed that he decided with Mr Perez that it was appropriate to buy out the CLNs, and he accepted that he did so because he had been told they were exercisable because no payment of £40,000 had been made by Petrocapital in accordance with the Undertakings. Mr Kristensen confirmed that he had been given advice by Mr Lukins that there was a risk of substantial damages being recoverable by Mr Armstrong and Mr de Mendonca because of *"alleged breaches"* after which the following exchange occurred:

> *"MR FENWICK: Again, do I take it that if that had not been the advice given to you, you would have been much more cautious about taking this step?*
>
> *MR KRISTENSEN: I would have certainly changed my methodology. I would have still wanted to reach a settlement, but it may not have been from the starting point that this one was"*.

94. Later on, it was put to Mr Kristensen that if he had not been advised of the claims which Mr de Mendonca and Mr Armstrong could bring, he would not have been in such a rush to conclude a settlement, to which he responded that he would have been in a rush to make *"another settlement"*.

95. I asked Mr Kristensen what the position would have been if he had been advised that the position in relation to the convertibility of the CLNs was that the point was very arguable, and that Petrocapital might win or it might lose. Mr Kristensen responded that:

> *"My approach would still have been to reach some sort of settlement but where my starting point before was millions of Euros starting point now might have been £500,000 worth of legal expenses, so somewhere between £40,000 and £500,000"*.

96. As to the advice given with regard to there being a substantial claim for damages, Mr Lukins said this during the course of his cross-examination:

> *"I said that there could be a substantial claim for damages. The issue, to be honest, was a fairly muddy situation and my overview or view of the facts was that essentially it looked from the paperwork I had seen that the note holders had been persuaded or encouraged not to take any action on the basis of Mr Schäfer, Jurby and/or Mr Olympitis and/or the company agreeing to place out the shares in return for further undertakings and from my knowledge of how litigation works, you are basically faced with a number of potential defendants there. You could have a Jurby Corporation – I mean just roughly assessing it. There are some bits of the company with probably no tenable assets. Mr Schäfer, who you couldn't track down, Mr Olympitis and the company and if you wanted to make trouble, even if your action didn't have much support, you'd probably bring an action against the company which would nevertheless draw the company into a fairly large claim until it could extract itself from that"*.

97. The £1.45 million was paid out of Petrocapital's funds to Mr Armstrong on 27 May 2010.

Queries by Fisher

98. Immediately upon receipt of the notification of the purchase by Petrocapital of the CLNs, Fisher, as Petrocapital's PLUS advisor, on 21 May 2010 itself emailed Petrocapital, copying in Mr Lukins, requesting clarification in respect of the transaction.

99. Following an exchange of correspondence, on 27 May 2010, Fisher wrote to Mr Lukins expressing its *"serious concerns"* about the circumstances in which Petrocapital had failed to redeem the balance of the CLNs for a total consideration of £40,000 in accordance with the Framework Agreement and the Undertakings, and had *"recently redeemed the same convertible loan notes for a consideration of £1.45 million"*. Fisher sought an explanation in relation to various matters raised in this letter, including the *"rationale behind"* Mr Lukins' advice that the redemption of the CLNs at a value of £1.45 million was in the best interests of Petrocapital, *"as*

regards the quantum if there was a liability". Fisher queried the figure of £1.45 million given … "*the shares so acquired being less than a 25% minority shareholding and the shares of the Company having been suspended from trading, with the result that it may have been unlikely that the value attributed to the shares under the redemption would have been obtained, had the shares been sold in the market"*.

100. Fisher's letter dated 27 May 2010 also raised queries in relation to the meeting on 20 April 2010, and sought confirmation of "*the basis of instruction from the Company in relation to said meeting and the advice given arising from it, including copies of any written advice given to the Company"*.

101. Fisher's letter dated 27 May 2010 was copied in to Mr Armstrong and the Board of Petrocapital.

102. In an email dated 28 May 2010, Mr Armstrong wrote to Mr Lukins commenting on Fisher's letter dated 27 May 2010, saying:

> "*Fisher seems to be very keen to ascertain 'instructions from the Company'. You clarified at an earlier date that it was appropriate for me to talk to you about matters relating to the company on a private and confidential basis, where I had certain concerns or needed advice. I consider that this was such a matter that I needed input on and the letter of 23 April required us to talk about this.*
> *Are the terms of the buy in a matter for anyone other than the Board? This is an 'investment decision' like any other"*.

103. Mr Lukins responded to Fisher's queries by his letter dated 28 May 2010, which I have already touched upon.

At paragraph 3 of this letter, Mr Lukins commented that:

> "*We do believe that shareholders in the Company could maintain an action against the persons who were Directors of the Company as at 31 July 2009 for negligence, as it is clear that the lapse of the Non-Conversion Undertakings potentially released the note holders from their obligation not to convert and they were then effectively free, at any time, to convert the notes into equity representing in excess of 20% of the Company's issued share capital"*.

At paragraph 4 of this letter, Mr Lukins said as follows:

> "*Our advice to the Company was that the Company was in breach of its obligations to the loan note holders and that potentially a number of consequences could follow. The most simplest (sic) measure of damages would be the cash sum offered to the note holders for redemption of the loan notes set out in the Non-Conversion Undertaking. However, it is clear that proposals were made to the loan note holders about placing out of their stock and that Jurby Corporation (who also had derived each shareholding by way of the acquisition of a large chunk of identical loan notes at minimal consideration) had placed out large chunks of those shares at a significant profit. It is arguable that if Mr Schäfer and the other board members were still in active negotiations with the loan note holders and that those representations resulted*

in the loan note holders not exercising their rights, then the note holders might have grounds for further action if they, on the basis of those representations, delayed exercising their rights when there seemed to be an active secondary market in the Company's stock on the Xetra market. It was our view that any Claimant seeking damages would be most likely to base his claim on the prevailing value of the shares into which the notes would have been convertible and at July 2009 shares were being dealt with on the Xetra market at €0.75 in large volumes which potentially gave a claim value in the region of £12 million. Obviously by early 2010 any options for realisation of value was severely limited as a result of the suspension in both London and Germany of the Company's stock and the options of the loan note holders were further limited. We have not taken Counsel's opinion on this matter, however if we were advising a claimant in this situation we would assess a starting point for a damages claim as the market value of the securities; obviously in practice it is unlikely that a claimant would recover a sum of this magnitude in full".

104. Once the settlement with Mr Armstrong and Mr de Mendonca had been concluded, it was incumbent upon Petrocapital to make a formal announcement as soon as practicable. However, the PLUS rules required that Petrocapital's corporate advisor, Fisher, be satisfied as to the circumstances, and verified in any announcement before it was publicised. Mr Kristensen refers in his second witness statement to having pushed Fisher, at about this time, to get the announcement out.

Communication with shareholders

105. Mr Kristensen also refers in his second witness statement to having spoken, at about this time, to Mr Murray, as solicitor acting for several of the other shareholders including Advice/Mr Kirsch. Mr Kristensen refers to Mr Murray as having been anxious to ensure that his clients had more representation on the Board, to which Mr Kristensen was agreeable in principle, subject to finding out what was being proposed. Mr Murray suggested to Mr Kristensen, that he contact Mr Kirsch. These discussions were reflected in an email from Mr Murray to Mr Kristensen dated 25 May 2010, which provided contact details for Mr Kirsch and Mr Husband.

106. Mr Kristensen then called Mr Kirsch, and a meeting was arranged that took place in Germany on 31 May 2010, at which Mr Kristensen met Mr Kirsch, another gentleman whose name he cannot recall, and Mr Landgraf. They mentioned to Mr Kristensen that they had been hoping that Mr Schäfer would be present at the meeting, but that he had not turned up. I have already referred to this meeting in paragraph 9.7.1 above, where I identify differences between the account given by Mr Kirsch, and that given by Mr Kristensen. As I have already said, to the extent that there are differences in the accounts given, I prefer the evidence of Mr Kristensen for reasons there explained.

107. On the basis of Mr Kristensen's evidence, I am satisfied that he arranged this meeting with a view to moving Petrocapital forward, and seeing if he could work with, rather than against, the shareholders based in Germany and Switzerland, in order to achieve this end.

108. Mr Kristensen described in his second witness statement having gained the impression that those he met were not being candid with him, but accepted that there were discussions concerning what had gone wrong in the past. Further, Mr Kristensen said that he gained the impression that although Mr Kirsch and the others tried to distance themselves from Mr Schäfer and Mr von Schubert, they knew more than they were letting on about the latter, and Mr Kristensen said that Mr Kirsch mentioned that he would like to see Mr Husband take up a position on the Board of Petrocapital.

109. Mr Kristensen referred in his second witness statement to Mr Kirsch having asked him about the *"loan note issue"*, which Mr Kirsch seemed to know about. Mr Kristensen describes Mr Kirsch expressing the view that Mr Armstrong and Mr de Mendonca were simply *"trying it on"*. Mr Kristensen said that he expressed the view that they had a strong case, but that he did not tell Mr Kirsch about the settlement that had been concluded because he did not think it would be appropriate to do so because that would have involved selectively briefing specific shareholders without being able to announce the settlement to the market, and that could result in an unfair advantage and, as Mr Kristensen put it *"the ability for those shareholders to trade stock in a grey market"*.

110. Mr Kristensen referred to the meeting lasting a couple of hours, and to those present then going on to dinner in the evening, which Mr Kristensen describes as *"perfectly cordial"*. At Mr Kirsch's suggestion, having been provided with his telephone number by Mr Kirsch, Mr Kristensen met Mr Schäfer at Frankfurt Airport hotel the following morning for a short meeting.

111. A day or so after Mr Kristensen's return from Germany, Mr Kirsch asked Mr Kristensen to participate in a conference call in order to introduce Mr Husband. Mr Kristensen described Mr Kirsch becoming quite aggressive during the course of this conference call, the latter being very insistent that Mr Husband be appointed to the Board straight away. Mr Kristensen described having become quite irritated by this, and he recalled following the telephone conference up by sending Mr Kirsch a copy of a list of questions which he had taken with him to Germany, as he was not prepared to allow Mr Kirsch to dictate to him, that he still had a number of concerns and questions that remained unanswered. He said that he had wanted these questions answered so that he could form a view as to whether there was any scope to tidy up what Mr Kristensen saw as a *"mess"* in relation to Petrocapital, with a view to the suspension on trading in its shares being removed.

112. Mr Kristensen recalls Mr Kirsch raising some further questions with regard to the CLNs, which resulted in him circulating a memo to Mr Kirsch, copied into Mr Husband, by email dated 3 June 2010. There are some potentially concerning features of this memo, in particular, whilst referring to the deal having been agreed with the note holders *"equivalent to £1.45 million"*, it does not say that the monies have already been paid away. Further, it refers to there being a *"contingent element of £0.3 million in relation to the realisation of the Montana Investment"*, whereas, at least at that stage, that is not what the Settlement Deed had provided for. Further, the reference to an exposure limited to £0.8 million could be somewhat misleading.

In paragraph 13 of his witness statement Mr Kirsch referred to this memo as being *"totally misleading"*. I do not consider that description to be an accurate one, and the criticisms made of the memo would have rather more force had Mr Kristensen been cross-examined upon it, which he was not, and had he then been unable satisfactorily to explain it. Further the memo does not to my mind undermine the generally positive view that I formed of Mr Kristensen and the thought process that he went through and, as we shall see, it was Mr Kristensen who initiated the revision of the terms of the Deed of Settlement.

Variation of the Settlement Deed

113. In May 2010 Petrocapital had entered into a Letter of Intent for the sale to European American Energy Ltd of Petrocapital's investment in Central Montana Resources ("Montana") for some US$4.5 million. This price of US$4.5 million had been used as a component in calculating the net asset value for the purposes of negotiating with Mr Armstrong and Mr de Mendonca in respect of the value of the CLNs on conversion into shares. Consequently, if this was a transaction that was unlikely to proceed, then that was liable to call into question the net asset value used for the purposes of the agreement reached with Mr Armstrong and Mr de Mendonca.

114. This agreement had been concluded prior to Mr Kristensen's appointment as a Director, and he was concerned as to the vagueness about who the *"real"* buyer was, and that the transaction was being conducted through an off-shore special purpose vehicle ("**SPV**"). Further, Mr Kristensen had concerns as to Fisher's role in relation to this transaction, as it appeared that they had done little due diligence in respect of it. This caused Mr Kristensen to take independent advice from Alfred Henry.

115. In the light of all this Mr Kristensen reached the view that the Deed of Settlement required, if possible, to be revised in order to make it acceptable to shareholders in the event that the Montana transaction did not proceed, or if the ultimate sale was for less than the book value figure of US$3.678 million which had been used for the purposes of the net asset value calculations carried out in negotiating the Deed of Settlement. At paragraph 49 of his first witness statement, Mr Kristensen said this:

> *"I had become concerned that the sale of the investment did not appear to be proceeding. I cannot recall whether I asked Mr de Mendonca or Mr Armstrong to pay any money back or whether I asked Mr de Mendonca in a phone call to pay some of the money back which I believe he would have refused to do. As the Deed had already been executed, I was not in a strong bargaining position, I managed to get Mr de Mendonca and Mr Armstrong to agree to pledge all of their existing stock to provide a safeguard against the situation whereby the Central Montana Resources asset was sold for less than previously agreed, which would have meant that my NAV calculations would have to be reduced. The Deed of Variation ensured that fully diluted net assets per share were enhanced no matter whatever the sale proceeds of this investment"*.

116. The Deed of Variation was, in fact, executed in or about late June 2010, and Mr Lukins acted as a witness. However, it was then backdated to 10 June 2010. There was some email correspondence on 14 June 2010 between Mr Lukins and Mr Armstrong in relation to this in which Mr Armstrong suggested that the Deed of Variation be dated with the same date *"as the first set we signed i.e. 21 May"*. Mr Lukins responded: *"Probably best dated today in terms of announcements and so that Tom is not seen to have been concealing anything at his meetings in Germany"*. Mr Armstrong then replied: *"I certainly think we should date it post his trip … but also pre the calls from Malcolm Murray on Friday"*.

117. On Friday 11 June 2010, Mr Lukins had sent an email to Mr Kristensen and Mr Armstrong referring to having had a call from Mr Murray *"In a slightly agitated state on behalf of his clients, in which he had referred to the fact that his clients were 'most concerned that the Company intends to disperse large amounts of its shareholder funds in redeeming some outstanding loan notes which will favour parties connected with Directors', and launched into a general diatribe about how his clients want to convene a general meeting to remove the Board if progress is not made"*. In fact, Mr Murray followed up his telephone call with an email sent on 11 June 2010.

118. On 14 June 2010 Mr Murray called Mr Lukins again, suggesting that Mr Kristensen call Mr Kirsch because he had been asked to prepare a requisition of a general meeting unless Advice was contacted in the next 24 hours. In response to an email from Mr Lukins informing him as to this, Mr Kristensen replied: *"good for him … Just had* [Mr Kirsch] *chasing me, but was in a meeting. Think its just "cage rattling" but unwilling to put it to a head, unless you advise me otherwise"*.

119. Mr Lukins replied to Mr Murray by letter dated 15 June 2010, explaining the background to the CLNs. However, the letter did not inform Mr Murray that the Deed of Settlement had actually been executed, or that the £1.45 million had been paid away. The contents of this letter had been approved by Mr Kristensen, who, in doing so, had commented: *"I had a chat with Kirsch this morning and reiterated the facts (of life) to him. Didn't like it much but he was clearly in a corner"*. In paragraph 17 of his witness statement Mr Kirsch commented that whilst he could not remember exactly what had been said in the course of this conversation with Mr Kristensen … *"From the documents shown to me by the Claimant's solicitors, I think it likely that this is the first time I found out that the Settlement had already taken place"*.

Updated opinion

120. Subsequent to this, Mr Lukins prepared a more detailed form of Letter of Advice, a copy of which he sent to Mr Armstrong by email dated 25 June 2010 commenting *"Updated opinion as requested"*. This bore the same date as the original letter of advice, 21 May 2010. The augmented letter of advice included, amongst other things, the following additional wording:

> *"It is our opinion that the terms that you have agreed with the Loan Note holders are fair and reasonable, particularly when viewed in the context of the original circumstances surrounding the Company entering into the*

Framework Agreement and associated documentation on 31 July 2008. It is clear that, for reasons good or bad, other shareholders who received their shareholding derived from the exercise of these loan notes were selling the shares at a price approaching, or in excess of €2 when the non conversion undertaking fell away and have profited at that level. Any litigant being able to demonstrate this point would certainly use this as a basis for a claim. We therefore consider that what you propose to do constitutes legitimate action in discharge of your functions as directors and in the best interests of the Company.

…

(b) *The note holders potentially have a claim against the company for loss; if such a claim were brought it is most likely that it will be based upon the prevailing market value of the shares at time of breach on the basis that the holders could claim that had they converted and sold the resulting shares this is the loss that they have suffered. Obviously the shares were trading on the Xetra at a price in excess of €2, it is of course arguable that any claim would not be successful on a straight basis of multiplication and allowances would need to be made for liquidity and reliability, but it is certainly likely that the then prevailing share price would form the basis for a loss calculation".*

Further valuation point

121. A further valuation point was taken by Mr Fenwick QC on behalf of Petrocapital during the course of cross-examination relating to the basis upon which funds raised by Jurby had been introduced into Petrocapital as dealt with in the latter's Financial Statements as referred to in paragraph 50 above, subsequent accounts adopting the same treatment as that contained in those for the year ended 28 February 2009 therein referred to. This was the subject matter of email correspondence involving Mr Lukins, Mr Armstrong, Mr le Druillenec and Mr Olympitis in June 2010.

122. Mr Fenwick QC's focus was on the part of note 17 to the accounts for the year ended 28 February 2010 that said: "*In the event of a winding up the instrument* [i.e. Jurby's equity instrument] *will be subordinated to all other classes of instruments that entitle the holder to share of the Company's net assets"*. On its face, this might be taken to suggest that this *"equity instrument"* was subordinated to the interests of shareholders. In an email dated 22 June 2010, Mr Lukins commented thereon as follows:

> *"Well that makes little sense – if its subordinated to all other instruments entitled to share in net assets then that includes the shareholders! (I assume they mean to the extent of nominal value only)"*.

123. Mr Lukins was cross-examined about this, but for reasons that I shall develop, it is not necessary for me to go further into the same.

Removal of Mr Armstrong, Mr Perez and Mr Kristensen

124. Following on from the events that I have described, each of Mr Armstrong, Mr Perez and Mr Kristensen ceased to be Directors on 31 August 2010.

E. PETROCAPITAL'S CLAIMS

Retainer

125. Petrocapital alleges that:-

125.1 M & F was retained by it to act from about June 2008 in respect of the Jurby acquisition and *"all subsequent matters"*;

125.2 There was an implied term of this retainer that M & F would exercise the care and skill to be expected of a reasonably competent commercial solicitor in performing its duties pursuant to that retainer; and

125.3 Further or alternatively, M & F owed Petrocapital a duty of care in tort to that effect.

May 2010

126. The allegations of breach of contract/negligence are set out in paragraph 59 et seq of the Amended Particulars of Claim. However, it is to be noted that:-

126.1 In paragraph 45.7 it had been alleged that:

> *"At most (which is not admitted) Mr Armstrong and Mr de Mendonca were in a position to seek specific performance of the Company's obligation to make payment to each of them of £20,000, or to sue the company for damages in the sum of £20,000 each plus interest"*;

126.2 In paragraph 46 it had been alleged that:

> *"Further and in any event, it was not in the Company's interest to expend £1.45 million of its working capital (which otherwise could have been used for investment purposes) in order to redeem the Convertible Notes, rather than to allow Mr Armstrong and/or Mr de Mendonca to convert their loan capital into Ordinary Shares in the Company …"*.

127. Paragraph 63 of the Amended Particulars of Claim, having referred back to paragraphs 38 to 44 thereof, alleges that, as pleaded therein:

> *" … the Defendant advised the Company on 20 May 2010, immediately prior to the Board Meeting on that day, and in a letter dated 21 May 2010, in relation to the Company's failure to redeem the Convertible Notes pursuant to the Non-Conversion Undertaking"*.

128. Paragraph 64 of the Amended Particulars of Claim then goes on to allege that that advice was, in substance, that:

"64.1 As a result of the Company's failure to make payment of £20,000 to each of Mr Armstrong and Mr de Mendonca by 31 July 2009, neither Mr Armstrong nor Mr de Mendonca remained bound by the irrevocable undertaking given to Jurby in the Non-Conversion Undertaking or the contractual promise to the Company not to seek the conversion of the Convertible Notes under their terms.

64.2 The Company was no longer entitled and Mr Armstrong and Mr de Mendonca are no longer bound to redeem the Convertible Notes on payment of £20,000 to each of Mr Armstrong and Mr de Mendonca.

64.3 The redemption of the Convertible Notes by the Company, rather than allowing Mr Armstrong and/or Mr de Mendonca to convert their Convertible Notes into Ordinary Shares in the Company, was in the best interests of the Company, particularly so if the Company was able to secure a 10% discount to the actual conversion of the shares".

129. Paragraph 65 of the Amended Particulars of Claim then goes on to allege that (emphasis added):

> *"The <u>said advice</u> was incorrect. In giving the <u>said advice</u>, in breach of contract, and/or negligently, the Defendant failed to exercise the care and skill to be expected of a reasonably competent commercial solicitor in performing its duties pursuant to the said retainer".*

130. Subparagraphs 65.1 to 65.8 then set out *"Particulars of Negligence"* as follows (again, emphasis added):

> *"65.1 On their true construction the undertakings given by Mr Armstrong and by Mr de Mendonca under their respective Non-Conversion Undertakings were irrevocable undertakings to Jurby not to exercise any rights they had under the terms of the Convertible Notes to require the conversion of loan capital to Ordinary Shares in the Company.*
>
> *65.2 The said undertakings constituted and/or evidenced agreements between (a) the Company and Mr Armstrong and (b) the Company and Mr de Mendonca.*
>
> *65.2.1 the Company had the right as against each of Mr Armstrong and Mr de Mendonca to the early redemption of each of the Convertible Notes by the payment to each of Mr Armstrong and Mr de Mendonca respectively of the sum of £20,000, and the Company irrevocably agreed with them to make such payment by (at the latest) 31 July 2009.*

65.2.2 Mr Armstrong and Mr de Mendonca irrevocably agreed with the Company not to take any steps to convert any of the Convertible Notes held by them.

65.3 The undertaking given by the Company to Jurby to make payment to Mr Armstrong and Mr de Mendonca was not a condition precedent to the irrevocable undertakings given by Mr Armstrong and Mr de Mendonca to Jurby, or the contractual promise given to them by the Company, not to take any steps to convert the Convertible Notes into Ordinary Shares in the Company.

65.4 If, which is denied, circumstances had arisen which would have entitled Mr Armstrong or Mr de Mendonca to effect their discharge from the said undertakings to Jurby and/or the contractual promises to the Company no such step had in fact been taken by either of them, and accordingly the unconditional irrevocable undertakings to Jurby and the contractual promises to the Company each had given remained in effect.

65.5 The breach by the Company of the irrevocable undertaking it had given in the Non-Conversion Undertaking to Jurby, and the contractual promises it had made, to make payment to each of Mr Armstrong and Mr de Mendonca in the sum of £20,000 by, at the latest, 31 July 2009, had not had the consequence that Mr Armstrong and Mr de Mendonca were released from their unconditional irrevocable undertakings to Jurby or contractual promises to the Company not to exercise any rights they had under the terms of the Convertible Notes to require the conversion of loan capital to ordinary Shares in the Company.

65.6 The Company was, in any event, entitled to enforce any breaches by Mr Armstrong and/or Mr de Mendonca of their irrevocable undertakings to Jurby pursuant to section 1 of the Contracts (Rights of Third Parties) Act 1999.

65.7 Further or alternatively Mr Armstrong and Mr de Mendonca were in breach of the non-Conversion Undertakings and/or the contractual promise each had given to the Company, and/or Mr Armstrong was in breach of fiduciary duty to the Company as pleaded at paragraphs [35] and [36] hereof, and the Company was entitled to take action in respect of the said breaches.

65.8 The Defendant should <u>therefore</u> have advised the Company that the only claim which might properly be made against it by Mr Armstrong and Mr de Mendonca was in respect of the unpaid sums of £20,000 to each of them, and that the Company should tender such sum to each of Mr Armstrong and Mr de Mendonca, plus a sum in respect of interest from 31 July 2009. <u>Such advice</u> should have been given to the Company as soon as Mr de Mendonca raised the suggestion in his letter to MR Lukins of 24

> *March 2010 that he was entitled to convert his Convertible Notes (as pleaded at paragraphs [24] and [25] above), and the Company should have been advised to respond to Mr de Mendonca in those terms".*

131. Paragraph 66 of the Amended Particulars of Claim then alleges that:-

> "Further or alternatively, it was not, in any event, in the Company's interests to expend £1.45 million of its working capital (which otherwise would have been available to the Company) in order to redeem the Convertible Notes, rather than to allow Mr Armstrong and/or Mr de Mendonca to convert their loan capital into Ordinary Shares in the Company: the Company's best interests would have been served by maintaining its working capital".

132. Paragraph 67 of the Amended Particulars of Claim then went on to allege *"further or alternatively"* that if M & F had given the correct advice as to the construction of the Undertakings, it should have advised Petrocapital's directors that no decision should be taken to redeem the CLNs at the price ultimately paid, or at any price other than their face value, without the summonsing of an *"Extraordinary General Meeting"* of Petrocapital, on the basis that the shareholders would have been adversely affected thereby, and would not have approved the payment of £1.45 million, or any significant sum, to Mr Armstrong and/or Mr de Mendonca to prevent them exercising their conversion rights.

133. Paragraph 68 of the Amended Particulars of Claim then went on to allege *"further or alternatively"*, that by 27 May 2010 M & F was aware that the advice given *"in respect of the propriety of the 2010 Settlement Deed and the payment made (alternatively about to be made) to Mr Armstrong on the same date was being questioned by Fisher"*. It is then alleged that having been so alerted, M & F should have advised Petrocapital not to make (alternatively to recall) the payment of £1.45 million, sought the advice of Counsel as to the construction of the Undertakings, and sought advice from Counsel as to the propriety of the 2010 Settlement Deed, and the payment of £1.45 million to Mr Armstrong and/or Mr de Mendonca.

First alternative case – drafting of the Undertaking

134. Paragraph 69 of the Amended Particulars of Claim raises an alternative case to the effect that if the advice given in May 2010 as to the effect of Petrocapital's failure to make payment under the Undertakings by 31 July 2009 was the correct advice on the true construction thereof, M & F was in any event in breach of contract and/or had acted negligently in the drafting of the Undertakings because, in essence, that was contrary to what had been intended in the drafting of the Undertakings, it having been intended by all relevant parties, and in particular Petrocapital, that the Undertakings should remain irrevocable and unenforceable notwithstanding that the two sums of £20,000 might not have been paid by 31 July 2009.

The second alternative case – not advising as to the desirability of paying £40,000

135. Paragraph 70 of the Amended Particulars of Claim sets out a further alternative allegation the essence of which is that M & F was negligent in not advising Petrocapital prior to 31 July 2009 that the Undertakings might be construed as giving rise to a claim by Mr Armstrong and/or Mr de Mendonca for conversion of the CLNs if payment of £20,000 was not made to them, or each of them, by Petrocapital by 31 July 2009 to redeem the CLNs and that, accordingly, Petrocapital should ensure that it made the relevant payments to Mr Armstrong and/or Mr de Mendonca by that date in order to avoid the possibility of Mr Armstrong and/or Mr de Mendonca relying upon such a construction.

Causation and damage

136. Paragraph 71 of the Amended Particulars of Claim then goes on to allege that:

> *"By reason of the aforesaid breaches the Claimant has suffered loss and damage".*
>
> *Particulars of Loss and Damage*
>
> *71.1 As a result of the negligence of the Defendant, the Company paid £1.45 million to redeem the Convertible Notes rather than the £40,000 it could have paid under the Non-Conversion Undertaking, and its loss is accordingly £1.41 million, plus the expenses wasted in remedying that failure including, inter alia, the costs of these proceedings.*
>
> *71.2 Alternatively, as a result of failing to advise appropriately in the light of Fisher's letter of 27 May 2010 as pleaded at paragraphs [68] to [68.3], £1.41 million plus expenses wasted in remedying that failure including, inter alia, the costs of these proceedings.*
>
> *71.3 Alternatively, as a result of the matters particularised at paragraphs [69] to [70.2], £1.41 million, plus expenses wasted in remedying that failure including, inter alia, the costs of these proceedings".*

F. PLEADING ISSUES

Introduction

137. I have set out the way Petrocapital's case as to breach of contract and negligence is pleaded at some length in view of a number of pleading points that have been taken. I identify each of the pleading points below, but consider the effect of them in dealing with the substantive merits of Petrocapital's claim.

Scope of the breach alleged

138. M & F takes the point that, as pleaded in relation to the events of May 2010, Petrocapital puts its case on an all or nothing basis comprising: the primary case based on the proposition that M & F was clearly wrong when it advised that the Undertakings had ceased to bind Mr Armstrong and Mr de Mendonca; and, a secondary case premised on the converse proposition that M & F was right about that, but that it was liable for having drafted the Undertakings so as to achieve that

result, when the parties did not intend it, and/or for having failed to give advice that would have caused Petrocapital to pay the sum of £40,000 in time. It is therefore alleged by M & F that the claim as pleaded, in contrast to that which Petrocapital has sought to run at trial, does not comprehend a less ambitious case to the effect that M & F might have been right about the construction point, but its advice was inappropriate in certain additional respects, in particular in overstating the risk that Mr Armstrong and/or Mr de Mendonca might have a claim for substantial damages, and that if that inappropriate advice had not been given, then Mr Kristensen and/or Mr Perez would have taken a harder line in negotiating a deal with the latter, in which case a better result would have been achieved for Petrocapital, which it has lost the opportunity of negotiating for.

139. The point was clearly flagged up in opening by Mr Lawrence QC on behalf of M & F who said, during the course of his opening: *"I want to make it clear at the outset of my opening that unsurprisingly, our submissions and our evidence are directed and solely directed at the case which is being pleaded against the Defendant. That case, the gist of that case – I don't think it is necessary to go to the document – the gist of that case is set out in paragraphs 59 through to 70 of the Amended Particulars of Claim"*.

140. It is right that Petrocapital's pleaded case as set out in paragraphs 126 to 133 above does not in terms allege that Mr Lukins/M & F, in breach of retainer, or negligently, gave bad advice to the effect that Mr Armstrong and/or Mr de Mendonca might have a claim for substantial damages against Petrocapital. However, Mr Fenwick QC, on behalf of Petrocapital, points to the fact that in response to subparagraph 45.7 and paragraph 46 of the Amended Particulars of Claim, referred to in paragraph 126 above, M & F, at e.g. paragraphs 32.2 and 32.3 of its Amended Defence, specifically referred to the threat to pursue damages claims as being an answer to the allegation that Petrocapital was liable to Mr Armstrong and Mr de Mendonca for £40,000 and no more, and in answer to an allegation that the settlement with Mr Armstrong and Mr de Mendonca was not in Petrocapital's interests. Paragraph 32.2 of the Amended Defence included the following:

> *"Mr Armstrong and Mr de Mendonca were in a position to seek specific performance of the Convertible Notes and/or damages in respect of the prevailing value of the shares into which the Convertible Notes would have converted. Mr de Mendonca also threatened to pursue a claim for damages based on the prevailing value of the shares into which the Convertible Notes would have converted as at 31 July 2009 when the shares were actively being dealt upon the Xetra market at a price of over €2 in large volumes based on representations alleged to have been made to him by the Directors of the company to place out some of his existing holding of ordinary shares at that time into the market and the potential for such a claim could not be ruled out …."*.

141. Mr Fenwick QC therefore makes the point that it has been apparent throughout that an element of the criticism against M & F in relation to Mr Lukins' advice that the settlement with Mr Armstrong and Mr de Mendonca was in Petrocapital's best interests is that this was at least in part based upon advice as to the prospects of Mr

Armstrong and/or Mr de Mendonca being able to bring substantial damages claims, which Petrocapital maintains was bad advice.

Jurby's Equitable Instrument

142. A second pleading point taken by Mr Lawrence QC on behalf of M & F relates to the way in which the monies introduced by Jurby into Petrocapital fall to be dealt with, and the effect thereof upon the value of the shares in Petrocapital based upon a net asset value. In short, in the course of cross-examination, and in particular that of Mr Lukins, Mr Fenwick QC sought to take the point that the value of £1.45 million placed upon Mr Armstrong's and Mr de Mendonca's shares upon conversion was flawed, in that it ignored the effect of Jurby's *"equitable instrument"* identified in Petrocapital's accounts as referred to in paragraphs 121 to 123 above. In essence, the valuation exercise that was carried out, really by Mr Kristensen, prior to agreement as to the relevant figure, assumed that all shareholders would take priority to Jurby's *"equitable instrument"*, even on liquidation, when this was not the case or at least far from clear.

143. Mr Lawrence QC complains that this was not a matter that had been previously pleaded, emerged without warning as a point as a result of Mr Fenwick QC's consideration of documents during the course of, or immediately leading up to trial, and so had not been dealt with by M & F in preparing evidence and otherwise preparing for trial. It was submitted that it would give rise to an unfairness if Petrocapital was to be allowed to rely upon this point now quite simply because M & F was in no position to be able fairly to deal with it when, if it was point to be taken, it should have been taken earlier.

M & F's case as to effect of non-payment of £40,000 by 31 July 2009

144. The essence of M & F's case as to the effect on the Undertakings, and in particular as to whether they remained irrevocable, if the £40,000 provided for was not paid by 31 July 2009, is as set out in subparagraph 15.2.4 of the Amended Defence, where it is alleged:

> *"However, when the Company failed to comply with its undertaking to Jurby, the Undertakings given by Mr Armstrong and Mr de Mendonca to Jurby likewise fell away and/or lapsed, the consideration for the same having wholly failed and/or not having been made by the agreed date. Thereafter Mr Armstrong and Mr de Mendonca were entitled to seek to exercise their conversion rights at any time they chose to subject to any further agreement in this regard being reached".*

145. In opening the case, Mr Lawrence QC on behalf of M & F argued that, as a matter of true construction of the Undertakings, they ceased to be irrevocable if, as occurred, Petrocapital failed to pay the sum of £40,000 by 31 July 2009. However, he also opened the case on behalf of M & F on the basis that an alternative analysis was that in not paying the sum of £40,000 by 31 July 2009, Petrocapital was in repudiatory breach of contract thereby entitling Mr Armstrong and Mr de Mendonca

to treat the undertakings that they had given as contained in the Undertakings as at an end by electing to do so, which, so submitted Mr Lawrence QC, they remained able to do in May 2010.

146. Although no pleading point was raised when Mr Lawrence QC opened the case on behalf of M & F, in closing, Mr Fenwick QC did take a pleading point that M & F's case, as pleaded, relied upon an automatic lapse, rather than any repudiatory breach entitling Mr Armstrong and Mr de Mendonca to terminate. Mr Fenwick QC, who maintains that the point is simply not open to M & F without re-amendment of the Defence, suggested that had this latter case been pleaded, then the presentation of the case, including cross-examination, would have been conducted on a different basis.

147. However, it is clear from paragraph 65.4 of the Amended Particulars of Claim, as well as the analysis at paragraph 109 et seq of Petrocapital's written Opening Submissions, that this is a line of argument that Petrocapital had anticipated. Further, following the conclusion of Closing Submissions, Petrocapital has made further short written Submissions to me in relation to the ability of Mr Armstrong and Mr de Mendonca to treat the Undertakings as at an end, taking the point that the tripartite nature of the Undertakings, involving Petrocapital, Jurby and Mr Armstrong/Mr de Mendonca as parties might render such termination impossible.

G. IS PETROCAPITAL'S CASE MADE OUT?

Advice given prior to Deed of Settlement dated 21 May 2010

Introduction

148. Central to this issue is the true construction and effect of the Undertakings. However, whatever the true construction thereof might be as a matter of strict legal interpretation, the real issue is whether the advice that Mr Lukins gave was advice that could properly have been given by a competent practitioner in the area of law in which Mr Lukins held himself out as having expertise without falling below the standard reasonably to be expected of him.

149. Construction of documents can be a notoriously difficult area. An error by a solicitor in construing, or advising on the construction of a statute or document is unlikely to constitute negligence, so long as the construction which he favours is a tenable one – see Jackson & Powell on Professional Negligence, 7th Edition, at para 11-103. However, the complaint against Mr Lukins and M & F goes beyond that in the circumstances of the present case, because Mr Fenwick QC submits that Mr Lukins took a wholly untenable view, and further that it was plainly not, in any event, in Petrocapital's interests as an investment company to redeem the CLNs or to buy out any shares to which Mr Armstrong and Mr de Mendonca were entitled on conversion, and further, subject to this point being open to Petrocapital on its pleaded case, that the advice that Mr de Mendonca had, or might have, a substantial claim for damages was obviously bad. Further there is the discrete point as to whether Mr Lukins ought to have advised that an extraordinary general meeting be summoned. It is necessary to consider each of these limbs of this element of the claim in turn.

Effect of Undertakings

150. As to the first of these limbs, this is the case as advanced in paragraph 65 of the Amended Particulars of Claim in respect of which it is necessary, as I see it, to consider whether Mr Lukins came to a tenable view in respect of the construction of the Undertakings, and also whether he ought, in the circumstances, to have qualified the advice that he gave in any way.

151. Petrocapital's case is that the use of the word *"irrevocable"* in the Undertakings is to be construed as making it clear that Mr Armstrong and Mr de Mendonca were, in effect, agreeing for all time not to convert the CLNs, whether or not the £40,000 was paid within 12 months or at all, and therefore that there was no question of the respective undertakings not to convert simply lapsing after 12 months. Further, as we have seen, Petrocapital argues that without re-amendment of the Defence, it is simply not open to M & F to run the argument that there was a repudiatory breach of the Undertakings by Petrocapital, but that even if it were open to M & F to run this argument on the pleadings, time was not of the essence of Petrocapital's obligation to pay within 12 months, and so Mr Armstrong and Mr de Mendonca had no right to treat Petrocapital as being in repudiatory breach and to terminate accordingly irrespective of the further complications referred to by Petrocapital given the tripartite nature of the Undertakings with Jurby as the principal party to whom they were addressed.

152. A number of potential construction issues thus arise.

153. The relevant principles of construction have, of course, been fully considered by the House of Lords and the Supreme Court in recent years, in particular in ***Investors Compensation Scheme Ltd v. West Bromwich Building Society*** [1998] 1 WLR 896, ***Chartbrook Ltd v. Persimmon Homes Ltd*** [2009] 1 AC 1101, and ***Rainy Sky SA v. Kookmin Bank*** [2011] 1 WLR 2900. In ***BMA Special Opportunities Hub Fund Ltd v. African Minerals Finance Ltd*** [2013] EWCA Civ. 416, Aitkens L.J. helpfully summarised the correct approach as follows at para [24]:

> *"The Court's job is to discern the intentions of the parties, objectively speaking, from the words used in the commercial documents, in the relevant context and against the factual background in which the document was created. The starting point is the wording of the document itself and the principle that commercial parties who agreed the wording intended the words used to mean what they say in setting out the parties' respective rights and obligations. If there are two possible constructions of the document a Court is entitled to confer the construction which is more consistent with "business commonsense".*

154. I would just add that ***Investors Compensation Scheme*** and ***Chartbrook*** provide authority for the proposition that if something has clearly gone wrong with the language used in the relevant document, then the Court, in construing it, may depart from the literal meaning in order to arrive at the meaning that the parties must have intended.

155. However, following on from the passage that I have referred to, Aitkens L.J. went on to … *"agree with the statement of Briggs J., in **Jackson v. Dear** [[2002] EWHC*

2060 at [40], [reversed on appeal at [2013] EWCA Civ. 89 but not affecting this point], *first that "Commercial commonsense" is not to be elevated to an overriding criteria of construction and, second, that the parties should not be subjected to "… the individual Judge's own notions of what might have been the sensible solution to the parties' conundrum". I would add, still less should the issue of construction be determined by what seems like "commercial commonsense" from the point of view of one of the parties to the contract."*

156. It is necessary to be mindful of the fact that certain of the evidence that I have heard, and indeed referred to above, would be inadmissible in construing the Undertakings. Thus:-

    156.1 Whilst the Court will be required to have regard to the background "*matrix of fact*", the previous negotiations of the parties, and their declarations of subjective intent, are inadmissible for the purpose thereof save, at least in the former case, for the purpose of establishing the parties' state of knowledge of the facts – ***Chartbrook*** at 1121D, per Lord Hoffmann.

    156.2 Subject to certain limited exceptions, the subsequent conduct of the parties is also an inadmissible aid to construction – see e.g. ***Amalgamated Investment and Property Co. Ltd v. Texas Commercial International Bank Ltd*** [1982] QB 84, at 120A-B. Thus, for example, how the CLNs were subsequently dealt with within Petrocapital's financial statements would not assist for the the purposes of construing what they meant.

157. On a literal reading of the Undertakings, without setting them in context, the wording does pretty clearly refer to "*irrevocable undertakings*", and to Mr Armstrong's and Mr de Mendonca "*irrevocably agreeing*". For what it is worth, and whilst his answers might not be an admissible aid to construction as going to his subjective intention, Mr Lukins was cross-examined about his choice of language in drafting the Undertakings, and the fact that he in his evidence had sought to equate the position with undertakings given for a limited period of time in the context of takeovers. He was shown a precedent taken from the Encyclopaedia of Forms and Precedents that did expressly limit the duration of undertakings, and he accepted that if it had been intended to restrict the irrevocability of the Undertakings to a limited period of time, then by adopting drafting such as that used in the precedent, the Undertakings could have been drafted so that the irrevocability was expressed as being subject to matters such as payment of the £40,000 within 12 months, but it was not.

158. However, having regard to the background circumstances there are a number of factors that do in my judgment point to a different intention than one based simply upon a literal first reading of the Undertakings:-

    158.1 Firstly, if it had been intended that the undertakings given by Mr Armstrong and Mr de Mendonca should have been truly irrevocable in the sense that they were never to have the opportunity to convert their loans into shares again, and were merely entitled to payment of £20,000

each, then the Framework Agreement could simply have provided for Jurby to purchase the CLNs and Mr Armstrong's and Mr de Mendonca's rights to convert thereunder, on deferred terms. Further, so long as the CLNs remained alive, albeit subject to the undertakings that Mr Armstrong and Mr de Mendonca had given in respect of them, Petrocapital remained subject to the obligations under clause 5 of the CLNs which were designed to preserve the value of the relevant shares on conversion.

158.2 The fact that Petrocapital's own obligation to redeem the balance of the CLNs as provided for by the Undertakings was, itself, expressed to be *"irrevocable"* does, as I see it, make it at least highly questionable whether the word *"irrevocable"* as used within the context of the Undertaking really adds anything to the reciprocal obligations of Mr Armstrong and Mr de Mendonca on the one hand, and Petrocapital on the other hand.

158.3 Further, there is the point that the relevant undertakings on the part of Mr Armstrong and Mr de Mendonca are expressed to be *"in consideration of"* Petrocapital agreeing to redeem the balance of the CLNs *"in any event within 12 months"*. This does, in my judgment, at least highly arguably, point to an intention that if payment was not effected within 12 months, then the undertaking should no longer be binding.

158.4 Thus there was, as I see it, at the relevant time, at least a highly tenable argument that the Undertakings fell to be construed in the manner contended for by M & F.

159. There is then M & F's alternative argument based on repudiatory breach. As I have indicated, a pleading point is taken in respect of it based, in particular, on the way that M & F's case is expressed in subparagraph 15.2.4 of the Amended Defence. I agree with Mr Fenwick QC that the case as there advanced is different from, and indeed inconsistent with one based on repudiatory breach on the part of Petrocapital leading to an entitlement on the part of Mr Armstrong and Mr de Mendonca to terminate because the case is there expressed in terms of an automatic lapsing of the undertakings given by Mr Armstrong and Mr de Mendonca upon the failure of Petrocapital to comply with its own undertaking to pay the two sums of £20,000 by 31 July 2009 *"in any event"*. M & F's alternative argument therefore does strictly go beyond its pleaded case.

160. However, it was a line of argument foreshadowed in the written Opening Submissions, and indeed anticipated and dealt with at some length in Mr Fenwick QC's and Mr Ryan's written Opening Submissions. Mr Lawrence QC opened the case on behalf of M & F without any pleading point being taken at that stage. Mr Fenwick QC complained in closing that there were areas of cross-examination that would have been pursued had this been M & F's pleaded case, but I am not persuaded that that is the case, or that anything of significance turns thereupon. It is true that possible affirmation on the part of Mr Armstrong or Mr de Mendonca might have been more fully explored, but having said that there is no evidence at all to suggest that Mr Armstrong or Mr de Mendonca might have affirmed, and the

passing of time is not itself an affirmation – see Chitty on Contracts, 30th Edition, at para 24-003 and ***Allen v. Robles*** [1969] 1 WLR 1193. In the circumstances, I consider that the justice of the case requires that I should have regard to this alternative argument notwithstanding the pleading point taken.

161. The argument depends upon the obligation on the part of Petrocapital to pay within 12 months being a condition of the contractual obligations created by the Undertakings, which itself depends upon time being of the essence of the obligation on the part of Petrocapital to pay £20,000 to each of Mr Armstrong and Mr de Mendonca within 12 months *"in any event"*.

162. The general rule is that a stipulation as to time in a contract is not of the essence given that S41 of the Law of Property Act 1925 provides that the rules of equity are to prevail. However, the general rule will not apply where time is expressly or implicitly of the essence, i.e. where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with, or that time is to be of the essence; or the circumstances of the contract or the subject matter might indicate that the fixed date must be exactly complied with – see Chitty (supra) at paras 21-012 and 21-013. Examples of the latter include a contract for the sale of shares liable to fluctuate in value (see ***Hair v. Nicholl*** 2 QB 130 cf. ***Grant v. Ligman*** [1996] 2 BCLC 24 at 31), and the exercise of an option for the purchase or re-purchase of property (***Dibbins v. Dibbins*** [1896] 2 Ch. 348).

163. The question as to whether the contract has made time of the essence is, again, one of construction that involves the application of the principles already considered in seeking to ascertain what, objectively, the parties must be taken to have intended – see ***Maas Global Logistics v. Power Packing Inc.*** [2003] EWHC 1393 at [43]-[47].

164. A provision in a contract that completion should take place *"in any event"* by a certain date has been held to be sufficient to make time of the essence – see ***Harold Wood Brick Co. Ltd v. Ferris*** [1935] 2 KB 198, CA, cf. ***Touch Ross & Co v. Secretary of State*** (1983) 46 P&CR 187 where the Court of Appeal reached a contrary view in respect of the use of the words *"in any event"*, but on the basis of reasoning described by Lewison, The Interpretation of Contracts, 5th Edition, at para 15.14, FN 95 as *"unconvincing"*.

165. I consider that the better view is that time was, as a matter of true construction thereof, of the essence of Petrocapital's obligation under the Undertakings to pay the sums of £20,000 to each of Mr Armstrong and Mr de Mendonca by 31 July 2009 because of a combination of the requirement to make payment *"in any event"* by 31 July 2009, the nature of the underlying right, i.e. to enjoy the benefit of shares with a fluctuating value, and the fact that, on one analysis, Petrocapital was given what was, in effect, an option to buy out Mr Armstrong's and Mr de Mendonca's right under the CLNs, exercisable within the relevant 12 month period. Certainly, I consider there to have been at least a very tenable argument that time was made of the essence, either expressly or by implication.

166. By way of their supplemental written submissions, Mr Fenwick QC and Mr Ryan argue that because of the tripartite nature of the Undertakings it was not open to Mr Armstrong and Mr de Mendonca to accept a repudiatory breach as terminating their

obligations, and certainly their obligations to Jurby, as Jurby was not in breach. However, it is clear, as Lord Millett points out in ***Hurst v. Bryk*** [2002] 1 AC 185 at 193H and 195H that the doctrine of repudiation applies to multi-party contracts as well as to two-party contracts. On Lord Millett's analysis acceptance of a repudiatory breach operates bilaterally as between each party in breach and each party accepting the breach. In a multi-party contract, it affects the mutual discharge of future obligations between the two camps (i.e. the camp of the wrongdoers on the one hand, and those of the wronged on the other hand), but does not operate so as to effect a discharge of obligations between persons in the same camp. For these purposes, it seems to me that Jurby must be regarded as being in the same camp as Petrocapital because of its control of Petrocapital, at least as at 31 July 2009, and the fact that it stood to benefit from its shares not being diluted by any exercise by Mr Armstrong and Mr de Mendonca of their conversion rights under the CLNs.

167. Thus, irrespective of the tripartite nature of the Undertakings, I consider that the better view is that from and after 31 July 2009, it was open to Mr Armstrong and Mr de Mendonca to elect to terminate the Undertakings on the basis of the repudiatory breach occasioned by the non-payment of the respective sums of £20,000 by 31 July 2009 "*in any event*", and thereby to procure their release from any further obligation to perform the undertakings on their part contained within the Undertakings not to exercise their conversion rights under the CLNs. Again, I certainly consider there to have been a highly tenable argument to that effect.

168. It is right that at no point did Mr Armstrong or Mr de Mendonca actually elect to treat the Undertakings as terminated. However, once Petrocapital was in repudiatory breach it was too late for it to cure matters by paying the relevant sums – see ***Bournemouth University v. Buckland*** [2010] ILR 908. As I have already said, the question of a prior election to affirm the Undertakings does not arise. Consequently, any right to terminate that existed as at 31 July 2009 would have still existed as at 21 May 2010, in which case, if this is right, it was open to Mr Armstrong and Mr de Mendonca to simultaneously, or immediately sequentially at least, give notice of termination to Undertakings, and to then exercise the conversion rights under the CLNs. Thus, in practice, although different as a matter of legal analysis, whether the undertakings on Mr Armstrong's and Mr de Mendonca's part automatically lapsed, or Mr Armstrong and Mr de Mendonca were entitled to terminate for repudiatory breach, all had the same practical effect.

169. I share certain of Mr Fenwick QC's stated concerns as to aspects of the meeting between Mr Lukins and Mr Armstrong and Mr de Mendonca on 20 April 2010, and as to whether Mr Lukins associated himself too closely with Mr Armstrong such that he was in danger of preventing himself from being able to give dispassionate advice to Petrocapital as its solicitor. However, on this issue, as to whether or not it was open to Mr Armstrong and Mr de Mendonca as at 21 May 2010, to exercise their conversion rights under the CLNs notwithstanding the undertakings that they had given by the Undertakings, I am not persuaded that Mr Lukins, in advising the Board of Petrocapital, and in particular Mr Kristensen and Mr Perez, on this point, gave advice that fell below the standard reasonably to be expected of a solicitor such as Mr Lukins holding himself out as having expertise as a corporate lawyer in that I consider that he expressed an opinion that represented a perfectly tenable view,

which he genuinely held, as to the true construction and effect of the Undertakings in the events as they had unfolded.

170. I have considered whether Mr Lukins should, as Mr Fenwick QC and Mr Ryan argue that he should, have qualified his advice by saying that the matter raised construction issues that were highly arguable either way and that any negotiations or settlement with Mr Armstrong and Mr de Mendonca should proceed on that basis. However, irrespective of my view that Mr Lukins was right in the views that he held, I consider that we are concerned with the sort of construction issues where Mr Lukins was entitled to proceed on the basis of his own settled view as to the meaning and effect of the Undertakings, particularly if his view did, as I consider that it did, accord with the parties' true subjective intentions as he reasonably understood them (see below).

171. Whilst Mr Lukins was, or ought to have been aware that his advice was being sought in somewhat controversial circumstances, this was not a situation in which he was actually aware that the construction of the Undertakings was likely to be controversial or in which, in my judgment, a reasonably competent solicitor in Mr Lukins position (with knowledge of the parties' subjective intentions) ought necessarily to have appreciated or advised that there were highly arguable construction issues that ought to be taken, cf. ***Queen Elizabeth's Grammar School Blackburn v Banks Wilson*** [2002] PNLR 14 at [45] and [47] per Arden LJ, where the solicitor acting on a purchase settled, and advised as to the effect of a restrictive covenant over which he knew that a dispute may well emerge, without cautioning that the provision was likely to be controversial.

In Petrocapital's best interests

172. On the basis of Petrocapital's pleaded case we are properly concerned here with the case advanced in paragraph 66 of the Amended Particulars of Claim to the effect that it was not, in any event, in Petrocapital's interests to expend £1.45 million of its working capital in order to redeem the CLNs, rather than to allow Mr Armstrong and/or Mr de Mendonca to convert their loan capital into shares, it being alleged that Petrocapital's best interests would have been best served by maintaining its working capital.

173. It is important to note first of all what the directors' duties were in deciding to cause Petrocapital to reach an agreement with Mr Armstrong and Mr de Mendonca on the terms that it did by the Deed of Settlement. S172 of the Companies Act 2006 requires a director to 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, having regard to a number of factors set out including the likely consequences of any decision in the long term, and the need to act fairly as between members of the company. So long as the directors act bona fide, what one is essentially concerned with is what the directors, subjectively, consider will be most likely to promote the success of the company not what the Court, looking at the matter objectively with the benefit of hindsight, might consider to have been the best option – see e.g. ***Mutual Life Insurance Co. of New York v. The Rank Organisation*** [1985] BCLC 11.

174. Having heard their evidence, I am satisfied that Mr Perez and Mr Kristensen, who effectively took the relevant decision given Mr Armstrong's disqualification from the process, did act in good faith in reaching the decision that they did that Petrocapital should enter into the Deed of Settlement and pay the sum of £1.45 million, and that the decision that they reached was one that they were entitled to reach as one that they subjectively considered was most likely to promote the success of Petrocapital by dealing with the various issues that arose, albeit that they did, as they were entitled to do, rely upon the advice of Mr Lukins in the way that I have described above.

175. In his letter of advice dated 21 May 2010 Mr Lukins made it clear that he could not comment from *"a financial perspective"* on the relevant proposals, the detailed valuation figures being based on calculations produced by the directors showing the effect of a redemption of the CLNs on Petrocapital's net value. In my judgment it is clear that the scope of Mr Lukins retainer did not, on any view, extend to advising as to whether the figures that the directors were working from as to the net asset value of Petrocapital were correct. I consider that the scope of Mr Lukins' retainer was therefore limited to advising as to the effect of Petrocapital having failed to pay the sums of £20,000 each to Mr Armstrong and Mr de Mendonca, and whether Mr Armstrong and Mr de Mendonca were entitled to exercise their conversion rights under the CLNs as considered above, and so far as this head is concerned whether, if Mr Armstrong and Mr de Mendonca were entitled to exercise their conversion rights, it was in Petrocapital's best interests to buy out Mr Armstrong's and Mr de Mendonca's rights for a sum representing the discount agreed on the value that shares allotted upon exercise of the conversion rights would have had based on a pro rata proportion of Petrocapital net asset value, whatever that might be.

176. Consequently, even if the calculation of the amount paid to Mr Armstrong and Mr de Mendonca was, on this basis, too high because of the value placed upon the Central Montana Investment in calculating the net asset value of Petrocapital, I do not consider that this is a criticism that can be laid at Mr Lukins' door. Further, I am satisfied that it was too late for Petrocapital to take the point referred to in paragraph 142 above that was taken in respect of the effect of the Jurby "*equitable instrument*" upon the value of any shares that would have been allotted to Mr Armstrong and Mr de Mendonca, for the first time during the course of cross-examination. M & F was, given the way in which the point so arose, in no position fairly to deal with the point at trial (in contrast to the issues concerning Central Montana which had, at least, been flagged up in paragraph 58 of the Amended Particulars of Claim). However, I consider that this matter fell, in any event, outside the scope of M & F's retainer which was limited as I have referred to in paragraph 175 above, and based upon the premise that the directors had carried out the appropriate calculations to arrive at a net asset value of Petrocapital. There is a further point that, on any view, Jurby would only stand to take, or share in the assets on liquidation, and I see no reason why, for the purposes of the relevant valuation exercise, one needed necessarily to have assumed a liquidation.

177. However, the substance of the criticism under this head is, as alleged in paragraph 66 of the Amended Particulars of Claim, that Petrocapital's best interests would have been served by maintaining its working capital for investment purposes, rather

than distributing £1.45 million thereof to Mr Armstrong and Mr de Mendonca when all that the CLNs entitle them to, if capable of conversion, was an allotment of further shares.

178. The allegation is plainly directed at Mr Lukins' advice in his letter dated 21 May 2009 that the redemption of the CLNs on the terms proposed was in Petrocapital's best interests. I do not consider that the allegation can be entirely explained away, as sought to be done in paragraph 60 of the Amended Defence, on the basis that the relevant advice fell outside the scope of the retainer being concerned solely with the impact of the proposal from a financial perspective. I do not consider that that is how the advice was read by Mr Perez and Mr Kristensen, and indeed had this aspect of the advice solely related to matters of a financial perspective, then one would not have expected Mr Lukins to have gone on in his letter to express the opinion that he did as to redemption being in Petrocapital's best interests given his earlier disclaimer in respect of the impact of the proposal from a *"financial perspective"*. Further, paragraph 60 of the Amended Defence does not rest easily with the way in which M & F actually responded to paragraphs 45.7 and 46 of the Amended Particulars of Claim by reference to paragraph 32.2 of the Amended Defence, which sought to justify matters as being in Petrocapital's best interests by reference to, amongst other things, Mr de Mendonca's threat to pursue a claim for damages based on the prevailing value of shares in July 2009. In addition, it is not without significance that when Mr Lukins updated or augmented his letter of advice dated 21 May 2010 in June 2010 as referred to in paragraph 120 above, this point as to a claim against Petrocapital for such losses was developed as additional reasoning for the advice given.

179. The evidence shows that Mr Lukins' actual rationale for his advice that it was in Petrocapital's interest to redeem the loan notes was based upon, and at various stages was expressed to Mr Perez and Mr Kristensen as the effective decision makers, as being based upon the following considerations discussed between them, namely that:-

    179.1 It was desirable as a matter of sensible corporate governance to avoid the internal dispute that was likely to arise upon the allotment to Mr Armstrong and Mr de Mendonca of a substantial block of shares following the exercise of such conversion rights as they had under the CLNs;

    179.2 Based upon the directors' calculations (in fact, as I understand it, Mr Kristensen's calculations), the value per share of the other shareholders' shares were likely to be greater if the CLNs were redeemed for an amount representing a discount on the value (based on net asset value of Petrocapital) of the shares that would be allotted on the exercise by Mr Armstrong and Mr de Mendonca of their conversion rights, than would have been the case had such shares been allotted so as to dilute the shareholdings of the other shareholders.;

    179.3 Given the legal costs that Petrocapital had recently incurred in respect of other litigation, it was highly desirable to settle any dispute that might

arise sooner rather than later if a reasonable settlement could be achieved; and

179.4 Mr de Mendonca had at least a viable claim for substantial damages.

180. I return to the question of whether there was substance in Mr de Mendonca's claim for damages, and the specific question of the impact of this on the advice given by Mr Lukins in the paragraphs immediately following. However, having regard to the various considerations set out in paragraphs 179.1 to 179.4 above that Mr Lukins relied upon in giving the advice that he did, I am not persuaded that the advice that Mr Lukins gave as expressed in his letter dated 21 May 2010 that the redemption of the CLNs was in the best interests of Petrocapital was advice that fell below the standards reasonably to be expected of a solicitor such as Mr Lukins holding himself out as having expertise as a corporate lawyer, in that I consider that the view that Mr Lukins had come to that formed the basis of his advice was a view that Mr Lukins was reasonably entitled to come to in the light of the considerations referred to in paragraphs 179.1 to 179.4 above, balanced against the advantage to Petrocapital of retaining the £1.45 million as cash for investment purposes. Indeed, subject to there being some substance in Mr de Mendonca's threats, Mr Perez and Mr Kristensen were able reasonably to form their own view as to the Deed of Settlement being in Petrocapital's best interests for these reasons.

181. It is necessary at this point to return to the pleading point identified in paragraphs 138 to 141 above. The position plainly is that it did not form part of Petrocapital's pleaded case against M & F that Mr Lukins' advice that Mr de Mendonca had a substantial and/or significant claim in damages against Petrocapital represented a distinct head of breach of duty or negligence. On the other hand, as we have seen, in paragraph 32.2 of its Amended Defence, M & F did plainly seek, at least in part, to justify its advice that settlement with Mr Armstrong and Mr de Mendonca was in Petrocapital's best interests by reference to, amongst other things, the fact that Mr de Mendonca had threatened to pursue a claim for damages based on the prevailing value of the shares into which the CLNs would have been converted as at 31 July 2009. We have seen that Mr Kristensen at least is likely to have taken a different view in relation to the terms of the Deed of Settlement, but not the principle of reaching a settlement with Mr de Mendonca and Mr Armstrong, had he not believed, on the basis of Mr Lukins' advice, that Mr de Mendonca had a good viable case for a substantial sum of money based upon a lost opportunity to sell when the shares were trading at a higher level than their value as at 31 May 2010 with their listing suspended.

182. It is right that this particular allegation is not pleaded as a separate head of claim, and Mr Lawrence QC fairly took the point in opening. Further, one can well see that if this had been pleaded as a separate head of claim, then it might well have been pleaded out in the Defence in a different way, and that the evidence might have developed rather differently with more focus upon the issue of the substance of any claim that Mr de Mendonca (or Mr Armstrong for that matter) might have had. Consequently, to the extent that Petrocapital seeks to develop this point as a separate head of claim, I would be disinclined to allow it to do so.

183. However, as M & F's own pleaded case seeks to maintain, a significant element of the rationale behind Mr Lukins' thinking on the matter, and hence the advice that he gave to the effect that it was in Petrocapital's interests to redeem the CLNs on the terms concluded was, as we have seen, that Mr de Mendonca had a good viable case for a substantial sum of money, and that can be seen to have informed the relevant directors' own thinking on the matter. Indeed, having regard to Mr Kristensen's thinking on the matter referred to in paragraphs 93 to 95 above and the discussions that took place between Mr Lukins and Mr Kristensen at the time, I consider that it would have been difficult for Mr Lukins to justify his advice that redemption on the terms concluded was in Petrocapital's best interests had he not had reasonable grounds for a belief that Mr de Mendonca had a good viable claim for a substantial sum of money. Thus although not strictly maintainable as a separate head of claim, I do consider it necessary as part of a consideration of the pleaded case to consider the issue as to whether, in the circumstances, Mr Lukins had a reasonable basis for his belief, as expressed to Mr Kristensen, that Mr de Mendonca did have a good viable case for substantial damages based upon a lost opportunity to sell when the shares were trading at a higher level than their value in May 2010.

184. Mr Lukins had met Mr de Mendonca on several occasions and had read the various letters in which Mr de Mendonca had forcefully set out his position. Mr de Mendonca was plainly very annoyed by the developments that had occurred in relation to Petrocapital which, as we have seen, raised a number of issues and concerns as to how monies were raised in Germany by the various parties involved, and as to what was behind Jurby's letter dated 7 September 2009 and the events that led to the suspension of trading in Petrocapital's shares in February 2010. The impression that Mr de Mendonca was plainly giving was that he was prepared to litigate if necessary in order to pursue his grievances.

185. We have seen (see paragraph 91 above) that Mr de Mendonca specifically told Mr Kristensen that he was aggrieved because Mr Schäfer had promised to place out some stock for him, but had not done so and that the share price of Petrocapital had subsequently plummeted, and that Mr de Mendonca felt that he had been deliberately misled and prevented from being able to realise all or part of his investment. If Mr de Mendonca was determined to pursue his grievances, then one can, in my judgment, well see that the matters that Mr de Mendonca was raising might well have formed the basis of some sort of claim that, against the background of the way that Jurby was dealing with its shares in Germany in somewhat odd and questionable circumstances, Mr Schäfer had deliberately strung Mr de Mendonca along after 31 July 2009 by deliberately misrepresenting his intentions, and what was going on, in circumstances in which if he, Mr de Mendonca, had not been strung along, then he might well have exercised his conversion rights following Petrocapital's non-payment of the £20,000 by 31 July 2009, and disposed of his shares at a price considerably in excess of the value that they had in May 2010. Whilst Mr de Mendonca did talk to Mr Lukins and Mr Kristensen in terms of what had been said by Mr Schäfer, Mr Schäfer was, of course, the individual behind Jurby which was, at the relevant time, the 97.5% shareholder in Petrocapital. One does not know the precise nature of the relationship at that time between Mr Schäfer and what were, in effect, his representatives on the board of Petrocapital, namely Mr von Schubert and, possibly, Mr Olympitis. However, prima facie, Mr Schäfer was

the principal directing mind of Petrocapital at the relevant time. In these circumstances one can well see a case with some real substance being made out to the effect that what was said to by Mr Schäfer was, in fact, said on behalf of Petrocapital amongst others.

186. As we have also seen (paragraph 89 above), Mr Kristensen qualified what he had said in paragraph 21 of first witness statement about having been told by Mr Lukins that the note holders had a *"strong case"* to having been advised that there was *"a case"*, i.e. *"a good viable case for a very substantial sum of money"*. Consequently, it is not the case that Mr Lukins was suggesting that Mr de Mendonca necessarily had a strong case, but the overall impression that I am left with is that what in substance Mr Lukins was saying was that there was the viable basis for a claim, and if the claim was made out, then it would sound in very substantial damages.

187. With hindsight, and with the benefit of the scrutiny that the Court room can provide, this may have been an over pessimistic view (from Petrocapital's perspective) of the prospects of Mr de Mendonca bringing a serious claim against Petrocapital. However, against the background of events as they unfolded in May 2010, I consider that the view that Mr Lukins came to and expressed was one that he was entitled to come to and express without it being properly said against him that he fell below the requisite standard of competence in giving the advice that he did as part and parcel of giving the advice that he did in respect of what was proposed being in the Company's best interests.

Summoning an extraordinary general meeting

188. This is the allegation contained at paragraph 67 of the Amended Particulars of Claim to the effect that Mr Lukins ought to have advised that before the Deed of Settlement was entered into, and/or the £1.45 million was paid out to Mr Armstrong for the benefit of himself and Mr de Mendonca, an extraordinary general meeting of Petrocapital should be summoned in order to consider the position.

189. This allegation, contained in the Amended Particulars of Claim, replaces an earlier allegation that the approval of Petrocapital's shareholders was required pursuant to Section 190 of the Companies Act 2006. That was an allegation that was understandably abandoned, and plainly had no merit in view of the terms of the latter provision which is concerned with substantial property transactions with directors. However, I am not persuaded that there is any merit in the allegation that is now sought to be advanced effectively in its place.

190. As I see it, this allegation wrongly presupposes a duty on the part of M & F to the shareholders of Petrocapital, rather than to Petrocapital itself when there can have been no basis for any such duty. However, more fundamentally, M & F was instructed by the board of Petrocapital, and company law clearly recognises that unless a company's Articles of Association require directors to conform to directions given by the company in general meeting, the conduct of the company's business and affairs is placed firmly in the director's hands – see e.g. Gore-Browne on Companies, at paragraph 14[4].

191. No special provision of Petrocapital's Articles of Association is relied upon, and therefore the question as to whether or not a compromise or settlement should be reached with Mr Armstrong and/or Mr de Mendonca was one for the board of directors of Petrocapital, Mr Armstrong correctly disqualifying himself from the process, rather than for the decision of Petrocapital in general meeting, and Mr Lukins was, in my judgment, entitled to proceed on that basis.

192. Consequently I do not find any proper basis for suggesting that Mr Lukins ought to have advised the directors of Petrocapital that a general meeting be summoned, the concept of an *"extraordinary general meeting"* having in any event having gone with the commencement of the Companies Act 2006.

Conclusion in respect of advice given prior to conclusion of the Deed of Settlement on 21 May 2010

193. Thus, in short, I do not consider that Mr Lukins/M & F acted in breach of the terms of his/their retainer or negligently in respect of the advice given to Petrocapital prior to the entry by Petrocapital into the Deed of Settlement on 21 May 2010.

Advice following Fisher's response

194. We are here concerned with the allegations contained in paragraph 68 of the Amended Particulars of Claim to the effect that once Fisher had begun to question the position, and expressed its concerns in the correspondence referred to in paragraphs 98 to 104 above, then Mr Lukins ought to have advised Petrocapital not to make, or at least to recall the payment of the £1.45 million, and to seek the advice of Counsel.

195. It is certainly right, as we have seen, that Fisher did raise concerns, that also extended to why Petrocapital had not, for whatever reason, paid the £40,000 prior to 31 July 2009. However, the position was that Fisher was, in a sense, coming to the situation blind and the correspondence was being written by someone other than Mr Lukins' usual contact at Fisher. On one view, until the position was explained, Fisher's concerns were to be expected. However, I do not consider that anything was said or suggested by Fisher which fundamentally undermined the basis upon which Mr Lukins had given the advice that he had that led to the board of Petrocapital taking the decision that it did on 21 May 2010 to enter into the Deed of Settlement and pay the sum of £1.45 million.

196. In those circumstances, I am not persuaded that Mr Lukins fell below the requisite standard to be expected of him, and therefore acted in breach of the terms of his retainer or negligently, in failing to advice Petrocapital not to make payment of the £1.45 million or to recall the same, and in not seeking advice from Counsel at that stage.

First alternative case - drafting of the Undertakings

197. This is the allegation contained in paragraph 69 of the Amended Particulars of Claim. The substance of the allegation is, as we have seen, that if, contrary to Petrocapital's principal case, the true effect of the Undertakings was that if the sums of £20,000 payable to each of Mr Armstrong and Mr de Mendonca had not been

paid by 31 July 2009, it was then open to the latter to convert their CLNs, then that was contrary to the true intention of Petrocapital at the time that it entered into the Framework Agreement and the Undertakings, and the drafting thereof was therefore defective as being contrary to that true intention.

198. In my judgment the claim under this head is not made out for the simple reason that, as discussed and considered in paragraph 41 above, the relevant construction of the Undertakings did accord with the true subjective intention of the parties thereto, and in particular the intention of Petrocapital as represented by its then board (as principally represented by Mr Armstrong) on entering into the Framework Agreement and the Undertakings. Further support for Petrocapital's true intention is, in my judgment, provided by the way in which Petrocapital dealt with the CLNs in its financial statements referred to in paragraph 49 above.

199. Thus, in short, I do not accept that it was ever actually intended by any relevant party that the undertakings given by the Undertakings should be truly irrevocable in the sense that they would continue to be irrevocable even if Petrocapital failed to pay the two sums of £20,000 to Mr Armstrong and Mr de Mendonca by 31 July 2009.

Second alternative case – no advice as to desirability of paying £20,000 to each of Mr Armstrong and Mr de Mendonca prior to 31 July 2009

200. This is the allegation contained in paragraph 70 of the Amended Particulars of Claim. The essence of the allegation is, as we have seen, that Mr Lukins ought to have advised Petrocapital that the Undertakings might be construed as giving rise to a claim by Mr Armstrong and/or Mr de Mendonca for conversion of the CLNs if payment of £20,000 was not made to them respectively by 31 July 2009, and that Petrocapital ought therefore to ensure that such sums were duly paid.

201. The key point sought to be made here is that Petrocapital ended up having to pay out £1.45 million to redeem the CLNs, when, if payment had been effected by 31 July 2009, it would then only have needed to pay out £40,000. It is said that the relevant provisions of the undertakings were provisions that Mr Lukins should have drawn to the attention of the new board of Petrocapital appointed upon the Jurby acquisition at some stage prior to 31 July 2009 even if, as I consider that he was, Mr Armstrong was aware that the true effect of the Undertakings was that he and Mr de Mendonca would be entitled to exercise their conversion rights under the CLNs if payment was not made by 31 July 2009.

202. Reliance is placed by Mr Fenwick QC and Mr Ryan upon the well established principle that a solicitor acting for a client in relation to a transaction is under a duty to draw his client's attention to an unusual term which may affect the interests of his client as he the solicitor knows them – see ***Sykes v. Midland Bank*** [1971] 1 QB 113 at 124B per Harman L.J. and 130F per Karminski L.J., and ***Credit Lyonnais SA v. Russell Jones & Walker*** [2003] PNLR 2 at [28] per Laddie J.

203. M & F/Mr Lukins clearly acted for Petrocapital in relation to the entry into the Framework Agreement and the Undertakings, although they/he did so on the basis of instructions provided by Mr Armstrong who was, prior to completion on 31 July

2008, representative of those who controlled Petrocapital up to that date. However, as we have seen, control of Petrocapital changed to Jurby/Mr Schäfer upon completion of the Framework Agreement, and the question that arises is as to whether such duty as M & F/Mr Lukins owed to Petrocapital required to be performed by providing the appropriate advice as to the meaning and effect of the Undertakings, and the desirability of paying the £40,000 by 31 July 2009, to the new board of Petrocapital appointed upon the change of control.

204. In my judgment M & F/Mr Lukins were/was under no such duty or obligation for, essentially, the reasons advanced by Mr Lawrence QC, namely:-

    204.1 Jurby, and those behind it, who were to take control of Petrocapital on 31 July 2008 were represented by their own lawyers as referred to in paragraph 29 above. In particular, Mr Colombotti, who was qualified as, amongst other things, a solicitor in England was acting for Jurby. In these circumstances, Mr Lukins was entitled to assume that the appropriate advice would be given to those who were to control Petrocapital, and thus directly or indirectly to its new board, by those acting on Jurby's behalf;

    204.2 There was an adverse interest and conflict as between the interests of those who previously controlled Petrocapital (Mr Armstrong and Mr de Mendonca) and those who were to control it following the acquisition by Jurby of 97.5% of the share capital of Petrocapital. In these circumstances, Mr Lukins was entitled to leave it to those who were acting for Jurby in relation to the transaction to give the appropriate advice.

205. Mr Fenwick QC argued, in response to the above, that when in a takeover transaction such as the present there is a conflict between the existing controller of the company and the company itself in relation to some post completion event, then the solicitor acting for the company is obliged to recognise that conflict and, if he is acting for the company, to provide the appropriate advice to the company in such a way that that advice is conveyed to those who are to control it post completion of the takeover. That may be the correct analysis in certain situations, but not in my judgment in circumstances such as the present when the solicitor acting for those previously in control of the company is aware that lawyers are acting on behalf of the new controllers who might reasonably have been expected to provide advice as to the effect of the terms of the transaction to those who are assuming control of the company.

206. Consequently, I do not consider that the alleged breach of retainer and negligence under this head is made out.

207. However, even if it were made out, I consider that there are a number of further difficulties in Petrocapital's way in establishing any claim for damages:-

    207.1 It would be necessary for Petrocapital to prove that if the appropriate advice had been given by Mr Lukins at the time of, or shortly after, Jurby acquired its 97.5% shareholding, then the board of Petrocapital, or those

who ultimately controlled Petrocapital, would have ensured that the two sums of £20,000 were paid prior to 31 July 2009. In ordinary circumstances, this would not be expected to be a significant evidential burden. However, as I have explained, circumstances within Petrocapital, concerning its management and control, took an unusual turn during the course of 2009. I have heard no evidence from Petrocapital as to how any decision to make payment of the two sums of £20,000 to Mr Armstrong and Mr de Mendonca respectively would have been arrived at or actioned notwithstanding the evidence that Petrocapital had, at the relevant time, sufficient liquid funds with which to effect payment. In the circumstances, I do not consider that I can be satisfied on the balance of probability that if the relevant advice had been given, the relevant sums would have been paid.

207.2 Further, it is not immediately clear that Petrocapital itself would have suffered any loss had it succeeded on this head alone. Had it received the appropriate advice, then it says that it would have made sure that the two sums of £20,000 were paid. The effect of that would have been that Mr Armstrong and Mr de Mendonca would not have been in the position to exercise their conversion rights into shares. However, Petrocapital itself would have been no worse off if Mr Armstrong and Mr de Mendonca had exercised their conversion rights, as shares had been allotted to them. The net asset position of Petrocapital would have been exactly the same. Indeed, Petrocapital would have been £40,000 worse off had it paid the two sums of £20,000. The payment away of the £1.45 million arose not because of any failure to advise as to the meaning and effect of the Undertakings, and the desirability of paying the two sums of £20,000, but subsequent and different events.

H. OVERALL CONCLUSION

208. I do not find any of the claims of breach of retainer or negligence made by Petrocapital against M & F to be established or made out. Consequently, the claim should in my judgment be dismissed.

209. There is no need for the parties to attend on the handing down of this Judgment. If all outstanding matters, including costs, can be agreed ahead of the hand down hearing, then a draft Agreed Order should be submitted for approval. If not, the outstanding issues will be dealt with either at a later hearing (if possible over the telephone) or in writing, as the parties consider best. I will extend the time for applying for permission to appeal so that period of time for making an application to the Court of Appeal for permission to appeal should not begin to run until I have dealt with any application made to me for permission to appeal at a further hearing or on paper.