IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No: FSD 0098/2014

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND IN THE MATTER OF WEAVERING MACRO FIXED INCOME FUND LIMITED (IN LIQUIDATION)

BETWEEN:

1. SIMON CONWAY

2. DAVID WALKER

(AS JOINT OFFICIAL LIQUIDATORS OF WEAVERING MACRO FIXED INCOME FUND LIMITED)

PLAINTIFFS

AND

SCANDINAVISKA ENSKILDA BANKEN AB (PUBL)

DEFENDANT

Appearances:	**Mr. David Lord Q.C. instructed by Mr. Shaun Folpp of Mourant Ozannes for the Plaintiffs**
	Mr. David Chivers Q.C. instructed by Mr. Sam Dawson and Mr. Kai McGriele of Solomon Harris for the Defendant
Before:	**The Hon. Justice Nigel Clifford Q.C.**
Heard:	**19th – 23rd October 2015**

JUDGMENT

INTRODUCTION

1. The Plaintiffs are the Joint Official Liquidators ("**the JoLs**") of a Cayman Fund, Weavering Macro Fixed Income Fund Limited ("**the Company**"). They were appointed as voluntary liquidators on the 19th March 2009. By order dated 3rd April 2009, the liquidation was ordered to continue subject to the supervision of the Court, whereupon the Plaintiffs became joint official liquidators. It is in that capacity that they have brought these proceedings.[1]

2. The Defendant, Skandinaviska Enskilda Banken AB (Publ) ("**SEB**") is a Swedish financial institution and was an investor in the Company. SEB acted as a depositary and custodian for, among others, two Swedish mutual funds, namely (i) HQ Solid ("**HQ Solid**"), a fund managed by HQ Fonder Sverige AB ("**HQ Fonder**"); and (ii) Catella Stiftelsefond ("**Catella**"), a fund managed by Catella Fondforvaltning AB ("**Catella Fonder**").

3. In the period between April 2006 and November 2007, SEB subscribed for US$8.5 million of *"Participating Shares"* (as defined in the Company's articles of association) on behalf of HQ Solid. The Company issued 56,836.96 Participating Shares to *"SEB Merchant Banking as nominee for HQ Solid."*

[1] One of the original JoLs, Mr Stokoe, who has given evidence in these proceedings, has retired and has been replaced by Mr Simon Conway on 13 July 2015

4. In March 2008, SEB subscribed for US$1 million of Participating Shares in the Company on behalf of Catella and was issued 5,926.98 of such shares. Subsequently, the Company issued to SEB equalisation shares, taking its total holding on behalf of Catella to 5,953.99 Participating Shares. In each case the Company issued such Participating Shares to *"SEB Merchant Banking as nominee for Catella Stiftelsefond."*

5. Despite acting in a nominee capacity, SEB was nevertheless the legal owner of these Participating Shares on the Company's register of members.

6. In the months prior to its liquidation, the Company made three redemption payments to SEB which are material to these proceedings.

7. On the 9th October 2008, SEB gave the required instructions to redeem all shares it held for Catella. This resulted in the Company paying to SEB US$1,096,903.58 on the 19th December 2008 ("**the First SEB Redemption Payment**").

8. Having previously redeemed some of the shares held for HQ Solid, on the 28th October 2008, SEB gave the required instructions to redeem the remaining shares. On the 2nd January 2009, the Company paid to SEB 25 per cent of this redemption in the sum of US$1,780,214.29 ("**the Second SEB Redemption Payment**"). On the 11th February 2009, the remaining 75 per cent of the redemption proceeds were paid by the Company to SEB in the sum of US$5,340,643.47 ("**the Third SEB Redemption Payment**").

9. In these proceedings the JoLs seek a declaration that those three payments are invalid pursuant to s.145(1) of the Companies Law ("**the Law**") and an order that SEB pay to the Company the total of the payments in the amount of US$8,217,761.54 plus interest.

10. Section 145(1) of the law provides:

"Every conveyance or transfer of property, or charge thereon, and every payment obligation and judicial proceeding, made, incurred, taken or suffered by any company in favour of any creditor at a time when the company is unable to pay its debts within the meaning of section 93 with a view to giving such creditor a preference over the other creditors shall be invalid if made, incurred, taken or suffered within six months immediately preceding the commencement of a liquidation."

11. SEB admits receiving the Redemption Payments, but denies that they constituted preferences within the meaning of s.145 of the Law and denies any liability to make repayment.

12. During the course of the proceedings the issues to be determined have become defined as follows:

i. As to the Company's controlling mind.

ii. Whether the Company was unable to pay its debts at the time of each of the SEB Redemption Payments.

iii. Whether the SEB Redemption Payments were made with a view to preferring SEB.

iv. Whether the SEB Redemption Payments were made with a view to preferring SEB over the other creditors.

v. As to the availability of a defence arising out of consequences of a voidable preference, including change of position, and, if so, whether it is made out on the facts.

vi. Whether there are illegality and public policy reasons why this claim should not be allowed.

THE COMPANY

Introduction

13. The Company was incorporated in April 2003 as an open-ended investment company, established as an exempted company with limited liability pursuant to the laws of the Cayman Islands. The share capital was US$50,000 divided into 100 management shares of US$1 par value each and US$4,990,000 participating shares of US$0.01 par value each.[2]

14. There were two directors of the Company. These were Stefan Peterson and Hans Ekstrom.

15. During the life of the Company, a number of Offering Memoranda were published, by which information about the Company was made available to investors who wished to invest in the Company by way of subscription for its shares. The last version of the Offering Memorandum to be published prior to the commencement of the Company's liquidation is dated 24th September 2008 (the "**OM**").[3]

16. Weavering Capital (UK) Limited ("**WCUK**") was the Company's investment manager and undertook its trading activities. WCUK was also the investment manager of Weavering Capital Fund ("**WCF**"), a BVI company that was counterparty to Interest Rate Swaps ("**the Swaps**") entered into by the Company.

17. WCUK maintained offices in London. It was placed into administration on the 19th March 2009 and, subsequently, liquidation in October 2009.

[2] Company's Amended and Restated Memorandum and Articles of Association – Exhibit IS-1 pages 135-171
[3] Exhibit IS-1 pages 172-205

18. Magnus Peterson was a director of WCUK, and was employed as WCUK's Chief Executive Officer and Principal Investment Manager. He is the brother of the Company's director, Stefan Peterson, and the step-son of the other director, Hans Ekstrom.

19. Magnus Peterson's wife, Mrs. Amanda Peterson, was also a director of WCUK. In addition Mr Charanpreet Dabhia ("Mr. Dabhia") was a director of WCUK and was employed, initially, as its Head of Business Development, and later, as its Chief Operating Officer. Others involved with the management of WCUK included Mr Edward Platt, who was employed as an investment manager, and Mr James Stewart, an investment commentator, and who was also a director of WCUK during its final period.

20. The Company's administrator was PNC Global Investment Servicing (Europe) Limited ("**PNC**") pursuant to an Administration and Accounting Services Agreement dated 30 July 2003.[4] Its auditors were Ernst and Young ("**EY**").

21. The Company retained a number of different clearing providers simultaneously, but at all times after November 2006 retained Fortis Bank Global Clearing NV as its back-office services provider, clearer and custodian. SEB also provided clearing and brokerage services to the Company. However, it is clear that SEB's role in that capacity was quite distinct from its role as an investor in the Company.

[4] Bundle F1 Additional Documents – pages 1-16

22. There were a number of other corporate entities within the Weavering Group. These included a Swedish arm, Rantehedge, an investment vehicle into which investors could invest, which was managed by Weavering Fonder, and which in turn was advised by Weavering Capital AB. All three entities were Swedish domiciled entities.

Subscription and Redemption of Shares

23. Subscription for the Company's shares is provided for in Articles 20-27. Redemption of the Company's shares is provided for in the Articles, commencing at Article 48.

24. The OM states as follows in relation to redemption of shares:

> ***"REDEMPTIONS***
>
> ***Redemption of Company Shares***
>
> *Shareholders can redeem their Shares, in whole or in part, in a minimum amount of US$50,000 (subject to the discretion of the Board of Directors to redeem lesser amounts), on one calendar month's prior written notice (subject to the discretion of the Board of Directors to waive such notice), on each Redemption Day. To effect a redemption, a Request for Redemption of Shares, obtained from the Company must be received by the Company by 5pm Dublin time one calendar month before any Redemption Day, accompanied by the share certificates, if any, duly endorsed and in a form for redemption acceptable to the Board of Directors.*
>
> *Redemptions are made at a price per Share equal to the NAV per Share of the Company, as of the close of business on the relevant Valuation Date, to the nearest whole US cent (the "Redemption Price").*
>
> ***Payment of Redemptions***
>
> *Redemption payments are generally made within 30 calendar days after the Redemption Day. No interest is paid from the Redemption Day to the payment date. Payment is made by telegraphic transfer (with transfer charges to the account of the recipient) to the Remitting Bank/Financial Institution or to another account in the name of the Shareholder."*

25. "Redemption Day" is defined as the first business day of each calendar month. "Valuation Day" is defined as the business day immediately preceding each Redemption Day.[5]

26. The effect of the price to be paid for redemptions was set out in Article 36 of the Company's articles of association as follows:

> *"The price to be paid for participating Shares which are redeemed shall be deemed to be a liability of the Company from the Valuation Point on the Redemption Day until the price is paid."*

The purported change in structure in 2007

27. Prior to January 2007, WCUK was engaged directly by the Company pursuant to an Investment Advisory Agreement dated 31 July 2003. In 2007 a proposal was put forward by Magnus Peterson whereby, for tax reasons, the formal structure pursuant to which the Company was run was to be changed. It was proposed that WCUK be engaged as the Company's "Investment Advisor", with a new entity, Weavering Capital Management Limited ("**WCM**") being engaged as the Company's "Investment Manager".

28. WCM is a Cayman Islands entity. Each of the Directors of the Company were also directors of WCM.

29. The changes were purportedly effected by entry into of:

[5] Those definitions are set out on page 9 of the OM.

i. A Management Agreement between the Company and WCM dated 30 January 2007, by which WCM was appointed the Company's Investment Manager; and

ii. A tripartite Investment Advisory Agreement between the Company, WCM and WCUK dated 30 January 2007, by which WCUK was appointed the Company's Investment Advisor.

30. However, it is clear from the evidence (and there is no real issue about this) that these agreements, for whatever reason, were never carried into effect.

31. Accordingly, for all practical purposes relevant to these proceedings, WCUK remained the Company's investment manager and undertook its trading activities.

The Swaps

32. The Swaps were entered into between the Company and WCF pursuant to the terms of a standard ISDA Master Agreement dated 20 January 2005.[6] It was purportedly signed by Mr. Ekstrom on behalf of the Company, although he has always denied that it bears his signature. Mr. Ekstrom and Stefan Peterson were also directors of WCF, but thought that by this time it had stopped trading. They do not appear even to have realised that WCF was the counterparty until March 2009.

[6] Exhibit IS-1 page 406

33. The nature of the Swaps and how they operated is explained in the expert report of Dr. Chudozie Okongwu, adduced in evidence by the JoLs. His report explains, inter alia, the nature of interest rate swaps, the nature of counterparty risk, the Swaps that were entered into by the Company, the dealings with those Swaps and the lack of any payment to the Company when positions beneficial to the Company were closed out, and the value of the Swaps to the Company. Dr Okongwu was not required to attend the trial for cross-examination. His evidence is unchallenged and I accept it.

34. Mr. Stokoe, has also investigated the Swaps and their effect on the Company and its NAV, as set out in his first witness statement which he has verified in evidence.[7] He was cross-examined, but not as to the position regarding the Swaps.

35. The evidence demonstrates the very significant impact the Swaps had on the trading performance of the Company, in essence as follows:

i. The Swaps were worthless paper transactions entered into with WCF, which was never in a position to honour its obligations pursuant to them. WCF (as explained by its Liquidator Mr Carter) had no realisable assets and did not trade other than as counterparty to the Swaps.

[7] Ian Stokoe first witness statement – paragraphs 49-76

ii. Magnus Peterson used the existence of the Swaps to show a sustained growth over the life of the Company. Large monthly adjustments were made to Swaps exposures through the full or partial closing out of existing Swaps and the opening of new Swaps so as to avoid generating the impression of too large profits that the Swaps would otherwise have showed on paper, but not in reality, and to avoid defeating the impression of the Company as relatively low risk. The result was that the Company was able to show the relatively modest but positive month on month performance expected by its investors.

iii. No gains were ever realised by the Company in relation to the Swaps (even when some of the Swaps were closed out).[8] They were simply used to present a picture of a fund showing sustained growth when in fact the unrealised gains represented by the Swaps were fictitious.

iv. The reality was that the Company was suffering large losses through its options trading (that were masked by the Swaps) and expending considerable sums on management and performance fees and brokerage fees largely to WCUK.

36. Accordingly, I find that the Swaps were worthless (as Magnus Peterson knew) and they must be taken out of account when it comes to assessing the solvency of the Company at the material times.

[8] As is clear from the Financial Statements – Exhibit IS-1 e.g. page 386

THE COMPANY'S CONTROLLING MIND

37. It is a key part of the JoLs' case that, at all material times, Magnus Peterson and his company WCUK managed and controlled the Company. On their case this management and control did not extend merely to the investments carried out by the Company but all facets of its business and, significantly for the purposes of these proceedings, all decisions about redemptions and how, when and to whom redemption payments were made. The Directors, it is contended, played a purely formal role and allowed Magnus Peterson to run things, such that he was permitted by them to be a *de facto* director.

38. For the purpose of making out this case the JoLs rely (though not exclusively) on evidence from other proceedings. There have been three previous sets of proceedings involving some of the matters that are relevant to these proceedings:

i. Proceedings brought by the JoLs against the Directors of the Company in Cayman under Cause No. FSD 113 of 2010 ("**the Directors Proceedings**").

ii. Proceedings brought by the administrators (and, in turn, liquidators) of WCUK against Magnus Peterson and others in England ("**the English Proceedings**").

iii. Criminal proceedings brought against Magnus Peterson in England in which Magnus Peterson was convicted of fraud and sentenced to 13 years' imprisonment.

39. I have previously ruled in the present action that the JoLs cannot rely on the judgments in the Directors Proceedings and the English Proceedings based on the principle set out in ***Hollington v Hewthorn & Co Ltd***[9]. Nevertheless all of the witness evidence that was before the Cayman Court (including the full transcript of the Directors' cross examination in those proceedings) is before the Court as well as parts of the evidence that was before the English Court in the English Proceedings.

40. It has been agreed that most of that evidence can be admitted in these proceedings. The exception related to a very short extract of the evidence of Magnus Peterson in the English Proceedings which was objected to by SEB as hearsay. Having heard submissions on this evidence during the course of leading counsels' openings, I ruled that it should be excluded. Although arguably the evidence in question is inherently plausible and not tainted by the fraud perpetrated by Magnus Peterson, it was a statement plainly made for his own purposes in other proceedings to which SEB was not a party and I did not consider it appropriate to admit it as hearsay as it was objected to.

41. So the position is that this key issue as to the Company's controlling mind falls to be determined to some extent on a consideration of the evidence from the previous proceedings admitted by agreement, together with other evidence before the Court.

[9] [1943] KB 587

42. It of course has to be borne in mind that the evidence admitted from the other proceedings is hearsay and there is the question of what weight can be attached to it. The same goes for transcripts of interviews of the Directors carried out by the JoLs which are before the Court. Neither of the Directors has given evidence in the present proceedings, nor, of course, has Magnus Peterson who is in prison.

43. I should add that it has also been agreed that the parties did not need to serve hearsay notices in relation to the other documents that have been disclosed in these proceedings (most of which were also before the courts in the Directors Proceedings and English Proceedings). However, SEB required the JoLs to identify all statements made by Magnus Peterson on which they rely and this was duly done.

44. In addition to the evidence in the previous proceedings and the transcripts of the interviews, the JoLs rely on the documents disclosed in this action and the evidence of Mr. Stokoe. As far as the latter is concerned, Mr. Stokoe has carried out a detailed investigation of the role of the Directors, which is set out in his first witness statement.[10] There was no challenge to his findings in cross-examination.

45. On the basis of all this detailed evidence of the role played by the Directors, the JoLs contend that in summary the position was as follows:

i. The Directors did not perform any significant role at all but did whatever was required of them by Magnus Peterson. They simply rubber-stamped his decisions when asked to do so.

---

[10] Paragraphs 82-176

ii. There were no effective Board Meetings, as explained by Mr Stokoe.[11] They were not held regularly and did not involve any scrutiny of the Company's business and affairs. Further, despite the collapse of Lehman Brothers and ensuing volatility in the markets in late 2008, and a large number of redemption requests received by the Company, no Board Meeting was held between 22 May and 23 December 2008. In so far as it can be described as a Board Meeting, the meeting on 23 December 2008 probably only took place because Magnus Peterson was in Sweden for Christmas.

iii. The Directors signed whatever documents they were asked to sign by Magnus Peterson, or practically anyone else. This was true, for example, of:

a) The minutes of Board Meetings.[12]

b) The Financial Statements and Confirmation Letters provided to EY.[13]

c) Specific confirmations given to investors.[14]

d) PNC Waivers.[15]

e) The proposed restructuring in relation to WCM, referred to above.

---

[11] First witness statement – paragraphs 168 -175
[12] Exhibit IS-1 page 786
[13] Ibid page 258 et seq and pages 673-690
[14] Ibid pages 704-719
[15] Exhibit IS-1 pages 720-759

f) The letter of the 31st December 2008 (which will be referred to below in relation to the redemptions) that Stefan Peterson signed on 7th January 2009.[16]

g) The signing of blank documents.[17]

iv. Further Magnus Peterson forged Hans Ekstrom's signature on the 2005 ISDA Master Agreement (referred to above) and the Swap confirmation letters from WCF.[18]

v. The Directors were not involved at all in the trading that was carried out on behalf of the Company, did not supervise Magnus Peterson and WCUK's activities, and did not even seek to ascertain whether the Company's investment restrictions were being adhered to (which they were not).

vi. They were provided with limited information consisting largely of the PNC Quarterly Reports.[19] As explained by Mr Stokoe[20] it was possible to track the Swaps through those reports, but the Directors did not do so. They did not even bother to read those reports properly and, for example, did not pick up that WCF was the counterparty to the Swaps when that was expressly stated in the September and December 2008 Quarterly Reports.[21]

[16] Ibid page 1013
[17] Ibid pages 774-775
[18] Ibid pages 467-477
[19] Ibid pages 832-933
[20] First witness statement – paragraphs 152-157
[21] Exhibit IS-1 pages 927 and 932

Further they did not appreciate that, as expressly stated in the audited financial statements[22], the purported gains on the Swaps were all "unrealised".

vii. At no time did the Directors seek any further information from Magnus Peterson or anyone else at WCUK or PNC or EY, and never spoke to PNC or EY.

viii. Their involvement in the redemption process in the last few months prior to the liquidation of the Company was virtually non-existent. They were aware that a large number of redemption requests were being received and they came to realise that the Company did not have the money to fund those payments, which they may for a time have thought was a temporary problem. However, even then they did not seek to become involved in any real sense or seek any clarity on the financial position of the Company. Indeed it appears that during this period Stefan Peterson's main concern was that he should be paid for his services and Hans Ekstrom simply raised a query about the Company's expenses. Their role remained limited to sanctioning the redemption policies devised by Magnus Peterson.[23]

46. In support of this analysis the JoLs rely on the totality of the Directors' evidence in the transcripts of the interviews and in the Directors' Proceedings. During the course of the hearing, Mr Lord, on behalf of the JoLs, has also drawn my attention to certain passages in the transcripts and has produced an extract of the transcripts upon which he particularly relies.

[22] For example - Exhibit IS-1 page 386
[23] As set out in a letter of 31 December 2008 (Exhibit IS-1 page 1013) and a Board Meeting on 22 February 2009 (Exhibit IS-1 page 829)

47. SEB contests the analysis. Complaint is made by their counsel, Mr. Chivers, that the JoLs *"rely on snippets extracted from transcripts meetings and the cross-examination of witnesses in previous proceedings"*[24]. However, Mr Chivers has also produced his own extracts from the interviews and previous proceedings, to demonstrate that the evidence was not all one way.

48. These particular extracts indicate that in response to certain questions the Directors stated that there was joint decision making with Magnus Peterson and WCUK, that they did not just sign documents without reading them, and that they were aware of the redemptions and took legal advice. In answer to certain questions they insisted that they took their directorships very seriously and denied that their role was nothing other than a *"rubber stamp"* or as *"puppets"*. In response to one particular question, when he was interviewed on 23 April 2009, Stefan Peterson said *"But Magnus can't instruct the board. It should be the other way round. We have instructed the investment manager or investment adviser to manage the fund."*

49. So it is submitted, on behalf of SEB, that some parts of the evidence flatly contradict the JoLs' case that Magnus Peterson was in charge. However, none of the extracts referred to suggest that the Directors were in charge of deciding who redemption payments were to be made to.

50. SEB also make a number of legal and constitutional points concerning the position under the Articles of Association of the Company and the role of PNC as the entity which actually made the redemption payments.

---

[24] Skeleton Argument -paragraph 3(3)

51. It is submitted that the Company and SEB, as a member, were bound by the terms of the Company's constitution. Under article 122 of the Company's Articles of Association, the Board of Directors was responsible for managing the Company and its business. Further, the articles provided that the redemption process was under the control of the directors: under article 48, a member redeeming shares was required to submit his share certificate to the directors; under article 49, the directors could declare a suspension; under article 50, the directors could temporarily suspend redemptions in order to effect the orderly liquidation of assets; and under articles 51 and 54, the directors had a discretion to refuse to redeem shares.

52. The Board could, however, delegate these powers to other persons under articles 144 and 145. But Mr. Chivers, on behalf of SEB, submits that the JoLs have produced no evidence demonstrating any delegation of board authority by the *de jure* Directors to Magnus Peterson to choose which creditors would receive redemption payments. On the contrary, he points out that Mr. Stokoe, in his first witness statement, said that he is *"unaware of the basis on which, constitutionally, Mr Magnus Peterson was authorised to unilaterally direct that redemption payments be made to certain Shareholders and not others ..."*[25]. Mr. Stokoe seems to have been commenting on the lack of any formal Board authority, but in any event the point was not pursued with him in cross-examination.

[25] Paragraph 223(ii)

53. The answer to this, it seem to me, is that the evidence shows that the Directors, in effect, delegated authority, including authority in relation to redemption payments, to Magnus Peterson which they were entitled to do pursuant to articles 144 and 145. Even if there was not any formal delegation of authority for this purpose, there is a compelling weight of evidence to the effect that the Board permitted Magnus Peterson to act as a *de facto* director and, in effect, delegated their powers to him as they were entitled to pursuant to the articles referred to. It is probably not even a question of deciding whether this amounted to ostensible authority. In my view it is clear that the Board allowed Magnus Peterson to act on its behalf in performing all the functions necessary for the payment of redemptions. The necessary implication is that Magnus Peterson had the Board's actual authority for this purpose. There is no requirement, in my view, that s.145 of the Law requires express actual delegated authority. Magnus Peterson was allowed to act on behalf of the Board for relevant purposes and clearly had authority to do so.

54. Turning to the point that it was the administrator, PNC, which actually made the redemption payments, the question raised is whether this had any effect on the controlling mind in making such payments.

55. The administration agreement provided that PNC would disburse money on *"Written Instructions"*[26] meaning signed by an *"Authorised Person"* which in turn meant an officer of the Company or any person duly authorised.[27] Having found that Magnus Peterson did have such authority, there is nothing further to be made from this.

56. It is also pointed out, however, on behalf of SEB that when making the redemption payments (which we shall come on to) PNC insisted, in one instance, on a waiver signed by a director of the Company[28]. Then, in January 2009, the time came when PNC was not willing carry out Magnus Peterson's instructions to make payments without a specific board resolution.[29] And, indeed, it appears that some redemption payments were made by PNC ahead of others selected by Magnus Peterson.

57. Nevertheless the evidence shows that the decision making in relation to the payment of redemptions, and specifically the SEB Redemption Payments, was that of Magnus Peterson, as can be seen from how each payment came to be made. There is nothing surprising about the fact that it was Magnus Peterson who was the decision maker. He was the "Principal Investment Advisor" and CEO of WCUK. Whilst it was PNC, as the Administrator, who would actually make redemption payments, unless PNC could fund redemptions from subscriptions (which they plainly could not at the relevant time) it was entirely reliant on WCUK to provide it with the cash to make the payments. WCUK (and in particular Magnus Peterson) was entirely in control of the whole process.

[26] Clause 15(viii)
[27] Clauses 1(a) and (f)
[28] Exhibit IS-1 page 1008
[29] Ibid page 1024

58. When the payments came to be made by PNC, they of course had authority to make them in accordance with the provisions of the administration agreement.[30] The services provided by PNC included arranging for the computation of the NAV (clause 15(xiii)), controlling and authorising all disbursements (clause 15 (viii)), maintaining the register of shareholders (Clause 16(v)), preparing and forwarding documents to shareholders (clause 16(vii)) and notifying the Adviser, the Custodian and the accounting agent of all share activity (clause 16(vii)). PNC's role is also made clear in the OM in which it is stated that *"The Administrator has been appointed to administer the day to day operations and business of the Fund, including processing subscriptions, redemptions, computing the Net Asset Value ..."*

59. WCUK, on the other hand, as the Investment Adviser, was appointed *"to manage the affairs of the Fund"*[31].

60. PNC's role was purely administrative, as would be expected. I specifically reject the submission of Mr. Chivers that PNC was part of the decision making process in relation to the payment of redemptions.

[30] Administration and Accounting Services Agreement – Bundle F1: pages 1-16
[31] Investment Advisory Agreement clause 2 – Exhibit IS -1 page 647

61. I have taken into account all the evidence referred to from the previous proceedings, from the documents disclosed and specifically from Mr. Stokoe, whose evidence I accept. Having carefully considered such evidence as a whole, and made due allowance for some discrepancies and those parts that are hearsay, I find that nevertheless the overwhelming weight of it is to the effect that Magnus Peterson directly, and through his company WCUK, managed and controlled the Company for all purposes relevant to these proceedings. He controlled the investments and he made the material decisions about redemptions.

62. Accordingly, I find that Magnus Peterson was indeed the Company's controlling mind in the payment of the relevant redemptions which now I must move on to examine.

THE REDEMPTION OF SEB'S SHARES AND LIQUIDATION OF THE COMPANY

63. During the month of October 2008, the Company received redemption requests for shares that at the determined NAV totalled US$138.4 million, including the redemption requests from SEB that amounted to US$8,217,761.54. Those redemption requests were processed on the 1st December 2008 Redemption Day (being the next Redemption Day following the requisite 30-day notice period), and calculated in accordance with the Company's NAV at that time. Pursuant to the Company's OM, the redemption payments would be expected generally to be made within 30 calendar days of the 1st December 2008 Redemption Day.

64. Additional redemption requests were received by the Company in November 2008 and December 2008, for processing in accordance with the January 2009 and February 2009 Redemption Days (being 2nd January 2009 and 2nd February 2009 respectively). The redemptions that fell due totalled approximately US$54.7 million and US$30.0 million respectively, as calculated in accordance with the relevant published NAVs.

65. On the 17th December 2008, Magnus Peterson sent an email to PNC asking that a select number of investors who had redeemed their shares in accordance with the 1 December 2008 Redemption Day be paid the following day, on the basis that those investors ("**the Swedish Redeemers**") were switching to another fund within the Weavering Group. That email was as follows:

> *"Hi Gillian,*
> *We have a few Swedish investors that have switched into our SEK based Fund as at 1st December.*
> *We need to pay them value tomorrow please.*
> *On the attached spreadsheet I have highlighted those investors in yellow. It is approximately US$7.6 million that needs to be paid.*
> *SEB are sending funds today to PNC so there should be no problem executing it.*
> *Best regards*
> *Magnus"* [32]

[32] Exhibit IS-1 page 978

66. It can be seen from the spreadsheet[33] attached to this email that SEB was one of the investors referred to by Magnus Peterson, and its redemption sum of US$1,096,903.58 formed part of the US$7.6 million to be paid. The redemption related to SEB's account in respect of Catella. The Directors were not involved at all in that decision.

67. As can be seen from the email chain thereafter,[34] there followed some issues regarding there being insufficient funds available for these redemption payments to be made to the Swedish Redeemers (which the JoLs say demonstrates that the Company was unable to pay its debts at that time). However, payment was made on the 19th December 2008, as can be seen from PNC's Daily Transaction Report for that date which records redemption payments in the sum of US$7,598,979.03 as having been made.[35]The First SEB Redemption payment of US$1,096,903.58 was received on that day.

68. No further sums were paid to any redeemers for the remainder of December 2008.

69. With the end of December 2008 approaching and apparently insufficient cash to meet the December 2008 redemption debt, Magnus Peterson and WCUK sought legal advice. The advice is set out in an email dated 30 December 2008[36] from Mr Kevin Nosib, of the law firm Ogier, to Mr Dabhia of WCUK, and refers to a conversation between the two of them the day before.

[33] Exhibit IS-1 pages 980-983
[34] Ibid pages 984-1000
[35] Ibid pages 1222-1225; payment wired out on 18 December 2008; received by SEB on 19 December 2008
[36] Ibid page 1005

Mr Nosib there sets out his understanding that the issues facing the Company were cash flow related. The JoLs make the point that if Mr Nosib had properly understood the position (as Magnus Peterson did) his advice would have been very different.

70. The email chain shows that on 29th December 2008 (the day of the conversation between Mr. Nosib and Mr Dabhia), there was an email from Magnus Peterson to Mr. Dabhia[37], in which Mr Peterson proposed a form of wording to be sent to the those investors who sought to redeem their shares in accordance with the 1 December 2008 Redemption Day in relation to a decision which he had made to pay only 25 per cent of the remaining December 2008 redemption debt and in which it was intimated that the balance of the December 2008 redemption debt would be paid by the end of January 2009. The evidence of the JoLs (in particular the analysis carried out by Mr Stokoe) demonstrates that Magnus Peterson must have known by this time that the Company would never be in a position to do all this (let alone pay the January 2009 redemption debt which was to fall due just 2 days later on the 2nd January 2009).

71. There appears to have been some discomfort felt on the part of PNC about the decision by Magnus Peterson to pay only 25 per cent of the redemption debt. On the 31st December 2008, Gillian Nugent of PNC sent to Mr Dabhia a waiver to be signed by a director confirming that only 25 per cent (excluding the full redemption payments already made) should be paid. This was forwarded to the Directors, copied to Magnus

[37] Exihibit IS-1 page 1006

Peterson, and was duly signed as requested, after an email from Magnus Peterson to Mr Ekstrom.[38]

72. The letter to investors proposed by Magnus Peterson, and dated 31 December 2008, was not in fact sent until the 7th January 2009, after it had been signed by Stefan Peterson at the request of Magnus Peterson.

73. By then, on the 2nd January 2009, the Second SEB Redemption Payment had been made in the sum of US$1,780,214.29. This was 25 per cent of the sum due in respect of the shares held for HQ Solid.

74. The letter sent to investors stated as follows:

> *"Dear Redeeming Investor*
> *Due to the illiquidity of the markets at present, and the fact that the Fund has received redemption requests for over 30% of its NAV, the Fund's directors have exercised their discretion to postpone a pro rata proportion of existing redemptions until market conditions improve.*
> *Reducing positions in December's market conditions to create cash to effect redemptions has proved very difficult, has started to have a detrimental effect on returns and, if continued, will in the opinion of the directors seriously prejudice existing investors.*
> *Therefore, after consulting Weavering Capital (UK) Ltd as the Fund's investment manager, in order to effect an orderly liquidation of the Fund's assets to meet the requested redemptions, the directors have decided to pay at the end of this month 25% of all redemptions requested at the end of November on a pro rata basis.*
> *The remaining redemption amounts will be paid out in one or more instalments as market conditions improve as the directors in their absolute discretion determine,*

[38] Additional Documents Bundle F pages 1109-1110

and the directors envisage this improvement will take place by the end January."[39]

75. On the same date as the Second SEB Redemption Payment, the Company incurred the further redemption obligations in the sum of US$54.7 million. At the same time, in addition to making payment of the Second SEB Redemption, further partial payments were also made, seemingly ad hoc, to some of the other December redeemers, with two additional partial payments on the 5th and 13th January 2009. Later in the month most of these other redeemers (except, it is pointed out by Mr. Chivers, SEB and three others) were paid the remaining portion of their redemptions.

76. Moving into February 2009, the next redemptions of some US$30 million became due (on the 2nd of the month). Shortly after, on 4th February 2009, one of the December redeemers was paid the remaining portion due, followed soon after by the Third SEB Redemption Payment (of US$5,340,643.47) and a payment of the remaining portion to one other December redeemer on 11th February 2009. That left just one December redeemer to be paid a remaining portion and this happened on 26th February 2009. The Third SEB Redemption Payment was made following on from an email dated 10th February 2009, from Magnus Peterson to PNC, requesting payment of the sum in question to *"SEB Merchant Banking as Nominee for HQ Solid"*.

77. All these payments made are summarised in a spreadsheet produced in the evidence of Mr. Stokoe.[40] Overall they amounted to the following:

[39] Exhibit IS-1 page 1013

Date	US$ Payment	US$ Total	US$ Total Due	US$ Shortfall
December 2008	$7,598,979.03			
January 2009	$72,334,131.96			
February 2009	$10,236,352.00			
		$90,169,462.99	$138,361,002.62	($48,191,539.23)

78. There are various emails relating to payment of these sums.[41] These emails, on the case of the JoLs, show, and I accept, that:

i. All decisions about redemption payments were being made by Magnus Peterson.

ii. The Company did not have sufficient funds to pay all those who had redeemed on the 1st December 2008 (let alone those who had redeemed on 2nd January 2009 and 2nd February 2009).

iii. Others (not Magnus Peterson) were looking to the Swaps to fund the redemption payments and Magnus Peterson confirmed that some of the Swaps would be closed out to meet the payments[42] (something he knew could not be done).

iv. Some redeemers were putting pressure on PNC and WCUK to pay them, but there does not appear to have been any pressure or even a request for payment from SEB.

[40] Exhibit IS-1 page 1226
[41] Exhibit IS-1 - between pages 972-1201
[42] Ibid - page 1065: email of 7 January 2009 from Magnus Peterson to PNC (Frank Barden)

79. It should be added that, as in December 2008, again in January 2009 Magnus Peterson selected to be paid Swedish redeemers who were switching in to another fund. Thus on 20th January 2009, he emailed PNC as follows:[43]

> *"Gillian,*
> *Just like last month we have 3 Swedish investors who have switched into our SEK based Fund.*
> *We need to pay them tomorrow please.*
> *They are [details].*
> *Regards*
> *Magnus"*

80. On this occasion SEB was not one of the redeemers, but the selection appears to have been made for the same reason as before.

81. The making of the Third SEB Redemption Payment resulted in payment of the entirety of sums due to SEB pursuant to its redemption requests. However, by then the Company had in excess of US$134 million in outstanding redemption obligations, being the balance of the December 2008 redemption debt of about US$50 million, in addition to the entirety of the January 2009 redemption debt and the February 2009 redemption debt.

[43] Exhibit IS-1 pages 1024-1025

82. During this period it was not until late January 2009 that it appears any thought was given to putting things on a formal footing and documenting the decision to pay some of the December 2008 redeemers notwithstanding the number of redemption requests received. This is explained in Mr. Stokoe's first witness statement.[44]

83. PNC, for their part, on the 20th January 2009, informed Magnus Peterson that they would require a Directors' resolution before paying out any redemption proceeds for December 2008.[45]

84. Finally there was a Board Meeting, but not until 22nd February 2009. The Minutes of that meeting, in paragraphs 11 to 12, record as follows:

> *"...During December it became apparent that due to a severe lack of liquidity in the fixed income markets, and taking into account the high level of redemptions, that redemption payments may need to be deferred in order that the Fund's assets that needed to be realised to meet the redemption payments could be sold at a fair market price and not at distressed levels. Using the powers under Article 50 the Directors determined on 30th December that redemption payments due by the end of December would be deferred to such time as liquidity returned to the fixed income markets and assets could be realised at fair value and on the basis of an orderly liquidation, and so that the interests of the remaining shareholders would not be prejudiced thereby. In making a judgment on market liquidity, it was noted that the Board will rely on the advice of the Investment Manager. In recognition of their fiduciary duty to the Fund and its Shareholders, the Directors confirmed that the Fund's redemption policy shall continue to be to secure an orderly liquidation of the Fund's assets and to pay out redemption proceeds to redeeming Shareholders on an equitable basis when funds are available, and taking into account that:*

[44] Paragraphs 219-222, pages 54-55
[45] Exhibit IS -1 page 1024: email dated 20 January 2009

(a) the policy of the Fund has always been to make redemption payments generally within 30 days of the relevant Redemption Day which permits the Directors in their discretion to extend the payment period; and

(b) where one redemption request is of such a size that it can only be satisfied in a number of payments or in one deferred payment (a "Large Redemption"), the Directors may satisfy all other contemporaneous or prior redemption requests in full before paying the redemption proceeds for the Large Redemption in order best to protect the Net Asset Value of the Fund and the interests of the remaining Shareholders."[46]

85. Leaving aside whether this was a correct analysis (which will be considered in relation to the issue of solvency) the Board's intervention was clearly limited and late. Other than Stefan Peterson signing the 31st December 2008 letter (on the 7th January 2009), the Directors had no further involvement in relation to the payment of redemption proceeds until this 22nd February 2009 Board Meeting. Further there are obvious inconsistencies between the 31st December 2008 letter and the Board Minutes. The minutes call for larger redemption requests to be subordinated to smaller redemption requests, while the 31st December 2008 letter refers to the pro-rated payment of 25 per cent of redemption sums due, and thereafter the payment of remaining amounts in one or more instalments. There was no provision unilaterally to pay one investor over another if the unpaid investor was a "Large Investor" (the 22nd February Board Minutes appear to be a belated attempt to rectify that).

---

[46] Exhibit IS-1 pages 829-831

86. Furthermore, by 22nd February 2009 SEB had received its redemption payments in full, with respect to both Catella and HQ Solid, and all the other redemption payments referred to above had also been paid, with the exception just of the one payment made a few days later on the 26th February 2009.

87. Magnus Peterson was aware of the need to treat all investors equally. He also, of course, was the person aware of the fraud in relation to the Swaps. He must have realised that the Company was unable to pay its debts. Accordingly, he should have suspended (or requested the Directors to suspend) calculation of the Company's NAV and he must have known that the Company should have taken the course of suspending payment of redemptions.

88. As I have already found, it was Magnus Peterson who was the Company's controlling mind in the payment of the relevant redemptions. However, if the intention of the Directors matters, then the JoLs rely on the knowledge of the Directors (already referred to) that a large number of redemption requests were being received and that the Company did not have the money to fund those payments. Knowing that the Company was unable to make these payments, nonetheless, as the evidence relating the redemption payments shows, they became involved in sanctioning the policies set out in the 31st December 2008 letter and the 22nd February 2009 Board Meeting.

89. There is no evidence that the Directors even knew about the First SEB Redemption Payment. But the policies they sanctioned could be said to be relevant to the payment of the Second and Third SEB Redemption Payments if their intention matters at all for this purpose.

90. At last, on about the 5th March 2009, the Directors became aware of the true nature of the Swaps and their likely effect on the solvency of the Company. In March 2009, the Directors resolved to suspend the determination of the NAV per share and the issue and redemption of shares of the Company with immediate effect. Shareholders were informed of this by letter dated the 11th March 2009.[47]

91. The Company was then put into liquidation on the 19th March 2009.

THE SOLVENCY ISSUE

92. Before moving on to consider whether the evidence of payment of redemptions establishes that payments were made with a view to giving a preference in respect of each of the payments to SEB, it is necessary first to establish whether the Company was *"unable to pay its debts within the meaning of section 93"* of the Law when each such payment was made. This is a threshold requirement for a claim under s.145(1) of the Law.

[47] Exhibit IS-1 page 1193

93. Section 93 of the Law provides three grounds upon which a company may be deemed unable to pay its debts. The first two (namely, (a) an unsatisfied demand for payment and (b) an unsatisfied execution of a judgment, decree or order) have no relevance in the present case. It is common ground that the JoLs must rely on s.93(c) and prove *"to the satisfaction of the Court that the* [Company] *is unable to pay its debts"* at the relevant times. This test of inability to pay debts under s.93(3) is one of commercial insolvency, a so-called cash flow test, rather than a balance sheet test. It is based on a company's present inability to pay debts as they fall due.[48]

94. Mr. Stokoe in his evidence carried out an analysis of the relevant position at the time of each of the three Redemption Days. On the figures set out by him he concluded that as at the 1st December 2008, once the worthless Swaps were disregarded, the Company had insufficient other assets to fund the redemption obligations unless it received significant subscription monies to use for such purpose, which it did not. Likewise, his analysis for the position as at the 2nd January 2009 and the 2nd February 2009 shows that in each case, ignoring the value of the Swaps, there were insufficient assets to pay the redemption debt.[49] This evidence was not challenged in cross-examination and I accept it, subject to determining the legal issues raised by Mr. Chivers on behalf of SEB, which will be dealt with below.

[48] *In the matter of FIA Leveraged Fund* FSD 13 of 2012, at paragraph 105; *Culross Global SPC Limited v Strategic Turnaround Master Partnership Limited* [2008] CILR 447.
[49] First witness statement – paragraphs 185-189

95. At my request during the hearing, for convenient reference, a schedule was produced on behalf of the JoLs setting out the relevant figures with the Swaps taken out of account. This schedule shows over the relevant period the reported NAV less the Swaps, and the amounts of monthly subscriptions and monthly redemptions. It appears to be clear from these figures that (subject again to the legal issues) that the Company was unable to pay its debts on the 1st December 2008, and this continued to be the position right up to the time when the Company went into liquidation and the Directors declined to provide a declaration of solvency.

96. SEB has not pleaded a positive case that the Company was able to pay its debts (other than raising its legal issues) but merely does not admit that the Company was unable to pay its debts[50] and has not adduced any evidence on the point. However, in his closing submissions Mr. Chivers disputed that the JoLs had established that the Company was insolvent on a commercial basis on each of the three dates on which SEB was paid redemption proceeds. He submitted that there had been no identification of the cash and other liquid assets of the Company which were available on each of the three dates on which SEB was paid redemption proceeds. He further submitted that there is no evidence as to which assets were within the Company's portfolio on the three dates which could have been sold, even at a significant discount, in order to raise cash to meet the redemption obligations.

[50] Re-Amended Defence – paragraph 18(2)

97. Mr. Lord, on behalf of the JoLs, accepted that the schedule does not expressly show what immediately realisable assets (if any) the Company had (other than subscription monies received) but submitted that it, nonetheless, demonstrated a very dire financial position for the Company. He contended that there was ample evidence before the Court to show that the Company did not have the ability to realise assets to raise cash to meet the redemption payments that had fallen due on the 1st December 2008, 2nd January 2009 and 2nd February 2009, namely:

i. The evidence of the Directors.

ii. The emails between WCUK and PNC in December 2008, demonstrate that PNC did not have the necessary funds with which to meet the redemption payments that had fallen due on 1st December 2008. For example, on 5th December 2008, PNC asked WCUK twice for confirmation as to when redemption monies could be requested from the prime broker and was told in response that WCUK would look to pay the redemptions "*around 28/29 Dec*".[51] Further, when it came to paying the Swedish redeemers, initially there appeared to be insufficient funds to make payment and they were only provided after some chasing.[52]

[51] Exhibit IS-1 pages 975-977
[52] Ibid pages 992-994

iii. At the end of December 2008 it is apparent that there were still insufficient funds to pay all those who had redeemed on the 1st December 2008, hence the decision to pay only 25 per cent, as belatedly recorded in the letter to redeeming investors dated the 31st December 2008, but sent on the 7th January 2009. The terms of that letter[53] admit that the Company was unable to pay its debts. Despite the terms of the letter there was one investor who did not receive 25 per cent until 13th January 2009, as shown on the spreadsheet.[54]

iv. Further the Company remained unable to pay all those who had redeemed on the 1st December 2008 by the 9th March 2009, when it resolved to suspend redemption payments. And it was unable to pay any of those investors who had redeemed on the 2nd January 2009 and 2nd February 2009.

v. In email exchanges in January 2009[55], Mr Barden of PNC was seeking assurances from Magnus Peterson that assets would be realised to create cash to pay the redemptions and was met with the response that some of the Swaps would be closed out to create the necessary cash (something that was, of course, impossible).

98. It is clear on the evidence that throughout this period Magnus Peterson must have known that there were insufficient funds to pay all the redemptions.

[53] Exhibit IS-1 page 1013
[54] Ibid page 1226
[55] Ibid pages 1063-1066

99. Taking account of all this evidence, the vast discrepancy between subscription payments received and redemption payments that fell due from 1st December 2008 until the liquidation of the Company, and the unchallenged evidence of Mr Stokoe, which I accept, I am satisfied that the JoLs have discharged the burden of proving that on 19th December 2008, 2nd January 2009 and 11th February 2009 the Company was unable to pay its debts.

100. This, however, is subject to resolving two legal issues raised on behalf of SEB. The first is the contention that there were no redemption debts that the Company was unable to pay until the 30 day grace period referred to in the OM had expired, which affects the First SEB Redemption Payment. The second, overarching, point made is that as the published NAVs were wrong on account of Magnus Peterson's fraud, they were not valuations at all, or at least not binding valuations, and so none of the redeeming shareholders became creditors of the Company. It follows from this that SEB, on its case, should have been paid nothing, and nor should any of the other redeemers.

101. Each of these issues now needs to be addressed.

The 30-Day Grace Period

102. The effect of article 36 of the Company's articles of association (which has been referred to above) is that a redeeming shareholder becomes a creditor of the Company from the Valuation Point on the Redemption Day. This is accepted by Mr Chivers. In ***Culross Global SPC Limited v Strategic Turnaround Master Partnership Limited***[56], the Cayman Court of Appeal held that an article containing very similar wording created a provable debt owed to the redeeming investor from the redemption day.[57]

103. So SEB has to accept that on the 1st December 2008 the amounts due to those investors who had redeemed on that day became debts of the Company, such that those investors became creditors of the Company on that date and, for example, had standing to petition to wind up the Company in that capacity.

104. However, reliance is placed by Mr. Chivers on the provision in the Company's OM that redemption payments are *"generally made within 30 calendar days after the Redemption Day"*[58]. He submitted that while redeeming shareholders became creditors of the Company on the relevant Redemption Day under article 36, they did not become current creditors on that day; rather they only became prospective creditors in respect of unpaid redemption proceeds.

[56] [2008] CILR 447
[57] The Court of Appeal's decision was overturned on other grounds by the Judicial Committee of the Privy Council: see [2010] 2 CILR 364
[58] Exhibit IS-1 pages 170-205, at page 189

So, it is contended, on a true construction of the Company's articles and the OM, which it is said must be interpreted together, the Company was obliged to pay redemption proceeds on the expiry of 30 calendar days after the relevant Redemption Day.

105. A forensic point is sought to be made that this interpretation has appeared to be common ground between the parties. However, it has certainly not been conceded in the final analysis in the submissions which have been made by Mr. Lord which will be referred to below.

106. Alternatively, Mr. Chivers submits that if the Court concludes that the articles must be construed in isolation and the OM is merely descriptive, the position is that article 36 does not spell out when the Company is to pay redemption proceeds. Reliance is therefore placed on the well-established principle of general application that, in the absence of any express provision as to timing in a contract, an obligation must be performed within a reasonable time: thus in ***Hick v Raymond Reid***[59]:

> *"When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of general application..."*

[59] [1893] AC 22 at page 32

107. Mr. Chivers also cited other cases demonstrating the application of the principle and showing that any estimate given by a party as to the likely amount of time necessary for performance is relevant.[60] So, it is submitted, that as in the present case the OM provided an estimate of the time necessary for the Company to pay (generally within 30 calendar days), there would be no breach of contract by the Company if it took advantage of a grace period of no more than that number of days. Thus it is contended that no redeemer could, as a matter of contract set out in the articles, have required performance of the obligation to pay until the expiry of 30 days as the obligation would not until then have fallen due.

108. On the basis of this analysis, it is submitted on behalf of SEB that the December 2008 redeemers did not have debts which were due for payment on the 19th December 2008 (the date of the First SEB Redemption Payment) and so they cannot be taken into account to establish insolvency on that date. Further, it follows that by 2nd January 2009 (the date of the Second SEB Redemption) although the December redeemers' debts had fallen due, the January redeemers' debts had not and so are not relevant to an assessment of the Company's insolvency on a commercial basis on that date. And carrying through the analysis to the 11th February 2009 (the date of the Third SEB Redemption Payment), although any December 2008 redeemers and January 2009 redeemers who remained unpaid were creditors whose debts were due, the February 2009 redeemers were only prospective creditors whose debts are not relevant to the determination of solvency on that date.

---

[60] Rennie v Westbury Homes (Holdings) Ltd [2007] EG 296; Astea (UK) Ltd v Time Group Ltd [2003] EWHC 725, approved in Peregrine Systems Ltd v Steria [2005] EWCA Civ 239

109. In response Mr Lord, on behalf of the JoLs, relies on ***Strategic Turnaround*** as establishing the effect of article 36 in this case to be that on the 1st December 2008 the amounts due to those investors who had redeemed on that day became debts of the Company, such that those investors became creditors of the Company on that date who, for example, could petition to wind it up. He referred me to the decision of the Privy Council in that case.[61] Mr. Chivers has pointed out that that the Privy Council held that it was not open to the company, after the redemption day had passed, to suspend redemptions, but that they did not need to consider, and did not consider, the time at which the debt owed became due and payable. Nevertheless, there was an observation by Lord Mance, to which my attention was drawn by Mr. Lord, which is relevant to the issue raised here. In ***Strategic Turnaround*** the relevant article provided that *"the price to be paid for shares which are to be redeemed shall be deemed to be a liability of the Company from the close of business on the Redemption Day until the price is paid"*.

Lord Mance, in paragraph 20, said this about it:

> *"The focus of these provisions is on the Redemption Date by reference to which the Redemption Price is crystallised and from which the Price is deemed to be a liability of the* [Company]*; the remittance of the 'redemption proceeds' is treated as a matter of supplementary procedure ... Both stages may be said to be part of a continuing process, but it does not follow that 'redemption' within the meaning of* [the articles] *only occurs at the conclusion of that whole process."*

[61] [2010] UKPC 33

110. In my view much the same can be said here. The allowance of a grace period of 30 days for redemption payments was a purely practical measure to allow for orderly payment of sums which had become due on the redemption date. It had no legal bearing on the liability which arose at that date. Subsequent payment in accordance with the grace period was, mirroring the words of Lord Mance, no more than a matter of supplementary procedure. Nor is there any need, as suggested by Mr. Chivers, to consider implying terms as to payment.

111. Mr. Lord also submits that on the face of it the contention of SEB as to the 30-day period is plainly wrong. It would only apply to the First SEB Redemption and then only because, if anything, on this analysis, the payment had been made early.

112. However, the point is made that the analysis must be wrong because it could lead to absurd results: for example, if a company owes a main contractor a substantial sum of money that it has no prospect of meeting, but that contractor agrees not to enforce it for a period (i.e. grants a 7-day period of grace for payment) and, during that period the company pays off its bank overdraft in order to relieve its directors of any obligations pursuant to personal guarantees, before going into liquidation shortly after, on SEB's argument that payment could not be a preference within s.145.

113. The test in s.93(c) of the Law, as Mr. Lord points out, is whether *"it is proved to the satisfaction of the Court that the Company is unable to pay its debts"*. Since it is accepted by SEB that on the 1st December 2008, all the 1st December 2008 redemption payments were "debts" of the Company, the test he submits is whether or not the Court is satisfied (in relation to the First SEB Redemption Payment) that on the 19th December 2008 the Company was unable to pay all the 1st December 2008 redemption payments.[62] In point of fact, however, he contends that it does not matter whether or not those debts are regarded as payable on 31st December 2008 or on 1st December 2008, as long as the Court is satisfied that on 19th December 2008, on the balance of probabilities, the Company would not have been able to pay all of the 1st December 2008 redemptions on 31st December 2008. It is submitted that the evidence amply demonstrates that the Company on the 19th December 2008 had no prospect of being able to pay all the 1st December 2008 redemption payments on 31st December 2008. I have no hesitation in accepting this to be the position.

114. Accordingly, I am of the view that the 30-day grace period has no bearing on the material position on solvency for the purpose of the claims in these proceedings.

[62] The JoLs actually go further and submit that the correct test is whether or not the Company is able to pay not only all of its incurred debts but also any future debts which it knows will arise (which include the further redemption payments that were incurred on 2 January 2009)

Fraudulent NAV

115. SEB contends that as the published NAVs were wrong on account of Magnus Peterson's fraud, this fraud had the following consequences:

i. The published NAVs, being based on Magnus Peterson's fraud, were not *"valuations"* of the Company's net assets at all within the meaning of the Company's articles. The Company therefore did not determine NAVs and the redemption process provided for in the articles and the OM was never completed. Redeeming shareholders accordingly never became creditors of the Company.

ii. Alternatively, the published NAVs, even if they constituted "valuations" within the meaning of the Company's articles, were not binding as between the Company and redeeming shareholders. The Company does not therefore owe legal liabilities to such shareholders.

iii. In the further alternative, the published NAVs were not binding as between the Company and redeeming shareholders to the extent of Magnus Peterson's fraud. The Company only owes legal liabilities to redeeming shareholders based on real (lower) NAVs.

116. It is thus submitted that the redeemers in this case never became creditors; that there was no liability to pay them anything and so the Company was not insolvent. So on this footing none of them (including it has to be accepted SEB) should have been paid anything.

117. Article 34 provides as follows:

"The assets of the Company shall be valued in accordance with such policies as the Directors may determine. Any valuations made pursuant to these Articles shall be binding on all persons."

118. SEB submits that a valuation of the Company's assets based on fraud would not be in accordance with any policy which the directors of the Company (or Magnus Peterson) could lawfully have adopted. Further, it is said, that a valuation of the Company's assets based on fraud would not be pursuant to the articles as required under article 34 because it would be absurd to suggest that the statutory contract of membership constituted by the articles, or the general law, permitted fraud. Reference is also made to article 32 whereby the Directors are required, in calculating the NAV, to *"apply such generally accepted accounting principles as they may determine"* which it is contended cannot be said to have happened because of the fraud in relation to the NAV.

119. In support of these contentions Mr Chivers submitted that it is implicit that a valuation to be carried out by a contracting party must be carried out rationally and in good faith. He cited ***Socimer International Ltd v Standard Bank London Ltd***[63], where at paragraph 66 Rix LJ said as follows:

"It is plain from these authorities that a decision maker's discretion will be limited as a matter of necessary implication by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality."

[63] [2008] 1 Lloyd's Rep 558

120. Other English authorities to the same effect were also cited.[64] In this jurisdiction in ***FIA Leveraged Fund v Firefighters' Retirement System***[65], Sir John Chadwick P adopted the same approach, using very much the same words as those of Rix LJ referred to above.[66]

121. Mr. Chivers also referred to the very recent Cayman case of ***Primeo Fund (in official liquidation) v Michael Pearson as Additional Liquidator of Herald Fund SPC (in official liquidation)***[67]. The ruling was on an application to determine certain issues in the Herald liquidation in relation to redemption requests and there was also a rectification issue. The latter required a consideration of O.12, r.2 of the Companies Winding Up Rules which requires an official liquidator to rectify the Company's register of members in certain circumstances in accordance with s.112 of the Law. Mr. Chivers points out that at paragraph 33 Jones J was of the view that for an NAV not to be binding between the company and its members there had to be *"some conduct on the part of the company itself or conduct on the part of an agent which can properly be imputed to the company which has the effect of vitiating the contract with its members."*

---

[64] West LB AG v Nomura Bank International plc [2010] EWHC 2863 (affirmed in [2012] EWCA 495) where the Court held that a valuation of shares carried out honestly but irrationally was not a valuation at all; and Jones v Sherwood Computer Services plc [1992] 1 WLR 277, where a fraudulent (as opposed to a merely mistaken) valuation was not binding as between contracting parties.

[65] 1 August 2012, CICA Appeal No 6 of 2012

[66] Sir John Chadwick P at paragraph 42.

[67] FSD 27 of 2013, a ruling of Jones J dated 12 June 2015

It is observed also that (at paragraph 48) Jones J drew a distinction between "internal" and "external" fraud, the former it is suggested being one to vitiate the contract with members, whereas the latter would not. This was a case of external fraud, though in the event the Judge left over the question of whether the power of rectification should be exercised until a further hearing.

122. As it is the JoLs' case that Magnus Peterson was the controlling mind and will of the Company, so, it is submitted by Mr. Chivers, that Magnus Peterson's fraud must be attributed to the Company as an internal fraud. The result it is contended is that the published NAVs are not binding, or alternatively are only binding in so far as they are based on the Company's real net assets.

123. Accordingly, on SEB's case, there was no determination of NAV in accordance with the contract for the December redemptions and no lawful December redeemers. So those redeemers did not become creditors and the Company was not insolvent.

124. The JoLs in response begin by observing that this is not an attractive argument by SEB: it results, it is said, in SEB benefitting from Magnus Peterson's fraud to the detriment of other redeemers and is contrary to the purpose of the insolvency legislation and s.145 in particular. SEB's argument, it is submitted, is inconsistent with the wording of article 34 and also runs contrary to its pleaded case. In paragraph 17(1) of the Re-Amended Defence:

> *"It is admitted that upon the 1 December 2008 Redemption Day, the Company became obliged to redeem Participating Shares in respect of which Redemption Notices had been duly given prior to that date. The Redemption Price payable on that date constituted a debt of the Company."*

125. Mr Lord also submits that the case as then put at trial on behalf of SEB runs contrary to authority. It ignores, he says, the decision of the Privy Council in ***Fairfield Sentry Limited v Migani***[68], to the effect that the determination of the NAV was binding. Mr Chivers submitted that ***Fairfield Sentry*** can be distinguished on the facts because in that case the redemption liabilities based upon the reported NAV were honestly, if mistakenly, determined. However, the question of "honesty" does not appear to form any part of the Privy Council's judgment. The whole thrust of the argument in that case was that the NAV had not been correctly determined[69] and Lord Sumption (at paragraph 24) had this to say about it:

> *"If, as the Articles clearly envisage, the Subscription Price and the Redemption Price are to be definitively ascertained at the time of the subscription or redemption, then the NAV per share on which those prices are based must be the one determined by the Directors at the time, whether or not the determination was correctly carried out in accordance with* [the Articles]. *That means either (i) that the Directors' determination at the time must be treated as conclusive whether or not there is a certificate* [under the Articles]*; or else (ii) that* [the Article] *must be read as referring to the ordinary transaction documents recording the NAV per share or the Subscription or Redemption Price which will necessarily be generated and communicated to the Member at the time, and not to some special document issued at the discretion of the Directors."*

126. Mr. Lord submits that this reasoning of the Privy Council applies whether or not the NAV had been correctly determined and whether or not the fund itself knew it had been.

---

[68] [2014] UKPC 611. A case arising out of the Madoff Ponzi Scheme fraud; the reasoning was followed by Jones J in Primeo in saying that the mere fact that the NAV was affected by fraud was not by itself sufficient to vitiate the contract – paragraph 33

[69] Paragraphs 22-24

127. Mr. Lord also drew attention to a decision of the Chief Justice in this jurisdiction, ***RMF Market Neutral Strategies (Master) Limited v DD Growth Premium 2X Fund***[70]. That case included a clawback claim by liquidators on the basis of undue or fraudulent preference and further reference will be made to it on the issue of preference here. However, for present purposes, it is to be observed that the Chief Justice accepted that the fund was insolvent on the basis of its liability to pay redeemers money which it did not have the ability to pay.[71] The NAV was grossly overstated as a result of a fraud in purchasing bonds which were then overvalued for the purposes of the NAV (in the same way as the Swaps were in the present case). Nevertheless, it was not suggested that the redeemers whose redemption entitlement was calculated on the basis of the overstated NAV were not creditors for that sum, or that the fund was not insolvent for that reason, or that the liquidators' claim fell foul of public policy due to illegality.

128. SEB's argument, it is submitted, also faces other hurdles. It must prove that Magnus Peterson's relevant knowledge is to be imputed to the Company for the purposes of the redemption contracts that arose in respect of those investors who redeemed on the 1st December 2008. It has not addressed this point (other than to not admit it). Whilst it is the Company's case that Magnus Peterson's intention is the relevant intention for the purpose of the SEB Redemption Payments (because he was the person who directed them to be made) it does not follow that his knowledge of the fraudulent nature of the Swaps is to be imputed to the Company for the purpose of the redemption contracts.

---

[70] FSD No 33 of 2011, judgment dated 17 November 2014
[71] Paragraphs 33-38 and 169

129. As explained by the Supreme Court in ***Jetivia SA v Bilta (UK) Limited***[72], it is perfectly possible for a company to rely on attribution of a person's knowledge for one purpose[73] (for example, as in ***Jetiva,*** causing the company to make payments) whilst disclaiming attribution of that same person's knowledge for another purpose (for example, again as in ***Jetiva***, when that person is defrauding the company). In the words of Lord Mance, a company *"can rely on attribution for one purpose, but disclaim attribution for another."*[74]

130. In the present case, submits Mr Lord, there is no reason to impute Magnus Peterson's knowledge of his fraud (which was a fraud on the Company and its shareholders) to the Company for the purpose of the redemption contracts. The fraud, it is observed, was not in the calculation of the NAV, which was carried out by PNC, but in the fraudulent valuation of the Swaps that Magnus Peterson provided to PNC to calculate the NAV. So, rather than being characterised as a fraud of the Company, it should be regarded as a fraud on the Company by Magnus Peterson, a director of WCUK one of the service providers, and hence an external fraud. In reliance on the basic principle set out in ***Re Hampshire Land Company***[75], it is submitted that a fraud on the Company should not be imputed to it by Magnus Peterson's knowledge.

---

[72] [2015] UKSC 23
[73] In fact the JoLs do not rely on attribution of knowledge, but rather that it was Magnus Peterson who directed the SEB redemption Payments to be made and therefore it is his intention that is relevant
[74] Judgment paragraph 43
[75] [1896] 2 Ch 743

131. But the matter does not rest there. It is also submitted on behalf of the JoLs that even if (contrary to the above) Magnus Peterson's knowledge is to be imputed to the Company for the purpose of the redemption contracts, it does not necessarily follow that those contracts are necessarily vitiated by that fraud. The correct legal analysis is said to be that if a contract is entered into for an illegal purpose or for the purpose of committing an illegal act, then it is unenforceable by the party who entered into the contract for that illegal purpose: ***21st Century Logistic Solutions v Maysden Limited***[76]. Mr. Chivers contends that this case does not assist because it concerns a contract entered into for an illegal purpose, whereas his case is that the NAV is not binding because of fraud. The counterpoint, it seems, is that if the redemption contracts were not entered into for an illegal purpose (which Mr Chivers appears to accept) then the claim to make recovery of sums paid pursuant to those redemption contracts does not depend on any illegality.

132. There may, of course, be other circumstances in which the fraud affecting the NAV will have to be addressed. One such circumstance may be if, as a result of recoveries, the Company becomes solvent and the JoLs are required by s.112 of the Law and O. 12, r.2 of the Companies Winding Up Rules to rectify the register of members of the Company, for which purpose there may be an application to the Court, as in ***Primeo.*** Mr. Stokoe accepted in cross-examination that this is a possibility at least. However, this is for the future. It is also to be noted that although in ***Primeo,*** Jones J held that s.112 *"contemplates the possibility of rectifying the register, if necessary, to eliminate or ameliorate the consequences of both "internal" and "external" fraud",*

---

[76] [2004] EWHC 231. Applying cases cited in paragraph 11

he also went on to say that a rectification of the register would not have any effect upon the unpaid redeemers in that case who would remain entitled to prove in the liquidation as creditors.[77]

133. Having considered in detail all the submissions referred to, I have come to the conclusion that not only is SEB's case contrary to its pleaded defence, but also it produces an unattractive result which must be rejected. I prefer the JoLs' case and the analysis put forward on their behalf. However, I think that it is necessary to guard against the issue in relation to the NAV being weighed down by too much analysis. What it all comes down to in the end can be summarised quite simply.

134. In my view, certainly for the purpose of this case, the NAV is binding in accordance with article 34 of the articles of association. The fact that it has emerged that the NAV is affected by fraud is not by itself sufficient to vitiate the NAV for the reasons explained by Lord Sumption in ***Fairfield Sentry*** and referred to by Jones J in ***Primeo***[78]. It seems to me that the claims in relation to the redemptions in this case have to be resolved by reference to the NAV which gave rise to their payment. The NAV remains binding (in accordance with article 34) for this specific, and perhaps limited, purpose, even though it has subsequently, after payment of the redemptions, proved to be affected by fraud. This I believe is the sensible and rational approach which avoids an unacceptable outcome.

---

[77] Ruling – paragraph 48
[78] Paragraph 33

135. It is consistent also with what happened in ***DD Growth***. The fraud there which affected the NAV gave rise to no issue of solvency to prevent the clawback claim. Nor should it do so in the present case.

136. Maybe, in the future, the NAV will be revisited if the liquidation ends up going down the ***Primeo*** route, perhaps before there is any final distribution. But that has no bearing on the present case.

137. So, far from being left out of account on solvency, I find that the NAV must be at the very heart of a claim to recover sums paid pursuant to it.

138. In conclusion, drawing all this together, I am of the view that neither the 30-day grace period nor the fraudulent NAV has any bearing on the material position on solvency for the purpose of these proceedings. As previously indicated, I am satisfied on the evidence that the JoLs have discharged the burden of proving that on each of the dates of payment of the SEB Redemptions the Company was unable to pay its debts. Indeed it also seems probable on the evidence that the Company was commercially insolvent all the time from the 1st December 2008 until it went into liquidation.

139. So now it is necessary to move on to consider the question of preference.

140. The effect of the SEB Redemption Payments was, it appears, to prefer SEB, subject to the issue addressed below about whether it amounted to a "*preference over the other creditors*". However, whether the payments were "*with a view to*" giving a preference within the meaning of s.145(1) requires analysis of the relevant legal principles.

Legal Principles

141. In order to understand the relevance of the authorities to which reference will be made, it is necessary to begin by tracking the evolution of the statutory provision.

142. The statutory precursor to s.145 of the Law was s.168 which applied until its repeal by the Companies (Amendment) Law 2007. Section 168 imported into corporate insolvency the law of preferences applying in individual bankruptcy:

> *"(1) Any such conveyance, mortgage, delivery of goods, payment, execution or other act relating to property as would, if made or done by or against an individual trader, be deemed in the event of bankruptcy to have been made or done by way of undue or fraudulent preference of the creditors of such trader, shall, if made or done by or against any company, be deemed in the event of such company being wound up under this Law to have been made or done by way of undue or fraudulent preference of the creditors of such company, and shall be invalid accordingly."*

143. That cross-reference to preferences applying in individual bankruptcy brought in the test in s.111(1) of the Bankruptcy Law (1997 Revision):

> *"Every conveyance or transfer of property, or charge thereon, and every payment, obligation and judicial proceedings, made, incurred, taken or suffered by any person unable to pay his debts as they become due from his own moneys, in favour of any creditor or any person in trust for any creditor, with a view to giving such creditor a preference over the other creditors, shall, if a provisional order takes*

effect against the person making, taking, paying or suffering the same within six months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the Trustee."

144. Section 168 of the Law was modelled on the former preference regime which applied in England: s.168 was in substantially the same form as s.320 of the UK Companies Act 1948 which applied the law of fraudulent preferences in individual bankruptcy to corporate insolvency. As recognised in this jurisdiction in ***RMF Market Neutral Strategies (Master) Limited v DD Growth Premium 2X Fund***[79], authorities on the former English preference regime were relevant to the interpretation of s.168 of the Law.

145. The former preference regime applying in England was repealed.[80] As explained in the note in ***Sealy & Millman: Annotated Guide to the Insolvency Legislation 2015***[81], the object of the current preference regime (now contained in s.239 of the UK Insolvency Act 1986) is to make preference claims easier to prove, by avoiding the need for a liquidator to establish impropriety and that the company's "dominant intention" was to prefer one creditor over others. Under s.239(5) all that must be proved is that the company *"was influenced ... by a desire"* to bring about a preference.

So in England authorities on the former preference regime are not relevant to the interpretation of the current regime.[82]

---

[79] [2013] 2 CILR 361
[80] Following publication of the report of the Cork Committee: (1982) Cmnd 8558
[81] at page 258
[82] As held by Millet J in *Re MC Bacon* [1990] BCLC 324, at page 335 d-f, cited in *DD Growth* at paragraph 181

146. However, the Cayman legislature did not follow the UK in replacing its voidable preference regime. To an extent s.145 of the Law replicates the substance of former s.168. Accordingly, the English authorities on the former regime there continue to be relevant here.[83] Such authorities have been cited to me by both Mr. Lord and Mr. Chivers.

147. Prior to ***DD Growth*** there was limited Cayman authority on the relevant test to be applied to determine the question of preference. In ***Segoes Services Limited (in Liquidation) v Oeoka, Kaweski and Highland Consulting Limited***[84], in applying English case law, it was held in the circumstances there presented that it was difficult to resist the inference of fraudulent preference where the director of the insolvent company, being aware of the company's insolvency and the demands of other creditors not yet satisfied, preferred his wife as a creditor of the company. The decision was reached on the basis of the onus being on the liquidator to satisfy the court that the dominant intention of the debtor (e.g. the directors of the company) in allowing a particular creditor to be paid ahead of other creditors was to prefer that creditor. The English case law was helpfully reviewed by the Chief Justice in ***DD Growth*** from which he set out what appear to be the relevant principles to be applied.

148. He began by distilling from the authorities the proposition that the mere fact of preference, that is the consequence that one creditor gets paid ahead of others, is not on

---

[83] In *Brac Construction Limited v Broome* [2006] CILR, at paragraph 12, the Cayman Court of Appeal recognised the relevance of English authority on English legislation which was *in pari materia* to Cayman statutory provisions

[84] [2006] CILR Note 1

its own enough. On this point he referred to ***Re Kushler Limited***[85], a decision of the Court of Appeal, where Lord Greene MR and Goddard LJ in their respective judgments explained that the statute is directing the court to ascertain the state of mind of the payer in relation to the particular transaction or transactions. Lord Greene MR at page 252 said:

> *"The statute is directing the court to ascertain the state of mind of the payer in relation to a particular transaction. A state of mind is as much a fact as a state of digestion and the method of ascertaining it is by evidence and inference, and I can see nothing in the language of the section which justifies the view that the problem which the legislature sets the court is to be dealt with on any principles different from those commonly employed in drawing inferences of fact. It must, however, be remembered that the inference to be drawn is of something which has about it, at the least, a taint of dishonesty, and, in extreme cases, much more than a mere taint of dishonesty. The court is not in the habit of drawing inferences which involve dishonesty or something approaching dishonesty unless there are solid grounds for drawing them."*

149. Goddard LJ at page 255 put it as follows:

> *"The authorities establish that the mere fact that a preference is shown is not sufficient to enable the court to draw the inference that that preference was fraudulent. Before that inference can be drawn the court must be satisfied that the dominant motive of the debtor was to prefer the particular creditor."*

150. So the court can infer an intention to prefer from the circumstances of the case; there is no requirement that the intention can only be established by direct evidence. Nor is it necessary to show an intention to disturb the operation of the bankruptcy laws in the sense of intending to avoid an equal distribution of the company's assets to the

---

[85] [1943] 1 Ch 248

company's creditors. So, considerations as to whether the payer contemplated whether he would be able to pay his debts at some future time were irrelevant (in the analysis of the Chief Justice in ***DD Growth***) once the payer was aware that the company could not pay its debts as they fell due at the moment when he made the particular payment. Reference was made in this regard to ***Re Matthews Ltd***[86] another decision of the Court of Appeal. In that case Lawton LJ, at page 263, said as follows:

> *"What the court has to do is to construe the statute and it does not seem to us that the statute directs any inquiry whether the debtor's purpose was to disturb the operation of the bankruptcy law. The question under the statute is whether the payment was made 'with a view of' giving the creditor a preference over other creditors."*

151. Having then referred to the facts of that case and considered ***Kushler***, as well as another case, ***In re Sarflax Ltd***[87], Lawton LJ, at page 264, concluded as follows:

> *"The result, in our view, is that if the debtor, at the time when he makes the payment, genuinely believes that he can pay his debts as they fall due there can be no intention on his part to prefer; there is then no knowledge on his part of insufficiency of assets which could indicate any intention to prefer. But that is not the present case. Mr Matthews was aware that the company could not pay its debts as they arose. The preference that he gave the bank was that he deliberately paid it ahead of the other creditors and put on them the whole risk of insufficiency of assets ...the payments were fraudulent preferences"*

152. There is no basis, in the view of the Chief Justice, for reading this judgment in ***Matthews*** as saying that the very fact of making payment being aware of the state of insolvency was sufficient to make it a fraudulent preference, although on the particular facts it was found to be sufficient.

---

[86] [1982] 1 Ch 257,
[87] [1979] Ch 592, at 602

153. The Chief Justice was also of the opinion that it will be sometimes necessary (as it was in ***DD Growth***) to distinguish between the motive of the debtor being something other than an actual intention to prefer when making payment. He referred to ***Re Cutts***[88], where Lord Evershed MR (at page 734) observed

> *"...it is notorious that human beings are by no means single-minded, the intention to prefer, which must be proved, is the principal or dominant intention. There may also be a valid distinction ... between an intention to prefer and the reason for forming and executing that intention."*

154. In the view of the Chief Justice this distinction is not a mere subtlety. A creditor who is given a payment lawfully due to him cannot be required to surrender it back to the insolvent debtor's estate simply on the basis that the intention was to pay him what was due to him. It is the requisite intention to prefer him as *"the principal or dominant intention"* that makes the payment an undue or fraudulent preference.[89]

155. The Chief Justice (in ***DD Growth***) cited extensively the judgment of Lord Evershed MR in ***Re Cutts***, including, from page 734, the following:

> *" ...if a debtor deliberately selects for payment A in preference to all his other creditors, it cannot, to my mind, matter, in the absence of other relevant circumstances, whether A is the debtor's oldest friend, closest relative or best client. On the other hand, where a debtor, owing money in all directions, has also robbed his employer's till, he may, knowing himself to be insolvent, elect to reimburse the till in order that, when the crash comes, the damaging fact of his robbery may not be discovered. Or a debtor may elect to make a particular payment under pressure of some threat, or to obtain for himself some immediate and material benefit or to fulfil some particular obligation. In these cases the*

[88] [1956] 1 WLR 728
[89] DD Growth – paragraph 172, citing from the judgment of Lord Evershed MR in Re Cutts at page 734

reason for the payment affects, essentially, the intention in making it. In the instances given the intention, that is the real or dominant intention, will no longer be to 'prefer' (that is to pay, as it were, out of turn) but will be to avoid the detection of a criminal act; to relieve the threat; to get the benefit and postpone the evil day; or to satisfy the particular obligation. Though the question of pressure in some form or another has, in the reported cases, often been the crux of the matter, it is plain that an inference of intention to prefer may be displaced in many other ways than by showing that the debtor acted under pressure ... the real question before us is whether, upon the evidence and findings of the [judge], the true inference is intention to prefer or whether an inference of some other kind similar to those in the examples given is, at the least, not equally legitimate."

156. From his review of these authorities, the Chief Justice then helpfully summarised the principles (in paragraph 175 of his judgment) as follows:

"The onus is on the person alleging a fraudulent preference to prove to the satisfaction of the court that the payment impugned was made by the bankrupt with the intention of preferring the payee over his other creditors;

It is competent for the court to draw the inference of an intention to prefer from all the facts of the case;

The intention to prefer, which must be proved, must be the principal or dominant intention; there might, however, be a valid distinction between an intention to prefer and the motive for that intention."

157. The Chief Justice was there considering the old s.168 of the Law, but he went on specifically to note that the amended provision, s.145, has retained the words *"with a view of giving such creditor preference over the other creditors"* and with them, as he

put it, the "*dominant intention*" test ascribed by the common law.[90] It is appropriate, therefore, to regard the principles summarised by the Chief Justice as being applicable to the present case.

158. On the facts of the ***DD Growth*** case, the Chief Justice went on to find that the payments there were made in response to "unrelenting and escalating pressure". He examined the motive for the payments being made and decided that they were in response to such pressure, rather than there being any dominant intention to prefer the payee over the other creditors.

159. Mr. Lord, on behalf of the JoLs, as well as referring to the authorities mentioned above, has also cited other cases. ***In re Sarflax Ltd***[91], he submits, establishes that it is not necessary to prove that payments were made with an intent to defraud. Further, as is shown by ***In re Cohen***[92], the absence of any direct evidence from the debtor of an intention to prefer is by no means fatal and, indeed, in a lot of cases there is no such evidence, so an inference is drawn. In that case Warrington LJ, at page 538, said as follows:

> *"The payment being purely voluntary and the circumstances attending it being what I have described, I must and do infer that, for some reason or other of which we are ignorant, or for no definite reason in fact and for no other motive, he selected the particular creditors for preferential treatment, and therefore made the payment with a view to preferring them. I can find no rule of law which prevents me from drawing what seems to me to be an obvious inference."*

---

[90] Judgment - paragraph 182
[91] [1979] 2 Ch 592
[92] [1924] 2 Ch 515

160. In the same case, Sargant LJ referred to the *prima facie* intention to be gathered from the mere fact of preference which can be displaced, but, as he put it, at page 544:

> *"No case has been cited to us nor do I think any case can be found where a debtor in imminent expectation of bankruptcy has given a preference in fact to a particular creditor, which is apparently voluntary and is wholly unexplained, and where that preference in fact has been held good. To hold otherwise in this case would, in my judgment, be inconsistent with the whole course of decision in bankruptcy in such cases and would revolutionise the settled law in this respect."*

161. Mr. Lord also drew attention to ***Re MC Bacon Ltd***[93], in support of the proposition that intention is objective (unlike "desire" in s.239 of the English Act) and *"a man is taken to intend the necessary consequences of his actions"*[94]. Intention was also distinguished from motive in ***Re Cutts***[95]:

> *"As to the substitution of 'intent' for 'view', which is the word actually used in section 44(1), 'object' and 'motive' have sometimes been used as other equivalents for 'view', but I think 'intent' or 'intention' gives the meaning best"*

162. When considering the older authorities it is important to bear in mind, submitted Mr. Lord, the change from the earlier sections that were dealing with "fraudulent preference" (and incorporated the word "fraudulent" in the section) and s.145 which is merely talking about "voidable preference". So, it is contended, there is no requirement to establish any element or taint of dishonesty pursuant to s.145. And as for the

---

[93] [1990] BCLC 324 at page 335
[94] Per Millett J
[95] Jenkins LJ at page 740

references to the intention to prefer a particular creditor, there is no reason for this purpose, it is contended, why a creditor cannot be a member of a class.

163. Mr Lord also cited a Canadian case ***Re Titan Investments Limited Partnership***[96], a case, he said, bearing similarities to the present case, where the Court concluded in paragraph 27:

> *"There is no evidence to indicate why Compte chose to distribute funds to certain investors in Titan and not to others. The doctrine of pressure is not applicable ...While it is impossible to determine why Compte chose to pay certain investors, I find that he did intend to prefer those investors that he paid out. His deliberate decision to ignore the requests of certain investors for redemption of their funds and to instead pay full redemptions to investors who had made no such requests is evidence of his decision to prefer the Overpaid Investors."*

164. In the final analysis, in the case put forward on behalf of the JoLs, there is contended to be a key principle to be derived from the authorities. This is that whilst the necessary intention to prefer cannot be inferred simply from the fact that payments made at the time had the effect of preferring the recipient, if payment is made at a time when the person orchestrating the payment knows that the company is unable to pay its debts (and *a fortiori* if he knows that liquidation is likely or even inevitable) then, in the

---

[96] (2005) ABQB 637

absence of any other explanation for the payment (such as pressure), the necessary intention to prefer will be inferred objectively.

165. Mr. Chivers, on behalf of SEB, takes issue with this submission. He contends that it ignores the plain wording of s.145 which requires proof that payments were made *"with a view"* to giving a preference and does not embody the required dominant intention to prefer one creditor over another. As well as relying on various of the authorities already cited (which led to the principles laid down by the Chief Justice in ***DD Growth***) he also cited two additional cases.

166. The first was ***The Trustee of the Property of New, Prance & Garrard v Hunting***[97]. In that case Lord Esher MR, at page 27, said as follows:

> *"The doctrine with regard to fraudulent preference is well known. The question whether there has been a fraudulent preference depends, not upon the mere fact that there has been a preference, but also on the state of mind of the person who made it. It must be shewn, not only that he has preferred a creditor, but that he has fraudulently done so. It depends upon what was in his mind. Whether it is called 'intention', or 'view', or 'object' does not appear to me to matter much. The question is whether in fact he had the intention to prefer certain creditors. It has been argued that the debtor must be taken to have intended the natural consequences of his act. I do not think that is true for this purpose. I think one must find out what he really did intend."*

167. The second additional case was ***Peat v Gresham Trust Limited***[98]. Lord Tomlin, at page 262, had this to say:

> *"In my opinion in these cases the onus is on those who claim to avoid the transaction to establish what the debtor really intended, and that the real intention was to prefer. The onus is only discharged when the court upon a review of all the circumstances is satisfied that the dominant intention to prefer was present. That may be a matter of direct evidence, but where there is not direct evidence and*

[97] [1897] 2 QB 19
[98] [1934] 2 AC 252

there is room for more than one explanation it is not enough to say there being no direct evidence the intent to prefer must be inferred. In my opinion there is nothing in the decision in In re Cohen to justify the doctrine for which the appellant contends [that an intent to prefer must be inferred]."

168. Mr Chivers also draws support from the cases already mentioned (and referred to by the Chief Justice in ***DD Growth***). In ***Kushler*** there is the reference to the court having to ascertain the state of mind of the payer[99]. In ***Cutts*** attention was drawn to an earlier part of the judgment of Lord Evershed MR (previously cited) where, at page 733, in referring to an inference which may be drawn as to the state of mind of the payer, it was said:

"But the inference should not be drawn, having regard to the situation of the onus of proof, unless such inference is the true and proper inference from the facts proved. Thus, it will not be drawn, if the inference from the facts is equivocal and, in particular, it will not be drawn from the mere circumstance that the creditor paid was in fact 'preferred', in the sense that he was paid when other creditors were not paid and could not be paid."

169. It was also submitted by Mr. Chivers that although it was suggested that ***Re MC Bacon*** indicates that intention can be determined objectively, state of mind for the purpose of dominant intention must be subjective.

170. In the end all this analysis leads back to ***DD Growth***. Applying those principles, it is plainly necessary, in my view, for the JoLs to prove to the satisfaction of the Court that the redemption payments were made with the intention of preferring SEB over other creditors. It is competent for the Court to draw the inference of an intention to prefer from all the facts of the case. However, the intention to prefer, which must be proved,

[99] Page 252- where mention is also made of "a taint of dishonesty"; also at page 255 there is the reference to the court having to be satisfied of the dominant motive to prefer a particular creditor

must be the principal or dominant intention. There is no mention, in the final analysis by the Chief Justice, of there being a need for evidence of dishonesty, which is understandable in that the relevant statutory provision has moved away from fraudulent preference to voidable preference. But in reaching his conclusions the Chief Justice did appear to accept that the dominant intention must be to prefer a particular creditor, although I see no reason why that could not be a class of particular creditors.

171. The principle of preferment of a particular creditor was actually expressed (in ***Kushler***[100]) in terms of the need for there to be a *"dominant motive"* to this end. And, indeed, in relation to principal or dominant intention, the Chief Justice acknowledged that there might be a valid distinction between an intention to prefer and the motive for that intention. This is because, as was made clear in that case, it might be necessary in particular circumstances to examine motive to determine whether a payment has been made as a result of something other than dominant intention to prefer, such as pressure being brought to bear.

172. The critical point of difference between the parties is whether payment of the redeemers in the knowledge that the Company was unable to pay its debts is of itself sufficient (in the absence of any other explanation such as pressure) to infer objectively the necessary intention of preference or whether there must be proof of something more, specifically a subjective dominant intention to prefer particular creditors over others.

---

[100] Page 255

173. Whether this difference needs to be resolved, in this case at least, depends upon the findings to be made in relation to the SEB Redemption Payments.

The First SEB Redemption Payment

174. On the basis that I find, as indeed I do, that the redemption payments were all made in the knowledge on the part of Magnus Peterson that the Company was unable to pay its debts, on the JoLs' case it is to be inferred that there was the necessary intention of preference.

175. However, the matter does not rest there. The JoLs also put forward a case of specific intention to prefer. It is submitted that the First SEB Redemption Payment was plainly made with a view to preferring SEB as one of the specified Swedish Redeemers. The Swedish Redeemers were paid ahead of the others and before even the expiry of the 30- day grace period in the OM. They were paid in full 13 days before any of the other investors who had redeemed on the same day were paid anything and in circumstances where the first payment to those other investors represented only 25 per cent of their entitlement.

The intention, it is said, appears in the words of the email from Magnus Peterson directing the payment.[101] Magnus Peterson intended them to be paid ahead of anyone else because he thought that they had, or would, switch into the Swedish fund referred to above.

[101] Email of 17 December 2008 – referred to and set out above

176. SEB disputes that there was any such intention. Reliance is placed on the evidence of Mr. Hedman of SEB to the effect that SEB never subscribed for shares in the Swedish fund, whether on behalf of Catella, HQ Solid or anyone else, and nor did SEB express an interest in a possible investment in such fund on behalf of these clients or any other clients. Mr Hedman has also given evidence that neither Catella nor HQ Solid invested in the fund themselves.

177. I accept the evidence of Mr Hedman. However, the fact that neither SEB, nor Catella or HQ Solid, actually invested in the Swedish fund, is, in my view, irrelevant. Individual unit holders may have done so, or Magnus Peterson may simply have been mistaken in his belief that SEB was among the Swedish investors through whom redemptions could be channelled for re-investment. But any such mistake cannot affect his intention in directing the First SEB Redemption Payment to be made.

178. The evidence in relation to this First SEB Redemption Payment has already been referred to above. I see no reason to reject the email as evidence of the intention to pay the Swedish Redeemers. The authenticity of it has been accepted and the instruction in it is clear and was acted upon. I acknowledge the point that Magnus Peterson has not given evidence and there has been no opportunity for SEB to cross-examine him on the email. It is also complained that there is nothing in the evidence of the JoLs to indicate that they investigated the circumstances surrounding the making of the payment.

Making due allowance for these points, I nevertheless see no reason to doubt the evidence. There is nothing to suggest that it is tainted by Magnus Peterson's fraud. It must stand as the only evidence, indeed, as to the reason for the early payment of the Swedish Redeemers.

179. Accordingly, I find on the evidence that there was an intention to pay the Swedish Redeemers on the basis that they were investors, or potential investors, in the Swedish fund. The fact that there may have been a mistake about this matters not. What does matter is the subjective intention of Magnus Peterson in acting, as I have found, as the Company's controlling mind. The intention appears to have been a principal or dominant intention to prefer a particular class of creditors. This resulted in a preference in fact of a particular creditor (as in ***Re Cohen***).

180. Therefore, I am satisfied that, on an application of the legal principles referred to, the First SEB Redemption Payment was made with a view to giving a preference within the meaning of s.145.

<u>The Second SEB Redemption Payment</u>

181. The question which has occurred to me is whether the intention in relation to the first payment continued beyond then. There is evidence that it did because of the email of 20th January 2009, when Magnus Peterson selected for payment three more Swedish investors who were said to have switched into the Swedish fund. This was actually after the Second SEB Redemption Payment. It is also right to note that after the First SEB Redemption Payment (which resulted in payment in full to SEB as nominee for

Catella) there was no specific mention of paying SEB as nominee for HQ Solid. However, nor is there anything to suggest that any distinction was made in the mind of Magnus Peterson as to the different capacities in which SEB was acting. The evidence rather indicates that there was a continuing general intention on his part to make preferential payments to the various Swedish Redeemers (SEB included) as a class thought, rightly or wrongly, to be re-investors in the Swedish fund.

182. The matter does not rest there. There is also the point that the Second SEB Redemption Payment appears to have been made with the intention of complying with the policy set out in the 31st December 2008 letter. That policy arguably had the effect of reinforcing the decision which had been made to pay SEB, resulting in a preference over other creditors. Thus it appears that in the absence of any other explanation for the Second SEB Redemption Payment (and there is none) that it was made with a view to prefer SEB.

183. So it is not right, as SEB submits, that the case in relation to the Second SEB Redemption Payment rests only upon the effect of preference rather than a dominant intention to prefer.

The Third SEB Redemption Payment

184. Nor is it right that the Third SEB Redemption Payment rests solely upon the effect of preference. It can be taken to have been paid pursuant to what I have found to be a continuing general intention to make preferential payments to the particular Swedish Redeemers as a class.

185. It may well be, as pointed out by Mr. Chivers, by reference to the relevant schedule previously referred to[102], that in the meantime various other redeemers had in fact been paid ahead of SEB. The reasons for this are not presently apparent and may well have to be investigated in the context of any claims pursued in relation to other preferences of these particular redeemers. But none of this detracts from the intention which there appears to have been to make the preferential payment to SEB.

186. Moreover, if an inference is to be drawn, there appears to be nothing here to displace the "inference of intention" in the analysis of Lord Evershed MR in ***Re Cutts***[103]. The same can be said of the Second SEB Redemption Payment. Additionally, it appears from the Board Minutes of the 22nd February 2009[104] (referred to above) that the payment may have been made pursuant to an intentional policy to prefer smaller investors over larger investors. Again this may have had the effect of reinforcing the decision which had been taken to pay SEB. The policy was one which could lead to the recipients being preferred over the other investors who had redeemed but were not paid in full or were not paid at all.

Summary

187. I am satisfied that each of the SEB redemption payments was made with the principal or dominant intention of preferring SEB as a member of a particular class of creditors, the Swedish Redeemers. Here there was not mere selection, but the added dimension of conscious decision making resulting in particular selection for payment. This was

[102] Exhibit IS-1 page 1226
[103] Page 734 of the Report
[104] Exhibit IS-1 pages 829-831

clearly the case, in my view, in relation to the First SEB Redemption Payment. It is less clear in relation to the Second and Third SEB Redemption Payments, although, on balance, I think that it is reasonable to draw the inference that these further payments were made as part of a continuing general intention to make preferential payments to the Swedish Redeemers. Furthermore, the intention in this regard appears to have been reinforced by particular decision making in relation to the payments.

188. As indicated, I also find that the payments were made in the knowledge on the part of Magnus Peterson that the Company was unable to pay its debts. However, having regard to my conclusion as to the specific intention to prefer SEB, it is not necessary for me to decide whether, absent such specific intention, the required intention of preference can be inferred objectively from the fact of such payments being made when the Company was commercially insolvent. This may well have to be resolved if claims are pursued against other redeemers. In such cases it can be anticipated that there will have to be weighed against such inference any other particular reasons in those individual cases why payments were made, such as pressure being brought to bear (as in ***DD Growth***). It may also be necessary to consider whether, perhaps, the evidence is equivocal.

Balanced against any inference of preference, it may have to be considered whether payments were simply made at random, or perhaps to play for time to keep the Company going, in the hope of Magnus Peterson to avoid detection of his fraud for as long as possible.

189. However, in this particular case, for the reasons given, I conclude that the First, Second and Third SEB Redemption Payments were each made with a view to giving a preference within the meaning of s.145.

A PREFERENCE OVER THE OTHER CREDITORS

190. This can be taken much more shortly.

191. A payment is a preference if it amounts to "a preference over the other creditors". Creditor is not defined for the purpose of s.145. The question has been raised whether for this purpose the other creditors have to be current creditors or whether, as the JoLs contend, there can be included all creditors (actual, future or contingent) who would be entitled in due course to prove in the insolvency.

192. Mr. Lord, on behalf of the JoLs, submits that the meaning of "other creditors" must be informed by what s.145 is intended to achieve. He contends that s.145 only arises in the event of the insolvency of a company and is intended to preserve the assets of the company for the benefit of all its creditors, to be treated equally. The view (in the words "with a view") must be, he says, be to prefer over the other creditors who could prove in a liquidation. Section 139(1) of the Law provides that:

> *"All debts payable on a contingency and all claims against the company whether present, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company".*

193. It is submitted, therefore, that all those investors who had applied to redeem their shares in the Company at the date of each of the SEB Redemption Payments (regardless of whether or not their Redemption Day had passed) were "other creditors"

for the purposes of s.145. So too were other investors who could be anticipated to redeem in the future.

194. Mr. Chivers, on behalf of SEB, disputes the analysis. He submits that paying creditors then due cannot possibly in law be a preference over creditors not yet due. This he says is the subject of authority. It was made clear by the Court of Appeal in ***Re Matthews Ltd***[105] when considering the English provision (s.44) and saying:

> *"It seems to us that, as a matter of language, the section is directed solely to the time when the payment is made. The section is contemplating that the inability to pay debts as they arise co-exists with the payment which is in question ...We do not think that the section, in this respect, is looking to future events. In particular, when the prerequisite for the operation of the section is that, at the time of the payment, the debtor should be unable to pay his debts as they arise, we think it unlikely that the draftsman would, without any express words, introduce considerations of whether the debtor will be able to pay his debts at some future time."*

195. Later redeemers could have no complaints, observes Mr. Chivers, if SEB and other shareholders redeemed earlier and were therefore paid earlier. To paraphrase Lord Evershed MR in ***Re Cutts*** the Company would not then have paid *"out of turn"*.

196. Having considered these submissions I have some doubt whether investors who have not yet redeemed can be included as "other creditors" for the purpose of the section. However, having regard to the determination I have already made on the question of solvency, that redeeming shareholders became creditors of the Company from the

[105] At page 264

Valuation Point on the Redemption Day[106], it is not necessary for me to decide the point.

197. Restricting "other creditors" to creditors whose debts existed at the date of each payment to SEB, the position is as follows:

i. The First SEB Redemption Payment was a preference over the other investors who had redeemed on 1st December 2008 who received no payment on that date.

ii. The Second SEB Redemption Payment was a preference over two remaining investors who had redeemed on 1st December 2008 (but who had not been paid their 25 per cent) and all the investors who had redeemed on 2nd January 2009.

iii. Third SEB Redemption Payment was a preference over those investors who had redeemed on 1st December 2008, but had not been paid in full, and all the investors who had redeemed on 2nd January 2009 and 2nd February 2009.

198. Accordingly, I am satisfied that there was a preference over the other creditors for the purposes of s.145.

199. This means that the JoLs have met the requirements of s.145 for the claims made in these proceedings, subject only to considering the particular defences raised by SEB.

DEFENCES OF SEB

[106] In accordance with the decision in Culross Global SPC Limited v Strategic Turnaround Master Partnership Limited

200. On the assumption that (contrary to SEB's primary case) the payments in this case were preferential, SEB relies on defences said to arise from consequences of a voidable preference as well as illegality and public policy.

Consequences of a voidable preference

201. SEB relies by way of defence on the fact that it was never enriched by receipt of the redemption payments. Alternatively, it contends that it changed its position.

202. As to these defences, the point is made that s.145 says nothing about the consequences if a payment is proved to be preferential; all it provides is that the payment is *"invalid"* if made within six months of the commencement of the company's liquidation. In particular, it is submitted, s.145 does not provide any statutory remedy enabling the Court to reverse a preferential transaction. So, it is said, in the absence of any statutory remedy available to them, the JoLs may only recover a payment under s.145 by seeking restitution based on principles of unjust enrichment. Various cases were cited in support of this proposition.

203. In ***Rose v AIB Group (UK) plc***[107], the court had to consider whether to make a validation order under s.127 of the Insolvency Act 1986, which does not spell out the appropriate remedy. It was accepted that whether a payment should be validated was separate from the issue of whether the creditor who had received the payment had changed his position. And it was accepted that in *"cases where payments can be*

[107] [2003] 1 WLR 2791

treated as void or ultra vires, it is commonplace that restitution is available subject to restitutionary defences."[108]

204. The next case cited, ***4Eng Limited v Roger Harper and others***[109], concerned claims brought under s.423 of the Insolvency Act 1986 to set aside transactions defrauding creditors. There the court was prepared to consider, by way of example, that it would be inappropriate to make an order requiring the transferee to pay back what he had received if it would be unfair to do so.[110] This shows, submits Mr. Chivers, that the statutory discretion under the section involves balancing the interests of the unpaid creditors and the innocent recipient of the moneys and that there is no principled reason why this should not also apply to a claim under s.145.

205. In Mr Chivers' submission the recovery claim is governed by common law and he went on to contend that there are no public policy grounds for ruling out common law defences. In support of this contention he cited the recent English case ***Charles Terence Estates Ltd v The Cornwall Council***[111]. In that case leases entered into by local councils were held to be void on the grounds that councils had failed to act in accordance with their fiduciary duties to council taxpayers. The councils, therefore,

[108] Paragraph 41
[109] [2009] EWHC 2633
[110] Judgment – paragraph 14
[111] [2011] EWHC 2542 at paragraphs 95 to 100

had claims for repayment of rent. Notwithstanding there being public policy reasons why the rental payments were void, the court allowed the landlords' common law defence of change position.

206. To allow SEB a common law defence, it is submitted, does not undermine the policy of treating unsecured creditors of the Company equally because having paid away the redemption proceeds which it received to Catella and HQ Solid, SEB is no better off than it was before it received the payment of such proceeds. And, it is observed, if SEB is required to repay redemption proceeds, it will be worse off than unpaid redeeming shareholders in the Company. The claim under s.145, it is submitted, is a claim in unjust enrichment and it must fail because SEB never received any enrichment.

207. Mr Chivers referred back in this context to the ***Titan Investments*** case, mentioned above in relation to the issue of preference. He did so because the JoLs rely on this Canadian case as also establishing that a change of position defence is not available in relation to a preference claim. The point he makes is that this case did not review the English position on unjust enrichment and change of position.

208. As far as change of position is concerned, the alternative argument is that SEB changed its position in good faith, in reliance on the receipt of the redemption proceeds, which gives rise to a defence. He submits that change of position is a recognised defence to claims brought in unjust enrichment[112], and also to claims brought in insolvency proceedings, as can be seen from the ***Rose*** and ***4Eng*** cases referred to above.

---

[112] See Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548

209. Further it is contended that a defence of change of position is only denied if a defendant is guilty of changing his position in bad faith. In the case of ***Niru Battery Manufacturing Company v Milestone Trading Limited***[113] it was held that bad faith in this context means *"a failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty as well as dishonesty itself."*[114] This, however, was not an insolvency case, nor one of unjust enrichment.

210. There is no doubt that SEB paid away the redemption proceeds. Having received the First SEB Redemption Payment, the proceeds were credited to Catella's cash account. Similarly, having received the Second and Third SEB Redemption Payments the sums were promptly credited to HQ Solid's cash account. However, I do not accept the submissions of Mr Chivers that the principle of unjust enrichment or change of position gives rise to any defence to a claim under s.145 of the Law.

211. This is because these common law defences are not available, in my view, to a statutory claim under s.145 of the Law. None of the cases cited by Mr. Chivers is relevant to the particular position of a claim under s.145, nor are they of assistance by way of analogy. The specific effect of a payment falling within s145 is that it is *"invalid"* and the effect of this can only sensibly mean, in my view, that the recipient has to pay back an equivalent sum of money to that received. It is clear to me that this

[113] [2002] EWHC 1425. Affirmed by the Court of Appeal in [2004] QB 985
[114] Paragraph 135 of the judgment of Moore-Bick J

is what the section is intended to achieve. Furthermore, the important point to make is that there is no discretion in the Court to make any other order.

212. Mr. Lord submits, and I accept, the absence of any discretion built into the section reflects the policy behind it of restoring value to the company for the benefit of its creditors which overrides the common law rules on unjust enrichment and change of position as between parties to a private transaction.[115] The cause of action derives from the section itself: pursuant to statute the payment is invalid, therefore, the recipient is obliged to repay what he received. There is no question of having to consider unjust enrichment, rather the recipient has received something he should not have received and is obliged to pay it back.

213. The position may arguably be different in England where the remedies available pursuant to the preference provisions are much wider, but the court is given a discretion. Section 239(3) of the Insolvency Act 1986 provides:

> *"Subject as follows, the court shall, on such an application, makes such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference."*

[115] There is academic support for this from Professor Goode: Goode on Commercial Law 4th ed paragraph 13-147

214. Even where the court is granted a discretion it is doubtful whether common law defences should be entertained to bypass the remedial relief provide by statute.[116] However, the plain point here is that there is no discretion pursuant to s.145. So no balancing exercise (of the kind referred to by Mr Chivers in relation to English cases) is required.

215. Mr Lord submits that s.145 is not concerned with the resolution of claims between private parties but with the protection of creditors in a winding up and it has the specific policy of protecting the value of the company's assets. Change of position by a creditor who has been preferred does nothing to mitigate the loss suffered by the general body of creditors as a result of the invalid transaction. To allow the preferred creditor to rely on change of position and keep the proceeds of an invalid payment would give that creditor an unfair advantage over the general body of creditors and defeat the purpose of the section and its clearly stated effect of rendering any payment invalid.

216. It is further submitted by Mr Lord that, to allow the defence contended for by SEB, additional words would have to be read into the section to provide that the payment is "invalid unless the recipient has acted in reliance on the payment in such a way as to change his position so that it not considered just that the payment should be invalid", or some such words to this effect, which is clearly at odds with the section as drafted and the clear policy behind it. I accept this submission.

---

[116] For the reasons explained by Professor Goode in his essay entitled "The Avoidance of Transactions in Insolvency Proceedings and Restitutionary Defences (2006)

217. As previously referred to, reliance is also placed by Mr. Lord on the Canadian ***Titan Investments*** case. It may not, as Mr. Chivers has observed, have reviewed the English position on unjust enrichment and change of position. However, what is relevant to note in that case is that a change of position defence was held not to be available in relation to a preference claim in respect of a payment which was thereby void.

218. In conclusion, in my view, as a matter of law, the defences founded upon the principles of unjust enrichment and change-of-position are not available to SEB.

219. Even if, for any reason, this were not the case, I am also of the view that SEB has not made out any defence of change of position on the facts.

220. Properly analysed this can be seen to be because SEB was acting as a nominee. As soon as SEB received the redemption payments it was obliged to pay over the money to Catella and HQ Solid respectively. But this did not involve any change of position. It was rather the consequence of the position of being a nominee. Furthermore, SEB cannot shelter behind being a nominee. SEB was the registered legal owner of the shares and has to accept the consequences of this. SEB is the party who was entitled to redeem the shares, but is also then the party with the corresponding liability to refund the money if the payments were invalid.

221. Furthermore, the alleged change of position has not in fact been made out. The relevant pleading is in paragraph 22(3), (4) and (5) of the Re-Amended Defence, the material parts of which are as follows:

> *"In January 2014, the Catella Stiftelsefond managed by Catella was liquidated and dissolved, all the surplus assets of that fund having been distributed to*

unitholders. There is accordingly no prospect of SEB recovering from that fund the redemption proceeds which SEB Credited to it.

In 2009, the management of the HQ Solid mutual fund originally managed by HQ was transferred to another fund management company, Optimised Portfolio Management Stockholm AB and the fund re-named 'OPM Solid'. This fund was then merged with another fund known as 'OPM Hedge'. In 2011, the OPM Hedge fund was merged with another fund 'OPM Omega'.

... SEB avers that there is no realistic prospect of it being able to bring a successful claim in the Swedish courts to recover from the OPM Omega fund the redemption proceeds paid by SEB to the HQ Solid fund."

222. SEB adduced expert evidence on Swedish law as to these matters in a report by a Mr Alf-Peter Svensson who attended the trial and was cross-examined. His evidence is that SEB cannot recover the proceeds and his report can be summarised as follows:

i. As a matter of Swedish law, a mutual fund has no legal personality of its own. SEB cannot therefore sue a fund.

ii. A fund's assets are managed by a fund management company and are entrusted to a depositary, such as SEB, for safekeeping. A fund's assets are jointly owned by unit holders, who have rights of redemption on demand and rights to dividends from underlying instruments held by the fund. They are, however, not responsible for any obligations incurred on behalf of the fund.

iii. Under the terms of the depositary agreements entered into by SEB with respect to the Catella and HQ Solid funds, SEB had rights of pledge and indemnity, the effect of which gave SEB the right to withhold redemption proceeds that it received in respect of Participating Shares in the Company in order to protect itself against claims from third parties.

iv. A fund management company is not liable to pay damages for breaches of any agreements entered into by it on behalf of a fund, including any depositary agreement entered into. Instead, in the event that a fund management company fails to perform any such agreements, the consequences are regulatory: the Swedish Financial Supervisory Authority ("SFSA") could impose fines or withdraw the fund management company's licence.

v. In the case of Catella, SEB's rights of pledge and indemnity are of no value, given that Catella has been liquidated and dissolved. There are, therefore, no assets against which SEB could have recourse.

vi. In the case of HQ Solid, if SEB sued OPMS, the manager of the merged OPM Omega fund, under the terms of its pledge and indemnity, OPMS would deny the claim on the ground of legal uncertainty. Further, the SFSA would not intervene.

223. However, it appears that neither the liquidation and dissolution of Catella, nor the mergers that took place in relation to HQ Solid, have impacted upon SEB's ability to recover the SEB Redemption Payments from the Swedish funds, their management companies or the unit holders in those Swedish funds. This is because it emerged from Mr. Svensson's evidence that, in his opinion, SEB never had the ability to do so. As far as the indemnities and the pledges are concerned, he accepted in cross-examination that they were in effect "worthless".

224. Further, as far as the liquidation of Catella is concerned, that did not occur until September 2013, by which time all the assets had already been distributed. By that time SEB was already on notice of the potential claims against it, having been

informed by email of the AGM of the Company that took place on 16th May 2013, and having been sent the Liquidators' Fifth Report.[117]

225. Mr. Hedman of SEB, in his evidence, confirmed that SEB's depositary and custodian business had received the email. He explained that SEB had procedures in place for escalating to management level any important notices received at the particular email address, although apparently it not happen with this email.

226. According to Mr. Hedman, SEB did not, however, receive an earlier letter from the JoLs, dated 24th June 2011, referring to possible preference claims, which (letter) was emailed to SEB S.A. Luxembourg, an entirely separate legal entity. Nevertheless, there was no indication in his evidence whether SEB would have done anything had it been informed of the claims earlier. Mr. Hedman could not say what happened to the moneys for Catella or whether SEB held any assets on behalf of Catella that it might have sought to hold onto pursuant to the pledge. But this is something that Mr Svensson, in any event, said SEB would not be entitled to do.

227. As far as the mergers are concerned, Mr. Svensson accepted that any of the "worthless" rights purportedly granted by the indemnity and pledge would still have been available to SEB following the merger. And, in any event, Mr. Hedman accepted that new depositary and custody account agreements would have been obtained by SEB. However, Mr. Svensson expressed the opinion that if any proceedings were brought against the manager of the merged funds (which, in any event, he viewed as contrary to the "main rule" and not open to SEB) they would not succeed because of

[117] Mr Stokoe – Third witness statement – paragraph 8

the change of membership of the fund. He also accepted, though, that such position would be just as likely even absent any merger because the membership of the fund would have changed anyway as existing unit holders redeemed and new unit holders subscribed.

228. Finally, in relation to both the liquidation and merger, Mr Svensson accepted that neither would have affected any claim that SEB could try to bring against the management companies, albeit in his opinion any such proceedings would never be successful anyway.

229. Accordingly, in my view, even if a change of position defence were available as a matter of law, I find that it has not here been established by SEB on the facts.

Illegality and Public Policy

230. The final defence of SEB is that if the Court determines that Magnus Peterson was the controlling mind of the Company, such that his knowledge and intentions must be imputed to it, then, it is submitted, the JoLs' claims fail on illegality and public policy grounds. It has been found, as set out above, that Magnus Peterson was the Company's controlling mind in the payment of the relevant redemptions. The question for determination is whether this gives rise to any defence.

231. For the purpose of this defence, reliance is placed on the fundamental principle that a court will not lend its aid to a litigant whose cause of action is founded on an illegal

act.[118] In the analysis put forward by Mr Chivers, the JoLs sue to remedy a wrong they say was done to the redeeming creditors who were not paid *pari passu* with SEB, but payment was on the basis of a fraudulent valuation.

232. This case, it is contended, turns upon an allegation that those other creditors should also have received the benefit of the fraudulent NAV and were entitled to a *pari passu* share of the pot of money which was, by fraud, removed from the members as a whole. On this basis it is submitted to be repugnant to public policy to found an action on an allegation that the proceeds of fraud should have been divided *pari passu* between the beneficiaries of the fraud.

233. A further point made on behalf of SEB is that the JoLs cannot sue in right of other creditors whose claims are based on the fraudulent NAV. It is contended that if the proceeds of the fraud were to be divided between the victims of the fraud, rather than the would-be beneficiaries of the fraud, the public policy considerations might be different. On the footing that the NAV is not set aside by virtue of the fraud, then, it is submitted, there is no evidence that it is members, rather than the unpaid redeeming creditors, who will benefit.

234. Accordingly, it is submitted, in defence that the preference claims against SEB are founded on Magnus Peterson's fraud; that the JoLs rely on the published NAV in order to establish the extent of the Company's liabilities and the status of SEB and other redeeming shareholders as creditors, and so rely on Magnus Peterson's dishonesty in overstating the NAV as part of their preference claims under s.145.

---

[118] Holman v Johnson (1775) 1 Cowp. 341 at 343, cited in Tinsley v Milligan [1994] 1 AC 340 at 354

235. This defence is an extra dimension or adjunct to the fraudulent NAV issue raised by SEB on the issue of solvency. To an extent, therefore, the analysis of that issue (as set out above) is also relevant to the determination which must be made as to this defence.

236. As set out in relation to the solvency issue, whilst it is the JoLs' case that Magnus Peterson's intention is the relevant intention for the purpose of the SEB Redemption Payments (because he was the person who directed them to be made) it does not follow that his knowledge of the fraudulent nature of the Swaps is to be imputed to the Company for the purpose of the redemption contracts.

237. There is the authority of the Supreme Court that it is perfectly possible for a company to rely on attribution of a person's knowledge for one purpose whilst disclaiming attribution of that same person's knowledge for another purpose.[119]

238. I have accepted this analysis and I have accepted that there is no reason to impute Magnus Peterson's knowledge of his fraud (which was a fraud on the Company and its shareholders) to the Company for the purpose of the redemption contracts. The fraud, as has been observed, on proper examination, was not in the calculation of the NAV (carried out by PNC) but in the fraudulent valuation of the Swaps provided by Magnus Peterson.

239. Mr. Lord submits that the JoLs do not rely on Magnus Peterson's fraud to found their claim. They rely rather on the redemption contracts which in this case gave rise to a legal liability which is admitted by SEB.[120]

[119] The case of Jetiva and the analysis of Lord Mance referred to above

240. There is the further point that even if (contrary to the above) Magnus Peterson's knowledge is to be imputed to the Company for the purpose of the redemption contracts, it does not necessarily follow that those contracts are vitiated by fraud. There is legal analysis of this as set out above. But it seems in any event to be accepted here that the redemption contracts were not entered into for an illegal purpose. It therefore follows that the claims to make recovery of sums paid pursuant to those redemption contracts do not depend on any illegality.

241. As I have already found in relation to solvency, the claims in respect of the redemptions in this case have to be resolved by reference to the NAV which gave rise to their payment. Just as the NAV must stand for the purpose of determining who were creditors, so it must also stand for recovery from any such creditors who were paid by reference to that NAV, but whose payments were a preference over other creditors within the meaning of s.145. In other words, just as the NAV was the measure for the amount found to have been paid out of turn, so it must stand for the purpose of the recovery of such money.

242. Mr. Lord also submits that the JoLs are not, as has been suggested on behalf of SEB, seeking to divide the proceeds of a fraud equally between creditors who are beneficiaries of the fraud. The proceeds of the fraud, as such, can be regarded as having gone to Magnus Peterson, through WCUK. He contends that what the JoLs are doing rather is seeking to ensure that all creditors should share equally on the proper basis of *pari passu* distribution.

---

[120] Paragraph 17(1) of the Re-Amended Defence, as referred to above in relation to the fraudulent NAV issue on solvency

243. He submits that the comments in the ***Titan Investments*** case demonstrate that the public policy points only in one direction in a case such as the present, namely that a preferred creditor should repay sums received so that all creditors can be treated equally. I accept these submissions.

244. Having regard to the findings which I have made, I reject the defence that the claims here fail on illegality or public policy grounds. There is a compelling reason why the NAV must stand to allow recovery of redemption payments made in accordance with it which are found to be invalid. The public policy, in my view, is very much in support of such recovery, rather than against it.

245. In the final analysis, in rejecting the defences, I would say this about them. If a creditor is paid out of turn, such that there is a preference within the meaning of s.145(1) of the Law, then the expected consequence will be a liability to make repayment.

CONCLUSION

246. In all the circumstances, and on the basis of my findings on the issues, I have come to the conclusion that each of the SEB Redemption Payments is invalid as a preference over the other creditors of the Company pursuant to s.145(1) of the Law. I make the declaration sought to such effect. Further I make an order that the SEB repay the following sums to the JoLs:

i. US$1,096,903.58;

ii. US$1,780,214.49; and

iii. US$5,340,643.47.

247. I am inclined to the view that there should be some allowance for interest on such sums pursuant to s.34 of the Judicature Law (2013 Revision). It seems to me also that costs should follow the event. I shall leave it to the parties to seek to agree these ancillary matters. If they are not able to do so, there will be liberty to apply to resolve any issues on the terms of the order.

248. The result in this case, it seems to me, achieves the objective of s.145 of the Law and also has the consequence of requiring repayment of money which on the Defendant's case (because of the misstated NAV) it should never have been paid at all.

Dated this the 4th day of December 2015

The Honourable Justice Nigel Clifford Q.C.
Judge of the Grand Court