Claim No: D30MA417

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS IN MANCHESTER**
**INSOLVENCY AND COMPANIES LIST**

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Friday, 25 May 2018
**Neutral Citation Number: [2018] EWHC 3868 (Ch)**

BEFORE:

**HIS HONOUR JUDGE PELLING QC**
**(Sitting as a Judge of the High Court)**

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BETWEEN:

**(1) VARDEN NUTTALL LIMITED (In Administration)**
**(acting by its Joint Administrators)**

**(2) DAVID MICHAEL CLEMENTS, PAUL ATKINSON and KENNETH WEBSTER MARLAND**
**(acting as Supervisors of the Individual Voluntary Arrangements of Riane Langton and others)**

Claimants

-and-

**(1) PHILIP NUTTALL**
**(2) DARREN VARDEN**

Defendants

- - - - - -

**HUGO GROVES (i**nstructed by Walker Morris LLP, Kings Court, 12 King Street, Leeds, LS1 2HL) appeared on behalf of the Claimants

**DAVID UFF** (instructed via Direct Access) appeared on behalf of the First Defendant

**JUDGMENT**
**(Approved)**

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Friday, 25 May 2018

JUDGE PELLING QC:

**Introduction**

1. This is the trial of a claim brought using the Part 7 procedure by (1) the administrators of Varden Nuttall Limited (in administration) ("the company") against Mr Varden and Mr Nuttall in their capacity as directors of the company and (2) by the current supervisors of a large number of individual voluntary arrangements ("IVAs") against Mr Nuttall in his capacity in his capacity as a former supervisor of some of those arrangements.

2. The business of the company was to offer the service of licensed insolvency practitioners, mostly as nominees under proposed IVAs and then as supervisors under IVAs. The claim arises from the fact that in August 2015 a deficiency was discovered on the company's trust accounts, where all funds belonging to the various estates being administered by licensed insolvency practitioners employed by the company were pooled. There is a dispute as to the amount of that deficiency, but Mr Nuttall accepts that it was in excess of £1.3 million.

3. Further investigation by the claimants in these proceedings have led to the discovery of what are alleged to be frauds on the estates managed by the licensed insolvency practitioners employed by the company resulting from allegedly fraudulent arrangements made by or with the approval of Mr Nuttall and Mr Varden with third party service providers in allegedly dishonest breach of the duties owed by Mr Nuttall in his capacity as a licensed insolvency practitioner and by him and Mr Varden ion their capacity as directors of the company.

4. Mr Varden did not appear and was not represented at the trial, having indicated an intention not to defend the proceedings. The trial proceeded therefore only in relation to the claims against Mr Nuttall. The trial took place between 10 - 11, 14 - 16 and 18 May 2018. I heard oral evidence called on behalf of the claimants from: (1) Miss Anel Andrew, a licensed insolvency practitioner employed by the company from 5 May 2015; (2) Mis Tracey Howarth, a licensed insolvency practitioners employed by the company from 5 November 2014 to 5 August 2015; (3) Mr John Halliday who was employed by the company as its IT manager from November 2008 until November 2010, and thereafter until 2016 in a similar role, but providing his services pursuant to an agreement between the company and a company controlled by Mr Halliday called Commercial Technology and Developments Services Limited ("CTDS"); (4) Ms Lorna Bingham, a licensed insolvency practitioner employed by the company between 6 October 2014 and 5 August 2015; (5) Mr Michael Howarth (no relation to Ms Tracey Howarth), a licensed insolvency practitioner employed by the company from 3 December 2007 to 5 December 2014; (6) Mr Steve Slater, who was employed by the company as its finance director from 6 July 2009 until June 2011, and thereafter as the Group financial director

employed by Release Money Group Limited ("RMG") until 20 October 2015; and (7) Mr David Clements, who is both one of the joint administrators of the company and one of the current supervise of the IVAs previously supervised by LIPs employed by the company. Mr Nuttall gave evidence on behalf of himself.

5. I note at the outset that this trial was to be a trial of all issues, including quantum in the event that the claims or part of the claims succeeded. It is an unfortunate aspect of this case that little thought appears to have been given as to how the sums claimed were to be proved in the event that the claimants were otherwise entitled to succeed, given that each allegation made gives rise to potentially different losses calculated in different ways and benefitting different claimants. It was only in the course of closing submissions that any attempt was made to make good on these points. It was submitted on behalf of the claimants by Mr Hugo Groves that in the event that this issue remained a cause of concern, I should direct accounts and inquiries as necessary. I return to this issue further below to the extent that is necessary.

6. There is another feature of this case that I need to draw attention to at the outset. The claim was presented on behalf of the claimants on an entirely rolled-up basis with the same or most of the same allegations of breach being relied upon to support both the claim made against Mr Nuttall in his capacity as a director of the company and the claims made against him in his capacity as the supervisor of those IVAs of which he was a supervisor at the relevant time. I suggested at the outset of the trial, and remain of the view, that it is necessary to keep these claims entirely separate. The duties are different. It does not follow that the breaches of duty as a director were also necessarily breaches of the duties owed as a supervisor, and the causation and in any event loss issues that arise are different. The claims against Mr Nuttall in his capacity as a director require the claimants to prove not merely breach of duty owed to the company, but that the alleged breaches caused loss to the company as well as the amount of that loss. The claims made against Mr Nuttall in his capacity as a supervisor require proof of breach of duty and that the alleged breach caused loss to particular IVA estates, and the amount of loss caused to each estate that has sustained loss. As I understood it, by the end of the trial this was common ground.

7. Finally, I should record that Mr Groves was entirely open about the purpose of this litigation. He accepted that it was unlikely that any substantial recovery could be made against Mr Nuttall personally, but that the claimants contend that a judgment in their favour would enable losses suffered by the company to be recovered from a director's liability insurer and that losses suffered by the IVA estates could be recovered from the underwriters of Mr Nuttall's LIP bonds. In relation to this last point, however, Mr Groves informed me that the bonds would respond only in the event of a finding of dishonesty against Mr Nuttall. Mr Uff, who appeared for Mr Nuttall, made it clear at all relevant stages that Mr Nuttall's prime concern was to avoid a finding of dishonesty. All this led Mr Groves to advance the supervisors' case against Mr Nuttall exclusively on the basis that he had dishonestly breached his duties as a supervisor while advancing the administrators' claims against him in his capacity as a director on

the basis that the alleged breaches of duty were negligent see transcript for 18 May 2018, page 163, line 22 to page 168, line 8.

8. Given the approach adopted by Mr Groves in relation to the claims against Mr Nuttall in his capacity as a supervisor, I remind myself that it is now clear that the test for dishonesty is the same in all civil and criminal proceedings where such an allegation is made - see Ivy v Genting Casinos (UK) Limited, t/a Crockfords [2017] UKSC, 67, paragraph 63. For dishonesty to be established, it is necessary first to establish subjectively the knowledge or belief of the person concerned as to the relevant facts and then to determine objectively whether that person's conduct was honest by applying the standards or ordinary decent people -see Ivey (ante) paragraph 7. In the context of this case, it requires Mr Nuttall's knowledge of the agreements relied upon by the claimants, for example, to be such as to render his participation contrary to the ordinary standards of honest behaviour - see Barlow Clowes International Limited v Eurotrust International Limited [2005] UKPC 37; [2006] 1 WLR, 115 paragraph 15-16.

9. In deciding the factual issues that are material to this dispute, I have approached them by testing the evidence of each of the witnesses where possible against contemporary documentation, admitted and incontrovertible facts, and inherent probabilities. This is entirely conventional - see Onassis & Anor v Vergottis [1968] 2 Lloyd's Rep, 403 at 407 and 431. It is particularly appropriate where, as here, the allegations relate to events that occurred some years ago and the oral evidence is based on recollection of such events - see *Gestmin SGPS SA v Credit Suisse (UK) Limited & Anor* [2013] EWHC 3560 (Comm) per Leggatt J (as he then was) at paragraphs 15-22.

10. As I have said, the claimants allege that Mr Nuttall has been dishonest at any rate in relation to the alleged breaches of duty in his capacity as a supervisor. In those circumstances I remind myself (1) that the legal and evidential burden rests throughout on the claimants to prove not merely the breaches on which they rely but (in relation to the alleged breach of Mr Nuttall's duties as a supervisor) that they were dishonest; (2) that the standard of proof is always the balance of probabilities, but (3) the more serious the allegation or the more serious the consequences of an allegation being true, the more cogent must be the evidence if the civil standard of proof is to be discharged - see *Re H (Minor: Sexual abuse: Standard of proof)* [1996] AC 563 per Lord Nicholls at 586. It is difficult to think if a more serious allegation for a chartered accountant to face in a civil context than one of dishonesty in a professional capacity or one where the consequences of that allegation being proved could be more serious.

11. Finally, it is necessary to remember that it does not necessarily follow from the fact that a witness has been shown to be dishonest in one respect that his evidence in all other respects is to be rejected. Experience suggests that people may give dishonest answers for a variety of reasons including an entirely misplaced wish to strengthen a true case that is perceived to be evidentially weak, as opposed to a desire to advance a dishonestly conceived case in a dishonest manner. It is for that reason that the approach to the factual issues that arise in this case should be as I indicated earlier in this judgment.

**Background**

12. The company was incorporated in February 2003. RMG was incorporated in February 2010 and became the company's parent as well as for two other subsidiaries called respectively Debt Release Direct Limited and Your Claim Refunded Limited. All these companies are now in administration. The company entered administration on 24 March 2016. RMG entered administration on 13 July 2016. YCR entered administration on 25 October 2016. DRD entered administration on 24 March 2017. Mr Nuttall was a director of the company from 18 February 2003 and was also a shareholder and director of RMG. The company employed licensed insolvency practitioners ("LIPs") and its business was to provide the LIPs' services to individuals in respect of proposals for and then administering mainly IVAs in England and Wales, and their equivalent, protected trust deeds, in Scotland. It also administered a small number of personal bankruptcies in England and their Scottish equivalent, sequestrations (collectively hereafter "insolvency cases"). This was a substantial business on any view. At the date when the company went into administration, the LIPs employed by the company were Mr Nuttall, Miss Andrew and another LIP, a Mr Lafferty, who was responsible for the Scottish Insolvency cases. At that date, the company's LIPs were administering 2762 insolvency cases between them.

13. The IVA scheme is governed by Part VIII of the Insolvency Act 1986. It depends upon the acceptance of a debtor's formal proposals for discharging his or her liabilities by his or her creditors at a meeting convened for the purpose by a nominee, and who will supervise the implementation of the proposal if it is accepted by creditors. On acceptance of the proposal, the Nominee is known thereafter as the supervisor of the IVA. Section 253 of the Insolvency Act 1986 requires such a person to be an LIP. The creditors may approve the proposals either with or without modifications or reject them. The effect of a proposal being accepted is that it binds all creditors entitled to vote in the procedure by which the proposal was considered and approved.

14. Although the detail will differ, the terms of most IVAs are broadly similar. They provide for the payment to the supervisor of a defined sum by or on behalf of the debtor, which is then held by the supervisor and distributed to creditors after deduction therefrom of fees, costs and disbursements in accordance with the terms approved by the creditors. If a supervisor considers it necessary for those terms to be varied, then this can generally only be done by an approval by creditors of the variation proposed at a meeting of creditors. A supervisor' will usually be entitled to a fee under the terms of each IVA. Typically this will provide for a fixed fee for the period down to the approval when the LIP is acting as nominee, and a fee which is a percentage of realisations while the LIP is acting as a supervisor. Typically during the period these proceedings are concerned with, the supervisor's fee would be 15 per cent of the sums realised. I was told by Mr Nuttall in the course of his evidence, and I accept, that a fee of

more than 15 per cent would be unacceptable to institutional creditors who in practice represent most creditors in relation to most IVAs.

15. The company's income was derived from the fees payable to supervisors because the LIPs were employees of the company and the fees otherwise nominally payable to the LIPs were in fact payable to the company. The company's profits were derived from the margin between gross fee income and its costs and expenses including the salaries paid to its employed LIPs. The monies forming the IVA estates were (or should have been) held in separate accounts or latterly a limited number of global trust accounts. Fees and reimbursement of disbursements on behalf of estates would be transferred to the company's own bank account as and when they became payable and were approved for payment by the supervisors of the relevant estates and used to meet its expenses, pay salaries and ultimately as dividends paid to its shareholder. Expenses payable directly from the IVA estates would be paid to those third parties ostensibly entitled to receive it, subject to approval by the supervisor concerned.

16. It will be apparent from what I have said so far that it is necessary for a supervisor to open an bank account to hold payments made by or on behalf of the debtor and from which the fees, costs, disbursements and the dividends to creditors can be debited. It was common ground between the parties that the supervisors held the sums received from or on behalf of the debtor on trust for the purpose of distributing the same in accordance with the arrangements as approved by creditors. It was also common ground that in relation to closed cases, that is to say cases where administration of the IVA had been completed in accordance with its terms, any further sums received were and are held upon trust either for the creditors if there were any following the completion of the IVA concerned, or ultimately on bare trust for the debtor.

17. Prior to March 2013 the company's banking facilities were provided by Cater Allen Private Bank ("CAPB"). The CAPB arrangements were entirely conventional. A separate trust account was opened and maintained by each LIP for each estate of which that LIP was the supervisor. In March 2013 the company transferred its banking arrangements to Barclays Bank PLC. This facility was markedly different from the CAPB arrangements. Instead of separate accounts being provided for each estate, the company operated initially one, and later up to four "client" accounts in which all estate funds were mixed. For reasons that are unclear and do not matter, these accounts were referred to internally and collectively as *".Net accounts*" and individually as respectively the 227, 350, 351 and 352 accounts. The 352 account was opened to receive all trust monies received after 17 November 2015 in order to avoid contagion of those sums with the deficiencies that arose in relation to the earlier global client accounts, which difficulties I describe in more detail later in this judgment.

18. It will be apparent from what I have said so far, and it is not in dispute, that any reasonably competent LIP would wish to reconcile the cash held on behalf of each estate of which he or she was a supervisor against that which should have been held according to the books and records maintained by the LIP of that estate. This is functionally no different from the reconciliation exercise that

solicitors are routinely required to carry out in relation to their client accounts by operation of the Solicitors Accounts Rules. This was entirely straightforward as long as the CAPB arrangements were in place. However, following the transfer to Barclays the exercise was not as straightforward. Running alongside the .Net accounts were a series of so-called virtual accounts maintained internally by the company. These accounts were meant to reflect the portion of money held in the .Net accounts attributable to each individual estate. These accounts were referred to by the company in this judgment as the "*AMS accounts*". In theory the sums held in the .Net account should have balanced to the penny with the sum of the credit balances of the AMS accounts. In practice, however, they did not. This was because actual money credited to or debited from the .Net accounts was not allocated correctly or at all to the relevant AMS accounts. Strikingly, and again this is not in dispute, the LIPs did not have access to any relevant information concerning the .Net accounts. Thus whilst the LIPs could, and apparently did, reconcile the AMS accounts for each estate to the books and records of that estate, that was a meaningless exercise if in fact there was a shortfall between the sums credited to the .Net account and the sums standing to the credit of the various AMS accounts. This, therefore, required a further reconciliation exercise between the credit balances on each of the AMS accounts on the one hand and the cash actually held in the .Net accounts on the other. Such an exercise could be carried out only by someone with access to all the AMS accounts. Thus the reconciliation could only be carried out by or under the supervision one of the company's directors.

19. There is a dispute as to when Mr Nuttall and Mr Varden first became aware that there was a deficiency between what should have been and what was in fact credited to the .Net accounts. What is not in dispute is that Mr Nuttall informed his regulatory body, the Institute of Chartered Accountants in England and Wales ("ICAEW") on 25 August 2015 of a difference between the total credit balance of the AMS accounts of £7,755,623 and the balance on the .Net accounts of £1,111,784 - a negative difference of in excess of £6.6 million. The report of the Review Committee of the ICAEW upholding the removal of Mr Nuttall's insolvency licence records that no reconciliation reports balancing the books and records of each estate, the AMS accounts and the .Net accounts were made before 28 August 2015. This was so notwithstanding clearly expressed complaints from Ms Bingham and Ms Howarth concerning their inability to access the .Net accounts, and the obvious risk posed by a failure to reconcile the actual cash held with either the books and records of each relevant estate or the AMS accounts. That report also records that Mr Nuttall delegated the task of performing weekly bank reconciliations to Mr Slater as well as delegating operational control over the .Net accounts to Mr Slater, who was not a LIP. That this was what happened is not in dispute.

20. Two questions emerge from this. First, how much in truth was missing and, secondly, where had it gone? The ICAEW concluded that by 19 February 2016 the negative balance had been reduced to £4,833,000 by reason of an extensive reconciliation exercise and of that about £4 million had been paid to the company, and about £750,000 odd had been paid to RMG. So far as this amount is concerned, a large portion of it seems to be referable to various schemes and arrangements that the claimants maintain were entered into or sanctioned by Mr

Nuttall in breach of the duties he owed to the company, because he knew the arrangements were not permitted under the IVAs being supervised by the LIPs employed by the company, and in dishonest breach of his duties as an LIP in relation to the IVAs of which he was supervisor. However, even aside from that issue, there is no dispute that there was a shortfall on the .Net accounts. Mr Nuttall contends that there was nothing wrong with the various schemes and arrangements entered into by the company, but he accepts that even if that is so, there is still a shortfall of £1.3 million odd between what should have been and what in fact was credited to the .Net accounts - see paragraph 22 of Mr Uff's written opening submissions. Mr Nuttall also accepts that the sums were transferred to the company's office account and then distributed. In fact any distribution could only have benefitted either Mr Nuttall or Mr Varden, or their respective families.

21. Aside from a claim to be entitled to recover the shortfall from Mr Nuttall, there are five substantial allegations made by the claimants against Mr Nuttall regarding the way in which the IVA estates were managed and charged by the company. In summary, these allegations concern:

(a) the manner in which a very substantial VAT repayment received following the decision of the First Tier Tax chamber Tribunal in Paymax Limited v HMRC [2011] UK FTT 360 was accounted for ("VAT Reclaim Issue");

(b) the arrangement made between CDTS and Mr Halliday concerning the provision of IT services and document management services to each IVA which are characterised by the claimants as in effect a secret commission arrangement by which money apparently paid to CDTS was in fact in part transferred by CDTS to RMG for the benefit ultimately of Mr Nuttall and Mr Varden ("CDTS Arrangements Issue");

(c) an arrangement entered into between Mr Nuttall on behalf of the company and Richardson Mail Solicitors Limited ("RMSL") by which RMSL was engaged to pursue PPI misselling claims on behalf of the debtors of at least some of the estates of which Mr Nuttall was a supervisor. The claimants allege that this was a scheme by which money belonging to the estates concerned was channelled to RMG because, in addition to the main agreement between Mr Nuttall on behalf of the companies and RSML there was a side agreement between RMG and RMSL by which sums became payable to RMG in respect of any referrals to RMSL that was successful ostensibly for the provision of data by RMG to RMSL ("RMSL Arrangements Issue");

(d) a similar arrangement to that alleged in relation to RSML entered into by Mr Nuttall on behalf of the company and RML with Expert Insolvency Claims Limited ("EIC") ("EIC Arrangements Issue"); and

(e) a similar arrangement to that described above in relation to RMSL, but this time concerning services provided by Home Loans Limited ("HLL"), the service being the appraisal of real property owned by debtors subject to IVAs being managed by supervisors employed by the company. Here again the

allegation is that a part of the fees ostensibly paid to HLL were in fact paid by HLL by prior arrangement to RMG ("HLL Arrangements Issue").

In relation to each of these arrangements the claimants allege that they were entered into for the purpose of transferring estate money to the company in fraud of those interested in the IVA estates by secret commission paid by the service providers concerned to RMG. It is principally in relation to these schemes that the claimants maintain Mr Nuttall was dishonest.

22. Finally, it is alleged that various payments to estates were treated in a manner that entitled the relevant LIP and therefore the company to fees when on analysis there was no such entitlement. These are items that could be characterised as accounting errors and omissions, but the second claimant maintains each and every one of them was a dishonest attempt to extract money from the IVA estates to which the LIPs and therefore the companies were not entitled, which extractions were, it is submitted, sanctioned by Mr Nuttall for the dishonest purpose of extracting fees that to the knowledge of Mr Nuttall the supervisors, and therefore the company was not entitled to.

23. It is necessary that I consider each of these allegations in detail.

**The shortfall issue**

24. Mr Nuttall owed duties to the company by sections 170 to 177 of the Companies Act 2006 that included duties to exercise reasonable care, skill and diligence, to ensure that the affairs of the company were properly administered, and that the company's assets were not dissipated to the prejudice of actual, prospective or contingent creditors of the company, at any rate at a point in time when it became clear that the company was insolvent. That these duties rested upon Mr Nuttall is admitted - see paragraph 23 of his defence. It is alleged that Mr Nuttall was in breach of those duties by failing to keep client, or as I would prefer to describe it estate or trust, money separate from company money and/or by causing or permitting payments to be made from the estate or trust money to the company so as to create the shortfall.

25. The shortfall is particularised by the claimants as being in the sum of £4,865,118.18. Three broad issues arise in relation to this element of the claim being (1) whether there was a shortfall at all, at any rate divorced from the other matters that I have referred to; (2) whether the existence of the shortfall was caused by an alleged breach of duty by Mr Nuttall and/or Mr Nuttall and Mr Varden; and (3) whether the shortfall was in the sum alleged or some other sum. As to the first of these points, it is not in dispute that there was a shortfall - see paragraphs 11.47 and 11.49 of Mr Nuttall's second witness statement and paragraph 22 of Mr Uff's opening submissions. Mr Nuttall also accepts that there could only be one explanation for the shortfall he admits of £1.3 million, namely that the money was used for an improper purpose - that is to say paying it to the company and from the company to RMG, for the ultimate benefit of himself, Mr Varden and those connected to them as shareholders in RMG.

26. I accept that Mr Nuttall carried out the proper level of oversight necessary in respect of trust monies in relation to the various estates, down to the point at which the company's banking arrangements were transferred to Barclays. Mr Nuttall alleges that he did not fully understand the way in which the Barclays banking arrangements worked and that he was dependent on Mr Slater for its operation.

27. I accept that Mr Nuttall was resistant to the change in banking arrangements and to an extent to the appointment of Mr Slater as well. However, none of this excuses a failure by Mr Nuttall to inform himself as to how the Barclays system worked, if he did not in truth understand it, or permitting control of the trust monies to be exercised by Mr Slater, who was not (and Mr Nuttall knew was not) subject to any oversight and who (as Mr Nuttall knew) was not a LIP. It does not explain or excuse either the failure to make any attempt to reconcile the balance of the .Net accounts with the various AMS accounts or to carry out spot checks so as to ensure that that exercise was being carried out by Mr Slater, if and to the extent that task had been delegated to him. None of this is consistent with maintaining proper control over the estate accounts or ensuring the LIPs employed by the company could do so. It is a breach by Mr Nuttall of each of the duties that he owed to the company as a director referred to earlier.

28. The shortfall is one that can be explained only on the basis of inappropriate payments from the trust accounts to the company and thereafter onwards to RMG for the ultimate benefit of Mr Nuttall, Mr Varden and their respective connected parties. As the ICAEW report put it:

> "The reality confronting the panel is of the applicant, who is an experienced insolvency practitioner, directing a company which handles large sums of estate money with high transaction volumes and delegating the daily responsibility of administering the bank accounts which receive that money to an employee. That employee was given by the applicant very high rights of access to the banking system. Having carried out that delegation, the applicant appears to have adopted a very light if non-existent touch in terms of daily control and supervision of that employee. The decision to delegate very responsible duties and to provide rights to the operation of the banking systems and then not to supervise and not to impose checks and balances lies at the heart of this matter."

29. It was submitted on behalf of Mr Nuttall that he was not aware of, or of the importance of, the .net accounts, that he thought the individual estate monies could be reconciled using the AMS accounts, and that he was not aware of any shortfall before July 2015. I reject each of these submissions.

30. As to the first of these points, that was so and could only be so if (as is now common ground) the AMS accounts balanced as a total with the sums credited to the .Net trust accounts. I am satisfied that Mr Nuttall was fully aware of the existence of the .Net accounts because, as Mr Slater said in the course of his evidence, Mr Nuttall instructed him from time to time to transfer money from

that account. Giving such instructions without first ensuring that the .Net accounts balanced with what should have been in that account according to the books and records of each IVA estate (or each AMS account assuming each had been reconciled to the books and accounts of the relevant estate) was itself a breach of the duties to exercise reasonable care, skill and diligence in and about his activities as a director and to ensure that the affairs of the company were properly administered.

31. Aside from that, such an instruction could only make sense if Mr Nuttall understood (as was the case) that there was a single trust account or at most two or three trust accounts from which transfers could be made in accordance with the instructions he gave. Mr Nuttall was responsible for the operational side of the company's business. He was an experienced chartered accountant and an experienced insolvency practitioner. It is inherently improbable that he did not understand the banking arrangements which were at the heart of the business he operated.

32. I also accept Mr Slater's evidence that he raised with both Mr Nuttall and Mr Varden the existence of discrepancies between the .Net account and the AMS accounts. The detail is set out in Mr Slater's statement at section 8 in subparagraphs 8.1 to 8.10. The detail surrounding the discrepancies reported is not material; once he was aware that there was a discrepancy, Mr Nuttall should have at that point taken effective steps to bring the trust account under proper control, but failed to do so. Mr Nuttall denies that any such communication took place. I consider it inherently probable that an employee in the position of Mr Slater would share the difficulties that he was experiencing with both Mr Nuttall and Mr Varden. There is no reason why he would not do so. It is not alleged that any part of the discrepancy arose from Mr Slater taking money that he was not entitled to for his own benefit. I think it likely that no-one appreciated the scale of the problem until later, but again that is immaterial for the reasons that I have given already. What matters is that there was a discrepancy on accounts that Mr Nuttall knew held trust moneys held on trust nominally by the supervisors for the purposes of the IVAs of which they were supervisors and by the company on trust for them. It was the fact there was a discrepancy, rather than its size, that ought to have triggered action.

33. Mr Slater's evidence was that Mr Nuttall's reaction when he was told of the discrepancies was to tell him to "*fix it*" - see paragraph 8.9 of his witness statement. I accept that evidence because it is consistent with what happened at the meeting on 23 July 2015. This was the meeting at which Mr Nuttall maintains he was told by Mr Slater for the first time about the shortfall. It is common ground that rather than relieving Mr Slater of any further involvement, Mr Nuttall, and, for what it is worth, Mr Varden as well, were content to leave Mr Slater in charge for the purpose of seeing whether the shortfall could be eliminated by accounting for fees due to the company or supposedly due to the company that had not yet been accounted for by deduction, either from the AMS accounts or possibly also the books and accounts maintained by the LIPs for each individual estate. In my judgment this conduct is in keeping with what Mr Slater says was the fix it reaction from Mr Nuttall the previous year.

34. There are some emails that confirm that Mr Nuttall was aware of both the existence of the .Net accounts and of the failure to reconcile them with the estate book and records at a much earlier date than he suggests was the case. In an email of 12 February 2014 from Mr Howarth to Mr Nuttall, Mr Howarth refers to "*the main Barclays client account*" which in context can only mean the .Net client account. The reference within that email to "*Debtsolv*" was to an electronic recording system used by the LIPs employed by the company to record estate accounting movements. It was in effect the books, records and accounts for each of the estates. Mr Howorth refers in terms to:

> "Also, is either Steve or yourself yet in a position to confirm that bank reconciliations are now being carried out between the main Barclays client account and Debtsolv? As you are aware, I have previously voiced my concerns about this on numerous occasions but have heard nothing further. Are you aware of any reconciliations being carried out since all the accounts were transferred in August/September last year? Ultimately as LIPs the client funds are our responsibility and we must have faith in our systems and controls to ensure nothing untoward can happen to those funds, which I am sure you would agree is certainly not the case currently."

This email demonstrates very clearly that as at its date, 12 February 2014, Mr Nuttall knew full well of the existence of the .Net accounts, of the need to reconcile the books and records of each estate account and that no reconciliation had been carried out as at that date. In those circumstances I consider that Mr Nuttall also ought to have known that there was or was likely to be a deficiency on the main client account by no later than February 2014, or at least that nothing had been done to check whether that was so.

35. Mr Nuttall was the director of the company responsible for its operations. From at least April 2014 government guidance on monitoring IVA providers warned regulators of the need to ensure that all LIPs had:

> "… full oversight and control over estate accounts with adequate safeguard arrangements in place which should include appropriate financial controls …"

Notwithstanding that obvious point, Mr Nuttall did nothing or nothing effective to satisfy himself that Mr Slater was doing what he was supposed to be doing or that the .Net account, which was the company's actual trust account, was being operated as it should have been. None of this is difficult. It is, as I have said, what solicitors do routinely for the purpose of complying with the Solicitors Accounts Rules. Mr Nuttall's duty as a director was to acquaint himself with the financial affairs of the company - see Re Barings plc (no 5) [2000] 1 BCLC 523 *per* Morritt LJ, as he then was, at 539, paragraph 47. I accept that Mr Nuttall was entitled to delegate management of the account (including reconciliation of the AMs with the .net accounts) but Mr Nuttall failed to take any steps to ensure that Mr Slater was performing the task delegated to him, that of safeguarding trust money or to resume control once he

knew or ought to have known that Mr Slater was not performing the tasks delegated to him. It was the failure to carry out the reconciliation task that led to the shortfall I am now concerned with since if that task had been performed as it should have been either the funds wrongly transferred from the .net account would not have been transferred or if they had been would or would probably have been discovered and reversed before the sums concerned reached even the level Mr Nuttall admits.

36. Even if I am wrong and Mr Nuttall really only appreciated the existence of a problem in July 2015, that does not assist him. It merely demonstrates that no reasonable or any control or oversight was exercised by Mr Nuttall over the person to whom he, perhaps in common with Mr Varden, delegated the management and control of trust monies. In my judgment that lack of oversight was made worse by the fact that, to the knowledge of Mr Nuttall, Mr Slater was not and never had been a licensed insolvency practitioner.

37. Turning now to quantum, it was not submitted by Mr Uff that the company was not entitled to recover the shortfall in principle as damages or equitable compensation for breach of duty by Mr Nuttall in his capacity as a director of the company, assuming breach was established. Mr Uff's client admitted a shortfall, unaffected by these matters, of £1.3 million. His submission was that the claimants had not proved the amount of the shortfall beyond what Mr Nuttall admitted because all the various calculations made by or on behalf of the claimants were affected by other allegations to which I turn below and which make it impossible to identify the true shortfall free of what are alleged to be the effect of those allegations. I accept Mr Uff's submission on this point.

38. It seems to me therefore that the claimants would be entitled to judgment for the amount admitted, that is to say £1.3 million, or alternatively an inquiry as to what the true amount should be. I am satisfied that the claimants are entitled to an inquiry at their option, given the terms of paragraphs 2 and 5 of the prayer to the particulars of claim. I am also satisfied that in principle the company is entitled to recover the costs of carrying out reconciliations by the administrators since that is a cost that the company would not have incurred but for the breaches of duty I have found proved. Mr Uff did not suggest otherwise. However the alleged cost of that exercise is not admitted given that the exercise that has been carried out is heavily linked with the cost of investigating the further issues to which I turn below. In those circumstances, I will hear further from counsel in relation to how the quantum issue is to be resolved following completion of this judgment.

**The VAT Reclaim Issue**

39. It is alleged by the claimants that in breach of their duties as directors of the company Mr Nuttall and Mr Varden:

> "Procured or allowed the diversion for their own personal benefit and/or the benefit of third parties connected to themselves of VAT refunds totalling £826,524 which were paid to the company

> by … HMRC … for the benefit of the insolvency cases only or to be returned to HMRC ('the VAT misapplications'),"

- see paragraph 26.3 of the particulars of claim. It is alleged in paragraph 27 of the particulars of claim that the breaches were dishonest because:

> "… they knew the VAT misapplications were taking place …"

In relation to his duties as a supervisor it is alleged that Mr Nuttall "dishonestly and fraudulently" breached his duties in that he:

> "… knowingly breached an undertaking he had given to HMRC in respect of the said VAT refunds and procured and/or allowed the VAT misapplications to take place and to be used for the benefit of himself and Mr Varden and connected parties …"

40. Mr Nuttall's pleaded defence is that on receipt from HMRC, the money was paid into a single VAT client account. He says those monies were then allocated to each relevant estate account and credited to the account net of all supervisors' fees, disbursements and costs that were due from the estate in question, or in the case of estates where the IVA had been concluded ("closed cases") retained in a VAT estate account for future distribution.

41. The background to this claim in summary is as follows. The company (in common with most other commercial insolvency service providers) paid VAT on the sums it received by way of nominee and supervisor fees. Payments from estate accounts in respect of nominee and supervisor fees were paid to the company on the basis that VAT would be payable in respect of those fees by the company. The decision of the First Tier Tribunal was that the supply of services of an LIP as nominee and supervisor was a single exempt supply, thereby enabling companies in the position of the company to claim back the VAT that had been paid previously. In principle the company ought the n to have accounted to each supervisor with the sum received back attributable to the IVAs being supervised by that supervisor subject to any permitted deductions.

42. On 12 September 2011 Mr Nuttall submitted a claim to recover VAT paid by the company (and Nuttall & Co, a predecessor business operated by Mr Nuttall as a sole trader) in the period between 30 September 2007 and 31 March 2011. He received from HMRC a total of £1,416,430. The payments were received by Mr Nuttall on various dates between March and June 2012. These monies paid to the company were paid by HMRC on terms that they would be dealt with in accordance with an undertaking given by Mr Nuttall to HMRC in his capacity as a director of the company. In so far as is material, the undertaking was to the following effect:

> "… I, the undersigned, can identify the names and addresses of consumers whom I intend to reimburse. I will reimburse those persons in cash or by cheque all of the amount credited by Revenue & Customs under section 80(1) of 80(1)(a) of the VAT

> Act 1994 together with any associated interest without any deduction for whatever purpose within 90 days of receiving the credit. I understand that I cannot use the credit for any other purpose. Furthermore, where some or all of the credited amount to be reimbursed has been paid or repaid to me and I have not reimbursed some or all of it to consumers, I will without reminder notify Revenue & Customs and return the balance together with any associated interest to Revenue & Customs within 14 days of the 90 days expiring. Where the credited amount has not been paid or repaid to me and I have not reimbursed some or all of it to consumers, I will notify Revenue & Customs of the amount of credit and associated interest I have not reimbursed to consumers within 14 days of the 90 days expiring. I will keep the necessary records as set out in the Regulations and will comply with any notice given to me by Revenue & Customs about producing the records I am required to keep …"

There then followed the signature of Mr Nuttall in his capacity as a director of the company. Mr Nuttall gave a similar undertaking in relation to the sum of £11,615-odd paid to Mr Nuttall in his capacity of the owner of Nuttall & Co.

43. In January 2012 Mr Nuttall's regulating authority, the ICAEW, had provided guidance as to the practical implications of the Paymex decision and in particular how repayments received from HMRC were to be dealt with. In so far as is material, that guidance was to the following effect:

> "… this further guidance does not constitute legal advice nor does it seek to instruct or direct IPs in the administration of their voluntary arrangements. The bodies issuing this guide do not accept liability in respect of actions that IPs may take in accordance with it, as it must be for each IP to be satisfied that his/her conduct meets the legal and professional requirements placed upon office holders. However, notwithstanding the above, IPs should have regard to the regulatory as well as the legal consequences of their actions …
>
> "The guidance is provided on the basis of the commonly utilised charging mechanism, namely that the costs of the supervisor, whether of himself or of the staff, are usually charged by way of an invoice from the firm to the supervisor. The supervisor then pays the invoice to the firm out of the assets within the IVA in accordance with its terms, including the VAT thereon charged as output tax. The firm then usually accounts to HMRC in the usual way, for the output tax against which the firm's input tax (in relation to its own business expenses) is set off in the usual way. On the basis of this mechanism there are issues as to how VAT can be validly reclaimed by the supervisor from the firm and by the firm from HMRC …

"3) **Power and obligation to make a claim - current cases**.

Counsel advises that in principle a supervisor in open cases has the power and obligation to make a claim to recover the mistakenly paid VAT, on the basis that the right to recover is an asset within the arrangement and so held on trust for the purposes of the arrangement.

The obligation to make a claim is not automatic or absolute. The supervisor, in his/her capacity as such, is entitled to exercise his/her commercial judgment as to whether the steps to be taken are in the interests of the general body of creditors and, ordinarily, the court will not interfere with a supervisor's decision made in the day-to-day administration of the arrangement unless such decision is fraudulent or in bad faith or one which no reasonable supervisor in the circumstances would have made. Such a decision must be made on a case-by-case basis taking into account the potential benefit for creditors versus the allowable costs involved in making the claim, both in respect of the potential legal costs of doing so as well as the time chargeable by the supervisor. In open cases he/she has an absolute entitlement to charge remuneration in accordance with the terms of the IVA. Consequently, it is unlikely that a court would regard as perverse a decision by a supervisor not to seek to reclaim the mistakenly paid VAT if the costs of doing so, and administering the recovered sum, would exceed the sum recovered, or result in little benefit to the creditors.

Whatever the decision, the IP should record his/her decision and his/her reasoning ...

"4) **Power and obligation to make a claim – closed cases**.

Where the terms of the arrangement provide for a continuing trust on failure or are silent on the point, a former supervisor of a failed arrangement also has the power and obligation to make a claim to recover the mistakenly paid VAT …

"5) **Identification of beneficiaries**.

In a current case, or a closed case where there is a continuing trust, the claim to recover the mistakenly paid VAT will be an asset held for the purposes of the arrangement, and the beneficiaries will be the creditors.

However, an IVA may have been completed where the terms of the arrangement were such that creditors had received all that they could have expected (e.g. the creditors have received 100p in the £ or the stated maximum dividend). In those circumstances, there can be no continuing trust for the benefit of

the creditors. Any sum recovered would be held on bare trust for the debtor. An exception is where a fee was capped and VAT inclusive (e.g. a Nominee's fee). Any VAT recovered in this respect less any deduction arising from attributable input tax would be payable to the supervisor's firm …

"6) **Destination and extent of claim**

Any claim for mistakenly charged VAT should be made by the supervisor, former supervisor or other estate administrator … against the Firm to whom the VAT was mistakenly paid by the estate in the first place. This may include a former Firm or Firms where cases have been transferred. The claim against the Firm or former Firm should be for the full amount of VAT mistakenly charged. …

The Firm, or former Firm, may then make a claim against HMRC …

"The refunded amount(s) should be paid into designated estate accounts (or a general clients' account in respect of any closed cases) and should be transferred by the firm into those accounts as soon as they are cleared.

These are in effect third party funds and should be segregated from those of the firm.

Where Nominee's or Supervisor's fees have been agreed in a fixed sum, inclusive of VAT then it would appear that it would not be in breach of HMRC's unjust enrichment provisions for the Firm to keep the value of the sum reclaimed from HMRC (less any adjustment arising from the partial exemption rules or the disallowance of case specific input tax) without passing it on to the relevant estate, whether in an open case or a closed case …

"9) **Remuneration.**

The proposal document as modified and varied together with any standard terms and conditions determines the extent of the supervisor's remuneration both in open and closed cases.

In open cases where, as a result of having to make the claim to recover the mistakenly paid VAT and administer its distribution, the supervisor is seeking further fees or remuneration above that provided for in the IVA, he is usually able to summon a variation meeting. That is certainly provided for in R3's and the Protocol Standard Conditions. Without a variation he is not entitled to further fees above those provided for in the IVA and would be vulnerable to a challenge by a creditor or debtor.

> In closed cases, the supervisor will have to rely upon the remuneration provisions that apply in respect of the continuing trust. The Protocol Standard Conditions do not provide for any fees to be paid where there is a trust although the proposal itself might make some provision. By contrast the R3 Standard Conditions do allow fees to be charged by the operation of condition 28(3) which provides that proceeds shall be "applied and distributed in accordance with the terms of the Arrangement" and condition 17(2) which provides that the "fees, costs, charges and expenses of the Supervisor shall be paid out of the assets of the Arrangement".
>
> In practice certain creditors or their representatives have indicated that they do not want to be faced with multiple variation meetings but would agree to an additional right to remuneration based on the sum recovered. IPs should understand that while an informal agreement of this sort is acceptable insofar as it affects the sums paid to the approving creditors, it cannot be binding on other creditors. In an open case in the event of challenge by one or more minority creditors, the IP might argue that the majority creditors' preference to avoid multiple variation meetings combined with the voting power of those majority creditors (who would have been expected to approve a binding resolution at any such meeting had one been convened) would have resulted in approval of the fees. In a closed case, there is no mechanism for binding dissenting creditors; therefore, unless R3 standard terms or similar apply … IPs will need to seek creditor approval for fees and deduct a charge only from those creditors who consent.
>
> There is no objection to an informal arrangement between the IP and a debtor regarding fees.
>
> Certain fee provisions refer to a fee based on a per centage of realisations. Counsel considers that the recovery of mistakenly paid VAT does not constitute a realisation, because it is the recovery of a sum mistakenly paid out of a realisation. But if creditors agree (some creditor agents have done so), it may be treated as if it were …"

44. The claimants allege that Mr Nuttall acted in dishonest breach of his duties as a supervisor and in breach of his duties as a director of the company by dealing with the VAT refund other than in accordance with the terms of the undertaking and the advice given by the ICAEW. If and to the extent that the advice of the ICAEW differs from the terms of the undertaking, it is alleged that Mr Nuttall acted in dishonest breach of duty by following the advice rather than complying strictly with the terms of the undertaking he had given to HMRC.

45. There is an overarching allegation of breach by failing to credit sums due to individual accounts rather than a specially created client account. In my

judgment that of itself is insignificant. The refunds were received at a time when the CAPB banking arrangements still applied and thus payments could have been credited to individual accounts. Mr Nuttall's point is that is what happened (in relation to open cases) ultimately once what he maintains were proper adjustments had been carried out. However, it is common ground that the money was credited to a single designated client account on receipt from HMRC. It is this which is said to be a dishonest breach of duty. In my judgment that allegation is not sustainable. Whether the money was held in a global designated account and then credited to individual accounts after the deduction of any sums properly payable to the company, or credited to individual accounts from which payments properly due were then deducted, does not in my view constitute a breach of duty of itself, much less one that is dishonest. It might be a technical breach of the undertaking given to HMRC but that is not of itself relevant to the issue in dispute in these proceedings. It is difficult in any event to see how a single global payment from HMRC could have been dealt with otherwise than by crediting it to a single client account prior to distribution to individual estates.

46. The much more significant issue concerns whether the sums in fact deducted were properly deductible at all. The allegations made by the claimant imply that fees deducted by or with the authority of Mr Nuttall fell into in four categories each of which required the prior approval of creditors before the deduction could be made. The four categories identified by the claimants are where:

    (1) the supervisor fee entitlement was 35 per cent of realisations, including all nominee costs, supervisor fees, disbursements and VAT;

    (2) the supervisor fee entitlement was 15 per cent of realisations (after deducting nominee costs) notwithstanding the ICAEW published guidance referred to above that creditor agents were prepared to permit office holders to treat them as such for the purposes of invoking fee approvals and that regulators would not regard fees drawn on this basis as improperly authorised;

    (3) the supervisor was entitled to a minimum fee which had not been recovered from the estate and remained due; and

    (4) the nominee fee that was expressed to be a sum inclusive of VAT.

47. As to these, it became common ground in the course of the trial that where the supervisor fee was inclusive of VAT no sum was repayable to the estate because he responsibility for paying VAT was that of the supervisor out of what he or she received if VAT was applicable. This point made in clear terms in the ICAEW guidance and is obvious. That being so, I do not see how it could be (or could reasonably have been thought by the claimants, each of whom are experienced professionals in this field, to be) a breach of duty, much less a dishonest breach of duty by Mr Nuttall for him to have deducted or authorised the deduction and transfer to the company of the amounts attributable to such IVAs from the global VAT repayment. Indeed, Mr Clements accepted that in

cross-examination. Similar considerations apply to cases where the nominee fee was expressed to be in a sum inclusive of VAT.

48. In relation to cases, whether open or closed, where the supervisor was entitled to a minimum fee which had not been received, I do not see how it can be a breach of duty for Mr Nuttall to have deducted or authorised the deduction from the refund of VAT otherwise payable to such an estate of the amount of any minimum fee then outstanding. It was plainly not a dishonest duty for him to have done so. There were sums due and owing to the supervisors of which IVAs and, therefore to the company, being the difference between the minimum fee agreed and the sum in fact received and it was plainly not dishonest for the company to have recovered the shortfall any more than it would have been for the supervisor to have done so and then account for the sum deducted to the company. Again Mr Clements accepted this point in cross examination.

49. The common point about all of these types of case is that there is no element of unjust enrichment of the company at the expense of either creditors or ultimately the debtor in such circumstances. As I have said, Mr Clements accepted that to be so in the course of his cross-examination.

50. The category that remains concerns cases where the supervisor's fee was expressed to be 15 per cent of realisations. The claimants' case is that creditors' approval was required before the repayment could be treated as being a realisation, that prior approval was not obtained from all creditors at meetings of creditors and therefore Mr Nuttall acted in breach of duty as both a director and dishonest breach of duty as a supervisor by permitting the deduction of 15 per cent of the sums recovered from HMRC as a realisation.

51. It is common ground that, in principle, creditors' approval would be required for fees to be deducted on this basis - see paragraph 36.7 of Mr Uff's written opening submissions. It appears to be accepted by the claimants that authority was obtained from a number of organisations representing institutional creditors - see paragraph 11.25 of Mr Clements' witness statement. However, two points are made in relation to that: first, that the approvals appear to have been obtained after not before deductions were made; and secondly, that such a consent is only sufficient in open cases where the institutional creditors giving consent represent over 75 per cent of the relevant estate's creditors. Where that is not so, then, at best, consent would entitle the insolvency practitioner to deduct a fee from the portion of the remittance due to the estate to which the institutional creditor who consents would otherwise be entitled. In relation to completed closed cases, no sum could be deducted without approval because, in a closed case, where the creditors have recovered all that they are entitled to, the fund is held on bare trust for the debtor.

52. I remind myself that the onus rests on the claimant to prove both the breach of duty alleged and that it was dishonest, applying the approach identified at the outset of this judgment. It was for the claimant therefore to identify each estate entitled to a Paymex credit where a realisation fee had been deducted and where the approval of the required majority (at least 75 per cent) of creditors was required but not obtained. They have not done so.

53. Major institutional consents were obtained at or about the relevant time, contrary to the view expressed by the claimants - see, by way of example, the letter from one institutional creditors' agent Max Recovery Limited dated 13 January 2012 which sets out its position in relation to both open and closed cases in these terms:

> "... We accept that the process of filing refund claims is both arduous and time consuming and can confirm that we are agreeable to the above element of any refund being treated as a realisation, thereby attracting the applicable fee as catered for in the relevant proposal, as modified. It is envisaged that this approach will cater adequately for protocol IVAs, due to remuneration being based on a per centage of realisations. In addition, in cases where the IPs per centage base remuneration has been fixed or capped by modification, we can confirm that we are agreeable to the element of any VAT refund that is to be distributed to creditors, attracting the applicable per centage realisation fee as catered for in the relevant proposal, as modified, on an unrestricted basis. For the sake of clarity, this is in addition to the fixed-cap fee. It is assumed that VAT refunds on older or some non-PC IVAs in which remuneration is determined by reference to time costs would attract the applicable charge-out rates. It is appreciated that time costs or working the refund claim on some of these cases will exceed the monetary benefit. We confirm we are agreeable to IPs refraining from applying for a refund where common sense dictates that the cost of doing so would be disproportionate to the benefit.
>
> Closed cases
> It is our understanding that VAT refunds in respect of closed cases may be administered by the former supervisor on trust principles ... We have researched the work required by trustees (i.e. former supervisors) to administer a closed case trust for the purposes of handling VAT refunds and have reached the view that a 25 per centage rate is appropriate in respect of remuneration and disbursement.
>
> Please accept this letter as the global approval from Matts to deduct 25 per cent in connection with to deduct 25 per cent in connection with the trustees' remuneration and disbursement ... every distribution made on closed-case VAT refunds to Max.
>
> For the sake of clarity, this approval applies to distributions out of closed-case asset refunds to Max only. Other beneficiaries may have alternative requirements in respect of remuneration. As with open cases, we confirm we are agreeable to IPs refraining from applying for a refund where common sense dictates that the cost of doing so would be disproportionate to the benefit ..."

54. Similar guidance was circulated by TDX Group Limited, another institutional creditors' agent, under cover of an email dated 2 September 2011, as modified by its letter of 12 January 2012 permitting the drawing of fees of 15 per cent of the net VAT refund attributable to each relevant estate for both open and closed cases. Whilst it is arguable in relation to open cases that consent by institutional creditors is not sufficient, even where they represent over 75 per cent of a IVA estate for the reasons identified by Mr Clements in his statement, it is difficult to see how a failure by Mr Nuttall to call formal variation meetings in all such cases can be characterised as dishonest in light of (a) the indication given by the ICAEW, that, in such cases, the IP could argue that the majority of creditors' voting powers would have resulted in approval, (b) the indication by institutional creditors' agents in clear terms to all LIPs of (i) their position and (ii) that they would object to the costs of calling such meetings .

55. It is argued on behalf of the claimants that the value of the advice given by the ICAEW is qualified by reference to the obligation resting on the insolvency practitioner to obtain his or her own legal advice. In my judgment, that may be relevant to an issue concerning negligence, or the lack of it, but it is not, in my judgment at least, one which impacts upon an allegation of dishonesty.

56. In relation to cases where the major creditors' representatives did not hold at least 75 per cent of voting rights, mass variations were proposed and, mostly, approved. There is no evidence of realisation fees being drawn in relation to those cases before approval was obtained and it is not obvious what loss could have resulted if approval was in fact received after the event.

57. There are, in my judgment, of number of insuperable difficulties in relation to claimants' case on the VAT issue. First, no attempt has been made to segregate cases falling into the three categories for which (it is now common ground) creditor agreement was not required from the one where it is alleged that such consent was required. Secondly, no attempt has been made to distinguish between those cases where at least 75 of creditors consented, albeit informally, and those where such creditors represented under 75 per cent of creditors. Thirdly, no attempt has been made to explain what loss has been caused, to which open case estates by reason of the failure to obtain formal consent. Fourthly, no attempt has been made to explain how a right-thinking person would conclude Mr Nuttall acted dishonestly in light of the information supplied to him by the ICAEW, and institutional creditors. Finally, there is no evidence of fees being deducted from open cases estates where institutional creditors were less than 75 per cent of total creditor body and no variations had been approved and no evidence of fees being deducted for any estate where there was a cap that precluded the collection of fees and where the Matts guidance was of no application. In relation to closed cases, there is no evidence of loss caused to such estates by the deduction of fees, other than on one of the bases authorised, for example, by Max Recovery Limited.

58. Much was made by Mr Groves of a payment of £300,000 from the VAT reimbursement to a company that was used to make a payment due on a property being acquired by the directors using another corporate vehicle. That, of itself,

goes nowhere unless it is proved that the £300,000 was a sum in excess of what the company was entitled to in respect of fees in the light of the conclusions I have, so far, reached. I put this point to Mr Groves in the course of his closing submissions and he agreed - see transcript for 18 May 2018 at p.137). It was suggested that it was for Mr Nuttall to prove an entitlement to the sums deducted - see transcript for 18 May 2018 at pp.135 to 136. In my judgment, that is a mistaken approach because it impermissibly reverses the onus of proof. The other point made, repeatedly, was that Mr Nuttall failed to credit money to individual accounts, as I have described. Whilst this was so, at least initially, it is not alleged that any of the Paymex money was lost as a result; only as a result of the deductions that were made, in respect of which it is alleged that the deductions were impermissible. In my judgment, therefore, this point does not take the issue any further.

59. In my judgment, for the reasons I have given, this element of the claimants' case fails .

**The CDTS Arrangements Issue**

60. These allegations are pleaded as breaches of Mr Nuttall's duties as a director, in paras.26, 4 and 5 of the particulars of claim by procuring or permitting the company to enter "*schemes of arrangements*" under which money was extracted from each insolvency case for the personal benefit of Mr Nuttall and Mr Varden and their connected parties by facilitating the payment to RMG of what are alleged to have been secret commissions. These allegations are repeated in para.28(7)(d) and (e) of the particulars of claim, with the payment to RMG being further particularised as a fee payable to CTDS by RMG. As the case developed, it became clear that that was an incorrect formulation and that what was being alleged was that Mr Nuttall acted in dishonest breach of duty as a supervisor by causing or permitting fees to be paid out of the estates, of which he was the supervisor, to CTDS, knowing that a portion of those fees would be paid by CTDS to RMG. That is not the allegation that is pleaded, but Mr Uff did not take that point, unsurprisingly, since the real point was fully explored, both in cross-examination by both parties and in the detailed oral closing submissions.

61. In his defence, Mr Nuttall asserted, as is common ground, that CTDS provided insolvency software, IT support and document management services to the company, at a cost of £480 per insolvency case, or £600 per joint case; that the cost was fair and reasonable when compared with alternative service providers, including Sawfish and Vision Blue, and that, although payments were made by CTDS to RMG, that was justified and was fair and reasonable because RMG provided CTDS with servers, staff, office accommodation and various support services, including scanning of documents into the server.

62. Whilst it will be necessary for me to set out some detail in relation to these arrangements, I should make clear at the outset that I am wholly unpersuaded by the argument that the cost charged out by CTDS gross of what it paid RMG was less than the cost of a similar service provided by either Sawfish or Vision Blue. That ignores that fact that, if payment by CTDS to RMG was improper,

the service provided by CTDS would have been even cheaper, to the benefit of creditors had it not been made. It highlights the importance of ascertaining what services, if any, were provided by RMG to CTDS and the true value of those services compared to the payments received as well as the degree to which if at all the making of the payment was disclosed by the supervisors or company to creditors.

63. It is common ground that the estate monies are held by supervisors of IVAs on trust for the purposes of the IVA; that is to say collecting the money and paying out dividends to creditors, net of deductible fees, disbursements and expenses. The manner in which fees, disbursements and expenses are dealt with are governed primarily by the terms of the approved proposals, which almost invariably adopt one of a small number of standard forms. However, the way in which a supervisor of an IVA should conduct himself or herself is also governed by the Statement of Insolvency Practice 9 ("SIP 9") which applies to all appointments starting on or after 1 November 2011. Insofar as is material, SIP 9 provides as follows:

> "INTRODUCTION
> 1. The particular nature of an insolvency office holder's position renders transparency and fairness in all dealings of primary importance. Creditors and other interested parties with a financial interest in the level of payments from an insolvent estate should be confident that the rules relating to charging have been properly complied with.
>
> ...
>
> 3. Payments to an office holder or his or her associates should be appropriate, reasonable and commensurate reflections of the work necessarily and properly undertaken.
>
> Those responsible for approving the basis or bases upon which payments to an office holder are to be calculated should be provided with sufficient information to make an informed judgment about the reasonableness of the office holder's requests ...
>
> KEY COMPLIANCE STANDARDS
>
> Provisions of General Application
>
> The information provided and the way in which the approval of payments to insolvency office holders and their associates for remuneration is sought should enable creditors and other interested parties to exercise properly their rights under the insolvency legislation.
>
> 6. An office holder should disclose:

a) payments, remuneration and expenses arising from an insolvency appointment to the office holder or his or her associates;

b) any business or personal relationships with parties ... who provide services to the office holder in respect of the insolvency appointment where the relationship could give rise to a conflict of interest ...

PROVISION OF INFORMATION WHEN FIXING THE BASES OF REMUNERATION

9. When seeking approval for the basis or bases of remuneration, an office holder should provide sufficient supporting information to enable the approving body, having regard to all the circumstances of the case, to make an informed judgment as to whether the basis or bases sought is/are appropriate. The nature and extent of the information provided will depend on the stage during the conduct of the case at which approval is being sought ...

11. An office holder should also provide details and the cost of any work that has been or is intended to be sub-contracted out that could otherwise be carried out by the office holder or his or her staff ...

DISBURSEMENTS

18. Costs met by and reimbursed to an office holder in connection with an insolvency appointment should be appropriate and reasonable. Such costs will fall into two categories:

a) Category 1 disbursements: These are costs where there is specific expenditure directly referable both to the appointment in question and a payment to an independent third party. These may include, for example, advertising, room hire, storage, postage, telephone charges, travel expenses, and equivalent costs reimbursed to the office holder or his or her staff.

b) Category 2 disbursements: These are costs that are directly referable to the appointment in question but not to a payment to an independent third party. They may include shared or allocated costs that can be allocated to the appointment on a proper and reasonable basis, for example, business mileage.

19. Category 1 disbursements can be drawn without prior approval, although an office holder should be prepared to disclose information about them in the same way as any other expenses.

> 20. Category 2 disbursements may be drawn if they have been approved in the same manner as an office holder's remuneration. When seeking approval, an office holder should explain, for each category of expense, the basis on which the charge is being made.
>
> 21. The following are not permissible:
>
> a) a charge calculated as a per centage of remuneration;
>
> b) an administration fee or charge additional to an office holder's remuneration;
>
> c) recovery of basic overhead costs such as office and equipment rental, depreciation and finance charges ...
>
> PAYMENT TO ASSOCIATES
>
> 24. Where services are provided from within the practice or by a party with whom the practice, or an individual within the practice, has a business or personal relationship, an office holder should take particular care to ensure that the best value and service is being provided ...
>
> 25. Payments that could reasonably be perceived as presenting a threat to the office holder's objectivity by virtue of a professional or personal relationship should not be made unless approved in the same manner as an office holder's remuneration or category 2 disbursements ..."

64. Much was made the claimants of an agreement referred to in the evidence as "*the Redmond agreement*", being an agreement between the company and Andrew Redmond, dated 18 May 2010. It was signed on behalf of the company by Mr Nuttall. Clause 2.3 of that agreement recorded that:

> "Andrew Redmond has certain confidential proprietary methodologies which, when applied, assists a provider of solutions
>
> 2.3.1 to create new or extra income directly or indirectly whether by reducing the cost of providing a service, identifying new ways of making income, providing new products or services which can then be provided to a client at more than cost, extracting income from the application of the solution or, without limitation, otherwise howsoever ('additional income') and/or
>
> 2.3.2 to reduce or eliminate

2.3.2.1 a liability of the provider of solutions to make a payment and/or

2.3.2.2 any costs or disbursement that the provider of solutions would otherwise generally need to incur to provide any solution or to be able to operate generally ..."

By clause 2.4 of the Redmond agreement, it was recited that:

" Andrew Redmond has agreed to share certain methodologies with the company for use by its and its affiliates on the same terms as set out in this letter."

The substance of the agreement is set out in clause 3, which, insofar as is material, provided as follows:

"3. Disclosure of methodologies

3.1 Andrew Redmond shall, following the signature of this letter ... company and on behalf of itself and its affiliates, disclosure certain methodologies with the company.

3.2 Andrew Redmond, licenses company and its affiliates ... to use such methodologies in the United Kingdom in relation to the group's business in relation to solutions managed by the group, whether past, current or future ... but for no other purpose and the company agrees that it will only use the methodologies for that purpose. The licence is non-exclusive and without any right to sub-license. If a person or entity ceases to be an affiliate of the company, it will no longer be a member of the group, and its rights under the letter will end.

3.3 The company shall keep and ensure its affiliates keep 3.3.1 the methodologies and 3.3.2 the ...[break in recording]... discussion with Andrew Redmond and/or entered into agreements set out in this letter with Andrew Redmond.

3.3.3 secret and confidential and shall not disclose and make available and shall ensure that none of its affiliates disclose or make available

3.3.4 any of the methodologies or

3.3.5 the fact that it has had any discussion with Andrew Redmond and/or entered into the agreement set out in this letter with Andrew Redmond ..."

By clause 5.3, a fee was payable to Mr Redmond of 15 per cent of all additional income, and 15 per cent of all cost savings, received or achieved.

65. It was submitted on behalf of the claimants that entry into the Redmond agreement put Mr Nuttall in an immediate position of conflict between his own interests interest and his duty as a supervisor. I do not agree. Mr Nuttall and the company were in business to make money by the provision of professional services. It would be entirely unobjectionable if Mr Nuttall, in his capacity as a director of the company, was able to arrange the way in which its business was carried on so as to enhance, lawfully, the income it received and/or, lawfully, to reduce the costs it incurred and that is equally so if done on the advice of Mr Redmond. The fee structure is unobjectionable because it is referable to the income of and costs incurred by the company not any of the estates of which Mr Nuttall was trustee in his capacity as a supervisor. There is no conflict for Mr Nuttall between his interest in making a success of the company's business and his duty in relation to the estates of which he was supervisor, as long as he complied with SIP 9, the terms of the IVA and his more general obligations as a trustee arising by reason of his position as, in effect, a trustee of the estate monies belonging to each IVA of which he was supervisor. Thus, although much is made by the claimants of the Redmond agreement, I regard it as largely, if not wholly, immaterial for present purposes, other than as background to the matters to which I refer below. What matters are the arrangements made by the company, whether they were recommended by Mr Redmond or not.

66. There is no real dispute as to the primary facts in relation to the element of the claim I am now considering. Mr Halliday was employed from November 2008 to create and then maintain IT infrastructure for the purpose of enabling the company to carry on its business. He was approached, I find, by, first, Mr Nuttall and then by Mr Nuttall and Mr Varden together, with a proposal, which it is said, and I am prepared to accept, came, initially, from Mr Redmond. Mr Nuttall and Mr Varden wanted Mr Halliday to offer exactly the same services as he was providing as an employee, but pursuant to a contract to be entered into between the company and CTDS, a company, as I have explained, that was controlled by Mr Halliday. It was clear from the outset that CTDS would not retain anything from the fees that CTDS would, ostensibly, be entitled to receive, other than a sum equal to Mr Halliday's salary and any other direct costs incurred by CTDS. This arrangement is not mentioned in the written agreement between CTDS and RMG or in any other written agreement. It was described as a "*marketing commission*" by Messrs. Nuttall and Varden. Although it was meant to be invoiced by RMG to CTDS, in practice, it never was. In the result, the cost per case that was levied against each estate as a sum ostensibly payable to CTDS for the provision of IT services, it was in fact not paid over to CTDS in full. Mr Halliday described the arrangement from his perspective, in his witness statement, as one where:

> "... The real thrust of the agreement, as far as I was concerned, was that RMG was to profit from him to the maximum extent possible. Any VAT or corporation tax payment or reclaim was the responsibility of CTDS and, ultimately, CTDS was left with a liability to HMRC on several occasions."

67. The problematic nature of these arrangements is revealed by an exchange of emails between Mr Halliday and Mr Nuttall on 17 June 2013, which were in these terms:

> "From: Phil Nuttall
>
> Sent: 17 June 2013 15.14
>
> To: John Halliday
>
> Subject: CTDS
>
> Just in case the ACCA, who are in tomorrow, may want to see the signed self-billing form and some invoices which I can produce, I just need your new home address and the date when you moved [so] I can produce them ..."

The ACCA was one of the regulatory bodies that controlled insolvency practitioners. The response to this email from Mr Halliday was as follows:

> "Hi Phil,
>
> My addresses are as follows. Pre 1 April 2011 ...
>
> Post 1 April 2011 ...
>
> I've got the self-bill authority ready to print. I just need the date when we started the CTDS charges so I can backdate it. I have ... this on letterhead, with my old address.
>
> Regards
>
> John"

In my judgment, this exchange demonstrates the creation of sham documentation, in the sense defined by Lord Diplock in Snook v London and West Riding Investments [1967] 2 QB at p.801. Mr Nuttall maintained that he was unaware of these arrangements but nonetheless (a) accepted that money was paid by CTDS to RMG and (b) maintained that, whilst he did not know the terms on which RMG provided support to CTDS, CTDS was provided with a server for IT systems, staff resources to upload estate documents, and two IT support staff were employed to assist. He maintains that there could be no principled objection to the arrangement, given paragraph 24 of SIP 9.

68. I reject Mr Nuttall's evidence that he was unaware of the arrangement. I accept Mr Halliday's evidence that it was Mr Nuttall who approached him initially about the proposed arrangement and that there were then further discussions with him, Mr Varden and Mr Nuttall about them. I accept Mr Halliday's evidence on these matters because (a) it is inherently probable that Mr Nuttall would be involved because he was the point of contact with Mr Redmond, who was apparently the source of the idea, (b) he was in operational control of the

insolvency business operated by the company and (c) he was also a director of, and shareholder in RMG. It is, in my judgment, inconceivable that he would not have been aware of the position or that it would have been suggested without his agreement. The emails concerning self-invoicing (referred to earlier) are plainly consistent only with him knowing and operating the arrangements. That he signed documentation giving effect to further arrangements of a similar kind, including in particular that referred to as the "HLL arrangement" (that I refer to in more detail below) further enhance the inherent probabilities of Mr Halliday's evidence on these issues being correct, rather than that of Mr Nuttall. It is undoubtedly this that led Mr Uff to concede in the course of his submissions that in relation to CTDS Mr Nuttall's conduct fell below the standards that were to be expected of him - see the transcript for 18 May 2018, page 30. Nonetheless, it is submitted by Mr Uff that I should acquit Mr Nuttall of dishonesty in relation to the CTDS arrangements. Regrettably, I am not able to do so. My reasons for that conclusion are as follows.

69. First, Mr Uff argues that SIP 9 creates a legitimate doubt as to whether the agreements were permissible ones or not. I reject that submission. Paragraph 18 of SIP 9 is of no application to the CTDS arrangement, because, as Mr Nuttall has always said, the payments made to CTDS were made directly from the estates or at least were allocated in the books and records of the estates as a direct payment. They were thus not costs met by and reimbursed to an office holder. If that is wrong, and even if the payments are treated as category 1 payments, that is entirely beside the point. It is not the concept of a per estate fee for IT and document storage support that is objectionable, but that the fee ostensibly payable for that service in fact includes what, according to Ms Andrew, the senior management of the company called a "*kick back*" or secret commission. It is inconceivable that anyone could consider such an arrangement to be honest in the absence of consent when viewed from the standpoint of the beneficiaries of the IVA (that is creditors and in some cases ultimately debtors) or for that matter from the standpoint of someone occupying a trustee or fiduciary position in relation to the money from which the secret commission was derived. In my view such an arrangement was one that could only be regarded as objectively honest if administered in accordance with paragraph 25 of SIP 9.

70. Secondly, although Mr Nuttall sought to rely on paragraph 24 of SIP, in my judgment that too entirely misses the point. He maintained that the gross fee paid by the estates represented good value by reference to all other independent suppliers but it is the secret commission element that is obviously objectionable.

71. Thirdly, in my judgment much more material to the honesty issue I am now concerned with are paragraphs 1 and 6 of SIP 9. Transparency and fairness are said to be of primary importance. There was nothing either transparent or fair about this arrangement. Mr Nuttall accepted in the course of his cross-examination that no more than 15 per cent of realisations could be charged by way of supervisor fees at the proposal stage because any greater per centage would not be tolerated and therefore not accepted by institutional creditors - see the transcript for 15 May 2018 at page 110, at lines 13-16. The only beneficiary of the secret commission arrangement was RMG at the expense of creditors,

again as Mr Nuttall accepted - see the transcript for 15 May 2018, page 122, lines 23 to page 123 line 18). This secret commission mechanism was in truth a mechanism by which a sum in excess of the agreed supervisor's fee could be obtained from each estate.

72. Finally, paragraph 6 of SIP 9 requires an office holder to disclose payments or remuneration or expenses paid to an officer or his or her associates. As an experienced licensed insolvency practitioner Mr Nuttall knew full well of this requirement. It is true to say that he asserted in answer to a question from me that all, or at least the majority of creditors, had consented to the arrangement. However, there is no evidence that comes close to demonstrating that to be so apart from Mr Nuttall's assertion. At the transcript for 15 May 2018 page 132, having conceded he was personally fully aware of the arrangements being made with Mr Halliday, contrary to the denial of that in his defence, Mr Nuttall asserted that the creditors were fully aware of the payments to RMG because it was openly discussed at meetings. However, it became clear that there was no substance to this point. Mr Nuttall accepted in cross-examination that the point was discussed in a meeting with only one representative of institutional creditors and not with any non-institutional creditors with the result, as he accepted, that even on his own case there were many creditors with no knowledge of the arrangement - see transcript for 15 May 2018, page 134 lines 6-22. In fact, even in relation to the discussions that Mr Nuttall alleges took place, disclosure was not full or frank because, as he accepted, a payment was being made to a holding company which was not disclosed - see transcript for 15 May 2018, page 135, lines 9-11. My conclusion is that if there were discussions as alleged by Mr Nuttall they were not for the purpose of formal disclosure because had they been I regard it as almost inevitable that a record of the conversation would have been kept when in fact, as is accepted, none was kept - see transcript for 15 May 2018, page 135, lines 16-20.

73. In the end Mr Nuttall accepted that the arrangement was a secret system for increasing fees - see transcript for 15 May 2018, page 136, lines 1-6. In my judgment that was the reality of the situation. Given what Mr Nuttall said was the position of institutional creditors to supervisor fees of in excess of 15 per cent, I consider it in the highest degree improbable that the representatives of such creditors would have consented to an arrangement such as I am now considering when he had obviously defeated such objections, and I reject that suggestion as inherently improbable and not demonstrated by any objective evidence available to me.

74. It was suggested by Mr Nuttall that services were being provided by RMG in return for the payment. I reject that suggestion. There is no evidence apart from assertion that such was the case. The services were, in any event, simply what had been available to Mr Halliday before the involvement of CTDS. No attempt was made, either at the time or at all, to demonstrate any connection between the amount of the secret commission and the value of (or cost of providing) the services alleged to have been provided. In any event, I consider that the services relied on, in part at least, to be simply unreal. The server was the server Mr Halliday was maintaining and thus not his to use in any real sense. He was not contracted to physically scan material into the document storage system but to

provide such a system for managing documentation. Thus, the fact that RMG paid staff to scan document is in my judgment irrelevant. The reality is as Mr Nuttall accepted, that this was a secret system for increasing fees. That was impermissible, as is expressly stated in paragraph 21(b) of SIP 9.

75. Mr Nuttall knew SIP 9 and its contents. He knew what he and Mr Varden had told Mr Halliday. He knew that the whole fee ostensibly payable to CTDS was not in fact paid to it as is shown by the email exchange referred to earlier. He knew that the sums paid over to RMG were at the expense of creditors and the secret means by which fees were being increased, and he knew that that was not permitted both by operation of the terms of the IVA and the terms of SIP 9 and was inimical to the role of an LIP as trustee of the IVA estate. He knew that no attempt had been made to inform other than at most a single agent for institutional creditors and he knew that even then the disclosure had not been full and frank. In fact, and for the reasons I have already outlined I reject Mr Nuttall's evidence that there was any material disclosure. Had what he says occurred happened then there would bound to have been a record of it in the interests of both parties to the discussion. It is, as I have said, inherently improbable that the institutional creditors' agent would have agreed if the information had been fully and frankly disclosed because such consent would have obviously defeated the admitted objection of such creditors to supervisor fees of in excess of 15 per cent of realisations. In those circumstances right thinking people would conclude that entering into and then giving effect to the arrangement was a dishonest breach of the duties owed by an administrator, being those those identified in SIP 9 and arising by reason of the administrator's role as a trustee of the IVA estate.

76. One issue remains in relation to this issue and that concerns Mr Nuttall's liability for payments made by or on behalf of IVAs of which he was not a supervisor at the time the payments were made. Although Mr Groves maintained that the Claimants were entitled to succeed by reference to all Mr Howarth's appointments because in effect Mr Howarth ceded effective control of those IVAs of which he was supervisor to Mr Nuttall, I am not able to accept that submission. In my judgment an individual is either the supervisor of an IVA or he/she is not. It is noteworthy that the Claimants have pleaded this case in relation to duties owed by Mr Nuttall as supervisor only "*... as an office holder to the insolvency cases*." He was not such an office holder in relation to the IVAs of which Mr Howarth was supervisor unless and until he was formally so appointed in place of Mr Howarth.

77. None of the allegations pleaded in paragraph 28(7) of the Particulars of Claim are apposite for a claim against Mr Nuttall in respect of payments made before he was appointed. It is not alleged, for example, that he was under a duty to disclose what had happened during the time Mr Howarth was the supervisor, although it is arguable that that would have been so. Any payments made after he was appointed in place of Mr Howarth will, of course, be caught in accordance with the conventional principles.

78. Mr Groves submitted that I should conclude that Mr Nuttall dishonestly assisted the supervisors, including in particular Mr Howarth, to breach their duties by

putting in place the CTDS arrangements. I accept that in principle such a claim is capable of being advanced on the basis of the findings set out above. However, I am not able to accept that submission because no such allegation has been pleaded. It was not suggested by Mr Uff that the claim for breach by Mr Nuttall of his duties as a director pleaded in paragraph 23(a), (b) and (d) should not succeed on the basis of the Claimant's factual case as I have found it proved. In those circumstances, the only dishonest assistance claim pleaded, being that pleaded in paragraph 27 of the Particulars of Claim, is probably not one that I need to consider further.

79. What remains unclear to me even now is what losses are said to have been suffered by the company as a result of the events to which I have referred concerning CTDS. I will hear counsel further after the conclusion of this judgment as to how these issues are to be resolved. Provisionally, I consider it is likely that it will be necessary for them to be resolved at an inquiry, as I have said. I will hear counsel after completion of this judgment as to what sums are due from Mr Nuttall on the basis of these conclusions. Provisionally I anticipate it will be necessary for there to be an accounting inquiries hearing to determine that sum in the absence of agreement.

**The RMSL and EIC Arrangements Issues**

80. I now turn more briefly to the payments made to RMSL. The essence of the Claimant's claim is the same as that made in relation to the CTDS Arrangements, that is that Mr Nuttall entered into an agreement with a third party provider on the basis that part of the fees to be paid to the third party provider would be paid by that third party to RMG. However, the detail is different in that the payments made to RMG by RMSL were subject to a written agreement. The agreement under which RMSL was to provide services is contained in or evidenced by a letter from RMSL dated 13 October 2011. Mr Nuttall's instructions given to RMSL as recorded in the letter were in these terms:

> "You have instructed us that it is incumbent upon you as supervisor of an IVA to ensure that any assets that are potentially available to an IVA should be realised and made available for the whole of the IVA estate, and this includes Causes of Action such as claims for the mis-sale of payment protection insurance. The process you require us to follow is to firstly undertake a two-fold review of all the IVAs supervised by you in order to ascertain any evidence of PPI and then gather any available evidence as to whether that PPI was mis-sold to a consumer. Upon identifying a case where PPI has been mis-sold you have instructed us to pursue a claim for compensation in order for those compensation refund monies to be realised into the IVA's estate by way of increased dividend payment to creditors. We have also agreed that we will provide you with regular updates in relation to the progress of each and every case."

The fee structure as set out in the letter was in these terms:

> "We have agreed that there is a two-fold review per IVA and the cost of the review at each stage is £100, giving a total of £200 of review fees per IVA whether or not a PPI claim is identified. In respect of the claims process you have agreed that each case will be conducted on a 'no win no fee' basis. You have agreed to sign a contingency fee agreement enclosed herewith. The agreement provides for a fee to our firm of 36 per cent, including VAT, of all monies recovered whether or not the compensation refund or goodwill payment against an individual creditor's debt in the IVA. We would further advise and confirm as per our meeting with Richardson Mail will pay a referral fee to Release Money Group in respect of each and every case which results in the 36 per cent inclusive of VAT fee being paid to Richardson Mail. The referral fee will be the sum equivalent to 25 per cent of the net fee paid to Richardson Mail. You have already indicated that you understand and accept that arrangement. We also confirm that the payment of that fee will not in any way impinge upon our advice to you, nor will it in any way allow any other party to influence our advice or the manner in which we conduct your cases ..."

Although the letter was addressed to Mr Nuttall, it was counter-signed by him in his capacity as a director of and on behalf of the company.

81. There was a separate agreement made between RMSL and RMG dated the following day. That agreement at recital C states that:

> "... the payment in respect of administrative costs incurred in the provision and preparation of data (admin payment) from Richardson Mail's solicitors payable in respect of any referrals made that result in a successful compensation and/or refund of monies paid to the consumer in respect of mis-sold payment protection insurance ..."

This agreement defined "*admin payment*" as being "*... a payment from the referee to the referrer attributable to the costs incurred in the preparation and provision of the data to the referee on cases which result in successful compensation and/or refund of monies paid to a consumer in respect of mis-sold payment protection insurance*." The agreement purported to impose on RML "*the obligation to process and evaluate client data, and payment data using the evaluation procedure*". "*Evaluation procedure*" was defined to be "*... the referrer's written criteria on referrals as amended from time to time in any consultations between the referrer and the client and/or parties that the referrer deems necessary*". "*Referrer*" was defined as the party making the referral. That could not be RMG obviously since it was not a supervisor of the employee of any supervisors, but could only be either the company or a particular supervisor. The referee was defined as being the party receiving the referral, which could only be RMSL. The word "*client*" was defined as meaning, in effect, the debtor and "*referral*" was defined as being the introduction by the

referrer to the referee, that is the introduction by either the company or LIP of the debtor, the subject of an IVA administered by an LIP employed by the company to RMSL. This agreement was signed on behalf of RMG by Mr Nuttall.

82. Although the Claimants criticise the double charge levied by RMSL under the agreement with the company, I do not consider that the Claimants have proved that to be inappropriate, much less dishonest. The two reviews are for different purposes, one being to ascertain any evidence of PPI having been purchased by the debtor and the other relating to evidence of mis-selling. No evidence was adduced that suggested that this was an inappropriate way to proceed at the time this agreement was entered into and it is not inappropriate on its face for the reasons I have given, that is that each payment is for a different part of the exercise.

83. The main focus of the Claimants is on the payment made to RMSL by RMG. There is every reason to be suspicious about this arrangement. First, the fee payable to RMG is described in the 13 October 2011 letter as being a "*referral fee*" of 25 per cent of the net fee payable to RMSL. No attempt is made in the letter to justify the fee on any other basis. If a referral fee is payable in respect of instructions given by or on behalf of the supervisor of an IVA then it is obvious that the fee ought to benefit the estate and therefore its creditors, and ultimately the debtor, and not RMG, or for that matter the company or the supervisor of the IVA concerned. Secondly, the description contained in the agreement between RMG and RMSL of the fee paid is different from and inconsistent with the terms in which the payment is described in the retainer between Mr Nuttall on behalf of the company and RMSL. The RMG agreement refers to it as an "*admin payment*" whereas the retainer letter refers to it as a "referral fee". Finally, RMG is a holding company. It did not provide services or even employ the LIPs. The operating company was the company. RMG did not and could not perform the services of a referrer. In those circumstances I consider that the payment by RMSL was in substance a referral fee paid to RMG which served to enhance the fees payable in respect of each IVA where a successful PPI mis-selling claim was made on behalf of the debtor.

84. As such, everything I said in relation to the CTDS payments applies with equal force to the RMSL payments save and except for one point, an allegation by Mr Nuttall that the existence of the arrangement had been disclosed in a way that the CTDS payments were not. I will turn to this in a moment.

85. A similar arrangement to that with RMSL was entered into in January 2013 with an entity called Expert Insolvency Claims (hereafter EIC). It is not necessary that I set out in any detail the arrangements since they were, in all material respects, the same as those with RMSL.

86. Before turning to the factual case concerning disclosure it is appropriate that I remind myself of the terms of SIP 9 and in particular paragraph 1 where transparency and fairness are described as being of primary importance, Paragraph 6, which requires the disclosure of all payments and remuneration to an office holder or his/her associates arising from the appointment, paragraph

25, which requires the disclosure of all payments that could reasonably be perceived as providing a threat to an office holder's objectivity. Where such payments have to be disclosed by operation of paragraph 25, they must be disclosed to the level necessary for a category 2 disbursement, that is in the same manner as for an office holder's remuneration - see paragraph 20 of SIP 9. Such disclosure should: "*... provide sufficient supporting information to enable the approving body, having regard to all the circumstances of the case, to make an informed judgment as to whether* ..." the basis of remuneration is appropriate. In my judgment it is clear from this provision and from the other relevant SIP 9 provisions that prior approval is required: see in addition the terms of paragraph 19 ("*prior approval*"). Paragraph 20 ("*Category 2 disbursements may be drawn if they have been approved*"), and paragraphs 9-12, when read together.

87. Mr Nuttall knew that the payments I am now considering needed to be disclosed. In my judgment he knew or turned a blind eye to the need for such disclosure to take place before rather than after the event or recklessly disregarded that requirement or even the possibility of such a requirement by operation of SIP 9. He knew of the need for disclosure for all the reasons set out above in relation to the CTDS payment and also because he had so informed Mr Varden - see Mr Varden's email of 7 October 2011 timed at 13.28 to Mr Nuttall and Mr Slater and see also, and perhaps more significantly, Mr Nuttall's response where he said:

> "With respect to disclosure ANY monies earned by any company in group or any company we have a financial interest in needs to be disclosed. It is just a big drive to transparency AND we don't disclose until the annual report after we have RECEIVED the cash. We could time it so that we receive the cash before anyone can say anything. Timing will be key IF they read the report."

88. It is common ground that there was no prior disclosure of the arrangements to creditors, and that the email I have referred to above is consistent with that being so in relation to at least the RMSL payments given that the email was dated only a few days before those arrangements were made. The only disclosure to which my attention was drawn was after the event and contained in supervisor reports to creditors. I was taken to only one example but it is common ground that it was typical. In the sixth and final report in respect of Mr & Mrs Andrews' IVA signed by Mr Nuttall and dated 12 December 2014 it is recorded at paragraph 3.3 that Mr Nuttall had instructed a third party to recover PPI premium and that £34,996 had been recovered. It is then recorded at paragraph 4.7 that:

> "Third party fees in relation to obtaining the payment protection insurance amounts to £12,588 including VAT. They have been paid to Release Money Group Limited, the holding company of Varden Nuttall Limited for the assistance given in making the claim."

89. In my judgment that disclosure was woefully inadequate because (a) it was after the event, (b) it did not even attempt to explain what services RMG was providing, (c) it did not attempt to explain what sums had been paid to RMG or

why it represented best value or otherwise the basis on which the charge had been made or (d) any other information which enabled the recipient of the report to make an informed judgment as to whether the payment was appropriate in principle, or an amount, if appropriate, in principle. This is made all the more unsatisfactory by the terms of Appendix 1 to the letter where the only reference to gross fees paid in respect of the PPI assessment is the sum of £360. There is no reference to the sums that are referred to in the text I have mentioned.

90. Mr Uff's oral submission on this was that if fully informed consent was required then he would, as he put it, "*fall on my sword at this point*". - See transcript for 18 May 2018, page 46, line 24. His submission was that to conclude that SIP 9 required the disclosure of information to enable fully informed consent to be given was not a fair analysis of the effect of SIP 9 and that the true interpretation of SIP 9 and its requirements turned on a legitimate disagreement concerning what was a category 1 and what was a category 2 disbursement - see transcript for 18 May 2018, pages 42-45, line 11.

91. In my judgment this analysis is mistaken because (a) I am not satisfied that the issue I am now concerned with is on any view one concerning a disbursement because the sum paid to RMSL or EIC to RMG was not a cost met by and reimbursed by an office holder, (b) I am not satisfied that any meaningful services were provided by RMG in return for the payment that it received or that the payment reflected best value for any services that were provided and (c) there was no fair disclosure of the payments made. The only disclosure was after the event and ineffective for the reasons I have explained. If and to the extent that Mr Nuttall relies on oral disclosure in discussions with representatives of institutional creditors I do not accept that any such disclosure was made or that it was full or fair for all the reasons I have given when considering the payments made by CTDS.

92. Mr Nuttall knew all about these arrangements, not least because he signed all of the documentation that record or purport to record them. He knew that there was an obligation to disclose all monies received by the company or in the group because he acknowledged that to be so in the email referred to above and because he was fully familiar with the terms of SIP 9. He also knew that institutional creditors would not agree to pay supervisors a fee in excess of 15 per cent of realisations, and thus would not agree to an arrangement whereby third party service providers paid part of the fee that provider received to either the supervisor or the company employing the supervisor or any company that controlled the company that employed the supervisor for reasons which are obvious. Mr Nuttall knew that at best only inadequate disclosure had been made and that it was after rather than before the event and was deliberately so in order to defeat adverse attention.

93. In my judgment, in those circumstances causing or permitting a payment to be made to and received by RMG of the sum paid to it by RMSL and EIC was a dishonest breach of duty in his capacity as the supervisor of those IVAs in respect of which he was a supervisor at the time payments were made, and of his duties as a director and as and to the same extent was the position in relation to the CTDS payments.

94. I will hear counsel as to quantum following delivery of this judgment. Provisionally it strikes me that a similar approach will be required in relation to the RMSL and EIC payments as that which will apply to the CTDS payments.

**The HLL Arrangement Issue**

95. These are summarised in paragraph 10.8 of Mr Clements' first affidavit. These arrangements were materially the same as those I have so far considered in detail in relation to CTDS, RMSL and EIC. There was an agreement entered into between HLL on the one hand and the company acting by Mr Nuttall on the other by which property appraisal services were to be provided by HLL for a fee chargeable to each estate.

96. By an agreement made on 9 January 2014, RMG, acting by Mr Nuttall, entered into an agreement with HLL by which a referral fee was payable by HLL to RMG of £100 per audit. This arrangement was as objectionable in my judgment as were the CTDS, RMSL and EIC arrangements under which part of the fee ostensibly payable to the service provider was either retained by the company and p[aid to RMG or paid by the service provider to RMG. Mr Nuttall is liable in respect of all such payments to the same extent and on the same basis as he is liable for the payments made to CTDS, RMSL and EIC.

97. Again, I will hear counsel concerning quantum and how it is to be arrived at at the end of this judgment in relation to this element as well as all the others, again expressing the provisional view that a common approach will have to be adopted.

**The Accounting Treatment of Repayments to IVA Estates**

98. It is necessary now that I refer to the various other arrangements the Claimants characterise as unlawful and as dishonest breaches of duty by Mr Nuttall in his capacity as a supervisor. These in summary concern returned dividends which were posted as "*voluntary contributions*", duplicate postings and reverse supervisor fees being characterised again as "*voluntary contributions*." The point made by the claimants is that this treatment enabled the supervisor concerned to claim a fee based on realisations when in truth no fee was payable on the items concerned.

99. In my judgment the evidence available to me does not justify any conclusion other than that these were accounting errors made in a small number of insolvency cases, which were at most negligent and do not amount to dishonest breaches of duty. My reasons for reaching that conclusion are essentially those identified by Mr Uff in paragraphs 37.1 to 37.16 of his opening submissions. These points were not addressed in Mr Groves' written closing submissions. This led Mr Uff to submit that the allegations of dishonesty made by reference to these allegations were "*utterly devoid of substance*." I regard these issues as essentially concerning accounting errors because they have to be viewed in the

context identified by Mr Nuttall in paragraph 20.10 and 21.4 of his witness statement.

100. Similar considerations apply to the allegation of charges levied in excess of fees and disbursements caps imposed by the relevant IVAs, if and to the extent that that is maintained other than by reference to the objectionable arrangements I have already referred to. It was for the Claimants to prove over-charging in breach of an IVA where fees and disbursements were capped and in my judgment they failed to do so. If and to the extent that the point is still relied on by the claimants, I accept the submission made by Mr Uff that charges made in respect of PPI claims were not disbursements because the costs were not costs met by and reimbursed to an office holder but were costs paid for by the supervisor from estate funds.

101. In my judgment this element of the claim has not been proved as either a dishonest breach of duty.

**Conclusions**

102. The reality is that Mr Nuttall was content to enhance the fees obtained from each insolvency case by entering into agreements with third party service providers as a means of enhancing the fees received from each IVA by the amount of the payments made by those providers to RMG. Those payments should have benefited the estates concerned but in fact they benefited ultimately Mr Nuttall and Mr Varden. In making and carrying into effect these arrangements Mr Nuttall acted in dishonest breach of his duties as a supervisor. He was in negligent (but not dishonest) breach of his duties as a director of the company in relation to the manner in which he supervised the company's accounting which resulted in the shortfall in the .net account. I do not accept that a dishonest breach of duty has been established in relation to the handling of the VAT payment returns and I do not accept that the accounting treatment of return payments constituted dishonest breaches of duty either. They were at best accounting errors in relation to a small number of cases that was at worse negligent.

103. In those circumstances I will hear from counsel concerning how this judgment ought to be carried into effect but will do so at 2 o'clock.

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