Neutral Citation Number: [2023] EWHC 496 (Ch)

Case No: CR-2014-003194

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

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

Date: 10/03/2023

Before :

ICC JUDGE MULLEN

- -

IN THE MATTER OF FASTFIT STATION LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

(1) SIMON JAMES BONNEY **(2) CHRISTOPHER NEWELL** **(in their capacity as joint liquidators of Fastfit Station Limited)**	**Applicants**
- and -	
(1) GRAHAM LEWIS BARKER **(2) FASTFIT STATION MK LTD**	**Respondents**

- -
- -

Mr Jon Colclough (instructed by **Summit Law LLP**) for the **Applicants**
Mr Simon Passfield (instructed by **Capital Law Limited**) for the **Respondents**

Hearing dates: 12-13 July 2022
Further written submissions: 27th July 2022

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Approved Judgment

This judgment was handed down remotely at 11am on 10th March 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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ICC JUDGE MULLEN

ICC JUDGE MULLEN :

1. This is my judgment following the trial of the application issued by Mr Simon Bonney and Mr Christopher Newell ("the Liquidators"), as joint liquidators of Fastfit Station Limited ("the Company"), against the Company's former director, Mr Graham Barker ("Mr Barker"), and the company of which he was at the relevant times a director and the shareholder, Fastfit Station MK Ltd ("Fastfit MK"). The Liquidators' claim arises out of the events leading up to the Company's entry into administration on 15th April 2014 and the pre-packaged sale of its business and assets to Fastfit MK under a sale and purchase agreement entered into on the same day ("the SPA").

2. The Company was incorporated on 8th July 1996 and carried on business fitting tyres and repairing vehicles. Mr Mark Robinson was appointed as a director in that year and Mr Barker was appointed in 2011, having worked with the company as a self-employed consultant since 2000. Fastfit MK was incorporated on 3rd March 2014. Its sole director on incorporation was Mr Robinson. Mr Barker was appointed as a director on 27th March 2014 and was the sole shareholder of Fastfit MK until 18th July 2014, when he transferred his shares to a Ms Amanda Clowes. Mr Robinson resigned as a director of Fastfit MK on 4th April 2014.

3. The proximity of the incorporation of Fastfit MK to the administration of the Company, and the similarity of the names, might suggest that Fastfit MK's formation was occasioned by the Company's financial difficulties. Mr Barker contends that these things were unconnected and that Fastfit MK, and another company called Grippy Limited, were instead incorporated to facilitate the splitting of the Company's repair and tyre-fitting businesses. However that might be, by 31st March 2014, the Company was undoubtedly insolvent, with a deficit accepted to be likely to have been in excess of £900,000. It is similarly common ground that it was cashflow insolvent. A notice of intention to appoint administrators was filed on 2nd April 2014 and, between 1st April 2014 and the date of administration, payments due to the Company totalling £110,345.09 were instead paid to Fastfit MK ("the April Payments"). This was achieved, at least in part, by new payment terminals being installed at the Company's premises, which were presented to its customers for payment and caused payments to be made to Fastfit MK's Metro Bank account. In any event it is accepted that the Company's debtors were directed to pay Fastfit MK.

4. The joint administrators appointed were Mr John Dickinson and Mr Carl Bowles of Carter Backer Winter LLP ("CBW") but the administration was short-lived. On 8th August 2014, the Company entered creditors' voluntary liquidation and the Liquidators were appointed. Shortly thereafter, they began to enquire into the circumstances of the April Payments. On 20th March 2020 the instant application was issued, supported by the witness statement of Mr Bonney and draft points of claim. On 28th May 2020 it was ordered that the draft stand as points of claim and directions were given for the filing of points of defence and points of reply. Further directions for disclosure and evidence were given by consent on 5th February 2021 and the matter was thereafter set down for trial.

5. The points of claim allege that the April Payments were transactions at an undervalue for the purposes of section 238 of the Insolvency Act 1986 ("IA 1986"). They further allege that Mr Barker breached the duties that he owed to the Company by reason of sections 171-175 of the Companies Act 2006 ("CA 2006") in causing or allowing it to

make the April Payments otherwise than for the benefit of the Company and, specifically, for the benefit of Fastfit MK and personally profiting from those payments by reason of his shareholding in Fastfit MK.

6. The respondents deny the Liquidators' claims. They say that the April Payments were made with the knowledge and approval of Mr Dickinson, from whom the Company's directors sought insolvency advice prior to administration. The April Payments were made in anticipation of the administration, in order to keep the business running, and thereby preserve its value, at a time when the Company's bank account with Royal Bank of Scotland was anticipated to be frozen.

7. The points of defence contend in relation to the claim under section 238 IA 1986 against Fastfit MK that:

   i) the April Payments cannot fall within the ambit of section 238 IA 1986 because they were not transactions "entered into" by the Company at all;

   ii) the bulk of the April Payments, in the sum of £87,495.37, was used to make payments on the Company's behalf to discharge its liabilities;

   iii) the deferred element of the consideration under the SPA was increased to reflect the sum of £22,849.72 that was not so used;

   iv) no order should be made under section 238 IA 1986 in any event because, if the April Payments had not been made, the Company would not be in a better position because those liabilities would not have been discharged and Fastfit MK "would not have agreed" to pay the enhanced level of deferred consideration provided for in the SPA;

   v) the April Payments were made in good faith for the purpose of carrying on the Company's business and there were reasonable grounds for believing that they would benefit the Company so that Fastfit MK has the protection of section 238(5) IA 1986 and, in any event, the court should decline to make an order in the exercise of its discretion.

8. In relation to the claim against Mr Barker for breach of duty, the points of defence say that:

   i) he did not act in breach of duty, having followed the advice received from Mr Dickinson;

   ii) the Company suffered no loss by reason of any breach; and

   iii) in any event, Mr Barker acted honestly and reasonably and ought fairly to be excused from any liability that he might otherwise have, by reason of section 1157 CA 2006.

9. The points of defence exhibit a schedule of the payments said to have been made towards the Company's liabilities from the April Payments as follows:

   <u>Money paid to the Company's Creditors</u>

4th April 2014 – Boost Capital	£1,048.00
4th April 2014 – Accountants	£1,000.00
7th April 2014 – Newspaper Advertisement	£1,069.20
7th April 2014 – Boost Capital	£1,073.00
7th April 2014 – Rent (Wolverton)	£3,337.84
7th April 2014 – Rent – (Bletchley)	£3,398.20
8th April 2014 – Boost Capital	£1,048.00
9th April 2014 – Boost Capital	£1,048.00
8th April 2014 – Credential (tyre disposal)	£2,986.80
10th April 2014 – Boost Capital	£1,048.00
11th April 2014 – Website Developer (March)	£759.50
14th April 2014 – Asset Finance	£1,842.55
15th April 2014 – Snap On (Equipment repairs)	£515.55
Total	**£20,174.64**

15th April 2014 – Salaries 1	£37,827.08
16th April 2014 – Salaries 2	£19,332.18
24th March 2014 to 15th April 2014 – Bonus and Overtime	£10,161.47
Total salaries and bonuses	**£67,320.73**

The issues

10. Mr Colclough, counsel for the Liquidators, and Mr Passfield, counsel for the respondents, have helpfully prepared an agreed list of issues disclosed by the pleadings. These can be summarised as follows:

    i) Issue 1: Were the April Payments transactions "entered into" by the Company?

    ii) Issue 2: Were the April Payments entered into at an "undervalue"?

    iii) Issue 3: Is Fastfit entitled to rely on the defence in section 238(5) IA 1986?

    iv) Issue 4: What order, if any, is appropriate to restore the position to what it would have been if the April Payments were not made?

v) Issue 5: Did Mr Barker act in breach of duty in causing or procuring the April Payments?

vi) Issue 6: To the extent that loss is a relevant consideration in a breach of fiduciary duty claim, did the Company suffer any loss as a result of the April Payments?

vii) Issue 7: Is Mr Barker entitled to rely on the defence in section 1157 CA 2006?

The legal framework

11. I will discuss the legal arguments raised by the parties in the context of my judgment on the individual issues. The following is by way of an introductory outline.

Section 238 IA 1986

12. Section 238 IA 1986 provides:

> "(1) This section applies in the case of a company where—
>
> (a) the company enters administration, or
>
> (b) the company goes into liquidation;
>
> and 'the office-holder' means the administrator or the liquidator, as the case may be.
>
> (2) Where the company has at a relevant time (defined in section 240) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section.
>
> (3) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.
>
> (4) For the purposes of this section and section 241, a company enters into a transaction with a person at an undervalue if—
>
> (a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or
>
> (b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.
>
> (5) The court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied—

> (a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and
>
> (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company."

It is accepted here that the April Payments took place at the "relevant time" for the purposes of this section and section 240 IA 1986.

13. Mr Colclough submitted that the provisions for unscrambling antecedent transactions are part of the court's powers for ensuring the equal treatment of creditors. This *pari passu* principle is described in *Goode on Principles of Corporate Insolvency Law* (5th edition) at paragraph 3-07 as follows:

> "As mentioned earlier, the *pari passu* principle is one of the most fundamental principles of corporate insolvency law. All unsecured creditors are required to share and share alike in a common pool of assets and realisations. This principle, formerly confined to winding-up, now applies also to administrations in which a distribution is made. Arrangements that would have the effect of distributing an asset of a company in liquidation (or in a distributing administration) other than in accordance with the statutory provisions for rateable distribution are to that extent to be treated as ineffective. This is the common law *pari passu* rule, which as stated above, is distinct from the anti-deprivation rule. As we shall see, the *pari passu* rule applies irrespective of whether insolvency proceedings are the trigger for the operation of the impugned provision, and the fact that the arrangement was a commercially sensible one entered into in good faith will not insulate it from the invalidating effect of the rule."

Breach of directors' duties

14. The duties of directors are codified in the CA 2006 as follows, insofar as relevant:

> "**171 Duty to act within powers**
>
> A director of a company must—
>
> (a) act in accordance with the company's constitution, and
>
> (b) only exercise powers for the purposes for which they are conferred.
>
> **172 Duty to promote the success of the company**
>
> (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole…
>
> …

> (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.
>
> **173 Duty to exercise independent judgment**
>
> (1) A director of a company must exercise independent judgment.
>
> …
>
> **174 Duty to exercise reasonable care, skill and diligence**
>
> (1)A director of a company must exercise reasonable care, skill and diligence.
>
> …
>
> **175 Duty to avoid conflicts of interest**
>
> (1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

Those duties are fiduciary duties, with the exception of that set out in section 174 CA 2006 (see section 178 CA 2006).

15. It is relevant to note that the duty to act in such as way as a director considers, in good faith, to be likely to promote the success of the company set out in section 172 is ordinarily approached subjectively. Jonathan Parker J said in *Regentcrest plc (in liq.) v Cohen* [2001] 2 BCLC 80 at paragraph 120:

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

16. There are exceptions to this approach, as described by Mr John Randall QC, sitting as a deputy judge of the High Court, in *Re HLC Environmental Projects Limited* [2013] EWHC 2876 Ch, at paragraph 92:

> "(a) Where the duty extends to consideration of the interests of creditors, their interests must be considered as "paramount"

> when taken into account in the directors' exercise of discretion (per Mr Leslie Kosmin QC in the *Colin Gwyer* case (above) at [74]). Although I note the contrary view expressed by Owen J. in the Supreme Court of Western Australia that although 'the directors must "take into account" the interests of creditors [i]t does not necessarily follow from this that the interests of creditors are determinative' (*Bell Group Ltd v Westpac Banking Corp* [2008] WASC 239 at [4438]–[4439], applying the judgment of Mason J. in *Walker v Wimborne* [1976] HCA 7; (1976) 137 C.L.R. 1), so far as English law is concerned I respectfully agree with Mr Kosmin QC that his use of 'paramount' was consistent with the judgment of Nourse L.J. in *Brady v Brady* (1987) 3 B.C.C. 535 (CA) at 552, where he observed that 'where the company is insolvent, or even doubtfully solvent, the interests of the company are in reality the interests of existing creditors alone'. I also note that this passage from Mr Kosmin QC's judgment was cited with apparent approval by Norris J. in *Roberts (Liquidator of Onslow Ditchling Ltd) v Frohlich* [2011] EWHC 257 (Ch); [2012] B.C.C. 407 at [85].
>
> (b) As Miss Leahy submitted, the subjective test only applies where there is evidence of actual consideration of the best interests of the company. Where there is no such evidence, the proper test is objective, namely whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company (*Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch. 62 at 74E–F, (obiter), per Pennycuick J.; *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 B.C.L.C. 598 at [138] per Mr Jonathan Crow).
>
> (c) Building on (b), I consider that it also follows that where a very material interest, such as that of a large creditor (in a company of doubtful solvency, where creditors' interests must be taken into account), is unreasonably (i.e. without objective justification) overlooked and not taken into account, the objective test must equally be applied. Failing to take into account a material factor is something which goes to the validity of the directors' decision-making process. This is not the court substituting its own judgment on the relevant facts (with the inevitable element of hindsight) for that of the directors made at the time; rather it is the court making an (objective) judgment taking into account all the relevant facts known or which ought to have been known at the time, the directors not having made such a judgment in the first place. I reject the respondent's contrary submission of law."

The extent to which directors must consider the interests of creditors, and when those interests become paramount, was considered by the Supreme Court in *BTI 2014 LLC v*

Sequana SA [2022] UKSC 25. It is not necessary for me to discuss the judgments of the justices. In the instant case there is no doubt that the Company was irretrievably insolvent, and known to be so, at the time of the April Payments.

17. Where a director is in breach of duty, the court has power to grant relief under section 1157 as follows:

> "If in proceedings for negligence, default, breach of duty or breach of trust against—"
>
> (a) an officer of a company, or
>
> (b) a person employed by a company as auditor (whether he is or is not an officer of the company),
>
> it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit."

The witnesses

Mr Bonney

18. I heard first from Mr Bonney. Mr Bonney did not have any direct knowledge of the matters leading up to the company's administration. He was fair-minded, accepting the limitations of his knowledge and, in my judgment, honest and professional. He was questioned by Mr Passfield as to the reasons for bringing the claim just before the expiry of the limitation period and, while he accepted that he was not aware of any costs/benefit analysis having been conducted or there having been consideration of what the litigation might yield for creditors, he denied that the claim was merely a fee-generation exercise. In my view, the criticisms of Mr Bonney are unjustified, at least insofar as they attempt to characterise the proceedings as a last ditch attempt to generate a return for Mr Bonney's firm, Quantuma Advisory Limited, in the liquidation. I add that qualification simply because I have not been taken through the whole of the correspondence between the parties, but I note that the letter before action is dated 2nd January 2018 and refers to previous correspondence. At least to that extent, this is not a claim that has been intimated out of the blue at the very last moment. Mr Bonney explained, and I accept, that the delay was occasioned by dealing with other matters and satisfying himself that the case was ready to take forward. It is also inevitable that there will be some cases where recovery will make little difference to the outcome to creditors but there will often be a public interest in policing the insolvency regime and ensuring that a delinquent director and his or her associated companies do not retain the fruits of any misconduct. For present purposes I need only say that I do not regard this claim to have been improperly brought by the Liquidators.

Mr Dickinson

19. Mr Dickinson was a somewhat defensive witness. He was unwell at the time of the hearing, and appeared somewhat physically uncomfortable as a result. He was faced with the difficulty of recalling events that unfolded rapidly more than eight years ago. He explained that had worked in the field of recovery for 35 years and started taking office-holder appointments in the early 2000s. His written evidence explains that his advice to direct revenue to Fastfit MK following the service of the notice of intention to appoint administrators on the Company's bankers was "purely practical" and he had advised that an account of the revenue would need to be made, probably in the SPA itself. He was adamant that the percentage of Fastfit MK's turnover that was payable as deferred consideration under the SPA was not referable to the April Payments. I am satisfied that Mr Dickinson was telling the truth as he remembered it, but it is undoubtedly the case that his recollection is questionable. That is perhaps not surprising in the context of these proceedings so long after the event but, as I shall explain, there is a striking instance, shortly after the end of the administration, where an incorrect statement was made on his behalf in an email to the Liquidators, into which he was copied, which he did not correct. His evidence was that he did probably did not pay attention to it. Whether his failure to correct the statement made was a lapse of memory or a failure to consider the request made, and the response to it, properly, it is most regrettable. I bear in mind the limitations of Mr Dickinson's recall, or insufficient attention to matters at the time, when considering his evidence, though he himself said that, while his recollection was "not 20:20" it was "pretty good".

Mr Barker

20. Mr Barker plainly recognised that some of the payments claimed to have been made on behalf of the Company out of the April Payments were indefensible and either struggled to defend them or, quite properly, did not try. He was, however, a confident witness, telling counsel during cross-examination that he expected his word to be taken as to the way in which staff wages and bonuses had been treated. There were inconsistencies between his pleaded case and his evidence. The points of defence, verified by a statement of truth signed by Mr Barker, state that Fastfit MK "agreed" to make additional payments by way of deferred consideration to cover the payments out of the April Payments that were not applied for the benefit of the Company. In his witness statement, however, he says that he and Mr Robinson felt that they "had no choice" but to pay the amount that Mr Dickinson had negotiated with the Royal Bank of Scotland as charge-holder. There is no mention of any negotiation or agreement as to this. There was, in my judgment, a degree of after the event rationalisation in Mr Barker's account of the events leading up to the administration of the Company and, as I shall explain, it does not easily sit with the available contemporaneous documents.

The administration and liquidation

21. I turn now to the events leading up to the administration of the Company and thereafter. In September 2013 the Company had found itself in a position where it was unable to pay staff, rent and suppliers. Towards the end of that year, on the advice of the Company's accountant, the directors met Mr Dickinson. In December 2013, however, Mr Robinson told Mr Barker that a former colleague might be prepared to advance a substantial loan and the Company turned to KSA Group Limited for advice as to entering into a company voluntary arrangement while the loan was explored further.

22. The loan fell through and the Company sought advice from CBW once again in March 2014. There was a meeting with Mr Dickinson on 24th March 2014. Mr Barker's account of this is as follows:

> "30. During the 24 March 2014 meeting, Mr Dickinson advised that we should expect to be able to buy the business back for £40,000 - £50,000, and also suggested that there would be a turnover charge of approximately 1% to 2% for a year. Crucially, Mr Dickinson made it abundantly clear that once Fastfit's bank (at this point, RBS) were notified of the move towards Administration, they would automatically freeze Fastfit's bank account. He explained that the natural consequence of this would be that suppliers and staff could not be paid from the RBS account and, because Fastfit had no other money or credit available, those individuals and businesses would go unpaid. This would have had a disastrous effect on the business.
>
> 31. We discussed with Mr Dickinson how card payments might be collected at Fastfit's branches, as the majority of customers paid their bills by card, and that these would ordinarily flow through streamline (our card terminal machine provider) into Fastfit's RBS account. We relied on Mr Dickinson's experience and knowledge and followed the advice that he gave.
>
> 32. On 25 March 2014, the quarterly rent fell due on the three sites operated by Fastfit. I recall asking Mr Dickinson whether the landlords should be paid. Mr Dickinson advised me that where possible, Fastfit should continue to pay things as they become due, and suppliers should be paid sufficiently to maintain essential supplies. Mark and I negotiated with Fastfit's landlords to pay the rent for only one month. I understood that Mr Dickinson was advising us to take these steps to protect the business and to allow an administration that would be preferable to a liquidation."

Mr Dickinson accepted the account of the meeting and the advice given but said that at that time he had not had a valuation of the business and he would have "guesstimated" the deferred consideration of 1% to 2% a year as the conversation was in an urgent context. He said that he would probably have advised that he would never sell a business without obtaining a valuation.

23. On 26th March 2014, Mr Barker emailed Mr Alex Ablett of CBW to respond to questions asked of him. He said that he had a few additional questions of his own. He said:

> "We're concerned as to how takings are going to be handled after the bank are notified. Virtually all of our takings come through the credit card machines and are credited to the RBS account 2 working days later. If the account is frozen, we are not going to be able to control any takings for around 8 days, which could be

> £70k. Where will this money go? How do we get around this? We will need some working capital."

It is apparent from the terms of this email that, as at its date, Mr Barker had not had firm advice on using alternative payment machines and the question of whether the bank account would in fact be frozen was still in doubt in his mind.

24. On 28th March 2014 Mr Barker emailed Mr Dickinson to say that a winding up petition had been threatened by one of its principal tyre suppliers, Stapletons Tyre Services. He wanted to know how to deal with it and suggested issuing a notice of intention to appoint the following Monday, 31st March 2014. He said:

> "With that timing, however, cash flow will then be too tight to pay the wages on 15th, so we could do with some clarification from you on whether any of the takings during the bank freeze period can be used please."

25. Mr Dickinson replied by email on 31st March 2014 and said:

> "We can work something out re the takings.
>
> An NOI will notify the bank.
>
> How are you getting on with the finance Co's"

On the same day there was a telephone call between Mr Barker and Mr Dickinson. The call was recorded automatically, apparently without Mr Dickinson's knowledge, by the Company's telephone system. The relevant parts of the conversation are as follows

> "Mr Barker: With the takings, in the period where the bank is frozen. What happens about those?
>
> Mr Dickinson: Well I think you push those into the new company and we'll take a percentage but we'll deal with them in the Sale & Purchase agreement. Yeah that would be my view.
>
> Mr Barker: Ok, regarding the timings we're a little bit panicky that Stapleton's if we don't say the right thing, they may well go for winding up order tomorrow."

Mr Barker accepted that he was not told that that Fastfit MK could use monies paid to it in connection with the purchase of the Company's assets. Later in the recording there is the following exchange:

> "Mr Barker: At what point should I start looking at, to be taking money into a different company then?
>
> Mr Dickinson: At the moment we do the NOI. We serve the NOI you know and the flag comes down on the bank really at that point. That's what I can advise you, alright. I can't advise you to do it any other way. If you choose to so something else, then that's up to you guys."

Mr Dickinson's evidence is that he advised that an account of this revenue would have to be made in the SPA. He accepted that he was a professional advisor and he was advising that he would address the payments in the sale and purchase agreement. Mr Barker's recollection, as set out in his written evidence, was that:

> "At the time, I took 'we will take a percentage' to mean that Mr Dickinson would look to take a percentage of the April payments, representing the net profit for that period. Mr Dickinson never actually clarified what he meant by 'percentage'. It was not discussed again and at no point during the administration did he mention an intention to collect any part of those takings."

Mr Barker's evidence thus appears to be that he does not seem to have had a clear statement from Mr Dickinson as to how these payments would in fact be treated and there was no further discussion of it.

26. During the conversation, Mr Dickinson followed up on his question about the finance companies:

> "Mr Dickinson: and have you dealt with the finance companies?
>
> Mr Barker: I have spoken to the one that we want to keep the SME one yeah. They didn't seem to have any objections to it. I'll follow it up and get it."

27. Mr Barker was asked to provide Mr Dickinson with a cashflow forecast. The version he provided was apparently prepared on the basis of the provision of the hoped-for third party loan rather than administration. Nonetheless this forecast apparently was used in Mr Dickinson's negotiations with RBS and deferred consideration of 5% was agreed, so that the consideration for the purchase amounted to £38,103 as an initial payment and 5% of turnover thereafter over 12 months. Mr Barker's evidence was that he and his fellow director had no choice but to accept the arrangement agreed by Mr Dickinson. He says that in fact this meant that £99,000 was paid in deferred consideration. Mr Dickinson was adamant that the 5% figure, instead of a figure of 1% to 2%, for deferred consideration was not referable to the April Payments and that his recollection was the funds available for the purchase were insufficient to get to the number that his agent recommended so the deferred consideration was set accordingly.

28. A draft SPA was prepared in April 2014 and Pitmans LLP was appointed to advise the directors on it. The first draft was sent on 10th April 2014 and the final version was executed on 15th April 2014. On the afternoon of the day before the document was executed, Mr Barker emailed Mr Dickinson and Mr Lockhart of CBW, among others, and said

> "Hi Duncan/John
>
> List of tyre stock attached, showing ROT position
>
> Extracted from our Daily Cash Flow also attached, showing money in and out of the bank account."

About an hour later he followed the email up with an explanation of his calculation of the retention of title claims. It is not clear what was in fact attached to the emails on that day. The two schedules in the bundle that follow on from them refer, first, to salary payments from May 2013 to 1st April 2014 and, secondly, to various payments between 23rd April 2014 to 30th July 2014. Neither of them give bank account details or, save in respect of salaries, refer to payments made between 1st and 15th April 2014. I struggle to see how these could be understood, as put to Mr Dickinson by Mr Passfield, as an account of the April Payments. In any event the consideration for the sale of the business had been agreed by 14th April 2014.

29. The respondents' case is that the executed version of the SPA contains an error, in that the provision for payment and transfer of staff says as follows:

> "12.4 The Buyer further acknowledges and agrees that it shall be solely responsible for payment of all wages and salaries due and related PAYE and National Insurance contributions and deductions in respect of the Employees for all periods after 1 April 2014."

Mr Barker says that the date "1st April 2014" should have been updated to "15th April 2014", the date of execution and, indeed, the date on which the staff were paid. His position is that 1st April 2014 reflected an earlier draft. It is not suggested that it was ever anticipated that the sale of the business would in fact be completed on 1st April 2014.

30. Following appointment of the administrators, Mr Ablett wrote to Mr Barker, copying in Mr Dickinson. He said that there were certain issues they needed to discuss, which he listed as follows:

> "1. Trading for the period 2 April 2014 to 14 April 2014
>
> 2. Directors Loan Account
>
> 3. Trading Premises Leases"

It does not appear that the reference to trading between 2nd April 2014 and 14th April 2014 prompted any comment from the directors.

31. On 24th April 2014, CBW prepared an internal strategy note. Under the heading "Investigations" is a table. Under "Areas of Concern" is listed "Trading (between NOI and App)" and next to this, under the heading "Strategy" is the following:

> "The Directors diverted all funds away from the Company and into the account of NewCo.
>
> We will look to make to retrieve these monies.
>
> Circa £40k"

32. In July 2014, the administrators sought a further £17,000 from Fastfit MK because they considered the Company's tyre stock to be undervalued. There was no mention of a need to account in respect of the April Payments. Mr Passfield suggested that this would

have been an obvious point at which to ask for any monies outstanding in relation to the post-notice of intention to appoint trading. It was, as he put it, "low hanging fruit." Mr Dickinson accepted that it would have been a potential point to claim them but they had a checklist for reviews and that, without looking at the documents, he could not tell "where along the line the account was", by which I understood him to mean that he thought this was a matter that would have been turned to in due course. He denied that the reason that no demand was made was that the April Payments were dealt with in the SPA.

33. On the liquidation of the Company on 8th August 2014, the administrators prepared a handover note for the Liquidators. Under the heading "Investigations" they highlighted areas that had been identified for further consideration. The first of these is as follows:

> " | Detail | Notes
>
> 1. Wrongful trading during the period between the Notice of Intention to Appoint an Administrator and the date of filing the Notice of Administration. | During the period between 3 April 2014 and 14 April 2014 the Directors sought to divert business from the Company to [Fastfit MK]."

34. The matter was investigated further by the Liquidators and, on 11th September 2014, Mr Bonney wrote to Fastfit MK and said:

> "We understand from discussions with the former Joint Administrators that trading revenues were paid to [Fastfit MK] prior to the company's business and assets being sold on 15 April 2014."

Pitmans LLP replied on 18th September 2014 to explain this:

> "By way of explanation, at the time that [the Company] first engaged Carter Backer Winter, there was a concern that [the Company]'s bank account may be frozen. Therefore, following discussions with John Dickinson and with his agreement, future customer receipts were paid into [Fastfit MK]'s bank account.
>
> The receipts were then used for [the Company]'s purposes, to pay outgoings of the Company. A schedule of payments made is attached. You will see that £57,159.26 was paid in relation to wages alone.
>
> Please note that there are additional creditors that [Fastfit MK] itself has paid and [Fastfit MK] will seek to be subrogated to the creditors' claims. [Fastfit MK] will also seek to set off amounts due against any sums due to FFS. Details and a proof of debt will follow."

It is notable that this letter does not allege that the SPA dealt with the April Payments. It simply says that Mr Dickinson agreed to this and that the sums had been used to discharge outgoings of the Company.

35. On 23rd September 2014 Mr Bonney emailed Mr Dickinson and Mr Ablett and explained the correspondence between him and Pitmans LLP. The email said:

> "The Letter from Pitmans suggests that you agreed that customer receipts of the Company could be paid into [Fastfit MK]'s bank account prior to the Administration and the sale of the business and assets due to concerns that the Company's bank account may be frozen. I'd be grateful if you would confirm whether this is correct as I would have thought a validation order would have been the recommended route and we are concerned that [Fastfit MK] are trying to use you to avoid culpability."

36. Mr Ablett responded, copying in Mr Dickinson. He said:

> "We did not, verbally or written, agree that customer receipts during the period leading up to the administration should be paid to the account of [Fastfit MK] with Metro Bank.
>
> We had made arrangements with RBS that the Company account remain open for customer receipts and that no funds be paid out of the account.
>
> During this period we had suspicions that they had sought to divert the sales of the Company to [Fastfit MK] and this was one of the key areas we had identified for further investigations.
>
> As you would have noted from our handover, we did bring this to the attention of the Directors and that we would be investigating this further."

Mr Dickinson accepted that this was wrong, insofar as it suggests that there was no agreement that monies could be paid into Fastfit MK's account. He did not think that Mr Ablett had checked the position with him. I find it difficult to believe that there would not have been some discussion at the time, though I accept that it might be difficult for Mr Dickinson to recall the position eight years later. He did not reply to correct the position and said that it was possible that the email did not have his attention at the time. It appears, however, that the Company's account with RBS did remain open. Mr Barker accepted that it was used until 7th April 2014. As Pitmans LLP's letter to the Liquidator noted, the concern at the time was that the account "may be frozen".

37. The recording of the 31st March 2014 telephone conversation was provided to the Liquidators by letter dated 9th October 2014. It was explained that:

> "Mr Dickinson's view was that funds should be paid into the new company's account and that to the extent that the Company had outgoings that it needed to pay then these should be paid. The

> directors didn't understand the process but found Mr Dickinson to be unconcerned about the problem and proposed solution."

38. Mr Bonney's response came on 21st October 2014:

> "I have listened to the recording which you have provided. It is apparent that it was made clear in that conversation that if payments were to be made into [Fastfit MK]'s bank account, then that would be on the basis that there would need to be some provision as to how they were treated in the SPA. Clearly, these funds belong to the Company and your client must account for them and repay such sum as he received less any genuine deductions. Unfortunately, as your client has been unwilling to provide the bank statements, we are unable to clarify any genuine deductions."

39. I need not set out any subsequent correspondence. As I have explained, I was not taken to the correspondence up to the letter before action or thereafter. The foregoing summary sets out the material facts. They are largely uncontentious. I will now move on my consideration of the issues in dispute. The overarching question is whether the SPA did in fact deal with the April Payments and the purpose of the payments made out of those monies.

Did the SPA take account of the April Payments?

40. I am unable to accept that the payments made to Fastfit MK were accounted for in the SPA. It is undoubtedly true that Mr Dickinson did contemplate that provision would be made for them in the telephone conversation on 31st March 2014 but I accept his evidence that he was advising at speed with the threat of a winding-up petition being presented imminently. There is nothing to tie the deferred consideration to the April Payments. The figure of 5% was included in the SPA prepared towards the beginning of April 2014, before it could be said what sums would in fact have been paid into the Fastfit MK account or paid from that account to discharge legitimate expenses of the Company. Even if I were to accept that details of the payments in and out of the Fastfit MK account were sent Mr Dickinson on 14th April 2014 that is only a day before the SPA was signed and seems to have had no bearing on the amount of the deferred consideration already agreed with RBS. There is nothing to indicate that Mr Dickinson, prior to 14th April 2014 in any event, knew that payments had in fact been made into the Fastfit MK account. The Company's account was not frozen on the service of the notice of intention to appoint and there is no evidence of the directors of the Company informing him that the Fastfit MK account was in fact being used. Mr Barker accepted that the matter was not discussed again after 31st March 2014.

41. It is no answer to say that the total consideration payable under the SPA was greater than the valuation of the Company's business received. The evidence is that the terms of the SPA were negotiated so as to be acceptable to RBS and Mr Barker felt obliged to go along with it. There is no reference to the April Payments in the SPA and there was no negotiation in respect of them between the administrators and Fastfit MK. The scope of the assets sold are set out in clause 2.1 of the SPA and, under clause 2.2, the Company's "cash in hand or in a bank or other financial institutions" and "Debts" (defined to mean "all book and other debts due to the Seller and/or the Administrators

as at the Transfer Date… in respect of the sale of goods or provision of services rendered prior to the Transfer Date") are specifically excluded. The fact that, in an initial conversation, Mr Barker said that these would be dealt with in the SPA, does not alter the position that they were not, it was plain that they were not and Fastfit MK had the benefit of legal advice as to the SPA's terms.

42. While subsequent conduct is not admissible as to the construction of a contract it is notable that the administrators plainly thought that the question of payments into Fastfit MK's account was still to be dealt with. The payments were raised in an email to the directors shortly after the administration, and not challenged, and they appear in both the strategy notes prepared by CBW and its handover notes to the liquidators. Neither the terms of the of SPA or any of the surrounding circumstances suggest that either any of the parties concerned in the SPA either did believe it or could have believed it to have taken account of the April Payments.

Payments made alleged to have been for the benefit of the Company

43. The payments alleged to have been made for the benefit of the Company from the April Payments total £87,495.37 and consist of £20,174.64 paid to trade creditors and £67,320.73 paid by way of salaries, bonus and overtime. I shall deal with the purpose of various payments relied upon by the respondents, insofar as they were maintained at trial.

Boost Capital

44. A total of £5,265.00 was paid to Boost Capital between 4th April and 10th April 2014. These payments were apparently re-payments of a loan of £200,000 made to the Company in about June 2013, under the terms of which loan the Company was to repay £264,000 over 12 months. It was secured by a personal guarantee by Mr Robinson and a guarantee from Fastfit Station Developments Ltd, which held the leases of the premises from which the Company operated.

45. Mr Barker accepted that he himself had identified these as payments that should not have been made but Mr Robinson was, as he put it, "the boss". He accepted that Boost Capital were not an essential supplier, or indeed a supplier at all, and that it was unlikely that Boost Capital would be used to provide finance for Fastfit MK in future. The payments are in fact shown by the Company's bank statements to have been made to Mr Robinson personally and it is not clear whether they were in fact used to discharge the loan. It is impossible to see how it benefitted the Company to discharge this debt ahead of its other creditors. It is impossible to escape the conclusion that these payments were made not to benefit the Company but to limit Mr Robinson's personal liability under the guarantee.

Salaries, wages and bonuses

46. The propriety of the application of the April Payments to salaries, wages and bonuses turns in large measure on the construction of the SPA. As I have explained, clause 12.4 provided that salaries were to be met by Fastfit MK for the periods from 1st April 2014. Mr Barker contends that this should have been amended to 15th April 2014, being the transfer date. As a matter of construction of the SPA as a whole, this seems to me to be most unlikely. The date in clause 12.4 is the only date specified in the operative

provisions of the agreement. Other assets and liabilities were transferred from "the Transfer Date", defined in the SPA to be 15th April 2014. No doubt this agreement is derived from a precedent that is drafted so as to require only the definition of "Transfer Date" to be amended, rather than multiple references to specific dates in various clauses in the agreement. Mr Barker accepted that he did not know what Mr Dickinson's intentions in respect of the date in clause 12.4 was and could not say that it was not exactly as he intended.

47. Both counsel relied upon the effect of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), which were not addressed in detail in their skeletons and were not provided in the authorities bundle. I therefore directed further submissions to be made in writing as to their effect. These were filed in a single document, setting out counsel's agreed position on the applicable provisions and their competing submissions as to their effect.

48. TUPE provides at regulation 4(1) and (2):

> "(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.
>
> (2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—
>
> > (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and
> >
> > (b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

The effect of this is that the employees are treated as if they had been employed by the transferee rather than the transferor, with all the associated rights.

49. Insolvency exceptions are found in Regulation 8:

> "(1) If at the time of a relevant transfer the transferor is subject to relevant insolvency proceedings paragraphs (2) to (6) apply.
>
> (2) In this regulation 'relevant employee' means an employee of the transferor—

> (a) whose contract of employment transfers to the transferee by virtue of the operation of these Regulations; or
>
> (b) whose employment with the transferor is terminated before the time of the relevant transfer in the circumstances described in regulation 7(1).
>
> (3) The relevant statutory scheme specified in paragraph (4)(b) (including that sub-paragraph as applied by paragraph 5 of Schedule 1) shall apply in the case of a relevant employee irrespective of the fact that the qualifying requirement that the employee's employment has been terminated is not met and for those purposes the date of the transfer shall be treated as the date of the termination and the transferor shall be treated as the employer.
>
> (4) In this regulation the 'relevant statutory schemes' are—
>
> (a) Chapter VI of Part XI of the 1996 Act;
>
> (b) Part XII of the 1996 Act.
>
> (5) Regulation 4 shall not operate to transfer liability for the sums payable to the relevant employee under the relevant statutory schemes.
>
> (6) In this regulation 'relevant insolvency proceedings' means insolvency proceedings which have been opened in relation to the transferor not with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner.
>
> (7) Regulations 4 and 7 do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner."

Counsel agree that administration is not an insolvency process "with a view to the liquidation of the assets of the transferor" within the meaning of regulation 8(7) (citing *Key2Law (Surrey) LLP v De'Antiquis* [2011] EWCA Civ 1567). Administration thus falls within the ambit of "relevant insolvency proceedings" to which regulations 8(2) to 8(6) apply.

50. There is thus no transfer of liability for sums payable to employees under the relevant statutory schemes under the Employment Rights Act 1996. Arrears, together with certain other liabilities, such as certain redundancy payments, do not transfer to the transferee and an employee is entitled to claim from the National Insurance Fund. The Secretary of State can then prove in the administration or subsequent liquidation as a subrogated creditor.

51. The editors of *Lightman & Moss* say the following at paragraph 16-098:

> "For the special insolvency regimes in reg.8(6) or 8(7) to apply, prior to the transfer the insolvency proceedings must have been "opened" (reg.8(6)) or "instituted" (reg.8(7)) in relation to the transferor. Where the transfer is effected without awaiting this event, the special insolvency protection will not apply. The EAT has suggested (in *Slater*) that one course to avoid this risk is for any sale pending the appointment of a liquidator to be provisional and conditional upon that appointment and subsequent agreement of the liquidator."

The passage goes on to say:

> "However if responsibility for the business passes in the meantime, there is liable to be found to have been a transfer notwithstanding the provisional nature of a sale: see *Celtec Ltd v Astley*."

52. The respondents contend that this means that the special insolvency regimes do not apply if:

i) the relevant transfer takes place after insolvency proceedings have been opened; but

ii) the transferee agrees to assume retrospective liability for some of the arrears prior to the date of administration.

The respondents' position is that "responsibility for the business" has passed to Fastfit MK at a date prior to the Company entering administration. The effect of clause 12.4 of the SPA, if taken at face value, would be to strip Fastfit MK of the protections it would otherwise have had under regulation 8(6) of TUPE.

53. The Liquidators' position is that this is not the correct analysis. The question is whether responsibility for the business passed to Fastfit MK before the Company entered administration or after and, here, it was plainly after. Parties are entitled to contract after administration that the transferee will assume a greater liability than it would otherwise do under TUPE. This gives an advantage to the creditors of the Company in that:

i) the employees will not need to claim from the National Insurance Fund; and

ii) the Secretary of State will not make a subrogated claim.

54. It seems to me that, on the basis of that agreed statement of the law, the Liquidators are undoubtedly right. The administration had been opened and the transfer took place thereafter. The Company was thus subject to the relevant insolvency regime at the time of the transfer. The SPA was not provisionally entered into pending the administration so as to give rise to the difficulties referred to by *Lightman & Moss*. The insolvency exception therefore applies and the use of the 1st April 2014 date appears to make commercial sense in context. Not only do creditors benefit from the fact that employees will not need to make a claim that the Secretary of State will then seek to recover from

the Company (or not such an extensive claim) but the transferee ensures that the employees continue to be paid and are not deprived of their wages (or not all of them) because of the transferor's insolvency.

55. I am unable to see any basis for construing clause 12.4 to mean anything over than what it says. It is not an obvious error and the respondents are unable to show that anything other was intended. Both parties to the SPA had instructed solicitors on the transaction and neither of them identified an error. This is in contrast to Mr Barker's eagle-eyed identification of an error in the administrators' return, which, as Mr Barker pointed out in an email of 24th April 2014, referred to payments of the deferred consideration being made within "20 days" rather than "20 Business Days".

56. In relation to Mr Barker's contention that some of the payments were in fact payments that fell due prior to 1st April 2014, this is not adequately evidenced. A new schedule was produced showing Mr Barker's calculation of this but there is no witness statement to explain his calculation or documentation to show an entitlement to a bonus or the period for which any payment was due. Mr Barker's response to Mr Colclough questioning about the absence of this evidence was to say that he was "kind of expecting you to take my word for it to be honest" and "well, I'm telling you". I cannot accept that the payments made included any element of salary, wages or bonuses owed by the Company.

Payment to Asset Finance

57. This is a payment of £1,842.55 made on 14th April 2014. Again, it is clear that it was made, not in the interests of the Company but to preserve the relationship between Fastfit MK and Asset Finance. Asset Finance was the lender that Mr Barker described in his conversation with Mr Dickinson on 31st March 2014 as "the one we want to keep". The "we" in this context can only be Fastfit MK, not the Company as it was to cease trading. I cannot see how a payment to this entity on 14th April 2014, the day before administration, can be regarded as being for the benefit of the Company or its creditors. It was not a payment to an essential supplier of the Company.

Payment to website developer

58. This was a payment made on 11th April 2014 in the sum of £759.50, apparently in relation to services provided in March of that year. The Company's website was one of the assets to be assigned to Fastfit MK and this was referred to in a spreadsheet sent to Mr Barker on 3rd April 2014. Again, I cannot see what benefit it was to the Company, or the general body of its creditors, to make a payment to its website developer a matter of days before it went into administration. Again, the only explanation must be that Mr Barker intended Fastfit MK to make use of this supplier in future and wished to ensure its continued goodwill. It was not a payment to an essential supplier of the Company.

Payment for a newspaper advertisement

59. This was a payment on 7th April 2014 for £1,069.20. Again, it is impossible to see how an advertisement so close to administration could benefit the Company, to any real degree. The only inference that can be drawn is that it was intended to promote the business that would be carried on by Fastfit MK. Again, it was not a payment to an essential supplier of the Company.

Payment of rent

60. The leases of the Company's sites were held by Fastfit Developments Limited. Mr Barker's evidence was that rent was payable a month in advance. It follows that the primary beneficiary of this advance payment would be Fastfit MK, the Company itself being intended to cease trading within a week. Again, it cannot seriously be argued that this was a payment that was intended to benefit the Company. The Company derived nugatory benefit, if any, from these payments.

Other payments

61. It is to be noted that there are other payments that the respondents, rightly, do not seek to justify on the basis that they were made for the benefit of the Company or preserved its value. These include £1,200 paid to Pitmans for advice on 10th April 2014 and the first tranche of consideration of £6,000 due under the SPA paid to SGH Martineau on 15th April 2014. These appear to me to be clear examples of, as Mr Colclough put it, Mr Barker being unable to disentangle his own interests, the interests of Fastfit MK and the interests of the Company and its creditors.

62. Having considered those points, I shall turn to the list of issues.

Issue 1: Were the April Payments transactions "entered into" by the Company"?

63. In *Hunt (Liquidator of Ovenden Colbert Printers Ltd) v Hosking* [2013] EWCA Civ 1408, Kitchin LJ explained the requirement that the company itself enter into the impugned transaction as follows:

> "31. The requirement that the company has itself entered into a transaction is an essential part of any claim under s.238 and comprises two interrelated elements: first, that there is a transaction; and second, that the transaction is something which the company has itself entered into.
>
> 32. As I have explained, the term 'transaction' is widely defined in s.436 as including a gift or arrangement. If it were necessary for the purposes of this decision, I would therefore be disposed to find it is broad enough to encompass a payment made by a company or by an agent of the company acting within the scope of his authority. But to focus unduly on the term 'transaction' risks obscuring the need for the second and vital element, namely the requirement that the transaction be something that the company has 'entered into'. This expression connotes the taking of some step or act of participation by the company. Thus the composite requirement requires the company to make the gift or make the arrangement or in some other way be party to or involved in the transaction in issue so that it can properly be said to have entered into it, and of course it must have done so within the period prescribed by s.240."

64. In that case the company, Ovenden, had entered into a fee agreement with its accountant, Mr Temple, to assist it in formulating its claims against companies in

liquidation. The arrangement provided for Mr Temple to pay any recoveries into his client account and pay his fees to his own account. Mr Temple made payment to Mr Hoskins or persons on his behalf. On Ovenden's own liquidation, the liquidator sought to recover those payments as transactions at an undervalue. The claim was struck out on the basis that the transactions made by Mr Temple to Mr Hoskins were not transactions "entered into" by the company. An appeal was dismissed. Kitchin LJ, as he then was, explained the transactions in that case as follows:

> "36. I come then to apply these principles in the context of the present case and in doing so I must consider the two ways the case can be put. The first and primary argument advanced by Mr Davenport on Mr Hunt's behalf is that Mr Temple has misappropriated the funds he held on trust for Ovenden because he had no right to take the moneys and make the payments to Mr Hosking. But here Mr Hunt faces precisely the difficulty encountered by Mr Manson in *Manson v Smith* (above). The improper withdrawal by Mr Temple of the funds he held on trust, if that is what it was, did not constitute a dealing between him and Ovenden.
>
> 37. Nor can it be said that Mr Temple was acting as agent for Ovenden in making the impugned payments. Mr Davenport disclaimed any such contention and he was right to do so. Mr Temple was a trustee of the funds but, as Lord Hoffmann explained in *Ingram v Inland Revenue Commissioners* [2000] 1 A.C. 293 at p.305, a trustee in English law is not an agent for his beneficiary. He contracts in his own name with a right of indemnity against the beneficiary for the liabilities he has incurred.
>
> 38. That brings me to the second way the case can be put, namely that Mr Temple was in some way authorised or entitled to make the impugned payments, albeit that they were made for no or inadequate consideration. However, in my judgment this argument also faces an insuperable difficulty.
>
> When Mr Temple took the funds from the client account and paid them over to Mr Hosking it required no further act or step by Ovenden beyond the 2003 agreement and the 2005 variation, and, as I have said, neither of these is said to constitute or form part of a relevant transaction. The payments themselves were not a gift by Ovenden to Mr Temple, nor did it enter into a further transaction of any other kind with him. It follows that the actions of Mr Temple in withdrawing the funds from the client account and paying them over to Mr Hosking were not transactions entered into by Ovenden, just as the transfers of land were not entered into by the bankrupt in *Re Brabon*."

That is not the situation here. The payments were payments made at the direction of the Company. It was accepted by Mr Barker that new card machines were installed in the Company's premises and the managers, i.e. Company employees, were instructed to

use them so that they were presented to the Company's customers for payment. It was the Company, by its employees, which caused the payments to be made.

65. Mr Colclough drew my attention to *Chitty on Contracts* at paragraph 24-040 for a statement of the uncontentious proposition that:

> "If the creditor requests the debtor to pay the debt to a third party, such a payment is equivalent to payment direct to the creditor, and is a good discharge of the debt."

That is the case here. The Company caused its creditors to make payments to Fastfit MK. It seems to me that that is plainly within the ambit of what Kitchin LJ described in *Ovenden* as being "involved in the transaction in issue so that it can properly be said to have entered into it". The facts here are distinguishable from those in *Ovenden*. There the impugned transactions were carried out by Mr Temple out of funds over which the company there had ceased to have any control. He was not acting as trustee or as agent for the company.

66. One obvious answer would of course be to say that the monies were paid to Fastfit MK as a matter of administrative convenience and were held on trust for the Company so that no value passed to Fastfit MK. Indeed, Mr Passfield did make that argument. That is not however pleaded. The points of defence simply say that the payments were not transactions entered into by the Company as the Company was not a party to them and they were compensated for by deferred consideration in the SPA. No beneficial interest is pleaded. I agree with Mr Colclough that it is not open to the respondents to run a trust argument now. The claim would have had to have been repleaded so as to rely on the payments out of Fastfit's account as preferences, but in any event I cannot see that it can succeed in circumstances where Fastfit MK treated the monies as monies to which it was beneficially entitled, paying both creditors of the Company with which it wished to maintain good relationships and its own creditors in the form of its legal advisors and those of the administrators.

Issue 2: Were the April Payments entered into at an undervalue?

67. Here I accept that the Company received no value from the transaction – that is to say that payments to Fastfit MK were gratuitous. What was done with them thereafter was entirely in the gift of Fastfit MK and included payments to lawyers and accountants instructed on the sale of the business. Rightly, no attempt has been made to contend that these payments were applied for the benefit of the Company. It is quite clear that these monies were applied, not for the benefit of the Company but for the benefit of Fastfit MK, Mr Barker as its shareholder and Mr Richardson as the personal guarantor of the Company's liability to Boost Capital. It is impossible to regard the payments of liabilities of the Company, which incidentally benefited the Company, as forming part of the consideration for the April Payments.

68. *Goode on Principles of Corporate Insolvency Law* at paragraph 13.30 explains:

> "The benefits given and received by the company must be valued as at the time of the transaction. Where one of those values is uncertain, the court may have regard to subsequent events in

> order to test the accuracy of the value ascribed to the benefit in question at the time of the transaction."

The editors go on to refer to the speech of Lord Scott in *Philips v Brewer Dolphin Bell Lawrie Ltd* in which he said, at paragraphs 20 and 26:

> "20… [S238(4)(b)] does not stipulate by what person or persons the consideration is to be provided. It simply directs attention to the consideration for which the company has entered into the transaction. The identification of this 'consideration' is in my opinion, a question of fact. It may also involve an issue of law, for example, as to the construction of some document. But if a company agrees to sell an asset to A on terms that B agrees to enter into some collateral agreement with the company, the consideration for the asset will, in my opinion, be the combination of the consideration, if any, expressed in the agreement with A and the value of the agreement with B. In short, the issue in the present case is not, in my opinion, to identify the section 238(4) 'transaction'; the issue is to identify the section 238(4) 'consideration'.
>
> …
>
> 26 Mr Mitchell submitted that these ex post facto events ought not to be taken into account in valuing PCG's sublease covenant as at 10 November 1989. I do not agree. In valuing the covenant as at that date, the critical uncertainty is whether the sublease would survive for the four years necessary to enable all the four £312,500 payments to fall due, or would survive long enough to enable some of them to fall due, or would come to an end before any had fallen due. Where the events, or some of them, on which the uncertainties depend have actually happened, it seems to me unsatisfactory and unnecessary for the court to wear blinkers and pretend that it does not know what has happened. Problems of a comparable sort may arise for judicial determination in many different areas of the law. The answers may not be uniform but may depend upon the particular context in which the problem arises. For the purposes of section 238(4) however, and the valuation of the consideration for which a company has entered into a transaction, reality should, in my opinion, be given precedence over speculation."

69. The editors of *Goode* discuss this element of Lord Scott's speech as follows:

> "Lord Scott's speech has generated much debate on the use of hindsight to determine a value at the time of the transaction. But it seems clear that Lord Scott was not in truth applying a hindsight test; rather he was relying on evidence of subsequent events to show that from the outset the covenant under the sub-lease was so precarious and its value so speculative that even at the time it was entered into a bank or finance house with

> knowledge of the surrounding circumstances would not have attributed any value to the sub-lease covenant"

70. The value of the benefits given and received has to be assessed at the time of the transaction, albeit hindsight can be used to assess the value of the consideration given. The Company had caused the April Payments to be made to Fastfit MK with no corresponding guarantee of a benefit being conferred on it or its creditors. The fact that the directors of Fastfit MK chose to make payments which primarily benefited that company but incidentally discharged some liabilities of the Company does not mean that that those payments are to be regarded as forming part of a composite transaction with the April Payments. The decision to make those payments was entirely within the gift of Fastfit MK. That is so despite the conversations with Mr Dickinson as to how to deal with payments and liabilities following the filing of the notice of intention to appoint administrators. Mr Dickinson's advice to pay creditors as they fell due was, on Mr Barker's own account, qualified by the statement that suppliers should be paid sufficiently to maintain essential supplies. On any footing the payments made were not in respect of essential supplies.

71. This case is thus also distinguishable from *De Weyer Limited (in liquidation); Kelmanson and other v Gallagher and other* [2022] EWHC 395 (Ch), on which the respondents relied. There the payment from De Weyer Limited into the account of the De Weyer Design Limited took place the day before the payment out to Mr Gallagher and Ms De Weyer. Deputy ICC Judge Curl QC accepted that the payments were a "single coordinated scheme or composite transaction, which was effected in order to discharge the debts owed by the Company to the Respondents". That is not the case here. Alternatively, he concluded that that the recipient company had set up no beneficial title of its own and noted that it was accepted that the monies remained those of the transferor company. As I have explained, it is not open to the respondents to contend that here.

Issue 3: Is Fastfit entitled to rely on the defence in section 238(5) IA 1986?

72. I do not accept that the April Payments were for the benefit of the Company or that there were reasonable grounds for thinking that they were. Mr Dickinson had indeed advised that, in the event of the bank account being frozen, monies could be funnelled into the new company and used to pay essential suppliers. He did not advise that Fastfit MK could use the monies as it saw fit. I agree with Mr Colclough that the best guide to the state of mind of the directors is to look at what they actually did. As he submitted, the focus of the directors during the telephone call on 31st March 2014 is revealing. Three creditors are mentioned: Stapletons, the petitioning creditor; the SME finance company, which they wanted Fastfit MK to continue to use; and RBS, because of a concern as to whether it would appoint its own administrators. No other creditors of the Company were considered and the April Payments were used to discharge creditors for the benefit of Fastfit MK, rather than to enable the Company to carry on its business. The bank account was not in fact frozen and was used until 7th April 2014. No advice was taken as to what the Company should do in those circumstances or as to the propriety of any of the payments out of Fastfit MK's account. I have already explained why the payments made cannot be regarded as being made to allow the Company to continue its business, rather than to benefit Fastfit MK when it had acquired that business. Nor could there be reasonable grounds for believing that they would.

Issue 4: What order is required to restore the position to that which would have obtained had the April Payments not been made.

73. The obvious point here is that liabilities of the Company have been discharged. It is, on a purely mathematical basis, no worse off insofar as the payments discharged the proper liabilities of the Company. Nonetheless the effect of these payments has been to subvert the insolvency regime and the *pari passu* principle. The proper order is to require the repayment of the monies and allow Fastfit to prove in the liquidation for the liabilities of the Company that it has discharged.

Issue 5: Is Mr Barker in breach of duty?

74. There is no evidence that Mr Barker considered the interests of the Company, or the interests of creditors as a class, at a time when the Company was irretrievably insolvent. Indeed, I am satisfied that he did not. As I have explained, it is plain that Mr Barker's focus was to acquire the business of the Company and to pay those creditors that would be of advantage to Fastfit MK in carrying on the business once acquired. There is no evidence of essential suppliers being paid so as preserve the value of the Company's business for the benefit of its creditors, as opposed to that to be carried on by Fastfit MK. In my judgment that amounts to a breach of the duty set out in section 172 CA 2006 and he personally benefited by the company of which he was shareholder having the benefit of the April Payments. Had he properly considered the interests of the Company or its creditors, the payments would not have been made. Instead, he preferred his own interests.

Issue 6: To the extent that loss is a relevant consideration in a breach of fiduciary duty claim, did the Company suffer any loss as a result of the April Payments?

75. While the balance sheet position of the Company might not be altered to the extent that the Company's debts were discharged, and it is thus no worse off, it seems to me that Mr Barker is liable to account and must reconstitute the fund that he, as a fiduciary, caused to be misapplied without regard for the interests of creditors, so that those monies are returned to the Company and dealt with as part of the liquidation. Given that I intend to direct pursuant to section 238(3) IA 1986 that Fastfit MK repay the monies received and stand subrogated to the rights of creditors that it discharged, it seems to me that Mr Barker's liability to reconstitute the fund should be secondary to that of Fastfit MK, so that he should be liable to do so only to the extent that Fastfit MK does not within a reasonable period and similarly be subrogated to the discharged creditors' claims.

Issue 7: Is Mr Barker entitled to rely on the defence set out in section 1157 CA 2006?

76. This hinges on reliance upon the advice of CBW and Mr Dickinson. That advice, however, was given at a very early stage and (a) was directed to what should be done in the event that the bank account was frozen and (b) contemplated the Company paying "essential suppliers". It does not appear that Mr Barker ever informed Mr Dickinson of what the Company was in fact doing, sought advice as to what to do in the event that the bank account remained upon, checked whether the Company account remained open, sought advice as to what he should do having established that it was still open, or clarified with Mr Dickinson whether any particular payment fell within the ambit of paying essential suppliers or was otherwise proper. Instead he paid those debts that he

thought would be of advantage to Fastfit MK. While it is no part of the Liquidators' case that Mr Barker was dishonest, and I accept he acted honestly, I cannot accept that it was reasonable for him to place so much reliance on a relatively informal conversation prior to the filing of the notice of intention to appoint. Nor can it be said that that he ought fairly to be excused in circumstances where he knew that payments made to Fastfit MK would need to be accounted for. He should have raised that issue with his own lawyers who would have immediately seen that the SPA did not deal with the question.

Conclusion

77. It appears to me that Mr Colclough is right that it cannot be correct that the insolvency regime can be subverted by monies being paid to a third party, which then has a free hand as to which creditors of the insolvent company are then paid. A preference claim under section 239 IA 1986 would not be open to the office-holder because the preferences themselves would not have been made by the insolvent company. It would make no difference if the third party was a company with identical directors to the insolvent company (see *Klempka v Miller* [2008] EWHC 3554 (Ch) at paragraph 61, *per* Mr Anthony Elleray QC, sitting as a deputy judge of the High Court).

78. Despite Mr Passfield's elegant arguments, in my judgment the proper order is for Fastfit MK to be directed to repay the April Payments and to be treated as an unsecured creditor in the liquidation for the same amount. To the extent that they are not repaid by Fastfit MK, it seems to me that it falls to Mr Barker to repay to the Company the monies misapplied accordingly.

79. I will hear counsel on consequential orders, including the question of interest.