Neutral Citation Number: [2022] EWHC 784 (Ch)

Case No: CR-2019-003186

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES COURT (ChD)
RE: MARYLEBONE WARWICK BALFOUR MANAGEMENT LIMITED (reg.nr. 02944316) (in liquidation)
AND RE: THE INSOLVENCY ACT 1986

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

Date: 06/04/2022

Before :

ICC JUDGE PRENTIS

- -

Between :

STEPHEN JOHN HUNT **(Liquidator of Marylebone Warwick Balfour Management Limited)**	**Applicant**
- and -	
(1) RICHARD BALFOUR-LYNN **(2) JAGTAR SINGH** **(3) MICHAEL BIBRING** **(4) JOHN HARRISON** **(5) RICHARD ASPLAND-ROBINSON** **(Also known as Guy Richard Aspland-Robinson)** **(6) JOSEPH SHASHOU** **(7) ANDREW BLURTON**	**Respondents**

- -

Lexa Hilliard QC (instructed by **Wedlake Bell LLP**) for the **Claimant**
Daniel Lewis (instructed by **Sylvester Amiel Lewin & Horne LLP**) for **Michael Bibring**
Jagtar Singh and **Richard Aspland-Robinson** in person
The First, Fourth, Sixth and Seventh Respondents did not appear.

Hearing dates: 25-28 and 31 January, 1-2 and 7-9 February 2022.

- -

JUDGMENT

ICC JUDGE PRENTIS:

Introduction

1. Between September 2002 and August 2010 £27,706,849 of PAYE and NICs otherwise due to HMRC in respect of the Respondents' remuneration for their services to Marylebone Warwick Balfour Management Limited (the "Company") was avoided and paid to them. This is the trial of the application issued by the present liquidator, Stephen Hunt, on 10 May 2019 contending that the entry into the avoidance scheme (the "Scheme") and/ or its continuation was in breach of the Respondents' fiduciary duties, and/ or that the payments were transactions defrauding creditors within the meaning of section 423 *Insolvency Act 1986* ("IA86"); and making other connected claims. At its height it is averred that the Respondents are jointly and severally liable for the £38,701,750 which is the debt admitted on HMRC's proof in the liquidation. The trial has proceeded only against Jagtar Singh, Michael Bibring and Richard Aspland-Robinson, the remaining Respondents having agreed a Tomlin Order with Mr Hunt sealed on 22 October 2021; so the claims against them are stayed on confidential terms. The other recipients under the Scheme, Paul Harries, Stephen Rodwell, Simon Leadbetter, Keval Pankhania, Ian Cave and Clive Hillier were named as respondents on the application notice as issued, but removed before its service.

The Company, its parents, and its liquidation

2. The styling of the Marylebone Warwick Balfour companies derived from their being an amalgamation in 1994 of the business interests of Richard Balfour-Lynn, a businessman who had latterly operated in the field of property development through Warwick Balfour Properties Ltd, and John Harrison, a chartered surveyor who had been operating in the same field through Marylebone Estates Ltd. They were childhood friends, and were joined in the founding of the Marylebone Warwick Balfour companies by Joseph Shashou who had been working with Mr Balfour-Lynn. What became the Marylebone

Warwick Balfour Group began as a residential investor and developer with a block of student housing on High Holborn.

3. The Company was incorporated on 30 June 1994 as Marylebone Warwick Balfour (Consultancy) Limited under number 02944316, changing to its present style on 13 December 1994, to provide management services to what has here been styled "Plc 1", Marylebone Warwick Balfour Group plc, and other group companies. Plc 1 was the Company's parent until 1 July 1997, when Plc 1 changed its name to Marylebone Warwick Balfour Holdings Limited.

4. The name change was consequent on a merger between Plc 1 and the Company's new parent, "Plc 2", which became effective on that date, with Plc 2 adopting Plc 1's style as Marylebone Warwick Balfour Group plc. Until then, since incorporation on 8 November 1996 Plc 2 had been known as Ex-Lands Properties plc. From 1 July 2008 until 20 June 2019 it became MWB Property Limited, and for entry into liquidation the next day it changed its name to Office Properties PL Limited.

5. As part of the arrangements which led to the inception of the Scheme, on 24 May 2002 the Company's parent changed again, to Servco (General Partner) Limited ("Servco GP"), the general partner of Servco Limited Partnership (variously "Servco Partnership", "ServeCo" and "ServCo"). Servco Partnership had been registered on 26 March 2002 as Asset and Property Services Limited Partnership, being renamed on 14 May 2002. The limited partners were the Respondents and Jayne McGivern. Of the £700 capital which they provided Mr Aspland-Robinson and Ms McGivern invested £56 each, the others £98 each. Servco Partnership remains in existence. Servco GP entered MVL on 12 July 2013 and was dissolved on 17 October 2019. Its liquidator was Lane Bednash.

6. The 2002 transfer did not effect any change in the Company's principal activity recorded in its annual accounts to 30 June of that year, being the supply of management services. However, its accounts to the next year-end added "property development" to those services. There was no change in this

until its last-filed accounts, those to the year-end 30 June 2011, by when the principal activities were "acting as a holding company and the supply of management services".

7. On 24 July 2009 Servco GP sold its shares in the Company, apparently completing on 12 January 2010, to a newco, Servco Services UK Limited ("Servco UK"), itself owned by the Respondents. Servco UK also entered MVL on 12 July 2013 with Mr Bednash as liquidator, and was dissolved on 15 October 2019.

8. The Company entered CVL on 14 May 2013 with Mr Bednash as liquidator. He filed his final account on 3 March 2016 and pursuant to section 201 IA86 it was dissolved on 3 June 2016. His final report confirms that HMRC had been desirous of funding a claim against the Company's directors "but following extensive investigation and liaising with duly instructed solicitors, barristers and tax experts, I determined that no such claim could be brought". While solicitors and barristers had been found on a CFA basis for a claim against BDO neither HMRC nor another funder could be found.

9. HMRC was not content. On 3 June 2017, by order of 24 May 2017 the Company was restored into voluntary liquidation on the application of Mr Bednash supported by HMRC on the basis that Mr Hunt would be appointed liquidator. On 30 December 2017 Stephen Hunt and Adam Harris filed at Companies House notice of their appointments as liquidators, apparently on 15 May 2017 by the High Court of Justice. Mr Harris ceased to act on 2 January 2018.

10. Aside from HMRC there are no material creditors in the liquidation.

The directors of the Company

11. Over its life the Company had 15 directors. I will say more about their roles later, as it is Mr Hunt's view that at the material times when the active

Respondents were not formally appointed directors of the Company they were de facto directors, and/ or in the case of Mr Singh a shadow director.

12. Their relationships are best described by what they did for Plc 2 as the main operational company; they were reflected in their roles at the Company.

13. The Respondents were the core of the senior management team at Plc 2. The exception is Mr Aspland-Robinson, who was not a director of Plc 2 but was a director of one of its subsidiaries, MWB Business Exchange plc ("Business Exchange"). "The Respondents" as used at trial and adopted here must be understood generally not to include Mr Aspland-Robinson.

14. Mr Balfour-Lynn was the Chief Executive of Plc 2, overseeing the operational side of the Group and, as the Defence states, "with responsibility for the direction of the Group, the co-ordination of the areas of activity, its financial strategy and liaison with the shareholders". In their evidence the Respondents were united in their view of him as a charismatic if autocratic leader. As the original founders he, Mr Shashou and Mr Harrison were the main shareholders in Plc 2, holding about 25% of its shares between them. He was a registered director of the Company from 30 June 1994 until 28 October 2003, and again from 21 December 2005 until 31 March 2012.

15. Mr Shashou and Mr Harrison were responsible for particular divisions of the business. Mr Shashou, a real estate man, ran the hotel and mixed-use development and investment programmes, Mr Harrison the commercial and leisure property businesses, with some involvement in other areas. They were each directors of the Company over the same dates as Mr Balfour-Lynn, except that Mr Shashou's final departure was 28 March 2011 and Mr Harrison's 21 September 2010.

16. Mr Bibring was another whose de jure directorship was interrupted on 28 October 2003, his having commenced on 24 January 1997 and re-commenced on 21 February 2005, holding office until liquidation. He qualified as a solicitor in 1979, and was a partner at Finers where he was head of its property department until being persuaded by Mr Balfour-Lynn, a client, to join Group in 1997. "I did not fulfil the role of group legal counsel at MWB but was

involved in various commercial and development aspects of the business. My role varied considerably as our business evolved but throughout my time at MWB I was principally involved in all development activity". Although remaining on the solicitors' roll, he ceased to practise law on joining the Group, but would recommend solicitors and other advisers. As at 1 May 2002 he was Legal and Commercial Director. He describes himself now as a property developer.

17. Mr Singh was registered director from incorporation on 30 June 1994 until 23 September 2005. He was a Fellow of the Association of Chartered Certified Accountants who joined Hill Samuel in 1980 and Lombard Odier & Cie in 1985. In 1988 he joined Warwick Balfour and began his association with Mr Balfour-Lynn. Together with Andrew Blurton he was Plc 2's Joint Finance Director: an unusual arrangement, featured in a Sunday newspaper as "the FD with two heads". There was logic behind it, though, Mr Blurton dealing with the accounting and regulatory side, Mr Singh the operational.

18. Mr Aspland-Robinson was a chartered surveyor. He was a partner at Richard Ellis from 1994, joining the Group in 1997 but leaving the next year for Prestbury Group plc. From 24 January 1997 until 10 November 1998 he was a registered director of the Company. He was so again following his return to the Group, between 1 July and (again) 28 October 2003. His return was as "business development director with responsibility for the development of the serviced office business", and for finding and acquiring real estate for the development, leisure and serviced office businesses. He was a registered director of Business Exchange from 18 November 2005 until 13 November 2012. Its accounts to 31 December 2005 state that "He is responsible for property acquisitions and the negotiation of major tenancies and licences as well as all Corporate Property Partnership agreements".

19. Other directors were William Broadbent, Brian Day and Stephen Rodwell from 24 January 1997 until 21 February 2005; Simon Leadbetter from 24 January 1997 until 26 August 2003; Jeremy Phillips from 24 January 1997 until 23 May 2002; Nicholas Otten from 15 October 1997 until 23 May 2002;

Ian Cave from 5 October 1998 until 13 October 2003; and Mickola Wilson from 18 December 2000 until 26 August 2003.

The claims

20. As Lexa Hilliard QC for Mr Hunt put it in her skeleton argument "Mr Hunt's fundamental complaint against the [Respondents] is that they failed to consider [the Company's] interests. Their sole concern was their own selfish interests and how they could extract the most funds out of [the Company] without accounting to HMRC for tax that was due and would become due". More virulently, the Reply states that the "Scheme was not in the best interests of the Company because the payments made pursuant to the Scheme lined the pockets of the Respondents at the expense of HMRC, leaving the Company with no assets to pay a very large and long-standing liability to HMRC".

21. There are two aspects to this part of the section 212 IA86 claim: causing the Company to enter the Scheme, and causing its continuation. There are also two distinct, if not materially different, legal lenses for the continuation part, as the claim straddles the coming into force of section 172 *Companies Act 2006* ("CA06") from 1 October 2008. By section 170 CA06:

> "(3) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.
>
> (4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties".

22. Prior to the adoption of section 172, the relevant duty was to act in what the director in good faith believed to be the best interests of the Company.

23. Section 172 itself reads, materially:

> "(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the

> benefit of its members as a whole, and in doing so have regard (amongst other matters) to:
>
> > (a) the likely consequences of any decision in the long term…
> >
> > (c) the need to foster the company's business relationships with suppliers, customers and others…
> >
> > (e) the desirability of the company maintaining a reputation for high standards of business conduct…
>
> (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company".

24. The general law and section 172 are engaged only where the person is a director. As section 250 CA06 puts it, "In the Companies Acts 'director' includes any person occupying the position of director, by whatever name called". Section 170(5) separately specifically provides that the general duties apply to shadow directors "where and to the extent that they are capable of applying". Both de facto and shadow directors are therefore subject to the law as now expressed in section 172. Here, the uncontroversial characterisation of a shadow director is as one in accordance with whose instructions the directors of a company are accustomed to act. Neither is it controversial that an individual might be both a shadow and a de facto director, the latter being one who, even though not validly appointed, exercises the powers and discharges the functions of a director of the relevant company: see Lord Hope in *Re Paycheck Services 3 Ltd* [2010] UKSC 51, [2010] 1 WLR 2793 at [39]. In assessing the quality of an individual's actions they must be set within the governance structure of the particular company. Ms Hilliard accepts that although it is a factor, it is not by itself enough to constitute a de facto director that a person is held out by the company as a director: HHJ Simon Brown QC at first instance in *re Mumtaz Properties Ltd* [2018] 8 WLUK 28, at [9].

25. Also agreed is that whether under the general law or section 172 a duty to consider the interests of creditors will arise "when the directors know or should know that the company is or is likely to become insolvent… In this context 'likely' means probable": David Richards LJ in *BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112, [2019] 1 BCLC 347 at [220]. Nobody

suggests that the content of that duty, being whether those interests are paramount, is of importance here: *ibid* [222].

26. Ms Hilliard and Daniel Lewis, who appears for Mr Bibring, have also each cited the convenient summary of law in *Re HLC Environmental Projects Ltd* [2013] EWHC 2876 (Ch), [2014] BCC 337 emphasising that the duty now contained in section 172 is primarily a subjective duty, but that where there is no evidence that a director actually considered matters the test becomes objective, "namely whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company": [92].

27. Mr Hunt avers that causing the Company to enter the Scheme was a breach of the Respondents' duty to act in what they genuinely believed to be the Company's best interests, in particular by committing it "to a scheme which was designed to be an aggressive form of tax avoidance and likely to be challenged by HMRC and likely to cause the Company loss". Instead, he says, they only considered and therefore preferred "their own personal interests" in receiving more funds through the Scheme than they would without it, as PAYE and NICs would then have been paid by the Company to HMRC.

28. The continuation was also a breach of that duty and later of section 172.

    28.1 They continued to prefer their own selfish interests.

    28.2 From 2004 they knew that HMRC had commenced inquiries into the Scheme.

    28.3 From October 2005 they knew that HMRC (a) "did not consider that the Scheme was legitimate tax avoidance, and (b) "was likely to take action against the Company to recover [the] PAYE and NICs" unless its offer to settle was accepted.

28.4 By October 2005 the unpaid PAYE and NICs totalled £11,764,599. The Company could not then discharge those, nor thereafter with the outstanding amounts increasing year on year.

28.5 Neither then nor thereafter did the Respondents cause the Company to make any provision for or otherwise mitigate the effect of the existing or ongoing PAYE and NICs by all or any of (a) ceasing in whole or in part the operation of the Scheme; (b) paying a sum on account to HMRC, as so invited, so as to mitigate accruing interest and penalties; (c) taking an indemnity from the recipient Respondents. Instead they adopted a policy of "sit and wait".

28.6 That was notwithstanding (a) a further engagement letter from BDO in 2007 which included specific terms that it was not advising on corporate law; (b) HMRC in July 2008 issuing the Company with decisions and determinations, and issuing a claim against the Company in the Newcastle County Court for £4,776,592 for unpaid NICs for the years 2002-2006; (c) the First-Tier Tribunal on 7 May 2009 handing down judgment in *PA Holdings Ltd v HMRC* [2009] UKFTT 95 (TC), the test case on which the County Court claim and the Company's appeals against the determinations and decisions had been stayed, and finding that while PAYE was not payable, NICs were; and (d) the Upper Tribunal upholding the FTT in its judgment handed down on 7 July 2010 [2010] UKUT 251 (TCC).

29. These duties are also said to have been breached by (a) after 1 October 2008 (if not before) payments under the Scheme being made without due regard to (i) their long-term consequences, or (ii) the need to foster the Company's business relationship with HMRC especially considering its status as involuntary creditor, or (iii) the "desirability of the Company maintaining a reputation for high standards of business conduct by ensuring that the Company performed its public duty to pay its fair and proper share of PAYE and NICs", through no provision being made; and (b) the payments under the Scheme being voidable under section 423 IA86.

30. The Respondents deny any breaches. The keystone of their defence is that before entering the Scheme and at all times during it they relied, reasonably and responsibly, on the advice of BDO. Mr Lewis cites by analogy the dictum of Zacaroli J in *Burnden Holdings (UK) Ltd v Fielding* [2019] EWHC 1566 (Ch), [2019] Bus LR 2878 at [158]:

> "The question whether there are sufficient distributable profits may turn on fine questions of accounting judgment. Directors are not required to be accountants and the comments of Lord Davey and Lord Halsbury LC in *Dovey's Case* [1901] AC 477 as to directors being entitled to rely on the judgment of others whom they appoint to carry out specialist financial roles within the company are as pertinent today as when they were made in 1901".

31. Mr Hunt's Reply is in high-keyed terms: any reliance on BDO's advice "was not reasonable and was, in fact, reckless and irrational given the financial and reputational consequences for the Company in circumstances where HMRC had made it clear that it did not consider that the Scheme was legitimate and had commenced proceedings to challenge it". More particularly, and as drawn out by Ms Hilliard in cross-examination:

    31.1 It was not a firm of lawyers.

    31.2 It was not asked to advise the directors on their duties, or as to any company or corporate matter.

    31.3 It never advised in writing.

    31.4 Insofar as counsel's advice was taken, BDO took it and not the Company.

    31.5 It never advised that the Scheme was without risk.

    31.6 It "would or should have been obvious to the Respondents that BDO was not independent and had an obvious conflict of interest in advising the Company. BDO was the promoter of the Scheme and had a vested interest in the Company continuing to operate the Scheme".

32. I will deal separately with the claims Mr Hunt makes for breach of section 317 *Companies Act 1985* ("CA85") and section 177 CA06 at the end. By closing, Ms Hilliard accepted that their main function was to further evidence the Respondents' preferring their own interests.

33. So too I will address then the Respondents' contentions that any breaches were ratified; that the *Limitation Act 1980* ("LA80") bars relief in respect of these claims; and that, were liability found, they should be relieved under section 727 CA85 or section 1157 CA06 as appropriate.

34. Section 423 is inaptly headed "Transactions defrauding creditors". Fraud is no part of it. Instead what is required is a transaction; at an undervalue; with the requisite purpose. By section 423(1)(a) there is a transaction at an undervalue where a person "makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration", and by section 423(1)(c) where a person "enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself".

35. That these were transactions is conceded by Mr Lewis, whose submissions on this have been followed by Mr Singh and Mr Aspland-Robinson.

36. As to their value, Mr Hunt distinguishes the PAYE and NICs elements from the rest, and so by way of relief under this limb only seeks return of those sums received by individual recipients; (insofar as the payments amounted to breaches of fiduciary duty, he avers that liability should be joint and several). The effect is that his case is put in terms of section 423(1)(a) and not (c).

37. Section 423(3)(3) provides the purpose condition.

> "In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose-
>
> (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or

(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make".

38. Here the purpose is that of the Company, and the claimant or potential claimant HMRC. Mr Hunt pleads a number of matters which he says demonstrates the requisite purpose:

38.1 The Company was acting by the Respondents.

38.2 They knew that its investments into Moorston Holdings Limited ("Moorston") "were not genuine investments but simply an artificial conduit for channelling further emoluments… to the Respondents" without payment of the otherwise-requisite PAYE and NICs.

38.3 They knew the Scheme was an "aggressive form of tax avoidance".

38.4 They knew it was not guaranteed to work.

38.5 They knew that there was "no likelihood that HMRC would regard it as a genuine tax avoidance scheme and would, therefore, treat the amounts paid as subject to PAYE and NICs".

38.6 They knew from 2005 of HMRC's claims and its invitation to settle yet continued with the Scheme.

39. As to purpose, in *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176, [2019] BCC 96 the Court of Appeal reviewed the authorities including its own decision in *IRC v Hashmi* [2002] EWCA Civ 981, [2002] 2 BCLC 489. Leggatt LJ, with whose judgment Gloster and Coulson LJJ agreed, said this:

"[13] As mentioned, the *Hashmi* case establishes that, where the transaction was entered into by the debtor for more than one purpose, the court does not have to be satisfied that the prohibited purpose was the dominant purpose, let alone the sole purpose, of the transaction…

[14] The description of the requisite purpose as a 'substantial' purpose was not necessary to the decision of the Court of Appeal in the *Hashmi* case and to my mind it risks causing confusion. The word 'substantial' is not used in s.423 and I can see no necessity or warrant for reading this (or any other) adjective into the section… there is no need to put a potentially confusing gloss on the

> statutory language. It is sufficient simply to ask whether the transaction was entered into by the debtor for the prohibited purpose. If it was, then the transaction falls within s.423(3), even if it was also entered into for one or more other purposes. The test is no more complicated than that.
>
> [15] …As Arden LJ emphasised, it is not enough to bring a transaction at an undervalue within s.423 that the transaction had the consequence of putting assets of the debtor beyond the reach of creditors. That is so even if the consequence was foreseeable or actually foreseen by the debtor at the time of entering into the transaction. Evidence that the debtor believed that the transaction would result in putting assets beyond the reach of creditors may support an inference that the transaction was entered into for the purpose of doing so, but the two things are not the same. To illustrate the distinction using a less homely example than that given by Arden LJ, a commander may order a missile strike on a military target knowing that it will almost certainly cause some civilian casualties. But this does not mean that the missile strike is being carried out for the purpose of causing such casualties.
>
> [16] When judging a person's intentions, we are generally more inclined to accept that an action was not done for the purpose of bringing about a particular consequence, even if the consequence was foreseen, if there is reason to believe that the consequence was something which the actor wished to avoid or at least had no wish to bring about. Hence, in the example just given, where the missile strike had a clear strategic purpose, we may readily accept that it was not ordered for the purpose of causing civilian casualties- particularly if, for example, there is evidence that the commander gave anxious consideration to how many civilians were likely to be in the target area and planned the strike for a time when the number was expected to be low. By contrast, a consequence is more likely to be perceived as positively intended if there is reason to think that it is something which the actor desired. Thus, evidence that a person who has entered into a transaction at an undervalue foresaw that the result would be to put assets out of the reach of creditors and desired that result might lead the court to infer that the transaction was entered into for that purpose. But such a conclusion is not a logical or legal necessity. It is a judgment which has to be based on an evaluation of all the relevant facts of the particular case".

40. Paragraphs [15] and [16] seem to me particularly apt in this case, where there is no issue but that the purpose of the Scheme was to transfer away from HMRC and into the Respondents' hands the PAYE and NICs which otherwise would have been payable.

41. I will address the terms of any relief, whether under the breach of fiduciary duty claims or section 423, at the end.

Witnesses

42. Mr Hunt called nobody with contemporaneous knowledge of the facts. His own witness statement was short and served to confirm that HMRC remained discontent with the outcome of Mr Bednash's investigations (although he himself made no criticism of them given the resources available to Mr Bednash); that they supported Mr Hunt; and that they had given him further documents. "My firm has a great deal of experience in unfunded investigative insolvency investigation and this is the main reason I am appointed by creditors", he said. "That model is difficult and risky to run and requires at its heart the ability to distinguish between a good and a bad claim". His own evidence, like that of every other witness in this case, was marked by temperance and a desire to assist the Court.

43. The investigation was both managed and to a considerable extent carried out by Andrew Fatherly, a senior manager who had worked for Mr Hunt's firm since 2011, which he had left last year, and on this case since 2018. He was a man with considerable experience of financial investigation, although not himself an accountant. The results of his investigations were contained in his 96-page witness statement based entirely on his own reconstruction of events, almost all from the documentary record. At the outset Mr Lewis challenged the admission of the statement; for reasons then given I allowed it in, but with the proviso that there was no need to cross-examine Mr Fatherly on factual matters to which he could give no direct evidence, and putting on Mr Lewis the obligation to produce a list of those documents concerning advice given to the Respondents on which he would have cross-examined; which he did.

44. Finally, Mr Hunt relied on the evidence of John McDermott of the Fraud Investigation Service of HMRC's Economic Crime Strategy Unit. Mr McDermott's evidence was not based on his own knowledge of the Company and its scheme. Instead, he was a late replacement for the retiring Philip

Hardy, who headed the HMRC team which had overall operational responsibility for monitoring such schemes, and his evidence was founded on what Mr Hardy had told him. That was freely acknowledged by Mr McDermott, an experienced HMRC manager, and I will excerpt from his evidence in a moment.

45. To be clear, I mean no criticism of Mr Hunt in the witnesses he has called. An impressive amount of work has gone into the formulation and presentation of what has become his case, through the efforts of Mr Fatherly and his team, his solicitors and Ms Hilliard. It is in large part a function of a stark feature of this case, which is that it all happened a long time ago: the inception of the Scheme was in 2002; it ended in August 2010. That is not significantly mitigated by the document files containing in excess of 9,000 pages. Although both sides probed the existence or not of other documents, this is neither a case in which the liquidator can take advantage of an obvious failure to deliver up, nor one where the Respondents can point to a culpable failure by the liquidator to obtain from third parties documents which might have assisted them. The one obvious hole is BDO's internal notes which, for reasons which may be surmised, have not been produced despite Mr Hunt's requests and the Respondents' express permissions.

46. None of Mr Singh, Mr Bibring and Mr Aspland-Robinson called any witness but themself. Each understandably professed difficulties in recollection over so many years, and no criticism can be made of that. I have, of course, had cited and bear in mind the observations of Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm). Ms Hilliard made plain that no dishonesty is alleged against any of them, and each gave their evidence honestly. It was only Mr Singh who was occasionally apt to theorise retrospectively, but that seemed borne of no more than an over-eager intellectual curiosity in the documents which probably never contained a complete record but sit as the stones to a factual reconstruction. I also regard him as mistaken in his belief that BDO ever provided separate written advice: not only has such a document not been produced, but there is no reference to it

in any other. Otherwise, the Respondents were content to say when they could not remember.

Conditional share schemes

47. Mr McDermott gave evidence designed to set the Scheme in context.

48. Such schemes developed following changes to legislation introduced by sections 140A-140C *Income and Corporation Taxes Act 1988* by the *Finance Act 1988*. The "generic structure" was for an employer company, or trustees of an employer company's employee benefit trust ("EBT") to subscribe for shares in a Newco at a substantial premium. The Newco would be UK tax resident even if incorporated abroad. The relevant employees would receive Newco shares which both carried rights to dividends and conditions for forfeiture. The conditions would be satisfied or waived and a dividend then paid. The Newco shares would often then be redeemed or cancelled. While that would give rise to a tax charge, their value would have reverted to par.

49. The purpose was to avoid income tax payable by the employer company, typically at 40%, and NICs, typically at 13.8%. Employees would instead be liable to tax on the dividends at the typical rate, being 25%, and escape NICs altogether.

50. Between 1998 and 1 December 2004 about 1,250 small, medium and large companies used these schemes, which were "widely marketed by a significant number of the top 20 accountancy firms".

51. HMRC was concerned at the scale of use. On 2 December 2004 the Paymaster General, Dawn Primarolo, made a ministerial statement which Mr McDermott said was widely advertised in the press. She warned that that year up to £2bn might be paid through the schemes.

> "We cannot allow avoidance on this scale to continue… We cannot… await the outcome in the courts before taking action. We intend that from today both tax and NICs legislation should achieve our objective of

> subjecting the rewards of employment to the proper amount of tax and NICs, however the rewards are delivered… To that end we will be including legislation in [the *Finance Bill 2005*], effective from today, to close down the avoidance schemes we know about… We will also ensure that NICs is charged on these schemes with effect from today. However, experience has taught us that we are not always able to anticipate the ingenuity and inventiveness of the avoidance industry. Nor should we have to. Our objective is clear and the time has come to close this activity down permanently".

So, legislation retrospective to that date was threatened.

52. When in April 2009 the Government published a working report on the impact of this statement, it referred to it as being "designed to engineer a permanent change in behaviour". HMRC reinforced it in the months following by speaking to all known promoters, who all confirmed that from 1 December 2004 they no longer marketed such schemes because they could not be effective. They included BDO, met on 21 October 2005.

53. According to HMRC, the Company's was the only scheme which continued to award shares and pay dividends after that date.

54. In September 2005 HMRC offered without prejudice terms for the settlement of PAYE and NICs under the schemes arising before 16 April 2003, with an extended final deadline of 28 April 2006; and in that month offered settlement for the period 16 April 2003 to 1 December 2004. There was a 90% uptake, leaving about 125 companies which had not settled their liabilities. The figures for BDO clients reflected the general position: 64 of its 72 users settled.

55. It does not of course follow from this HMRC overview that any of the directors of the Company knew of these matters at any time.

The origins of the Scheme: the Programme

56. The Group operated in a number of fields through six divisions comprising batteries of directly and indirectly owned companies. There was a serviced office division, operative in the UK and Europe; a hotel division, including Malmaison and Hotel du Vin; Liberty's department store; a fund management division specialising in commercial leisure assets; asset management through ownership of offices, commercial and industrial premises; and project management.

57. As at 27 March 2002 the chairman of the Group was David Marshall. That was the date of his statement accompanying the Group's interim results for the six months to 31 December 2001 which began:

> "A year ago we highlighted our concerns over the impact of the worsening economic conditions in some of our markets. This situation steadily worsened during this six month period… Although there are signs that the economy is recovering, some sectors have yet to reflect this improving environment".

There had therefore been a write-down of £92m, through £53m of exceptional items and £39m as a reduction in reserves.

58. On the same date Plc 2 announced its "entering the next phase of its current business plan, namely maturing and enhancing the values of its existing businesses", as it was put in Mr Marshall's letter of 1 May 2002, explaining the notice convening a 24 May 2002 EGM. "As Shareholders know, we have been concerned for some time about the worsening business environment and its impact on our principal activities… The economic impact on our businesses is reflected in the Interim Results which show a pre-tax loss before exceptional items of £15.2 million and exceptional write downs of £73.5 million". The Group was therefore not intending to take on further assets beyond its six divisions, nor enter into new businesses. His March letter had outlined this as a "proposed four year realisation plan, in which the Board is targeting gross cash returns in excess of 200p per share".

59. By the May letter this proposal had become the "Cash Distribution Programme to return cash to Shareholders by 31 December 2005", to be

approved at the EGM. "Our individual business plans for all of the six divisions of the Group have indicated that we should optimise their values based on current capital structures between now and the end of December 2005". A return of 200p per share would equate to an "internal rate of return" of 20% per annum.

60. Linked to the implementation of the Cash Distribution Programme (the "Programme") was a proposal, which also required voting on, to "transfer the administrative, operational and head office functions of the Group to a newly formed service provider, ServeCo, to cap and reduce the Group's overheads under the Services Agreement".

61. As to the transfer, Plc 2 shareholders were told that, as was the case, "ServeCo will be principally owned by the Executive Directors", and that the agreed annual fee under the Services Agreement was to be £5.4m, reducing to £2.4m by the year end 31 December 2005.

> "The Board expects the Services Agreement to produce an immediate saving for the Group of approximately 10 per cent of head office costs in the current calendar year, with substantial reductions in future years… The Services Agreement has been structured so that the fees charged to MWB represent the expected direct cost to be incurred by ServeCo in providing the services and ServeCo will not earn any profit margin on this cost. In other words, it is intended that ServeCo will not make a profit on its management contract with MWB".

If that was Plc 2's intention, it was not the Company's to which was delegated Servco Partnership's performance under the Services Agreement.

62. Mr Marshall's May letter continued:

> "Whilst of course the Board will continue to manage and control the business, the Board regards ServeCo as an important element of the proposed restructuring as it allows [Plc2] to keep its experienced team together and to incentivise and motivate them appropriately…".

63. Conditional on the passing of these resolutions and of the transfer of the Company's shares to Servco Partnership, there had also on 27 March 2002 been executed an Agreement for Services between Plc 2 and Servco Partnership. It contained recitals that

> "(A) The Company [ie Plc 2] proposes to implement the Business Plan which, inter alia, will provide for the disposal of all the Company's assets and businesses.
>
> (B) In order to reduce its overhead costs over the term of the Business Plan and retain the services of its head office staff to implement the Business Plan the Company wishes to outsource substantially all its head office services to ServeCo and ServeCo wishes to provide those services".

64. The "Business Plan" was the "4 year realisation programme to be completed by 31 December 2005 as amended or extended from time to time by the Board with the consent of the Independent Directors". The Services to be provided were those in Schedule 1, by clause 3.1 to Plc 2 and its present subsidiaries and such other companies in the Group as might later be agreed, but without, unless specified, ServeCo being delegated board powers. A "non-exhaustive" list of those board powers was identified in Schedule 6, which included responsibility "for the oversight and approval of the implementation of the Business Plan by ServeCo on its behalf pursuant to this agreement". The preamble to the Schedule 1 Services obliged them to "be provided to a level consistent with that of the services provided" by Plc 2 in the preceding 12 months, and that "service levels will be merely continued". The Services included particular obligations, including property and financial management, but were also more general:

> "The administration of the implementation of those parts of the Business Plan as shall be unconditionally approved by the Board and in force from time to time in connection with which ServeCo shall be entitled to make recommendation to the Board and [Plc 2] shall, acting in good faith, have due regard to any such recommendations".

So Servco Partnership had an active role in suggesting the terms of and carrying through the Business Plan.

65. By clause 3.3 in providing the Services Servco Partnership "shall use all reasonable endeavours to optimise the return to [Plc 2's] shareholders". By clause 3.5 it could subcontract the provision of the Services to the Company.

66. Schedule 2 set out the Fees payable, reducing from £5,418,810 pro rata to 31 December 2002, to £5,084,956 for the calendar year 2003, to £2,390,519 for 2005; there was also provision for the recharging of certain expenses.

67. Another wing of the Programme which required formal approval was the "capped Replacement Incentive Scheme", designed said Mr Marshall to "further align the interests of Directors and staff with those of the Shareholders" by being "linked purely to Shareholders' Gross Cash Returns rather than to the share price".

> "The Executive Directors would have been eligible for annual cash bonuses under the Annual Incentive Scheme with the potential to receive a total in excess of £8 million up to 31 December 2005, together with the value of any future LTIP [long term incentive plan] entitlements… the potential value foregone by the Executive Directors under the existing Annual Incentive Scheme alone will be broadly equivalent to payments available to be made to all 90 employees participating in the Replacement Incentive Scheme, i.e. it will be broadly cash neutral to the Group".

68. The Replacement Incentive Scheme was also conditionally constituted by a 27 March 2002 agreement between the Company and ServeCo, which was amended on 1 May 2002. Eligible were directors and employees of Plc 2 and employees of the Company. The Company was to establish an EBT, the trustee of which would be Mourant; it would continue until 31 December 2005 or earlier termination; the Company would pay to the EBT an Incentive Payment calculated with reference to the Gross Cash Return and capped at £15m; the participation of Mr Balfour-Lynn, Mr Harrison and Mr Shashou was subject to a higher threshold of Gross Cash Returns being in excess of

200p per share, apparently to reflect their sizeable individual holdings. By clause 4.8, deducted from the Incentive Payment by Plc 2 would be payments of such income tax and NICs "as may be required by law", and it would also meet NICs on the payment out of the Incentive Payment.

69. Resolution 5 at the EGM sought approval of the Replacement Incentive Scheme; and resolution 6 approval, subject to the passing of resolution 5, of "the terms of the ServeCo Arrangements". Both passed.

70. Mr Bibring has expounded on the background to the Programme. He confirms that the attacks of 11 September 2001 had altered Plc 2's business substantially: "we all realised that things were going to change dramatically". The directors had subsequently taken stock of the nature of Plc 2's business. "We were a very unusual commodity; being a small listed vehicle active in many different asset classes it was difficult to get the correct exposure by analysts in specific sectors simply because we were subscale in each individual asset class". So, after "countless discussions" "it was felt that the best way of protecting, and enhancing shareholder value, was by returning cash to shareholders in an organised manner". The rock of the Respondents' defence is then given.

> "That was going to take a great deal of time, organisation and planning and it was essential that if we were going to do that we would retain the services of not only the respondents but also other key personnel within the business".

71. As Mr Singh said in opening, the nature of the Programme meant that Group assets were shrinking, and that everybody would be out of a job: so retention was genuinely important, not only of staff, but of the directors including the Respondents.

72. Mr Bibring recalled that the Agreement for Services with Servco Partnership was "negotiated between non-execs and the board on an arm's length basis". Its fixed and reduced fee structure was deliberate, to ensure that shareholders had certainty over exposure to costs, and to seek to "retain and incentivise all important staff" as these were "complex businesses that needed active

management and direction from senior people"; it also reflected the targeted offloading of businesses.

73. Three other matters can be drawn out now from these arrangements.

73.1 Subject to later variation, the reduction in payments under the Agreement for Services went hand-in-hand with the realisation of assets under the Programme.

73.2 The stringent and prescribed payment regime itself required significant oversight by the Company.

73.3 While payments under that agreement had been calibrated to exclude the making of profits by the Company (and to be better than cash-neutral to Plc 2), they were not prohibited.

The Scheme: inception and operation

74. BDO Stoy Hayward's involvement predated the putting of the Programme to Plc 2's shareholders. Its partner, Edward Magrin, specialised, as the Defence says, in "tax mitigation for companies, individuals, trusts and partnerships".

75. Mr Singh recalled that "In 2001/2002 I was introduced somehow to BDO and the partner Edward Magrin". Mr Magrin was told about the proposed change in direction of Plc 2 and "stated that due to this there was an appropriate remuneration scheme that would be in the best interests of the Company to set". Plainly, there is a great deal more behind that last phrase than appears on its face, but it does show that the implementation of the Programme was always intended to be subject to tax planning, if possible.

76. Mr Magrin is an important but, for us, silent character. Mr Bibring, highly experienced and with the luxury of being able to select whom he wished as adviser, described him.

> "Mr Magrin was an extremely able and experienced tax practitioner who assured us completely… He was extremely detailed and was very

> professional and conservative in all his dealings with us and his advice and his knowledge seemed immense… we took enormous comfort from Mr Magrin being involved which he was throughout. We felt we were in extremely safe hands…".

77. In cross-examination Mr Bibring said more: "He's an incredibly diligent, detailed, technical man"; "…these people were the best of the best"; "…we were relying on experts in their field"; "It would not have occurred to me to take any further advice than the BDO advice that we were getting…".

78. On 3 May 2002 Mr Bibring and Mr Singh attended a meeting with BDO concerning Servco Partnership and tax planning. From BDO's handwritten notes it seems there was some discussion of tax mitigation planning, although as Mr Singh said in cross-examination, that was not necessarily entirely about the Scheme. The note does, though, make a remark which applies more generally, that Servco Partnership was instituted "for confidentiality reasons". While Plc 2's accounts contained the requisite disclosures so far as it was involved, they would not have told any reader the full story of what the directors were pocketing.

79. It also records a phrase which Mr Hunt says characterises the Scheme as a whole: "Cannot guarantee that planning will be successful- but blessed by leading QCs".

80. Also at this meeting was Liz Cohen. Mr Bibring said that she was a tax and corporate lawyer whom his personal accountant had recommended should attend, as Mr Bibring was not an expert on tax and would not understand the detail.

81. Following this, Mr Bibring and Mr Singh reported back to the other Respondents. They agreed that Mr Magrin should come to meet them all. A meeting was convened at which BDO presented the proposed scheme, confirming says Mr Singh

> "that it was a bona fide lawful remuneration scheme appropriate to the goals of the Company and that it had been blessed by Senior Tax

> Leading Counsel and was being taken up by all of the Top 5 Accountancy and Taxation Firms and being proposed to many of their Clients and had been for a couple of years. We were reassured by these statements as they came from a Professional Firm of substance and credible reputation, a top 7 firm in the UK".

Present at this meeting, said Mr Bibring, were the Company's six main directors. By that he meant the Respondents excluding Mr Aspland-Robinson, who was not only not then a director, but was never part of the inner circle. He recalled the meeting as "lengthy" and "very, very lively". After it, "we all agreed to work with BDO on this because they had satisfied us of the integrity and legitimacy of the arrangements and the fact that they had been blessed by leading counsel".

82. Shortly after this was a further meeting of BDO and the Company's active board, attended by "personal accounting and tax advisers", where an individual had them. Mr Singh did not, and on the Scheme becoming active appointed BDO itself "to ensure that all proper disclosure was being made when doing my personal tax returns as I was not an expert on personal or corporate tax or accounting".

83. Following these meetings, says Mr Singh

> "The Company decided to proceed with the remuneration scheme as it was considered to be in the best interests of the Company having regard to the Management Agreement it had entered into with [Plc 2] and having regard to the fact that BDO confirmed several times that it was lawful".

84. It was after the meeting on 22 May that BDO sent a letter to Mr Bibring of "MWB Group plc", copied to Mr Singh, thanking for engaging them "to provide certain tax consultancy advice", and enclosing the engagement letter for signature. That letter was addressed to the partners of Servco Partnership. The BDO partner in charge was confirmed as Edward Magrin, and his managers David Brookes and Lynne Pearson. BDO's fees for "implementation of the arrangements" were to be £50,000. Their terms of

business, also attached, described their "service to the partnership and the executives":

> "We shall advise on and project manage:
>
> - the establishment of an overseas Employee Benefit Trust (EBT) including the formation of an overseas company (Newco) owned by the EBT;
> - the share structure of Newco;
> - the reduction of employers' NIC;
> - the reduction of the income tax change [sic] from 40% to 25%;
> - related taxation issues"

85. Other relevant terms were these.

> "3.1 Our advice will be based on our understanding of the statute, case law and practice as at the time of its issue and any subsequent changes in such law and practice may therefore affect its conclusions.
>
> 3.2 There can be no guarantee that specific planning will secure the intended/ expected tax outcome. For example, the Inland Revenue and ultimately the Courts may rule that the tax legislation in question is not being used in a way intended by Parliament…
>
> 3.4 You should ask us to confirm advice previously given if you want to repeat a transaction... It is our policy to set out in writing any advice on which you may wish to rely".

86. The letter had also recorded, again, that "As we discussed at our meeting the arrangements have been blessed by leading tax Counsel. However, this can be no guarantee that the arrangements will be tax effective".

87. Mr Bibring confirmed that he would have seen this letter, but thought it unlikely he would have circulated it. He would not have read it in detail.

88. It can be observed that insofar as BDO was providing ongoing advice the first part of term 3.4 would seem to be inapplicable. The second part was its own policy, which it might or might not choose to obey.

89. On 27 May 2002 Mr Bibring on Company paper returned to BDO the terms which he had signed. He told Mr Magrin at BDO that he and Mr Singh would be the directors of the EBT Newco, and asked to see a copy of counsel's opinion.

> "I do think there will still be a need for us to meet again with Michael Harries [Mr Balfour-Lynn's personal accountant at Gerald Edelman] just to go through the effectiveness of the scheme. Obviously, we understand there is no guarantee but clearly we are working on the basis that this scheme is likely to work".

90. Advice was therefore being taken by individuals through their accountants. The Respondents have not contended at trial that they ever understood that BDO was guaranteeing the Scheme effective. Their beliefs were a matter of degree. However, they say that they were always reliant, and properly so, on BDO's advice as to the Scheme's initial and ongoing likely effectiveness.

91. On 29 May at a telecon with Mr Bibring BDO confirmed it was happy to arrange a consultation with Rex Bretten QC, as BDO only had client-specific opinions. Its note records Mr Bibring as saying that, anyway, "Going to proceed… [we] should 'push the button'".

92. On 31 May a senior employee, Paul Harries, met Mr Magrin and Ms Pearson to give further information, in particular explaining that the Company already had an EBT for bonuses for its employees run by Mourants of Jersey. BDO opined that "a new EBT will be required for this planning", through Ogiers; it would be "more flexible" if the new EBT covered the Company as well as Servco Partnership.

93. On 7 June BDO sent instructions to Mr Bretten at 24 Old Buildings, copied to Mr Bibring. Mr Bibring and Mr Harries would attend the consultation. The

> "specific matter I wish to discuss is that which you have advised on previously, namely the use of conditional shares to benefit employees and directors in a way that avoids National Insurance Contributions… and reduces the tax rate suffered by the employee from 40% to 25%".

94. There was a pre-consultation conversation on 10 June between Mr Bretten ("GRB") and BDO. "No particular problem re proposals. May need more time to review EBT/ Articles". "Not to get into detailed drafting points this pm. GRB to give further consideration post the conference". "Just want comfort that works conceptually". "GRB has never known partner also to be employee of partnership".

95. The 10 June 2002 telephone consultation was attended by Mr Singh and Mr Harries, and Mr Magrin and Ms Pearson. The note records that

> "Conceptual basis that employer contributing funds wants immediate D1 CT deduction while employee has immediate enjoyment of funds without Sch E/ NI that normally attaches. Has to be understood that IR not likely to welcome with open arms… tax deduction by employer not matched by Sch E/ NI charge for employee – expect that IR will enquire and seek to frustrate – seek to ensure technically robust re statute/ case law".

96. This speaks to risk, and its management.

97. The attendance note also has "GRB would like further time to review draft Articles + EBT to ensure appropriate and in line with today's discussions". Mr Bretten was also to provide further advice on one point in his instructions. Although we do not know what that was, as this shows this specialist tax silk was engaging with the specifics of this particular scheme. The note sets out over half a dozen pages his detailed consideration of what was proposed, including in light of anti-avoidance provisions.

98. As the Defence observes, here, before implementation of the Scheme, was the Company taking advice.

> "The purpose of the telephone consultation was for the Company to be advised on the Conditional Share Scheme which BDO had suggested was an appropriate and tax advantageous way for the profits of the Company to be distributed to the Respondents and other key employees… while avoiding any liability on the Company to pay PAYE and NIC".

99. The Defence also states that Mr Singh

> "understood from the consultation that the scheme would be structured in such a way that there was no risk of there being any liability on the Company for PAYE and NIC and that this was a scheme commonly used and recommended by the 'Big 5' accountancy firms".

The "no" is an overstatement, but is an accurate indication of Mr Singh's perception of the degree of unlikelihood of the Scheme failing. Mr Singh believes he would have told the other Respondents of his understanding, and I cannot see why he would not have done: they were a close group.

100. On 14 June 2002 Mr Singh wrote to Mr Magrin formally instructing BDO to proceed with the setting up of the EBTs for the Company and "ServeCo".

> "I have today discussed with Lynne [Pearson] the generic issues concerning the EBT/ Company which will be set up to issue shares. We have acknowledged that we are happy with the initial dividend distribution of 96 pence in the pound and, that should an allocation be given to an employee who subsequently leaves and for example joins a competitor, that they will still receive 90 pence in the pound.
>
> We remain intent on making a distribution to the EBT prior to 30 June 2002 and on sending a Letter of Wish[es] from [the Company] to the Trustees of the EBT within the first two weeks of July.
>
> Please contact either myself, Michael Bibring or Paul Harries should there be any other information or instructions you require…".

101. On 20 June there was a telecon between Mr Bretten, Mr Magrin and Ms Pearson discussing drafting of documents including board minutes.

102. On 21 June Servco GP, with Paul Harries as chairman, resolved to approve the establishment of the Servco Limited Partnership Employee Benefit Trust (the "Trust"), through the draft Trust Deed, which "would establish a discretionary trust for the benefit of employees of [Servco GP], [Servco Partnership] and any companies controlled directly or indirectly by either" of them.

> "The Chairman explained that the Trust was being established to provide benefits to employees and former employees of the Group and that it was anticipated that the Trust would operate in conjunction with proposed incentive arrangements to be adopted by the Group in respect of senior executives and employees of the Group".

103. On or as from 24 June 2002 Mr Singh and Mr Bibring were appointed directors of Moorston Holdings Limited, incorporated in the British Virgin Islands on 6 June ("Moorston"). Moorston acted as the Scheme's Newco. It was on BDO's advice registered at Companies House as an overseas company, and administered and operated in the UK so the recipients of the dividends paid would be subject to UK tax.

104. On 27 June 2002 a declaration of trust was made between Servco Partnership, acting by Servco GP, as Settlor and Ogier Employee Benefit Trust Limited of St Helier, Jersey, as the Original Trustees, establishing the Trust pursuant to the laws of England and Wales. By the first two recitals:

> "1. The Settlor considers that the loyalty and dedication of staff within the Group has contributed to the Group's prosperity and considers that a loyal, dedicated and motivated staff is essential to the Group's continuing prosperity and growth. Accordingly, the Settlor wishes to create a trust for the principle [sic] benefit of employees of the Group.
>
> 2. The Settlor wishes to encourage and reward staff employed by the Group by establishing a trust as set out in this Declaration of Trust with a view to such trust holding assets for the benefit of selected individuals

> and their families, and with the object of making distributions as determined to be appropriate, including (but not limited to) the provision against future termination of service by reason of their death by accident during service or their disablement by accident during service...".

105. By clause 1, the Group included any company controlled by Servco GP. Beneficiaries were employees or former employees, or their families, of any member of the Group. The Trustees were the Original Trustees or such other trustees of the Trust from time to time.

106. By clause 5(a) "In the exercise of their powers and discretions the Trustees shall consider any written recommendations made to them by [Servco GP] but the Trustees shall not be bound to comply with any such recommendations". Servco GP also had the power under clause 13 to appoint remove and appoint Trustees and, under clause 15, and with some exceptions, to alter the terms of the Trust Deed.

107. Clause 20 expressly provided that were a payment to be made which "will or might give rise to a liability upon any member of the Group to account for PAYE and/ or NIC, then if and when any such payment or provision is made the Trustees shall account directly to the appropriate authorities for all PAYE and/ or primary NIC payable in respect thereof (and the Trustees shall have no right against any member of the Group to be reimbursed for such PAYE or NIC)".

108. On 27 June Mr Singh and Mr Bibring attended a board meeting of the Company, the minute recording their declaration of interests as beneficiaries under the Trust; and they resolved that for the period ended 30 June 2002, the Company should contribute £10,000 to the Trust; and that

> "Further incentive arrangements to include but not limited to the provision of conditional shares, such shares being incentives to motivate employees and thereby to enhance trading performance, in respect of executives of the Company be approved".

109. The next day, Mr Singh and Mr Bibring as directors of Moorston resolved to allot 2 ordinary $1 shares at par to the Trustee (this was erroneous, as Moorston's capital was denominated in pounds sterling).

110. On the same day, as directors of the Company, and having declared interests, they resolved to contribute £3,133,169 to the Trust for the period 30 June 2002. The first stage of the first operating of the Scheme had therefore been achieved.

111. Mr Bibring confirms that BDO had given "full advice as to how the arrangements were to be managed and how all correspondence and documentation should be written". BDO had drafted all the board minutes.

112. There remained finessing. On 9 July in a telecon Mr Harries was still discussing steps with BDO. On 12 July he had a meeting with Mr Magrin and Ms Pearson. He told them that the directors of Plc 2 were to be transferred as from 30 June to the Company's payroll. Their salaries were to be recharged by the Company to Plc 2. £275,000 was to go to the six main Respondents, with less to the other two. Ambiguously, the note has "say £100k base salary + £175k through the structure": ambiguous because it is not clear from that if the £100,000 is actual salary or its equivalent.

113. Also on 12 July 2002 BDO sent an engagement letter to the Company's directors, in similar terms to Servco GP's. Mr Blurton signed it for the Company on 27 August. The named BDO personnel were now Mr Magrin and Ms Pearson as manager. Fees were to be time costs plus £10,000, this in respect of the "proposed use of the EBT to provide a further class of additional shares… The fees for the option structure discussed with Paul Harries can be discussed once you have determined how you wish to proceed".

114. Term 1 of the terms of engagement prescribed BDO's services to the Company:

> "We shall provide general tax consultancy advice, as requested, from time to time.

> In particular, we shall advise on and project manage the following specific projects:
>
> - the use of the existing EBT structure to provide directors and employees of [the Company] with further incentive packages with a view to reducing the income tax charge from 40% to 25% and reduce employer's national insurance.
> - the use of the existing EBT structure to include option arrangements and the investment of funds within the structure".

115. The reference to "project manage" matched what was already happening.

116. The "no guarantee" term 3.2 was reiterated.

117. On 14 August the Company wrote to the Trustee confirming that the two payments made were for the year end 30 June 2002 "and should be used for the exclusive benefit of [the Company's] employees". It then expressed the wish that the funds should be applied in the subscription for 3,143,169 redeemable 1p preference shares in Moorston, at a premium of 99p per share.

> "We recognise that, as Trustees, you have complete discretion over the application of the Trust funds. However, we would like to recommend that the redeemable preference shares in Moorston… are distributed by the Trust to the employees set out in the attached Appendix as soon as practicable".

The letter confirmed that those employees, who were not just the Respondents, were beneficiaries.

> "We should be grateful if you would confirm in writing, without in any way fettering your discretion, that you are happy in principal [sic] to participate in and operate the arrangements outlined above by countersigning and returning to us the enclosed copy of this letter".

118. With this first transaction and all the others there is obviously documentation missing: how were these recipients and figures arrived at: what, if anything, was BDO writing when it sent through these documents.

119. We do not have a copy with the countersignature, but on 23 August the Trustee applied to Moorston at the Company's address for a subscription of those shares; and on 9 September each recipient was written to informing them of the award of the particular number of shares identified in the Appendix "as recognition of your service" at the Company; and that a dividend would be declared on them on 30 September 2002, and on "the first, second and third anniversaries of the Award". The recipient was asked to agree to the Trustee acting as their nominee and holding legal title to those shares.

120. We do have a copy of a communication from Ms Pearson to Ogiers of 20 September, stating that Servco Partnership

> "would now like to put in place, say 10, new classes of share in Moorston, with each class having engrained dividend rights, similar to those in place for the existing preference shares. The idea is that each class will have a different dividend date for the large fixed dividend so that these large dividend payments can be made quarterly", which would also require new Moorston articles.

121. The control of BDO over the minutiae of the Scheme is clear.

122. On 30 September the dividend was paid.

123. This same method was used for a further dividend paid on 11 December, the Company having paid £1,110,730 to the Trustee on 29 October and the relevant shares now being B Redeemable Preference Shares.

124. The third dividend, paid on 26 March 2003 and again of 96p per share on A ordinarys was effected by direct subscription by the Company to Moorston, rather than through the EBT. That reflected ongoing consideration and revisions recommended by BDO.

125. On 25 October 2002 it had again been Mr Harries who talked with Mr Magrin and Ms Pearson, on an agenda which he had drawn up. There were discussions on cash flow issues, and wanting to extract anticipated profit of £1.8m to 31 December "without paying 40% tax".

126. On 29 November Mr Harries was emailing Ms Pearson, after a voicemail about changes to the EBT legislation consequent on the Dextra decision.

> "The main issue I have is the £1.8m that we were planning to pay from [the Company] into the EBT in December. I need to understand how the new rules work, and what level of tax the individuals will pay in the future.
>
> There seem to be three options.
>
> 1. Use the EBT scheme and make sure that the relevant income tax and NIC is paid to ensure we get the CT deduction in [the Company].
>
> 2. Pay the money out of ServCo as a distribution, which presumably will be taxed at 40%, but there will be no NI payable.
>
> 3. Pay the money from [the Company] as salary. In this case [the Company] will have to pay NI, but the individuals will all have paid the maximum NI for 2002/3 already.
>
> Option 2 looks better than option 3, so long as my understanding of the treatment of partnership profits is correct. I believe the critical question is what is the tax rate in option 1. If it is the dividend rate of 25% plus NI this should be less than the 40% tax take in option 2.
>
> I need to know the answer relatively quickly as the partnership year end is 31 December and I need to know how to pay the money out."

127. So here is Mr Harries, not only aware of the position, but himself thinking about it and its mechanics and its future application.

128. On 8 January 2003 Mr Harries had another meeting with Mr Magrin and Ms Pearson. Mr Magrin suggested variations, with BDO to draft the documents. "The planning is based on the draft legislation introduced with effect from 27 November 2002- could be amended and could have retrospective effect. PH advised that he and everyone else involved is aware of this".

129. The result was the changed format for the March 2003 dividend.

130. The hiatus continued with the fourth dividend, of 24 June 2003, before settling into a pattern for the fifth, of 25 July 2003 to the thirty-fourth of 4 August 2010.

131. On 1 April was another Harries: Magrin: Pearson telecon, discussing various matters including transitional provision. BDO was to review documentation again. There is a note: "Better if transfer… not tied up re benefitting certain people".

132. On 29 April the same three met Peter Le Breton and Ben Armitage from Ogiers. "Re next round of remuneration planning, we advised Paul that planning would still be possible despite changes in the Finance Bill". BDO would be providing documents. "Paul needs to get the fixed amounts paid pre 30/6/03, but the amounts based on profits would be better dealt with by way of an accrual in the 30/6/03 accounts, with actual payments being made by [the Company] in July/ August".

133. On 15 May Mr Magrin emailed Mr Harries, copied to Mr Singh among others, about Moorston.

> "We should be able to continue to limit the tax to 25% with no NIC. We have had a number of conferences with tax counsel on our solution to the Finance Bill 2003 changes with the intention that we can continue to secure a tax rate of 25% with no NIC. Following on from those conferences we have been working through the necessary revised documentation with both solicitors and tax counsel. I should be able to get back to you next week on the subject".

134. That was followed by Mr Magrin and Ms Pearson having an apparently lengthy consultation with Peter Trevett QC on 30 May on a number of tax-related matters, including specific consideration of Moorston, as to which there was to be a post-meeting review once Mr Trevett had been sent its new articles for review.

135. In the morning of 2 June was a meeting of Mr Harries, Mr Magrin and Ms Pearson, still discussing the Scheme which Keval Pankhania was now to join, though, like Mr Harries, not a director: some A shares would need redeeming to get the ratios right. Mr Magrin "explained the draft legislation in the Finance Bill". At the end is a note: "? What is fall back position if challenged: aggressive", which is ambiguous as to whose question this was, and as to whether "aggressive" is the proposed response or the proposed scheme.

136. The same day BDO send Mr Trevett further instructions concerning Moorston and another BDO client, for a conference call on 4 June. Enclosures included Moorston's current and proposed articles and details of how a proposed variation to its scheme would operate: "I should be grateful if you would consider the above proposals and advise generally on the tax implications…".

137. On 4 June Mr Trevett held his consultation with BDO, which included discussion of particulars of the Scheme.

138. On 30 June Mr Bibring and Mr Singh as directors of the Company approved a new administration agreement with the Trustee, and ratified four tranches of transfers of Moorston shares held by the Trustee to the Trustee as nominee for the respective recipients, with effect from different dates. These appear to relate to the four dividend declarations by then effected. Mr Hunt's skeleton says that this was on BDO's recommendation, given the impending passage of the Income Tax (Earnings and Pensions) Act 2003 and the Finance Act 2003.

139. On 27 July the Trustee, Moorston and Ogier Secretaries Limited of St Helier, Jersey, also entered an agreement for the provision of the latter's administrative services to Moorston.

140. Ms Hilliard took the court through an example of how the Scheme operated from July 2003 (so that it is from 2008 does not matter).

    140.1 On16 January 2008 the Company by its directors Mr Blurton and Mr Bibring resolved to subscribe for a 1p D redeemable share in Moorston at a premium of £1,299,999.99 "in respect of the year to 30 June 2008".

140.2 On the same date the Company by Mr Blurton wrote to Moorston, at the same address, so subscribing; and confirming that the subscription monies would be held to Moorston's order "until such time as we receive notification that you require the said funds or we transfer the funds to your bank account, if earlier".

140.3 On 23 January the same directors of the Company met. "The Chairman reminded those present that incentive arrangements had been implemented to benefit and incentivise senior executives and employees of the Company and its group companies" which had included the award of C redeemable shares in Moorston; those holders had also received a rights issue of E Redeemable Shares; and the holders of the E Redeemable Shares had received a rights issue of F Redeemable Shares. The Company then resolved to approve the redemption of F Redeemable Shares in accordance with the schedule thereto; and agreed to pass a resolution approving the same, as the holder of the Moorston D Redeemable Shares.

140.4 There is an approved (but this example undated) resolution by the Company as such holder for such redemption, signed by Mr Blurton.

140.5 Also on 23 January was a meeting of the Moorston directors, Mr Singh and Mr Bibring, noting the Company's resolution and resolving to redeem those F Redeemable Shares, and send notice of the same to holders and beneficial owners.

140.6 On 29 January was a Blurton/ Bibring meeting as directors of the Company, with the same reminder as to incentivisation; and that as holders of E Redeemable Shares in Moorston had received F Redeemable Shares, those F shares were also beneficially owned by directors and employees of the Group. There was then recorded a discussion about declaring a dividend on the F shares, and a resolution that the Company should approve a dividend of £140.82

per share; and that as a resolution of the holder of the D Redeemable Shares (being the Company) was required, such resolution should be passed.

140.7 So it was, by writing on the same date.

140.8 Also on 29 January Moorston, through Mr Blurton as Mr Bibring's alternate and Mr Singh, noted the Company's resolution to pay the dividend immediately.

140.9 On 30 January the recipients were informed by Mr Singh of the transfer of the relevant amount on that date; this transfer was for each of a sum which combined the dividend payment, and the 1p for each redeemed share.

140.10 More formally they were informed by letter from Ogier of 11 February 2008 of the redemption and dividend: "Please note that the redemption proceeds will be treated as a disposal for capital gains tax". A dividend tax voucher was also included.

140.11 It is perhaps not surprising that neither Mr Bibring nor Mr Singh professed detailed knowledge of how this convoluted construct worked at law. As Ms Hilliard suggested, it seems that the purpose of forfeiture was to create a condition for section 140A of the Taxes Act, and the particular numbers were simply to get the maths right between the recipients. It must also be understood that under the Scheme the only voting rights in respect of any class of Moorston redeemable shares were held by the Company through its D shares; which were also the only class on which a dividend could not be declared.

141. Without the need for further modifications, from July 2003 communications between the Company and BDO became more sporadic save, it can be assumed, over the periodic dividend declarations.

142. The Company and BDO were not keeping the Scheme secret from HMRC.

143. On 2 May 2003 the Company, in a letter drafted by BDO, informed HMRC that under s.140G of the Taxes Act 1988 employees were provided with shares in Moorston which were conditional, as identified in a schedule.

144. HMRC responded by letter to BDO of 1 July asking a number of basic questions: is this a close company; is there a trust deed; if so, could a copy be provided; what contributions had been made; had an inspector of taxes permitted deductions of any payments into the trust?

145. BDO, despite chasing, did not respond until 12 December, and a meeting between Mr Singh, Mr Magrin and Ms Pearson of 24 November seems to have related to personal matters only.

146. Mr Singh and Ms Pearson met next, together with one "TD", on 27 April 2004. They discussed the Company's 30 June 2003 year end accounts: BDO said no specific disclosure was needed of the EBT payments, but they would check the calculations from the auditor, BSG Valentine.

147. On 4 June HMRC notified an inquiry into the Company's return to 30 June 2002 and the use of the Trust. On 20 July a request for detailed information was made. The letter was headed in bold "Employee Benefit Trust (EBT) – Potential National Insurance Contributions (NICs) and Income Tax liability".

148. By 22 October, and having received an explanatory letter from Mr Blurton of 21 September, HMRC notified BSG Valentine that in respect of the deductions made for payments to the EBT in the period ended 30 June 2002 it was making further investigations and the "deduction is not accepted in the accounts at this present time".

149. Four days later Dave Feldman of HMRC's Special Compliance Office in Manchester notified the Company of his intention "to conduct enquiries into the matter of the award of conditional shares in Moorston": "I need to consider whether or not PAYE/ NIC deductions should have been applied to the sums paid to the employees in the form of dividends from Moorston…, or if there are any other taxable implications".

150. Following receipt of HMRC letters directed at their personal 5 April 2003 filings, by 11 November the Company board was intending to meet BDO to discuss them. BDO had already dealt with Mr Aspland-Robinson's letter, as he was going away.

151. On 2 December Dawn Primarolo as Paymaster General made the already-cited announcement in Parliament confirming a crack-down on schemes avoiding PAYE and NIC; and that HMRC would be challenging the arrangements in courts "where it is appropriate to do so".

152. At the 14 January 2005 meeting between Mr Singh, Mr Magrin and Ms Pearson there was discussion of the next bonus round of £1.4-£1.6m and of the December mini-budget. Mr Singh was told that the legislation would be backdated to 3 December 2004; that it was not expected to affect Moorston, but the draft would need reviewing at the end of January. While BDO was to provide the documents for the next subscription, the Company "will then wait until draft legislation is available before taking decision on dividends/ share redemptions. If legislation does affect Moorston, then MWBM can redeem its share".

153. HMRC was also making enquiries of BSG Valentine, which on 28 July replied to an HMRC letter of 29 April to confirm that of the £10,567,939 wages and salaries charge in the year to 30 June 2003, £1,110,730 was referable to payments to the Trust.

154. BSG Valentine was also liaising with BDO. On 3 August 2005 Ms Pearson wrote to its Barry Mackenzie, copied to Mr Blurton: "With regard to the planning that we have been involved in, where the Servco EBT was used, Dextra should have no impact".

155. In August BDO sought further advice from Mr Bretten. On 20 August Ms Pearson emailed his clerks in advance of a consultation on the 22nd, wanting "initial discussions" about Moorston and "the planning that has been implemented, which is a variation of the 25% dividend planning for employee bonuses". So, in her eyes, the Scheme was outside the usual. She confirmed that the redemption of classes was calculated to ensure that "they are held in

the same ratio as the allocation of the pool". One problem was that there were now insufficient C shares left in the hands of the employees.

156. Mr Magrin also attended the consultation. The short record of advice refers to the "best way to proceed" as being a rights issue of new 1p shares.

157. Mr Magrin and Ms Pearson spoke with Mr Singh and Mr Bibring on 24 October, in part to report on a meeting the previous Friday, the 21st, with HMRC

> "to discuss conditional share planning pre 16/4/03. HMRC made an offer, same for all taxpayers who have implemented these arrangements… If not accepted there will be a precedent case. Spoken to barristers who advised on this, they feel may have a weak case. We will be writing to advise Jag [ie Mr Singh] of this formally. ? Play a waiting game. Nothing has changed re counsel's advice re whether works… If accept the offer must dismantle the structure. JS/MB's view is sit & wait".

158. The weak case, then, was HMRC's. Mr Magrin's formal letter was written on 23 November and sent on the 25th. HMRC's offer, which was open for acceptance until 9 December, was in respect of the implementation of conditional share award schemes before 16 April 2003, on which date, BDO explained, the legislation had changed. It applied to the Company as "preference shares in a special purpose company were awarded conditionally to your employees pre 16 April 2003 in satisfaction of discretionary bonuses for services rendered". The "key aspects" of the offer were that "corporation tax relief [would be obtained] for the cost of the share award"; the relevant employees' tax position would remain unaltered, as HMRC would not re-characterise the dividends as earnings; and the Company would pay NICs on the dividends, plus interest. If accepted, the special purpose company would have to be wound up. Mr Magrin attached a schedule indicating the financial implications of acceptance at £3,653,831.

159. On 11 November Mr D T Wilson of HMRC, Birmingham Solihull Area Compliance, informed the Company that he intended to enquire into its tax return for the year end 30 June 2004, and enclosing a letter to the auditors.

Their response of 24 January 2006 confirmed that, as Ms Hilliard says, the Scheme was now "being operated significantly more aggressively: of the £10,180,583 wages and salaries in the accounts, £8,202,645 had been met by subscriptions for redeemable shares".

160. That was also evidenced in the directors' tax returns. To take as an example Mr Bibring, his salary recorded for 5 April 2003 was £80,916; for 2004 and 2005 it was £7,352; in 2006 £17,687; 2007 £11,891; 2008 £12,000; 2009 £12,553; 2010 and 2011 £12,000. Otherwise he was remunerated, grandly, through the Scheme: the PAYE and NICs avoided for those years were £836,125 in 2003; £791,213 2004; £30,696 2005; £438,607 2006; £1,345,911 2007; £405,839 2008; £467,097 2009; £525,592 2010; and £23,831 2011; totalling £4,864,906.

161. On 17 November Mr Blurton wrote to Ms Pearson referring to a letter of his of 14 July.

> "I know that the strategy has been to hold off responding so that the Moorston scheme is not top of the Inland Revenue pile. However, now that you have responded… on our personal tax enquiries, I wonder whether now is the time to respond to them on the Company enquiries. We are over a year since the original letter…".

162. Noted on the same letter is Ms Pearson's record of a telecon of the same date with Mr Blurton, (informally) advising him of the HMRC offer:

> "Edward has been discussing with Jag & Jag has advised that MWBM will not be accepting. Given the offer we are not dealing with the enquiry at present, until IR advise how they wish to proceed".

163. When on 25 November Ms Pearson sent Mr Singh the formal letter of two days earlier, with its schedules, she referred to "your recent discussions with Edward… I understand that you have decided not to accept the offer and I should be grateful if you would write to confirm that". This was copied to Mr Blurton, the auditors, and various BDO recipients.

164. A letter of 24 January 2006 from BSG Valentine to HMRC again apologised for a delayed reply. It confirmed that for the Company's year end 30 June 2004 Plc 2 had paid it £5,053,549 under the Services Agreement, and £2,501,258 for "Directors' salaries (paid by MWB Management on behalf of MWB Group)".

164.1 As this draws out, the Company's income was not restricted to payments under the Services Agreement. First, it had its own property business, including through subsidiaries, at least for its year ends 2003-2010. Its turnover in, for example, 2007 was £15.2m. Secondly, throughout the Scheme Plc 2 transferred to the Company the sums which it was due to pay the Respondents under their service contracts, in order that they be paid by the Company with the benefits of the Scheme. We do not have a copy of such a contract, and there were never formal contracts, whether of employment or for their services, between the Respondents and the Company. But Plc 2's annual accounts to 30 June 2002 record, for example, that "In accordance with the service contracts between the Executive Directors and [Plc 2], Directors' salaries plus associated National Insurance and pension contributions totalling £1,779,000 were not paid to the Directors, but were instead paid to ServCo", as were the salaries totalling £401,000 plus NICs of "two Senior Executives of the Company who were also partners of ServCo" (one of these must be Mr Aspland-Robinson, and Mr Singh took the other to be Mr Harries). The Executive Directors were the other six Respondents, the annual salary of each being £275,000, and with pension contribution for Mr Balfour-Lynn, Mr Harrison and Mr Shashou of 15% of salary, and for the others of 6.2%. The amounts which Plc 2 paid the Company in lieu of paying the Respondents directly included the sums referable to the NICs thereon.

164.2 In those same accounts, the Report on Remuneration of Directors identifies how this remuneration was determined.

> Salaries and benefits were subject to annual review by the Remuneration Committee comprising the four non-executive directors. They reviewed the levels "relative to the employment conditions of comparator companies in the FTSE Real Estate Index". Performance was "measured primarily by reference to measures that the Committee considers are expected to enhance returns to shareholders". In setting remuneration "a number of factors and objectives" were considered, using "published data and market research, together with the services of a firm of executive remuneration consultants, to ensure that the total remuneration payable to the Executive Directors is competitive but not excessive within the property sector and also with companies of similar size in other industries"; the factors and objectives included "the importance of a reasonably competitive remuneration package to attract, retain and motivate management of the appropriate calibre and experience for the benefit of [Plc 2]; the degree of influence that performance related rewards can have on returns to shareholders, and on the performance of the business, and the size and nature of the business, whilst having regard to the interests of shareholders and the financial health of the Group".

165. Although we do not have a copy, it is apparent from Mr Feldman's letter of 15 March 2006 to Mr Blurton that BDO had communicated the Company's rejection of HMRC's offer. So, "I intend to resolve matters formally", he said. More requests for information were made. The time for acceptance of the offer was also extended to 28 April.

166. As at 17 March Mr Blurton had not received the letter, but it had been copied to BDO so Ms Pearson "Briefly explained what it's about" over the telephone. Mr Blurton was going to copy to Mr Singh, and they would revert the next week. The reversion was actually on 20 April. We have a note from Ms Pearson: "Jag advised that they do not wish to accept the offer".

167. On 31 March Mr Mackenzie of BSG Valentine wrote to Mr Blurton:

> "It may be helpful to have BDO update their view on tax planning measures in earlier years to ensure there is no current exposure as a result of recent tax cases and [correspondence] with special office".

168. Mr Blurton forwarded this with a covering note to Ms Pearson on 27 April, commenting

> "I believe we have not changed our position here and that there is no further provision for tax that is required in the accounts. Is that correct? Can you come back to me with your thoughts."

Against that note she wrote "Confirmed". Against Mr Mackenzie's email she wrote: "Still comfortable; too early re enquiry".

169. On 3 May Mr Feldman wrote again to the Company: the offer had now expired, and was withdrawn. "HMRC will resolve this issue through litigation. You will be contacted in due course".

170. On 30 June Ms Pearson informed Mr Blurton and Mr Singh of HMRC's request for certain information regarding the awards of Moorston A and B Redeemable Shares in August and November 2002. In a following telecon, Mr Singh confirmed there were no formal contracts of employment for the recipients.

171. Internally, Mr Singh had been acting as the conduit between BDO and the Company throughout. On 3 July he suggested to Mr Blurton that rather than their consulting about everything, and as his PA Rebecca had "all the communication files with Lynne Pearson", he would deal with the information requests, and "come to you for selective bits if required- this will be the most efficient way".

172. On 14 July BDO replied to HMRC's of 15 March. HMRC's question 1 had sought "all communications of or to [the Company] relating to the Proposal", meaning the "idea or concept… that subsequently became and was implemented as the Scheme". The response is "There are no [such] communications… The Proposal was discussed with directors of [the

Company] at meetings with a partner of [BDO] on 3 May and 31 May 2002. There are no formal notes of these meetings. Representatives of [the Company] also attended a consultation with tax counsel to discuss the Proposal". The Company "decided to implement the Scheme based on [those] discussions".

173. As I have already noted, I consider Mr Singh mistaken when he recollected formal documents of advice from BDO. This does, though, show that BDO regarded tax counsel's advice as pertaining to the Scheme, and as being given to the Company.

174. On 16 August Mr Blurton wrote to Ms Pearson to ask whether Dextra and the new HMRC steps in respect of EBT arrangements would result in "new exposure… for which tax provision should be made. I believe the firm answer is 'no', particularly because of the extra robustness of the Moorston structure". Ms Pearson's reply must have been a comfort: "As you suggest, in our view there is no exposure to corporation tax" on the Company's contributions to the Trust; but it also reminded him that there were no such contributions after 29 October 2002.

175. On 5 April 2007 HMRC wrote directly to Mr Bibring. This was a pre-section 20 *Taxes Management Act 1970* letter, seeking voluntary disclosure of documents before the formality of a request pursuant to that section. He was written to as director of Moorston, but because of HMRC's expressed concerns as to the liabilities of the Company. The documents sought were minutes, resolutions and bank statements to 31 December 2005, and all communications between Moorston and its advisers, the EBT, and/ or the Company.

176. On the same date a similar but more formal letter was written to the Company. HMRC "is reviewing your participation in the Scheme"; its offer has not been accepted. "I therefore intend to resolve matters formally and to do so I need additional information from you".

177. On 9 July Miranda Ward of BDO was writing to Mr Singh in respect of the 5 April letter: "As you are aware a response is required to HMRC by 13 July

2007 in connection with the enquiry into" the Scheme. She has most of documents on file, but asks for "Any document we would not have received regarding how the quantum of the discretionary awards and the split between the individuals was determined for June 2002, 2003, 2004, 2005 and 2006. For example, notes of a remuneration committee meeting where the level of bonus was discussed and agreed".

178. The result of this is seen in her letter to HMRC of 16 July:

> "…please note that often there was no formal method used to determine the amounts to be delivered via shares in Moorston… as discretionary awards for the services of key personnel. The relatively small management team of the Company operate very closely on a day to day basis and such decisions tend to be taken informally based on results and each individual's contribution to those results".

179. That is the best positive contemporaneous evidence we have (there is the negative contemporaneous evidence as well, in the non-location of any notes or records). Mr Singh confirmed it as his understanding. Mr Bibring believed that the profit share assessments were undertaken by Mr Balfour-Lynn and Mr Singh, albeit that "I think probably it would have been Mr Balfour-Lynn telling Mr Singh what should happen". Given how closely the Respondents worked together, it is a surprising element that at the time none knew exactly what the others were receiving.

180. On 2 October BDO sent the Company a further engagement letter, for tax consultancy advice to be charged at hourly rates. Mr Magrin was the named partner, with Steve Little and Miranda Ward assisting. Again, terms were attached. "There can be no guarantee that specific planning will secure the intended/ expected tax outcome": term 4.3. Term 4.6 was that "Where company law issues arise we recommend that separate legal advice be taken. Where we advise in relation to or comment on any draft agreements or other legal documentation the impact of our advice or comments on the legal drafting should be confirmed with your lawyers".

181. Why this letter was sent nobody recalls. It perhaps relates to what had been BDO entisising into BDO Stoy Hayward LLP. Whatever, it demonstrates the ongoing active relationship of BDO with the Company.

182. By letter of 7 April 2008 HMRC notified the Company that the next stage of the enquiry would be to issue determinations.

> "The generic arrangement that used dividends on conditional shares or restricted securities was widely marketed by a number of promoters and each had their own variation. It was the volume and variety of the arrangements that, in part, led to the decision by the HMRC Executive Committee to offer proposals to settle the disputed liabilities outside of litigation. Most users accepted the proposals…".

HMRC had since 2006 been considering each of the remaining cases on their own facts, and there are

> "now a number of cases progressing towards litigation covering different variations of the generic arrangements. While a decision on any case may not be definitive, it would at least inform all concerned in other cases of the wisdom of a legal challenge".

It forecast the hearing of some appeals "later in 2008", and confirmed that settlement through payment of all PAYE and NIC remained possible.

> "Irrespective of whether you wish to settle or litigate, as interest is continuing to build up, I suggest you consider making a payment on account so as to mitigate the interest charge".

183. On 14 April Ms Ward gave Mr Blurton and Mr Singh BDO's views on that letter. She began by confirming that she had asked HMRC in the future to send correspondence of this nature direct to BDO for its forwarding to the Company. BDO was therefore taking charge of this process. She told the Company that protective assessments would be issued as part of the litigation process, which would be HMRC's claim for PAYE and NICs in respect of the Scheme: they were necessary to

> "keep these periods 'open' until the litigation process is resolved. Naturally, we would advise that these assessments are appealed and the tax and NIC is stood over pending final resolution of the litigation process. Therefore, on receipt, please forward the determinations to us for us to deal with on behalf of the Company".

She warned that the raising of the assessments might not be immediate, and that the litigation process "could be quite protracted": "HMRC have told us that a case is unlikely to be heard… until the end of the year at the earliest".

184. She also said this: "Please note that HMRC's decision to issue protective assessments does not alter [BDO's] judgment that the arrangement is robust".

185. On 9 July HMRC issued the Company with section 8 decisions and regulation 80 determinations for the period 6 April 2002 to 5 April 2006, with copies to BDO. The regulation 80 determinations were for unpaid PAYE in respect of "Employees and directors who were awarded shares as part of a conditional share scheme" and totalled £11,376,566; the section 8 notices were for NICs totalling £4,776,592.

186. Of the same date is an HMRC letter to the Company explaining that these were the decisions which the 7 April 2008 letter said would be issued; and the basis on which, although the "meaning of 'earnings derived from employment' had not been specifically tested before the General or Special Commissioners or the Courts", HMRC believed that payments under the Scheme were earnings. It told the Company that it had a right to appeal, that if it did so that should be before the Special Commissioners; and that the correspondence had been copied to BDO.

187. The next day HMRC wrote to the Company informing it that "we must take action through the County Court" to preserve the claim to NICs, being subject to a 6-year limitation period. A schedule was enclosed. "If you make a payment, please tell me the exact arrears, including interest, you are paying, and the order in which you want us to allocate the payments. No further interest will be charged on the amount paid from the date we receive the payment".

188. On 11 July 2008 Ms Ward wrote to Mr Singh. As she had said in April, assessment notices were "standard procedure" where HMRC was intending to litigate. In almost identical language, she stated:

> "Please note that HMRC's decision to issue protective assessments does not alter [BDO's] opinion on how robust the arrangement is".

She asked for instructions to deal with the appeals for the Company.

189. On 16 July BDO told BSG Valentine that the Company would be appealing the assessments on the basis they were wrong in law.

190. HMRC continued to follow through the promised and predicted strategy. On 22 July HMRC issued its claim against the Company in the Newcastle upon Tyne County Court for £4,778,482 unpaid NICs on a protective basis. It was to be unresolved at the Company's liquidation nearly 5 years later.

191. The 29 July appeals made by BDO on behalf of the Company were in respect of both the regulation 80 determinations and section 8 decisions.

> "The grounds of appeal are that the payments made to the individuals… in respect of which the determinations are made, being the payment of a dividend of shares, was not a payment of 'earnings' within section 3 of the Social Security Contributions and Benefits Act 1992, so that no contributions in respect thereof were payable by our client under section 6 of the Act".

This was also the basis of the Company's filed defence to the Newcastle proceedings. As to the PAYE, none of the payments were

> "of 'employment income' (and is not permitted to be treated as a payment of 'employment income') so that no tax in respect thereof was payable by our client under regulation 68 of the Income Tax (Pay as You Earn) Regulations 2003".

192. BDO's letter accompanying the NICs appeal ended: "Further, we write to confirm that the full amount of NIC shown as due under the above Notices of Decision be stood over".

193. That for the PAYE appeal ended: "In addition, we hereby apply as agents for [the Company] to postpone all tax due… as set out in the notices. For the avoidance of doubt, the total amount of tax to be postponed for all tax years is £11,132,420.93".

194. When that same day Ms Ward wrote to Mr Blurton enclosing copies of the appeals, she warned him of the ensuing County Court proceedings.

> "Please note it is also necessary for HMRC to seek action through the Courts as some of the assessments relate back to the 2002/03 tax year. You should soon receive papers from the County Court in this respect. Again these Court assessments will be appealed and the amounts held over. I have spoken with the Inspector and it should not be necessary to also lodge separate appeals against the Court, however please forward all correspondence to me when it arrives".

195. The appeals were also the same day copied to Mr Mackenzie at BSG Valentine.

196. HMRC confirmed their receipt on 6 August 2008, and that the "full amount of NIC and tax charged has been stood over and postponed".

197. On 13 August Mr Singh contacted Ms Ward enclosing the now-served claim form. "Please could BDO deal with this to ensure that this is also appealed and suspended within the County Court". He asked to be telephoned that afternoon to discuss the claim. The next day a short-form Defence was filed. On 15 October HMRC's short-form Reply was filed, together with a request that "the matter be adjourned generally pending the final determination of the Defendant's liability".

198. These and the other various agreed stays on litigation and enforcement were pending the outcome of the test case.

199. Ms Hilliard observes that the appeals did not amount any direct challenge to the determined amounts: so, if liability were established, the quantum was set. She also complains that the Company took no steps to progress these appeals, but that is to ignore both the consensual nature of the stay, and the ability of HMRC to ensure the progression of the appeals if it wished. Marching on with those with the test case outstanding would have served no purpose.

200. On 7 May 2009 the recently-constituted First Tier Tribunal handed down its judgment in the test case, *PA Holdings Ltd v HMRC* [2009] UKFTT 95 (TC), following the hearing the previous November. The taxpayer succeeded on its appeal against the regulation 80 PAYE decision; but failed against the section 8 NICs decision. An appeal and cross-appeal were lodged.

201. On 11 May BSG Valentine wrote to Mr Blurton asking about the outcome of "BDO's appeals" against the assessments for year ends 2003-2006, "as obviously we cannot ignore these contingent liabilities in the [auditor's] report for 2008 unless already settled".

202. Mr Blurton forwarded this enquiry to BDO on 21 May. The next day Miranda Ward, now Mrs Chamberlain, responded to say that the NIC assessments were adjourned to October 2009, with an expectation that there would be a further adjournment rather than dismissal. As to the litigation, in January HMRC had indicated they would be speaking to their counsel in May "who would assess their chance of a successful challenge", which had apparently not yet happened.

203. On 18 June Naomi Herman of BDO wrote to Mr Blurton and Mr Singh informing them in brief terms of the *PA Holdings* outcome; that it was not yet known if either side would appeal; and that while a further update would be provided, "suffice to say that at this stage no further action is required on your part". She also reminded them that HMRC had in their case made an offer to settle, on the basis that the dividend treatment was accepted by HMRC but NICs would be payable.

204. Further advice came from Mrs Chamberlain to Mr Blurton and Mr Singh on 29 June. She had talked to Mr Blurton about the outcome of *PA Holdings*, and

set out "some further thoughts with relation to the case's bearing on the current planning [the Company] undertakes through Moorston". Whether either side would appeal was still not yet known, and

> "as the case was at the First Tier Tribunal the decision has not set a legal precedent. However, what the PA Holdings case has highlighted is that where there is a factual link between the share based payments and the shareholder's employment the distribution may be argued to be emoluments and may be subject to Class 1 NIC.
>
> We remain confident, based on the earlier advice of Tax Counsel, that the arrangement is robust, however you may wish to give consideration to the potential NIC liability which may arise should HMRC be successful in applying a similar arrangement to [the Company's] current arrangement.
>
> You may wish to discuss this latest development with the auditors… in case they feel a disclosure should be made in the accounts".

205. All agree that this is an important letter. Mr Lewis acknowledges that it marks a change in tone from BDO, but, he submits, there are no "red flags".

206. That is how the Respondents took it. Mr Bibring recalled "BDO making it clear to us that nothing that had come out… that led them to believe that we should be cancelling the arrangements we had or altering them in anyway".

207. Mr Blurton responded to the 29 June letter on 11 July, apologising for his delay. "I understand all that you say…". He asked whether a contingent liability needs to be recorded in the Company's accounts.

> "The balance here is to ensure that, on the one hand the accounts disclose contingencies fairly and on the other that they do not unnecessarily disclose commercially sensitive matters and/ or give the indication that there is a liability when there isn't one, or that we think there is a liability when we don't".

He asked her to draft a contingency note. In reality commercial sensitivity did not weigh in any balance, but this missive does show recognition, and consideration, of the changing reality.

208. Mrs Chamberlain's reply of 17 July began:

> "As I believe you are aware, we remain confident, based on the earlier advice of leading Counsel, that the arrangement is robust. Naturally, in light of the recent Tribunal decision in PA Holdings Ltd and as a matter of course we have asked Counsel to consider the matter and we should keep you updated".

209. The "matter of course" reinforces that what the Company was receiving was not just BDO's advice, but its advice confirmed by counsel. I do not think that it could reasonably be considered that the advice was inadequate, uncertain, or ought to be reviewed. From an eminent source, it was portraying itself as the most authoritative there was.

210. Mrs Chamberlain had also "from an accounting perspective… discussed the matter with Solly Benaim", who was the audit partner.

> "As HMRC lost the PAYE element… and given Counsel's support of our case, then it is our judgment the PAYE element is too remote to require any accounts disclosure".

211. As to NICs, the Company and its auditors

> "need to decide whether the £3.7 million is material. If it is not material, then no disclosure is required. If it is, then on balance, and purely from an accounting view point it would seem that you should disclose the £3.7m in the notes to the accounts. Naturally, the auditors… would need to take their own view on this but, as the possibility of the liability becoming due is in our view still remote and the amount of the liability is still in dispute, a contingent liability note along the following lines could be used: 'HMRC has raised enquiries into certain arrangements which the company has implemented. The Directors have, however,

> been advised that no further taxation should arise as a result of the enquiries. The possible liability of [the Company] is estimated at £3.7m and was not provided for in the accounts as it is considered unlikely to arise'".

212. On 2 September Mr Singh and Mr Blurton agreed the inclusion of this wording. This note appeared in the Company's audited Financial Statements for the year ends 30 June 2008 (approved 22 June 2010); and 30 June 2009 (approved 23 September 2010); and 30 June 2010 (approved 27 June 2011); and 30 June 2011 (the last filed) (approved 29 March 2012). It was always in the original amount of £3.7m (being the amount of the then-existing NIC assessments: £3,727,302).

213. Mrs Chamberlain's 17 July letter ended, despite the advice and the suggested terms of the note for BSG Valentine's consideration:

> "if the employees were to agree to reimburse the Company for any PAYE and NI that may become due as a result of the enquiry and tax litigation, then that fact, together with the view of leading Counsel could help justify that it is too remote for the liability to fall on the Company and therefore no disclosure is required".

Presumably that last part was in case BSG Valentine thought wider disclosure or treatment was needed.

214. Again, all are agreed that this is another important document.

215. On 24 July HMRC wrote to the Company "to update you on the latest developments". Both sides in *PA Holdings* were awaiting responses to applications for permission to appeal the FTT.

> "HMRC's position has not changed… Accordingly, we still believe the full amount of PAYE tax and NICs remains due and will continue to proceed to litigation in your case unless you wish to settle… Finally, you are reminded that interest is continuing to build up on any unpaid sums and for that reason I suggest you consider making a payment on account

> so as to mitigate the interest charge. You should accompany any payment on account with written confirmation of your understanding that the acceptance of such a payment would not commit either side to a particular course of action".

216. On 2 September Mrs Chamberlain telephoned Mr Blurton to discuss "a number of queries" which he had raised by emails; we have her attendance note. The second of those concerned HMRC's 24 July suggestion that the Company might wish to make a payment on account. Mrs Chamberlain said she had already emailed him and Mr Singh about that letter, but that it was now known that both sides would be appealing. The clerk to one side had said that it was not likely to be heard until 2010.

> "Further, we had been to a different counsel to review the decision in *PA Holdings* and Counsel had confirmed that he believed the taxpayer still had a strong argument to run in that the dividends derived from the share itself rather than employment and therefore there should not be a charge to NIC".

217. Mrs Chamberlain was of the view that no response was required to the 24 July letter

> "unless AB wished to make payment on account in respect of either the PAYE or NIC liability… AB confirmed they have no intention of making a payment on account… Further MC confirmed that we maintain good communication with Mr MacKenzie, the Inspector, and therefore no further response is required".

218. Mr Blurton's third query related to the contingent liability note, which would be adopted. Mrs Chamberlain "reconfirmed" that the £3.7m related to NIC liability only, not PAYE or interest.

> "The PAYE liability was not included in this figure on the basis that HMRC lost on the PAYE point at the Special Commissioners in *PA Holdings*, and therefore this liability was considered too remote to need to be reflected in the accounts. AB agreed. The interest element on the

> NICs will be due and payable if the NIC liability is due. However as the interest equates to around £200k it is not material to the figure of £3.7m already included in the wording. AB confirmed he was happy with the proposed note in the account".

219. There is no doubt that by now the risks of the Scheme not being effective were perceived by the Respondents to have increased. On 14 October 2009 Mrs Chamberlain sent Mr Singh, seemingly for information, the assessments which had already raised. She went on to confirm that HMRC would seek settlement first from the Company, but that those liabilities could be transferred to individual directors "where there has been a wilful failure to operate PAYE/NIC… As Counsel opined on the arrangement and [the Company] took professional advice, in my judgment, I do not believe they would be able to run this argument successfully". It may be added that, at least by the end of trial, that was not a course which HMRC had engaged.

220. Between October 2009 and July 2010 the Scheme was used twice, in December 2009 for the thirty-second time, and in March 2010 the thirty-third. A few days before its final operation on 4 August 2010, on 30 July BDO warned that letters would be received from HMRC as part of a "scare mongering" exercise. That followed the Upper Tribunal on 7 July handing down judgment in the appeal heard in February, in which it upheld the FTT's decision.

221. On this occasion BDO's information was incorrect. It was not until 15 October that Mr MacKenzie wrote referring to

> "previous correspondence on this long running dispute.
>
> HMRC's position on conditional share schemes has always been that they do not achieve the intention of mitigating Income Tax and NICs. Accordingly, we have always made clear that we believe the full amount of PAYE tax and NICs remains due".

222. He noted the assessments raised in respect of both elements, and that there was postponement of the liabilities "until the dispute is settled".

> "Thus far the Company has not requested an appeal hearing and HMRC has not made any attempts to force the matter. This is due to the fact that we are both awaiting the outcome of [*PA Holdings*]. The result of that case may not be definitive but it will at least inform all concerned on the wisdom of any legal challenge…
>
> An application to appeal the Upper Tribunal's decision has been made.
>
> The current position therefore remains that HMRC's position has not changed on conditional share schemes. Accordingly, we still believe that your company is liable for PAYE tax of £11,132,420.93 with accrued interest to 31 October of £4,163,295.45 and NICs of £3,725,376.13 with accrued interest to 31 October of £1,375,5770.64 for the years 2002-2003 to 2005-2006. There may [be] further PAYE tax and NICs for later years.
>
> As interest is continuing to build up on any unpaid sums I would again advise you to consider making a payment on account to mitigate the interest charge.
>
> If you do not wish to consider making a full payment on account of the unpaid sums I would strongly advise you to at least consider the NICs figures. That is because both the First Tier's and the Upper Tribunal's decisions in the litigated case confirmed that NICs are due".

223. On 21 March 2011 HMRC issued regulation 80 determinations and section 8 decisions for the years 2006-2012. Those were appealed by the Company on 30 March; and on 25 June 2012 HMRC issued a claim for the NIC element of these as well in the Newcastle upon Tyne County Court, which was no nearer determination on the Company's liquidation than the earlier claim.

224. On 12 April was a meeting "requested in order to update MWBM employees on the progress of the *PA Holdings* case and also to address what impact the case may have on the ongoing enquiry into remuneration planning undertaken by MWBM". It was attended by Mr Magrin and Mrs Chamberlain, and Nelson Colaco of BSG Valentine. Each Respondent was there except for Mr

Aspland-Robinson, represented though by his accountant Melvyn Davis of RSM Tenon. So too was another recipient, Mr Pankhania.

225. After the update on the case it was Mr Balfour-Lynn who enquired about personal liability if HMRC won: "potentially ambiguous" said Mr Magrin "and we would naturally advise MWBM to seek Counsel's advice". Likewise, said Mr Magrin, as to the "ability to put the liability on the directors under their 'fiduciary duties'". Mr Shashou asked whether they should consider resigning and winding up Company. "It was mentioned… that this route might not be possible while such large contingent liabilities existed". That last is, again, a phrase of ambiguity absent direct evidence: contingent liabilities would not prevent a liquidation, unless perhaps it was intended as a solvent winding-up.

226. No other advice on these matters ever appears to have been taken directly, by the Respondents or by the Company.

227. In July 2011, though, BDO again approached Mr Bretten for advice. Instructions were sent directed at the question of whether others than the Company could be made liable, even on the assumption that the directors had acted in good faith throughout. On 29 July BDO asked Mr Bretten to confirm an additional point on the position of a recipient employee of the Company under the Scheme.

228. *PA Holdings* went before the Court of Appeal in October of that year, and on 30 November it gave its decision: HMRC's appeal succeeded, and the taxpayer's cross-appeal was dismissed: there was liability for both the PAYE and NIC elements. Permission to appeal to the Supreme Court was given on the PAYE point, but not pursued.

229. On 15 June 2012 Mr Singh wrote to Mrs Chamberlain, copied to Mr Magrin: "Nelson from BSG has asked why we don't just liquidate the Company ourselves now, rather than wait for HMRC to do it eventually?".

230. It is, again, BDO to whom the Company has turned for advice on this important issue. Mrs Chamberlain's reply contained, again, the curious

assumption (unless it was to be solvent) that there could be no liquidation without HMRC's consent. Additionally, it "does not give the right impression to liquidate a company with an ongoing enquiry and outstanding assessments and may make final settlement negotiations more antagonistic".

231. Mr Colaco had been copied in. He wondered whether, as "the Company has no funds (correct me if I am wrong) to pay the NIC liability" it was not better to have one's own liquidator. "I am assuming you do not intend doing a deal with HMRC via funds from outside the company". To which Mr Singh replied "There are no additional funds externally to meet this potential liability".

232. Liquidation followed advice from Sarah Harman of counsel that, to adopt the Amended Particulars of Claim, while there was no judgment on the claims for PAYE and NICs, the Company's situation was not distinguishable, at least as to NICs, from PA Holdings'. While the Respondents would not accept that, her conclusion was therefore that it "seems overwhelmingly likely that the Company's defence to HMRC's proceedings claiming NIC amounts will fail".

The roles of the Respondents

233. I have already outlined the roles of Mr Singh, Mr Bibring and Mr Aspland-Robinson and their dates of formal office, being (relevantly) until 23 September 2005 for Mr Singh, until 28 October 2003 and from 21 February 2005 for Mr Bibring, and between 1 July and 28 October 2003 for Mr Aspland-Robinson. Mr Hunt says that they are also liable for their actions over the entire relevant period, stretching from 2002 to 2010, as de facto directors or, in the case of Mr Singh, as a shadow director.

234. By closing, the issue was not contentious as to the first two. Mr Bibring confirmed that his role had not altered in the short time that he was off the record: "it certainly didn't make the slightest difference to how I felt about my obligations, duties and responsibilities"; indeed he was not aware that he ever was. He was involved in the foundation and oversight of the Scheme.

235. Mr Bibring described the Respondents' roles more generally. He recalled being a director of most if not all of the Group's businesses and subsidiaries, and that "most of the Respondents were directors of most of those companies from time to time. Because we worked closely as a group where we were involved we would carry out the necessary work whether or not formally directors".

236. He had no idea why the 28 October 2003 recorded mass resignations had occurred, and he still regarded the six as directors, but not Mr Aspland-Robinson: as he said, he and the rest remained directors of Plc 2. So he confirmed frankly that he regarded himself as a director throughout the period.

237. "The management team consisted of the seven respondents (not always with Rick Aspland-Robinson) and from time to time others and we all had our own roles and workloads". As there were separate divisions they all had their own responsibilities; and aside from board meetings, there were operational and ad hoc meetings, and

> "'Tuesday meetings' for ad hoc discussion of pressing items. These meetings were legendary within our business as extremely detailed and often very lively and vociferous discussions… They were part of a philosophy within the business to ensure that we constantly discussed and debated issues in order to ensure the very best for the company and its shareholders… We worked in a small office and were all situated physically close to one another. We had regular meetings to discuss all aspects of the business from time to time. As well as formal meetings there were literally hundreds of ad hoc meetings of some or all of the directors… One of the most important aspects of the way we ran the business was that all of us had different specialities and we relied on each other to perform their own tasks without second-guessing everything".

So for finance Mr Bibring relied on the two finance directors. External advice would be sought as appropriate.

> "It was a highly professional operation run to the highest standards… we were surrounded by the best quality advice".
>
> "As a group we were extremely skilled in different areas… There was a great deal of trust between us and respect for one another. We would rely on those of us running individual projects or aspects of the business to get on with it keeping us in the loop when necessary".
>
> "Seeing each other throughout each day on a regular basis led to a very proactive and cohesive approach where the trust between each other for each of us to manage our own portfolios was immense".

238. This account, which I accept, excludes the notion that Mr Singh could have been a shadow of anyone (and no individual is cited by Mr Hunt in this speculative submission). These were all highly capable and professional individuals, experts within their own fields and operating as a trusted and trusting team.

239. Mr Bibring also stated that he was "surprised" to learn in late 2012 that though Mr Singh was managing the Scheme day-to-day he had ceased to be a director "for some considerable time"; and he was "annoyed", and, later says, "utterly astonished", to find that he himself was the only formal director: "I had not known this, but as I have said earlier people always acted as directors even when they were not formally".

240. That was right. Mr Singh raised no real opposition to the point, just leaving it to the court. He has been a director of 376 companies, and even at that time was a man who, as he said "had a lot of experience" as director and understood his duties. Despite being described in a 6 June 1997 circular connected with the reverse takeover of Ex-Land Properties plc as responsible for "corporate tax strategy", I accept that this did not denote Mr Singh as an expert in that field: he explained this meant no more than the tax strategy surrounding certain specific projects, rather than that for Plc 1 as a whole.

241. The reason for his formal resignation in 2005 was so that he could take up the post of Chief Financial Officer of the Initial Style Conference and Meetings

Centres Group (which had been part of the Rentokil group), and then in June 2006 of the De Vere Group of Hotels and Business, then valued at about £1.75bn. From the third or fourth quarter of 2006 he was also CFO of Vector Hospitality Group which was aiming to be the first £2bn REIT in the UK; in the end the money was not raised, but it had involved much foreign travel. Nevertheless, "I continued to play an important role in [the Company] with the other Directors but clearly would not be able to focus as much time as before due to these new substantive roles". In cross-examination he said that the reduction of time meant he did less operational troubleshooting for the Group.

242. His role at the Company dealing with the Scheme, and as the primary conduit for BDO, just rolled on.

> "As I had introduced BDO to the Company I was the main conduit through which the administration requests from BDO would flow and I would talk to the Board in order to obtain the relevant information and send back to BDO. Even after my resignation as a Director I remained the main conduit and post box as the workload was not that much and I understood the process which BDO wished to follow for them to administer the Scheme".

243. Mr Bibring confirmed he did not see any difference in Mr Singh's engagement after his resignation.

244. I am therefore satisfied that Mr Singh was a de facto director of the Company at all relevant periods for which he was not holding a de jure position.

245. As already trailed, Mr Aspland-Robinson is in a different category. His directorship of the Company in the relevant period was fleeting, although he was a beneficiary of the Scheme throughout. Participation was not contingent on holding office at the Company. He was a director of Business Exchange from November 2005 and is recorded in its 31 December 2005 accounts as having been a director of its principal operating companies since 2004. He was never a director of Plc 1 or Plc 2.

246. He described himself as having "reasonable" experience of directorships, holding 42 of them; though, as he said, 36 related to Business Exchange's business.

247. Whether he was always so I cannot say, but at trial Mr Aspland-Robinson was someone who gave heavy consideration to each point. "I am a chartered surveyor. I am not an accountant". He did not regard himself as "sophisticated". Being appointed a director of the Company did not seem something of great importance to him; he did not know why he had been, or why his appointment had been so short. He saw his work for the Group, including his remuneration, as "one umbrella". His employment contract was with Business Exchange. Being described as a "director" did give helpful gravitas in negotiation.

248. While he attended board meetings for Business Exchange, he never attended those of the Company or Plc 2 or, he said, was ever invited to any. He never received any "information, correspondence or otherwise on the financial affairs including the HMRC investigation or the insolvency of the Company". Unlike all the others (except Mr Blurton), who had been awarded shares on Plc 2's floatation, he had purchased his Plc 2 shares in the marketplace, spending £3.8m; £3.5m became a capital loss.

249. No doubt Mr Aspland-Robinson was an important part of the Group's commercial functioning; significant enough to be a member of the Servco Partnership, though (together with Jayne McGivern) with the reduced share of £56 rather than the others' £98. But his particular skills were operational, finding and acquiring real estate projects, rather than managerial. As Mr Singh said, he was "a valuable… management team member, because he was dealing with all the real estate side in terms of leases and the properties". He "had no knowledge of the Scheme", meaning its operation, although obviously aware of its results.

250. That his name was listed as a director's on the Company's letterhead used on 27 May, 14 June or 14 August 2002 amounts to little in the context: others were listed there who are not alleged to be directors, and (to take another

example) on the letterhead used on 2 September 2004 5 out of the 14 names were of those not at that time registered as, or alleged to be, directors: Simon Leadbetter, Jeremy Phillips, Nicholas Otten, Ian Cave, Mickola Wilson. Neither do the ambiguities as to Mr Aspland-Robinson's position in Mr Blurton's untested statement add material weight.

251. It is Mr Aspland-Robinson's directorship which appears the fluke, rather than (as with the others) his non-directorship. I agree with his evidence, supported by Mr Bibring's, that he is not to be regarded as a de facto director. Any liability of his pertains only to the period 1 July to 28 October 2003.

The Company's financial state

252. The solvency of the Company within the test enunciated by the Court of Appeal in *Sequana* is directly relevant both to the engagement of certain duties, and to the availability of ratification.

253. Throughout, the Company's accounts were audited by BSG Valentine. No complaint is made that its directors were not keeping themselves properly up-to-date with its financial position at any time.

254. The accounts for the year end 30 June 2002 had net current assets and shareholders' funds of £45,000; for 2003 those were negatives of £5,945; for 2004 there were large increased negatives of just over £2.5m for each; in 2005 the figures were a positive £146,214 and £196,2154 respectively; in 2006, signed off by the board on 8 November 2007 the negatives were £381,465 and £331,464, although its group position were positives around £400,000; these accounts also repeated the note which had appeared on the previous year's, within the auditor's report, under "Principal risks and uncertainties" (and directed specifically at its group): "As the majority of the group's income is derived from providing management services to other group and associated companies, the main risk and uncertainty that would affect the group is if any of the other group or associated companies ceased their particular trades". That, of course, was in the context where under the Programme they were

doing just that. The 2007 accounts, signed on 16 May 2008, had positives of £158,400 and £208,401.

255. As already set out, the 2008 accounts were not signed until 22 June 2010. They and their successors carried the note:

> 'HMRC has raised enquiries into certain arrangements which the company has implemented. The Directors have, however, been advised that no further taxation should arise as a result of the enquiries. The possible liability of [the Company] is estimated at £3.7m and was not provided for in the accounts as it is considered unlikely to arise'".

256. That note was subject to specific emphasis in the auditor's report. BSG Valentine confirmed that "we have considered the adequacy of the disclosure… The ultimate outcome of the matter cannot presently be determined, and no provision for any liability that may result has been made in the financial statements". They still showed positives of £147,003 and £197,004.

257. The 30 June 2009 accounts were encumbered with more reports, but were not signed until 23 September 2010, a month after the last payment under the Scheme. The accounts themselves showed small negatives of £91,567 and £41,567. BSG Valentine stated that its opinion was not qualified, but the negative balance sheet "indicates the existence of a material uncertainty which may cast significant doubt about the company's ability to continue as a going concern. The financial statements do not include the adjustments that would result if the company was unable to continue as a going concern". The directors' report confirmed that by now "trading has effectively ceased in all subsidiary companies". That said, the next year's accounts continued to show significant turnover of more than £5m for the group and only a marginal increased negativity on those measures for the Company. The last-filed accounts, for 2011, showed a position of profit again: net current assets of £192,478 and a balance sheet of £242,478.

258. So, leaving aside the potential liability to HMRC, the Company was wavering in and out of a solvent position on its accounts. The Respondents agree that

they knew that if there was liability to HMRC, then it would be insolvent. The question then becomes whether they ought to have realised that the Company was probably likely to be or become insolvent.

259. This is not a case (sensibly) in which Mr Hunt has looked down through the Company's own subsidiaries and the Group as a whole to see what could have been paid up or across at any point. He is content to rely on the Group's ultimate insolvency. But that means that this investigation becomes directed, as with the alleged breaches themselves, at the credibility of BDO's advice and, here, BSG Valentine's. Without more, their advice and their treatment of the Company's position was that no further disclosures needed to be made, and no other treatment made of HMRC's claim. On that basis I consider that in this case, where there was ongoing oversight both (at least annually) by the auditor, and over frequent periods by BDO, the insolvency test is not met over the relevant period. Whether that basis can be shifted can be seen from the findings below.

The purpose of the Scheme and the role of BDO: discussion

260. The Amended Particulars put the matter thus:

> "In reality the Scheme was nothing more than an illegitimate attempt to avoid/ reduce payment of PAYE and NICs by seeking to disguise as dividends what was in reality remuneration, the payment of which included amounts representing PAYE and NICs that should/ would otherwise have been paid by the Company to HMRC. No commercial benefit accrued to the Company by setting up the Scheme or by subscribing for shares in Moorston. The sole purpose of the Scheme was to extract funds from the Company and channel them to the Respondents and the other participants in an illegitimate attempt to avoid/ reduce payment of PAYE and NICs".

261. The Defence denies.

> The Scheme "was undertaken as an incentivisation arrangement in the interests of the Company and its member. The more that could be distributed, the more incentivised the Respondents and the senior employees would be to stay with and promote the interests of the Company. If the Company could legitimately avoid incurring any PAYE and NIC, as the Company was advised by BDO and leading tax counsel that it could, the money available to be distributed would be that much greater and would provide more incentive for the Respondents and other senior executives." It was implemented with "the full consent of its shareholders".
>
> "If there was any real risk that the Company might be liable for PAYE/ NIC the Company would reasonably have expected to have been advised by… BDO to reserve money or take indemnities from the recipients. No such advice was provided because BDO advisers considered that the Company had no such liability. The Respondents were entitled to rely on the professional advice that was being given by BDO".

262. I consider that the Scheme was put in place, and subsequently operated, for genuine commercial reasons.

263. It was incepted, and always intended to operate, hand in hand with the Programme which Plc 2's shareholders had voted to approve and at no additional cost to Plc 2. The Programme involved the winding down of the Group's businesses and its final result would be its cessation of any business.

264. The desirability of keeping the team together was evinced from the outset. Plc 2's chairman, Mr Marshall, referred to it in his 1 May 2002 letter, itself an intrinsic part of the documents for its shareholders to consider prior to the EGM vote. In initially setting up the Scheme through the EBT Servco GP referred to its purpose in not only benefitting but incentivising the recipients; the same was recorded in the initial declaration of trust; so too each Company resolution initiating a dividend process.

265. It may be protested that these were just documents prepared by BDO. But there can be no serious suggestion that BDO was not acting in good faith.

Although a claim against it was actively considered, nobody would fund it and none has been brought. The closest ground for a bad faith claim may be the 3 December 2002 internal BDO communication attaching information on the "aggressive tax planning we discussed" and stating "we are trying to retain our IP on these solutions and extend the period of time before the Inland Revenue catch up with this type of planning". Even leaving aside the points that "aggressive" is not a synonym for "illegal" and that there is no evidence that the Company was aware of this document, it does not seem that it even relates to the scheme the Company was adopting.

266. Neither does it seem to me that points on which Ms Hilliard laid large emphasis speak against either the good faith of BDO, or the good faith of the Respondents in relying on its advice.

266.1 That it was not a firm of lawyers is a distinction without a material difference when speaking of professional accountants advising on tax; in any event, the advice here was supported by tax silks.

266.2 Counsel's advice was on instructions from BDO, but it is frankly unreal to suggest that the Respondents, sitting in on consultations, were meant to realise that they should ignore the advice they were listening to because it was not formally addressed to them.

266.3 In any event, BDO regarded the Company as the real client for this legal advice, and counsel's advice was directed at the Company and its particular situation and requirements. That advice extended into the drafting of constitutional documents, and documents for the due operation of the Scheme.

266.4 Neither can it matter that, contrary to its terms of engagement, BDO was not advising in writing: it was advising both in emailed writing, and orally, as it had been retained to do.

266.5 The Respondents were aware of their duties as directors, and did not require separate advice as to that.

266.6 BDO was advising on company law, apparently competently, insofar as it was drafting documents for each stage of the Scheme's implementation.

266.7 BDO's "conflict of interest" is illusory. It was being paid for advice it was giving. The Respondents were aware that its view was different to HMRC's. BDO had no "vested interest in the Company continuing to operate the Scheme" beyond the amour propre of any professional for the advice they were giving: there is, for example, no evidence that the fees the Company was paying were of such order as to influence the advice.

267. Instead, the documents which BDO was preparing were reflective of the instructions of the Respondents, having received its advice. The various recitations as to purpose were not empty formulae, but true.

268. It was desirable that the Respondents stayed together as a team for the Programme to be effected. Plc 2's affairs were complex. As the four-year period of the Programme shows, its assets were in varying states of realisability. Mr Bibring described the Malmaison and Liberty's businesses, acquired in 2000, as "immature", needing turning around before value could be realised. So in his view the Scheme was justified.

> "In order to best protect [the Company] and ensure its ability to retain all relevant and important personnel and perform the necessary tasks to create value for PLC and its shareholders it was agreed to implement the dividend scheme recommended by BDO. This clearly was going to be for the benefit of [the Company] as well as individuals and enhance the ability for [the Company] to perform efficiently for the benefit of shareholders of PLC… I recall that this was all part and parcel of the overall discussions as to the cost level that PLC would be responsible for".

269. Mr Bibring also stressed that although, in hindsight, large levels of remuneration were drawn through the Scheme, that was not necessarily to be the case. While the sums representing the Respondents' £275,000 salaries from Plc 2 were to be transferred to the Company, their contracts with it were limited to £12,000 per annum (in fact, looking at Mr Bibring's figures and without the benefit of any written agreement, the amount seems to have varied; whatever, in any year it was but a small fraction of the salary foregone). In place of the original salary, coupled with potential benefits under the Replacement Incentive Scheme, was this reduced amount, with those potential benefits, plus the potential non-contractual bonuses under the Scheme.

270. I bear in mind that the Respondents' Plc 2 salaries were approved as market rates on an arms' length basis, and so too the potential benefits under the Replacement Incentive Scheme. So, through the Scheme they were ultimately seeking to gain above-market rewards. I am, though, satisfied that here, given the peculiarities of the Programme, they genuinely considered that to be in the Company's best interests; and, had it been relevant, so too would an objective director.

271. I accept Mr Bibring's evidence that rewards through the Replacement Share Scheme "would have been a reasonable sum of money, but that wasn't what got me up in the morning", and that these awards, or their potential, were what kept the team in place. He said that "…we were paid bonuses because we were working hard and doing quite well". "I think probably any one of the six of us could have gone to many other places and earned more money". He himself was approached four or five times over this period sometimes directly, sometimes by headhunters. He stayed because he loved what he did- he described the "collegiality" of the six, who with their different skills worked well together- and he was being paid well for it.

272. Mr Singh and Mr Aspland-Robinson shared that view. The latter described his remuneration at these levels as being "a function of you work you get paid". "If at any stage I felt like I was not being paid correctly for the business that I was doing and the capital that I was creating for the business I'd say

'I'm off'". Mr Singh stated "I think it would have been simple. I would have left… If I hadn't been paid or incentivised I would have gone". He acknowledged that Plc 2's Replacement Incentive Scheme was "an incentive, but for me it was not the main incentive" as any awards under it would be "de minimis" (and in fact there were never any).

273. Although after this time, without evidence from all the Respondents, and as there was never a complete document trail, the process is not neatly packaged, the evidence is that these were genuinely bonuses rather than pre-apportioned distributions.

274. Mr Singh's evidence was that the "Scheme was set up, structured and administered by BDO under the constant watchful eye of Edward Magrin and his specialist Team", but BDO was not responsible for the figures distributed. With reference to 5 March 2004 correspondence between himself and Ms Pearson, when he sent her a spreadsheet for the "salary share scheme jan-mar… Please let's talk to confirm new figures", he confirmed that the format was one provided by BDO, but he would fill in the figures.

275. That document showed in column 1 Plc 2 "current salary" and so forth leading to column 6 "gross pay"; "Company salary" and NICs were deducted to give a column headed "surplus"; this was quartered and a bonus declared in proportion to partnership interests in Servco Partnership. The sheet also dealt with redemption of shares and recorded the figure for paid tax at 25%.

276. In this example, then, nobody other than partners in Servco Partnership was receiving bonuses, and those partners were receiving according to their percentages, although Mr Singh confirmed that neither was invariably the case. "There would have been ad hoc times when [Mr Balfour-Lynn] felt that other people should have been rewarded more if they did a particular transaction or something" said Mr Singh, who agreed that the bonuses were not a contractual right. They were awarded on "effort and so on… It was to do with the contribution that the management team made towards the… goals of the realisation scheme".

277. Mr Singh was the only witness who could provide direct insight into the process. Although Mr Bibring perceived Mr Singh as being involved, Mr Singh confirmed that actually he was no more than liaison with Mr Balfour-Lynn, who ascribed the appropriate numbers.

278. The evidence is that this was a genuine process. "I had no idea what my dividends would be at what stage" said Mr Aspland-Ropbinson. Mr Bibring said this in his Amended Defence:

> "These were legitimate dividend payments. The whole concept of income and earnings is that they are fixed sums. In the case here these amounts could have gone up or down depending on results. There was huge risk to me as my contracted salary was reduced… [to £12,000]. The Company's principal activity was an outsourced agency for the MWB Group and fixed and reducing fees were agreed. In order to retain the best people to discharge the obligations the Company sensibly and quite properly took advice from BDO as to how to structure matters and remain competitive".

279. While the evidence is that a factor in the setting of the amounts was the Plc 2 salary foregone and paid into the Company, the risk was genuine. In his year end 5 April 2005 Mr Bibring received through the Scheme not even his £275,000 Plc 2 salary, but £7,352 as salary and Moorston dividends of £84,674, resulting in a PAYE/ NIC saving of £30,696.

280. It is not controversial that the effect of the Scheme's operation, known at the least to Mr Singh and Mr Bibring, was that all the Company's profits were paid out, leaving nothing at any stage for HMRC, and such that if PAYE and NIC were payable the Company would have no funds of its own retained to do so.

281. It does not follow from that that, as Mr Hunt avers, the Scheme was always likely to cause loss to and be challenged by HMRC (or, more accurately, that the Respondents perceived or should have perceived that as the situation); nor that, as was put in cross-examination, the "purpose in making those payments and not holding anything back to meet a… possible liability to HMRC was to

benefit yourself at the potential expense of HMRC?". Those are views formed with hindsight.

282. As described, from the outset and throughout BDO was intimately connected with the Scheme: it fashioned it, and then oversaw it. As Mr Singh recalled "…we would have gone to BDO and discussed anything that had come from the Revenue, and we took their advice"; "Mr Magrin was always available and when anything, when any major turn in this scheme came about, there would have always been a discussion with Mr Magrin, always"; "if anything had been sent to me or the board of any consequence, of any materiality, we would have picked up the phone to Mr Magrin and we would have asked him, 'What do you think, Edward? Is this correct? Should we be doing something or not be doing something?' And he would give his advice".

283. BDO was engaged on an ongoing basis to give advice, and was active under that engagement. It was a firm of the highest reputation, whose dealings with the Company were led by the impressive Mr Magrin. Of course, it was the Respondents who were making decisions on the part of the Company and not BDO; but in the making of those decisions there was nothing on this evidence which ought to have led them to be second-guessing the advice of BDO, experts in this field. Indeed, neither their own personal accountants nor the Company's auditors were telling them anything different.

284. In accordance with its engagement, and demonstrative of the Respondents' reliance, it was to BDO that they turned each time there was an issue: whether that was when HMRC initiated enquiries in 2004, or in January 2005 with the implementation of new legislation; or October and November that year with the HMRC offer; or in April 2006 with HMRC correspondence leading in 2008 to the rendering of the assessments and initiation of the claim; or in August 2006 following queries from BSG Valentine. Through those events BDO's advice was the same, and definitive: the Scheme was robust. Moreover, HMRC was acting in the way which BDO was predicting.

285. Although differing in degree, BDO's advice did not change in 2008, nor even in 2009 after the FTT had handed down its decision: it remained confident the

Scheme was robust; no further action was needed by the Company. While consideration was to be given to the ongoing NIC liabilities and interest, the most needed in the Company's accounts was a note (and again the auditors were not advising differently). Counsel was to be approached, and in September 2009 his view reported as being that the taxpayer in *PA Holdings* still had a "strong case" in respect of the NICs element which it had lost. Even near the end, it was to BDO to whom the Respondents turned for advice on liquidation.

286. The Respondents considered BDO's particular and cumulative and consistent advice and took it at face value. They were entitled to do so. In proper discharge of their duties they had the wisdom to take this top-level advice throughout, and to use BDO to oversee the Scheme to the extent of drafting its ongoing necessary documentation. That the Court of Appeal later found that the equivalent to the Scheme protected neither against NICs nor against PAYE does not affect that reasonable reliance. Ms Hilliard confirmed that it was not Mr Hunt's case that BDO sold a scheme which it knew was inoperable.

287. In the context of that advice, there was nothing wrong with the Respondents adopting a "sit and wait" policy, or trying to ensure that the Company's issues were at the bottom of the HMRC pile. Neither was there a need to make provision for accruing liabilities of principal, interest or penalties; nor to cease the Scheme. Those were matter for commercial judgments, which were being exercised, informed by the advice which the Respondents had consistently sought and obtained. While the word "robust" was a BDO favourite, that does not undermine its being relied on: the review of relevant documents at trial has a more repetitious effect than would have been apparent at the time. Further, if the word were inapt in its conveying of a sizeable degree of strength and resilience to attack, there was a dictionary of alternatives carrying their different meanings.

288. For the same reasons, the 1 October 2008 extension of the duty to the consideration of long-term consequences makes no difference: that is what the Respondents were doing in taking the advice. The advice was specific to HMRC, and recognised it as an involuntary creditor. As to the complaint that

maintaining a reputation for high standard of business conduct involved "ensuring that the Company performed its public duty to pay its fair and proper share of PAYE and NICs", one answer is the same: commendably, it took advice as to that duty. Another answer is that this is an illegitimate equating. Another is that the court has no direct evidence as to the business morals which this would engage as between 2002 and 2010; and insofar as reliance is put on HMRC's attitude expressed through its correspondence and actions, it may be noted that the Company and BDO apparently maintained a good relationship with the officers involved, and that the HMRC timescales for the litigation against the Company or its appeals to the FTT do not bespeak urgency or outrage.

289. I add that even were I wrong in my conclusion of the applicability of the *Sequana* test, it would make no difference because in operating the Scheme there was repeated assessment of HMRC's status.

290. Neither can any breaches of disclosure obligations by the Company's directors make a difference. While most of the Respondents were not aware of what precisely their fellows were receiving, they were all aware at all times of the existence of the Scheme and of their own and others' remuneration through it and were content to continue with the Scheme over its many years in that state of knowledge.

291. The breach of duty claim fails.

The Scheme: section 423

292. For very short reasons, this claim fails as well.

293. As *JSC v Ablyazov* makes clear, purpose, which is one of the pre-conditions to liability, is distinct from consequence. Here, it was a consequence of the Scheme that assets which would otherwise have been used for the payment of PAYE and NICs were put beyond the reach of the creditor who would receive such payments, HMRC. That was not its purpose. Nor was its purpose

"otherwise prejudicing the interests of HMRC in relation to a claim which it might make at some time and did in fact make", as the amended particulars of claim have it. The Respondents' evidence was that they had no interest in making, and would not have made, payments under the Scheme without the belief that it was likely to be legitimate; and that was their belief. The purpose, then, was to pay monies pursuant to a legitimate scheme, as to which BDO was consulted at all stages.

Section 317 CA 85 and section 177 CA06

294. There is no need to linger on these, as although the amended particulars still averred a liability to account founded on a breach of the obligations under these sections (the latter applying from 1 October 2008), Ms Hilliard clarified in closing her acceptance that the true remedy for breach would be in rescission, and that remedy was not pursued. Nothing material is to be gained by further considering the interesting questions of whether, here, the degree of disclosure was sufficient to meet the sections.

Ratification and s.1157 CA06

295. Again, these can be left on the wayside. For what it is worth, I would have considered that (at least while the Company was solvent) it was open to Servco GP to express its ratification on behalf of Servco Partnership but, if it did not express any opinion, then it would remain open to the members of Servco Partnership to do so.

Limitation

296. Mr Hunt has been blowing the embers of a long-abandoned fire.

297. The parties are agreed that there is no limitation issue on the section 423 claim, on the authority of *Hill v Spread Trustee Co Ltd* [2006] EWCA Civ

542, [2007] 1 WLR 2404. It can be observed, though, that although it is the judgment of Arden LJ at [126-128] which has been cited elsewhere, the principle that where the applicant under section 424 was an office-holder time would not begin to run against them until appointment actually derives from the judgments of Sir Martin Nourse at [144]-[151] and Waller LJ at [152], not concurring on this point with Arden LJ.

298. Nor is there now any issue over the application of section 21(1)(b) LA80 to the breach of duty claims. By that section

> "No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action… to recover from the trustee… the proceeds of trust property… previously received by the trustee and converted to his use".

As Ms Hilliard recognised, the non-barring effected by that section would apply only to the claim against each individual recipient: it would not preserve the possibility of joint and several liability for the receipts of all.

299. For that, Ms Hilliard turns to section 32(1)(b) and (2).

> "(1) …where in the case of any action for which a period of limitation is prescribed by this Act… (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant… the period of limitation shall not begin to run until the plaintiff has discovered the… concealment… or could with reasonable diligence have discovered it.
>
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty".

300. These subsections and their interaction have been subject to recent consideration by the Court of Appeal in *Potter v Canada Square Operations Ltd* [2021] EWCA Civ 339, [2022] QB 1. At [67] Rose LJ confirmed that

deliberate concealment within section 32(1)(b) did not require active concealment, and at [75] observed that "Inherent in the concept of 'concealing' something is the existence of some obligation to disclose it… For the purposes of the Act that obligation need only be one arising from a combination of utility and morality to adopt Rix LJ's phrase" in *The Kriti Palm* [2007] 1 All ER (Comm) 667. She therefore rejected the notion that the section would be "satisfied only if there is a pre-existing legal duty to disclose". In so doing, she preserved its potential application where there was such a legal duty.

301. In part VI of her judgment Rose LJ turned to the meaning of "deliberate" as used in both subsections, noting at [94] that "Although 'deliberate' is a common English word, I do not consider that there is a clear, 'natural' meaning in this context". She took for granted at [86] that the word would include "subjective knowledge or actual awareness" of the commission of the act or concealment, and wilful blindness to the same. She concluded at [137] that it would also encompass recklessness, as expressed by Lord Bingham in *R v G* [2004] 1 AC 1034 and which she had summarised at [87]:

> "a person acts recklessly with respect to a circumstance when he is aware of a risk that it exists or will exist and it is, in the circumstances known to him, unreasonable to take the risk. A person acts recklessly with respect to a result when he is aware of the risk that it will occur and it is, in the circumstances known to him, unreasonable to take that risk".

302. The Chancellor agreed with the judgment of Rose LJ and that of Males LJ, who at [199] turned to the series of questions to be asked under section 32(1)(b) on the facts before them: "(1) whether this was a case of active concealment or mere non-disclosure; (2) if the latter, whether the bank was under a duty to disclose the commission, either as an independent duty or as a duty in 'Limitation Act terms'; (3) whether the bank knew that (or was reckless whether) the commission was relevant to a right of action of the claimant". At [200] he confirmed his agreement with Rose LJ "that, in the context of section 32(1)(b), a defendant who is reckless whether a duty exists,

or whether a fact is relevant to a right of action, can properly be described… as deliberately concealing the fact in question".

303. Here, Mr Hunt relies on the dictum of Peter Smith J in *Haysport Properties Ltd v Ackerman* [2016] EWHC 393 (Ch), [2016] BCC 676 at [56] that "It is well established that a director has a duty to disclose his own wrongdoing", citing the Court of Appeal in *Fassihi v Item Software (UK) Ltd* [2004] EWCA Civ 1244, [2004] BCC 994 and his own decision in *Tesco Stores Ltd v Pook* [2003] EWHC 823 (Ch), [2004] IRLR 618. The dictum is, on the authority of *Fassihi*, an overstatement: with specific reference to *Pook*, Arden LJ at [41], with whom Mummery LJ and Holman J agreed on the point, declined to find such a "separate and independent duty", instead treating the disclosure obligation as one which might arise on particular facts within "the duty to act in what he in good faith considers to be the best interests of his company". That said, it would be a rare case in which the obligation of single-minded loyalty would be met by a failure to disclose, and it was not suggested by the Respondents that this was such a case.

304. Here, the failure to disclose did not relate either to the existence of the Scheme, or to the overall figures washing through it. Whether from HMRC or (relevantly) from the Company through its directors, there was no concealment of anything except the exact numbers for each individual; and it is not suggested that they would not have been forthcoming had a director requested them. There has therefore been no failure to disclose which is material to the cause of action on which joint and several liability is sought.

305. In any event, there could be no such liability in the period up to the resignations of Mr Broadbent, Mr Day and Mr Rodwell on 21 February 2005, as until then there were independent directors capable of discovering matters for themselves.

Conclusion

306. The 10 May 2019 application is therefore dismissed.

307. The parties must seek to agree an order, including as to costs.