Neutral Citation Number: [2023] EWHC 760 (Comm)

Case No: CC-2021-CDF-000001

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
CIRCUIT COMMERCIAL COURT (KBD)

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 3 April 2023

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

- -

Between:

(1) CAPITAL GREEN RECYCLING LIMITED **(2) ONE STOP RECYCLING LIMITED**	**Claimants**
- and -	
(1) STEVEN NICHOLAS BIRD **(2) AMY ALISON BIRD**	**Defendants**

- -
- -

Richard Ascroft (instructed by **Blake Morgan LLP**) for the **Claimants**
James Pearce-Smith (instructed by **Capital Law Ltd**) for the **Defendants**

Hearing dates: 28, 29, 30 November and 1, 2, 5, 6, 7, 8, 15 December 2022
Written submissions: 12, 13 December 2022

- -

Approved Judgment

This judgment was handed down remotely at 12 p.m. on 3 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

HIS HONOUR JUDGE KEYSER KC

His Honour Judge Keyser KC:

Introduction

1. The second claimant ("OSR") was incorporated in 2000 and has at all times carried on the business of a scrap metal merchant.

2. Until 16 December 2019 the defendants, Mr and Mrs Bird, who are husband and wife, were the sole directors of OSR and they and Mr Bird's mother, Mrs Bird senior, owned the entire issued share capital of the company.

3. By a share purchase agreement dated 16 December 2019 ("the SPA") Mr and Mrs Bird and Mrs Bird senior sold the majority of the issued share capital in OSR to the first claimant ("CGR"). Mr and Mrs Bird retained a minority shareholding in OSR.

4. CGR had been incorporated on 20 November 2019 for the purpose of buying the shares in OSR. Its directors were Mr Shyam Chhabria (who resigned as a director on 20 December 2019) and his son Mr Nirmal Chhabria, both of whom were and are resident in the United Kingdom, and Mr Sanjeev Gupta, who was and is resident in Singapore. Those three persons were also the directors of and persons with significant control of The Capital Green Group Limited, which had been incorporated on 19 November 2019 and was the person with significant control of CGR.

5. In these proceedings, CGR alleges that Mr and Mrs Bird were in breach of warranties contained in the SPA and that it was induced to enter into the SPA by misrepresentations made fraudulently or at least negligently by Mr and Mrs Bird. It claims damages for breach of warranty and for fraudulent or negligent misrepresentation. CGR also says that its investigations as majority shareholder since completion of the SPA have shown that Mr and Mrs Bird, as the directors of OSR, had previously approved the payment to themselves of dividends from OSR to which they were not entitled. Accordingly, OSR claims equitable compensation in respect of those wrongful payments. For their part, the Birds deny the claims and make some limited cross-claims that I shall deal with shortly.

6. From this point on, I shall for convenience, and without signifying any disrespect, refer to the central individuals as they were referred to at trial. Mr and Mrs Bird are respectively Steve and Amy and together the Birds. Mr Shyam Chhabria and Mr Nirmal Chhabria are respectively Shyam and Nirmal. Mr Sanjeev Gupta is Captain, a nickname he was first given by the man of the same name who is well-known as the founder of Liberty House Group (and whom, for the sake of clarity, I shall call Mr Gupta).[1]

7. The remainder of this judgment will be structured as follows. First, I shall set out a narrative of the background and of what I consider to be some relevant facts leading up to the entry into the SPA. Second, I shall set out the provisions of the SPA that are relevant to this case. Third, I shall set out some further narrative regarding events after the completion of the SPA. Fourth, I shall discuss in turn the heads of claim and cross-claim.

---

[1] In quotations from documents or witness statements, I shall generally substitute these various ways of referring to people for the other names or initials used in the original source.

8. Although the judgment contains a lengthy narrative and refers to various specific pieces of evidence, it will make no explicit mention of a great deal of the material adduced at trial. I have had regard to all of the evidence, but I only refer to such of it as seems to me to be of particular importance.

9. I am grateful to Mr Ascroft and Mr Pearce-Smith, counsel respectively for the claimants and the defendants, for their helpful submissions and for the pleasant, though forceful, way in which they conducted the case.

The Facts: Before the Share Purchase Agreement

Steve, Amy and OSR

10. Steve left school without any qualifications and before long had found employment in the scrap metal trade, becoming over time a highly experienced and accomplished trader both in this country and around the world. One of the companies with which he did business had a scrap yard in the East End of London, and it was there that he met the owner's daughter, Amy, whom he subsequently married. Amy is perhaps the central figure in the case. She stayed on at school to get some GCSEs but has no greater formal education. She spent some time in her youth as a model. However, in evidence she described herself, with obvious enthusiasm, as "a scrap girl". When she and Steve started trading via OSR in Birmingham in 2009, he did the buying and selling and she, though without any formal training, took responsibility for the accounting, financial and compliance aspects of the business, while at first also commuting from their home in Birmingham to work at the family company in London in order to help make ends meet. As the business expanded, the basic division of responsibilities remained: Steve did the buying and selling, and Amy had oversight of the office, though she also assisted in the trading and ran the home and a family of five young children. The manner of her evidence at trial, as well as the substance of the other evidence, leaves no doubt but that she is a person of very high intelligence and considerable ability. An important question in this case is whether these qualities were deployed under cross-examination in order to convey or to conceal the truth.

11. OSR's business grew rapidly. In 2016 it moved, for the third time, to a larger site comprising some 5½ acres[2]. By now, it had some 42 employees in the yard and the office. A full-time operations manager was taken on in 2017 to take on responsibility for the yard staff, maintenance and day-to-day compliance. There were several departmental managers, including Denise Haywood, the Accounts Manager. External consultants were engaged to ensure regulatory compliance and to deal with HR matters. A firm of accountants, Garratts, was engaged to prepare financial statements and quarterly management accounts. OSR's own office used two relevant software programmes. Sage was used for accounting; it was administered by Ms Haywood with the assistance of Summer Connolley and Sarah Boucher, who were responsible respectively for the sales ledger and the purchase ledger. Fred Metal and Waste Recycling software (FRED) was used to record loads passing through the site, whether sales or purchases, and posted its data directly to Sage. Amy's various responsibilities included liaison with the departmental managers, including Ms Haywood. She was proficient in the use of both Sage and FRED.

[2] The location of the site in Birmingham was advantageous in several respects that made it attractive to Nirmal and CGR. These are conveniently summarised in the expert report of Mr Geoff Mesher for CGR; I need not repeat them here.

12. In late 2016 OSR ordered a new, large shear, which was capable of cutting up roughly twice as much scrap per hour as the previous shear. This was a long-term investment, designed to make OSR's operations more efficient, but it came at a significant cost. The price of the shear was nearly £2,000,000 and the necessary groundworks cost roughly £500,000. Further, delivery of the shear was delayed by several months until September 2017, and in the meantime the company had been increasing its stock in anticipation of increased production. These things placed considerable pressures on OSR's cashflow position.

13. OSR's business was funded by a number of finance agreements, in addition to operating leases of equipment. There was a simple loan from Funding Circle, a multi-asset loan from Close Bros and a stock-based loan from Growth Street. OSR also had an invoice-discounting facility, initially with HSBC Bank, then with Aldermore Bank, and from June 2018 with Bibby Invoice Discounting Limited ("Bibby"). This facility ("the Bibby Facility") was a confidential invoice-discounting facility pursuant to an Invoice Finance Agreement dated 28 June 2018, which incorporated Bibby's Recourse General Conditions. It involved the assignment to Bibby of all existing Debts (as therein defined; in effect, all invoices rendered by OSR and unpaid) on the date of the Invoice Finance Agreement and the automatic assignment to Bibby of all Debts coming into existence thereafter. Bibby would make prepayment of Approved Debts at a rate of 88% for domestic sales and a rate of 80% for export sales. The Bibby Facility was subject to a funding limit of £2,500,000 and was supported by a debenture granted by OSR and by personal guarantees given by Steve and Amy. The warranties given by Steve and Amy in clause 6.2(A) of the Recourse General Conditions included warranties that the goods the subject of any Debt had been delivered to OSR's customer and that OSR had given Bibby complete and accurate details of the Transaction and the Debt. The operation of the Bibby Facility gives rise to a central issue in the case.

Shyam and Nirmal

14. Shyam has more than four decades of experience in the scrap metal industry. He has run his own business and has worked for TATA Steel in India and in the metal scrap division of Liberty Steel. When he gave evidence he came across as a pleasant and dignified man, though his involvement in the events relevant to this case was more limited than that of his son.

15. Nirmal has impressive business credentials. He graduated in Accountancy and Finance in Mumbai and with an MBA from Cardiff University. Thereafter he held roles in several large companies, including SIMEC Group and Liberty House Group, where he was assistant to Mr Gupta. In 2018 he was appointed as a Council member of CBI Wales, and in the same year he graduated with an Executive MBA from London Business School. Subsequently he went to work for a venture capital firm. His recent LinkedIn profile describes him as a "Restructuring & Turnaround Specialist"; "turnaround" refers to turning around businesses that are struggling or failing. The evidence shows that as well as having impressive qualifications and experience he is capable of great charm, as was evident when he was in the witness box. But it also indicates that he purposely uses this charm to further his own ends and that he is manipulative and untrustworthy. As for his own evidence, it was frequently obvious that he was unwilling to answer questions put to him until he had first ascertained whether he was constrained by documentary evidence that might

embarrass him if he gave an untruthful answer. Among pieces of evidence that were full of bluster and evasion were those concerning cash-flow constraints and the promise of immediate injection of cash after completion of the SPA (day 1) and his attempt to justify the pursuit, until shortly before trial, of a manifestly unsustainable claim in respect of a Metal Cash Card debt (day 2). Pieces of evidence that involved patently absurd attempts to avoid the truth included his explanations of revised terms discussed on 25 October 2019 and his understanding of an email sent by Amy on 9 December 2019 (day 2). Other examples, all of which hit the mark, were given by Mr Pearce-Smith in his closing submissions but need not be recited here.

Communications concerning a sale of OSR

16. Contact between the Birds and the Chhabrias began in 2016. OSR had a trading relationship with Liberty Steel's scrap metal division, where Shyam was working. Steve both liked and respected Shyam—Amy said in evidence that Steve regarded him as "a mentor figure"—and they got on well. During 2017 and 2018 Steve and Shyam significantly increased the amount of business being done between their two companies.

17. Between about late 2016 and the early part of 2018 there were significant discussions concerning a potential purchase of OSR by Liberty Steel. Shyam was not directly involved in these discussions, but both Mr Gupta and Nirmal were. At this stage, as I find, Nirmal began "showering [Amy] with compliments" (her expression) concerning her abilities and her potential. Conscious of her own lack of formal business qualifications, she was flattered that someone with such an impressive background in the business world should treat her in that manner. She now feels that Nirmal was manipulating her, with a view to obtaining information about OSR. I think she is right: although the terms of the compliments may well have been merited, Nirmal's charm offensive had the insincerity borne of self-interest.

18. Some months after the discussions had ended without agreement, in July 2018 Steve and Amy were invited to meet with Shyam and Nirmal at Liberty Steel's headquarters in London. Steve and Amy had, as I find, supposed that the purpose of the meeting would be to discuss renewed interest on the part of Liberty Steel, but in the event the discussions, which took place at a nearby restaurant, concerned a proposal for a joint venture between the Birds and the Chhabria family with a view to developing OSR's business. (Shyam had obtained permission from his employer to participate in these talks on his own behalf.) The discussion seems to have been tentative; no agreement was reached and, as Amy put it in evidence, things went quiet until July 2019.

19. There is an issue as to the circumstances in which discussions about a possible sale were renewed in July 2019. According to Shyam, who by now was heading Liberty Steel's scrap metal business, Amy and Steve approached him and enquired whether Liberty Steel might renew its interest in buying OSR; and, when Liberty Steel decided that it was not interested, Shyam suggested that Amy and Steve might be assisted in finding a buyer by Nirmal, who was by now working as Investment Director for Greybull Capital LLP, a private investment firm that specialised in acquiring and turning around distressed companies. According to Amy, the approach came from Shyam and Nirmal with an invitation to lunch at a restaurant in Birmingham. I prefer Amy's evidence on this point: she has a generally good memory and I think that Shyam has conflated events in 2018 and 2019.

20. At the lunch meeting, Nirmal made clear that he wanted Steve and Amy to remain at the company and that he envisaged a partnership of different skill sets; then as later, his talk was in terms of OSR being run by them all as one big family, something that greatly appealed to Steve and Amy. I find that Steve and Amy told him that the main thing holding back the growth of the business was that it was cash-strapped, and they expressed the hope that this in particular was where Nirmal's experience and connections would be valuable. In his written evidence Nirmal said nothing about any mention of cashflow problems, but in cross-examination he substantially confirmed Amy's evidence on the point, though qualifying it by saying that she mentioned that cash was limited "from time to time".

21. From that point onwards, Amy freely provided information to Nirmal whenever he requested it, as he accepted in cross-examination, although there was no non-disclosure agreement in place and she and Steve had taken no legal advice. Nirmal gave evidence that he repeatedly urged them to get legal advice and could not understand why they had not done so, but I think it more likely that he downplayed the need for such advice and encouraged them to proceed on the basis of friendship and partnership. This information was, of course, supplemental to the information that had been provided to the Liberty Steel team, of which Nirmal had been a part, in the earlier abortive negotiations.

22. The Chhabrias were not intending to finance the acquisition of the shares in OSR themselves. They were looking for an investor and turned to Captain. He had previously worked as a commodities trader and owned his own shipping company. In 2019 he was looking to buy a business of a kind with which he had not previously been involved and he had a budget of £2 million to £3 million for that purpose. He had been introduced to Nirmal by a mutual acquaintance while Nirmal was working for Liberty Steel and they became friends. When Nirmal approached him about funding the acquisition of a majority shareholding in OSR he met with a favourable response. The tenor of Captain's evidence was that he did not trouble himself with the details of the business, trusting rather to Nirmal to ensure that it was a worthwhile investment. His discussions about the matter with Shyam and Nirmal were, he said, conducted in "a very Asian way", with a focus not so much on business detail as on "synergies" between the Chhabria and Gupta families and his own desire to have a business in the UK when his own son was planning to move here. The agreement reached between Nirmal and Captain was that they would each hold 50% of the shares of the parent company to be used to purchase the shares in OSR, and that Captain would put up all of the money while Nirmal would have responsibility for the running of OSR together with the existing management team.

23. The arrangement between Nirmal and Captain gave Nirmal a strong incentive to get the deal with the Birds over the line, because his own money was not at risk and he would immediately take a 50% share of the holding company (representing, at the time, a 45% share of OSR).

24. On 21 August 2019, Amy and Steve met Captain for the first time, at their own home, along with Shyam and Nirmal. Nirmal produced a document that he had prepared in connection with the proposed purchase, entitled "Project Trident", and gave a presentation by reference to it. A section headed "Main Growth Levers" noted that increasing the proportion of export sales would "generate better margins and cash flow which gives the opportunity to bid for larger factory contracts", and that a

rebalancing of the product portfolio as between ferrous and non-ferrous would give enhanced revenue and margins, thereby helping to capture more material from demolition sites, which was "currently impossible due to cash restrictions". Nirmal's evidence was that this indicated his understanding that increased availability of cash was necessary for growth; he denied that he knew or believed that cashflow problems were affecting OSR's daily operations. In accordance with a section of the document headed "Core Cash Drivers", Nirmal and Captain confirmed that a trade line of $5 million would be available at the outset, with up to a further $15 million being available over the following three years. Steve and Amy understood that the initial injection of cash would be made by Captain personally, but his evidence was that he never intended putting any of his own money into the venture and planned rather to use his own shipping company, Netbulk, to raise money on finance. Captain also gave evidence that he never viewed OSR as a vehicle for making money; his intention was simply to use it to grow the business "platform" that he had in Singapore. This was consistent with his evidence to the effect that he was not greatly concerned with the assessment of the purchase price, provided it fell within his range of £2 million to £3 million, and that he did not concern himself with the details of the deal.

25. At this stage it was envisaged that Nirmal and Captain, through their new company, would acquire 90% of the shares in OSR and that Steve and Amy would retain 10% of the shares (these proportions were later altered) and would stay on in order to assist in the development of OSR. I do not think it likely that there was much detailed discussion about the price at this meeting; indeed, I find that there was very little discussion at all between the parties as to the method of valuation of the shares, as distinct from the price that would be paid, whatever may have been discussed between Nirmal and Captain.

26. On 23 or 24 August 2019 Steve, Amy, Shyam and Nirmal met at London Business School, whose offices Nirmal used as a base for his work on the proposed purchase. (Amy's statement said that the meeting was at the London School of Economics, but her understanding was mistaken.) Also present was Marco Danielli, a student at London Business School who assisted Nirmal with financial modelling. At this meeting Nirmal proposed that a price of £2.85 million would be paid for a 90% shareholding in OSR. I find that he explained the proposed price by reference to an EBITDA basis of valuation. However, the proposed price was neither arrived at nor agreed on the basis of such a calculation. Nirmal's evidence in cross-examination was to the effect that he first arrived at a price and then worked out the EBITDA multiple that would correspond to it. As for Steve and Amy, they had not carried out their own valuation exercise and I doubt how far they understood Nirmal's rationalisation of the proposal. While Nirmal took Amy for a tour around the college, Steve told Shyam that they were looking for a slightly higher price of £3 million. However, it was put to him that it was not worth allowing a relatively minor dispute over price to become a deal-breaker. Further, although recollections about precisely what was said have differed, it seems clear that Steve was made more amenable to accepting the offered price by the assurance that he would be the Chief Executive Officer of what was expected to be a large, even multi-national business. Thus the ground was laid for agreement of these basic terms over the coming weeks. The day after the meeting Nirmal sent an email to Steve and Amy:

> "Was a pleasure seeing you both yesterday and looking forward to a very successful and fruitful journey going forward.
>
> …
>
> Further to our discussion I am listing below the highlights of what we discussed.
>
> Bird family to receive £2.85m in total for the entire business
> …
>
> Both of you to have a combined total of 10% shareholding in the newco. No dilution on that front.
>
> Basic wage of £100k for each one of you. As regards the Dividend payment of £50k each , I will see as to which is the better and efficient way for the business to pay that, but the amount stands confirmed.
>
> All of the above is based around a successful due diligence and nothing overly surprising coming to light during that process. I don't think that would be the case as we discussed, based around all the discussions we have had that this based around our families collaborating and each one of us wanting to grow the business to be a substantial player within the metal recycling space. We are extremely positive and confident that with our joint strengths and skills the synergies and the outcome realised would be extremely rewarding for all of us."

Thus, the agreement was that Steve and Amy would each have annual remuneration of £150,000, although the precise way in which that would be paid remained to be decided.

27. During September and October 2019 further meetings took place, mainly at OSR's premises. I am satisfied that at one of these meetings, which must have taken place in September, Amy spoke to Nirmal about debts that were owed to OSR but were thought to be irrecoverable; these are mentioned below. Her evidence was that at the same meeting she also told him about the manner in which the Bibby Facility was being operated and that she mentioned this to him on a number of further occasions before completion of the SPA. On this latter point there is a conflict of evidence, both as to what was said and as to how the Bibby Facility was in fact being operated.

28. On 2 October 2019 Nirmal sent to the Birds an email with Heads of Terms attached, which had been prepared by solicitors instructed by him. These showed, as previously discussed, a price of £2.85 million for a 90% shareholding. However, Steve and Amy now decided that, as they were to remain in management roles within the company and there was to be an input of much-needed finance, they would prefer to retain a larger shareholding. This was discussed at a further meeting at London Business School on 25 October 2019, when it was agreed that Steve and Amy would retain a 20% shareholding and that the price for an 80% shareholding would be £2.06 million.

29. There is a conflict of evidence as to how that price was arrived at, which is relevant only to what it reveals about the principal actors. According to Amy, she proposed that, if 90% shareholding was worth £2.85 million, the price for an 80% shareholding ought to be £2.53 million, but this met with a patronising or even ridiculing response from Nirmal, who made her feel foolish in front of the others for her lack of understanding of business valuations; the result was that she lost the confidence to challenge his figure of £2.06 million; and then, when Steve left the meeting for some minutes, Nirmal and Shyam "showered [her] with compliments" as being the person who really ran the company. According to Nirmal, a price of £2.53 million was not proposed and the price of £2.06 million took account of an agreement at the meeting that the entire remuneration package would be in the form of an annual salary of £150,000 rather than a salary of £100,000 and a dividend of £50,000 (cf. the email at paragraph 26 above). I accept Amy's evidence on this point and reject Nirmal's evidence. First, it is inherently likely that Steve and Amy would be looking for the same *pro rata* price per share. Second, it is far from apparent why fixing remuneration as a salary should be considered a benefit worth such a large reduction in the price. Third, the alleged benefit of certainty by agreeing a salary is entirely illusory: when revised Heads of Terms were sent on 27 October 2019, the wording about remuneration ("A total remuneration package of £150,000 per annum (before tax) and comprising salary and/or dividends to be structured in the most tax efficient way for all parties") remained unchanged. When Nirmal was questioned about this in cross-examination, he said that Steve and Amy had wanted the wording left unchanged in order to provide maximum flexibility. This undermines his explanation for the disproportionate reduction in the price. Fourth, during this passage of his cross-examination Nirmal blustered and was evasive; he seemed to me clearly to be attempting to avoid giving direct answers to the questions put to him. In my view this points to a conclusion that is confirmed by the totality of the evidence: in his dealings with Steve and, in particular, Amy, Nirmal deployed his charm and commercial competence against their relative naivety, now flattering them as desirable business partners for his multi-national ambitions and now making them conscious of their comparative lack of commercial nous (despite Amy's innate intelligence, probably at least equal to his own, and Steve's very considerable skills as a trader); and thus he fostered a strong element of dependency on himself, particularly on Amy's part. One example of the flattery is in an email that Nirmal sent to Amy on 11 December 2019 after she had sent him some requested information:

> ":), Don't know what to say Amy, with each day it makes me even more confident that the wonders you could do with your time if you did not have to do everything by yourself. We are going to help make this positive change Amy soon."

30. As I have already mentioned, revised Heads of Terms were sent by Nirmal on 27 October 2019. Among the provisions that remained unchanged from the earlier draft were those in section 3, "Assumptions":

> "The Buyer has calculated the Price on the basis of the following assumptions:
>
> 3.1 the two trade debts owed to the Company by Belstand and the Metal Cash Card business which in aggregate amount to £595,115 and which are otherwise considered by the

> Sellers to be bad or doubtful shall not be taken into account for the purposes of agreeing the working capital figure at completion; and
>
> 3.2 all plant and equipment and motor vehicles used by the Company is sufficient for the business and is in reasonable working order, repair and maintenance."

In fact, the amended particulars of claim, paragraphs 52 and 53, contained an allegation that the Birds were in breach of warranty in failing to record the Metal Cash Card debt as a bad debt. That allegation was dropped only in the week immediately preceding the trial, despite the fact that the Heads of Terms showed that Nirmal was aware of the position. (The likely status of the debt as a bad debt was also declared in the Disclosure Letter provided for by the SPA.) When Nirmal was asked about this in cross-examination, he failed to give any plausible explanation for the inclusion of the allegation in the claim.

31. On 11 November 2019 Mr Danieli sent Amy, for checking and completion, a list of OSR's debtors. This showed that debts due and unpaid for more than 60 days amounted to approximately £592,000. This was later to assume significance in the light of the terms of the SPA.

32. On 18 November 2019 Amy and Steve met with Shyam and Nirmal at the Landmark Hotel in London. Amy asked to have a private conversation with Nirmal. The conversation concerned OSR's stock levels. The management accounts for 30 September 2019, which Amy sent by email to Nirmal on the day of the meeting, showed a closing figure for stock of £1,896,670. Amy told Nirmal that she felt that this figure was significantly overstated. The principal reason for this was that the new shear created large amounts of by-product, known as "dirt". The dirt was by no means without value, but before it was marketable it had to be screened, or "tromelled". Although OSR had invested in equipment to perform this operation, they had been unable to keep up with the production of dirt, with the result that there was a large build-up of dirt. Even though the dirt had a value, Amy decided that she would feel more comfortable if the dirt was not counted in the stock in her dealings with Nirmal; this would reduce the stock valuation to about 50% of that shown in the management accounts. In cross-examination she explained: "What I was saying to Nirmal was, 'Not all of the stock shown in the accounts is immediately sellable. I would feel more comfortable if we took the lower figure, because I don't want to mislead you guys.'" Nirmal confirmed in evidence that Amy had told him that the value of the stock was roughly half that shown in the accounts. In cross-examination he suggested, however, that the presence of dirt was a distinct matter, separate from what Amy had told him at the Landmark Hotel, and had meant that the value of the stock was much lower even than the figure acknowledged by Amy. I reject that evidence: it was made up on the instant, when Nirmal was trying to explain the problematic way in which parts of the amended particulars of claim were expressed, and it does not accord with any pleaded case advanced by CGR. Nirmal also said in cross-examination that Amy had explained to him that the figure for stock in the accounts had not been reduced on account of the dirt component, because the Bibby Facility depended on the net value of the business, to which stock levels were important. If (as I think) that evidence is correct, it tends to confirm that Nirmal was

aware that OSR's cashflow situation was tight and that the Bibby Facility was being abused.

33. There is some conflict of evidence as to what was said concerning the effect of an overvaluation of stock on the value of the company. According to Amy, the tenor of the discussion was that the overvaluation would have no effect on OSR's EBITDA. This appeared to be the meaning of Nirmal's witness statement also, but in cross-examination he said that the overvaluation would indeed affect the EBITDA. It is hard to know whether Captain's evidence makes the position more or less uncertain. He was not privy to the conversation on 18 November 2019 and learned about the issue over stock valuation in a telephone conversation with Nirmal. In his witness statement, Captain said that, although they were willing to proceed with the purchase, Nirmal would take advice on the effect of the overvaluation on the price, because they were acquiring a shareholding in a company with £1 million less of assets than they had believed it to have. However, in cross-examination Captain said that, although he had been concerned at the conduct involved in overstating the value of the stock, he had not been much concerned about the £1 million, as it did not affect either the EBITDA or his plans for OSR. (Captain actually said that he was not acquiring OSR in order to make money and that he was relatively unconcerned about losing £1 million or so, because it was money he could easily make elsewhere. He said that he saw OSR as a way of growing the platform that he had in Singapore.) Taking all the evidence together, I think that the conversation between Amy and Nirmal was to the effect that the overstatement of stock was unlikely to affect either the profits of the company or the price of the shares.

34. On 15 November 2019, Hawkins Hatton, the solicitors acting for the Birds, had sent to them and to Garratts a marked-up draft of the SPA received from CGR's solicitors, together with a 13-page table that explained Hawkins Hatton's views and sought information and responses from the Birds and Garratts. Remarkably, on 19 November Amy forwarded the document, including the comments made by Garratts, to Nirmal. This is one among many examples of Amy's naïve trust and confidence in Nirmal.

35. On 26 November 2019 Amy sent to Nirmal, at his request, the October management accounts. Like those for September, these showed an unadjusted figure for stock. The SPA was later to define the "management accounts" as those for October 2019.

36. On 9 and 10 December 2019 some significant emails passed between Amy and Nirmal. First, in the early afternoon of 9 December there was a sequence of communications concerning information provided by Amy in respect of the Sales Reserve; I show the sequence as drawn from the relevant emails.

> "NC What is the reason for the Sales Reserve reducing drastically?
>
> AB Just because it is the beginning of the month I would think.
>
> NC Once again can you tell me what forms part of it?
>
> AB The sales reserve is made up of scrap which has been delivered but not billed yet. It moves up and down

> considerably through the month. Tends to be higher at month end as we have built parcels up. or for example if there is 3 days 1&2 which is unbilled (1500 x £160).
>
> NC My understanding from our previous discussion was that the Sales Reserve forms part of your drawdown from Bibby towards orders that have not yet been invoiced for."

37. That evening, after what she described as "an intense day", Amy sent to Nirmal an email touching on a number of points. He replied on the following day, with an email that began as follows:

> "It was an intense day and I can imagine that not having done this before it can be a minefield. I know I keep saying this on the phone when we speak, but in true sense you are doing a great job and are truly a Super woman, managing the business, fire-fighting, plus the kids and on top of that going through this entire process, you do have superhuman abilities :), also trust me there is nothing to be worried about, as we have always worked at this deal with a lot of emotion and trust that we have laid on the families and individuals involved. So don't worry, once this is all done, I am confident your (sic) going to feel much lighter and refreshed as you will have us to share the challenges with you. 2 more days to go and we will be successfully through. Funds are ready and Captain is still here and looking forward to completion."

The main part of his response was provided by way of appending comments (which I show in italics) next to the text of Amy's email:

> "You have inserted 1.4m in working capital but the numbers worked today are lower? *(The £1.4m was supplied by us to James [Coade: see below] on Friday and your figures got to me this morning, so they would have already inserted this last Friday after we had spoken. Also the constant movement of WC downwards makes it very very difficult to plan for cash. But I have seen your email this evening to Stephen, and I will pick this up with him tomorrow and we will come to a mutual agreement on this, not to worry.)*
>
> Due to the Growth Street having to be paid (140k) I have delayed last quarters vat payment (200k) also due to the industry having a down turn and inland revenue not chasing it I have not paid the corp tax. You will remember I had a new funder lined up to take Growth Street out but you asked me not to do anything whilst we pushed this through. *(When is your VAT payment due by? Also when is Corp tax due by? I know about the funder you mentioned when we spoke back in October, but in hindsight I would say that you its better you didn't end up taking it, because, if you had the new line of*

> *funding and given that one of the clauses in that agreement would have been to provide management accounts, and given the issue with Stock and the write-down we have taken would have put the business in serious breach of covenant and that would have also raised alarm bells with Bibby, so I feel that it is better that you didn't end up going down that route.)*
>
> We discussed an MOU [memorandum of understanding] around stock but I just want to confirm that this is covered off in working capital figure. *(MOU around stock? Sorry don't remember what was that?)*
>
> I have also spoken with you previously about the Bibby facility and the drawing of funds once a contract is made but prior to delivery, I haven't put the stock or Bibby in the disclosure letter, do I need to? *(I am aware of this doesn't this comprise of your Sales reserve?)*
>
> I look forward to your comments tomorrow, we are very much still committed but this is a minefield for us and I am trying to make sure every base is covered. You have done this before— we haven't so I am sure it's normal to be worried. *(Amy I salute you for holding up so well and keeping your spirits high, if anything I promise we have a relaxing surprise for you for your birthday ;):) , jointly we are going to make OSR a leading name in the Scrap industry fingers crossed.)*"

38. I make a number of comments about this exchange. First, the main body of Nirmal's email was, as I find, typical of his manner of dealing with Amy, with its flattery of her as a "Superwoman" with "superhuman abilities" and its very personal and encouraging tone. Second, this has to be seen in the context of a situation in which Amy was in awe of Nirmal, and he well knew it. Third, the level of dependency that this was creating is shown in Amy's naïve request for Nirmal's advice as to what she ought to put in the Disclosure Letter. Fourth, Nirmal said in cross-examination that he had followed up his email with advice, given in a telephone conversation, that Amy should seek advice from her own solicitor regarding the Disclosure Letter. I do not believe that evidence. Fifth, although the amended particulars of claim alleged in paragraphs 46 to 50 that the defendants were in breach of warranty by overstating the value of the stock in the management accounts, Amy had in fact disclosed the overvaluation and even asked Nirmal in terms whether this ought to be put in the Disclosure Letter. Sixth, Nirmal's response did not directly address the question of what ought to be put in the Disclosure Letter. According to Amy, Nirmal told her by telephone that in order to get the deal "over the line" it was important not to say anything to Captain about the use of the Bibby Facility and therefore not to mention it in the Disclosure Letter. I accept that evidence. Seventh, it was clear from Amy's email that OSR's cash constraints were affecting its daily operations, not merely its capacity for growth. Nirmal did accept this in cross-examination. Eighth, Nirmal was anxious not to do anything that might alert either Bibby or any potential new funder to an overvaluation of the stock. Ninth, it was for that reason that he had told Amy not to conclude a new finance deal after Growth Street had pulled out of the market. It

was the gap in financing, caused by Growth Street's withdrawal, that led OSR to fail to pay its tax on time in December 2019.

39. On 10 December 2019 CGR's solicitors, Blake Morgan, sent an email to Hawkins Hatton, raising a number of points. One of these was that, although CGR had originally intended to refinance the borrowing from Funding Circle within 90 days of completion, the recent write-down of stock had "caused issues around [CGR's] budgeting and future cash planning", so that the proposal now was to refinance that borrowing within the next 6 to 12 months. Nirmal said in cross-examination that he could not remember whether that had been written on his instructions; that is surprising, as in my view it must have been.

40. I have mentioned (paragraph 29 above) the flattering email that Nirmal sent to Amy on 11 December 2019. Something of the trust that she was placing in him appears from an email that she sent him on 12 December 2019. She had been asked, apparently by her solicitors, to comment on the way in which the draft provisions of the SPA dealt with the management accounts. Amy forwarded the enquiry to Nirmal, with the comment: "I have to go back on the below, obviously the October [2019 management] accounts do not have the adjusted stock in them. I am not sure how to respond." In cross-examination, Nirmal disputed the suggestion that Amy had been asking for his guidance on how to respond; he said she had just been keeping him "in the loop". However, his response to the email was: "Let me speak to Stephen [an accountant] and I will come back to you." Clearly, Nirmal understood very well that he was being asked to help Amy with her response to her own advisers.

41. On 13 December 2019 Amy sent to Nirmal an email that asked for confirmation of a number of matters that had been discussed between them that afternoon. His responses are italicised:

> "Acquisitions
>
> Should an opportunity for an acquisition arise and One Stop Recycling can afford to raise the capital required without adversely affecting the current business then it will be deemed as under the One Stop Recycling umbrella and Steve and I will automatically own 20% of it, all be it that on paper it would just mean the value of the company as a whole would increase. *(As discussed this afternoon, that our first priority is making sure that we get One Stop Recycling running effeciently and not being cash starved, given the current situation with the stock write down and also with the neighbouring site that we have mutually decided to take back from the existing tenants and wish to expand and grow the One Stop operations further into, it is clear that in the short term One Stop Recy's requirement for capital is greater than we originally anticipated, but we have now budgeted for that. Hence as we discussed when the opportunity to acquire a new business arises, and if OSR at that moment in time has free cash in the business, which can be used to (fund the equity and if required any portion of debt in the target business) (sic), most certainly we will do that as long as it does not*

jeopardise the operations of OSR and puts the business in any kind of stress. In the case of such an acquisition, definitely both you and Steve will automatically own 20% of that new acquired business and this would add to the value to the existing OSR business for sure.)

Should an opportunity arise for a much larger acquisition - say £10m that One Stop could not afford then we would have the option to buy in. It would be a seperate (sic) entity and should we choose to buy in it would be in return for share capital in that company. *(Yes the fundamental of what you say above is correct, but it is really hard to put a definite number and define a exact value for a large and small acquisition, what I would say is that the decision to fund a new acquistion with or without OSR money or would depend purely around the timing of the acquisition and also what is the cash position of OSR as a business at that moment in time. That would help us decide whether we use cash from the OSR business to fund the new acquisition or we raise fresh capital, I think we can take a call on this purely based around the health of the business at that moment in time, but your (sic) right, where in if we have to raise capital from outside (ie not use OSR funds) to fund such acquisition, it would be a in a separate (sic) entity separate (sic) to OSR but both you and Steve will be able to buy in return for share capital, should you choose to do so.)*

Steve is keen to understand what the threshold for acquisitions in One Stop would be but I am of the opinion that it would depend on the profits/health of the company at the time of the acquisition and as such it would be difficult to attach threshold but if you think otherwise please let me know. *(Absolutely correct Amy, none of us has a crystal ball, hence as you mention it is hard to attach a threshold, what I would say that in the next coming months, the focus would be stabilise the OSR business the cash position and prepare towards the start of operations on the neighbouring site, which is going to require further capital, our aim should be to get that running absolutely effeciently (sic), which I am confident that given the business partnership we are creating, and given our individual expertise and skill we should get this ship sailing effeciently (sic) and smoother which would in turn help bring organic growth to the business.)*

Amy as we discussed on the phone, both of us have looked at this deal and all along have had a very reasonable and pragmatic approach, and we have come a long long way, under no circumstances do we want either parties to feel unhappy with anything. Hence I said from the start that I want you and Steve to stay with us all the way to the end,

> *because I have a lot of trust and faith in the 2 of you, and I am sure you do the same in us.*
>
> Dismissal
>
> The buyer has stated we cannot have our employment terminated without serious cause. Therefore, our shares would not be subject to compulsory sale. I understand serious cause to be fraud, theft or anti-competition rules being broken among other items already covered in the agreements. *(I will send you a seperate (sic) response in a seperate (sic) mail to you on this as I have spoken to Jo at Blake Morgan and I will copy her in, so if you have any questions Jo will be happy to answer them to clear any doubts.)*"

42. The SPA was executed and the sale completed on 16 December 2019.

The Share Purchase Agreement

43. The SPA identified Steve, Amy and Susan Bird as "the Sellers" and CGR as "the Buyer". By clause 2 and Schedule 1, the Sellers agreed to sell certain shares (the "Sale Shares") in OSR ("the Company") to the Buyer: Steve, 40 Ordinary Shares; Amy, 40 Ordinary Shares; Susan Bird, 1 A Ordinary Share.

44. Clause 3 provided that, subject to clause 3.4, the Price for the Sale Shares was £2,060,000. Of this, £1,236,000 ("the Completion Payment") was to be paid on completion of the sale and purchase of the Sale Shares, and the balance of £824,000 ("the Deferred Consideration") was to be paid (subject to paragraph 4 of Schedule 7) in equal instalments of £412,000 on 16 December 2020 and 16 December 2021.

45. Clause 3.4 provided:

> "The Price shall be subject to adjustment as follows:
>
> 3.4.1 if there is a Net Debt Excess, the Price shall be reduced by an amount equal to the Net Debt Excess; and
>
> 3.4.2 if there is a Working Capital Shortfall, the Price shall be reduced by an amount equal to the Working Capital Shortfall."

Relevant definitions were contained in Schedule 7. "Working Capital Shortfall" was defined as the amount by which the Actual Working Capital was less than the Target Working Capital of £1,282,000. "Actual Working Capital" was defined as the aggregate current assets (excluding Cash as defined) less the aggregate current liabilities (excluding Borrowings as defined) as at the Completion Date and as set out in the "Completion Accounts" (the statement of the financial position of OSR as at the Completion Date, which were to be drawn up in accordance with the further provisions of Schedule 7). The effect of these provisions was that the Price would be reduced by the full amount of any Working Capital Shortfall, even though it related only to 80% of the shares in OSR. Clause 3 further provided:

> "3.5 Following Completion the parties shall procure that the Completion Accounts and the Adjusted Price Statement are prepared and agreed or determined in accordance with Schedule 7 (Completion Accounts).
>
> 3.6 Following agreement or determination of the Completion Accounts and Adjusted Price Statement in accordance with clause 3.5 and Schedule 7 (Completion Accounts) if the amount of the Price as set out in the Adjusted Price Statement is less than £2,060,000 (two million and sixty thousand pounds), the Sellers shall pay to the Buyer an amount equal to the shortfall in cash on or before the Adjusted Price Payment Date.
>
> 3.7 The Price shall be deemed to be reduced by the amount of any payment made to the Buyer for each and any Claim and any payment made to the Buyer in accordance with clause 3.6."

"Claim" was defined to mean "any Indemnity Claim, any Warranty Claim and any Tax Covenant Claim". "Warranty Claim" was defined to mean "a claim for breach of any of the Warranties or Tax Warranties". "Warranties" was defined to mean "the warranties contained in Schedule 3 Part 1 (General Warranties) and Schedule 3 Part 2 (Tax Warranties")". This case is concerned only with the General Warranties.

46. Warranties were dealt with in clause 6 and Schedule 3. Clause 6.1 provided:

> "The Warrantors jointly and severally warrant to the Buyer that each of the statements in Schedule 3 is true accurate and not misleading in all respects."

"Warrantors" was defined to mean Mr and Mrs Bird. Further relevant provisions in clause 6 were as follows:

> "6.3 Each of the Warranties is separate and without prejudice to any other Warranty and (except where this Agreement expressly provides otherwise) shall not be limited or restricted by reference to or inference from any other term of this Agreement or any other Warranty.
>
> 6.4 Warranties qualified by the expression **so far as the** Warrantors **are aware** or any other similar expression, are deemed to be given to the best of the knowledge, information and belief of the Warrantors having made reasonable enquiries of each other Warrantors.
>
> 6.5 The Warranties (other than the Fundamental Warranties) are given subject to all matters Disclosed and save as expressly provided in this Agreement, no information of which the Buyer its agents or its advisers has constructive or imputed knowledge, or which could have been

> discovered (whether by investigation made by the Buyer or on its behalf), shall prejudice or prevent any Claim or reduce the amount recoverable by the Buyer under this Agreement.
>
> 6.6 The Fundamental Warranties are not subject to any matters Disclosed or to the limitations on claims set out in Schedule 4.
>
> 6.7 The parties agree that:
>
> 6.7.1 all Warranty Claims other than Fundamental Warranty Claims shall be limited in accordance with, and to the extent provided for in, Schedule 4 (Limitations on Claims) …
>
> except to the extent that any claim arises or is delayed as a result of dishonesty, fraud, wilful concealment or wilful misconduct on the part of the Warrantors."

"Fundamental Warranties" was defined to mean "the warranties of the Sellers set out in paragraphs 1 and 2 of Schedule 3 Part 1 (General Warranties)". This case is not concerned with Fundamental Warranty Claims.

47. Among the extensive warranties in Part 1 of Schedule 3 were the following paragraphs:

> "4.2 The Accounts [i.e. OSR's audited financial statements for the accounting reference period ended on the Accounts Date, namely 30 June 2019]:
>
> 4.2.1 have been properly prepared and audited in accordance with all applicable law and Accounting Standards;
>
> …
>
> 4.2.3 give a true and fair view of the assets, liabilities, commitments and state of affairs of the Company at the Accounts Date and of the profits and losses of the Company for the accounting period which ended on the Accounts Date;
>
> …
>
> 4.2.5 properly reflect the financial position of the Company as at their date;
>
> 4.2.6 comply with the requirements of the Companies Act and all other applicable laws and regulations in the UK;

…

4.2.8 make proper provision or reserve for bad and doubtful debts, obsolete or slow-moving stocks, non-chargeable work-in-progress and for depreciation on fixed assets;

4.2.9 make proper provision or reserve for all liabilities and capital commitments of the Company outstanding at the Accounts Date, including contingent, unquantified or disputed liabilities".

"5.1 The Management Accounts [i.e. "the unaudited accounts of the Company comprising a balance sheet as at 31 October 2019 and a profit and loss account for the period which commenced on 1 July 2019 and ended on 31 October 2019, true, complete and accurate copies of which are included in the Disclosure Documents"]:

…

5.1.2 do not contain any material inaccuracies and fairly represent the income and expenditure of the for [sic] the period to which they relate".

"6.1 Since the Accounts Date:

6.1.1 the business of the Company has been continued in the ordinary and usual course and as a going concern".

"7.1 All the accounts, books, ledgers, financial and other records (Records) of the Company:

7.1.1 are in its possession;

7.1.2 have been fully, properly and accurately prepared and maintained;

7.1.3 do not contain any material inaccuracies, discrepancies or omissions;

7.1.4 constitute an accurate record of all the matters required by law to appear in them and in the case of the accounting records comply with the requirements of section 386 and 388 of the Companies Act 2006."

"9.2.5 There are no circumstances or matters which might affect or prejudice the continuation of any of the

> Facilities or which might give rise to any alteration in any of their terms."
>
> "9.5.1 The Company has at all times conducted and is conducting its business in all material respects in accordance with all applicable laws and mandatory regulations whether of the UK or elsewhere."
>
> "11.4 No party is in default under any Material Contract [essentially, a contract of significant financial value and with a financially significant customer or supplier of One Stop, which had not been fully performed at the date of the SPA], no such default has been threatened and as far as the Warrantors are aware there are no facts or circumstances likely to give rise to any such default."
>
> "15.2 The plant, machinery, vehicles and other equipment used in connection with the Business are in working order and have been maintained and are not to any extent surplus to requirements or obsolete."

48. Clause 1.1 contained certain definitions that are relevant to the words "subject to all matters Disclosed" in clause 6.5 and to the provisions relating to Management Accounts in paragraph 7 of Schedule 3:

> "'Disclosed' fairly disclosed to the Buyer, expressly for the purposes of this Agreement, in the Disclosure Letter, giving sufficient detail to enable the Buyer to identify the nature and scope of the matter disclosed;
>
> 'Disclosure Documents' the documents and information contained in an electronic data room maintained by the Sellers' Solicitors named Project_Trident the contents of which are contained in two identical data CDs the outside covers of which have been signed for identification by or on behalf of the Sellers and the Buyer and annexed to the Disclosure Letter;
>
> 'Disclosure Letter' the disclosure letter of the same date as this Agreement from the Sellers to the Buyer together with the Disclosure Documents".

49. Pursuant to clause 6.7 above, Schedule 4 provided for "Limitations on Claims" for breaches of the General Warranties. The following paragraphs are relevant:

> "2.3 The liability of the Warrantors in respect of a Warranty Claim … shall be limited to 80% of the actual claim on the basis that the Warrantors retain 20% of the issued share capital of the Company."

> "3.1 The maximum aggregate liability of the Warrantors in respect of all Warranty Claims … shall not exceed the Price."
>
> "3.3 The Warrantors will have no liability in respect of any Warranty Claim to the extent that such Warranty Claim:
>
> > 3.3.1 relates to facts, matters, events or circumstances that are within the actual knowledge of the Buyer at the date of this Agreement as constituting an actionable breach of Warranty as at Completion. For the purposes of this Agreement, the actual knowledge of the Buyer shall be limited to the actual knowledge of Nirmal Chhabria only;
> >
> > …; or
> >
> > 3.3.3 was Disclosed."
>
> "8. The Warrantors shall have no liability in respect of any Warranty Claim if and to the extent that any specific allowance, provision or reserve was made in the Accounts in respect of the matter or circumstances giving rise to the Warranty Claim."
>
> "12. The Buyer shall not be entitled to recover more than once in respect of any particular loss or damage suffered in respect of a Warranty Claim."

50. Clause 19 was an "entire agreement" clause:

> "This Agreement, the Disclosure Letter and the documents in the Agreed Form and all agreements entered, or to be entered into, pursuant to the terms of this Agreement or entered into between the Sellers and the Buyer in writing and expressly referring to this Agreement:
>
> 19.1.1 together constitute the entire agreement and understanding between the parties with respect to the subject matter of this Agreement; and
>
> 19.1.2 (in relation to such subject matter) supersede and extinguish all prior discussions, correspondence, negotiations, drafts, promises, assurances, warranties, understandings and agreements between the parties and their agents (or any of them)."

51. Some further provisions of the SPA will be mentioned below when the counterclaim is considered.

Facts: After Completion of the Share Purchase Agreement

52. On 17 December 2019, the day after completion of the SPA, Steve and Amy went out for dinner with Nirmal and Captain. Captain's evidence was to the effect that the Birds' body-language and conversation were not what he would have expected at a

celebratory dinner—in particular, they kept emphasising that things in the company were "very tight" and that an injection of money was required immediately—and that he sensed that something was wrong. It may be that Captain was discomfited at what he thought was socially inappropriate behaviour, but I do not think that there was any more involved than an expression of the anxiety that Amy in particular felt about the immediate need for an injection of funds.

53. On 18 December 2019, Steve and Amy, Shyam, Nirmal and Captain were all present at OSR's premises. Also present were James Coade, Anthony Hall, and Mr Danieli. Mr Coade was a qualified accountant and had for some years been working for a number of different companies, mainly in the energy sector, as a full-time interim accountant. Nirmal, with whose brother Varun Mr Coade was good friends, had approached him in October 2019 with a view to becoming Finance Director of OSR after completion of the SPA, and it had been agreed that Mr Coade would take up that position in March 2020, when his existing consultancy contract ended, and in the meantime would work part-time for OSR at weekends. Mr Coade is still Finance Director for both OSR and CGR. Mr Hall, too, is an accountant. He is, among other things, a director and the person with significant control of Gorilla Park Investments Ltd, which carries on accounting, auditing and management consultancy activities. Mr Coade was appointed as a director of that company in 2018 and his evidence was that it specialised in turnaround projects for struggling companies. Mr Coade had introduced Mr Hall to Nirmal, with a view to him carrying out work for OSR until Mr Coade could take up his full-time duties. In fact, Mr Hall was taken ill on 18 December, had to leave at lunchtime and had no further involvement.

54. CGR's case is that it was on 18 December 2019 that it became aware that Amy had been abusing the Bibby Facility. Much evidence was given on this point, which I shall summarise, witness by witness.

- Mr Coade: After an initial meeting with Nirmal, Shyam and Captain, he was introduced to Amy. Then he, Mr Hall, Mr Danieli and Amy sat around her desk while she explained the processes in place at OSR. It was then that Amy explained that, because of problems with cashflow, she had created (what Mr Coade called) False Invoices for customers for product that had not left the site and had then used those False Invoices to draw down on the Bibby Facility. This came as a shock to Mr Coade, who immediately realised that the practice was wrong. He told her that they would have to look into the practice. Mr Coade, Mr Hall and Mr Danieli then went to the OSR boardroom, where they told Nirmal and Captain what Amy had told them. "[I]t came as a huge shock to [Nirmal] and Captain, as well as everyone else in the room. I think it is fair to say that, from that moment, there was a real nervousness in the boardroom about what people had got themselves involved into." It was a "bombshell". Nirmal spoke to Amy and told her that "she must cease the practice of raising advance invoices immediately" (statement, paragraph 14). Later that day, Amy showed them a list, which she called "the Amy List", which kept a record of the advance invoices. Mr Hall advised her to rename it "the Bob List", though Mr Coade did not think it mattered much what it was called. What Mr Coade describes is what I shall call Advance Invoicing: the practice of drawing down on the Bibby Facility against orders that had not yet been despatched to the customers.

- Mr Hall: Within 10 to 15 minutes of starting to explain procedures to Mr Coade and Mr Hall, Amy told them about the misuse of the Bibby Facility. In cross-examination Mr Hall said that what was described was not simply Advance Invoicing but what has been referred to in these proceedings as Fresh Air Invoicing: drawing down against fictitious orders, in the expectation that the named customer would at some future date place an order that could be used to balance the books. It felt as though Amy were making a confession. Mr Hall left to go to the lavatory and took the opportunity to recount what he had been told to Nirmal, who was visibly shocked. In cross-examination, though not in his witness statement, he said that there had also been a meeting in the boardroom, as described by Mr Coade. He said that he could not remember the sequence of events; it seems to me that the account makes sense only on the basis that the conversation en route to the lavatory came before the boardroom meeting, and this gains some support from paragraph 8 of Mr Hall's witness statement.

- Nirmal: Shortly after Amy had begun to talk Mr Coade and Mr Hall through OSR's operating procedures, she came out to speak privately to Nirmal and asked him if she could tell them about the position regarding stock. Nirmal told her to be open with them and tell the exactly how everything stood. Later, Mr Coade and Mr Hall came into the boardroom, where Nirmal was with his father and Captain, and asked if Nirmal had been informed about the situation with Bibby. When Nirmal asked what he was talking about, Mr Coade explained that Amy had been drawing down on the Bibby Facility in relation to orders that had not been fulfilled. This was the first that Nirmal had heard of this practice; it came as a complete shock to him and the others. Having previously believed that he had paid for a healthy, solvent business, he was now concerned about how bad things might be and decided that the matter required a proper investigation. He immediately told Amy that the practice of Advance Invoicing was unacceptable and had to stop straight away. His trust in her was largely undermined, though in view of her central role in the management of the company and the small number of employees he had to carry on working with her. On the same day, Amy dropped "another bombshell" by telling him that £500,000 was needed immediately as the business had no cash with which to pay wages.

- Amy: Amy spoke to Nirmal before speaking to Mr Coade and Mr Hall. He told her to tell them everything she had told him about the use of the Bibby Facility and told her not to worry, because Mr Coade was "not a vanilla accountant" and knew "how to sort these things out". She took this to mean that, with the investment that would be coming from Captain, Mr Coade would help to regularise the position with a minimum of fuss, so that the Bibby Facility was used correctly in future. Therefore she explained the position to Mr Coade and Mr Hall, explaining too that the Amy List would have to be used in conjunction with the Debtors' List in order to enable them to chase up outstanding debts. They laughed at her for calling the list of Advance Invoices by her own name, and Mr Hall suggested renaming it the Bob List. Mr Coade said that he had been involved with businesses in far worse situations and there was no cause to worry

55. I accept Amy's evidence on these matters as being broadly accurate.

1) My assessment of the evidence as a whole leads me to the view that Nirmal has deliberately tried to paint a false picture of being misled into buying a failing business which he had believed to be healthy. In fact, he received very detailed financial information concerning OSR, because he already had extensive knowledge of the business through his earlier involvement while acting for Liberty and because Amy had given him everything that he asked for and had been so in thrall to him that she had done so with a lack of prudence. The probability, in my view, is that he sought the involvement of Mr Coade and Mr Hall because of his awareness of the problems that OSR faced and, I think, because he was interested in establishing grounds on which he could avoid so far as possible the payment of any price for the shares.

2) It is highly unlikely—and, in my view, psychologically practically impossible—that Amy would have concealed from Nirmal a practice that she immediately confessed to Mr Coade and Mr Hall, who were strangers to her.

3) Mr Coade seemed to me to be a manifestly partisan witness. That does not itself mean that his evidence is false but it does mean that I treat it with considerable caution because, bluntly, I regard him as a hired gun. This is important, because much of CGR's case on breach of warranty rested not only on Mr Coade's factual evidence but on his presentation of data via detailed spreadsheets that were not subject of analysis by the experts who were expressly under rigorous duties of impartiality. That said, it is to be noted that Mr Coade's evidence as to the practice described by Amy (statement, paragraph 13) and subsequently by Ms Haywood (statement, paragraph 44) concerned what was ostensibly Advance Invoicing, not Fresh Air Invoicing, although he himself analyses them as being more correctly the latter (statement, paragraph 52).

4) I place little reliance on Mr Hall's evidence for a number of reasons. (a) His involvement was fleeting and it is clear that he was unwell even while he was present at the premises. (b) I regard it as certain that Amy described only Advance Invoicing and not Fresh Air Invoicing, and it seems to me that Mr Hall's recollection has been contaminated by information provided to him later. (c) As already stated, Amy would not have been confessing to Mr Hall if she had not also confessed to Nirmal. (d) Nirmal can only have been "shocked" once: if he was shocked when Mr Hall spoke to him on the way to the lavatory, he will not later have been shocked in the boardroom. (e) Mr Hall described a further admission by Amy to the effect that she and Steve had taken £250,000 from OSR and they were gradually paying it back: that is not an allegation otherwise made, no such confession would have been made to Mr Hall in those circumstances, and I do not accept the evidence. (f) Mr Hall's suggestion that the list of improperly used invoices be renamed the Bob List does not sit well with his professed belief that it was a record of fraudulent conduct at which he was shocked.

5) The very fact that the Amy List was re-named the Bob List suggests that the practice of Advance Invoicing was probably not being required to be discontinued.

6) The WhatsApp exchanges between Amy and Nirmal on 19 December 2019 give no indication of any untoward developments the previous day. In particular, at 10.27 a.m. Nirmal wrote: "Morning amy good day yesterday. We covered a good amount." And, after some further messages of no present relevance, at 10.31 a.m. Amy wrote: "Thanks for yesterday I feel so much better, really looking forward to next year."

7) If there had really been shock, horror and dismay at revelations made on 18 December 2019, such as called into question the commercial viability of the deal and the trustworthiness of the Birds, one would have expected the disclosure of significant amounts of resulting emails, texts or WhatsApp messages among those involved for CGR. No such disclosure has been given. I infer that the communications one would have expected do not exist.

8) The practice of Advance Invoicing was not in fact discontinued, as the Daily Files showing the financial position of the company show. If Amy had been instructed to stop the practice, it is likely that she would have done so. Moreover, the Daily Files were sent to Nirmal and to Mr Coade. They included the Bob List, which showed that the balance was fluctuating; this in turn showed that Advance Invoicing was continuing. Nirmal's response to this point was that he had neither the time nor the expertise to understand the spreadsheets. I do not believe that. In cross-examination he said, by way of explanation, that he had to work on the basis of "a great deal of trust". That is scarcely consistent with his previous evidence that the disclosure of Advance Invoicing had damaged his trust in Amy and that by January 2020 that trust was "completely destroyed" (below). Nor is it consistent with another explanation that he gave in cross-examination, namely that he could not be expected to understand how the files worked and that the dates on them could have been made up. Mr Coade claimed a lack of understanding of the spreadsheet that contained the Bob List; this, however, is incredible, in the light of Mr Coade's proficiency with spreadsheets and the simplicity of the Bob List, and as Mr Pearce-Smith observed it would have been easy to ask Amy for an explanation of things he did not understand.

9) A specific example of the last point concerns the production of five manual invoices (that is, Word invoices, not entered on the Sage system) for Liberty Steel in March and April 2020. These resulted in the issue of a default notice by Bibby in August 2020 on the grounds that the debts had not existed. In cross-examination Nirmal sought to attribute this scheme to Amy and to absolve himself from responsibility on the basis that the files were in disarray and he could not understand or follow them. However, it seems to me quite clear that the scheme was directed by Nirmal, in conjunction with Mr Coade. In this entire passage of evidence, near the end of his cross-examination, Nirmal appeared to be doing his best to avoid straight answers to the questions put to him and to be introducing as much confusion as he could. Mr Coade claimed in cross-examination that it was the discovery of the Liberty Steel invoices that caused him to launch his disciplinary investigation into the Birds (see below). I reject that evidence. I think it likely that the impetus for the initiation of disciplinary proceedings was the realisation that negotiations with the Birds over the price were unlikely to yield further benefits.

56. On 20 December 2019 Captain caused his company, Netbulk, to advance £550,375 to OSR. I am satisfied that this was a loan. However, OSR issued a pro forma invoice in the full amount of the advance, purportedly for goods. This was arranged by Nirmal, at Captain's insistence, and was an attempt to manufacture security for the loan: if OSR defaulted on repayment, Captain intended to claim that property in goods of an equivalent value had passed. However, there was in fact no underlying contract for the sale of goods. On 9 January 2020 Captain caused Netbulk to advance a further loan of £570,000 to OSR. Netbulk made further advances to OSR of £189,993 on 31 January 2020 and £139,993 on 6 March 2020. These further advances were also supported by pro forma invoices, purportedly in relation to the sale of goods[3]. When he was recalled to be further cross-examined in the light of his further disclosure and production of a second witness statement, Nirmal said that the use of the pro forma invoices was a scheme cooked up by the Birds in discussion with Captain, and he denied that he had known that the invoices did not represent genuine sale transactions. Both parts of that assertion were a plain lie.

57. After the completion of the SPA, Amy continued with the day-to-day management of OSR's office and Steve was in charge of purchasing and procurement. Mr Coade came in at weekends and spoke frequently to Nirmal, who was living in London. Nirmal's evidence was that his initial confidence in Amy and Steve to manage the business had been "completely destroyed" (witness statement, paragraph 53) as a result of what he had learned of the use of the Bibby Facility and Amy's requests, first in December and then again in early January 2020, for large injections of finance. He stated that, as he became more accurately aware of the operations of the business, he learned a number of things that increased his concern: Steve was entering into unprofitable transactions to generate quick cash ("robbing Peter to pay Paul"); there was a large amount of dirt even in the screened material, rendering the stock of even less value than Amy had admitted to; relations between the Birds and certain members of staff were poor. (A number of allegations that were made in Nirmal's witness statement and in the particulars of claim were not pursued at trial.) Nirmal stated that money that had been earmarked for development and growth was found to be required for the purpose of keeping OSR afloat from day to day; the company was close to insolvency. By the time of the first national lockdown in March 2020 CGR had not (he said) been able to get to the bottom of all the problems facing the company, but the problems were increased by the lockdown itself.

58. On 17 February 2020 the Birds produced the first draft of the Completion Accounts, which had been prepared by Garratts.

59. On 25 March 2020 Haines Watts, the accountants acting for CGR, sent to Garratts revised draft Completion Accounts and a revised price adjustment statement. These included a downwards adjustment of about £750,000 in respect of sales invoices that had been raised prior to completion of the SPA but in respect of which deliveries had been made after completion of the SPA. By email on the following day, Mr Hitchens of Garratts queried this with the Birds:

---

[3] Most of Captain's evidence on this matter, both written and oral, was clearly to the effect that the invoices were for the purpose of enabling Netbulk to make a proprietary claim in the event of OSR's insolvency. However, in cross-examination Captain also said that, on the contrary, the invoices were not for that purpose but were intended to place pressure on Amy to ensure that the advances were repaid. If that evidence made sense, it has eluded me.

> "You will have received the information from Haines Watts and the revised adjustment calculation. You will note that the circa £750K negative adjustment appears to relate to sales invoices you raised prior to 16 December which related to sales after that date. Thus sales raised in advance. Can I please have your comments on this as I have a call with Haines Watts on Monday to discuss the adjustments and this one is the only one that has any effect on the clawback.
>
> I can't believe you would have raised £750K of sales invoices in advance so hopefully there is an explanation to remove this adjustment?"

Amy replied:

> "This is correct Terry - hence the reason for the sale.
>
> It was a really terrible situation we were in and this had actually been the case for about 5 years. The damage had been done during the site move from next door when it went up to about 1.2m, just couldn't get it back down. They have known about it since the first day in December when we were all in the office together. Had I disclosed prior to the deal they would have pulled out and the outcome for both Steve and I and One Stop would have been even worse."

CGR rely on this as an admission by Amy that she had concealed the true picture from Nirmal. The point is discussed below.

60. After a "round-table" conference call had taken place on 30 March 2020, on 6 April Haines Watts produced a further revision of the Completion Accounts and adjusted price statement.

61. Amy's evidence was that it was at this point in time that she first understood that the Completion Accounts were being used not simply for the purpose of proving a new start for OSR with a properly regularised position but as the basis for determining a price reduction for the shares. She now took issue with the reduction of nearly £750,000 for Advance Invoicing, because all but about £150,000 of that amount had already been paid by customers to OSR. However, the Birds did ultimately agree the full price reduction of c. £750,000. After a conference call on 16 April 2020, Amy wrote by email to Nirmal, copied to Mr Coade:

> "Apologies for not sending this last night, connection gave up the ghost!
>
> Steve and myself have been through everything repeatedly and having gone through the items on the completion accounts I just want to point out that everything I knew about and was on the system was disclosed other than Bibby. I didn't disclose Bibby because I was scared not because I had taken it in my head to be deceitful. I was quite upset after the call with yourselves and

> Steve because I felt that you implied that I had tried to cover everything up and whether you believe me or not that is not the case, in fact from before the deal I was more accommodating than most in this situation providing trading margins and calculations almost daily towards the end.
>
> The problems within one stop as mentioned previously were historical from when we moved into the new site and installed the shear but unfortunately I could not dig my way out, I now know that if I had some better advisors around me there would have been a better way.
>
> We believe whole heartedly in One Stop and would like to move forward with you, however, I am mentally exhausted as I am sure you are. The amount we have achieved since January within the company in all departments has been testament to everyone's commitment to the project.
>
> I have had to email this as I am too emotional to have this discussion in person and it makes it uncomfortable for everyone.
>
> Long and the short of it is we have got 200k together and that is as much as we can get.
>
> I think for all concerned we need to draw a conclusion to this as it is having a detrimental effect on One Stop moving forward and on my mental health.
>
> I look forward to your decision."

Again, this email is further discussed below.

62. The lengthy response to that email was sent from and ostensibly by Captain on 28 May 2020. It complained that the Birds had, contrary to their protestations, failed to disclose "a large number of issues" before completion of the SPA. It threatened legal claims under a number of heads, if an agreed resolution could not be achieved. It raised allegations of possible fraud, including in respect of the operation of the Bibby Facility. Finally, it made a "without prejudice" offer to resolve matters on the basis that the Birds would receive a total amount of nearly £173,000 for the entirety of their shares (both the 80% in the SPA and the 20% that they had retained) and would resign as directors of OSR. The email sought a response within 3 days and asked the Birds to stay away from the business in the meantime.

63. In her witness statement, Amy explained what happened when Captain's email was received:

> "Steve got up and walked out, however I stayed to discuss the email as I thought I had a good relationship with Nirmal, Shyam and Mr Coade. I said that surely our removal wasn't right, as how could OSR continue without me and Steve.

> Nirmal said he would smooth things over with Captain and that we should take the weekend off. Nirmal asked me to tell the OSR staff that we were taking annual leave so that no-one would worry. I returned home, still with the faith that Nirmal would smooth things over."

64. Amy's belief that Nirmal was doing his best for her and was mediating for her with Captain is reflected in a sequence of WhatsApp exchanges between Amy and Nirmal on the late morning and early afternoon of 30 May 2020:

> "Amy Hi Nirmal. Hope everything was ok at the site yesterday. I need to respond to captain as he only gave us 3 days. I know Steve has requested an extension through yourself a couple of times and you said you would ask but as the letter came from Captain we should probably send the request directly to him. If that is a problem from your end please let me know. Thanks. Amy
>
> Nirmal: Hi Amy, with great difficulty managed to speak to captain with great difficulty. I put the request ahead to him and he asked me to keep out of it , and just focus on the site and the business. Really very sorry I did push a lot but he's not listening. So best to reply back to that mail he sent. Thanks. Nirmal
>
> Amy Ok Nirmal. I wish you all the best."

65. I am satisfied that Amy was mistaken in her belief and that Nirmal, while pretending to make efforts to soften the hard approach supposedly being taken by Captain, was in fact the driving force behind that approach. His oral evidence in cross-examination was that the email of 28 May 2020 was drafted by CGR's solicitors with "input" from him, Mr Coade and Captain. He also said that Captain was "well aware" of what was going on and that they "kept him in the loop". No doubt Captain was aware of the terms of the email and approved the decision to send it. But I find that the primary impetus and decision-maker was Nirmal. Indeed, it was he who sent the text of the email to Captain so that the latter could send it to Amy. Of course, there was no obligation upon Nirmal to be on Amy's side or to be sympathetic to her. What is, at the least, distasteful is that he pretended to be so and (as I am sure) did so in order to maintain and increase her dependency on him and so manipulate her to his own advantage.

66. After 28 May 2020 Steve and Amy played no further part in OSR's business. Mr Coade conducted a confidential investigation into their activities in the business. In July 2020 OSR appointed Mr Angus Lavin, a HR Consultant, to determine disciplinary proceedings against the Birds. (Mr Lavin had originally been engaged by Nirmal in February 2020 to conduct a review of practices at OSR, though the first Covid lockdown had interrupted his work.) Amy and Steve did not attend the hearing on 6 August, though they did make written representations. On 13 August 2020 Mr Lavin delivered his report to the directors; he found the complaints against both Steve and Amy to have been established.

67. In August 2020 Steve and Amy were summarily dismissed from OSR for gross misconduct. CGR exercised the rights under the "bad leaver" provisions in the SPA to acquire the Birds' remaining 20% shareholding for a nominal price; it is now the sole registered shareholder. Proceedings brought by Steve and Amy in the Employment Tribunal in respect of their dismissal are currently stayed.

68. CGR and the Birds were unable to agree the Completion Accounts, and accordingly the matter was referred for expert determination by Mr Fred Brown FCA of Grant Thornton UK LLP in accordance with clause 3 of, and Schedule 7 to, the SPA. On 27 September 2021 he determined that the Working Capital Shortfall was £1,492,896. Accordingly, and pursuant to clause 3 of the SPA, the price was adjusted to £567,104.

69. Mr Brown's determination was carried out on the basis of certain matters agreed between the parties and a number of specific disputes that he was required to resolve. Two relevant points of agreement were: (1) that the value of the stock should be taken to be £985,152; (2) that an adjustment of £749,753 fell to be made against deferred income in respect of advance invoices, subject to any (disputed) reduction of that figure to allow for debts of over 60 days. Mr Brown reduced the figure by £155,863 in that regard.

70. In accordance with the SPA, the Birds were paid £1,236,000 on completion. The balance of £824,000 was due, by equal annual instalments, by 16 December 2021. Since completion, the Birds have repaid to OSR a total of approximately £945,000, which by agreement between the parties has been treated as a repayment of the price in that amount[4]. Accordingly the Birds have received approximately £291,000 for their shares. *Prima facie* the amount due to them by way of deferred consideration is £275,993.71. They do not claim that sum in these proceedings, as the liability for the payment accrued after the proceedings had commenced, but they will claim it if CGR's claim fails. CGR maintains that the value of its claim extinguishes the sum due by way of deferred consideration.

Capital Green's Breach of Warranty Claim

71. Although CGR alleged numerous breaches of warranty on the part of the Birds, it pursued only two of those allegations at trial, because it accepted that the others, even if established, did not give rise to any demonstrable loss[5]. I shall address the two allegations that were relied on in turn.

(1) Operation of the Bibby Facility

72. This allegation is set out in paragraphs 27 to 37 of the amended particulars of claim. In summary, it is as follows:

[4] When this repayment was mentioned to Captain in cross-examination, he said that he knew nothing about it. That surprising evidence seemed clear enough, though CGR has attempted to row back on it. Even if Captain had at one time been told of the repayment, he does not appear to have been sufficiently interested in the point to remember it—an indication of his general nonchalance regarding the financial aspects of the transaction. This may, perhaps, explain much about the course of the proceedings.

[5] As a result of this, the merit of the other allegations has not been explored at trial. However, the claims in respect of bad debts and failure to maintain plant and equipment seem fairly clearly to have been bad, and the claim in respect of the sale of cranes was at best dubious.

1) Prior to the completion of the SPA, the Bibby Facility had not been operated in accordance with its terms, specifically because OSR had been submitting to Bibby Fresh Air Invoices. These were fabricated invoices manufactured by OSR for the purpose of obtaining advances from Bibby. The goods to which they related were not subject of any underlying order from or contract with the named customers and had not been delivered to those customers. The invoices had not been delivered to those customers and the customers had no liability to pay the moneys shown on the invoices.

2) Steve and Amy were both well aware of the abuse of the Bibby Facility with Fresh Air Invoices. Indeed, it was part of a dishonest scheme operated by Amy, with Steve's knowledge, for the purposes of obtaining moneys to which OSR was not entitled. The elaboration of this scheme in the evidence was to the following effect. Amy used Fresh Air Invoices when OSR had particular cash flow difficulties and as a means of obtaining urgently needed cash. She would use her knowledge of the ordering patterns of particular customers to anticipate future orders; thus, at least in theory, a Fresh Air Invoice could be matched against a subsequent order from the named customer.

3) To facilitate the operation of this scheme, Amy kept not only her Working Files but also a separate so-called Amy List of Fresh Air Invoices, recording the relevant particulars of each such invoice.

4) CGR was ignorant of the Fresh Air Invoices or the dishonest scheme until Amy told Mr Coade about it on 18 December 2019.

5) The undisclosed abuse of the Bibby Facility was a breach of warranty under the SPA. Paragraph 37 of the amended particulars of claim sets out 14 allegations of breaches of specific warranties. I shall not set them out, because it is common ground that the matter complained of would, if undisclosed, be a breach of warranty.

73. The Birds' case may be shortly summarised. Fresh Air Invoices were not used. The abuse of the Bibby Facility that took place was simply that invoices would sometimes be sent to Bibby for payment before the goods to which they related had actually gone out for delivery; however, all such invoices (that is, Advance Invoices) related to existing orders and contracts and the breach of the Bibby Facility consisted simply in submitting the invoices to Bibby prematurely. Amy expressly told Nirmal of this practice before completion of the SPA. She did not tell him about Fresh Air Invoices because there were no such invoices.

74. CGR's pleaded case against the Birds is based on Fresh Air Invoices, not Advance Invoices. As it is common ground that CGR was not told anything about Fresh Air Invoices, the issue regarding breach of warranty is therefore, simply, whether OSR was using Fresh Air Invoices. However, before addressing that issue, I shall consider the factual question whether Amy told Nirmal about the Advance Invoices, because a lot of evidence was directed to this question. CGR's case is that Nirmal was not even aware of the Advance Invoices.

Did Amy tell Nirmal about the Advance Invoices?

75. Amy's written evidence was as follows:

> "[D]uring one meeting in the board room at the [OSR] site (I cannot remember the date) I explained to Nirmal and Shyam how the Bibby Facility worked and about One Stop's doubtful debts. I think Captain may also have been there, but I cannot remember for certain. In relation to the Bibby Facility, I told them that, sometimes, when OSR was stuck for cash, invoices would be raised against stock sold as recorded on a trade card/contract, rather than following delivery. Nirmal and Shyam did not suggest that this was a problem, in fact they both laughed and said that everyone was using discount invoicing facilities in the same way. When we were leaving the boardroom, Shyam explained that at Liberty, they were raising invoices 'on product that (wasn't) even out of the ground yet'. He was therefore aware that the aged debtors lists were inaccurate because of how the Bibby Facility was used."
>
> "I had several further conversations with Nirmal regarding the use of the Bibby Facility and the stock levels, they were usually by telephone or when he was present at the [OSR] site, but there were a number of emails."

Amy's oral evidence was to substantially the same effect.

76. Shyam's written evidence was that on 18 December 2019 he was at OSR's premises when Mr Hall came into the room and "informed us about how Mrs Bird had informed him about how the Bibby facility was being used in a way it should not be used. I recall everyone in the room (including Nirmal) being shocked and very worked up about it. I was also worked up about it as the way that the facility was being used was unbelievable." The witness statement made it clear that Shyam found it hard to recall "the exact detail". The main significance of the evidence is that it implies that Shyam learned then of an egregious ("unbelievable") abuse of the Bibby Facility rather than a case of simply jumping the gun with the use of Advance Invoices. Shyam was not directly cross-examined about that evidence. He was, however, cross-examined about Amy's evidence, and he denied that he had been present when Amy and Nirmal had discussed the Bibby Facility or that he had made the alleged remark about Liberty's raising of invoices—he said that he had been "in the business too long to make such a flippant remark."

77. In his witness statement, Nirmal addressed the matter as follows:

> "Prior to completion of the deal I was aware the Bibby Facility existed and had limited conversations and emails with Amy in relation to the same. Throughout that time my understanding was that the facility was only used to drawdown funds where goods had been delivered and invoiced (as would be expected) or where goods had been delivered but not yet invoiced (and such orders formed part of the sales reserve – being a reserve for items sold and delivered but which had not yet been invoiced). I can categorically state that I had no knowledge

> whatsoever of the manner in which the Bibby Facility was actually being used."

That evidence was of a piece with Nirmal's answers to cross-examination concerning the email of 9 December 2019: he said that his conversations with Amy had concerned the Sales Reserve, which recorded deliveries of goods for which no invoice had yet been issued; there had been no conversation about the operation of the Bibby Facility but only about the prospect of refinancing *all* existing facilities; his response in December 2019 had been because he was perplexed that there were invoices that had been sent to Bibby but were not reflected by entries in the Sales Reserve.

78. I accept Amy's evidence that she told Nirmal about the Advance Invoices. I also think it probable that Shyam knew of them, though at the time he probably took little notice of the matter. My reasons are as follows.

1) The email exchange on 9 and 10 December 2019 is very important, for a number of reasons. One reason is that it shows that, contrary to Nirmal's express evidence in cross-examination, there had indeed been at least some conversation between him and Amy concerning the operation of the Bibby Facility—there was more than merely a discussion about the possibility of refinancing all of OSR's facilities. More importantly, however, Amy expressly identified the matter of the previous conversation(s): "the drawing of funds [from the Bibby Facility] once a contract is made but prior to delivery". That is the use of Advance Invoices. Nirmal expressly confirmed that he understood the point being recorded by Amy. This is directly contrary to Nirmal's claim that he believed that all drawdown from Bibby was in respect of goods that had been delivered.

2) Nirmal's present case (that he believed that drawdown took place only in respect of delivered goods, albeit that the customer might not yet have been billed) leaves the question why, in that case, Amy was bothering to ask about what to put in the Disclosure Letter. The practice so described would not in itself have been a breach of the Bibby Facility. Further, insofar as Nirmal seeks to rely on the understanding of the Sales Reserve as recording orders that had been delivered but not invoiced for, on 9 December he referred to the Sales Reserve as forming only "*part of* [OSR's] drawdown from Bibby towards orders that have not yet been invoiced for" (my emphasis), which seems to imply that Nirmal knew of drawdown from Bibby in respect of uninvoiced orders both where delivery had been made and where it had not.

3) Rather extraordinarily, Amy was asking for Nirmal's guidance as to the formal disclosure she ought to make in respect of the Advance Invoicing. This level of dependency does not sit easily with the notion that she would at the same time have been misleading him as to the conduct in question.

4) I am satisfied that Nirmal knew that Advance Invoicing was contrary to the terms of the Bibby Facility, because (a) he had a copy of the terms of the Bibby Facility and (b) there would have been no need for Amy to disclose the practice of Advance Invoicing unless it had been contrary to the terms of the Bibby Facility.

5) The email exchange of 9 and 10 December 2019 shows that Nirmal was not greatly concerned about the mere possibility that Bibby was being misled, because one of his reasons for not wishing to proceed with a new funder was concern lest Bibby should be alerted to the misstatement of the levels of stock in OSR.

6) I think it unlikely that Amy has concocted her evidence about Shyam being privy to what she told Nirmal or about Shyam's reaction to it. Amy dealt mainly with Nirmal; Shyam had only a semi-detached involvement in the matter. The only relevant question was what Nirmal knew; Shyam's knowledge was irrelevant. The respect in which the Birds clearly held Shyam, together with his seniority and experience, tends to make it unlikely that Amy would create a pointless conflict of evidence with him. I note Shyam's denial that he would have made such a "flippant" remark as Amy attributes to him, but I think it quite likely that he would indeed have made a light-hearted remark of that kind in the context of conversations that tended not only to informality but to a sense of the familial.

7) I also take into account the evidence concerning a conversation between Amy and Nirmal on 18 December 2019 before Amy spoke to Mr Coade and Mr Hall. Nirmal accepts that there was a conversation. His account is that Amy asked him only whether she ought to tell Mr Coade and Mr Hall about the stock situation, and that he replied that she should be frank and open with them. Amy's account is that she asked whether she ought to tell them about the use of the Bibby Facility and that Nirmal told her to tell them everything she had told him. Amy's account of this conversation is more probable, because the overvaluation of stock had been a matter of open discussion and disclosure between the parties and their advisers.

8) I take into account my views as to what else happened on 18 December 2019, as discussed above.

79. CGR relies on two apparent admissions on the part of Amy, in the emails dated 26 March and 17 April 2020. These are certainly significant pieces of evidence against the defendants, but they fall to be considered as part of the totality of the evidence.

80. Amy's explanation for the terms of her email of 26 March 2020 comes to this. She had told Nirmal the position regarding the Bibby Facility. He had explained to her that the best way of dealing with it was to put it to one side, not mentioning it in the Disclosure Letter, and leave it to be dealt with after completion; in particular, it would be better to resolve the point with Captain after completion than to raise it before. She was therefore aware that neither Captain nor CGR's advisers had known of the Advance Invoicing before completion, and that Haines and Watts would be likely to include a downward adjustment for the Advance Invoicing. However,

> "Nirmal and Mr Coade had told me repeatedly that the Completion Accounts were just an exercise that had to be done in order for everything to be finalized and for them to have an accurate starting point. I did not understand the importance of this exercise and, as I had total faith in Nirmal, went along with the adjustments proposed. I did not dream that the full price

> adjustment would then be legally payable by Steve and I (sic) – to my mind everything had been disclosed to Nirmal pre-deal and so this was an exercise to straighten out the accounts" (witness statement, paragraph 122).

Amy explained that she wanted to conclude the Completion Accounts process quickly, without provoking an argument with Nirmal, and concentrate on developing OSR's business. To this reason for responding to Garratts in the terms she did is to be added that by this time she was at emotional breaking point and wanted to close down discussions and arguments with Garratts, whose tone she was now finding confrontational.

81. As for the email of 17 April 2020, Amy's explanation appears from some passages in her witness statement:

> "On 8 April 2020 I had a call with Nirmal and Mr Coade. Again, we were discussing OSR's cash flow situation and the money he (and Captain) wanted Steve and I (sic) to put back into the business. Nirmal was acting as an intermediary for Captain (as he generally did during our calls) and so I was trying to negotiate with Captain through Nirmal. I said I knew about the £750k adjustment that CGR wanted to make to the Completion Accounts in relation to Bibby and confirmed that Steve and I would pay that back into OSR. … I wanted to please Nirmal and move OSR forward, which is why (eventually) we agreed to just pay it. I was so mentally exhausted from the constant instruction from Mr Coade and Nirmal but I saw the bigger picture and thought that if I just showed willing, in the end it would all come good. I had in mind what Nirmal had previously told me (during the call on 27 March 2020) that I had to help him so that he could help me.
>
> On 17 [the correct date is 16] April 2020, I had another lengthy conference call with Nirmal, during which he said that he thought Captain would want repayment in line with the Completion Accounts but that he was still fully committed to growing OSR with us as one big family. Nirmal said he wanted to get Captain off his back and stop further questions from him. He was concerned that we had asked Captain for more money because of cash-flow problems in OSR and he didn't want Captain to stop supporting us. Nirmal referred to Captain as the money man and said we needed to keep him happy as he would be the man injecting the money into OSR … We therefore wanted to help Nirmal keep Captain happy. Nirmal asked me to send him an email, which I understood would be forwarded to Captain, regarding the Completion accounts."

The email in question is the email of 17 April 2020, the opening line of which indicates that it had been expected the previous day. I accept Amy's account of the conference call and of the circumstances in which the email was written. I have already commented on the duplicity of Nirmal's dealings with her at this time. The

contrast between the way he presented himself to Amy and the reality is further shown in the WhatsApp communications between Nirmal and Mr Coade after the conference call. On the evening of 16 April they wrote as follows:

> "Nirmal: No mail as yet from Amy
>
> Mr Coade: Would like to be a fly on wall in their household this evening.
>
> Nirmal: Me too 😊
>
> Nirmal: Strange that she said that she will send something across this is getting a bit ridiculous not that it wasn't the case already."

The following morning the exchanges continued:

> "Mr Coade: Did Amy send the email in the end?
>
> Nirmal: No she did not.
>
> Mr Coade: She has just sent it through. Not good. £200k.
>
> Mr Coade: Don't think she appreciates her mental health will get a lot worse on the back of this."

82. The terms of the emails of 26 March and 17 April 2020 are in themselves adverse to the Birds' case. However, I have come to the conclusion that the explanation of them given by Amy is substantially correct and that they do not outweigh the matters supporting the conclusion I have already indicated. I refer in particular to the following matters.

1) Amy is an impressive and capable woman. However, it is clear that she is not emotionally invulnerable. She was, and she felt herself to be, rather out of her depth as matters progressed. The lengthy narrative set out above serves to illustrate the (with respect, rather pitiful) way in which she became dependent on and confiding in Nirmal, although he was on the other side of the transaction. I have no doubt at all that he deliberately brought that state of affairs about for his own advantage.

2) I do not find it at all implausible that Amy genuinely believed, until quite a late stage of the Completion Accounts process, that there would be no price reduction in respect of the Advance Invoicing, because she had told Nirmal what was going on.

3) In my judgment, when Amy recognised the implications of the Completion Accounts process, she found herself in what she saw as a difficult position. The success of her and Steve's continued involvement in OSR depended on the support of Nirmal, who was still seen as a trusted friend and ally. The success of OSR itself depended on the continued financial support of Captain, with whom contact was mediated by Nirmal. Therefore it appeared important both to maintain Nirmal's support in negotiations with Captain and, similarly,

not to jeopardise Nirmal's relationship with Captain. By this time two financial pressures were being brought to bear on the Birds: on the one hand, the contention that there ought to be a price reduction for the Advance Invoicing; on the other hand, Captain's demand that they inject capital. This is the immediate context of the email of 17 April 2020.

4) The evidence indicates that Nirmal was, for his own ends, misleading Amy into viewing him as a sympathetic ally who wanted to avoid a rupture of the relationship that (as she thought) existed and who offered her best hope of continuing to be a part of a thriving and prosperous OSR.

Was OSR using Fresh Air Invoices?

83. I have dealt at some length with the question of CGR's knowledge of the Advance Invoices, both because it took up a significant amount of time at trial and because it reveals a lot about some of the individuals in the case, Nirmal in particular.

84. However, CGR's pleaded case is not about Advance Invoices. It is about Fresh Air Invoices: invoices that did not relate to any underlying contract but were a fabrication, used in anticipation that the fiction that they related to genuine orders could be covered up by subsequent orders from the named customers.

85. CGR has sought to prove the allegation in respect of Fresh Air Invoices in two ways. The first way is by reliance on admissions supposedly made by Amy on 18 December 2019. I have dealt with this at length. As explained above, I do not accept that Amy made any admission regarding Fresh Air Invoicing.

86. The second way in which CGR has sought to prove that Amy operated Fresh Air Invoicing is by evidence from the documents as analysed by Mr Coade and, on the basis of that evidence, cross-examination of, in particular, Amy.

87. As I have already mentioned, Mr Coade's evidence described what amounted to admissions by Amy and, later, by Ms Haywood of a practice that amounted to Advance Invoicing. However, in paragraph 52 of his witness statement he stated that he believed the invoices to be what I have called Fresh Air Invoices:

> "I am aware that Amy Bird has sought, as part of these proceedings, to characterise the False Invoices as advance invoicing. I do not believe this is correct (or justifiable) for a number of reasons:
>
> a. Fundamentally, it is a clear breach of the terms of the facility. It is simply incorrect and unlawful to raise a pro forma invoice and put it through an invoice discounting facility, particularly given the invoice wasn't even sent to customer;
>
> b. The reality of the situation was that in many cases the orders simply did not actually exist (either in the future or at all). Amy apparently would look at what stock was in the yard and think she could sell that to a certain party and then create an invoice based on that;

> c. Even if a client had ordered product the amount of the invoice would not be known until the goods had been dispatched because the weight is never going to be exactly what was ordered and the amount of the invoice would depend on the actual weight based upon weighbridge readings."

As it stands, that evidence is of strictly limited value. It consists primarily of a statement of opinion. The opinion is said to be supported by three matters of fact. The first matter (breach of the Bibby Facility) is not relevant to the distinction between Advance Invoicing and Fresh Air Invoicing[6]. The third matter (amount of the invoice) is similarly irrelevant to that distinction, because the use of an invoice to draw down on the Bibby Facility before goods have left the premises necessarily means that the weight on the invoice cannot be accurate, as the goods will not have been over the weighbridge. (If a customer orders 10 tonnes of scrap, the actual weight will in practically every case be either slightly less or slightly more than that precise figure.) The difference between Advance Invoices and Fresh Air Invoices is that the former do, but the latter do not, relate to orders that have actually been received. This is the second matter mentioned by Mr Coade ("in many cases the orders simply did not actually exist"). But his witness statement is, on this point, simply unparticularised assertion. When it was put to him in cross-examination that he had not identified a single example of Fresh Air Invoicing, he said that he did not feel the need to do so; the evidence was "pretty clear". He also said, confusingly, that Advance Invoicing was itself Fresh Air Invoicing.

88. CGR did not produce any list or schedule of invoices said to be Fresh Air Invoices. Its case until the trial stood at the level of generality in paragraphs 27 to 37 of the amended particulars of claim and paragraph 52 of Mr Coade's witness statement. However, at the trial CGR sought to particularise and prove its case on Fresh Air Invoicing by referring to Excel spreadsheets that were said to provide numerous examples of the practice and were presented to the court largely by way of cross-examination of Amy. I can only regard this as a highly unsatisfactory and, indeed, irregular way to proceed. The point is made on behalf of CGR that those of the spreadsheets that comprised the Working Files had been compiled by OSR's employees before the completion of the SPA and had been disclosed in the proceedings. The facts remain, however, that there had been no prior identification of the transactions to be challenged and that the instances relied on by CGR were identified in the course of a voyage of discovery at the trial. The folder of soft-copy spreadsheets was added to piecemeal in the course of the trial, and there had been no disclosure of the documents relating to the challenged transactions, save for bulk and partial disclosure of trade cards. The spreadsheets had not been analysed by the expert witnesses on either side, who had not been instructed in that regard. Mr Pearce-Smith complained in his closing submissions that the Birds had been ambushed.

[6] Mr Coade's statement is written in terms suggesting condemnation of Advance Invoicing. However, it is clear, despite his denials in cross-examination, that Mr Coade was well aware that the practice was continuing after completion of the SPA. Indeed, he was complicit with Nirmal in a piece of Fresh Air Invoicing. See paragraph 55 above.

89. Mr Ascroft submitted[7] that the documents showed numerous clear indications of Fresh Air Invoicing, including the following. The supposed orders shown on some invoices were apparently satisfied by the delivery of different stock at different prices and at significantly later dates. The supposed orders referred to in some invoices are said to have been unfulfilled for several weeks until the invoices were cancelled after completion of the SPA. Some advance invoices were subject of a credit after being challenged by customers in the course of a Bibby audit. A significant number of invoices are said to have been drawn up to reflect not a new order but a prior delivery[8]. Mr Ascroft observed that the defendants had not attempted to correlate the trade cards disclosed by CGR, which were said to be the record of orders received, with any of the advance invoices.

90. I have come to the conclusion that, although it is possible that Amy engaged in some Fresh Air Invoicing, it is more probable that she did not. I also think that, if (contrary to my view) there was any Fresh Air Invoicing, it has not been shown to have been significant when set against Advance Invoicing. I make the following observations.

1) As I have mentioned, the manner in which the case in this respect was advanced seems to me to have been highly unsatisfactory. This might have led Mr Pearce-Smith to object in the course of evidence rather than in closing submissions. It might also, in truth, have led me to intervene. However, a consequence is that CGR is inviting findings of a dishonest practice to be made on the strength of a case that was put to witnesses—Amy in particular, but also Ms Haywood—without prior particularisation or identification of the transactions and documents in question.

2) It seems to me that the confidence with which conclusions can be drawn from the documents depends, in large measure, on the extent of one's familiarity with the business to which the documents relate. The expectations of customers for scrap metal, the way in which their orders will be made up and might reasonably be satisfied, the timescales within which orders for certain kinds of scrap or from certain customers might be expected to be fulfilled, the terms on which discrepancies in deliveries or arguments concerning the adequacy of the goods might be resolved: knowledge of these and similar matters will be important in assessing the plausibility of explanations that are given for apparent anomalies in the documentation. Of those who gave evidence at trial, the two people with far and away the greatest understanding of the scrap business generally and OSR's dealings with its customers in particular were Steve and Amy; only Amy was questioned significantly on relevant matters. I think it fair to say that Amy's response to intensive and prolonged cross-examination on the Bibby Facility, which took up much of day 7 of the trial, was commanding and that she was able to give plausible answers to most of the matters put to her. There were indeed occasions when she was unable to explain apparent anomalies in the documents (for example, in a sequence of questions concerning information she provided to Bibby on 26 June 2018 and related documents), but it is by no means apparent to me that this was because no innocent explanation was possible; I think that lapse of

[7] The detailed submissions, with references to the trial bundles, are in paragraph 27 of his written closing submissions.

[8] A single footnote in Mr Ascroft's written closing submissions analyses one particular customer, by reference to spreadsheet no. 24, over 37 lines of text.

time, lack of forewarning that she would be required to discuss the transactions in question, and lack of direct involvement in the making of relevant records pertaining to those transactions were all likely reasons for her inability. I bear in mind the possibility that, with the generality of her exculpatory answers, Amy might have been trying to get out of a tight spot by, so to speak, blinding us with science—using her intelligence and detailed knowledge to mislead. But I do not believe that that is what she was attempting to do.

3) Two specific examples can be given of the risk of attempting to infer more than the evidence will justify. First, as I have mentioned, the Advance Invoices necessarily showed false quantities, because the goods had not crossed the weighbridge. Ms Heywood attempted, rather unimpressively, to justify the very precise but fictitious weights shown on these invoices as being best estimates, borne of experience. In fact, they are clearly just a way of making the invoices look as though they relate to actual deliveries. However, the fact that in some cases it appears that the quantities in actual deliveries from past orders have been used to draw up Advance Invoices does not demonstrate that there were no further orders underlying those invoices. Second, in the course of a routine audit by Bibby in February 2019 one of OSR's customers, International Metal Recyclers Ltd ("IMR"), informed Bibby that it did not "have or recognise" any of the invoices on a list supplied by Bibby. When Bibby asked OSR for a statement of account, Ms Haywood played for time and suggested to Amy that she (Ms Haywood) might put on her "out of office" response. Prima facie that does look rather suspicious, and on the whole Ms Haywood's answers to questions on the matter did not generate much confidence. However, she was right to point out that the so-called "invoice numbers" given by Bibby to IMR were not the invoice numbers at all; it is hardly surprising that IMR failed to recognise them. In fact, IMR had certainly received the largest of the invoices, and I have no reason to believe that any of the invoices related to fictitious orders.

4) In that last connection, it may be noted that Bibby never served any default notice on OSR as a result of its audits of the account[9]. Mr Coade noted that Bibby had not identified Fresh Air Invoicing but he presented this as a failure on Bibby's part to identify what was happening, whereas an at least equally likely reason for Bibby's inaction is that there was no Fresh Air Invoicing.

5) Mr Ascroft relied in his submissions on the failure of the defendants to correlate trade cards (internal records) disclosed by CGR with any of the Advance Invoices on the Amy List, although they had insisted that all Advance Invoices related to orders that were recorded in trade cards. This is not a strong point in CGR's favour. First, CGR ought to have dealt with this aspect of the case by identifying the alleged Fresh Air Invoices and giving disclosure in respect of them, including the invoices, trade cards, communications and payment records. This was not done. Second, accordingly, witnesses had to respond in cross-examination to matters being identified for the first time and without any focused disclosure. Third, there is at least significant doubt as to whether all or even most of the trade cards have

[9] At least, it did not do so until after completion of the SPA. It subsequently served a default notice in respect of Fresh Air Invoices for which Nirmal and Mr Coade were responsible: see paragraph 55(9) above.

been disclosed[10]. Fourth—and perhaps for that reason—it was not put to Amy that there were no trade cards in respect of the alleged Fresh Air Invoices, although it was her evidence that all Advance Invoices related to orders and that all orders were recorded in trade cards.

6) If I had found that Fresh Air Invoicing had taken place, I should not have felt able to translate the finding into a quantifiable claim for damages for breach of warranty. First, CGR has never made any attempt to quantify the amount of Fresh Air Invoicing that has supposedly taken place. Second, the damages claim is advanced by reference to the discussion in the expert report of Mr Geoff Mesher (paragraphs 5.6 to 5.31). However, Mr Mesher does not distinguish between Advance Invoicing and Fresh Air Invoicing and thus does not provide any basis for assessing the financial effect of the latter. Third, in view of my conclusions as set out above it is unnecessary for me to discuss the complications of the calculation of the damages claim and the expert evidence in support of it; therefore it is probably unhelpful to say too much about it. However, the SPA provided an agreed mechanism for price adjustment through the Completion Accounts—on a basis highly favourable to the purchaser, be it noted—and that the advance invoices (whether Advance or Fresh Air Invoices) formed part of the matters taken into account in that process and in the adjusted price that resulted from it. Even if a freestanding damages claim for breach of warranty in respect of Advance / Fresh Air Invoices would lie in principle (cf. paragraph 12 of Schedule 4, which Mr Pearce-Smith submits would preclude such a claim), those invoices resulted in a significant contractual reduction in the price. The best evidence as to the actual value of a company on an assumed factual basis is generally the price freely agreed between parties at arm's length. It is not clear to me that the way the matter has been dealt with by the parties' agreement ought in this case to be subordinated to the opinions of the expert witnesses. In particular, Mr Mesher's opinion that the effect of Advance / Fresh Air Invoicing was to reduce the market value of OSR by £5,091,000 seems to me (with respect) to have little connection with reality.

(2) The Purchase Reserve Ledger

91. This allegation of breach of warranty is set out in paragraphs 51 and 53 of the amended particulars of claim. Paragraph 51 set out the conduct said to constitute the breach of warranty:

> "51. The Purchase Reserve Ledger at Completion showed a liability of £226,966.86 as at the Completion Date in respect of purchases made by OSR for which OSR was yet to be invoiced. The actual liability as at the Completion Date in respect of purchases which had not been invoiced was £665,389.76. The additional liability ('the Liability') which had not been accrued for was £438,422.90."

[10] The adequacy of CGR's disclosure has proved a running sore in these proceedings. In the course of the trial Nirmal had to be recalled for further cross-examination after it became apparent that there had been a failure to make prior disclosure of significant emails that any genuine search would have revealed.

Paragraph 53 set out the particular warranties of which the conduct was said to be in breach (some of the warranties relate solely to the allegation in paragraph 52, which was not pursued at trial, concerning bad debts):

> "53. In the premises the First and Second Defendants (and each of them) are in breach of the following warranties given by them under the SPA:
>
> (1) paragraph 4.2.1 of Part 1 of Schedule 3 to the SPA, because the Liability should have been recorded in full in the Accounts and/or the Bad Debts should have been provided or reserved for in the Accounts in accordance with FRS 102;
>
> (2) paragraph 4.2.3 of Part 1 of Schedule 3 to the SPA, because the extent of OSR's liabilities was understated in the Accounts and/or the value of sums due to OSR was overstated in the Accounts;
>
> (3) paragraph 4.2.5 of Part 1 of Schedule 3 of the SPA, because the Accounts did not properly reflect the financial position of OSR as at 30 June 2019;
>
> (4) Paragraph 4.2.8 of Part 1 of Schedule 3 of the SPA, because the Accounts did not make proper provision or reserve for the Bad Debts;
>
> (5) paragraph 4.2.9 of Part 1 of Schedule 3 of the SPA because the Accounts did not make full provision or reserve for all liabilities whether quantified, contingent, disputed or otherwise;
>
> (6) paragraph 5.1.2 of Part 1 of Schedule 3 to the SPA, because the failure to record the Liability and the recording of the Bad Debts in the Management Accounts constituted a material inaccuracy and the Management Accounts did not fairly represent the income and expenditure of OSR;
>
> (7) paragraphs 7.1.2 to 7.1.4 of Part 1 of Schedule 3 to the SPA because, as a result of failure to record the Liability the Accounts, the Management Accounts and previous management accounts:
>
> (a) were not fully, properly or accurately prepared or maintained;
>
> (b) contained material inaccuracies in relation to OSR's liabilities; and
>
> (c) did not, by reason of the failure to accurately record all liabilities as aforesaid, constitute an accurate record of all the matters required by law to appear in them and did not

> comply with the requirements of section 386 of the Companies Act 2006."

92. This allegation straightforwardly fails because the matter pleaded in paragraph 51 does not, if established, constitute a breach of warranty. The state of affairs at the Completion Date was not warranted. In fact, the case advanced by Mr Ascroft on behalf of CGR related to the Accounts (that is, the audited financial statements for the year ended 30 June 2019) and the Management Accounts (that is, as at 31 October 2019), which were the relevant documents and dates for the warranties: see paragraph 47 above. The fact that the matter alleged in paragraph 51 of the amended particulars of claim was not a warranted matter was pointed out in terms by Mr Pearce-Smith at trial and was acknowledged by Mr Ascroft. No application to amend the pleading was made. If such an application had been made, it would have been considered on its merits. Mr Ascroft instead pointed, in closing submissions, to the fact that the specific warranties relied on had been set out in paragraph 53 of the amended particulars of claim and said that the true basis of the claim had been set out in paragraph 65 of Mr Coade's witness statement. These are points that might have carried weight in any application to amend the pleaded claim, though there are other matters that might have had to be considered as weighing in the other direction. What is not, in my view, acceptable is to rely on such matters as dispensing with the need to bring the statements of case into line with the case that is sought to be advanced and as thereby circumventing the discipline that an application for permission to amend would have brought to bear. The result, in short, is that the allegation made by CGR in its pleaded case is of conduct that does not constitute a breach of warranty. Therefore this head of claim must fail.

93. I feel no uneasiness or reluctance about holding CGR to its pleadings, and not just because of its failure to take the opportunity of seeking permission to amend its case. This head of claim again depended on spreadsheets prepared by Mr Coade and the adequacy of the disclosure made in support was at best questionable. It is unnecessary to discuss the further cogent points made against this head of claim by Mr Pearce-Smith in his closing submissions.

Capital Green's Misrepresentation Claim

94. The Misrepresentation Claim received very little attention at trial, perhaps because it is hard to see how it advances matters. It was mentioned briefly by Mr Ascroft in his opening submissions and featured in his closing written submissions, though only in terms repeated from his skeleton argument, but he did not mention it in his closing oral submissions. This fact and the general vagueness of the pleaded case make this aspect of the case difficult for me to analyse and are worthy of note, because paragraph 58 of the amended particulars of claim advances the case on the basis of fraud.

95. The Representations relied on are set out in paragraphs 9 to 11 of the amended particulars of claim:

> "9. Before the SPA was entered into, and in order to induce the Claimants to enter into the SPA, Amy Bird, on behalf of the Defendants, sent the following e-mails to Nirmal Chhabria, on

behalf of the Claimants, whereby she made the following representations:

(1) an e-mail dated 21st November 2019 whereby Amy Bird represented that the management accounts attached to that e-mail for the period ended 30th September 2019 ('the September Management Accounts') were accurate and/or were accurate to the best of her knowledge and belief;

(2) an e-mail dated 20th November 2019 whereby she represented that:

> (a) the aged debtors of OSR as at that date totalled £2,459,267.43 and were as identified in the report entitled 'debtors 2019' ('the Aged Debtors Report'); and
>
> (b) the aged creditors of OSR as at that date totalled £2,024,245.00 and were as identified in the report entitled 'creditors 2019' ('the Aged Creditors Report').

10. Before the SPA was entered into, and in order to induce the Claimants to enter into the SPA, the Defendants or Hawkins Hatton Solicitors, on behalf of the Defendants, completed a document entitled 'Legal Review Q & A' ('the Q & A') which they sent to Blake Morgan Solicitors, on behalf of the First Claimant, whereby they represented that:

> (1) they were party to a written invoice discounting facility agreement with Bibby Invoice Discounting Ltd entered into on or about 28th June 2018 ('the Bibby Facility') (response 3.2 of the Q & A); and
>
> (2) they had not breached any of the covenants in the Bibby Facility (response 3.10 of the Q & A).

11. On or about 18 November 2019 in a meeting held at the Landmark Hotel in London, Amy Bird, acting on behalf of the Defendants, requested a private conversation with Nirmal Chhabria acting on behalf of CGR. During that conversation she informed Mr Chhabria that there was an issue in terms of stock which was recorded in the accounts at an inflated level. She stated that herself and Steven Bird wished to be open and honest with CGR. At the end of the conversation Nirmal Chhabria asked Amy Bird whether there were any other matters she wished to tell him about or other matters which had not been disclosed. She confirmed that there was not. In making this statement in order to induce CGR to enter into the SPA, Amy Bird on behalf of the Defendants represented that there were no other significant or material items relating to the operation of the business and the accounts of the business which had not been disclosed to CGR."

96. The plea of falsity is set out in paragraph 57 of the amended particulars of claim:

> "57. Further the Representations set out in paragraphs 9 to 11 above were false. In particular:
>
> (1) Contrary to the representations set out in paragraph 9(1) above the September Management Accounts were inaccurate in at least the following respects:
>
> (a) Sales were overstated for the reasons set out in paragraphs 30 to 34 above;
>
> (b) Trade Creditors and Accruals were overstated for the reasons set out in paragraphs 51 to 53 and paragraph 56 above;
>
> (2) Contrary to the representation set out in paragraph 9(2)(a) above the Aged Debtors Report was materially overstated for the reasons set out in paragraphs 29 to 33 above.
>
> (3) Contrary to the representation set out in paragraph 10 above OSR was in breach of the covenants contained in the Bibby Facility.
>
> (4) Contrary to the representation set out in paragraph 11 above there were other material and/or significant matters to disclose including that OSR had been operating the Bibby Facility in a dishonest manner as set out in paragraph 29 to 33 above and had continually overstated the trade creditors of OSR in its management accounts and annual accounts."

97. I accept that, in principle, a claim for damages for misrepresentation would lie, notwithstanding the "entire agreement" provision in clause 19. (I refer, for convenience, to the discussion in *MDW Holdings Ltd v Norvill* [2021] EWHC 1135 (Ch) at [245]-[247].) However, I reject the claim advanced in the present case.

98. As for the allegations of misrepresentation in paragraph 9 and paragraph 57(1) and (2):

1) The emails referred to in paragraph 9 of the amended particulars of claim were not even identified in Mr Ascroft's chronology of relevant events, though they were mentioned in his skeleton argument (repeated in his written closing submissions).

2) I am not persuaded that the email of 21 November 2019 contained or implied any representation of fact. The email was blank. It attached, at CGR's request, a document that had been prepared by Garratts. The Birds were not asked for any assurance or warranty in respect of the document.

3) In any event, the first matter relied on as a particular of falsity (paragraph 57(1)(a)) relates to Fresh Air Invoices, which have been discussed above.

4) The second matter relied on as a particular of falsity (paragraph 57(1)(b)) relates to matters set out in paragraphs 51 and 52 of the amended particulars of claim. Paragraph 51 relates to the "Purchase Reserve Ledger at Completion" and is incapable of being a particular of falsity of a representation made in management accounts for a period ending more than 10 weeks before the date of completion. Paragraph 52 relates to two "Bad Debts", but the allegations relating to those were discontinued before trial.

5) I am satisfied, on the basis both of Nirmal's evidence and of the terms of the SPA, that CGR did not in fact rely on the September Management Accounts but on the October Management Accounts.

6) The particular of falsity alleged in paragraph 57(2) relates, again, to the Bibby Facility and relies on the same matters as those relied on in paragraph 57(1)(a).

99. As for the allegation of misrepresentation in paragraphs 10 and 57(3), the allegation of falsity consisting of "breach of the covenants contained in the Bibby Facility" is completely unparticularised. The warranty in clause 6.2(A) of the Bibby Facility (cf. paragraph 13 above) had been breached, but Nirmal knew that, because he had been told of the Advance Invoices. No breach of any other warranty has been established; there may possibly have been a breach of the warranties in clause 6.2(C) or clause 6.2(D), by reason of an overstatement of stock, but it has not been proved that there was such a breach and, anyway, Nirmal was aware of the overstatement of stock. Further, it is clear to me that Nirmal was not concerned about breaches of the terms of the Bibby Facility and indeed both participated in and procured such breaches after completion.

100. As for the allegation of misrepresentation in paragraphs 11 and 57(4), the Bibby Facility has already been discussed. The further matter alleged is that, in telling Nirmal that there were no other significant matters to be disclosed, Amy concealed that OSR "had continually overstated the trade creditors of OSR in its management accounts and annual accounts." In his skeleton argument, repeated in his closing written submissions, Mr Ascroft did not expand upon or explain this allegation of falsity; he just referred to paragraph 57 of the amended particulars of claim. "Aged creditors" are referred to in paragraph 9(2)(b), but no allegation of falsity is made in that regard. The other substantive allegation of falsity in respect of trade creditors is in paragraph 57(1)(b), which relates to the Purchase Reserve Ledger at Completion. It may be that what Mr Ascroft had in mind was to rely on the Purchase Reserve Ledger in the audited financial statements to 30 June 2019 and in the Management Accounts (that is, as at 31 October 2019): see paragraphs 91 and 92 above. However, those are not matters that were ever pleaded. This matters, because it is entirely unacceptable to advance a claim of fraud on the basis that a "nothing to disclose" statement is false because of the existence of disclosable matters that have not been clearly particularised.

101. I am also of the view that the attempt to turn what Amy said on 18 November 2019 into a representation that there was nothing else to be disclosed is to place on it greater weight than it will bear. She had asked to speak to Nirmal privately, because she wanted to tell him of the position regarding stock valuation, which was causing her some concern. I accept her evidence (witness statement, paragraph 89) that, when they had spoken about the stock, Nirmal asked whether she wanted to discuss

anything else. She confirmed that there were no other matters concerning her. I think it unreasonable to construe this as meaning anything more than that she had discussed everything she wanted to discuss.

102. Generally, I find that CGR, through Nirmal, did not rely, in deciding whether to enter into the SPA, on any representations that have been alleged. What it relied on was its own assessment as to the potential of the business, coupled with the terms of the SPA in respect of the Completion Accounts. This is indicated, not least, by the fact that Nirmal pursued completion, without any attempt to renegotiate the price, despite what he was told about the Bibby Facility, the stock valuation and the debts believed to be irrecoverable. In my view the averment in paragraph 31 of the amended defence accurately reflects the true position: Nirmal's concern was to get an indication of the new working capital that would be required on completion and to come up with a Target Working Capital figure for the SPA; but to the extent that information could be shown to be inaccurate CGR would rely on the protection afforded to it by the contractual provisions relating to the Completion Accounts and price adjustment (cf. paragraph 45 above). Given this protection and the frankly nonchalant approach of Captain to the purchase price, CGR did not rely on the alleged representations in deciding to proceed. Mr Ascroft put the matter to me in opening on the basis that, but for the alleged misrepresentations, CGR would not have entered into the SPA. I reject that contention.

One Stop's Breach of Duty Claim

103. OSR's claim in these proceedings is set out in paragraphs 66 to 74 of the amended particulars of claim, though it has been modified somewhat in the light of the evidence, and is to the following effect. In the course of the financial year ending on 30 June 2019 Steve and Amy, as the directors of OSR, caused OSR to pay to them dividends totalling £100,000 by means of weekly payments by standing order of £1,000 to each of them. They continued to cause such payments to be made to them, in a total sum of £24,000 to each of them, until completion of the SPA. In fact, at all times when these payments were being made, OSR was insolvent or at least of doubtful solvency. Therefore, in the discharge of their duty under section 172 of the Companies Act 2006, Steve and Amy were required when considering whether to pay themselves interim dividends to have regard to the interests of creditors. However, in deciding to cause OSR to make those payments they were in breach of the duty in section 172 because (a) there were no grounds upon which they could reasonably and *bona fide* have concluded that the payments were most likely to promote the interests of OSR's creditors and (b) no intelligent and honest director of OSR could, in all the circumstances, reasonably have believed that the payment of the dividends was in the interests of OSR's creditors. OSR does not allege that the dividends received by Steve and Amy were unlawful as being contrary to the requirements of Part 23 of the Companies Act 2006. Rather, it relies in particular on the recognition by the Supreme Court in *BTI 2014 LLC v Sequana SA and others* [2022] UKSC 25, [2022] 3 WLR 709, that a director who distributes an otherwise lawful dividend at a time when the company is insolvent may be in breach of duty to the company—the so-called

"creditor duty".[11] OSR claims, at least in the amended particulars of claim, to recover £148,000 together with interest. The nature of the relief claimed is equitable compensation: point 1 in OSR's prayer for relief.

104. The claim as pursued was modified as a result of Amy's evidence in her witness statement and Mr Mesher's analysis in consequence of that evidence. Amy stated:

> "As Shareholder/Directors, Steve and I agreed that it would be more tax-efficient for our remuneration to be paid by way of dividends. To assist OSR's cashflow, we received payments on a weekly basis. I understand that this method of payment is common practice for owner-managed companies and actually served to save OSR money. We received dividend payments of £48,000 between 1 July and 16 December 2019. These were voted for and confirmed in the June 2019 accounts, but we took payment after the end of the accounting period to make cash flow easier."

In view of the way the claim has been advanced, this evidence (which I accept) means that the £100,000 dividend declared in the year ended June 2019 (cf. paragraphs 66 and 67 of the amended particulars of claim) relates to the same money as was received by monthly payments from July to December 2019. The report of Mr Mesher confirms that the practice of declaring a lump sum dividend at the end of each financial year is common with owner-managed businesses. It appears that in this case the dividend of £100,000 was credited to the Birds' directors' current account. Drawings from that current account would not themselves constitute payment of the dividend but rather withdrawals of the Birds' own money; the actual payment of the dividend was effected by the crediting of the current account, which created a debt owed by the company to the directors.

105. The upshot is that OSR's claim, as advanced, is for recovery of the dividend of £100,000 declared in 2019. In fact, the amount actually recoverable by payment would be the sum of the deficit on the directors' current account that was cleared by the credit (£24,428) and the amount drawn down from the current account (£48,000): namely, £72,428. As for the balance, the matter would fall to be dealt with by an accounting adjustment on the directors' current account rather than by the actual transfer of money.

106. So far as material, section 172 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,

[11] The claim is also pleaded on the basis of breach of trust. Even if this alternative analysis is available in principle, I cannot see that it adds anything to the claim based on the duty in section 172. The case was argued before me simply on the basis of the creditor duty under section 172, and after *Sequana* that seems to me to be correct.

> (b) the interests of the company's employees,
>
> (c) the need to foster the company's business relationships with suppliers, customers and others,
>
> (d) the impact of the company's operations on the community and the environment,
>
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
>
> (f) the need to act fairly as between members of the company.
>
> …
>
> (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

107. In *Sequana* the reasoning in the judgment of Lord Briggs was approved by the majority, and I shall refer only to that judgment here. At [120] he made the following comments on insolvency:

> "Insolvency takes two forms. Either may exist without the other. The first is usually called balance sheet insolvency, where the value of the company's assets is exceeded by the value of its liabilities: see section 123(2) of the 1986 Act. The second is what is generally known as commercial insolvency, where the company is unable to pay its debts as they fall due: see section 123(1)(e) of the 1986 Act and the *Cheyne Finance* case. For present purposes what matters is that neither will necessarily be permanent, nor fatal to the long-term success of the company, although of course either may be, and commercial insolvency often is. A company may experience short-term commercial insolvency due to a temporary adverse balance between the liquidity of its assets and the maturity of its debts. Many start-up companies are balance sheet
>
> insolvent before a new invention or business product is sufficiently developed to be brought to market so as to generate revenue or goodwill value, and yet the company later becomes spectacularly successful, and its shareholders become millionaires. In both cases the directors may perceive that there is a reasonable prospect that the company will be able to trade out of insolvency, for the benefit of both creditors and shareholders, a perception often labelled as seeing light at the end of the tunnel."

Lord Briggs provided further important context for the creditors' duty by referring to section 214 of the Insolvency Act 1986, which provides that, where a company is in insolvent liquidation, the court may, on the application of the liquidator, declare that a person who was a director of the company is liable to contribute to the company's assets, if that person knew or ought to have known that there was no reasonable prospect that the company would avoid insolvent liquidation or insolvent administration. Lord Briggs continued:

> "122. This statutory obligation is not to be understood simply as the recognition of a common law creditor duty. First, literally speaking, section 214 merely confers a discretionary power on the court to require a director to make a contribution to the assets of the company in the stated circumstances, while conferring a defence to such a liability [by section 214(3)] if the director took every step he ought to have taken to minimise the loss to creditors. Secondly, the statutory liability is not to account or to make equitable compensation for loss caused by an assumed breach of fiduciary duty, but to make such contribution to the assets of the company as the court thinks fit.
>
> 123. But section 214 is a central plank in the statutory scheme of creditor protection which has been in force during the whole of the period in which the *West Mercia* case has stood as binding authority for the existence of a common law creditor duty. This court decided in *In re Lehman Bros International (Europe) (No 4)* [2017] UKSC 38, [2018] AC 465, that the statutory scheme is the dominant element in the UK's framework of insolvency law, to which purely judge-made rules or principles must either be accommodated or abandoned: see per Lord Neuberger of Abbotsbury at paras 12-13 and 83.
>
> 124. It is to be noted that the trigger for the application of the section 214 liability, looking backwards from an insolvent liquidation (or administration, under section 246ZB of the 1986 Act) that has in fact happened, is that it is such a liquidation or administration, not just an insolvency, that has become inevitable. In most although not necessarily all cases insolvency will have happened some time before a liquidation or administration became inevitable."

Lord Briggs then confirmed that the creditor duty could apply to a decision by directors to pay a lawful dividend. At [161] he adopted one of the reasons given by David Richards LJ in the Court of Appeal:

> "Part 23 identifies profits available for distribution on a balance sheet basis. A company may well have a balance sheet surplus while being commercially (i.e. cash flow) insolvent. It cannot be the case that directors of a company already unable to pay its debts as they fall due could distribute a dividend, or do so if the consequence of the payment was to bring about cash flow insolvency. To do so in those circumstances would be to take a

> foolhardy risk as to the long-term success of the company, by exposing it to the real risk (or at least a gravely increased risk) of being wound up."

Lord Briggs then addressed the content of the creditor duty. The discussion at [172]-[175] is important, though for brevity's sake I do not set it out here. The conclusion was at [176]:

> "In my view, prior to the time when liquidation becomes inevitable and section 214 becomes engaged, the creditor duty is a duty to consider creditors' interests, to give them appropriate weight, and to balance them against shareholders' interests where they may conflict. Circumstances may require the directors to treat shareholders' interests as subordinate to those of the creditors. This is implicit both in the recognition in section 172(3) that the general duty in section 172(1) is 'subject to' the creditor duty, and in the recognition that, in some circumstances, the directors must 'act in the interests of creditors'. This is likely to be a fact sensitive question. Much will depend upon the brightness or otherwise of the light at the end of the tunnel; i.e. upon what the directors reasonably regard as the degree of likelihood that a proposed course of action will lead the company away from threatened insolvency, or back out of actual insolvency. It may well depend upon a realistic appreciation of who, as between creditors and shareholders, then have the most skin in the game: i.e. who risks the greatest damage if the proposed course of action does not succeed."

At [191]-[199] Lord Briggs rejected the suggestion that the creditor duty was triggered by the existence of a real risk of insolvency. He concluded at [199] and [203]:

> "199. … It is not necessary for this court therefore to decide whether any other trigger earlier than insolvency itself would be sufficient, any more than it was for the Court of Appeal. The candidates proposed in argument are probable insolvency and imminent insolvency. Both find support from dicta in the authorities. In my view any trigger earlier than actual insolvency needs clear justification."

> "203. I would prefer a formulation in which either 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, are sufficient triggers for the engagement of the creditor duty. It will not be in every or even most cases when directors know or ought to know of a probability of an insolvent liquidation, earlier than when the company is already insolvent. But that additional probability-based trigger may be needed in cases where the probabilities about what lies at the end of the tunnel are there

> for directors to see even before the tunnel of insolvency is entered."

Accordingly, the creditor duty is triggered if the company is actually insolvent. Even in the absence of actual insolvency, it may also be triggered (the point was not strictly decided) if the directors know or ought to know that insolvency is imminent (that is, just around the corner and going to happen) or that it is probable that the company will enter into insolvent liquidation or administration.

108. Before analysing OSR's claim in these proceedings, I note some of its features. It is brought purely for the benefit of CGR, which is its sole shareholder. OSR appears, according to its financial statements, to be a busy and healthy company. It has not entered into liquidation or administration, so the discretionary jurisdiction under section 214 of the Insolvency Act 1986 has not been engaged. The claim is not brought to protect the interests of creditors, though their interests are the focus of the creditor duty when it is owed to the company. CGR's own claims in these proceedings had the purpose of bringing about a situation in which it acquired the entire issued share capital in OSR without making any payment to the Birds. OSR's claim has the purpose of making the Birds pay £148,000 into the company that CGR would have acquired without payment. That would be scann'd.

109. The first question is whether the creditor duty was triggered. OSR's pleaded case is that it was, because at all material times OSR was insolvent or of doubtful insolvency: paragraph 70 of the amended particulars of claim. In the light of *Sequana*, "doubtful" solvency is insufficient to give rise to the creditor duty: actual insolvency is required (or, possibly, in the absence of actual insolvency, imminent insolvency or probable liquidation or administration). The amended particulars of claim do not specify whether insolvency was on the cashflow basis or the balance sheet basis; both have been relied on. As it seems to me, the "material" time when considering the dividend (which is the basis of the pleaded case) was 30 June 2019; the financial statements later approved are evidence of the informal agreement—the Birds did not operate OSR by way of formal resolutions—to declare the dividend.

110. OSR's financial statements for the year ended 30 June 2019 were approved and signed on 4 November 2019. They show the following things (round figures shown below are approximate unless otherwise stated).

- Gross profit was £4.3 million. Operating profit was £850,000. Profit before taxation was £492,000. Profit after tax was £387,000 (up from £360,000 in 2018).

- Total assets were £9.3 million. Current assets were nearly £6 million, which included £127,000 cash at bank and in hand (up from £15,000 in 2018). Net current liabilities were £832,000. Net assets were £782,000.

- The directors' aggregate remuneration was precisely £140,000 (up from £116,000 in 2018).

- Dividends paid during the year (excluding those for which a liability existed at the end of the prior year) were unchanged from 2018, at precisely £100,000.

111. Although the financial statements show a solvent company, both Mr Mesher (paragraphs 6.6 to 6.10 of his report) and the defendants' expert Mr Matthew Haddow (section 6 of his report) opine, on the basis of information provided to them, that on 30 June 2019 OSR was probably insolvent on a balance sheet basis. Mr Mesher opined that OSR was also insolvent on a cashflow basis (paragraphs 6.4 and 6.5 of his report) and Mr Haddow implicitly agreed, though with less precision as to the date (cf. paragraphs 6.27ff of his report; also point 2.16 of the joint statement).

112. The opinions of the experts are deserving of considerable respect, but they must be considered in the light of the actual facts of the case. Several points are relevant.

1) The experts have proceeded on the basis that the true value of stock was as stated in the Completion Accounts. That was a reasonable basis on which to proceed, because the figure was agreed for the purpose of the Completion Accounts, but I do not believe that it is correct. Amy's evidence was that, because the large component of dirt stock was not available for immediate sale but would first require tromelling, she felt easier about excluding it from the valuation; however, she considered that, once tromelled, it would have substantial value, which she estimated at £600,000. I accept her evidence that this was her belief, and I do not consider that any other evidence in the case shows that the belief was unfounded or incorrect.

2) Indeed, the post-completion history of OSR's balance sheet tends to suggest that the value of the stock as at 30 June 2019 was at least as high as it was stated to be in the financial statements to that date, namely £1,994,226. OSR's financial statements for the period 1 July 2019 to 31 December 2020 include a balance sheet that shows the figures for 30 June 2019 "as restated"; the figure for stock is the figure originally shown, without reduction. The figure for stock as at 31 December 2020 was £2,996,854. OSR's Nominal Ledger shows this to be the result of a "Stock Revaluation/Correction at YE 20". I do not think that any satisfactory explanation has been given for the increase. Mr Coade's evidence was that the decision was taken to defer the write-down of stock until the end of 2020, but that does not accord with the unadjusted figure for 2019 and fails to explain the increase in 2020, which (if Mr Coade were right to say that there was a downwards adjustment) would amount to an uplift of nearly £2 million. Nirmal's claim that higher levels of stock were retained as a result of Covid is not supported by the evidence. Mr Coade said in cross-examination that the increase in stock valuation resulted from analysis of stock movements in and out. There are two problems with that. First, the "correction" is shown by two entries on one of the spreadsheets, which together give a suspiciously round number, not suggestive of a genuine revaluation. Second, the Environment Agency annual waste returns show that in 2020 OSR sold a significantly greater tonnage of scrap than it bought. Mr Ascroft objected, with an untimely interjection, that the Environment Agency was concerned with tonnage not value. That is true, but the waste returns nevertheless render Mr Coade's explanation for the great increase in stock values fairly implausible in the absence of supporting evidence. Further, it was not the answer that came to Mr Coade's mind: he said that he would rather trust the auditors than the records of the Environment Agency, which might have been completed inaccurately by a junior member of staff. That response

was even less convincing than Mr Ascroft's. The most likely conclusion is that either (a) OSR falsified its stock valuation in 2020 or (b) the figure for stock shown in the 2019 financial statements was not corrected in the 2020 financial statements because it was thought not to overstate the true value of the stock in June 2019. I think that both are probably the case; the second is very probable.

3) In OSR's financial statements to 31 December 2020, the net assets were shown as £1,287,500. The restated figure for 30 June 2019 was £576,545, representing a reduction of £205,628 from the original figure, which was attributable to the write-off of money owed by a single debtor only—see Note 9 to the financial statements. The dividends for 2019 were shown in the balance of retained earnings as at 31 December 2020. In the period to 31 December 2020, interim dividends of £100,000 (payable, necessarily, to CGR) were recorded; as the financial statements recorded a loss during that period, the interim dividends were only justified on the basis of the retained profits from 2019. Therefore, the lawfulness of the 2020 dividends was premised on the retained profits from 2019.

4) The financial statements for 2020 show "Adjustments to tax charge in respect of previous periods" of £434,210. Mr Coade said in cross-examination that this related to Research & Development. If that is right, and if it relates to previous periods, it is relevantly credited to 2019. (Mr Coade said that to establish such a claim would cost £100,000 in accountancy fees, but I have seen nothing to support that improbable assertion and I do not accept it.) Further, if adjustments were made to the accounts to reflect the matters complained of by CGR, so as to reduce profits or show a loss, there ought to be a corresponding entitlement to further tax credits.

5) I am not, in the circumstances, persuaded that OSR was actually insolvent on the balance sheet basis on 30 June 2019 or, indeed, at any time before completion of the SPA.

6) As regards what Lord Briggs called commercial insolvency, the practice of Advance Invoicing is certainly evidence of cashflow pressures. However, it is to be noted that the practice had continued for several years and that there is no evidence that creditors were going unpaid up to 30 June 2019. Mr Mesher adverts to the evidence that OSR frequently had less than £5,000 ready cash in the bank at close of business; however, that does not show insolvency, and the 2019 financial statements recorded cash at bank as £127,696, a figure that was not adjusted in the 2020 financial statements. Mr Mesher refers to the sale of two cranes in late 2019, but that was several months after the date of the declaration of the dividends and, even if the later date be supposed relevant, does not establish actual insolvency. Later, too, was the failure to pay tax on time in December 2019, which might itself have been an indication of cashflow insolvency. Of course, the withdrawal of the Growth Street facility in November 2019 was an obvious cause of increased cashflow pressures at the end of the year, though not one that was, or was likely to be, fatal to the viability of the business. In the circumstances, although it is clear that OSR was facing cashflow problems during 2019, I am not satisfied that it was actually insolvent on a cashflow basis when the dividend was declared.

113. However, if (contrary to the view just expressed) the creditor duty was indeed triggered, I would not make an award of equitable compensation, for the reasons set out in the following paragraphs.

114. First, although I would be willing to accept that there was *ex hypothesi* a breach of duty (because there is no evidence that consideration was given to the interests of the creditors), I would not regard the breach as causative of any loss to OSR. The interests of creditors would not be paramount; they would be a factor to be taken into account with others. The dividend in the present case was chosen as a tax-efficient way of providing remuneration to the director-shareholders. Such a method of remuneration is common, as Mr Mesher pointed out, and there is nothing intrinsically wrong with it. Indeed, it is what CGR was envisaging as a potential method of providing the Birds' remuneration package after completion of the SPA. Mr Ascroft criticised the amount of the remuneration, but this lies ill on the part of CGR, which had agreed a remuneration package of £150,000 each to Steve and Amy. If this was reasonable and proper remuneration, it could have been paid by salary alone. If that is so, the fact that it was paid in part by dividend is immaterial, provided there is no contravention of Part 23 of the Companies Act 2006. I do not consider that regard to the interests of creditors would have led to the decision to reduce the directors' remuneration package.

115. Mr Ascroft relied on *Global Corporate Ltd v Hale* [2018] EWCA Civ 2618, [2019] BCC 431, as authority showing that the ability to receive the moneys as salary rather than dividends is irrelevant to liability. I do not agree that the case is on point, at least as regards the reasoning in the preceding paragraph. In the *Global Corporate* case, liquidators sought repayment of moneys that had been paid as interim dividends to the director and shareholder. The ground on which repayment was sought was that the payments were unlawful as dividends, because the company had insufficient distributable reserves of profits. The claim, which was brought by the assignee from the liquidator, was thus for recovery of payments constituting dividends that were unlawful under the Companies Act 2006, not (as in this case) for compensation for the payment of lawful dividends authorised in breach of the duty under section 172. The trial judge dismissed a claim under section 212 of the Insolvency Act 1986 based on the director's misfeasance, on the grounds that it was not misfeasance to receive by way of purported dividend what could have been received as lawful remuneration. There was no appeal from that decision, which therefore did not arise for consideration in the Court of Appeal. However, disagreeing with the trial judge, the Court of Appeal held that, as the moneys had been received as dividends in circumstances where the statutory conditions for the payments of dividends were not satisfied (because there were no profits out of which a distribution could lawfully be made), they were recoverable. In focusing on the state of mind of the directors when the payments were made (which may have been ambiguous and conditional) rather than on the payments themselves, the trial judge had fallen into error; if he had focused on the payments and the statutory criteria, there could have been only one answer, namely that the payments were not lawfully made. This does not touch the reasoning in the preceding paragraph of this judgment, for the following reasons. (1) The present case is not concerned with payments that were unlawful as being outwith the powers under Part 23 of the 2006 Act. It is concerned with payments that were lawful under the Act (i.e. as dividends) but are said to have been made in breach of the creditor duty (cf. *Sequana* at [115]). Therefore the discussion concerning saving the

legality of the payments by taking them outside Part 23 by an exercise in recharacterization is not in point. (2) For that reason, the issue is not determined by application of statutory criteria, as it was in the *Global Corporate* case. The reasoning in the preceding paragraph assumes that there was indeed a breach of duty. The question, rather, is as to the consequence of the breach of duty. In the *Global Corporate* case a dividend was paid in circumstances where it was unlawful to pay it: that was the end of the matter. In the present case, a dividend was paid in circumstances where it was lawful to pay it but where *ex hypothesi* it was a breach of duty to the company to pay it without first considering the interests of creditors: the question whether the money could properly have been paid if those interests had been considered is directly material. (3) No question of "recharacterization" arises. The point is not that the Birds could lawfully have made and received the payments as salary but not as dividends. It is that, because their remuneration would not have been properly open to attack if it had been by way of salary, it is not properly open to attack when it was by way of dividend—provided, of course, Part 23 was complied with.

116. Second, any breach of duty can have caused no actual loss in any event. I appreciate that the present claim is strictly OSR's, while the other claims are CGR's. But the person obtaining the substantial benefit of any recovery by OSR is CGR; this claim is not brought for the benefit of creditors. The effect of ordering equitable compensation would be to negate the dividend. The effect of negating the dividend would be to alter the premise of the Completion Accounts by reintroducing the same amount of money into the company, thereby reducing the Working Capital Shortfall by an equivalent amount and increasing the price under the SPA correspondingly. That would simply create pointless circularity. If for any reason it should be said that the position as between the Birds and OSR is still capable of correction but that the position as between the Birds and CGR on the Completion Accounts is a fait accompli, my response would be that equity would decline to award compensation in those circumstances, where no creditors are affected and the claim is brought solely for CGR's benefit. CGR cannot eat its cake and have it.

The Birds' Counterclaim

117. The counterclaim received very little attention at trial. Two heads of cross-claim fall for consideration; a third has been overtaken by events.

Release from personal guarantees

118. Clause 7.5 of the SPA provided:

> "The Buyer covenants with the Warrantors that it will look to release the Warrantors from the personal guarantees identified below on the following basis:
>
> 7.5.1 in respect of the Personal Guarantees relating to Bibby on or before 90 days from the Completion Date;
>
> 7.5.2 in respect of the Personal Guarantees relating to Funding Circle on or before 12 months from the Completion Date;

> 7.5.3 in respect of the Personal Guarantees relating to Growth Street on or before 12 months from the Completion Date;
>
> 7.5.4 in respect of the Personal Guarantees as soon as practicable following the cessation of the Sellers' employment with the Company and in any event within 120 days from the date which the Seller's employment with the Company ceases."

Having regard to the definition of "Personal Guarantees" in clause 1.1, it is clear that clause 7.5.4 ought to say "in respect of the Personal Guarantees of Close [Brothers Group plc]".

119. The personal guarantees relating to Bibby and Growth Street have been cancelled. The personal guarantees relating to Funding Circle have not been cancelled. The position relating to the personal guarantees relating to Close has not been confirmed. The Birds seek an order that CGR procure or attempt to procure the release of the subsisting personal guarantees. In my judgment they are entitled to such an order. If the appropriate terms, including terms that will enable the court to police compliance, cannot be agreed, I shall hear counsel.

Debts more than 60 days old: Completion Accounts and Estoppel

120. This head of cross-claim is set out in paragraphs 110 to 116 of the amended counterclaim and arises out of the detailed provisions of Schedule 7 to the SPA regarding the agreement or determination of the Completion Accounts. These included the following:

> "3.1 The Completion Accounts shall be prepared and determined in accordance with the following accounting principles, policies, bases and methods …
>
> …
>
> 3.3 The specific principles, policies, bases, practices and methods referred to in paragraph 3.1.1 are:
>
> …
>
> 3.3.2 debts which are less than 60 days old (being current and period 1 balances as per the Company's sage accounting system on the date of Completion) shall be included in the calculation of the Completion Statement subject to such debts not being bad or doubtful in which case they shall be fully provided for".

The implication of paragraph 3.3.2 is that debts that were 60 days old or more would not be included in the calculation. That would have the effect of reducing the Actual Working Capital by the sum of such debts. To the extent that the Actual Working Capital was less than the Target Working Capital of £1,282,000, there would be a

Working Capital Shortfall. The price payable under the SPA was to be reduced by an amount equal to the Working Capital Shortfall: see clause 3.4.2 (paragraph 45 above).

121. The cross-claim in this connection is to the following effect. Amy raised concerns about these provisions with Nirmal, because OSR was owed very substantial debts that were more than 60 days old but were neither bad nor doubtful. Nirmal assured her that CGR would not rely on the provisions in respect of any debts that, though more than 60 days old, were paid following completion. He said this to induce the Birds to enter into the SPA and they reasonably relied on his assurance in doing so. However, in the event CGR insisted on a strict application of paragraph 3.3.2 of Schedule 7, even though many of the debts that were 60 days old or more had in fact been repaid by the time the Birds were dismissed. Paragraph 116 of the amended counterclaim avers:

> "In the premises, it is unconscionable for CGR to rely upon the provisions of paragraph 3 of the SPA to insist that the figure for Actual Working Capital in the Completion Accounts be reduced by debts of more than 60 days which have been paid since Completion as it would be unjustly enriched, and hence it is estopped from doing so."

122. The defence to counterclaim denies that Nirmal gave any assurances such as are alleged and pleads reliance on the full terms of the SPA and, in particular, the "entire agreement" provision in clause 19.

123. This head of the counterclaim depends on Amy's evidence. In her witness statement she addressed the point as follows:

> "108. My trust in Nirmal was absolute, even when it came to the wording and drafting of the SPA. He encouraged me to rely on him when it came to the SPA's terms, which I did, over and above my solicitors at the time. For example, there was a term in the SPA which said that any debt over 60 days old was to be excluded from the completion accounts. Whilst I now appreciate that this means that the price would be adjusted down by any such debt (and in retrospect feel that the SPA was drafted in such a way to penalise me and Steve for the previous disclosures made), I sought assurance from Nirmal by telephone and in person, the exact dates of which I do not recall, that he (on behalf of CGR) would not rely on this clause for debts which were paid following Completion. This is because there was a significant amount of debt owed to OSR (worth around £546,000) which was older than 60 days but not bad or doubtful, and therefore if CGR was going to rely on the clause, we would have agreed to a reduction in the purchase price of around £546,000 for no reason."

This does not actually allege that Nirmal gave any assurance. The tenor of Amy's oral evidence in cross-examination was that she did receive an assurance but could not say when she received it, as she had so many conversations with Nirmal. She said that, when the process of preparing Completion Accounts was in hand in early 2020,

her accountant told her that she ought to be able to get a reasonable purchaser to give credit for moneys actually received; however, when she raised it with Nirmal and asked him to confirm that he would not rely on the strict wording of the SPA, he just walked away.

124. The matter was put to Nirmal in cross-examination, when he denied any recollection of Amy ever having raised the matter with him.

125. I reject this head of counterclaim. I find that the assurance said to have been given by Nirmal has not been proved. There is nothing in the documents to support it. Amy, whose evidence was often so precise when recounting her recollections of conversations, was very vague when relating what Nirmal had said. It may well be that her trust in Nirmal was such that she assumed that CGR would not adopt a strict reading of the relevant provisions of the SPA, and that she sought to address the point when she belatedly realised that the Completion Accounts were no mere formality but could lead to a significant reduction in the price. At all events, it has not been established to my satisfaction on the balance of probabilities that Nirmal gave an assurance on the point.

Conclusion

126. The claims of CGR and OSR are dismissed.

127. The counterclaim is allowed insofar as it relates to the procuring of a release from personal guarantees, but otherwise it is dismissed.

128. If the terms of the order and other consequential matters cannot be agreed, I shall hear counsel further.