Neutral Citation Number: [2023] EWHC 603 (Ch)

Case No: BL-2020-MAN-000067

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BISINESS LIST (ChD)

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

Date: 20 March 2023

Before :

HHJ CAWSON KC
SITTING AS A JUDGE OF THE HIGH COURT

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Between :

ASTON RISK MANAGEMENT LTD	**Claimant**
- and -	
(1) MR LEE JONES	
(2) MR RICHARD KILBURN	
(3) MR CLINTON JONES	
(4) PROFESSOR MARK LUTMAN	
(5) NEUTRINO NETWORK LTD	
(6) CUMULO ACCOUNTANCY AND TAXATION LTD	**Defendants**

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Louis Doyle KC (instructed by **Fieldfisher LLP**) for the **Claimant**
The First Defendant appeared in person on behalf of himself and the **Fifth Defendant**

Hearing dates: 30 January to 3 February, and 6 and 8 February 2023

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.30 am on Monday 20 March 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

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HHJ CAWSON QC

HHJ CAWSON KC:

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Introduction

1. This is a claim brought by the Claimant, Aston Risk Management Ltd ("**ARM**"), as assignee of the claims of Audiological Support Services Ltd ("**ASS**") and its liquidators, against the First to Sixth Defendants.

2. The claims as against the Second, Third, Fourth, and Sixth Defendants were compromised at the commencement of the trial as originally listed in October 2022. This development necessitated an adjournment of the trial as against the First and Fifth Defendants, which ultimately took place between 30 January 2023 and 8 February 2023.

3. The principal issues for determination as between ARM and the First and Fifth Defendants are the following:

   i) Whether the First Defendant acted as a de facto director of ASS;

   ii) If so, whether the First Defendant acted in breach of his fiduciary duties as a de facto director of ASS in:

      a) Causing ASS to make a series of payments to the Fifth Defendant between 23 May 2014 and 26 November 2014 totalling £594,352.03,

which it is alleged were only supported by properly authorised invoices totalling £148,558.31, resulting in an overpayment of £445,766.72;

b) Causing ASS to make a series of payments to the Sixth Defendant between 27 June 2014 and 24 November 2014 totalling £74,543.43, which it is alleged were only supported by properly authorised invoices totalling £25,120, resulting in an overpayment of £49,423.43;

c) Causing ASS, shortly prior to it entering into administration on 18 December 2014, to dispose of a number of assets collectively comprising its business and undertaking to Audiological Measurement and Reporting plc ("**AMR**") without regard to ASS's ownership thereof and without payment;

iii) Whether any of the payments referred to in subparagraph (ii)(a) above constituted a transaction at an undervalue within the meaning of s. 238 of the Insolvency Act 1986 ("**IA 1986**"), or a preference within the meaning of s. 239 IA 1986;

iv) Whether the Fifth Defendant is liable to account to the Claimant as a constructive trustee for having knowingly received the monies referred to in subparagraph (ii)(a) as applied by the First Defendant in breach of his fiduciary duties owed to ASS.

4. The First Defendant appeared in person on behalf of himself and the Fifth Defendant, a company of which he has at all relevant times been the sole director. At a Pre-Trial Review on 16 December 2022, and in consequence of submissions made by the First Defendant in respect of a health condition at a time when there was a significant increase in community rates of Covid 19 and influenza, I directed that the First Defendant might attend the trial, which would otherwise continue to be held face-to-face and in person, by video link. The trial satisfactorily proceeded on this basis with the First Defendant being able to fully participate therein, including by cross-examining witnesses, giving his own evidence, and making submissions over the video link.

5. Mr Louis Doyle KC appeared on behalf of the Claimant.

Key participants in events

6. The key participants in the events behind the present claim are the following:

Aston Risk Management Ltd ("**ARM**")	The Claimant, to which company the claims the subject matter of the present proceedings were assigned by a Deed of Assignment dated 14 July 2017 and made between ASS (1), ASS's liquidators, Mr Dickinson and Mr Snowden (2) and ARM (3) ("**the Assignment**").
Audiological Support Services Ltd ("**ASS**")	Company incorporated on 10 April 2012 by Clinton Jones. Entered into administration on

	18 December 2014 pursuant to an order of that date. Entered into creditors' voluntary liquidation on 7 August 2015, and dissolved on 15 July 2020.
Audiological Support Group Ltd ("**ASG**")	Parent company of ASS following its incorporation on 2 May 2015. Returns to Companies House show it as holding 100% of ASS's share capital, on account of 4% never being allotted to Prof Lutman as said to have been originally intended.
Richard Moose ("**Mr Moose**")	A director of ASS until his resignation on 6 June 2014. Appointed a director of ASG on 4 March 2016. Witness for ARM.
Colin Sayer ("**Mr Sayer**")	A director of ASS until his resignation on 6 June 2014. Appointed a director of ASG on 4 March 2016. Witness for ARM.
Lee Jones ("**Mr Jones**")	The First Defendant. Sole director, and ultimate owner, together with Mrs Jones, of Neutrino.
Richard Kilburn ("**Mr Kilburn**")	The Second Defendant. A certified accountant and owner and director of the Sixth Defendant. Witness for ARM.
Clinton Jones	The Third Defendant. An audiologist. A director of ASS and ASG.
Professor Mark Lutman ("**Prof Lutman**")	The Fourth Defendant. Professor of Audiology at the University of Southampton, 1995 – 2012; Emeritus Professor thereafter. One of the authors of the guidelines for diagnosis and quantification of noise induced hearing loss ("**NIHL**") commonly used by medical experts in the UK Courts (the CLB Guidelines). A director of ASS
Mark Lutman Consultant Ltd	Company through which Prof Lutman provided services to ASS.
Neutrino Networks Ltd ("**Neutrino**")	The Fifth Defendant. Sole director, Mr Jones. Ultimate owners, Mr and Mrs Jones.

Cumulo Accountancy and Taxation Ltd ("**Cumulo**")	The Sixth Defendant. Owned and controlled by Mr Kilburn.
Mobile Doctors Ltd t/a Quindell Health Services ("**QHS**")	Company with which ASS entered into agreement dated 16 December 2013 for provision of audiological reports in relation to NIHL claims. Member of the Quindell group of companies ("**the Quindell Group**") forming subsidiaries of Quindell Portfolio plc.
Peter Laithwaite ("**Mr Laithwaite**")	Board director, Quindell Group.
Tom Pennington ("**Mr Pennington**")	Senior manager at QHS.
Helen Furby ("**Ms Furby**")	Project manager, Quindell Group.
Mark Evans ("**Mr Evans**")	Solicitor with Silverbeck Rymer, a firm within the Quindell Group at the relevant time. Had some responsibility on behalf of QHS with regard to quality of NIHL reports produced by ASS.
ZuuZuu Ltd ("**ZuuZuu**")	Company through which pension fund connected to Mr Sayer (Abbey Pension Fund) advanced money to the ASS by way of loan agreement dated 10 February 2014.
Susan Jones ("**Mrs Jones**")	Wife of Mr Jones.
Alex Jones	Son of Mr and Mrs Jones.
Audiological Measurement and Reporting plc ("**AMR**", aka "**Measurement**")	Company incorporated on 10 November 2010, when Mr Jones and Jones Associates (Investments) Ltd (owned/controlled by Mr Jones) were appointed directors, the latter resigning on 14 October 2011. Sole shareholders throughout were Mrs Jones (one share) and Creditas Capital (Portfolio 2) Ltd ("**Portfolio 2**") (incorporated 24 November 2014, dissolved 2 October 2018, sole director and shareholder Mr Jones). Clinton Jones, Prof Lutman and Mr Pinn appointed directors of AMR on 23 December 2014. Dormant in year to 30 November 2013.

	Turnover for period from 1 December 2014 to 31 December 2015: £4,026,653. Entered into administration in June 2016.
James Snowdon ("**Mr Snowden**")	Insolvency practitioner, partner in Carter Backer Winter ("**CBW**"). Appointed Joint Administrator of ASS on 18 December 2014. Liquidator of ASS as from 7 August 2015. Ceased to act as Liquidator on 29 March 2020. Witness for ARM.
John Dickinson ("**Mr Dickinson**")	Insolvency practitioner, partner CBW. Joint Administrator of ASS with Mr Snowdon. Liquidator of ASS as from 7 August 2015.
David Pearce ("**Mr Pearce**")	Director, Quindell Group
David Ravech	Chairman, Quindell Group
Creditas Capital (Portfolio 1) Ltd ("**Portfolio 1**")	Corporate vehicle in ownership of Mr Jones and Mr Kilburn for purpose of holding shares in ASS's parent, ASG. Referred to as "*Party B"* in Heads of Agreement (Confidential Terms Sheet) dated 25 April 2014. Mr Jones and Mr Kilburn sole directors (but not shareholders). One of two issued shares held by each of Creditas Capital plc (controlled by Mr and Mrs Jones) and Cumulo (controlled by Mr Kilburn). Re-named Audiology Investments (Portfolio 1) Ltd on 8 December 2014, ten days prior administration of ASS.
Edward Judge ("**Mr Judge**")	Solicitor, Partner, Irwin Mitchell, London.
RFD Network Ltd ("**RFD**")	Incorporated on 21 January 2011 with Mr Jones as sole director. Single issued share held by Creditas Capital plc until September 2018, upon Mrs Jones becoming person with significant control.
Antony Pinn ("**Mr Pinn**")	Appointed director of AMR (with Clinton Jones and Prof Lutman) on 23 December 2014. Also director of Creditas Capital (Trade Finance) Ltd (purported assignee of ASS's

	book debts pursuant to charge dated 14 October 2014, challenged by administrators of ASS) with Mr Jones until Mr Pinn resigned on 7 September 2017.
Auricle Ltd ("**Auricle**")	Subsidiary, with ASS, of ASG

Narrative Background

7. Clinton Jones, who is an audiologist, caused ASS to be incorporated on 12 April 2012 for the purpose of trading in the preparation of NIHL reports. The intention behind these reports was that they would be produced using audiological measurements taken by audiologists engaged by ASS to be used by solicitors, claims managers and others in the pursuit of NIHL claims. Mr Moose suggested in his witness statement that these reports were not to be produced as full medical reports signed off by an ENT doctor, but as reports based on audiological readings for use, at least, in negotiating claims. An issue subsequently emerged as to whether they were, or required to be CPR Part 35 compliant as experts' reports.

8. Later in 2012, Clinton Jones approached Prof Lutman for advice in respect of the audiometry services provided and undertaken by ASS, and did so given Prof Lutman's recognised expertise in the audiological field. This approach led to Prof Lutman entering into a *"Contract for Director Services"* with the ASS, which was expressed to commence on 1 September 2012 and provided for the appointment of Prof Lutman as *"Clinical Director"*. The recital to the contract referred to the fact that its purpose was: *"not to establish an employment relationship, but to define the extent under which the relationship between* [ASS] *and* [Prof Lutman] *allows for there to be a contract for services to work as and when necessary and requirements allow."* Although expressed to take effect from 1 September 2012, the contract was signed on 11 November 2012.

9. Prof Lutman was formally appointed as a director of ASS on 1 April 2013. Although not reflected in any return to Companies' House, and although ASS's register of members has not been produced, ARM maintains that it was always intended that Prof Lutman should be allotted 4% of the issued share capital of ASS. In fact, until ASS subsequently became a subsidiary of ASG in May 2014, there were only three issued shares in the share capital of ASS, held as to one each by Clinton Jones, Mr Moose and Mr Sayer.

10. Mr Moose and Mr Sayer are also recorded as having been appointed as directors of ASS on 1 April 2013.

11. Mr Moose is qualified as a barrister, although he has never practiced as such. He is now a Partner and Head of the Litigation and Civil Disputes Departments at Jolliffes, Solicitors. Mr Sayer's background is in insurance. Mr Moose and Mr Sayer were brought into ASS in order to provide Clinton Jones with additional expertise.

12. In November 2013, Mr Moose and Mr Sayer were introduced to Mr Jones and Mr Kilburn, the initial introduction being to Mr Jones who then introduced Mr Kilburn to

Mr Moose and Mr Sayer as his business partner and an accountant. These introductions did not relate to the business of ASS, but to another potential venture.

13. On 16 December 2013, ASS entered into an agreement ("**the Quindell Agreement**") with QHS for the provision of audiological reports in respect of NIHL claims to QHS, which provided claims management services. QHS subsequently became, by far, ASS's biggest client, and ASS produced some 30,000 reports for QHS during 2014.

14. The Quindell Agreement provided for ASS to carry out a screening first stage, with ASS only being paid for those tests that indicated that there was a NIHL claim. In that event, a second more detailed report would be produced. ARM maintains that prior to the Quindell Agreement, QHS projected that there would be a failure rate of only 30% at the first stage. However, the failure rate subsequently turned out to be very much more significant than this.

15. Prof Lutman has maintained that he only became aware of the Quindell Agreement at a board meeting on 31 January 2014, one of only two board meetings that he says that he was invited to attend, the other having been on 8 November 2013.

16. On 10 February 2014, ASS entered into a Loan Agreement with ZuuZuu, pursuant to which ZuuZuu lent £70,000 to ASS. The monies lent derived from a pension fund associated with Mr Sayer, the Abbey Pension Fund, with ZuuZuu being used as the vehicle for the loan.

17. On 6 March 2014, Clinton Jones, Mr Moose and Mr Sayer met with members of the Board of Quindell Group. It is ARM's case that it was intimated thereat that Quindell Group was interested in purchasing ASS, Clinton Jones having apparently been informed the evening before the meeting that an offer of £30 million would be made thereat. However, in the event, no offer was forthcoming.

18. A meeting took place between Clinton Jones, Mr Moose, Mr Sayer, Mr Jones and Mr Kilburn at Stapleford Park Hotel, Melton Mowbray, on 24 and 25 April 2014. According to Mr Moose, this was the first occasion on which Clinton Jones met Mr Jones and Mr Kilburn. It had been realised by this stage that if ASS were to meet QHS's expectations under the Quindell Agreement, then it would need to raise additional capital and/or significantly develop its IT infrastructure and systems, and its accounting systems. It was these considerations, and Mr Jones' known expertise in IT and software development, as well as Mr Kilburn's qualification as an accountant, that prompted the introduction of Mr Jones and Mr Kilburn and the holding of this meeting.

19. Shortly prior to this meeting, Mr Moose and Mr Sayer each transferred personal funds to ASS to meet the payroll. It was Mr Sayer's evidence that Mr Jones took an unusually keen interest in them having done so.

20. By the evening of 25 April 2014, Heads of Agreement, headed *"Confidential Term Sheet"* ("**the Term Sheet**"), had been prepared, albeit that the copy produced was only signed by Mr Jones and was not dated. The Term Sheet provided for the engagement of Mr Jones/Neutrino and Mr Kilburn/Cumulo, and for the incorporation of a new holding company for ASS in which Mr Jones, Mr Kilburn, Mr Moose, Mr Sayer and Clinton Jones would, either themselves, or through corporate vehicles

(ultimately Portfolio 1 in the case of Mr Jones and Mr Kilburn), hold shares. The Term Sheet further provided that the corporate vehicle controlled by Mr Jones and Mr Kilburn (described as *"Party B"*) would hold 25% of the share capital of the holding company in consideration of the latter facilitating: *"the provision of a cloud-based, fully managed IT and telecommunications management and PBX system (the 'Neutrino IT System') to be contracted from, and provided by, [Neutrino] at a fee of £7.50 per instruction processed by [ASS] for a renewable term of 60 months to form part of the SHA. The parties to work in good faith to facilitate the design and implementation thereof as swiftly as possible."*

21. The Term Sheet also included the following:

i) Under the heading *"IP": "The IP may remain locked and owned by the respective parties. Alternatively, Party B is open to further discussions and remains flexible."*

ii) Under the heading *"NEUTRINO IT SYSTEM"*: *"The contract for the System will be provided by [Neutrino]. Neutrino will devise, deploy and maintain a System that will, broadly speaking:*

- *Provide for a complete call centre PBX inbound and outbound telephone system for all companies, massively reducing both hardware, software and telecoms/call costs and provide real-time call recording for compliance and PI;*

- *Provide a real-time recurring and spot billing service for each instructing party;*

- *Provide a system of managing appointments and reports, including report generation and billing."*

22. Portfolio 1 was incorporated on 28 April 2014, with the directors and shareholders referred to in paragraph 6 above. On the same day, and ahead of a meeting with QHS/Quindell Group on 30 April 2014, Mr Jones emailed Mr Moose and Mr Sayers referring to having: *"spent a few hours today re-analysing the business plan"*. The email expressed the view that, absent fee bearing work within 30 days that could commence in a volume of in excess of 2,000 cases per month: *"... the business is hopelessly flawed with a continuing and increasing cash requirement making it almost certainly - and in our considered opinion - hopelessly insolvent."*

23. On 30 April 2014, Clinton Jones resigned as company secretary of ASS, and Mr Kilburn was appointed in his place the following day.

24. Weekly review meetings were held between QHS and ASS via conference call. Mr Jones has referred me to the minutes of a meeting between Ms Furby of QHS and Clinton Jones held on 29 April 2014 prepared, as I understand it, by Ms Furby, and circulated to Mr Laithwaite, Mr Pennington, Mr Pearce, Mr Sayer, Mr Moose and Mr Evans. Item 9 within these minutes relates to *"Report Quality"*, and the minutes record that following a discussion with Mr Evans, the changes then listed below were required to the reports produced by ASS. There is then reference to *"CL"* having commented that certain at least of the changes required would: *"... be made in*

conjunction with the app being developed". Mr Jones suggests that the fact that QHS had raised concerns in respect of the quality of reports being produced by ASS was not something that was raised in the discussions leading to the agreement reflected in the Term Sheet, and subsequently the conclusion of the MSA, and he says that he was therefore misled into committing Neutrino to the latter.

25. On 30 April 2014, a meeting took place with Mr Pennington and Mr Laithwaite of Quindell Group at the latter's offices in Bolton. The meeting was attended by Mr Jones, Mr Kilburn, Clinton Jones, Mr Moose, and Mr Sayer, and was arranged to consider the renegotiation of the terms of the Quindell Agreement given that the failure rate of referred cases had turned out to be circa 70%, rather than the 30% predicted by QHS. It was Mr Moose's evidence, which I accept, that without prior consultation or agreement, Mr Jones felt able to interject during the course of the meeting to say that ASS would accept £62.50 plus VAT per test if QHS would make payment of ASS's invoices by the 21st rather than the 28th of each month, which QHS readily agreed. In the event, the Quindell Agreement was renegotiated so as to provide for ASS to receive £62.50 plus VAT for all screenings (Part 1 fee), rather than just those that indicated a claim, and £137.50 plus VAT for each subsequent report undertaken on those cases which passed the screening test (Part 2 test).

26. It is important to note that Mr Jones had no existing relationship with QHS or Quindell Group prior to him being introduced thereto through his involvement in ASS, and ASS's relationship with QHS as a party to the Quindell Agreement.

27. A Master Services Agreement ("**the MSA**") was entered into between ASS (as Customer) and Neutrino (as Supplier) dated 1 May 2014. This provided, so far as relevant, as follows:

i) For the provision by Neutrino of the *"Neutrino IT Services"* anticipated by the Term Sheet on the terms set out therein, the MSA giving the impression of being a standard form agreement with bespoke customer details and service charges, specified as set out in Annex A thereto.

ii) Clause 8.1 provided that: *"Neutrino has taken care to describe the Services it can provide as carefully and specifically as possible, but in some cases a bespoke Service may be required. CUSTOMER shall refer to NEUTRINO on specific guidance on Services covered by this Agreement. CUSTOMER shall, where requested by NEUTRINO, provide accurate information sought by NEUTRINO in the provision of services to ensure that NEUTRINO can quote and provide the most appropriate and applicable service to CUSTOMER."*

iii) Clause 12.1 provided that: *"Unless otherwise specifically stated in writing in an Order, the parties respective Intellectual Property Rights shall remain the property of whichever creates or owns the same and nothing in this Agreement shall be deemed to confer any assignment or licence of the Intellectual Property Rights of the other, save that the Intellectual Property Rights or goodwill in the Numbers and IMSIs shall hereby remain be vested (sic) in Neutrino at all times."*

iv) Annex A included a section headed *"Service Charges: Programming Service(s)"* which identified as *"Items"*: *"Claims Management System"* and

"Rehabilitation Management System". This referred to *"Billing"* as being *"Per Report"*, specifying £7.50 per Audiology Report for the first 1000, and £5 per report thereafter. It stated that there was: *"... no additional charge to the Rehabilitation Management System that can be used by the Customer and/or associated companies…"*

v) The *"Description & Terms"* referred to in the same section specified the following:

> *"Complete medico legal reporting and Rehabilitation IT infrastructure system (collectively, the 'System') for processing Audiological Hearing Reports and/or ancillary documents including but not limited to:*
> - *Ingestion of referrals via CSV bulk import*
> - *Ingestion of referrals via Web UI*
> - *Search, sort manage referrals*
> - *Diary, Expert booking system*
> - *WebKit/mobile browser Expert management UI (capture Reports)*
> - *Audiological Report PDF generation (for sending to Referrers via their own system i.e. Quindel (sic), and direct sending to own System referrers via UI (login for Referrer)*
> - *Auto invoice creation and sales ledger*
> - *KPI and query (basic MI reports)*
> - *Rehabilitation system to include the instruction, order processing and management of rehabilitation services including but not Ltd to, the supply and fitting of period aids to customers of the company,*
>
> *Hereinafter the '**SYSTEM INTELLECTUAL PROPERTY**'"*

28. Clinton Jones circulated a pdf scan of the signed MSA to Mr Jones and Mr Kilburn, copying in Mr Moose and Mr Sayer, under cover of an email dated 7 May 2014 (10:53). The copy so circulated included an additional page which, I understand to be common ground, had been scanned the wrong way around, and so was not legible on the copy so circulated. However, this page, which had been attached to the signed document, included an Addendum in the following terms:

> *"Upon completion of the System as agreed between [Neutrino] and [ASS], [Neutrino] shall assign the full legal and beneficial ownership of the System (the SYSTEM INTELLECTUAL PROPERTY) and any derivative works thereof (the Neutrino Work) to TOPCO nominated by [ASS] for such purpose and without further consideration. Any additional and/or subsequent Work and/or Future Development by [Neutrino] shall be agreed between the parties and provided by [Neutrino] without additional consideration and the full legal and beneficial ownership of such additional Work and/or Development, shall be assigned to TOPCO upon completion, in each instance, without limitation."*

29. In relation to this Addendum, Mr Jones referred me to a document headed "*Action Points & Agenda (LJ & RK) Tuesday, 6 May 2014"*, which set out points that Mr Jones and Mr Kilburn stated that they wished to discuss and confirm in the course of ongoing discussions that led to the conclusion of the MSA. Included therein, under Agenda Item 2, was the following: *"As discussed and agreed, the IP in this System is created and belongs to the System provider and manager, Neutrino Networks Ltd,*

who will exclusively licence said IP to ASS and provide management and support in consideration of the agreed rate of: £7.50 per referral processed … then £5.00 per referral over 1,000 in any given month." Mr Jones maintains that this was what was discussed and agreed between the parties, and should prevail to the extent that the Addendum purports to provide otherwise.

30. Roughly contemporaneously with the conclusion of the MSA, a separate agreement was reached orally between ASS and Cumulo for the provision to ASS of accountancy and company secretarial services at a rate of £1,800 per month plus £300 VAT, i.e., £2,100 per month.

31. ASG was incorporated by Mr Kilburn on 2 May 2014. At all relevant times, its only directors were Clinton Jones and Mr Jones. From incorporation, until a shareholders' meeting held on 22 July 2014, the four issued shares in the share capital of ASG were held as to one each by Clinton Jones, Portfolio 1, Mr Moose, and Mr Sayer. As already mentioned, returns at Companies House show ASG to have become the sole shareholder in ASS, although it is ARM's case that the intention was that Prof Lutman should be a 4% shareholder therein.

32. It is to be noted that on 2 May 2014, Mr Jones felt able to email, amongst others, Mr Pearce, Ms Furby, Mr Evans and Mr Hodgkinson of QHS/Quindell Group and inform them that:

> *"I am now the CTO (as well as shareholder) at Audiological Support Services Ltd ("ASS") and have assumed ownership of this project from a technical perspective. If you would be so kind as to liaise directly with myself, with the rest of the team in CC as required, I would be very grateful."*

33. In the same email, Mr Jones referred to the fact that he was <u>also</u> the CEO of Neutrino, *"which is handling the deployment and IT requirements of ASS moving forwards."*

34. On 12 May 2014, Auricle was incorporated with Mr Jones being appointed as sole director, Mr Kilburn being appointed as secretary, and ASG being the sole shareholder therein. Auricle subsequently entered into a contract with a manufacturer, Phonak UK, for the supply of hearing aids for the rehabilitation services provided by ASS.

35. Further, on 12 May 2014, a Shareholders Agreement was entered into between Portfolio 1, Clinton Jones, Mr Moose and Mr Sayer (1) ASG (2) and the subsidiaries from time to time of ASG (being date thereof ASS and Auricle) ("**the SHA**"). It is to be noted that Prof Lutman was not a party to the SHA.

36. The key features of the SHA relevant for present purposes are the following:

i) It provided for two *"Parties"*, namely *"Party A"* (being Clinton Jones, Mr Moose and Mr Sayer) and *"Party B"* (being Portfolio 1), and that Clinton Jones and Mr Jones should be the initial directors of ASG (clause 6), Clinton Jones effectively representing Party A, and Mr Jones effectively representing Party B.

ii) Party A and Party B (who were defined as *"Shareholders"*) should have one vote each at *"Shareholder Meetings"* with there being no casting vote, meaning that all votes would either be carried unanimously, or not carried (clauses 49-54).

iii) Any question arising at any board meeting should be decided by unanimous vote of the directors present (clause 40), there being a quorum of two directors required to be present (in person or by telephone or video conferencing) (clause 46);

iv) *"The Business and affairs of the Company [i.e. ASG] and each Subject [i.e. ASS and Auricle] will be overall managed by the Company Board [i.e. the Board of ASG] and decisions will be decided by a majority vote except as specifically stated in this Agreement"* (clause 56).

v) *"The Directors of each Subject may only conduct the day-to-day business of the Subject within the strict controls and confines of the Annual Business Plan and specifically shall not bind or otherwise commit or otherwise bind any Subject or incur any additional expenditure (other than reasonable nominal day-to-day expenses and the like) without the formal consent of the Company Board"* (clause 59).

vi) *"The Shareholders must ensure so far as is lawfully possible that the Company or a Subject does not do any of the following without the consent of all the Shareholders either obtained at a Shareholder meeting or in writing: … (g) pass any resolution or take any action for the winding up, administration, receivership, dissolution or liquidation of the Company; … (r) enter into any contractual obligation with a value exceeding £250 …"* (Clause 60).

37. Whilst not specifically encompassed by the terms of the SHA, but as foreshadowed by the Term Sheet, it is common ground that the basis upon which Portfolio 1 (effectively behalf of Mr Jones and Mr Kilburn) was to acquire an interest in ASS through a shareholding in ASG was that of *"sweat equity"*, i.e. that in return for the a 25% shareholding in ASG (held through Portfolio 1) with the degree of control provided for by the SHA, Mr Jones would, amongst other things, procure Neutrino to enter into the MSA and develop IT infrastructure and systems for ASS as provided for thereby, and Mr Kilburn would, through Cumulo, provide accountancy and company secretarial services at the agreed rate.

38. In paragraph 43 of his first witness statement, Mr Jones explained that his position following having entered into the SHA was that: *"myself and [Clinton Jones] controlled ASG and hence [ASS] as directors of ASG."* It will be recalled that clause 56 of the SHA provided that the business affairs of ASG, as well as ASS and Auricle, should be *"overall managed"* by the Board of ASG, i.e., Mr Jones and Clinton Jones.

39. Prior to the date of the SHA, on 8 May 2014, Mr Sayer met with Mr Kilburn at Neutrino's offices in order to hand over accountancy information and administrative documents, following which Mr Kilburn took control of the accountancy and tax position of ASS, Mr Kilburn having already by then replaced Clinton Jones as company secretary of ASS. It was Mr Sayer's evidence, that he raised with Mr Kilburn at this meeting the fact that, as from the commencement of trading, HMRC

had approved ASS operating on a VAT cash accounting basis to assist with cash flow, but that the income generated by the Quindell Agreement would put ASS outside the £1.35 million VAT threshold in the year ending 30 April 2015, with the consequence that ASS would be obliged to move over to invoice accounting for VAT purposes. The problem identified by Mr Sayer was that the VAT quarter to 31 May 2014 and following would, if accounted for on an invoice accounting basis for VAT in respect of both Part 1 and Part 2 report invoices, create a severe cash flow problem for ASS in settling its VAT liability unless an arrangement could be reached with HMRC.

40. Draft accounts of ASS for the year ended 30 April 2014 were produced at about this time, as evidenced by a draft bearing the date 15 May 2014. This disclosed a net profit for the year of £96,370, and showed net assets of £16,799.

41. With, I fear, the benefit of hindsight, Mr Jones has criticised Mr Sayer for having set up ASS's VAT accounting systems on the basis of cash accounting, which Mr Jones maintains was illegal. However, in his evidence, Mr Kilburn accepted that the adoption of the VAT cash accounting system by Mr Sayer was not wrong, albeit that if matters developed with QHS as anticipated, a time was bound to have come within the relatively near future when ASS would (subject to contrary agreement with HMRC) have been required to account for VAT on an invoice accounting basis, with the resultant cash flow difficulties. In the event, as we shall see, ASS did not move to an invoice accounting basis prior to entering into administration in December 2014, when the issue was picked up prior to the making of the relevant administration order by one of the proposed joint administrators, Mr Snowden, who was concerned that ASS should, by then, have been accounting for its VAT on an invoice basis, rather than on payment. As referred to above, as from 8 May 2014, Mr Kilburn had had responsibility for accountancy and taxation matters, in place of Mr Sayer, whose role significantly reduced thereafter.

42. A further issue that I should mention is an entry in ASS accounting records that purported to be a legitimate business expense, but in fact related to expenses connected with Mr Sayer's daughter's wedding in December 2013. Much was made by Mr Jones of this being reported to him by Mr Kilburn, and of him being of the view that this demonstrated fraud and dishonesty on the part of Mr Sayer. Mr Jones cross-examined Mr Sayer on the point on this basis. Mr Sayer denied that any fraud or dishonesty had been involved, and maintained that the accounting entry had arisen as a result of discussions with the other then directors of ASS at the time of his daughter's wedding, that ASS had not actually borne any expenses in connection with the wedding, and that he had sought to correct the position so far as a VAT return was concerned with HMRC. Having heard Mr Sayer's explanation, I am left with the impression that, whilst the original making of the relevant entry might have involved a degree of stupidity or naïveté, Mr Sayer did not act fraudulently or dishonestly, and that Mr Jones used the events in question as a pretext for seeking to undermine Mr Sayers' position in ASS.

43. The evidence suggests that soon after his involvement with ASS began, Mr Jones began to take the lead role in discussions with QHS, as anticipated by his email dated 2 May 2014 to various representatives of QHS/Quindell Group referred to above. It is his evidence and case that, in doing so, he discovered that there were unforeseen difficulties with regard to the relationship with QHS, and in particular with regard to

the quality of reports that were being produced, and as to whether they met the requirements of QHS.

44. Some insight in this respect is provided by Ms Furby's notes of the weekly review meeting held on 16 June 2014 between Mr Jones and Ms Furby, with Clinton Jones present for part of the call. Under the heading *"Performance"*, the notes record that Mr Evans had signed off: *"... the last proposed report confirming it addressed all inclusions previously discussed V3 received 30.05.14."* However, a number of issues are referred to as having been raised under the heading *"Commercials"*, including an issue concerning the *"old format"* positive reports produced so far. It was noted that these needing reformatting into a new report template. It was then noted that Mr Moose had previously suggested that this could be completed without charge, but that Mr Jones had indicated a charge for each report in the region of £37.50. Matters were left on the basis of Mr Jones reporting back with a realistic costing and timeframe for the approximately 2,000 reports to be reformatted by 23 June 2014. Reference was further made to *"Tinnitus report"*, which was referred to as requiring development following which a cost for the *"add-on report"* could be discussed.

45. It is clear that from fairly soon after the entry into the SHA, the relationship between Mr Jones on the one hand, and Mr Moose and Mr Sayer on the other hand, began to become increasingly strained. Mr Jones primarily puts this down to having been misled as to the quality of the reports produced for QHS, in respect of which Mr Moose, in particular, is said by Mr Jones to have played a leading part, and down to a failure to disclose ongoing issues with QHS said to be revealed by the minutes of the meeting with Ms Furby on 29 April 2014. Further, Mr Jones referred in evidence to concerns that he says that he had with regard to the expenses recorded in the accounting records linked to Mr Sayer's daughter's wedding, and to his complaint with regard to the way that Mr Sayer had caused ASS to account for VAT.

46. Mr Moose and Mr Sayer resigned as directors of ASS on 6 June 2014, leaving Clinton Jones and Prof Lutman as the directors thereof. They say that they were not pushed into resigning, but rather resigned as directors of ASS anticipating that they would become directors of ASG, which never happened. This tends to suggest that it was after their resignations as directors of ASS that, at least from their perspective, their relationship with Mr Jones began to significantly deteriorate.

47. It is ARM's position, through Mr Moose and Mr Sayer, that the breakdown in the relationship was essentially down to Mr Jones seeking to take increasing control over the affairs of ASS, and the relationship with QHL, and that rather than having been misled with regard to the quality of reports and the relationship with QHL, it was only after Mr Jones and Neutrino had become committed to ASS through the MSA and the SHA, that Mr Jones fully appreciated the extent of the task involved in Neutrino performing its obligations under the MSA.

48. As to increasing control being exercised by Mr Jones, ARM points to Mr Jones' email dated 2 May 2014 and subsequent email correspondence showing Mr Jones to be taking the lead and initiative so far as arranging meetings with, and more generally dealing with QHL was concerned. An example of Mr Jones' approach is said to be provided by an email exchange on 23 June 2014. ASS received £169,800 from QHS in respect of the May 2014 Part 1 reports. Mr Sayer caused £150,000 to be transferred from ASS's current account to an overnight deposit account. Mr Sayer explained in

his witness statement that he did this in order to: *"accrue as much value as possible … when cash was not required."* Mr Kilburn raised this transaction in an email to Mr Sayer, Clinton Jones, Mr Moose and Mr Jones, in which he asked that the bank account be left alone given that he was trying to get control over the business' financial position and: *"understand cash flow and how to clear our creditors without going bust!"* Mr Jones responded very promptly on 23 June 2014 to Mr Kilburn's email, beginning his email with: *"Gentlemen, Enough. I am utterly, utterly speechless. I repeat this is not authorised"*, before threatening an injunction if what Mr Sayer had done was repeated, and saying, *"I trust I have made myself perfectly clear."*

49. On 9 July 2014, Mr Jones emailed Clinton Jones with his: *"… thinking about this situation with Quindell"*. This set out some costings in order to meet what were understood to be QHS's requirements including £12,000 (3 x 4 days) *"pre-programming module"*, and £9,800 in respect of *"2,500 report input/re-gen (pre-audit)"*, total £21,800 (before VAT). He then said: *"I am only offering this as a solution to ASS as I am affected by the risk and overall issue as a shareholder. I will need compensation by way of equity or other relief else I must reserve the right to re-bill this on a proper commercial rate, not a mates rate basis: so it's without prejudice to my rights as a shareholder, I need to just make ASS perfectly aware."* He concluded by saying: *"Please consider then either confirm acceptance or give me your alternative suggestions so we can press on either way."*

50. There is evidence of a series of email exchanges at this time involving, variously, Mr Jones, Clinton Jones, Ms Furby and Prof Lutman, concerning QHS's requirements.

51. An important meeting took place on 19 July 2022 attended by Mr Jones and Clinton Jones, and, on behalf of QHS/Quindell Group, Mr Laithwaite, Mr Pennington and Ms Furby. A transcript of this meeting has been produced. The following, in particular, should be noted therefrom:

i) Mr Laithwaite is recorded as beginning the meeting by suggesting that the parties try to look at where the pressure points were, and see how they could get these resolved and move forward.

ii) During the course of this meeting, Mr Laithwaite spoke in terms of reports produced by ASS not being of merchantable quality or fit for purpose because they were not *"admissible to the court"*, and of ASS not having delivered the product ordered.

iii) Mr Jones is recorded as having spoken in terms of being *"as pissed off"* as Mr Laithwaite was, seemingly blaming others for the predicament and referring to only just having become aware of problem. He referred to the 2,500-3,000 historic reports, which were analogue and not on a computer database, and which would require considerable effort to process. However, in respect of other issues he said:

> *"So, in principle, we've got a further call set up with Professor Mark Lutman and Mark Evans and Helen tomorrow, so there should be no reason why we've not got a report in a format that's acceptable to your business before the close of business tomorrow, and probably at worst*

> *case, by the close of business at the end of the week, assuming that we might have some backwards and forwards on some minute detail. That being the case, we're going to then be in a position where we can regenerate reports and send them to you and given that that's now systematic for all the recent reports we've generated, we can do that over a period of four or five hours, you know, in the wee hours of the morning. So it's not a big deal"* [emphasis added].

52. Prior to this meeting with QHS/Quindell, Mr Jones had sought to convene a shareholders' meeting. This was ultimately fixed to take place on 22 July 2014. Ahead of the meeting, Mr Moose and Mr Sayer complained that they were unable to ascertain what was on the agenda.

53. On the morning of the shareholders' meeting on 22 July 2014, but before it started, Mr Pennington emailed Mr Jones saying: *"I am comfortable paying you as soon as possible for all reports carried out in June 2014 where we have received an acceptable report and have been able to invoice the same onto our customer. I cannot make any payment under any other circumstances."* Mr Pennington concluded by saying that he was sure that this was what had been agreed, referring to an email trail. Mr Jones responded concurring that this was what ASS had understood had been agreed: *"... using the very latest discussed and agreed Report structure and brand new algorithms"*. He also referred to not being worried about invoicing as yet given that the revised reports would not start streaming over until the back end of the week, and to Mr Pearce having said to hold on as he needed to make some changes regarding receiving re-runs over API.

54. There is a transcript available of the shareholders' meeting held on 22 July 2014, attended by Mr Jones, Clinton Jones, Mr Sayer, Mr Moose and Mr Kilburn.

55. It is clear from the transcript, that Mr Jones soon got to the point, raising *"... certain representations that have been made and our view on the financial position of the company and a few other things..."*, and asserting that the first thing that they needed to talk about, first and foremost, was *"... the situation with Quindell and these reports."*

56. Having outlined the position with regard to QHS/Quindell, Mr Jones is recorded as saying:

> *"I think to sum it up really in a nutshell, in a 30 second conversation, is if we don't resolve the situation that ASS finds itself in today, we shut it at five o'clock this afternoon by calling the administrator because that's the bottom line. So there is no way to wrap that up. There is no way to put it in cotton wool or whatever way you want to look at it. Quindell aren't happy with the fact that they've got the reports that they have.*
>
> *They disagree for the record that they never approved anything or that the report - and in fact Peter Laithwaite and the board on a call with myself, Clinton have said that those reports aren't fit for purpose. They have paid us £260,000 or £280,000 – or whatever it happens to be – over a quarter of a million quid for reports that they can't use. Unless we can resolve that they want their money back. So essentially, we've had to talk to them about what their needs are in*

terms of what does that report need to look like? So it's a manifest rewrite of the report completely."

57. Mr Moose sought to suggest that QHS, through Mr Evans, had previously agreed the contents of the reports, a point seemingly supported by the notes of the meeting with Ms Furby of 16 June 2014, and he sought further information as to why they were thought not to be fit for purpose. However, it is clear from the transcript that Mr Jones was having nothing of this. Ultimately, as an alternative to the administration that he had suggested, and a threat that *"We'll walk away",* Mr Jones put a proposition to Mr Moose and Mr Sayer that they should reduce their shareholding from 25% to 5%. As he put it: *"We would like to put the proposition to you where we feel we need the equity to be and how it needs to be adjusted"*.

58. When Mr Sayer asked Mr Jones how this proposal would affect Clinton Jones, Mr Jones replied that: *"Well our view is that he's going to be providing ongoing work within the business; you guys aren't, so that's the bottom line from our perspective. I think where we sit, our view is that this business, if we walk out of here we've got to face administration with Quindell. Or if it doesn't go into administration, who is going to fund it because if it can't produce the reports that work has already been done for - my company's also a fairly significant creditor now, having done the work - we can't provide reports to Quindell they will be asking for the £260,000 back."*

59. At one point at this meeting, Mr Kilburn observed that ASS: *"Has been a company with relatively shit financials, but a strong business in terms of Quindell, the product, the IP, the people, the concept - the whole thing. As we sit here today, the Quindell people are clearly not very happy. That wipes out in a single blow what we are suggesting is 20% of the value, if you just broad brush…"*

60. Under some pressure, in the circumstances of the shareholders meeting on 22 July 2014, Mr Sayer did indicate that he would acquiesce in his shareholding being reduced. Mr Jones contends that Mr Moose did likewise, but Mr Moose says that he remained silent and did not acquiesce. In any event, without any further input from Mr Sayer or Mr Moose, and without them signing anything, the share capital of ASG was subsequently reorganised with the issue of further shares so that, as recorded in the annual return submitted on 21 May 2015, Portfolio 1 held 51 A Ordinary Shares and 25 B Ordinary Shares, Clinton Jones held 24 A Ordinary Shares and 25 B Ordinary Shares, Mr Moose held 10 A Ordinary and 25 B Ordinary Shares, and Mr Sayer held 10 A Ordinary Shares and 25 B Ordinary Shares.

61. Following the shareholders meeting on 22 July 2022, Mr Moose and Mr Sayer played no real part in the day-to-day affairs of either ASG or ASS, and did not attend any further meetings prior to ASS entering into administration in December 2014. The relationship between them and Mr Jones would not have been helped by the fact that, on 31 July 2024, ZuuZuu made demand on ASS for the repayment of the £70,000 that it had lent to ASS. This was not repaid until it was repaid two instalments on 13 and 26 November 2014, after ZuuZuu's Solicitors had written on 7 November 2014 threatening winding up proceedings.

62. It is ARM's case that it can be seen to have become increasingly clear in the period leading up to the shareholders meeting on 22 July 2022 that Mr Jones was using his force of personality and business experience to take the essential decisions in relation

to the affairs of ASS, with the acquiescence of Clinton Jones who was content to go along with what Mr Jones was proposing. Reliance is placed on a large number of emails and other documents that are said to demonstrate this as being the case.

63. An example is said to be provided by an email dated 24 June 2014 from Mr Jones to Mr Sayer, Clinton Jones and Mr Moose. In this email, which followed on from the exchange on 23 June 2014, Mr Jones purported to formally instruct Mr Sayer to cease and desist from accessing or otherwise giving instructions to ASS's bank, having made the point that this was a matter for approval by himself and Clinton Jones in line with the Business Plans. The email concluded by saying: *"For the sake of proper due process, Clinton will reply all to affirm my instructions as a Board Director of ASG and the instructions flowing down therefore to ASS on the instruction thereof ASG the same… Clinton, if you please…"* ARM points to a significant number of other emails said to have been sent in similar vein, that are said to show Mr Jones essentially acting as managing director of ASS, with Clinton Jones acting as he (Mr Jones) pleased.

64. On the other hand, it is Mr Jones' position that decisions were taken jointly by himself and Clinton Jones, in their capacity as directors of ASG, giving directions to ASS on behalf of the latter, with Clinton Jones being fully involved in that decision making process, and not simply going along with what Mr Jones required.

65. Following the shareholders meeting on 22 July 2014, on 26 July 2014, Mr Jones emailed Clinton Jones attaching an updated/replacement invoice (number 201200109) purporting to waive additional costs said to have been agreed to be waived pending the outcome of the shareholders meeting. He attached a new invoice (number 201200111) which was said to cater for: *"the additional work to correct that which we discussed last night [Prof Lutman] and I discovered yesterday in way [Mr Moose] had engineered the pre-amble 'skeleton' and effectively re-write a lot of logic and re-do reports, add new questions and triggers to DB"*. Mr Jones asked Clinton Jones to reply to confirm that the new invoice was accepted and also knowledge that Neutrino had waived invoice number 201200109 for £21,575.

66. The email went on to say:

> *"As Shareholders Equity is resolved, Neutrino will issue a revision ORDER FORM to append to the existing Master Services Agreement, to cover the new IP, which is agreed Neutrino will licence exclusively to ASS, notably this will specify that Neutrino may revoke said licence and all IP in the event that ASS becomes insolvent, does not pay its invoices or otherwise breaches the MSA - the IP being exclusively therefore licensed for the duration of the agreement only. I will revise an ORDER to reflect this as discussed and sent over for signature shortly.*
>
> *Please confirm and I will then push on with rollout/development."*

67. Clinton Jones provided the confirmation requested by Mr Jones in an email sent six minutes after receiving Mr Jones' email on 26 July 2014.

68. Invoice number 201200111 contains the description: *"new software module (re-write report generation engine),"* and is in an amount of £4,000 plus VAT. It is one of the invoices in dispute in the present proceedings. The waived invoice number

201200109 in an amount of £21,595 plus VAT was described as relating to *"Re-run reports (21,950@2500 @2686=23,529)"*.

69. On 17 September 2014 Mr Jones sent an email to Mr Kilburn, copied into Clinton Jones, setting out a number of matters that were said to have been discussed and agreed the previous day by: *"the board of ASS and ASG agreed as part of the revised business plan for ASS moving forwards"*. I do not understand it to be suggested that Prof Lutman was present at any board meeting of ASS the previous day, otherwise he might have been expected to have been copied in on this email along with Clinton Jones. Consequently, the meeting can only have been between Mr Jones, Mr Kilburn and Clinton Jones, if indeed it ever took place bearing in mind that no minutes have been produced. Even if it did take place, it evidently did not include one of the two de jure directors of ASS.

70. The matters that are referred to in this email dated 17 September 2014 as having been agreed included:

i) The adoption of a new service incorporating Tinnitus reporting, offered principally to QHS/Quindell;

ii) Increasing Clinton Jones' salary to £120,000 per annum, and Mr Jones and Mr Kilburn each being entitled to charge £150,000 per annum in equal monthly payments, with Mr Jones assuming the role of Chief Technical Officer, and Mr Kilburn as Chief Financial Officer. This is said to be justified on the basis of additional work being done in light of the revised business plan going forward, and *"the now non-existent work being done by Moose and Sayer"*.

71. So far as Tinnitus reports are concerned, an Additional Order Form to the existing MSA has been produced relating to new software said to have been requested by ASS in addition to that already provided to enable the capture, analysis, work-flow and generation of reports for Tinnitus. This Additional Order Form purports to have been signed by Mr Jones on behalf of Neutrino and by Clinton Jones on behalf of ASS on 15 September 2014. It provides for a non-recurring charge of £30,000 plus VAT, plus monthly recurring charges of £19.35 per report for the first 1000, and £18.60 thereafter. The non-recurring costs are covered by invoice number 201200123, which is another of the invoices in dispute. There are no subsequent invoices raised charging for reports at this rate suggesting that the relevant software was either not developed or was never utilised to produce reports.

72. Two other Additional Order Forms have been produced, said by Mr Jones and Neutrino to be supplemental to the existing MSA, namely:

i) One that purports to relate to *"NextGen Claims Management System NATIVE ANDROID APP"* and is described as: *"New software … requested by [ASS] in addition to that already provided due to [ASS] miss-specifying the original System requirements to Neutrino such as to replace the System previously supplied for use by [ASS] as specified in the MSA, incorporating completely new native android app as opposed to a Webkit/Webview based App through which all reports will be captured by audiologists (hereinafter the **NATIVE APP**"*. The document produced does not appear to provide for any non-recurring cost, but it does provide for a recurring £6.25 per audiology report

for the first 1,000, and thereafter £4.15 subject to a minimum monthly sum of £8,325. This is again signed by Mr Jones on behalf of Neutrino and Clinton Jones on behalf of ASS, but the document produced has not been dated.

ii) A second that purports to relate to *" NextGen Claims Management System Reporting Module"* and is described as to *"New software ... requested by [ASS] in addition to that already provided due to Customer miss-specifying the original System requirements to Neutrino such as to replace the System previously supplied for use by Customer as specified in the MSA, incorporating completely revised Reporting module to accommodate revised reports algorithms, report structure and layout required to support Quindell and all other clients moving forwards (hereinafter the* ***NEXT GEN SYSTEM)****."* Again, the document produced does not appear to provide for any non-recurring payment, but it does provide for a recurring £7.50 per audiology report for the first 1,000, and thereafter £5.00. This is again signed by Mr Jones on behalf of Neutrino and Clinton Jones on behalf of ASS, but the document produced has not been dated.

73. It is to be noted that these two Additional Order Forms purported to provide, amongst other things, that:

i) The parties thereto accepted and agreed that the subject matter thereof was: *"an additional requirement supplied at considerable cost by Neutrino and as such ... is outside of the scope of the original MSA Annex A and shall not be considered an element of, or contained within the SYSTEM INTELLECTUAL PROPERTY therein originally specified"*;

ii) All intellectual property in the subject matter thereof should remain at all times the absolute property of Neutrino, with Neutrino thereby granting ASS a licence to use the subject matter thereof *"at the same Rates as specified in the original Order"*.

74. The terms referred to in subparagraph 73(ii) above reflected what Mr Jones had said in his email dated 26 July 2014 referred to in paragraphs 65 and 66 above.

75. I should note an email dated 13 October 2014 sent by Mr Jones to Mr Kilburn, that was copied in to Clinton Jones. This referred to monies alleged to be owed to Neutrino totalling £260,000, and amounts of £120,000 and £80,000 owed to Prof Lutman and Mr Sayer respectively, which ASS was not in a position to pay, hence Mr Jones saying in this email that: *"there's either a pecking order or a compromise"*. Having identified that he was *"obviously conflicted"* on this issue, he went on to say that he was "*not prepared to compromise"* and that *"Neutrino will not continue (at all) unless all invoices moving forwards are secured by way of assignment of ASS invoices (on an ongoing basis) be that QHS or others, as security for debt ... Lets discuss."*

76. The following day, 14 October 2014, ASS entered into a Deed of Assignment of its book debts to Creditas Capital (Trade Finance) Ltd ("**CCTF**"), a company of which Creditas Capital plc is the sole shareholder, and Mr Jones and Mr Pinn the directors. This deed was not registered as a company charge, and attempts to enforce it in the administration of ASS proved unsuccessful as referred to below.

77. As evidenced by the email correspondence, following the shareholders meeting on 22 July 2014, if not before, Mr Jones and Clinton Jones engaged with Prof Lutman with regard to resolving issues as to the quality and contents of reports to be produced for QHS. Further Counsel was instructed to advise in respect thereof, in particular with regard to how the reports might comply with CPR Part 35, if this was a requirement of QHS.

78. As already identified, payments were made by ASS to Neutrino between 23 May 2014 and 26 November 2014 totalling £594,352.03. ARM's case is that properly authorised invoices totalled only £148,558.31, resulting in an overpayment to Neutrino of £445,766.72. 28 of the invoices submitted by Neutrino are challenged by ARM. The descriptions thereon, and the amounts thereof, were as follows:

Invoice number (last three digits only)	**Date**	**Description**	**Amount Ex VAT**
100	19.05.14	Development of Mapping API/Interface extension to Diary and tools Lone Worker system TOTAL	£5,000 £2,500 £7,500
104	01.07.14	New software module (hybrid admin/export login/functions)	£5,000
105	03.07.14	New software module (hybrid admin/export login/functions) -11.5 x £1,000	£11,500
107	18.07.14	New software module (re-write report generation engine) -14.5 x £1000	£14,500
108	18.07.14	Re-run reports (21,900 @2500 @2686 = 23,529	£23,529
109	18.07.14	Re-run reports (£21,900 @2500 @ 2686 = 23,529) – 2686 x 8.0398	£21,595 (waived)
111	26.07.14	New software module (re-write report generation engine) - 4 x 1000	£4,000
112	30.07.14	Neutrino Medico system (IP fee) <= 1000 p/m - 2000 x 7.50 Neutrino Medico system (IP fee) > 1000 p/m - 1832 x 5.00 TOTAL	£15,000 £9,160 £24,160
114	13.08.14	Neutrino Medico system (IP fee) <= 1000 p/m – 1000 x 7.5 Neutrino Medico system (IP fee) > 1000 p/m – 3143 x 5.00 *"July 2014 Medico license fee* *Fail 1341* *Pass 1466* *Refer 1305* *Undefined 31"*	£7,500 £15,715

		TOTAL	£23,215
117	27.08.14	New software module (re-write report generation engine) – 4 x 1,000 *"errors in original new Medico Reports (wrong wording and signatures)* *should have been picked up at approval point* *all Medico reports have to be completely re-worked and re generated"*	£4,000
118	28.08.14	*Neutrino Medico system (IP fee) <= 1000 p/m (Waived)* Neutrino Medico system (IP fee) > 1000 p/m (see below) Re-run all pass & fail reports sent to Quindell (including old reports) from start to midnight 26.08.14: Pass - 3,751 x 5.00 Fail 3,862 x 5.00 OLD REPORTS Pass - 2,615 x 5.00 Fail - 77 x 5.00 TOTAL	 £18,755 19,310 £13,075 £385 £61,830
123	15.09.14	Coding Tinnitus Report module and report sub-system	£30,000
128	29.09.14	IT Consultancy Retainer Fee	£12,500
129	01.10.14	IT Consultancy Retainer Fee	£12,500
130	13.10.14	First 1000 Reports Re-run all PASS & FAIL reports sent to Quindell (including old reports) from start to 30 September 2014 [est.] Pass and fail reports to end Sept – 17,000 x 5.00 Old report pass 2,615 x 5.00 TOTAL	£7,500 £85,000 £13,075 £105,575
131	13.10.14	1 new software module (re-write report generation engine) - 8 x 1,000 2 re-code and combine code branches – 14 x 1,000 *"1 this is due to re-engineering reports* *2 additional cost invoiced in advance to cover combining code branches into one*	£8,000 £14,000

		logic tree (and interim port to facilitate quindell)" TOTAL	 £22,000
132	17.10.14	3 Man day dealing with emergency code resolution (aborted 16:30)) – 3 x 1,000	£3,000
137	03.11.14	IT Consultancy Retainer Fee November 2014	£12,500
138	03.11.14	Neutrino Medico system (IP fee) <= 1000 p/m October 2014 - 1000 x 6.25 Neutrino Medico system (IP fee) > 1000 p/m October 2014 – 3023 x 4.15 TOTAL	£6,250 £12,545.45 £18,795.45
139	13.11.14	Recoding Quindell API 3 dual man days brackets expected), may exceed - will advise 6 x 1,000	 £6,000
141	01.12.14	Recoding Quindell API 7.5 dual man days (additional expected)	 £15,000
146	01.12.14	IT Consultancy Retainer Fee December 2014	£12,500
147	01.12.14	Neutrino Medico system (IP fee) <= 1000 p/m November 2014 (1000 x 6.25) Neutrino Medico system (IP fee) > 1000 p/m November 2014 (2368 x 4.15 TOTAL Due 25.12.14	 £6,250 £9,827.20 £16,077.20
148	01.12.14	Email system and backup - November 2014	 £450
140	01.12.14	First 1,000 Reports (1,000 x 7.5) Re-run all PASS & FAIL reports sent to Quindell (including OLD REPORTS) from 01 Oct 14 > 30 Nov 14 [est.] PASS and FAIL reports Oct & Nov 2014 (6,301 x 5.00) TOTAL Payment or suitable security due in advance	£7,500 £31,955 £39,455
149	26.02.15	Neutrino Medico system (IP fee) <= 1000 p/m December2014 (1,000 x 7.5) Neutrino Medico system (IP fee) > 1000 p/m December 2014 (1255 x 5.00) TOTAL Due 25.12.14	 £7,500 £6,250 £13,775
150	26.02.15	Neutrino Medico system (IP fee) <= 1000	

		p/m December2014 (1,000 x 6.25) Neutrino Medico system (IP fee) > 1000 p/m December 2014 (1255 x 4.15) TOTAL Due 25.12.14	£6,250 £5,208.25 £11,458.25
151	26.02.15	Telephony: December 2014 - calls	£154

79. So far as the payments to Cumulo are concerned, ARM's case is that £74,543.43 was paid to Cumulo, of which only £25,120 represented authorised invoices, resulting in an overpayment of £49,423.43. Invoices totalling £51,780 are objected to, being:

i) An invoice dated 31 August 2014 for £5,000 plus VAT, purporting to relate to: *"Reconstruct all accounting for the Year Ended 30 April 2014 and report, year end accounting and taxation";*

ii) Four invoices dated 1 October 2014, 18 October 2014 and 1 November 2014 respectively, each in an amount of £12,500 plus VAT and purporting to relate to *"Financial Support Retainer"*; and

iii) An invoice for £780 dated 6 November 2014, a copy of which has not been produced.

80. On 24 November 2014, ARM's Solicitors, Fieldfisher LLP, then acting for Mr Moose and Mr Sayer, wrote a letter before action to each of the Defendants. This letter alleged that there had been an unlawful share transfer in relation to the dilation of Mr Moose's and Mr Sayer's shares in ASG following the shareholders meeting on 22 July 2014, and it challenged the lawfulness of a number of the payments made to Neutrino referred to above. The letter concluded by alleging that the affairs of ASG and ASS had been conducted in a manner unfairly prejudicial to the interests of Mr Moose and Mr Sayer as members.

81. Against the background of this letter before action, it is necessary to consider in some detail the circumstances in which ASS came to enter into administration on 18 December 2014.

82. In his Joint Administrators' Report and Proposals dated 9 February 2015 ("**the Administration Report and Proposals**"), Mr Snowden referred to the fact that, on 26 November 2014, he was contacted by Mr Judge, acting on behalf of ASS and Neutrino, requesting that he join a telephone call to discuss the solvency of ASS and *"the untenable position that it was in"*. It was Mr Snowden's evidence that he gained the impression during the telephone call that subsequently took place that Mr Jones was representing ASS in the approach to him, and he says that he agreed to meet Mr Jones personally at the earliest opportunity, which he did, at Mr Jones' home, on 1 December 2014.

83. In an email dated 27 November 2014 (16:04) to Clinton Jones, Mr Jones referred to speaking to Mr Judge *"as Neutrino"* with regard to the latter's position, and what was involved: *"commercially and in terms of equity moving forwards etc"*. Mr Jones identified in this email the importance of having Prof Lutman's *"complete buy in"*,

and he identified *"another option"* namely: *"we wind it up and start again with the same set up-which we touched on with [Mr Judge] on the call… Lets discuss this also."*

84. In a further email dated 27 November 2014 (18:40) from Mr Jones to Clinton Jones, copying in Mr Kilburn and Alex Jones and headed *"CONFIDENTIAL & SUBJECT TO CONTRACT"*, Mr Jones set out his further thoughts. He identified that he felt that he should: *"remain at distance to ASS through the process and encamp within Neutrino/Creditas."* He then indicated that he was, in principle, prepared to fund *"the winding up"* and *"(to a point) repurchasing ASS [its goodwill/assets etc - what there are of them!] into Newco, through a fresh corporate holding vehicle which I have incorporated in standby."* He continued: *"this of course absolutely assumes we obtain [Prof Lutman's] complete and long-term tie in (which Clinton and I are dealing with personally)."* The email went on to discuss potential shareholdings in the *"new structure"*.

85. On 1 December 2014, Mr Jones emailed Prof Lutman under the heading *"CONFIDENTIAL AGREEMENT"*. This email bears quoting in full:

> *"As discussed, to protect our positions (as both creditors and partners in ASS) and that of the ASS business and employee's moving forwards (in whatever guise) we've agreed with each other that we won't enter into any discussions, negotiations or business with any other party without the consent and involvement of the other party – and will furthermore do all things necessary to block ASS being purchased or otherwise an interest in it being acquired by any other than ourselves, broadly aligned to existing shareholdings, but increasing us both to compensate for removing Sayer and Moose (broadly as discussed).*
>
> *In terms of the new phoenix moving forwards, we need to increase your shareholding and also make sure we both have each other's mutual long term tie in rather than what was there, before. Bringing you into true value, a new mutual shareholders agreement and such like. I've wanted to do this for some time, and at least out of this mess some serious good will reward us all."*

86. An updated version of the draft accounts for the year ended 30 April 2014 was produced on 2 December 2014 as evidenced by a draft bearing that date. This was produced by Mr Kilburn for use in connection with an administration application. It showed a very different position to the draft accounts that had been produced on 15 May 2014, showing a loss for the year of £253,639, and a balance sheet deficiency of £289,308. The revised draft accounts were relied upon in support of the administration applications subsequently made.

87. In an email sent to Mr Judge on 3 December 2014, Mr Jones posed the question as to whether, on the making of an administration order, it would be viable to shut down or strike off Portfolio 1. He explained that he was asking the question out of concern that Portfolio 1 would still be bound by the SHA with *"the idiots"* on administration. He also enquired as to whether Mr Moose or Mr Sayer could *"go after"* him or Mr Kilburn personally, or as shareholders in Portfolio 1.

88. Mr Jones was taken in cross-examination to an email dated 4 December 2014 sent by Mr Jones to Mr Kilburn and Mr Judge in which he referred to being *"out with*

Quindell all day in Liverpool". Mr Jones said that he had no recollection of any such all-day meeting in Liverpool.

89. However, the evidence is to the effect that Mr Jones was holding meetings with QHS/Quindell at this time in that, in an email dated 14 December 2014, Mr Hodgkinson of Quindell Group sought an urgent update from Mr Jones and Clinton Jones *"following our last meeting"*. This email went on to refer to the fact that, at the last meeting, it had been discussed and agreed that all of the historic reports which ASS had provided (circa 30,000) should be re-written and re-produced as discussed: *"as in their current format they were of no real use to us, and could not be disclosed to the Defendant insurers."* Mr Hodgkinson expressed concern that matters had not been progressed, referring to the fact that the next scheduled payment was imminently due.

90. In the meantime, on 4 December 2014, Neutrino issued an administration application in its capacity as a creditor, claiming to be owed approximately £120,000. The application sought the appointment of Mr Snowden and Mr Dickinson as joint administrators, and was supported by Prof Lutman.

91. On 8 December 2014, Mr Snowden attended at Mr Kilburn's offices together with Mr Jones in order to undertake a review of ASS's financial position. In paragraph 3.14 the Administration Report and Proposals, reference is made to it having become clear that there was a very substantial provision, in the order of £2.5 million, that had been placed against debtors, principally in relation to debts due from QHS, with deferred payment terms of 12 months or greater. Further, there appeared to be an accrued VAT liability of approximately £0.5 million that required further investigation. Mr Snowden goes on in paragraph 3.15 of the Administration Report and Proposals to refer to a cash shortfall of £260,000 by 19 March 2015 being identified, and therefore to ASS being insolvent without an immediate injection of funds because it could not pay its debts as they fell due. In paragraph 3.16 Mr Snowden refers to having taken internal advice within his firm with regard to the VAT position, and specifically ASS's use of a cash accounting basis rather than an invoice accounting basis in respect of VAT, and to him concluding that the latter ought to have been used with the consequence that ASS had a substantial immediate VAT liability rather than an accrued liability that would fall due for payment on payment of invoices. This provided further evidence as to the insolvent position of ASS.

92. On 8 December 2014, Portfolio 1 changed its name to *'Audiology Investments (Portfolio 1) Ltd'*.

93. The administration application was opposed by Mr Moose and Mr Sayer, who disputed Neutrino's status as a creditor. At the hearing of the administration application on 12 December 2014, by consent, the application was adjourned for 35 days.

94. On 16 December 2014 Mr Snowden wrote to the Court in relation to Neutrino's administration application observing that, without an immediate injection of funding, which appeared to be very unlikely for a number of reasons including the internal disputes within ASS, ASS was insolvent on the basis of being unable to pay its debts as when they fell due. It is Mr Snowden's evidence that he appended to this letter to

the Court a cash flow illustration demonstrating that ASS was cash flow insolvent to the tune of approximately £300,000.

95. On 16 December 2014, Clinton Jones resigned as a director of ASS, and Mr Jones resigned as a director of ASG.

96. On 17 December 2014, Prof Lutman, by then the sole director of ASS, issued a second administration application in his capacity as a creditor of ASS. In paragraph 50 of his Defence, Prof Lutman pleaded that having taken advice from Mr Kilburn and Mr Judge's firm, Irwin Mitchell, he concluded that the best course of action was to place ASS into administration.

97. An Administration Order was made on Prof Lutman's application on 18 December 2014. It is Mr Snowden's evidence that, prior to the hearing, he made it clear to Mr Moose's and Mr Sayer's representatives that no *"pre-pack"* was being lined up, and that there was no immediate urgency to effect a sale. In his evidence, Mr Snowden confirmed to me that, following his appointment, ASS continued trading pending a hoped for sale of its assets, and that, until the events that I shall come to, ASS continued to produce reports using the systems that Neutrino had set up. Mr Snowden was assisted by the fact that Quindell made a payment of £252,000 odd to ASS on 19 December 2014, which helped to fund the administration, and enabled it to continue to trade for the time being.

98. It is ARM's case that Mr Jones caused ASS to transfer the substance of its business and undertaking to AMR shortly prior to entering into administration. AMR, the ownership and control of which is referred to in the table at paragraph 6 above, changed its name from *'Auris (UK) plc'* to *'Audiological Measurement & Reporting Plc'*, a name similar to that of ASS, on 24 December 2014. AMR was, at all relevant times, ultimately owned and/or controlled by Mr Jones, and Mr Clinton Jones and Prof Lutman were appointed as directors in addition to Mr Jones on 23 December 2014.

99. The statement of affairs of ASS as at the date of its entry into administration on 18 December 2014, as sworn by Prof Lutman on 27 January 2015, showed a total deficiency of £344,453, being assets (uncharged) of £444,595, less unsecured claims of £764,939. ASS's accounting records showed book debts valued at £2,990,663 on the entry into administration, of which £2,780,718 represented the debt due from QHS.

100. It was Mr Snowden's evidence that he was telephoned at home in the evening on 20 December 2014 by an irate Mr Jones, who told him that ASS needed to be sold very quickly and had a value of £10,000, which Mr Snowden described as ridiculous. Mr Snowden says that he informed Mr Jones that he had appointed agents to market the business, and that Mr Jones responded to say: *"that he would just take the business if I didn't sell it to him for £10,000. It was a heated discussion."* Mr Snowdon says that Mr Jones made contact the following day in more conciliatory tones.

101. Earlier in the day on 20 December 2014, Mr Jones had written to Mr Kilburn explaining that he needed to further, *"my existing negotiations with [Mr Snowden] and various other matters with Quindell (separate to this and to which I am bound by confidentiality) to see what sits where."* He went on to *"reiterate"* that he remained

supportive of ASS through administration, *"with a view to acquiring it/its assets and support the investment required, but those negotiations are sensitive and presently between myself and [Mr Snowden]"*.

102. So far as contact the following day is concerned, Mr Jones (secretly) recorded a conversation with Mr Snowden on 21 December 2014. Mr Jones has relied upon a passage on the third page of the transcript of this conversation in support of the contention that Mr Snowden accepted, during the course of that conversation, that it would be reasonable to pay fees to Neutrino for providing support in the administration. It is certainly correct that the transcript does record Mr Snowden as accepting such a proposition in principle at least, which is understandable if Neutrino's could assist with the administration and further the purposes thereof, but this would have depended on Mr Jones' co-operation.

103. A further matter discussed during the course of the conversation between Mr Jones and Mr Snowden on 21 December 2014 was that of the 30,000 odd reports that had been provided to QHS where QHS had said that there was an issue as to whether any use could be made of them, and where there was thus an issue regarding ASS receiving payment. Mr Jones is recorded as pointing out that, in respect of these 30,000 odd reports, all the data that Neutrino had in respect thereof had been sent to QHS, and that they had paid for it and were entitled to use it. He continued: *"... so the point I was trying to make yesterday that they would re-instruct me to do it if ASS didn't exist was that they'd have to pay the report reprocessing fee, which [with] the app fee and the processing fee comes to about £11, yes they'd have to pay maybe another 300 grand or whatever it ... is, but they have that data, if they provided it back to me to re-run it as a second opinion with a new business with [Prof Lutman], I don't think that causes a problem because there isn't a breach because they've already paid and enjoyed the data."*

104. On 22 December 2014, Mr Jones emailed Mr Snowden, Prof Lutman and Clinton Jones informing them that he had heard that Mr Moose was speaking to Quindell Group about *"taking the company back"*. Mr Jones expressed concern about this asking whether there was anything that Mr Snowden could do to stop it. Mr Jones said that this involvement of Mr Moose was making him less inclined to proceed with any acquisition. Mr Jones concluded by suggesting that Mr Snowden should not be: *"speaking to them"*.

105. It was Mr Snowden's evidence that, the following day (23 December 2014), he received a telephone call from Clinton Jones and Prof Lutman relating to a potential offer. He said that Mr Jones was also on the call, and that part way through the call Mr Jones joined in and became very aggressive. Mr Snowdon's evidence was to the effect that Mr Jones said that unless he made an immediate payment of a debt of around £70,000, he would cut off the IT systems to ASS. Mr Snowdon says that he responded to say that, in those circumstances, he would not be in a position to trade ASS in administration and would therefore cease trading, make all the employees redundant and seek to realise the assets of ASS if Mr Jones did not withdraw his threat. Mr Snowden says that the threat was not withdrawn, with the result that trading ceased that evening.

106. There is contemporaneous email correspondence from 23 December 2014 that is broadly consistent with such a conversation, but which suggests that the position was

rather more involved and nuanced. After a number of earlier exchanges, in an email sent at 17:05 on 23 December 2014 to Mr Snowden, Mr Jones made a confidential, without prejudice and subject to contract offer that comprised the following proposals:

i) *"Newco will sort the issue with appointments/clients and Quindell";*

ii) *"Newco will undertake to provide the reports to QLS in place of ASS for December (the WIP), supported of course with its directors and suppliers [Prof Lutman/Neutrino/Clinton Jones/Mr Jones]; … For which Neutrino will seek an assignment of the WIP for December to Newco and then, provided QLS pay, remit upon collection from QLS a fixed fee of £60,000 (Newco keeping the bal and divvy up internally, £39K Neutrino does need min as to costs of re-running etc. we will worry about the balance). If Newco does not get paid by QLS, it won't pay ASS"*;

iii) *"Newco will ensure all outstanding/30K reports re-run in respect of which it will charge 30% to recover (good faith as per the original anticipated fee)";*

iv) *"ASS will sell ALL the assets (physical computer, machines, audiometers, etc) to Newco at £2,000 forthwith (no later than noon 24 December 2014)".*

107. This offer was rejected by Mr Snowden, and in a subsequent email Mr Jones informed Mr Snowden that: *"I will be instructing Neutrino to terminate all services with immediate effect."*

108. It was in these circumstances that Neutrino ceased forthwith to provide all services to ASS, with the result that Mr Snowden caused ASS, which had continued to trade in administration, to cease trading.

109. The *"Newco"* referred to in Mr Jones' email dated 23 December 2014 was, clearly, AMR, which, as referred to above, changed its name to a new name capable of association with ASS the following day, 24 December 2014.

110. On 24 December 2014, Mr Jones emailed Mr Snowden, copying in Clinton Jones and Prof Lutman, offering to reproduce all reports for Quindell (*"probably about 32,000 now"*) in return for payment. He concluded by saying that he needed to know what Mr Snowden wanted to do: *"as I have already commenced the process of decoupling ASS data and expunging it from our databases and systems ready to send back to you (which will be useless)."*

111. On 29 December 2014, Mr Moose took a screenshot of ASS's website (www.audiologicalservices.co.uk), which he had discovered now described itself as AMR's website. In evidence, Mr Jones said that the relevant webpage was a template that had been developed by his own companies, and he contended that there is no evidence that AMR continued to use this web address.

112. In the New Year, Mr Snowden met with Mr Jones and Clinton Jones. It was Mr Snowden's evidence that the meeting was held in order to see if a deal could be struck for the sale of ASS's goodwill based on a percentage of turnover. Mr Snowdon says that he offered a share of the value of the Quindell debt (circa £250,000), and offered

that the new entity (AMR) would get a proportion of the debts recovered from QHS/Quindell Group, if it assisted in perfecting the defective audiological reports. He says that he instructed his solicitors to draft a sale and purchase agreement, which was circulated. However, nothing came of this. Mr Jones sought to explain this on the basis of the Joint Administrators having sought indemnities that he was advised not to give.

113. It is relevant to note that Mr Judge declined to act for either Mr Jones or Neutrino following the entry of ASS into administration, citing a conflict of interest. Thereafter, insolvency specialists at Reynolds Porter Chamberlain LLP ("**RPC**") were instructed on behalf of Mr Jones and Neutrino. Mr Jones has disclosed an exchange of correspondence with RPC on 25 January 2015. In an email to Prof Lutman and Sanjay Pritam of RPC, copying in Clinton Jones and Alex Jones, Mr Jones said: *"As an aside: it won't do us any harm at all if the administrator and their solicitors "have the hump" and won't negotiate or demand again (as they already have) repay their additional legal costs to negotiate. A justification for us to walk away because their demands are too high, rather than simply having a "change of heart"…"Let them dig their own hole…".* In his reply sent the same day, Sanjay Pritam cautioned Mr Jones to *"keep professional though"*, and suggested leaving the door slightly ajar, *"especially given the possibility that we may need to go back for some element of the IP, in the existing data if nothing else."*

114. Other correspondence with RPC is of potential relevance. Thus, for example, in an email dated 26 January 2015, RPC advised that their view was that Neutrino's ownership meant that use of the software by AMR was not an issue going forward. In an email in response of the same date, Mr Jones raised the question as to whether the Joint Administrators would have a claim against AMR if AMR was using data supplied by QLS. He expressed his own view that QHS had, on behalf/instructions of QLS, paid ASS for reports, which ASS had failed to provide, and that this provided a favourable answer. Further emails of the same date are relevant on this issue.

115. In the Administration Report and Proposals, dated 9 February 2015, Mr Snowden reported that the Joint Administrators continued to seek to realise the balance of the book debts. In the Joint Administrators' Progress Report dated 15 July 2015, it was reported that detailed negotiations had been held with QHS to seek an early realisation of the remaining debtor position in the form of a lump sum settlement. In the Joint Administrators' Final Report dated 10 August 2015 it was reported that, on 28 July 2015, following detailed legal advice in relation to the merits of bringing a legal claim in the alternative to a settlement, agreement had been reached with QHS pursuant to which the latter had paid £200,000 plus VAT for pre-December 2014 invoices, as well as £40,000 plus VAT for post-December 2014 WIP. However, in his evidence, Mr Snowdon described the £200,000 paid by QHS as having been paid for data belonging to ASS. I am bound to say that in the absence of other contemporaneous documentation, the Final Progress Report dated 10 August 2014 is likely to provide a more accurate record of what the £200,000 paid represented than Mr Snowden's own recollection many years after the event.

116. On 30 January 2015, CCTF asserted a claim in the administration to the effect that CCTF had been engaged by ASS to collect book debts, and had taken an assignment thereof pursuant to the Deed of Assignment dated 14 October 2014 referred to in paragraph 76 above, which had conferred security over the book debts of ASS on

CCTF. However, the claim was rejected by the Joint Administrators on the basis that the security had required to be registered as a company charge, but had not been and was therefore void as against the creditors of ASS. The matter was ultimately compromised on the basis of ASS paying CCTF's costs.

117. On 6 March 2015, AMR entered into an agreement with Quindell Legal Services Ltd ("**QLS**") ("**the QLS Agreement**"). Clause 2.1 of the QLS Agreement recorded that:

> *"With effect from 1 January 2015, QLS has referred Clients to AMR for AMR to provide the Services and QLS hereby appoints AMR from that date to provide the Services on a non-exclusive basis as its preferred supplier as and when instructed to."*

118. In essence, pursuant to the terms of the QLS Agreement, QLS agreed to refer hearing assessment claims to AMR on a non-exclusive basis as the latter's preferred supplier on the basis of AMR providing full audiological services and reports being charged at £125 plus VAT per client (£75 plus VAT within seven days, the balance of £50 plus VAT payable within 90 days of calendar month of services provision end).

119. Clause 2.1 of the QLS Agreement is significant. There is an issue as to how soon after the entry of ASS into administration, AMR began to carry on business, with Mr Jones maintaining in paragraph 163 of his main witness statement that it was not until mid-summer 2015. Further, in his witness statement, Prof Lutman, had stated that whilst trading commenced on 14 January 2015, AMR did not carry out any material business until at least two months after that date as new software had to be written and new systems put in place. However, I consider that I am entitled to proceed on the basis that clause 2.1 would not have referred to QLS having referred clients to AMR with effect from 1 January 2015, if that was not the case. Further, with ASS having ceased to carry on business shortly prior to Christmas 2014, there is a logic in QLS wanting to ensure some continuity in the referral of clients for hearing assessments hence the agreement providing as it did. In addition, I note that, on 3 February 2015, an appointment letter was circulated by AMR to clients to arrange for audiological testing. In the circumstances, I am satisfied that AMR conducted at least some business from early 2015.

120. On 7 August 2015, ASS moved from administration into creditors' voluntary liquidation.

121. On 19 November 2015, Prof Lutman resigned as a director of AMR. He has explained that this was because he had not been issued shares therein as agreed, and had not been paid monies due to him in respect of services provided.

122. Filed, audited accounts of AMR for the period ended 1 December 2014 to 31 December 2015 (approved on 19 October 2016) disclose turnover of £4,026,653 and a pre-tax profit of £1,037,191 (£825,508 after tax). AMR's principal activity was described as: *"providing medico-legal audiological services principally in relation to cases of Noise Induced Hearing Loss"*.

123. These accounts show directors' remuneration as £105,125, and identify an interim dividend of £791,000 having been paid (there being only two shareholders, namely Mrs Jones and Creditas Capital (Portfolio 2) Ltd, the sole shareholder of the latter

being Creditas Capital plc)). Note 17 (related party transactions) discloses a dividend of £177,975 as having been paid to Mark Lutman Consultants Ltd and the same amount as paid jointly to Clinton Jones and his wife, Margaret. Both payments are identified as *being "in respect of 22.5% issued share capital in the company [AMR] which was held by Creditas Capital (Portfolio 2) Ltd in trust for the director."*

124. Note 18 to these accounts records Creditas Capital (Portfolio 2) Ltd as AMR's parent company, and the ultimate controlling party of AMR as being Mrs Jones. RFD Network Ltd is identified in Note 17 as *"fellow subsidiary (not wholly owned)"*, and as having invoiced and been paid £1,473,968 during the year (2014: nil) *"for transaction processing costs"*, a further £247,085 (2014: nil) being outstanding on the balance sheet. The sole director of RFD Network Ltd was Mr Jones, and its sole shareholder was Creditas Capital plc.

125. In the year ending 31 December 2015, Zaro Equestrian Ltd received its only income of £911,667 for *"consultancy services"* from RFD Network Ltd. The accounts of neither company explain what sort of *"consultancy services"* an equestrian company might have provided to an IT company. Zaro Equestrian Ltd's sole director is Mr Jones, and its shareholders are Mrs Jones and Creditas Capital plc. Note 12 *("Related Party Transactions"*) to RFD Network Ltd's filed accounts to 31 December 2015 disclose Neutrino as having provided this company with office equipment of £200,000 (2014: nil), goods of £120,607 (2014: nil) and general office items of £10,000 (2014: nil). Neutrino's turnover in its filed accounts to 31 December 2015 was £158,000 (2014: £671,946) with a gross profit of £25,115 (2014: £652,118) and net profit of £18,388 (2014: £309,934).

126. A further agreement was entered into between AMR and QLS in August 2015 for the provision of audiological testing services and reports. However, following the acquisition of Quindell Group by Slater & Gordon, the contractual relationship between QLS and AMR came to an end in late 2015/early 2016. In the event, various issues between the relevant parties were compromised by way of a Deed dated 8 February 2016 between QLS (by then called Slater Gordon Solutions Legal Ltd) (1) AMR (2), RFD Network Ltd (3), Mark Lutman Consultant Ltd (4), Prof Lutman (5), and Clinton Jones (6). Under this agreement, amongst other things, QLS agreed to pay £268,150 to AMR and RFD Network Ltd in full and final settlement.

127. AMR entered into administration on 5 June 2017.

128. On 14 July 2017, ASS and its Liquidators assigned the claims that ARM now brings by the present proceedings to ARM.

129. On 15 July 2017, ASS was dissolved.

130. The present proceedings were commenced on 21 July 2020 against all six Defendants, all of whom defended the proceedings to trial.

131. The trial was initially due to commence as against all six Defendants on 4 October 2022, but on the first day of the trial, the proceedings were compromised as between ARM and Defendants apart from Mr Jones and Neutrino. This necessitated an adjournment of the trial as against Mr Jones and Neutrino until 30 January 2023. Directions were given that would have permitted either ARM or Mr Jones/Neutrino to

call Mr Kilburn, Clinton Jones or Prof Lutman, all of whom had made witness statements and might have been expected to give evidence at the original trial, as witnesses at the adjourned trial. In the event, only Mr Kilburn was called as a witness, by ARM.

Witnesses and approach to the evidence

132. I heard from five witnesses, namely Mr Sayer, Mr Moose, Mr Snowden and Mr Kilburn, all of whom were called by ARM, and Mr Jones who gave evidence on behalf of himself and Neutrino.

133. It is a feature of the present case that the Court is concerned with events in 2014 and early 2015, i.e. some 8-9 years ago. In these circumstances in particular, it is necessary to bear firmly in mind the much repeated observations made by Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit Suisse Limited* [2013] EWHC 3560 (Comm) at [15] – [22] with regard to the unreliability of memory, and his caution to place limited, if any, weight on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.

134. The particular concern identified by Leggatt J was the ability of a witness, in seeking to recall events that took place some time ago, to falsely do so, but with genuine conviction and belief that their recollection is accurate. Thus, as Leggatt J cautioned in *Gestmin* at [22]: *"... it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."*

135. Allied to this is a concern that a witness seeking to recall events over a significant period of time is liable in reconstructing those events in his or her own mind, to do so in a way that inaccurately recalls those events in his or her favour, and to exaggerate perceived advantages to his or her own case, and to do so without necessarily deliberately giving false evidence. There is a particular concern where a witness feels strongly about an issue, or harbours a particular grievance.

136. However, the Court of Appeal in *Kogan v Martin* [2019] EWCA Civ 1645, at [88], stressed the importance of making findings by reference to all the evidence, that is both documentary evidence and witness evidence, placing such weight as the circumstances require on each.

137. In addition to documentary evidence, it is necessary to test the witness evidence against the inherent probabilities of the relevant situation, and considerations such as the consistency (or otherwise) of a particular witness' evidence with other evidence, the internal consistency of that evidence, and the consistency of that evidence with what the witness might have said on other occasions – see e.g. *Kimathi v The FCO* [2018] EWHC 2066 (QB), at [98].

138. In the present case, there is a great deal of contemporaneous documentation in the form of email exchanges, minutes of meetings etc.. I consider that they are likely to provide a more accurate and reliable record of events than recollections of the witnesses many years after the event.

139. I found Mr Sayer and Mr Moose, notwithstanding their vested interest in the present proceedings through their ownership of ARM, to be essentially honest witnesses doing their best to assist the Court. So far as Mr Sayer is concerned, there was the issue concerning the expenses associated with his daughter's wedding. However, for reasons that I have explained, I do not consider that there is too much to be read into this. For reasons that I will return to, I do not consider that Mr Sayer or Mr Moore deliberately misrepresented the position so far as ASS's relationship with QHS was concerned in relation to the production of reports prior to the conclusion of the MSA or the SHA. In the event, I do not consider that a great deal in the case turns upon their evidence.

140. So far as Mr Snowden is concerned, I did at times get the impression that he was being unnecessarily combative in response to questions put to him by Mr Jones. Further, as he himself accepted, he had not refreshed his memory concerning the administration and liquidation of ASS by reference to his own files. Although I consider that he was doing his best to assist the Court, there were matters in respect of which his own recollection of events differed from that which appeared from the contemporaneous documentation, e.g., as to the basis of the settlement with QHS in July 2015, and whether the £200,000 paid by QHS related to data, as he recalled, or for pre-December 2014 invoices, as reflected in his Final Report. I consider that I must therefore treat his evidence with some care, if not supported by contemporaneous documentation, other corroborative evidence and/or the common sense of the situation.

141. I found Mr Kilburn to be a perfectly honest witness doing his best to assist the Court in respect of events that took place many years ago.

142. Mr Jones is a savvy and experienced businessman who has been industrious in his defence of the present proceedings, and in preparation for the trial, producing lengthy and detailed opening submissions and chronology, and producing additional documents during the course of the trial. He was clearly very much on top of the documents in the case, and able to competently put his case to ARM's witnesses by reference to the documents in cross-examination. I had considerable reservations about my direction permitting him to attend the trial remotely by video link, but in the event attending this way proved perfectly satisfactory and enabled him to fully participate in the proceedings in respect of the examination of witnesses and the making of submissions, whilst enabling his own evidence to be fully tested under cross-examination.

143. It is, however, very clear from the documents, in particular a number of email exchanges and minutes of meetings that have been produced, as well as the way that Mr Jones has conducted himself during the course of the present proceedings, that Mr Jones has a very strong personality, likes to get his own way, and does not suffer fools gladly. I do not consider that he has deliberately sought to mislead the Court in his evidence, or in making submissions, but for reasons that I shall return to I do consider that his evidence is tainted by the considerations identified by Leggatt J in *Gestmin* at [22], referred to above, and that he has subconsciously, if not consciously, in recalling events going back to 2014-15, done so in a way that unreliability supports his own case and agenda. Consequently, I consider that before accepting it, I should treat his evidence with considerable care to the extent that it is not corroborated by other evidence or the obvious common sense of the situation.

144. The burden of proof is, of course, on ARM to prove its case to the requisite civil standard. However, the position is complicated by the fact that if it is established that Mr Jones was a de facto director of ASS, then the onus may shift to him to explain the relevant transactions complained of given his connection with Neutrino and AMR.

Was Mr Jones a de facto director of ASS?

The legal principles

145. The present proceedings include claims of breach on the part of Mr Jones of duties said to be owed by Mr Jones to ASS as a de facto director thereof. Mr Jones was formally appointed as a director of ASG, but not of ASS. However, common law and statutory duties owed by directors of companies have been held to extend to persons who act as directors, even though they have not been formally appointed as such. The definition of *"director"* in s. 250 of the Companies Act 2006 ("**CA 2006**") is expressed to extend to *"any person occupying the position of director, by whatever name called"*.

146. In *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180, Millett J (as he then was), at 183a-b, highlighted the necessity, when alleging that an individual was a de facto director of a company, of to be able to plead and prove that they undertook functions in the company that could only be discharged by a director of that company. As Jacob J (as he then was) identified in *Secretary of State for Trade & Industry v Tjolle* [1998] BCC 282 at 290c-d: "*Otherwise they would be liable for events over which they had no real control, either in fact or in law*". In the same passage, Jacob J identified that the central question which the courts seek to answer is whether the individual was: *"part of the corporate governing structure."* In *Re Kaytech International Plc* [1999] BCC 390, Robert Walker LJ posed the question as to whether the individual had: *"assumed the status and functions of a company director."*

147. The relevant principles for determining whether a person should be regarded as a de facto director were helpfully explained by Arden LJ (as she then was) in *Smithton Limited v Naggar* [2014] EWCA Civ 939, [2015] 1 WLR 189, at [31] to [44], a passage referred to by Mr Doyle KC, as follows:

> "*31. The Companies Act definition does not elucidate that matter. Provisionally it seems to me that that term is to be tested against the usual split of powers between shareholders and directors under Table A i.e.. on the basis that the powers of management of the company's business are delegated to the directors and the shareholders cannot intervene except by special resolution. On that basis it means a person who either alone or with others has ultimate control of the management of any part of the company's business. In the usual case, in my judgment, it would not include a purely negative role of giving or receiving permission for some business activity.*
>
> *32. The role of a de facto or shadow director need not extend over the whole range of a company's activities (see Re Mea Corporation Ltd [2003] 1 BCLC 618; Secretary of State v Deverell [2001] Ch 340). A person may be both a shadow director and a de facto director at the same time (Re Mea Corporation).*
>
> *Practical points: what makes a person a de facto director?*

> *33. Lord Collins sensibly held that there was no one definitive test for a de facto director. The question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director. However, a number of points arise out of Holland and the previous cases which are of general practical importance in determining who is a de facto director. I note these points in the following paragraphs.*
>
> *34. The concepts of shadow director and de facto are different but there is some overlap.*
>
> *35. A person may be de facto director even if there was no invalid appointment. The question is whether he has assumed responsibility to act as a director.*
>
> *36. To answer that question, the court may have to determine in what capacity the director was acting (as in Holland).*
>
> *37. The court will in general also have to determine the corporate governance structure of the company so as to decide in relation to the company's business whether the defendant's acts were directorial in nature.*
>
> *38. The court is required to look at what the director actually did and not any job title actually given to him.*
>
> *39. A defendant does not avoid liability if he shows that he in good faith thought he was not acting as a director. The question whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief.*
>
> *40. The court must look at the cumulative effect of the activities relied on. The court should look at all the circumstances "in the round" (per Jonathan Parker J in Secretary of State v Jones).*
>
> *41. It is also important to look at the acts in their context. A single act might lead to liability in an exceptional case.*
>
> *42. Relevant factors include:*
>
> *i) whether the company considered him to be a director and held him out as such;*
>
> *ii) whether third parties considered that he was a director;*
>
> *43. The fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision.*
>
> *44. Acts outside the period when he is said to have been a de facto director may throw light on whether he was a de facto director in the relevant period*."

148. The reference in the above passage to '*Holland'* is a reference to the decision of the Supreme Court in *Commissioners of HM Revenue and Customs v Holland* [2010] UKSC 51, [2010] 1 WLR 2793. That case concerned the position of a company with a corporate director, and the issue was whether the defendant, the sole director of the corporate director, was a de facto director of the company in circumstances where he was the physical person who carried out all the directorial acts. By majority of 3-2, the Supreme Court held that the defendant was not a de facto director. The majority

concluded that such a finding would contradict the principle of separate legal personality, and would fail to recognise the distinction between a company and its directors where the defendant had, they found, done nothing other than discharge his duties as a director of the corporate director.

149. In the present case, it is Mr Jones' position that, to the extent that he took decisions in relation to ASS, he, at all relevant times, was simply acting in his capacity as a director of ASG pursuant to the SHA, which provided for ASG to have oversight over ASS giving effect to the business plan provided for by the SHA. He also says that many of his acts were, properly analysed, carried out as a director of Neutrino.

150. There are some similarities with the facts of *Re Hydrodam (Corby) Ltd* (supra). This case concerned a company with two Channel Island based corporate directors, of which the ultimate holding company was Eagle Trust plc. The issue was as to whether directors of Eagle Trust plc were shadow or de facto directors of the company. However, the allegation that they were was based solely upon the fact that they were directors of Eagle Trust plc. It was not alleged that they did anything at all in relation to the affairs of the company, not even voting as directors of Legal Trust plc in respect of any matter in relation to the affairs of the company. In these circumstances, the claim that they were shadow or de facto directors failed.

151. However, at 184d-f, Millett J said this in a passage that I consider highly relevant in the circumstances of the present case:

> *"It is possible (although it is not so alleged) that the directors of Eagle Trust as a collective body gave directions to the directors of the company and that the directors of the company were accustomed to act in accordance with such directions. But if they did give such directions as directors of Eagle Trust, acting as the board of Eagle Trust, they did so as agents for Eagle Trust (or more accurately as the appropriate organ of Eagle Trust) and the result is to constitute Eagle Trust, but not themselves, shadow directors of the company.*
>
> *In practice, in a case of the present kind, it is much more likely that it will be found that the executive directors of the ultimate parent company (or some of them) have from time to time individually and personally given directions to the directors of the subsidiary and thereby rendered themselves personally liable as shadow directors of the subsidiary. But if all they have done is to act in their capacity as directors of the ultimate holding company, in passing resolutions at board meetings, then in my judgment the holding company is the shadow director of the subsidiary, and they are not."*

152. One can see from this passage that Millett J drew an important distinction between a situation in which the directors of the ultimate holding company were acting as a collective body in giving directions to the directors of the company, in which case the ultimate holding company might be considered to be a shadow director of the company, and what Millett J considered to be the more likely position where the executive directors of the ultimate parent company (or some of them) individually and personally give directions to the directors of the company, in which case they themselves might be considered to be shadow directors of the company.

153. In the present case, it is not alleged that Mr Jones acted as a shadow director in giving directions to the directors of ASS (i.e., Clinton Jones and Prof Lutman), but rather that he acted as a de facto director in taking decisions on behalf of ASS, either on his own or jointly with Clinton Jones. However, given the way that Mr Jones puts his case, the distinction identified by Millett J between where the directors of the ultimate holding company act as a collective body, and where they act individually may well be apposite, and is a point to which I will return.

ARM's case

154. The plea as to Mr Jones and Mr Kilburn being de facto directors of ASS is contained in paragraph 20 of the Particulars of Claim. It is alleged that they each:

i) Were senior to both of the de jure directors (Clinton Jones and Prof Lutman) who reported and answered to Mr Jones and Mr Kilburn;

ii) Were held out by ASS as directors;

iii) Were a central part of and played a central role in the corporate governance of ASS and exercised real influence in the corporate governance thereof;

iv) Were the moving hands and nerve centres from which the activities of ASS radiated; and

v) Adopted and played roles which were sufficient to impose fiduciary duties on an individual adopting and playing such roles and to make that individual liable for breach of such duties as a director of ASS.

155. So far as Mr Jones is concerned, in paragraph 21 of the Particulars of Claim, particular reliance is placed upon the following:

i) It is alleged that he assumed a role analogous to that of a Chief Executive Officer of ASS. Evidence of this is said to be provided by, amongst other things, an email dated 1 May 2014 from Mr Jones to Clinton Jones directing Clinton Jones to refer calls from BT to him.

ii) Mr Jones referring to himself and holding himself out as the IT Director of ASS and its Chief Technical Officer. Evidence for this is said to be provided by, amongst other things, the email dated 2 May 2014 to Mr Pearce and others at Quindell Group where, as referred to in paragraph 32 above, he had referred to now being the *"CTO"*, as well as being a shareholder at ASS, and informed Quindell Group that he has assumed *"ownership of this project from a technical perspective."* The evidence is then said to show Mr Jones taking the lead with subsequent discussions with representatives of QHS/Quindell Group, such that, as Mr Jones himself recognised, he established a close relationship with the latter.

iii) Mr Jones assuming the right to approve and veto payments from the bank accounts of ASS. Reference is made on behalf of ARM to, amongst other things, the email exchanges on 23 and 24 June 2014 in which Mr Jones expressed himself to be *"utterly, utterly speechless"*, and in which he gave

directions as to how ASS's bank account ought to be operated, namely on the joint instructions of himself and Clinton Jones.

iv) Mr Jones acting on behalf of ASS in negotiations with QHS/Quindell Group in relation to matters concerning the Quindell Agreement, acting more generally on behalf of ASS in its relationship with QHS/Quindell, and holding himself out to QHS/Quindell as a director of ASS. Reference is made on behalf of ARM to Mr Jones' decisive intervention during the course of the meeting with QHS/Quindell as early as 30 April 2014, and to email correspondence such as an email dated 9 July 2014 from Mr Jones to Ms Furby and Mr Evans, and the transcript of the meeting with various representatives of QHS/Quindell on 19 July 2014, as demonstrating Mr Jones' overall directorial control over dealings and discussions with QHS/Quindell.

v) Mr Jones acting on behalf of ASS in relation to human resources matters, such as the hiring and firing of staff. Reliance is placed on a number of emails, including an email from Mr Jones to Clinton Jones dated 6 June 2014 relating to an employee, John, and an email exchange on 28 October 2014 relating to another employee. However, I note that by this email, Mr Jones sought Clinton Jones' concurrence with a particular course of action, suggesting that if Clinton Jones did concur, then: *"we adopt this 'Topco' position when we all speak later"*.

vi) Mr Jones taking a central role in the day-to-day management and operation of the business of ASS involving monitoring and direct involvement on a micro level, including the settling, monitoring and enforcement of targets re. staff. Reliance is, again, placed on a number of emails, including emails circulated to Clinton Jones, copying in Mr Sayer, Mr Moose, and Mr Kilburn, with a weekly call agenda prepared by Mr Jones (see e.g., that dated 8 June 2014), and an email chain dated 29 September 2014 relating to the appointment of Alex Jones as *"central liaison manager"*.

vii) Instructing counsel on behalf of ASS and incurring on behalf of ASS the cost involved in doing so. Reliance is placed upon email exchanges on 10 and 11 October 2014.

156. In his Skeleton Argument, Mr Doyle KC emphasise the following matters:

i) Mr Jones holding himself out to third parties such as QHS as having the authority third party would reasonably expect of a director, and acting with such authority, reliance being placed upon the fact that Mr Jones has admitted in evidence that he may have appeared to be a director of ASS.

ii) Mr Jones authorising and causing to be made the payments to Neutrino and Cumulo that are complained of, and also the alleged transfer of the business and undertaking of ASS to AMR shortly prior to administration.

iii) The implementation of the business plan adopted (at Mr Jones' direction) by ASS;

iv) Mr Jones causing ASS to enter into the assignment dated 14 October 2014 with CCTF in respect of ASS's book debts;

v) Mr Jones taking the lead in causing ASS to seek advice from Mr Judge and Mr Snowden in November and December 2014, leading to ASS entering into administration on 18 December 2014.

157. Thus, it is submitted that the evidence clearly demonstrates that Mr Jones was part of the corporate governance structure of ASS, undertaking functions in relation thereto which could properly be discharged only by a director, and that he did thus assume the status and function of a director so as to make himself responsible as if he were a director of ASS.

158. On this basis, it is submitted that Mr Jones was a de facto director of ASS, and was therefore subject to the common law and statutory duties that he would have been subject to if formally appointed as such.

Mr Jones' case

159. In addition to accepting that third parties dealing with ASS might reasonably have assumed that he was a director thereof, I understand Mr Jones to accept that, together with Clinton Jones, he did take directorial decisions in relation to ASS at the relevant time, albeit that certain of his actions are put down to having acted as a director of Neutrino.

160. However, Mr Jones' case is that, as provided for by clause 55 et seq of the SHA, Clinton Jones and Prof Lutman had control of the daily running of ASS, which was subject to shareholder restraint (i.e., that of ASG). As expressed in paragraph 7(i) of the Defence:

> *"Pursuant to clauses 56, 58 and 59 [Clinton Jones and Prof Lutman] were required to report to the board of ASG. [They] were required to ensure that the company's business was conducted within the ambit of the group's overall business plan determined by the board of ASG. Clearly on occasion the board of ASG and the company collaborated on strategic and financial matters which were important to the group as a whole, including the relationship with QHS, a major client of the company."*

161. On this basis, it is Mr Jones' case that his directorial actions were not actions taken by him as an individual, but rather but rather represented the actions of himself and Clinton Jones acting together as the Board of ASG in the manner envisaged by the SHA, exercising oversight over Clinton Jones and Prof Lutman, as the de jure directors of ASS with day to day control, with regard to giving effect to a business plan as provided for by the SHA. Although he did not specifically mention this during the course of his evidence or submissions, it may be that his reference to the *"Topco position"* in his email dated 6 June 2014 was a reference to acting together with Clinton Jones as the Board of ASG in this way.

162. Mr Jones submitted that his emails to Clinton Jones seeking his concurrence in various matters, i.e., the emails that Mr Doyle KC described as the *"Clinton, if you please"* emails, were sent in his capacity as a director of ASG in order to obtain

Clinton Jones' concurrence as a director of ASG. On this basis, and albeit that we are presently concerned with potential de facto directorship rather than potential shadow directorship, Mr Jones would draw an analogy with the position of the board of the ultimate holding company in *Re Hydrodam (Corby) Limited*, whose actions in their capacity as directors of the board of the ultimate holding company did not constitute them as shadow directors.

163. Therefore, having regard to the capacity in which he acted, namely as a board member of ASG, Mr Jones submits that he is not properly to be regarded as having become a de facto director of ASS. He would, therefore, draw something of an analogy with *Holland*, and the position of the defendant, the director of the corporate director, whose actions were held by the majority in the Supreme Court to be referable to the corporate director, rather than the defendant as an individual.

Conclusion as to Mr Jones status as a de facto director

164. Apart from the question as to the formal status pursuant to which Mr Jones acted, I am satisfied that the role that he played in directing the affairs of ASS from after the conclusion of the MSA and the SHA was consistent only with him being part of the corporate governance structure, if not the key and principal element of the corporate governance structure, and that he had assumed the status of functions of a company director performing functions that could only properly be discharged by a director of ASS.

165. Whilst Clinton Jones, but not Prof Lutman who the evidence suggests had a very much more limited role, may have had control over the daily running of ASS in the sense of overseeing the production of audiology reports, I consider that the evidence does demonstrate that Mr Jones, himself, played a significant part in the day-to-day affairs of ASS and in taking decisions in respect thereof. I do not accept that his role was limited to that of exercising shareholder restraint through his position as a director of ASG in the way alleged by Mr Jones.

166. Mr Jones' more extensive and intimate involvement in the affairs of ASS is, I consider, evidenced by, amongst other things, the following:

i) Mr Jones having driven the process behind the agreement as reflected in the Confidential Term Sheet, and ASS then placing an order for an IT infrastructure and system with Neutrino as provided for by the MSA.

ii) Mr Jones holding a meeting with Mr Kilburn shortly after the entry into the SHA, with only Mr Jones and Mr Kilburn being present. This meeting is recorded in a meeting note headed *"Action Points & Agenda (LJ & RK) Friday, 9 May 2014"*, from which it can be seen that the meeting concerned the management of ASS, and that Mr Jones and Mr Kilburn considered themselves as having authority in respect thereof.

iii) The lead taken by Mr Jones at weekly management meetings as demonstrated by *"action point minutes"* produced relating thereto.

iv) Mr Jones taking the lead in discussions with representatives of QHS/Quindell Group, including during the telephone meetings on 16 June 2014 and 19 July

2014, which concerned the relationship between ASS and the latter, and I agree with the submission to this effect made on behalf of ARM that during the course of these meetings Mr Jones gave every appearance of assuming a role akin to that of Managing Director of ASS.

v) Mr Jones' role in the decisions reflected in his email dated 17 September 2014 sent to Mr Kilburn, and copied into Clinton Jones and Alex Jones, referring to matters discussed and agreed the previous day by *"the board of ASS and ASG"*. It is unlikely that Prof Lutman, albeit one of the de jure directors of ASS, was party to any such discussion and agreement, and I consider that the reality of the position is that the relevant decisions were taken following discussions between Mr Jones and Clinton Jones, possibly also involving Mr Kilburn, with Mr Jones driving the process, hence him being the author of the email.

vi) The fact that in his email to Prof Lutman dated 1 December 2014, Mr Jones referred to himself and Prof Lutman as *"both creditors and partners in ASS"* (emphasis added). This reference to being a partner is inconsistent with the purely formal role as a supervising director of ASG that he now contends for.

vii) Taking the lead in instructing Mr Judge of Irwin Mitchell, and engaging with Mr Snowden on 26 November 2014 with regard to the potential administration of ASS, and doing so on behalf of ASS. I accept that he did give the impression to Mr Snowden that he was representing ASS, and that he did so because he was. He may also have been representing Neutrino, but, as I shall return to below, I consider his attempts now to portray himself as purely representing Neutrino are not supported by the evidence.

167. To my mind, the real issue is not as to what Mr Jones actually did, but whether Mr Jones' actions are to be categorised as him acting individually, or rather as a director of ASG taking decisions and performing directorial actions in respect of the affairs of ASS that are properly to be regarded as those of ASG (as agreed upon between himself and Clinton Jones as the Board of ASG).

168. On proper analysis, I consider that there are a number of difficulties in maintaining otherwise than that Mr Jones was acting individually including, in particular, the following:

i) Firstly, I consider that the reality of the position was that it was not so much a question of Mr Jones as a director of ASG, or Mr Jones and Clinton Jones as directors of ASG, providing some *"overall"* oversight role in respect of the affairs of ASS as appears to have been envisaged by the rather difficult language of clause 55 et seq of the SHA, but rather Mr Jones, or Mr Jones with a degree of concurrence of Clinton Jones, actually acting as a director of ASS, with intimate involvement in its affairs. In this respect, I consider it significant that Prof Lutman, one of the de jure directors of ASS, in reality had little if any role to play in the decision making processes of ASS, or even in its day to day affairs.

ii) Secondly, as between Mr Jones and Clinton Jones, it is, I consider, clear on the evidence that Mr Jones was very much the dominant personality who

effectively drove the required decisions and ensured that he got what he wanted. It may be unfair to describe Clinton Jones as a stooge, or as entirely compliant, but it is reasonably clear that Clinton Jones was effectively prepared to go along with more or less anything that Mr Jones wanted. In the circumstances, although Mr Jones may have obtained Clinton Jones' formal agreement to certain directorial actions, it is difficult to categorise these actions as those of a properly functioning Board of ASG.

iii) Thirdly, the role that Mr Jones played in ASS's was so fundamental, that it was not confined to particular clearly identified decisions, such as, e.g., whether to agree to an addendum to the MSA, but extended to day-to-day decisions that it is difficult to categorise as being those of the Board of ASG.

169. In the circumstances, and for these reasons, I consider that Mr Jones is properly to be categorised as having acted as a de facto director of ASS from, or from shortly after the date of the MSA and the SHA, and certainly by the time that Mr Moose and Mr Sayer resigned as directors of ASS in early June 2014.

170. I consider that the present case falls to be distinguished on its facts from the case of *Holland* (supra). In that case, the defendant's actions were to be categorised as those of the corporate director performing its role as a director of the company because he was the sole director of the corporate director. Here, ASG was not a director of ASS and so Mr Jones' actions, whilst he might have happened to be a director of ASG, are capable of very many more interpretations.

Did Mr Jones act in breach of his fiduciary duties a de facto director of ASS?

Introduction

171. Before considering the allegations against Mr Jones, and whether he has acted in breach of his duties as de factor director of ASS, I first consider the legal principles. As identified above, the allegations against Mr Jones fall into two categories. Firstly, causing the making of payments to Neutrino and Cumulo for which there was no consideration, and secondly causing the transfer of ASS's business and undertaking to AMR, again for no consideration, shortly prior to administration.

Legal Principles

172. S. 170(1) CA 2006 provides that the *"general duties"* specified in ss. 171 to 177 are owed by a director of a company to the company. As identified in paragraph 145 above, the definition of *"director"* in s. 250 CA 2006 extends not only to de jure directors, but also to any person occupying the position of director, by whatever name called, and therefore to de facto directors. As set out in ss 170(3) and (4), the general duties are based on common law rules and equitable principles, and they are to be interpreted and applied in the same way as common law rules or equitable principles.

Section 171

173. Section 171 ("*Duty to act within powers*") provides:

"*A director of a company must:*

(a) act in accordance with the company's constitution, and

(b) only exercise powers for the purposes for which they were conferred."

Section 172

174. Section 172 ("*Duty to promote the success of the company*") provides:

> *"(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,*
>
> *(b) the interests of the company's employees,*
>
> *(c) the need to foster the company's business relationships with suppliers, customers and others ...*"

175. Sub-section 172(3) provides:

> "*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*."

176. The duty imposed by s.172 comprises both subjective and objective elements:

i) Given that the duty is expressed to be to act in such as way as the director considers, in good faith, to be likely to promote the success of the company, s. 172 is ordinarily approached subjectively. As Jonathan Parker J said in *Regentcrest plc (in liq.) v Cohen* [2001] 2 BCLC 80 at [120]:

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

ii) However, in *Re HLC Environmental Projects Ltd* [2013] EWHC 2876 (Ch); [2014] B.C.C. 337, Mr John Randall QC, sitting as a Deputy High Court judge, explained that the general principle of subjectivity is subject to three qualifications (at [92]) as follows:

> *"(a) Where the duty extends to consideration of the interests of creditors, their interests must be considered as 'paramount' when taken into account in the directors' exercise of discretion.*
>
> *(b) ... the subjective test only applies where there is evidence of actual consideration of the best interests of the company. Where there is no such evidence, the proper test is objective, namely, whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company. ...*
>
> *(c) Building on (b), I consider that it also follows that where a very material interest, such as that of a large creditor (in a company of doubtful solvency, where creditors' interests must be taken into account), is unreasonably (i.e. without objective justification) overlooked and not taken into account, the objective test must equally be applied. Failing to take into account a material factor is something which goes to the validity of the directors' decision-making process. This is not the court substituting its own judgment on the relevant facts (with the inevitable element of hindsight) for that of the directors made at the time; rather it is the court making an (objective) judgment taking into account all the relevant facts known or which ought to have been known at the time, the directors not having made such a judgment in the first place."*

177. Paragraph 92(a) of Mr John Randall QC's judgment now requires some qualification in the light of the recent decision of the Supreme Court in *BT1 2014 LCC v Sequana and others* [2022] UKSC 23, [2022] 3 WLR 709.

178. In this case, the Supreme Court recognised that a stage might be reached in a company's financial fortunes when it became necessary for the directors to have regard to the interests of creditors. The view of the majority (Lord Hodge DPSC, Lord Briggs and Lord Kitchen JJSC) was that this stage would be reached in the event either of: *"imminent insolvency (i.e., an insolvency which directors know or ought to know is just round the corner and going to happen) or the probability of an insolvent liquidation (or administration) about which the directors know or ought to know"* – per Lord Briggs JSC at [203]. The view of the minority (Lord Reed PSC and Lady Arden) was that this stage would be reached when the company was insolvent, bordering on insolvency or it was probable that the company would enter into an insolvent liquidation or administration.

179. However, the majority (Lord Reed PSC, Lord Hodge DPSC, and Lord Briggs and Lord Kitchen JJSC) rejected the suggestion that the creditors' interests should necessarily become paramount. In their view, when the duty to have regard to the interests of creditors arose, the directors were required to take into account and give appropriate weight to the interests of the company's creditors, and to balance them against shareholders' interests where they might conflict. Lady Arden considered that

where the duty arose, it was one not to materially harm creditors' interests. However, whichever of these approaches was correct, once an insolvent liquidation or administration became inevitable, then the creditors' interests became apparent paramount in that, in those circumstances, the shareholders ceased to retain any valuable interest in the company.

Section 173

180. S. 173 requires a director to exercise independent judgment.

Section 174

181. S. 174 ("Duty *to exercise reasonable, care, skill and diligence*") imposes a non-fiduciary duty and provides:

> "*(1) A director of a company must exercise reasonable care, skill and diligence.*
>
> *(2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with:*
>
> *(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by a director in relation to the company, and*
>
> *(b) the general knowledge, skill and experience that the director has*."

182. Briggs J (as he then was) explained the subjective and objective elements of this test (which mirrors exactly that applicable to wrongful trading under s.214 of the 1986 Act) in *Lexi Holdings Plc (in admin.) v Luqman* [2008] EWHC 1639 (Ch):

> "*The objective test sets the basic standard. It is no excuse for a director to say that, in fact, she did not have the general knowledge, skill or experience reasonably to be expected of a person carrying out her appointed functions. The subjective test potentially raises the standard by reference to any greater general knowledge, skill or experience which the particular director actually has*."

Section 175

183. S. 175 (*"Duty to avoid conflicts of interest"*) provides that:

> *"(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.*
>
> *(2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).*

> *(3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company."*

184. S. 175(4) goes on to provide that the duty is not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest, or the matter is authorised by the directors in accordance with ss. 175(5) and (6).

Burden of proof

185. Overall, the burden of proof plainly is upon ARM to prove its case.

186. However, Mr Doyle KC relies upon a line of authority to the effect that where a director or other party in a fiduciary relationship with the company, or a party connected with the latter, receives a sum of money or other benefit from the company, then the evidential burden shifts to the director or other fiduciary to prove that the payment to other benefit transferred was proper.

187. Mr Doyle KC relies upon the following passage from judgment of Lesley Anderson QC, sitting as a deputy High Court Judge in *Re Idessa* (*UK*) *Ltd* (*in liq*)*, Burke v Morrison* [2011] EWHC 804 (Civ), [2012] 1 BCLC 80, at [28]:

> *"I am satisfied that whether it is to be viewed strictly as a shifting of the evidential burden or simply an example of the well-settled principle that a fiduciary is obliged to account for his dealings with the trust estate that [counsel for the liquidator] is correct to say that once the liquidator proves the relevant payment has been made the evidential burden is on the respondents to explain the transactions in question".*

188. But it is to be noted that Ms Anderson QC went on in the same paragraph to say:

> *"Depending on the other evidence, it may be that the absence of a satisfactory explanation drives the court to conclude that there was no proper justification for the payment. However, it seems to me to be a step too far for [counsel for the liquidator] to say that, absent such an explanation, in all cases the default position is liability for the respondent directors. In some cases, despite the absence of any adequate explanation, it may be clear from the other evidence that the payment was one which was made in good faith and for proper company purposes".*

189. *Re Idessa* (supra) was followed and applied by Newey J (as he then was) in *GHLM Trading Ltd v Maroo and other* [2012] EWHC 61 (Ch), [2012] 2 BCLC 370 at [143] er seq. At [149], Newey J agreed that: *"once it is shown that a company director has received company money, it is for him to show that the payment was proper".*

190. In reaching this conclusion, Newey J referred to *Sinclair Investments* (*UK*) *Ltd v Versailles Trade Finance Ltd* [2011] 2 BCLC 501 at [34], per Lord Neuberger MR, as authority for the proposition that for these purposes the position of a director was analogous to that of a trustee receiving trust property.

191. Further, Newey J endorsed what had been said by Robert Miles QC (as he then was), sitting as a deputy High Court Judge, in *Gillman & Soame Ltd v Young* [2007] EWHC

1245 (Ch), at [82], namely:

> *'I should also say something about the burden of proof. Where a person in a fiduciary position receives property of his principal the burden is on him to account: United Pan-Europe Communications v Deutsche Bank [2000] 2 BCLC 461 at [34]. This principle applies to company directors as it does to trustees: Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch), [2005] All ER (D) 397 (Jul) at [1513]. It is, therefore, for GSL to prove that Mr Young received a particular payment from the company; but where it does so, it is for him to show that the payment was proper.'*

192. I consider that I can draw from these authorities the principle that, whether viewed in terms of a shifting of the evidential burden or an application of the principle that a trustee or other fiduciary is obliged to account for his dealings with the trust estate where he or an associate has received a payment or other benefit therefrom, once liquidators (or here their assignees) prove that the relevant payment has been made, or other benefit received, by a director (or de facto director) or an associate thereof, then the burden is on the director (or de facto director) to explain the transaction.

193. It may be that, in appropriate circumstances, the absence of a satisfactory explanation will lead the court to conclude that there was no proper justification for the transaction. However, as Ms Anderson QC observed in *Re Idessa* (supra) at [28], this will depend on the evidence, and I agree with her view that it would be taking matters too far to say that in all cases, absent a satisfactory explanation, the default position is that the director (or de facto director) is liable to account. In some cases, it may be clear from the other evidence that the payment or other benefit conferred was one which was made in good faith and for proper company purposes.

Solvency

194. This is not an easy case in which to determine whether, when, and to what extent ASS was or became insolvent. Fortunately, I do not ultimately consider that the case turns upon the issue.

195. In his evidence on behalf of ARM, Mr Sayer, in the course of cross-examination by Mr Jones, doubted that ASS was ever insolvent. I note the following exchange:

> *"A At what point do I think it was insolvent? Is that what you're asking?*
>
> *Q Yes, it is, yes.*
>
> *A I'm not convinced it was insolvent at all, even before the administration. I think the figures and numbers provided to the administrators were false. As I say, there was over £700,000 collected in by the administrator. Even he said -- he said: I don't believe this. I've never had a company where there's been so much collected in."*

196. I consider there to be little doubt that all those involved with ASS considered it to have at least the potential to be a real money-spinner given the relationship with QHS, and it is not insignificant that, by the time that ASS came to enter into administration,

it had work in progress of some £2.9 million that had been achieved over a comparatively short period of time.

197. It is true that in his email to Mr Moose and Mr Sayer dated 28 April 2014, Mr Jones referred to the business being hopelessly flawed with a continuing and increasing cash requirement such as to make it almost certainly hopelessly insolvent, but this was in the event that ASS did not come away with *"something reconciled"* at the forthcoming meeting with QHS, or could not find alternative work generating in excess of 2,000 cases per month. In the event, agreement was reached with QHS at the meeting with the latter on 30 April 2014, at which Mr Jones put forward a proposal regarding pricing without consulting the other representatives of ASS present. Consequently, I do not consider that Mr Jones' email dated 28 April 2014 materially assists on the question of solvency.

198. So far as balance sheet solvency is concerned, as I have mentioned, the draft accounts of ASS for the year ended 30 April 2014, as prepared on 15 May 2014 showed a balance sheet surplus of £16,799. However, the subsequent draft accounts for the year ended 30 April 2014, as prepared on 2 December 2014, showed a deficiency of £289,000. The difference is principally accounted for by a significant increase in the trade creditors and other creditors due within one year figures in the draft accounts prepared on 2 December 2014.

199. The Statement of Affairs in the administration of ASS, as sworn by Prof Lutman, disclosed (a) 118 non-preferential unsecured claims, excluding HMRC, totalling £510,998, and (b) an estimated deficiency to creditors of some £331,917. The Liquidators' final account dated 31 February 2020 identified, at paragraph 5.6 thereof, that 81 claims had been received totalling £1,083,570, suggesting that the actual deficiency was substantially greater than that sworn to by Prof Lutman in January 2015. Prima facie this shows that ASS was significantly more insolvent than represented at the time of the administration bearing in mind that the statement of affairs as sworn by Prof Lutman had suggested that uncharged assets (WIP) with a book value of £2,972,663 would only realise £444,545.

200. So far as cash flow insolvency is concerned, the following matters are of particular relevance:

i) Shortly prior to the meeting with QHS on 30 April 2014, Mr Moose and Mr Sayer had had to introduce funds in order to enable the wages to be paid, and the position throughout was that monies due to Prof Lutman remained outstanding.

ii) In his email dated 13 October 2013, Mr Jones himself spoke in terms of monies outstanding and due to Mr Sayer (£80,000), to Prof Lutman (£120,000) and to Neutrino (total £260,000), and in terms of the need for *"either a pecking order or compromise"*, prompting Mr Jones to insist on and procure security in the form of the Deed of Assignment executed the following day.

iii) The contents of Mr Jones' email dated 13 October 2014 points firmly to ASS being unable to pay its debts as they fell due by 13 October 2014, and probably to an inability to pay its debts as they fell due for some sometime prior thereto. I consider that the position is compounded by the fact that, given

its increased turnover as reflected in its WIP figures, ASS probably ought, by then, to have switched to an accounting basis for VAT rather than a cash basis, resulting in a significant immediate liability for VAT, at least unless it could have come to some arrangement with HMRC.

201. So far as Mr Jones' own position is concerned, it is his case that Mr Kilburn was ultimately responsible within ASS for keeping him advised with regard to the financial position, and that he had no reason to believe that ASS was insolvent until shortly prior to entering into administration in December 2014, particularly given that WIP stood at some £2.9 million.

202. Drawing this together, I consider it likely that, despite Mr Sayer's views in relation to solvency, ASS was insolvent so far as an ability to pay debts, certainly by 13 October 2014, if not for some considerable time prior thereto, and that this must have been known by Mr Jones, Clinton Jones and Mr Kilburn, if not Prof Lutman. Further, ASS was balance sheet insolvent as at 30 April 2014 based upon the draft accounts to that date prepared on 2 December 2014. However, bearing in mind the WIP that accrued after 30 April 2014, I consider it difficult to say within any degree of certainty that ASS continued to be balance sheet insolvent through from 30 April 2014 to the date of its entry into administration in December 2014, and the position revealed from the draft accounts prepared on 2 December 2014 was only ascertained at that time and contrasted with the balance sheet surplus shown by the draft that had been prepared in May 2014.

Payments to Neutrino

ARM's case against Mr Jones

203. I have set out in paragraph 78 above details of the invoices that are in dispute. They essentially fall into three categories, namely:

i) Invoices relating to the development of new software, including that the subject matter of the Additional Order Form signed on 15 September 2014 relating to the production of tinnitus reports;

ii) The production of reports, and the re-running of reports following developments to the software/systems; and

iii) IT Consultancy Retainer Fees agreed to be paid as referred to in Mr Jones' email dated 17 September 2014.

204. So far as figures are concerned, and on the basis of the figures relied upon at trial as opposed to those pleaded in paragraph 25 of the Particulars of Claim, it is alleged that of the £594,352.03 that was paid to Neutrino, £148,558.31 was referable to authorised invoices, but that Neutrino submitted unauthorised or unjustifiable invoices totalling £626,771.36, being the total (plus VAT) of the invoices referred to in paragraph 78 above. If one excludes VAT, which Mr Snowden accepted would have been recovered in the administration or liquidation, £495,293 was paid to Neutrino, of which only £123,799 was authorised and justified, a difference in issue of £371,494.

205. As pleaded in paragraph 25 of the Particulars of Claim, ARM case is that notwithstanding the terms of the MSA and what is alleged to have been the obligation on Neutrino thereunder to provide its services to ASS without additional charge (save for the payment of the sum of between £5 and £7.50 per report), Mr Jones, Mr Kilburn, Clinton Jones and Prof Lutman each caused or allowed payments to be made to Neutrino where no such payments were properly due and owing to Neutrino and no consideration was provided by Neutrino for the same. As pleaded in paragraph 25 of the Particulars of Claim, it is alleged that ASS paid the sum of £595,161.41 to Neutrino of which £222,675.67 was fairly attributable to payment for the provision of reports, with the balance of £375,485.94 representing payments not due to Neutrino which were entirely unwarranted. As I have said in paragraph 204 above, at trial the case was advanced by reference to the figures referred to therein.

206. In support of its case that Neutrino provided no consideration for payments made by reference to the invoices that are challenged, it is, in essence, ARM's case that:

i) The MSA provided for Neutrino to provide a complete medicolegal reporting and rehabilitation IT infrastructure and system for processing audiological hearing assessment reports and ancillary documents, including the PDF generation thereof for sending to referrers such as QHS via their own systems, this being the basis upon which Portfolio 1 (i.e. Mr Jones and Mr Kilburn) obtained *"sweat equity"* in ASS's holding company, ASG.

ii) This obliged Neutrino to provide the software updates and developments the subject matter of the contested invoices, particularly bearing in mind the further *"sweat equity"* that Neutrino received through an increase in the percentage of its shareholding in ASG following the shareholders' meeting on 22 July 2014. To the extent necessary, ARM relies upon the addendum attached to the MSA as specifically providing that any additional and/or subsequent *"Work and/or Future Development"* by Neutrino should be provided without further additional consideration. Consequently, so it is said, Neutrino was obliged to provide the additional services the subject matter of the contested invoices, even in respect of the development of software to produce Tinnitus reports. However, ARM in any event challenges whether, in fact, software was developed for the production of Tinnitus reports, and questions whether other software was developed to the extent contended by Mr Jones and Neutrino.

iii) Further, ARM contends that, given the terms of the MSA, there was no proper basis for Neutrino to invoice for any additional IT consultancy retainer fees, because the latter related to work and services that Neutrino was already obliged to provide pursuant to the terms of the MSA.

iv) In addition, ARM contends that whilst the MSA entitled Neutrino to charge per report for the production of reports, that did not extend to re-running reports that had already been produced. ARM emphasises that the only rates provided for by the MSA were *"£7.50 per Audiology Report for the first thousand, thereafter £5"*. In any event, ARM submits that there is insufficient evidence justifying either the requirement to re-run reports, or to support the fact that they were actually re-run as represented by the invoices that have been produced.

207. In these circumstances, and as particularised in paragraph 30 of the Particulars of Claim, it is alleged that Mr Jones, Mr Kilburn, Clinton Jones and Prof Lutman acted in breach of their fiduciary and other duties as directors, or in Mr Jones' and Mr Kilburn's case as de facto directors, of ASS. In short, so far as Mr Jones is concerned, it is alleged that:

i) Mr Jones caused or allowed powers which had been conferred upon him and others to be used otherwise than for the purposes for which they were conferred, in breach of s. 171 CA 2006;

ii) Mr Jones failed to act in good faith and in a manner likely to promote the success of ASS, or in a manner likely to benefit the members of ASS as a whole in breach of s.172 CA 2006. As the case was developed in submissions:

a) Mr Doyle KC submitted that at the time that most if not all of the payments were made, ASS was insolvent, and therefore that Mr Jones was therefore obliged to have regard to the interests of creditors, and balance the interests of creditors as against those of shareholders, i.e. ASG. Given that Mr Jones had not had regard to the interests of creditors, then, on the authority of *Re HLC Environmental Projects Ltd* (supra) at [92], in the absence of consideration it is necessary to apply an objective test, and consider whether the reasonable objective person would have considered the payments to be justifiable.

b) Mr Doyle KC further placed reliance on what he submitted was the hopelessly conflicted position of Mr Jones acting and taking key decisions as if he were a director of ASS, whist being a director of and interested in Neutrino and taking decisions on its behalf that were potentially at least in conflict with the position of ASS. In the circumstances, the argument would be that Mr Jones was disabled from, and in practice did not give consideration to the interests of the shareholders of ASS as a whole, so as to, again, require the application of an objective test, and a consideration as to whether the reasonable objective person would have considered the payments to be justifiable.

iii) Mr Jones failed to exercise independent judgment in breach of s. 173 CA 2006, and failed to avoid a situation in which his own interests (given his interests in Neutrino) conflicted with his duties to ASS in breach of s. 175 CA 2006.

iv) Mr Jones failed to exercise reasonable care, skill and diligence by causing or allowing in circumstances where he knew or ought properly to have known that the same were not due and payable, in breach of s. 174 CA 2006.

208. Consequently it is submitted that Mr Jones is liable to restore the monies which have been misapplied by the payment of equitable damages.

Mr Jones' defence

209. The essence of Mr Jones' defence to the claim in respect of the payments to Neutrino is, in essence, as follows:

i) Although this does not form part of his pleaded case as set out in his Defence, Mr Jones sought to allege at trial that he and Neutrino had been dishonestly misled with regard to the relationship between ASS and QHS and that, in entering into the MSA and the SHA, the fact that QHS had raised issues concerning the quality and/or contents of had been deliberately supressed. Evidence as to this is said to be provided by the minutes of the meeting between Clinton Jones and Ms Furby on 29 April 2014, which is said to show QHS having raised issues that were kept from him.

ii) Mr Jones has further alleged that, apart from the question of fraudulent misrepresentation, the issues with QHS were down to incompetence or negligence on the part of ASS, and in particular Mr Moose, in devising the format of reports to be sent to QHS. However, as I shall go on to explain in more detail below, this is not how matters were put by Mr Jones to Mr Moose in the course of cross-examination, and it was me who, during the course of Mr Moose's cross-examination, asked him to comment on an email dated 5 December 2014 from Prof Lutman to Mr Jones, Mr Kilburn, Mr Judge and Mr Snowden, copied in to Clinton Jones, in which Prof Lutman said:

> *" – on reviewing the Phase 1 version, it is plain to see how awful it was and that the conclusions were plain wrong.*
>
> *As the Director responsible for this project at the time, Richard Moose clearly had not taken sufficient care to ensure that work being released by the Company was of an acceptable standard. The reputational damage of releasing work like that would have been immense."*

This email followed on from email correspondence on 4 December 2014 between Mr Jones, Mr Kilburn, Clinton Jones, Prof Lutman, Mr Judge and Mr Snowden in which included various allegations as to who was to blame for problems concerning the quality and content of reports submitted to QHS.,

iii) Mr Jones therefore says that when he became aware of the full extent of the problem as matters progressed, the considerations referred to in sub-paragraphs (i) and (ii) above justified the action that he took at the shareholders meeting on 22 July 2014, in stating that ASS would have to enter into administration at the end of that day unless Mr Moose and Mr Sayer agreed to their shareholdings in ASG being reduced, on the basis that Mr Jones (through Portfolio 1) was entitled to additional *"sweat capital"* to compensate for work done in order to resolve the issues regarding QHS/Quindell Group reports, with Mr Jones stating that unless matters were resolved, then QHS would seek its money back.

iv) Although during the course of cross-examination, and in answer to a question that I posed, Mr Jones gave the impression that the additional *"sweat capital"* obtained following the shareholders' meeting on 22 July 2014 was intended to more generally compensate Mr Jones and Neutrino, ultimately, I understood his evidence to be that it was only intended to provide compensation in respect of matters the subject matter of invoice number 109.

v) It was Mr Jones's and Neutrino's case that further work had reasonably been required, and was reasonably required, to resolve issues with QHS resulting from the matters referred to in sub-paragraphs (i) and (ii) above, and that this justified payment over and above that provided for by the MSA. This is the basis upon which Mr Jones and Neutrino seek to justify the payment in respect of the subject matter of invoices numbered 104, 105, 107, 111, 117, 123, 132, 139, 141 and 148 referred to in paragraph 78 above. It is Mr Jones' case that this further work was either the subject matter of an Additional Order Form, signed or approved by Clinton Jones in concurrence with Mr Jones, or, alternatively, represented expenditure that was authorised by Clinton Jones and himself on behalf of ASS, if not also Prof Lutman. In these circumstances, it is Mr Jones's and Neutrino's case that the relevant invoices related to work that was reasonably required to resolve issues with QHS and further the relationship with QHS, and that they had been duly authorised on behalf of ASS, such that, to the extent that the relevant invoices and expenditure in question required to be considered objectively, a reasonable objective person would have thought the expenditure to have been justifiable in the best interests of ASS in order to resolve issues with QHS, develop the relationship with the latter, and secure payment from QHS.

vi) It is Mr Jones case that the addendum to the MSA was never incorporated as part of the signed document, and so it is not open to ARM to maintain that it was agreed that future development work would be done for no additional consideration, although Mr Jones would say that the work here was, in any event, necessary and uncovenanted for remedial work resulting from the actions of Mr Moose, Mr Sayer, Clinton Jones and/or Prof Lutman, which should be paid for as invoiced, rather than future development work of the kind anticipated by the Addendum to the MSA.

vii) It is thus Mr Jones' and Neutrino's case that the additional work required in developing software and systems fell outside the scope of the MSA, and/or was justified as additional work.

viii) Further, on Mr Jones' and Neutrino's case, the MSA, and the recurring fees provided for thereby did, in any event, extend to re-running reports that required to be re-run once the necessary works had been carried out on the IT software and systems. Hence, he submits that the invoices in respect of the re-running of reports were fully justified.

ix) Mr Jones referred to an email exchange on 14 May 2014 relating to the Loan Worker system the subject matter of invoice number 100 referred to in paragraph 78 above, which such exchange included Mr Sayer's concurrence in the relevant item of expenditure. It is said that this demonstrates that Mr Sayer was happy to *"go with the flow"* and essentially leave technical matters to Clinton Jones.

Conclusion in respect of Mr Jones' liability for the payments to Neutrino

210. The starting point must, as I see it, be a consideration of the meaning and effect of the MSA, and whether it did incorporate the Addendum thereto.

211. As to whether or not the Addendum was incorporated, I consider that the evidence supports the proposition that, as signed by way of agreement, the MSA included the Addendum so as to incorporate the Addendum within its terms. I recognise that there is language within the *"Action Points & Agenda (LJ & RK) Tuesday, 6 May 2014"* that Mr Jones took me to that sets out Mr Jones' and Mr Kilburn's contractual intentions in terms which are inconsistent with elements at least of the Addendum. However, what requires to be given effect to is the document as signed and agreed between the parties, and the best evidence as to what that comprised is, in my judgment, provided by the attachment to Clinton Jones' email of 7 May 2014 which, as explained in paragraph 28 above, was included as part of the pdf attachment, albeit reversed on the scan attached to the email. I do not consider the earlier document dated 6 May 2014 is admissible to contradict the terms of the MSA, incorporating the Addendum, absent a claim for rectification.

212. The terms of the Addendum are, as I see it, clear to the effect that any additional and/or subsequent work and/or future development by Neutrino should be agreed between the parties and provided by Neutrino without additional consideration. Further, and in any event, the terms of the relevant part of Annex A to the MSA, under the heading *"SERVICE CHARGES Programming Service(s)"* and *"Description & Terms"*, require Neutrino to provide a *"complete"* medico legal reporting and rehabilitation IT infrastructure and system. Having due regard to the provisions of clauses 2 and 8 of the MSA, I consider this required Neutrino to provide a workable and operable system compatible with the requirements of referrers such as QHS for *"audiological Report PDF generation"* as described under this heading. There were clearly issues between ASS and QHS/Quindell Group with regard to the content and format of reports. However, unless, perhaps, there is cogent evidence that ASS had knowingly, or perhaps negligently, provided inaccurate information as to QHS's requirements to Neutrino so as to cause it to waste time and effort on software or systems that were inappropriate for QHS's requirements, i.e., because it had to produce new software or systems to cater for revised reports that had been necessitated by such considerations, then I consider that further work to meet the latter's requirements would fall within the scope of the MSA.

213. The further issue concerning the MSA relates to whether the recurring charge provided for thereby (£7.50 per report for the first thousand reports, and £5 per report thereafter) extends not only to the production of an original report, but also to a report that requires to be re-run, for example following some software development required to meet QHS's requirements, which then required the audiological report pdf to be regenerated and transmitted to QHS.

214. I am persuaded that the terms of the MSA do so extend so long as the re-run was reasonably required in order to meet QHS's requirements. Bearing in mind my finding that Neutrino would, itself, be required to bear the cost of carrying out the software development, at least unless ASS was responsible to the extent that I have indicated, I consider that if Neutrino was then required to go through the process, again, of generating the relevant pdf with new content or format to be sent directly to QHS through it systems, then commercial considerations would suggest that the re-run report ought to be treated as a report for the purposes of the relevant charging provisions. I consider that this is supported by the language of the relevant part of the MSA under the heading *"Description & Terms"* with its reference to the generation

of *"Audiological Report"* pdf's and the sending of the same to QHS through their own system. This, in my judgment, serves to inform the meaning of *"report"* as referred to in the charging provisions.

215. Turning then to how these considerations apply to the facts of the present case, I firstly do not consider that there is any cogent evidence that ASS deliberately misrepresented the position concerning reports to Neutrino, or acted negligently in this respect, notwithstanding Mr Jones' protestations of fraudulent misrepresentation, and incompetence on the part of, in particular, Mr Moose.

216. There is no plea in the Defence of fraudulent misrepresentation or of incompetence or negligence on the part of Mr Moose or Mr Sayer that ARM could have responded to in a structured way procedurally, merely an allegation that Mr Moose had been the author of the original template which required to be refined to make it fit for purpose, and that there had been numerous difficulties with QHS with regard to the reports that had been produced.

217. However, irrespective of any pleading issue, the allegations of misrepresentation, incompetence and negligence, as developed in Mr Jones's witness statements and submissions, apart from a lack of cogent evidence to support them, were unfocused and generalised. The cross-examination of Mr Moose by Mr Jones on these issues was particularly instructive – see the transcript, Day 3, pages 126 to 152. When Mr Moose, in response to questions put to him by Mr Jones, explained his involvement in the preparation of reports, and that the reports had been prepared by Clinton Jones and Prof Lutman with the benefit of their knowledge and experience as audiologists, that it was Prof Lutman who had required the deletion of the statement of truth that had led to difficulties regarding compliance with CPR Part 35, and that his involvement was limited, Mr Jones did not challenge this, or put to him why he might have acted fraudulently or negligently. As I have already mentioned, it was me who put to Mr Moose Prof Lutman's email dated 5 December 2014 blaming Mr Moose, which Mr Moose answered in terms that did not detract from his earlier answers under cross-examination, the broad thrust of which I accept, as to his limited involvement in the preparation of reports. Further, Mr Moose, again without challenge, made the point that when he was involved in the preparation of reports in the limited way that he referred to, ASS was working to the satisfaction of Mr Evans of QHS/Quindell Group, who appeared at least to have the authority of QHS with regard to the quality and contents of reports, whatever Mr Hodgkinson might subsequently have said to Mr Jones with regard to Mr Evans' authority.

218. In the above circumstances, I do not consider that there was anything in respect of the above matters that provided any good reason for departing from the terms and effect of the MSA, which had been negotiated and agreed to on the basis of Mr Jones and Mr Kilburn, through Portfolio 1, acquiring the *"sweat capital"* that they did.

219. I consider that the evidence shows, as Mr Doyle KC suggested in submissions, that QHS blew hot and cold as to its own requirements, and that this caused considerable difficulty so far as integrating reports into the software and systems being developed by Neutrino was concerned. This is, as I see it, evidenced by a number of factors, including:

i) The minutes of the conference call with QHS on 16 June 2014 recording Mr Evans having signed off on the last proposed report confirming that it addressed all inclusions previously discussed, and the subsequent approach of QHS during the telephone meeting on 19 July 2014.

ii) The fact that although Mr Jones was intimately involved in discussions, and indeed led the discussions with QHS as from the conference call on 16 June 2014, if not earlier in the light of his email dated 2 May 2014 to Quindell Group referring to himself at CTO, the difficulties in meeting QHS's requirements continued up to the time that ASS entered into administration as evidenced by the fact that there was then an apparent need to re-run some 20,000 odd reports.

220. It is true that during the course of the telephone meeting on 19 July 2014, Mr Jones not only expressed sympathy with QHS, but himself referred to having been let down by others within ASS. However, it is to be noted that Mr Moose, at least, during the course of the meeting on 22 July 2014, seriously contested and challenged the fact that Mr Jones had any basis for adopting this approach.

221. I consider that the reality of the position is that Neutrino, in agreeing to the terms of the MSA in return for *'sweat capital'*, took on the risk regarding the need to develop software and IT systems to meet QHS's requirements, but in the period leading up to the shareholders meeting on 22 July 2022, realised that it had, through Mr Jones, struck a bad bargain with onerous obligations, and then sought to create a pretext for forcing upon Mr Moose and Mr Sayer a reduction in their shareholding percentages in order to enhance that of Portfolio 1, by exaggerating QHS's dissatisfaction with and likely response in respect of the reports produced for it, alleging that Mr Jones/Neutrino had been misled, and exploiting the position so far as the treatment of the expense connected with Mr Sayer's daughter's wedding was concerned. Hence, as I see it, the hardball attitude taken by Mr Jones during the course of the shareholders' meeting on 22 July 2022, during the course of which I consider that he exaggerated the stand being taken by QHS by, amongst other things, saying that QHS had threatened to recoup monies so as to threaten the solvency of ASS, when that was not something that QHS had specifically done.

222. Mr Jones' aggressive response was, as we have seen, rewarded by the fact that he was able to secure the reductions in Mr Sayer's and Mr Moose's shareholdings in ASG that he had been seeking to achieve, with Mr Sayer's acquiescence if not that of Mr Moose.

223. As I have already mentioned, at one stage in the course of his evidence, in answer to a question that I posed, Mr Jones gave the impression that the enhanced *"sweat equity"* achieved by the events of 22 July 2022 was intended to provide compensation to Neutrino for the additional work required as a result of the difficulties concerning the contents and format of the reports, but it is clear from the email dated 26 July 2014 from Mr Jones to Clinton Jones, that any waiver consequential upon the enhanced shareholder position only related to the subject matter of invoice number 109 referred to in paragraph 78 above.

224. Neutrino was, at the relevant time, an associate of Mr Jones given that he was the sole director thereof, and directly and indirectly a shareholder therein. Further, ARM, as

assignee of the relevant cause of action, has proved that the relevant monies were received by Neutrino. Consequently, I consider that, in accordance with the principles considered in paragraph 186 et seq above, there is something of an onus on Mr Jones and Neutrino to explain and justify the payments.

225. Whilst there might be justification for various one-off items such as those covered by invoice number 100 dated 19 May 2014 the subject, in part, of the email correspondence on 14 May 2014 in which Mr Sayer concurred in the expenditure relating to the Loan Worker system, this would be on the basis that such expenditure fell outside the scope of the MSA. However, given the conclusions that I have reached as set out in paragraph 211 et seq above concerning the effect of the MSA, I consider that the various items relating to new software modules, coding, recoding, and IT Consultancy Retainer Fee are properly to be regarded as falling within the scope of what was required to be done by Neutrino pursuant to the terms of the MSA in any event such that there was, properly considered, no consideration received from Neutrino for the payments. For the avoidance of doubt, the invoices in question are those numbered 104, 105, 107, 111, 117, 123, 128, 129, 131, 132, 137, 139, 141,146, and 148.

226. I do not consider that there can have been any proper commercial justification for these payments given what I have found to be the true effect of the terms the MSA, particularly bearing in mind that the MSA was entered into against the background of the allotment to Portfolio 1 (i.e. to Mr Jones' and Mr Kilburn's company) of *"sweat equity"* in return for the services to be provided, and bearing in mind the enhanced *"sweat equity"* leveraged by Mr Jones at the shareholders meeting on 22 July 2014.

227. It is true that in Mr Jones' email dated 17 September 2014 he seeks to justify himself and Mr Kilburn (in fact their respective companies) each charging £150,000 per annum as compensation for *"the non-existent work being done by Moose and Sayer"* and *"work not foreseen by [Mr Jones] and [Mr Kilburn] at the outset of involvement with ASS"*. However, to the extent that Mr Moose and Mr Sayer were no longer involved as might initially have been envisaged, I consider this largely to be down to them effectively being marginalised by Mr Jones. Further, I consider that the key consideration is not whether there was additional unforeseen work, but whether the work in question fell within the scope of the MSA, which I consider that it did, in circumstances in which, in my judgment, Mr Jones/Neutrino had taken on the risk that additional work might be required to produce the IT software and systems required to meet QHS's requirements.

228. In the circumstances of the present case, I consider that, for the purposes of s.172 CA 2006, one is concerned not with what Mr Jones might subjectively have thought to have been the best interests of ASS, but whether the payments referable to the invoices in question can objectively be seen to be in the best interests of ASS. I consider this objective approach to be warranted by two considerations:

i) Firstly, because Mr Jones had placed himself in a position where his own interests (through Neutrino) conflicted with those of ASS, which had an interest in holding Neutrino to its contractual bargain. As to this I note that Mr Jones recognised the existence of the conflict himself in correspondence – see e.g. his email dated 13 October 2014. The difficulty is that although he might have said that the conflict prevented him from being part of the relevant

decision, the evidence shows that he largely drove the relevant decisions, e.g. that following the letter dated 13 October 2014 to assign ASS's debts to a company connected with Mr Jones the following day. The point was highlighted during an exchange whilst Mr Jones was cross-examining Mr Moose when, after Mr Moose had provide an answer, Mr Jones said:

> *"Well, I think that's an interesting point, Mr Moose, and, you know, to some extent I did struggle. It was very difficult to be -- to have agreed to be a director of ASG with Mr Clinton Jones and in parallel be the supplier. At face value that didn't -- when we all met and agreed this, didn't pose itself to be any sort of real problem, although there was going to be inevitably conflicts if I had to stand aside on a decision regarding D5."*

ii) Secondly, because I consider it likely that, certainly in relation to the later payments, ASS was, at the date thereof, unable to pay its debts as they felt due so as to require the interests of creditors to be at least taken into account, applying *Sequana*, there being no evidence that the interests of creditors were taken into consideration and balanced as against those of the members of ASS.

229. I do not consider that the transactions in question can be commercially justified. That being the case, I find that ARM has established that Mr Jones acted in breach of his fiduciary duties as a de facto director of ASS by being party to causing ASS to make payments that related to the invoices referred to in paragraph 225 above. I consider that Mr Jones acted in breach, at least, of his duties under s. 172 and s. 175 CA 2006. Given that it is his own case that the relevant expenditure was specifically authorised by himself and Clinton Jones, Mr Jones was clearly party to causing the relevant payments to be made to pay for the expenditure that he had authorised.

230. This finding of breach of fiduciary duty extends, in my judgment, to invoice numbered 123 relating to coding a Tinnitus report module on the basis that this fell within the scope of the MSA. However, apart from Mr Jones' say-so, there is no evidence that the work was, in fact, done, and no reports can have been prepared from the product thereof because none of the invoices charge rates provided for by the Additional Order Form signed on 15 September 2014. When interviewed by the liquidator of ASS, Prof Lutman doubted at least, whether the relevant work had actually been done. I appreciate that Prof Lutman has not been called as a witness and cross-examined, but nevertheless, I consider that I should give ARM, as assignee from ASS, the benefit of the doubt on the point, given the onus on Mr Jones/Neutrino to explain and justify the transaction. Consequently, even if the relevant work had not fallen within the scope of the services that Neutrino was required to provide pursuant to the MSA, and therefore could properly have been authorised as additional work, I would not have found that the evidence supported the relevant invoice.

231. I turn then to the question of the invoices relating to reports or re-run reports. I have already found that reports reasonably required to be re-run in consequence of developments to the software systems do fall within the scope of reports that Neutrino was entitled to separately charge for under the terms of the MSA. That being the case, I do not consider that any separate authority was required to charge for these items.

Further, if the re-runs in question were reasonably required to be carried out in consequence of software developments that Neutrino was required to fund because it was obliged to carry out the requisite work pursuant to the terms of the MSA, and the re-runs were actually carried out, then I consider that it is difficult to say that the carrying out of the re-runs, or charging ASS for same, could, objectively considered, be said to be otherwise than something done in good faith and in the best interests of ASS, in which case breach of fiduciary duty on the part of Mr Jones would not be made out.

232. I am concerned by observations made by Prof Lutman in the course of being interviewed or examined by or on behalf of the Joint Administrators of ASS with regard to whether all the reports claimed to have been re-run were actually re-run, or reasonably needed to be re-run, and about possible duplication. Further, it is a matter of some concern that no documentation has been produced by Neutrino to evidence the fact of the re-running of the various reports.

233. Clearly, a number or reports required to be re-run, but it is difficult to confirm with any degree of certainty which of those re-runs covered by the disputed invoices were reasonably required or actually took place.

234. I have considered whether I should, again, give ARM the benefit of the doubt on the basis that the onus rests on Mr Jones and Neutrino to justify transactions, and conclude that the burden has not been satisfied in the absence of further evidence to corroborate Mr Jones' and Neutrino's case. However, I consider that I need to take into account that they are being asked to justify these re-runs in proceedings commenced some six years after the event, and determined some eight years after the event. In the circumstances, I have concluded that the proper course is to give the benefit of the doubt to Mr Jones and Neutrino in respect of most of the re-runs on the basis of being satisfied on the balance of probability that they were carried out and were reasonable required.

235. However, I consider that an exception is required in relation to the later invoices dated from 1 December 2014 onwards. In respect of these, I cannot be satisfied on the balance of probability that the re-runs were carried and were reasonably required, or that the invoices in question were properly payable out of the monies that ASS paid to Neutrino, essentially for the following reasons:

i) The invoices in question, numbered 140, 147, 149 and 150, all post date the last payment to Neutrino on 26 November 2014;

ii) Invoices numbered 149 and 150, dated 26 February 2015, post-dated the entry of ASS into administration, and were expressed to be due on 25 December 2014, again after ASS entered into administration;

iii) Invoice numbered 47, dated 1 December 2014, was expressed to be due on 25 December 2014, again after ASS entered into administration;

iv) Invoice numbered 140, dated 1 December 2012, required payment or suitable security in advance, and as there is no evidence of payment being made or security provided, one must presume that the work the subject matter thereof was not done;

v) Further, invoices numbered 140 and 147 both post-date when steps were being taken to place ASS into administration and Mr Snowden had been engaged.

236. On the above basis, save for invoices numbered 140, 147, 149 and 150, I hold that the invoices relating to the running or re-running of reports have been justified on the basis of being recurring sums due under the terms of the MSA, subject to the variations in rates provided for in respect of the native android app by the Additional Order Form relating thereto.

237. My only further qualification, apart from the exclusion of invoices numbered 140, 147, 149, and 150, is in relation to possible duplication, upon which I have not heard submissions. I would, following the hand down of this judgment, be open to hearing submissions from ARM with regard to the question of duplication in respect of the invoices which I have found to be justified, which might potentially lead to other invoices being disallowed, or rather the payment thereof being treated as a breach of fiduciary duty.

238. Consequently, subject to this duplication issue, I find that of the invoices relating to the running or re-running of reports, those numbered 100, 112, 114, 118, 130 and 138 have been justified by Mr Jones/Neutrino.

239. As mentioned, invoice number 109 is waived, therefore no payment should be permitted as against the same.

240. Whilst I will hear further submissions as to the figures involved if it is appropriate to determine the same bearing in mind that I am only presently concerned with liability issues, I make the total of the invoices relating to runs or re-runs that I found to be justified to be £241,007.45 (excluding VAT). The invoices already accepted by ARM as being justified total £123,798.60 (excluding VAT). On this basis the justified invoices total £364,874.05 (excluding VAT). The total amount paid was £495,293.40 (excluding VAT). This is a difference of £130,418.95 which, subject to duplication questions, represents the amount which I consider that Mr Jones is liable to account for breach of his duties as a de facto director. I have referred to VAT exclusive figures on the basis of Mr Snowden's acceptance that VAT paid by ASS would have been recovered by it as it was registered for VAT.

241. In short, therefore, subject to further submissions with regard to duplication and figures, I consider that Mr Jones is liable to account for the sum of £130,418.95 plus interest for breach of his duties as a de facto director of ASS under this head.

242. I should add that I have considered whether Mr Jones should be relieved from liability pursuant to s. 1157 CA 2006 which gives the court power to exempt a director from liability in the case of, amongst other things, breach of duty, where the director (the onus being on him) can establish three distinct things, namely: (a) that he has acted honestly; (b) that he acted reasonably; and (c) that having regard to all the circumstances, he ought *"fairly to be excused"*. Even if Mr Jones might have acted honestly, I do not consider that he acted reasonably in respect of the matters complained of. Nor do I, in the exercise of my discretion, consider that, in all the circumstances, he ought fairly to be excused from liability bearing in mind his key role in the circumstances behind the breach, the effect on ASS and the benefit gained by Neutrino, a company with which he was associated.

Payments to Cumulo

243. The impugned invoices are the following:

i) Invoice dated 31 August 2014, numbered 92429, in an amount of £5,000 plus VAT, with the details: *"Reconstruct all accounting for the Year Ended 30 April 2014 and report, year end accounting and taxation."*

ii) Invoice dated 1 October 2014, numbered 92422, in an amount of £12,500 plus VAT, with the details: *"Financial Support Retainer - September"*.

iii) Invoice dated 18 October 2014, numbered 92423, in an amount of £12,500 plus VAT, with the details: *"Financial Support Retainer - October"*.

iv) Invoice dated 1 November 2014, numbered 92467, in an amount of £12,500 plus VAT, with the details: *"Financial Support Retainer – November 2014"*.

v) Invoice dated 6 November 2014, numbered 92431, in an amount of £650 plus VAT. The invoice has not been produced, and so no description is available.

244. The total amount paid to Cumulo was £62,119.57 plus VAT, and it is accepted that there were authorised invoices totalling £20,933.35 plus VAT. Consequently, there is an alleged overpayment of £41,186.22, taking into account that the VAT will already have been recovered.

245. I have not made any finding as to whether Mr Kilburn was a de facto director himself. Therefore, I will proceed on the basis that, in contrast to the position in respect of the payments to Neutrino, the onus is on ARM to establish the impropriety of the payments.

246. ARM's case predominantly rests, as I see it, upon the discussion and agreement recorded in Mr Jones' email dated 17 September 2014 to Mr Kilburn, Clinton Jones and Alex Jones, that refers, amongst other things, to it being agreed that *"RK"* (i.e. Cumulo) would be entitled to charge £150,000 per annum in equal monthly payments as a result of taking on additional responsibilities, and work said not to have been foreseen at the outset of the involvement with ASS.

247. On the basis that these matters were discussed and agreed upon by *"the board of ASS and ASG"*, Mr Jones was clearly a party to the relevant decision and instrumental therefore in ASS paying to Cumulo the sums of £12,500 plus VAT paid to Cumulo on 1 October 2014, 18 October 2014, and 1 November 2014.

248. However, there is no real clear evidence as to the circumstances in which the sums of £5,000 plus VAT and £650 plus VAT were paid to Cumulo on 31 August 2014 and 6 November 2014 respectively. In the circumstances, I cannot be satisfied, on the balance of probabilities, that Mr Jones was responsible for the making of these payments. Further, the payment made on 31 August 2014 was made of time when it was less clear as to whether or not ASS was able to pay its debts as they found due.

249. So far as the retainer amounts of £12,500 per month are concerned, the essence of ARM's case is that it was agreed as part of the initial arrangements between the parties involving Mr Jones and Mr Kilburn, that Cumulo would provide accounting

services in return for £1,800 per month plus VAT, and that Mr Jones and Mr Kilburn would not be entitled to remuneration as directors. I consider this to be borne out by the evidence. Further, I do not consider that any additional involvement that Mr Jones and Mr Kilburn may have had in ASS by mid-September 2014 was down to unforeseen circumstances as such, rather, as considered above, that any additional input fell within the scope of what had already been agreed to be provided, or followed as a consequence of the events of the shareholders' meeting on 22 July 2014, as a result of which Portfolio 1's percentage shareholding (or '*sweat capital'*) in ASG increased to the advantage not only of Mr Jones, but also Mr Kilburn.

250. In the circumstances, I find it difficult to see that there was any additional consideration provided by Cumulo for the retainer sums of £15,000 per month. Further, I consider that these payments were likely made at a time when ASS was insolvent, at least in the sense of being unable to pay its debts as they fell due, as evidenced by Mr Jones' email dated 13 October 2014 demanding security on behalf of Neutrino. This required those taking the decision to make these payments to have regard to the interests of creditors, and to balance those interests as against the shareholder interests, assuming that ASS was not then irredeemably insolvent, in which case the creditors' interests would become paramount applying *Sequana* (supra). There is no evidence that any consideration was given to creditor interests, and on that basis it is for the Court to consider objectively whether the relevant payments were in the best interests of ASS, applying *Re HLC Environmental Projects Ltd* (supra) at [92].

251. A further consideration is that one gets from Mr Jones' email dated 13 October 2013 the fact that Prof Lutman, one of the de jure directors of ASS, was not a party to the relevant decision.

252. Considering objectively whether the payments in question were made in good faith and in the best interests of the shareholders of ASS, appropriate regard being given to the interests of creditors, I am satisfied that the payments in question cannot be justified essentially for the reasons advanced by ARM, and that it amounted to a breach of Mr Jones' fiduciary duties as a de facto director of ASS in causing the payments to be made.

253. I have again considered whether Mr Jones ought to be excused from liability pursuant to s. 1157 CA 2006, but again have concluded that he ought not to be so excused for much the same reasons as referred to in paragraph 242 above in relation to the breach concerning the payments to Neutrino. I recognise that, in this case, neither Mr Jones nor any company associated with him might have benefited from the payments in question, but Mr Jones clearly played a leading role in authorising the relevant payments, which were significant in value. I do not consider that Mr Jones can properly be regarded as acting reasonably in respect of the authorisation of these payments, and nor do I consider, having regard to all the circumstances of the case, that he ought fairly to be excused from liability.

254. However, I do note that whilst £1,800 plus VAT was paid to Cumulo on 6 November 2014, no payments were made in respect of this monthly sum in September or October 2014. Consistent with ARM's case, Cumulo would have been entitled to those payments, and therefore I consider it appropriate to give credit for the same as

against the sums for which Mr Jones is otherwise liable to account by way of equitable damages.

255. Consequently, under this head, I consider that Mr Jones is liable in respect of the three payments of £12,500 plus VAT made on 1 October 2014, 18 October 2014 and 1 November 2014, but giving credit as against the same for two payments of £1,800. On this basis, subject to further argument as to precise figures, I consider that ARM's claim is established under this head in an amount of £33,900.

Alleged wrongful transfer of assets shortly prior to administration

ARM's case

256. It is ARM's case that, at the time of the entry of ASS into administration, ASS owned beneficially a collection of valuable assets comprising its business and undertaking and including:

i) Its website;

ii) The systems, intellectual property and know-how provided by Neutrino pursuant to the terms of the MSA;

iii) The documentation and template documentation used in connection with the provision of the reports provided by ASS;

iv) The staff employed by ASS and their contact details;

v) The connections and contracts with QHS/Quindell Group including the Quindell Agreement;

vi) The data of clients and patients collected by ASS in connection with the provision of reports;

(Together "**the ASS Business and Undertaking**").

257. It is then alleged by ARM that Mr Jones, together with Clinton Jones and Prof Lutman:

i) Utilised AMR (which Mr Jones ultimately owned and controlled) for the purpose of carrying on the business of ASS in succession to ASS;

ii) On a date shortly prior to the administration of ASS, deliberately removed the ASS Business and Undertaking and transferred the same to AMR without regard to ASS's ownership of the same, and without paying for the same;

iii) Immediately commenced to trade AMR utilising the ASS Business and Undertaking: *"in exactly the same manner with exactly the same customers as [ASS] had trading with prior to the appointment of the administrators (including, in particular, Quindell)."*

258. ARM alleges that by deliberately removing the ASS Business and Undertaking and transferring the same to AMR without regard to ASS's ownership of the same and

without paying for the same, or at least causing ASS to do so, Mr Jones acted in breach of his duties as a de facto director of ASS.

259. It is thus alleged that:

i) Mr Jones exercised or caused or allowed powers which had been conferred upon him, to be used otherwise than for the purposes for which they were conferred, contrary to s. 171 CA 2006;

ii) Mr Jones acted otherwise than in good faith and in a manner likely to promote the success of ASS or in a manner likely to benefit members of ASS as a whole. It is ARM's case that, as by this stage ASS was plainly insolvent and unable to pay its debts as they fell due if not also balance sheet insolvent, it was at least incumbent upon Mr Jones to have regard to the interests of creditors and balance them as against the interests of the members, if not incumbent upon him to treat creditors' interests as paramount given the likely deficiency on administration or liquidation at that point. Consequently, it is ARM's case that Mr Jones acted in breach of his duties under s. 172 CA 2006;

iii) Mr Jones failed to exercise independent judgment, acting for his own selfish and partisan (i.e. to receive the benefit of the ASS Business and Undertaking without paying for the same). On that basis it is alleged that Mr Jones acted in breach of his duties under s. 173 CA 2006;

iv) Mr Jones failed to exercise reasonable care, skill and diligence by causing or allowing the ASS Business and Undertaking to be removed from ASS without payment in breach of his duties under s. 174 CA 2006;

v) Mr Jones failed to avoid a situation in which he had a direct or indirect financial interest which conflicted with the interests of ASS, by causing or allowing the ASS Business and Undertaking to be removed for his direct or indirect benefit in circumstances where, in so acting, there was a clear and obvious conflict of interest in breach of his duties under s. 175 CA 2006;

vi) Mr Jones used assets belonging to ASS for his own benefit by causing the same to be transferred to AMR.

260. It is thus ARM's case that Mr Jones is liable to pay equitable damages by reference to the value of the assets of ASS wrongly transferred away.

Mr Jones' case

261. Mr Jones denies that any assets were transferred away from ASS, whether shortly prior to administration or otherwise. He maintains that the assets identified by ARM as having been transferred away were either not transferred, were incapable of transfer, or were assets that ASS simply did own to be able to transfer to AMR. Thus, for example, it is his case that the intellectual property in the software and systems that Neutrino had developed for ASS belonged to Neutrino and that ASS could not have owned staff as assets capable of being owned by ASS. So far as data is concerned, he points to Mr Snowden's evidence regarding the sale of the same to the Quindell Group in course of the administration as showing that this remained with

ASS. However, as regards data, it is to be recalled that in his conversation with Mr Snowden on 21 December 2014, Mr Jones had suggest that the data had already been sent to QHS.

262. On this basis, it was Mr Jones' case that AMR took forward its own business model, from scratch, with a third party IT supplier, and did not acquire any assets from ASS. As Mr Jones put it in his closing submissions: *"AMR did not need anything from anybody"*.

263. It is thus Mr Jones' case that AMR's claim in respect of the wrongful transfer of the ASS Business and Undertaking is entirely misconceived.

Determination of the wrongful transfer of ASS Business and Undertaking claim

264. I must be mindful of ARM's pleaded case. In a sense there is something of a contradiction in it to the extent that in paragraph 28(iii) of the Particulars of Claim it is alleged that there was a deliberate transfer the ASS Business and Undertaking to AMR shortly prior to the administration of ASS, but then it is alleged in paragraph 27 of the Particulars of Claim that at the time of the appointment of the Joint Administrators, ASS owned the collection of assets said to make up the ASS Business Undertaking, which it could not have done if it had disposed of them shortly prior thereto.

265. However, it was clear from the way that the case as a whole was pleaded and the way that Mr Doyle KC put his case on behalf of ARM that what is being alleged is that, in the lead up to the administration of ASS, Mr Jones took steps to get AMR in place as a Phoenix company, able to use the assets and connections of ASS in order to carry on business effectively in succession to ASS once it had entered into administration, either by acquiring the assets from the Joint Administrators on favourable terms if necessary to do so given the above, or, if favourable terms could not be obtained, by simply making use of those assets and connections in any event because AMR had been positioned to do so by the time that ASS entered into administration.

266. The evidence does, in my judgment, show quite clearly that Mr Jones took steps at an early stage to get his Phoenix company (AMR) in place. Hence, for example:

i) The reference in Mr Jones' email dated 27th of November 2014 (16:04) to winding ASS up and starting again *"with the same set-up"*, and to obtaining Prof Lutman's *"complete buy in"*.

ii) The reference in Mr Jones' email dated 27 November 2014 (18:40) to funding the winding up of ASS, and repurchasing the goodwill/assets etc of ASS through *"Newco"*.

iii) The references in Mr Jones' email dated 1 December 2014 to Prof Lutman in which he spoke in terms of protecting his own and Prof Lutman's interests in ASS as *"creditors and partners"*, referred to doing all things necessary to block ASS being purchased or otherwise any interest in it being acquired by anybody else, and highlighted *"the new phoenix moving forward"*.

iv) The manoeuvring revealed by Mr Jones' email dated 3 December 2014 to Mr Judge in which he enquired with regard to striking off of Portfolio 1 with a view to avoiding difficulties with *"the idiots"* on administration given that Portfolio 1 was bound to Mr Moose and Mr Sayer by the SHA, as well as enquiring with regard to whether Mr Moose and Mr Sayer would be able to *"go after"* him.

v) The evidence that, despite his denials, Mr Jones attended the full day meeting with Quindell Group on 4 December 2014 that he had referred to in an email of that date, the evidence being not just the email itself but also Mr Hodgkinson's email dated 14 December 2014 that referred to their last meeting.

vi) The appointment of Clinton Jones and Prof Lutman, as well as Antony Pinn, as directors of AMR on 23 December 2014, and the change of AMR's name to its current name similar to that of ASS on 24 December 2014, coupled with the fact that Portfolio 1 had changed its name on 8 December 2014.

267. Whilst Mr Jones may, in his email dated 27 November 2014 (18:40), have referred to intending to remain at a distance to ASS, as he put it, and place himself in the Neutrino/Capita camp, this does, to my mind, only but expose the conflicted position that he was in. What is clear is that he was at the heart of driving the process towards administration, combined with getting a Phoenix company in place to protect his interests as *"creditor and partner in ASS"* as he put it in his email to Prof Lutman dated 1 December 2014 (emphasis added).

268. So far as the assets of ASS are concerned there are clearly issues with regard to the ownership of intellectual property in the software and systems developed by Neutrino, and in relation to data, and how the same might have been transferred to and/or utilised by AMR. So far as intellectual property is concerned, the Addendum to the MSA refers to Neutrino being obliged to assign the same to *"TOPCO"* nominated by ASS, which is not entirely clear as to its meaning and effect. Further, the position is complicated by the attempts in the Additional Order Forms relating to the native application and the next-generation system to seek to ensure that intellectual property rights remained with Neutrino in relation to software developed pursuant thereto. I heard no real argument on these issues, and I do not consider them capable of resolution on the evidence and information before me.

269. However, I agree with Mr Doyle KC that this ought not to matter once it is recognised that ARM's case is, in substance, that there was transferred to AMR that which was necessary for AMR, effectively, to carry on the business that ASS had previously carried on, and that some assets at least were transferred including a number of corporate opportunities and relationships that had only come to Mr Jones through ASS, including, in particular the connection with QHS/Quindell Group.

270. I have noted RPC's advice to Mr Jones in an email dated 26 January 2015 that Neutrino's ownership meant that use of software by AMR was not an issue going forward. What can properly be said, in my view, is that, even if ASS did not own the IP in the software, to the extent that AMR did use the software that have been developed for ASS, it was able to do so because Mr Jones had used the opportunity that had arisen to him through his de facto directorship of ASS to make it available to

AMR to use the same for its benefit, without regard to the interests of ASS. I consider it unlikely that RPC would have been advising on this issue unless relevant to the way in which AMR was carrying on business, or intended to do so, by making use of the relevant software developed for ASS.

271. Much the same point can be made in relation to data, in particular in the light of Mr Jones' comments during the course of his meeting with Mr Snowden on 21 December 2014 when he made the point that QHS had the data, which they had paid for, and that if they provided it back to him to re-run with a *"new business"* then that would not cause a problem *"because there isn't a breach because they've already paid for and enjoyed the data."* However, the point is that Mr Jones would only been in the position that he was with the new business (i.e., AMR) because of the connection established with QHS through his de facto directorship of ASS, and his ability to exploit through AMR the corporate opportunity that that provided.

272. The key asset of the ASS Business and Undertaking that Mr Jones was able to cause to be transferred to AMR was, as I see it, the connection with QHS/Quindell Group, which could be exploited in this and other ways for the benefit of AMR rather than ASS.

273. Further, although it may only have been a temporary measure and there is no evidence as to how long the website was used in this way, the fact is that, as Mr Moose discovered, ASS's website was effectively hijacked by substituting the name of AMR on it. In addition, although there is no clear evidence as to the position in respect of other employees save for the fact that it would appear that a number of the former employees of ASS did subsequently join AMR, as the above emails demonstrate, Mr Jones was anxious to ensure from an early stage Prof Lutman's involvement in the Phoenix operation, as he was regarded as key to it. However, procuring Prof Lutman to join the new venture in this way clearly, as I see it, formed part of the process of procuring the transfer of the ASS Business and Undertaking to AMR.

274. It is, of course, Mr Jones' case that there was no transfer of anything, and that AMR took forward its own business model from scratch with a third party IT supplier. It may be that there was further significant software development with the new IT supplier, however, the contention that AMR started from scratch without the benefit of assets/opportunities transferred from ASS is not, in my judgment, supported by the evidence. In particular:

i) Of critical importance to AMR was the connection that Mr Jones had established and developed with QHS/Quindell Group through the opportunity provided through his de facto directorship of ASS. In this respect, it is highly material that whilst AMR entered into the QLS Agreement on 6 March 2015, it was specifically stated in clause 2.1 thereof that: *"With effect from 1 January 2015, QLS has referred Clients to AMR to provide the Services…"*.

ii) The fact that in his conversation with Mr Snowden on 21 December 2014, Mr Jones refer to the ability of his new business to re-run the data transferred to QHS. There is no good reason why Mr Jones would have mentioned this if this was not something that AMR intended to do.

iii) The fact that Mr Jones was able to make the offer that he was by his email dated 23 December 2014, effectively on behalf of *"Newco"*, i.e., AMR, and to then walk away, if, unsurprisingly, Mr Snowden did not accept the offer made. This can, as I see it, only have been down to the fact that Mr Jones had got his ducks in a row, and got AMR into the position where it really did not need to do a deal with Mr Snowden. This is consistent with Mr Jones' correspondence with RPC on 25 January 2015 in which he said that he was not concerned with regard to the Joint Administrators having *"the hump"* and not negotiating or demanding again.

iv) The advice from RPC on 26 January 2015 with regard to there being no problem in utilising software on the basis that it belonged to Neutrino. Again, this is consistent only with AMR intending to use the software. Neutrino might own the intellectual property in the software, but the giving of this advice is inconsistent with AMR starting from scratch with new software, and AMR would only have gained the opportunity to benefit from this software through Mr Jones, and his involvement as a de facto director of ASS.

v) The figures referred to in paragraph 122 et seq above from AMR's accounts for the period ended 1 December 2014 do not rest easily with Mr Jones' evidence that AMR started from scratch, and only commenced to carry on business some considerable way into 2015. These accounts show turnover from a supposed standing start of in excess of £4 million, and a net profit of some £885,508, and did so after Mrs Jones' company, RDF Network Ltd, of which Mr Jones was the sole director, had invoiced and been paid £1,473,968 during the year.

275. I am satisfied therefore that it has been established that Mr Jones caused ASS to transfer the benefit of the substance of the ASS Business and Undertaking to AMR roughly contemporaneously with ASS into administration.

276. Further, I am satisfied that Mr Jones so acting constituted a breach of his fiduciary duties owed to ASS as a de facto director and, in particular his duties under s.172 CA 2006 and s.175 CA 2006.

277. So far as the Mr Jones' duties s. 172 are concerned, in the light of the conflicted position in which Mr Jones found himself in, and bearing in mind that, given the insolvency of the company, it was incumbent upon Mr Jones to have regard to the interests of creditors, if not treat their interests as paramount, one is concerned with whether that which occurred can be objectively justified as being likely to promote the success of ASS having due regard to the interests of the creditors. In my view, that which occurred cannot be so justified, not least because it hindered the ability of the Joint Administrators to conduct the administration of ASS for the benefit of creditors, and thereby achieve the purpose of administration, if appropriate through the realisation of the assets of ASS.

278. I therefore consider that it has been established that Mr Jones did act in breach of his duties as a de facto director of ASS in causing the ASS Business and Undertaking, whatever it comprised, to be transferred to AMR, and that Mr Jones is liable to pay equitable damages to ARM, as assignee from ASS, according to compensate for the loss occasioned thereby.

279. I have again considered whether Mr Jones ought to be excused from liability pursuant to s. 1157 CA 2006 in respect of his breach of duty in relation to the transfer of the ASS Business and Undertaking to AMR, but have again concluded that he ought not to be so excused. I do not consider that Mr Jones can properly be regarded as having acted reasonably in respect of the relevant transfer, and nor do I consider, having regard to all the circumstances of the case, that he ought fairly to be excused from liability given, not least, the key role that he played in what occurred and that the relevant transfer was to a Phoenix company in which he has a significant stake or interest.

280. The present trial is only concerned with liability, and not quantum, and I have heard no submissions as to appropriate remedy. Whilst I would wish to hear further submissions as to whether or not this is the correct approach, my provisional view is that the equitable damages payable should be assessed by reference to the value of the assets transferred to and for the benefit of AMR and thus lost to the estate of ASS, and that the appropriate method of valuation would be to consider what might have been obtained for the same as at the date that ASS entered into administration had Mr Jones not acted in breach of fiduciary duty as found.

ARM's case against Neutrino

Introduction

281. ARM's primary case against Neutrino has been put in terms of a liability to account as constructive trustee for knowing receipt in respect of payments made to it by ASS as a result of Mr Jones acting in breach of his fiduciary duties.

282. The alternative way that ARM put its case is that the relevant payments, to the extent that there was no consideration for the same, represented and were transactions at an undervalue within the meaning of s. 238 IA 1986. However, the case on this alternative basis was not pursued at trial, with Mr Doyle KC focussing on the knowing receipt claim.

Knowing receipt

283. Mr Doyle KC, on behalf of ARM, refers to the identification by Hoffmann LJ in *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 at 700 of the three essential requirements of a knowing receipt claim, namely:

> "*to establish a knowing receipt claim, a claimant must establish: first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty*".

284. As to knowledge on the part of a defendant, in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 at 485, Nourse LJ identified that: "*the recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt" and, "while a knowing recipient will often be found to have acted dishonestly, it has never been a prerequisite of the liability that he should*".

285. ARM's case in knowing receipt is very simple, and parasitic upon the findings of breach of fiduciary duty as against Mr Jones in relation to the payments to Neutrino. In short:

i) The payments were made in breach of fiduciary duty on the part of Mr Jones, if not also other Defendants, being a breach of fiduciary duty akin to a breach of trust given a director's, or a de facto director's duties in respect of company property;

ii) The monies, being company property, were received by Neutrino; and

iii) At the time of each impugned payment, Neutrino, through its sole director, Mr Jones, knew that the payment was made in breach of duty (because Mr Jones was responsible for causing it to be made) such that it is unconscionable for Neutrino to retain any such payment or any asset or monies representing the same. As to the knowledge of a company equating with that of its controlling director, see, e.g., Lewin on Trusts, 20th Ed, at 42-054;

iv) Consequently, a duty to account as constructive trustee arises, and it is irrelevant for the purposes of such a knowing receipt claim, that any such payment, or the value representing it, has been paid away or otherwise expended by Neutrino.

286. There was insufficient time at trial to get into the detail of submissions on this head of claim, but I understand Mr Jones' position on behalf of himself and Neutrino to be that there was no breach of fiduciary duty on his part, and so there can have been no question of any knowledge on the part Neutrino (through Mr Jones) that the monies had been applied in its favour as a result of Mr Jones having acted in breach of his fiduciary duties, and so the claim against Neutrino must fail.

287. However, I have found that Mr Jones did act in breach of his fiduciary duties to the extent identified above, and given that he was responsible for authorising the expenditure behind the relevant payments in his capacity as a de facto director of ASS, I consider that Neutrino's knowledge requires to be equated with that of Mr Jones and his own knowledge of the facts that constituted the breach of fiduciary duty.

288. In the circumstances, I consider that Neutrino is liable to account as a constructive trustee for the monies that it received that I have found were applied in breach of fiduciary duty, namely the relevant proportion of the monies that it did receive as referred to in paragraph 240 above.

Transaction at an undervalue

289. As to this head of claim, it is ARM's pleaded case that:

i) S. 238 applies where, at a *"relevant time"*, a company, amongst other things, enters into a transaction with a person on terms that provide for the company to receive no consideration – see s. 238(2) and (4).

ii) In the present case, ASS received no consideration for the reasons referred to above.

iii) The payments were made at the *"relevant time"* because they were made within two years of the onset of insolvency (i.e. the date of entry into administration), and at the time that the payments were made, ASS was unable to pay its debts as they fell due within the meaning of s. 123 IA 1986, or became unable to pay its debts in consequence of making the payments, the latter being presumed to be the case given that the payments were made to a person (Neutrino) connected with ASS – see ss. 240(1) and (2) IA 1986.

iv) The Court cannot be satisfied that ASS made the payments in good faith and for the purpose of carrying on its business, and that at the time it did so there were reasonable grounds for believing that the payments would benefit ASS, so as to entitle Neutrino to rely upon the statutory defence under s. 238(5).

v) Consequently, the Court ought to make an order restoring the position to what it would have been had not ASS made the disputed payments by ordering Neutrino to repay the sums the subject matter of the invoices that ARM contends relate to matters for which Neutrino has given no consideration for – see s. 238(1).

290. Although this transaction at an undervalue case is pleaded by ARM, as I have said, Mr Doyle KC indicated in opening that he was not pursuing this head of claim (because ARM did not need to do so). Consequently, I heard no argument upon it. In the light thereof, and given that I have found for ARM against Neutrino on an alternative basis, I do not consider it appropriate to make any findings upon this head of claim.

Overall conclusion

291. In conclusion, and in summary, I find that:

i) Mr Jones was a de facto director of ASS at the relevant time and owed fiduciary and other duties to ASS as such.

ii) Mr Jones acted in breach of those duties in causing certain but not all of the payments to Neutrino and Cumulo to be made. On my calculations, and subject to further submissions as to quantum and duplication of invoices, the claim is made out in an amount of £130,418.95 in respect of the payments to Neutrino, and £33,900 in the case of the payments to Cumulo.

iii) Mr Jones acted in breach of his fiduciary duties as a de facto director in causing ASS to transfer the ASS Business and Undertaking to AMR roughly contemporaneously with the entry of ASS into administration, and that, subject to further submissions as to remedy and how equitable damages should be assessed, that he is liable to pay equitable damages referable to the value of the assets wrongly transferred.

iv) Neutrino is liable to account as a constructive trustee for having knowingly received as applied in breach of fiduciary duty, out of the monies paid to it by

ASS, an amount equal to the value of the invoices that I have found have been successfully impugned, on my calculations the figure of £130,418.95.

v) Prima facie there is an entitlement to interest on the equitable damages awarded against Mr Jones and on the amount in respect of which Neutrino is liable to account as a constructive trustee. I will need to hear from the parities as to the basis thereof.

292. I will hear the parties on a future date, ideally no later than 30 April 2023, to be fixed, on all consequential matters. I adjourn the hearing and extend time for filing any appellant's notice until 21 days after that adjourned hearing.