OUTER HOUSE, COURT OF SESSION

[2021] CSOH 99

P115/17

OPINION OF LORD TYRE

In the Note by

JAMES BERNARD STEPHEN and MALCOLM COHEN as Joint Liquidators of RFC 2012 plc

Noters

for

Orders under paragraph 75 of Schedule B1 to the Insolvency Act 1986

Noters: McBrearty QC, T Young; Shepherd & Wedderburn LLP
Respondents: (David John Whitehouse and Paul John Clark): A Young QC, Paterson; CMS LLP

6 October 2021

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Introduction

[1] The noters are the liquidators of RFC 2012 plc ("the company"), whose former name was The Rangers Football Club plc. They were appointed as joint interim liquidators of the company on 31 October 2012 and as liquidators at a creditors' meeting on 4 December 2012. The respondents were appointed as joint administrators of the company, pursuant to a notice of intention to appoint administrators filed on 13 February 2012 by the directors of the company. Their appointment took effect on 14 February 2012 and terminated on 31 October 2012 upon the noters' appointment as joint interim liquidators. The respondents have not yet been discharged.

[2] In this application under paragraph 75 of Schedule B1 to the Insolvency Act 1986, the noters allege that the respondents were guilty of breaches of duties owed by them to the company as joint administrators. They contend that as a consequence the company suffered loss, injury and damage, and that the interests of the general body of creditors were not served. The noters seek an order requiring the respondents to contribute a sum of £47,690,410, together with interest and the expenses of these proceedings. The respondents deny that they have committed any breach of duty or are liable to make any contribution.

[3] The application came before me for a proof before answer which, due to Covid 19 restrictions, was conducted remotely. I heard 16 days of factual evidence, the bulk of which came from the respondents and senior members of their staff who conducted the administration. Expert evidence was led on four matters, namely player sales and valuation, brand valuation, heritable property valuation and general conduct of administration. In each case the parties' respective experts gave their evidence concurrently, allowing them the opportunity to comment on one another's oral evidence as it was given.

Events leading up to the appointment of administrators

[4] In late 2010 and early 2011, Mr Craig Whyte, a businessman and owner of Liberty Capital Limited, was in talks with the owners of the company, which owned and operated the football club known as Rangers FC ("the club"), with a view to acquiring it. By a share purchase agreement dated 6 May 2011 among Murray MHL Limited, Wavetower Limited and Liberty Capital Limited, Murray MHL Limited agreed to sell an 85% shareholding in the company to Wavetower Limited. The consideration for the shares was £1. Wavetower Limited changed its name to The Rangers FC Group Limited ("RFCGL").

[5] At the time of the acquisition of the company by Mr Whyte, Messrs Whitehouse and Clark were partners in MCR, an independent restructuring practice, as was Mr David Grier. Prior to the acquisition, MCR were engaged to advise Liberty Capital Ltd in relation to re-financing and repayment of the existing debt to Lloyds Bank. The principal point of contact was Mr Grier. Following upon Mr Whyte's acquisition of the company, MCR entered into a further agreement with Liberty Capital Ltd to provide services including (1) ongoing consultancy advice including discussions with the company's finance team on the monitoring of cash; (2) development of a high level post-acquisition strategy focusing on operational and financial elements; and (3) liaison with HM Revenue & Customs ("HMRC") in respect of a potential tax liability. Subject to the response of HMRC, MCR were to provide outline recommendations and options available to Liberty Capital Ltd and the company.

[6] In November 2011, MCR were acquired by Duff & Phelps LLC ("D&P"). Messrs Whitehouse, Clark and Grier became partners in D&P. On 30 November 2011, D&P, again via Mr Grier, sent an engagement letter to Mr Whyte undertaking to provide the following services:

> "1. Consider and evaluate potential solvent and insolvent exit strategies and to assist management in meeting their fiduciary duties and obligations when running a company with particular attention being paid to any proposed restructuring on a solvent or insolvent basis;
>
> 2. To assist the Company in discussions with Grant Thornton in relation to outstanding audit requirements;
>
> 3. Working alongside the Company's tax advisors to assist the Company in consultation with HMRC;
>
> 4. Review at a high level the Company's short term cash flow forecast, which had been prepared to identify the working capital requirements of the Company;
>
> 5. Provide ad hoc advice as requested by the directors of the Company."

Although Mr Grier was the principal point of contact for Mr Whyte at D&P, Mr Clark and Mr Whitehouse became more involved in the work towards the end of 2011 as it became clear that there was a risk of the company becoming insolvent.

[7] One of the major issues for the company at this time was its tax liabilities. The company had outstanding two potential tax liabilities which came to be known as the big tax case (concerning the past use of employee benefit trusts as a method of paying players and others without incurring liabilities to PAYE and NIC) and the small tax case (concerning an amount of unpaid VAT). In addition, the company was incurring further liabilities as a consequence of non-payment of taxes as they fell due. An attempt was made during the January 2012 transfer window to sell players to realise some funds that could be applied to reduce those liabilities, but in the event only one player (Nikica Jelavic) was sold for a substantial fee, and payment of most of that fee was deferred.

[8] By the end of January 2012 it appeared to be very likely that the company was heading towards administration. D&P were one of the firms being considered by Mr Whyte for appointment as administrators, although HMRC were also now intending to place the company in administration, using a different firm. D&P began to assemble a team in

anticipation of receiving appointment. On 10 February 2012, a time to pay proposal that had been put by the directors to HMRC was rejected. On 14 February 2012, after discussion between the directors and HMRC, the respondents were appointed as joint administrators.

The administration: a brief chronology

[9] At this point it is convenient to explain the respective roles of the members of the D&P staff who, in addition to the respondents themselves, carried out significant work on the administration. All dates in the following chronology, and in the remainder of this opinion, are in 2012 unless otherwise stated.

- Simon Shipperlee was engaged in the administration from the outset, reporting directly to the respondents. He was responsible for the football aspects of trading the company in administration, including liaising with the football authorities, taking any necessary regulatory steps, and leading discussions with the players and coaching staff. He was based at the club's Ibrox Stadium in Glasgow during the administration and acted as a point of contact for the supporters' groups.
- Peter Hart shared responsibility for the day to day running of the business with Mr Shipperlee. This included responsibility for trading, cash flow and funding, public relations, match day operations, and dealing with the club's website communications and its fans. Mr Hart's responsibilities included decision-making in relation to redundancies among non-playing staff.
- Sarah Bell joined the team in Glasgow about a week after the beginning of the administration. She managed the rest of the team, dealing with any urgent matters that the respondents themselves did not have capacity to cover. She

dealt with a variety of different matters, including overseeing litigation against Collyer Bristow LLP for the return of money held in their client account, and a further, larger litigation against Collyer Bristow in respect of alleged breaches of trust and duty and alleged conspiracy whilst acting as advisors to the company. She had a high level role in formulating the administrators' proposals including the proposal for a creditors' voluntary arrangement ("CVA"). She too had a role in overseeing the company's cash flow.

- James Saunders joined the team about two weeks after the beginning of administration, and remained a member of the team until 4 May when he took a period of extended leave before returning on 31 May. He was primarily involved, along with Mrs Bell, with the sale aspects of the administration.
- Charles Walder was a more junior member of the administration staff, working together with Mrs Bell and Mr Saunders on the sale process.

[10] The administration team began by holding meetings with players, supporters' groups, representatives of the Scottish Premier League ("SPL"), and the club manager, Ally McCoist. One of the first matters that required to be attended to was whether an outstanding application to the SPL to approve the signing of a player, Daniel Cousin, should be maintained. The respondents decided that it should, but on 17 February the application was refused by the SPL Board. Another matter that came to the administrator's attention at an early stage was that the Scottish Football Association ("SFA") had begun a disciplinary investigation into Mr Whyte's status as a "fit and proper person" and that, in view of the company's entry into administration, the SFA Board had decided to establish an independent committee to carry out the investigation.

[11] The respondents' view at the outset of the administration was that the best course of action to pursue was the sale of the company as a going concern, that being first in the hierarchy of statutory objectives for administrators. An Information Memorandum for prospective purchasers was prepared by Messrs Saunders and Walder, supervised by Mrs Bell, and released on 19 February to interested parties who were willing to sign a non-disclosure agreement. On the following day, the respondents instructed Lambert Smith Hampton ("LSH") to provide a valuation report in respect of Ibrox Stadium and the Albion Car Park, and in respect of Murray Park, the company's training ground and youth academy located at Milngavie.

[12] During the remainder of February, the respondents and their staff assessed the company's cash flow situation. At the outset of the administration the company had around £3,375,000 in its bank account. A short-term cash flow forecast produced on 23 February indicated that trading the company to the end of the 2011-12 SPL season would result in a cash shortfall of £2,435,000, assuming that a cost reduction programme was implemented in the football part of its business. The respondents considered means of addressing the anticipated shortfall. Two senior executives were made redundant with effect from 29 February. A decision was made at an early stage to meet the full staff payroll for February.

[13] The respondents then began negotiations in relation to proposed player redundancies. Mr McCoist provided a list of eight players (out of a playing staff of 67) for possible redundancy. The respondents regarded this as insufficient to address the cash shortfall. The chief executive of the Professional Footballers Association Scotland ("PFAS"), Fraser Wishart, suggested that savings could be made by means of wage deferrals rather than redundancies. The respondents' view was that wage reductions, as opposed to

deferrals, were necessary. Deferrals would decrease the value of the company to a purchaser, and in any event PAYE and NIC would continue to be payable on the full wage bill. The respondents resolved to announce redundancies on 1 March but negotiations continued for a further week thereafter.

[14] On 9 March agreement was reached that the players would accept reductions in their salaries of between 25% and 75% for the three month period to 31 May. Mr McCoist agreed to waive his salary until the end of the season. The aggregate effect was a reduction in wage costs of around £1 million. There were, however, two significant conditions attached to the players' wage reduction agreement. Firstly, some of the more valuable players insisted that new, lower minimum buy out clauses, which fixed the amount for which the company was bound to sell if an offer acceptable to the player was made by another club, were included in their contracts. Secondly, the players insisted that there would be no significant redundancies among the playing and non-playing staff. In the event, only two players (at their own request) and a small number of non-playing staff were made redundant. One player was sold to a South Korean club.

[15] In the meantime, on 24 February, representatives of the respondents had a meeting with HMRC, following which Mr Clark reported HMRC's view as being that liquidation looked inevitable. On 1 March, court proceedings against Collyer Bristow were commenced in England for the release of company funds.

[16] The report by LSH on valuation of the company's heritable property was received on 14 March. The value of Ibrox Stadium, including the Albion Car Park, on a fully operational going concern basis, was stated to be £32 million. The value of Murray Park on the basis of continuing use as a training facility and youth academy was stated at £6,150,000. The values of Ibrox Stadium (including the Albion Car Park) and of Murray Park, on the basis of

discontinuance of the existing uses and disposal for development were stated to be £3,400,000 and £4,420,000 respectively. LSH observed that a period of 12 months would be realistic to achieve these values.

[17] The administrators had now identified an issue that was causing concern and uncertainty among potential purchasers of the company. In May 2011, Mr Whyte had committed the club to a deal with Ticketus, under which Ticketus received the income from season ticket sales for the current season and following two seasons. The respondents estimated that this income flow represented 60% of the cash flow of the company for those seasons. Ticketus contended that this deal could not be undone by the administrators; if that was correct, it would have a significant impact on future income and accordingly on the value of the company. The respondents decided to make an urgent application to the court for directions.

[18] By 15 March the respondents had received a number of expressions of interest from persons whom they judged to be credible potential purchasers. The D&P team prepared a Memorandum of Offer: essentially a template to be used when making an offer for the company. Indicative offers were invited, to be submitted by close of business on 16 March, on one of two bases, namely (a) a CVA, or (b) a sale of the business and assets of the company to a new legal entity. On 16 March, the following indicative offers were received:

- An offer of £25 million, based on a business and assets sale, from an American consortium called SCARF, which included a Mr Bill Miller. This offer was on the basis that no future revenue would be payable to Ticketus;
- An offer of £10 million, based on a CVA, from a consortium calling themselves the Blue Knights. This offer assumed that the Ticketus agreements would

continue with much of the future season ticket revenue not being available to the club;

- An offer of £5 million, based on a CVA, from Mr Brian Kennedy, a sports business investor.

[19] On 23 March, a hearing took place in the application for directions. Lord Hodge gave his decision, which was that as the agreement with Ticketus created contractual rights only, the administrators could repudiate it if they considered that it was in the best interests of all creditors to do so. The following day, a further indicative offer was received. This offer, from a Singapore consortium, was of £10 million, based on a CVA and on the assumption that no future revenue would be paid to Ticketus.

[20] For those bidders whose offers proceeded on the basis of a CVA, there was a need, in order to gain control of the business and assets of the club, to acquire the company's shares, most of which were owned by RFCGL and under the ultimate control of Mr Whyte. (That issue did not, of course, arise in relation to the purchase of the company's business and assets by a Newco.) Mr Whyte had given no undertaking to transfer the shares, and the respondents regarded it as a matter for the respective potential purchasers to enter into negotiations with him, albeit that they would provide whatever assistance they could. On 26 March, however, the respondents sought legal advice from Taylor Wessing, solicitors in London, as to how they might procure the transfer of the shares to a successful bidder. Taylor Wessing wrote to Mr Whyte's solicitors inviting them to confirm that in the event of a sale proceeding by way of a CVA he would provide the necessary stock transfers. No immediate substantive response was received.

[21] On 24 March, the respondents received an offer of £1 million from West Bromwich Albion FC ("WBA") for Steven Naismith, who was recognised to be one of the club's most

valuable players. At that time Mr Naismith was recovering from an injury and not expected to play for the remainder of the season. As the transfer window was not open in either Scotland or England, the offer was made on the basis that although WBA would make immediate payment of the transfer fee and assume responsibility for payment of the player's wages, his registration as their player would not take place until 1 July. The offer was rejected by the respondents as too low, as were increased offers of £1,250,000 on 29 March and £1,500,000 on 7 April.

[22] On 3 April an expression of interest in the purchase of Murray Park was received from an agent for a Mr Stephen McKenna, stating that Mr McKenna had agreed terms with a well-known residential developer. Mrs Bell considered that although the overall aim was to achieve a sale as a going concern, the expression of interest was worth pursuing, and she instructed Mr Walder to follow up the contact. Mr McKenna subsequently expressed an interest in purchasing the business and assets of the company, and not merely the heritable property.

[23] In the meantime, the respondents had fixed 4 April as the date for "best and final bids" from parties interested in a going concern purchase. Four offers were received:

- An offer of £10 million from Bill Miller, based on a trade sale and conditional on the company's SPL share being transferred;
- An offer of £10 million from the Blue Knights, based on a CVA but with a potential trade sale if that was unsuccessful;
- An offer of £12 million from the Singapore consortium, with potential additional deferred consideration based on qualification for European competition, based on a CVA but with willingness to consider a trade sale;

- An offer of €30 million from a German consortium, based on a CVA. This consortium never provided proof of funding and were not regarded by the respondents as likely to be credible bidders.

[24] The respondents intended to announce the identity of a preferred bidder during the week commencing 9 April. However, over the weekend of 6-9 April (which was Easter weekend), the SPL announced that they would be proposing new Financial Fair Play regulations at a meeting on 30 April that would significantly increase the sanctions imposed upon insolvent clubs. The interested parties were informed.

[25] On 5 April, Mr Wishart sent an email to Mr Whitehouse and Mr Clark noting that the players had been advised of their right in terms of TUPE regulations, in the event of a transfer of the company's business and assets to a new company, to decide not to transfer to it, but rather "to remain with the oldco and take what that brings". Mr Wishart observed that the players would "make an informed decision as to whether to transfer to a newco or not based upon the new owner's plans for the future of the club".

[26] On 11 April, Mr Whyte's agent emailed the respondents with his terms for the transfer of a 51% holding for no cost "provided all property assets remain within Rangers Football Club plc". The terms were not acceptable to the respondents. On 13 April a final offer for Steven Naismith was received from WBA, in the sum of £1,700,000. As this was less than the sum of £2 million in his buy-out clause (as re-negotiated in March), the offer was not accepted.

[27] In the course of the next four weeks, the various offers that had been made for the company – or for its business and assets – were amended and/or withdrawn. On 11 April, the Blue Knights offered to pay £500,000 for an exclusivity period of 21 days but this offer was withdrawn the following day. On 18 April, Mr Miller offered £10 million, including

a £500,000 exclusivity payment, for a business and assets sale but this was conditional on the SPL resolutions being voted down at the meeting on 30 April. On 20 April the Singapore consortium issued a press release stating that they were withdrawing their bid. On 28 April, Brian Kennedy, now supported by the Blue Knights, made an offer of £5.5 million based on a CVA. This however included receipt of £3.8 million of "football debts" due to the company and accordingly had a net value of only £1.7 million. On 2 May, Mr Miller made a revised and final offer of £8,500,000, of which £3,000,000 would be deferred until the second anniversary of completion. This offer was conditional upon, inter alia, transfer of the SPL share.

[28] One reason for the reduction of Mr Miller's bid was that on 23 April the SFA had announced the result of its disciplinary proceedings, imposing a substantial fine and prohibiting the signing of any players over the age of 18 for a period of 12 months. (The respondents' appeal against this decision was refused at an SFA appellate tribunal hearing on 14 May. However, on 29 May that decision was the subject of a successful application for judicial review: see [2012] CSOH 95.)

[29] On 1 May the respondents received a first expression of interest from Mr Charles Green, who formed two companies (referred to here collectively as "Sevco") as vehicles for purchase of the company's business and assets. On 3 May, Mr Miller was announced as the preferred bidder. The following day, Sevco submitted an offer of £8,250,000 based on a CVA structure and an additional £4 million dependent on qualification for European football competition, together with a fall-back option for a sale of the business and assets for £5,500,000. On the evening of the same day (4 May), the respondents received an email from Mr Miller's solicitor intimating withdrawal of his interest. A press release issued by Mr Miller on 8 May referred to preliminary information and analysis having been "more

optimistic than reality", and also to "hearing the message from Rangers supporters and fans loud and clear ('Yank go home!')". On 12 May, Brian Kennedy and the Blue Knights withdrew their bid, leaving Mr Green and Sevco as the only remaining realistic bidder. Their offer was accepted on 12 May.

[30] On 29 May the respondents issued their formal proposal for a CVA to the company's creditors. The proposal was that Sevco would make £8,250,000 available for creditors, as a loan to the Company, and pay a non-refundable exclusivity fee of £250,000. After the costs of the administration, there would be a fund of around £5 million for the creditors, in addition to other assets as outlined in the proposal. A meeting of creditors was fixed for 14 June. On 8 June, HMRC gave notice to the respondents that they would vote against a CVA. As HMRC were by far the company's largest creditor, this meant that the CVA proposal could not succeed. At the meeting on 14 June, HMRC duly voted against the proposal. The business and assets of the company were, accordingly, sold to Sevco for £5,500,000 in terms of the 12 May agreement. Sevco Scotland Limited subsequently changed its name to The Rangers Football Club Limited.

[31] After the sale of the business and assets, a number of players declined to transfer to Sevco and instead registered with other clubs, in England and elsewhere. Sevco sought to argue that it retained the players' registrations and was entitled to transfer fees. Certain clubs made payments to Sevco to avoid litigation, including Southampton (for Steven Davis) and Coventry (for John Fleck). No transfer fee for any of the players was payable to the company. On 4 July 2012, the SPL member clubs voted to refuse to allow Rangers' SPL share to be transferred to Sevco. The club was accepted instead into the third division of the Scottish Football League for the season 2012-13.

The duties of an administrator

[32] Paragraph 3 of Schedule B1 to the Insolvency Act 1986 states:

> "(1) The administrator of a company must perform his functions with the objective of—
>
> (a) rescuing the company as a going concern, or
> (b achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
> (c) realising property in order to make a distribution to one or more secured or preferential creditors.
>
> (2) Subject to sub-paragraph (4), the administrator of a company must perform his functions in the interests of the company's creditors as a whole.
>
> (3) The administrator must perform his functions with the objective specified in sub-paragraph (1)(a) unless he thinks either—
>
> (a) that it is not reasonably practicable to achieve that objective, or
> (b) that the objective specified in sub-paragraph (1)(b) would achieve a better result for the company's creditors as a whole.
>
> (4) The administrator may perform his functions with the objective specified in sub-paragraph (1)(c) only if—
>
> (a) he thinks that it is not reasonably practicable to achieve either of the objectives specified in sub-paragraph (1)(a) and (b), and
> (b) he does not unnecessarily harm the interests of the creditors of the company as a whole."

[33] The hierarchical structure of paragraph 3 is well recognised. So too is the discretion vested in the administrator when making the decisions required by subparagraphs (3) and (4). As Snowden J observed in *Davey* v *Money* [2018] Bus LR 1903; [2018] EWHC 766 (Ch) at paragraph 255:

> "Given the range of interests to be addressed under paragraph 3 of Schedule B1, the use of the expression that the administrator 'thinks' rather than, for example, 'reasonably believes' is a clear indication that Parliament intended a degree of latitude to be given to an administrator in deciding upon the objective to be pursued, and that he is not lightly to be second-guessed by the court with the benefit of hindsight …"

Snowden J went on, however, to note that the same degree of deference does not extend to the methods adopted by the administrator to pursue his chosen course: the stricture in subparagraph (4)(b) not to unnecessarily harm the interests of the creditors of the company as a whole is subject to a more objective standard of review.

[34] In *Re One Blackfriars Ltd* [2021] EWHC 684 (Ch) at paragraph 200, HH Judge Kimball QC helpfully described the process prescribed by paragraph 3 as follows:

> "It is clear from the terms of paragraph 3 … that one of the main duties of an administrator is to form a judgment as to which of the statutory objectives he or she is going to pursue. This is a dynamic and iterative process which involves the exercise of commercial judgment. It begins before appointment and continues after appointment. An initial view will almost always be formed and pursued in the early stages of any administration. This will then be followed by a firm decision. This decision is required to be taken at the latest after the expiry of eight weeks from the day the company entered into administration and must be expressed in a formal statement to creditors as to which statutory objective is being pursued. This choice must, however, be kept under review because the appropriate objective may change in the course of the administration (as circumstances change or further information emerges)."

[35] The administrator owes a duty to the company to carry out his duties with the standard of care reasonably to be expected of an ordinarily skilled and careful insolvency practitioner (see eg *Re Charnley Davies Ltd (No 2)* [1990] BCC 605, Millett J at 618; *Davey* v *Money* above, Snowden J at paragraphs 383-4). Where, therefore, the administrator is carrying out functions which require professional expertise, the standard in *Hunter* v *Hanley* 1955 SC 200 is applicable in determining whether he has committed a breach of duty. There may, however, be aspects of the administration which do not require the exercise by the administrator of any specialist skill, and in that situation the standard to be applied is not the *Hunter* v *Hanley* standard but merely the exercise of reasonable care. But as Lord Drummond Young observed in a different context in *French* v *Strathclyde Fire Board* 2013 SLT 247 at paragraph 41,

> "… there is no sharp dividing line between these tests; there is rather a spectrum of situations ranging from a case where the person responsible for safety has clear professional or technical qualifications to cases where he has no particular qualifications but is under an ordinary common law duty of care. The extent to which specialist expertise must be brought to bear will vary according to the circumstances of the particular case."

The same appears to me to apply to the variety of tasks that an administrator will require to carry out in the course of a complex administration such as the one with which these proceedings are concerned.

[36] A particular aspect of the administrator's duty that is relevant to the present case is the duty to take specialist advice on matters outwith the administrator's own expertise. The administrator's duty in this respect is regarded as analogous to that of a trustee: see Lightman & Moss, *Law of Administrators and Receivers of Companies* (6th ed, 2017) at paragraph 12-037, and the authorities cited. As the authors note, the administrator must take reasonable steps to acquire information relevant to his decisions, including, if appropriate, taking relevant professional advice. If he seeks advice from apparently competent advisers and follows the advice so obtained, he will not be in breach of his fiduciary duty for failure to have regard to relevant matters if the advice given to him turns out to have been materially wrong.

[37] The power of the court to examine the conduct of an administrator is contained in paragraph 75 of Schedule B1 which, so far as material, provides as follows:

> "(1) The court may examine the conduct of a person who—
>
> (a) is or purports to be the administrator of a company, or
> (b) has been or has purported to be the administrator of a company.
>
> (2) An examination under this paragraph may be held only on the application of—
>
> …

(c) the liquidator of the company …

(3) An application under sub-paragraph (2) must allege that the administrator—

…

(c) has breached a fiduciary or other duty in relation to the company…

…

(4) On an examination under this paragraph into a person's conduct the court may order him—

(a) to repay, restore or account for money or property;
(b) to pay interest;
(c) to contribute a sum to the company's property by way of compensation for breach of duty or misfeasance…"

The noters' contentions

[38] As presented in submissions at the close of the proof, the noters' contentions, all of which are denied by the respondents, fall into two broad chapters: (i) that the respondents were in breach of their duty of care in relation to the company by failing properly to manage the company's costs during the administration, and (ii) that they were in breach of duty by failing to take reasonable care to obtain the best price possible in the circumstances for the company's business as a whole or, at least, for its heritable property.

(i) Failure to manage costs during the administration

[39] The noters contend that the respondents had no coherent strategy for managing the company's cost base, and that they failed to have regard to factors that ought to have featured in their decision-making. More specifically, it is contended:

- in relation to the playing staff, that the respondents failed to carry through their initial strategy of making redundancies, and were persuaded instead by

the players and their representatives to make savings by way of temporary wage reductions; that they failed to perform any analysis of the costs and benefits of the courses open to them; that they gave no consideration to the advantages of effecting a permanent reduction in the cost base; that they failed to give proper consideration to realising value for creditors by selling some or all of the company's most marketable players; and that they gave no meaningful consideration to the risk and consequences of not achieving a CVA;

- alternatively, in relation to the playing staff, that the respondents ought by about 5 April to have changed their strategy of retaining the squad more or less intact and should have proceeded instead to attempt to sell players;
- in relation to the non-playing staff, that the respondents gave no real thought or analysis to the possibility of making significant redundancies;
- that had the respondents engaged in these exercises, they would have been able to make savings equivalent to those made by wage reductions from redundancies alone;
- that the respondents gave no consideration to, and took no advice on, the possibility of transferring players within the UK for value outside the transfer window, and in particular were in breach of duty in not accepting the offer of £1.7 million made by WBA for Steven Naismith.

[40] As regards quantification of loss, the noters contend, on the basis of their expert evidence, that appropriate redundancies among players could have produced cost savings of £1,253,852, and that appropriate redundancies among non-playing staff could have produced savings of a further £955,623. In relation to the alleged failure to realise marketable

playing staff, it is accepted (with the exception of Steven Naismith) that this is properly quantifiable on the basis of loss of a chance of selling some or all of a group of ten saleable players whose aggregate value (according to the noters' expert evidence) was £19,700,000 or, alternatively, in relation to six of the ten players whose contracts contained buy-out clauses, £7,375,000, plus the unreduced value of the other four. As regards Steven Naismith, the noters submit that there is a loss amounting to the £1,700,000 that was offered for him.

(ii) Failure to obtain best possible sale price of the business and its assets

[41] The noters contend:

- that the respondents were in breach of duty in failing to take advice on the value of the Rangers brand, despite being aware that it had value;
- that they were in breach of duty in failing to consider and take advice on appropriate strategies, such as sale and lease back, for realising the value of the heritable property; and
- that they failed to identify and address two serious difficulties with their preferred strategy of pursuing a CVA, namely the preference for liquidation expressed from the outset by HMRC, without whose support no CVA could proceed, and the absence of any enforceable mechanism for obtaining the company shares controlled by Mr Whyte.

[42] The noters submit that, taking all of these matters individually and cumulatively, the respondents lost control of the bidding process and left themselves in a position whereby their ability to obtain the maximum value for the company's business, or for its individual assets, was compromised. The noters' quantification is based upon loss of a chance of securing a total amount that was around £25 million more than the net figure paid by Sevco

for the company's business and assets, either through an increased bid that took account of and included the value of the brand and the heritable property, or by realising the value of the heritable property separately and disposing of the remaining assets as a going concern, for an amount equal or close to the sum paid by Sevco.

Loss of a chance: the law

[43] As can be seen from the above summary of the noters' contentions, some parts of their claim are presented on the basis of the loss of a chance. Parties were broadly in agreement as regards the circumstances in which the law departs from the ordinary burden on a pursuer to prove facts on the balance of probabilities by having recourse to the concept of loss of opportunity or loss of a chance. The distinction was put thus by Lord Hoffmann in *Gregg* v *Scott* [2005] 2 AC 176 at paragraph 83:

> "… (T)he law distinguishes between cases in which the outcome depends upon what the claimant himself … or someone for whom the defendant is responsible … would have done, and cases in which it depends upon what some third party would have done. In the first class of cases the claimant must prove on a balance of probability that he or the defendant would have acted so as to produce a favourable outcome. In the latter class, he may recover for loss of the chance that the third party would have so acted …"

[44] This was recently affirmed in *Perry* v *Raleys* [2020] AC 352, where Lord Briggs, with the concurrence of the other members of the Supreme Court, observed (paragraphs 20 and 21):

> "For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation.

> This sensible, fair and practicable dividing line was laid down by the Court of Appeal in *Allied Maples Group Ltd* v *Simmons & Simmons* [1995] 1 WLR 1602 …"

[45] As regards evaluation of the chance, Stuart Smith LJ expressed the following view in the *Allied Maples Group* case at page 1614:

> "… (I)n my judgment, the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be."

I proceed therefore on the basis that if the court is satisfied that the chance founded upon by the pursuer is more than speculative but less than certain, it must then make an assessment of the likelihood or otherwise of the third party having acted in the way that the pursuer claims would have resulted in him being better off.

Assessment of witnesses

[46] Before beginning my examination of each of the two chapters of the noters' contentions, I require to set out briefly my assessment of the reliability and credibility of the factual witnesses, and my assessment of the admissibility of, and weight to be attached to, the expert evidence.

Factual witnesses

[47] As regards the respondents themselves, I found Mr Clark to be a credible and reliable witness who did his best to answer questions fairly and to assist the court. On behalf of the noters it was submitted that he was unreliable and, in respect of one peripheral matter (the attempted signing of Daniel Cousin) not credible. I reject those criticisms. Although

Mr Clark's answers sometimes strayed beyond the scope of the questions asked, my impression was that this was due to him attempting to answer the question fully rather than attempting to avoid it. Although his explanation of the reasons for attempting to sign Cousin does not find exact support in the contemporaneous documents, I am content to accept it.

[48] As regards Mr Whitehouse, I am satisfied that he was doing his best to assist the court and that he was generally credible. At times, however, it was far from clear whether he was providing his recollection of what actually happened or providing an assessment, with the benefit of hindsight, of what would or would not have been an appropriate course of action. On occasions his explanation of why something was done was demonstrably inaccurate, for example in relation to the decision not to sell Steven Naismith. It was also apparent from his evidence that he was less directly involved in detailed decision-making than Mr Clark. I have therefore placed greater weight on the evidence of Mr Clark, and preferred it in the case of any discrepancies.

[49] With the exception of Mr Walder, I found all of the members of the respondents' staff to be credible and reliable witnesses. I formed the impression that Mr Walder, who gave his evidence from his current place of work in the United States, was not attempting to answer the questions put to him fully and truthfully, preferring to shelter behind assertions of remembering nothing, and to avoid direct answers. Some of his responses, such as claiming not to know what exactly a CVA was, were clearly not credible. I find it difficult to understand why Mr Walder regarded it as appropriate to be so uncooperative, having previously provided a detailed written witness statement to the respondents' agents. In the circumstances I attach no weight to his written or oral evidence except where it is supported by the terms of a contemporaneous document. The noters also criticised Mr Hart as being unreliable, bordering on incredible. This was largely due to his reaction to being shown

emails sent by him during the administration period which appeared to contain frank and trenchantly expressed criticisms of his then bosses, the respondents (by whom he is no longer employed). I found Mr Hart's attempts to explain away his remarks in these emails unconvincing. I do not, however, regard this as a reason not to treat his evidence in relation to events occurring during the administration period as unreliable or incredible.

[50] As regards all of the other factual witnesses led on behalf of one or other of the parties, I found them to be credible and, as regards evidence referred to in this opinion, generally reliable.

Expert witnesses

[51] I am satisfied that all of the expert witnesses were suitably qualified to express opinions on the matters upon which they respectively prepared reports and gave oral evidence to the court. It is necessary, however, to address certain issues in relation to the evidence of Mr David Buchler, who gave opinion evidence on behalf of the respondents on the conduct of the administration generally.

[52] Mr Buchler is a chartered accountant and licensed insolvency practitioner, founder and senior partner of Buchler Phillips, with some 40 years of experience (over 1,000 assignments) in turnaround, restructuring and insolvency. He has been an adviser to a number of different football clubs and was receiver or administrator of Oxford United FC, Millwall FC, Bradford City FC and Swindon Town FC. He was the owner and chairman of Barnet FC for three years in the mid-1990s and is a former chief executive and vice chairman (on two occasions) of Tottenham Hotspur FC.

[53] In his supplementary report (though not in his principal report), Mr Buchler disclosed "for completeness" that Mr Whitehouse and Mr Clark were formerly partners/colleagues in

his firm, Buchler Phillips, having joined the firm to set up its Manchester office in the late 1990s. He stated that he had not had any business contact with either of them for over 20 years prior to his instruction in this litigation. In the course of cross-examination, there emerged somewhat closer connections between Mr Buchler and the respondents. He had in the past taken a number of joint appointments with one or other of them. He and Mr Whitehouse had worked together in the administration of Bradford City FC in 2002. They had remained in partnership until less than 20 years ago.

[54] On behalf of the noters it was accepted that Mr Buchler's past connections with Mr Whitehouse and Mr Clark did not of itself render his evidence inadmissible. However, it was submitted that for three reasons Mr Buchler's evidence should be excluded as inadmissible or, in any event, treated as carrying little weight. Firstly, his failure fully to disclose his prior business relationship with the respondents cast doubt upon his understanding of his duties as an expert witness. It raised questions about the extent to which Mr Buchler was liable to be unduly and perhaps subconsciously favourable to the respondents, as well as whether he had applied his mind to that issue to ensure that he was not being influenced by his personal connections when reaching his opinion. Secondly, much of his evidence consisted of *ipse dixit* statements that he did not think that he would have done what was being suggested by the noters, or that he would have done what the respondents did. Such statements carried no evidential value. Thirdly, his opinions were to some extent based upon a flawed factual basis. For example, his opinion in relation to the application of a "football creditor" rule in Scotland proceeded upon an unfounded assumption that this had been regarded as an important factor by the respondents at the time of the administration. His view that a sale of Steven Naismith would have made the club less attractive to prospective purchasers was based not on evidence but on discussion with

colleagues. He was sometimes unable to distinguish between what he assumed the respondents would have thought or done and what he understood them to have actually thought or done.

[55] In my judgment there is some substance to the noters' criticisms, and although I do not hold that Mr Buchler's evidence must, on the basis of the principles enunciated in *Kennedy* v *Cordia* 2016 SC (UKSC) 59, be treated as inadmissible, I consider that I must approach his evidence with caution. Senior counsel for the respondents attributed the absence from Mr Buchler's principal report of any reference to his connections with the respondents to administrative failure on the part of the respondents' advisers, in circumstances in which Mr Buchler was engaged at a late stage of the case after the expert previously instructed had unfortunately died. In my view that explanation fails to have proper regard to the duty incumbent upon Mr Buchler himself to disclose prior connections. I accept, as did the noters, that Mr Buchler did not intentionally tailor his evidence to favour the respondents. I cannot however entirely exclude the possibility that he was subconsciously sympathetic to their arguments. This is in part due to the tone of his written reports in which he frequently refers to his understanding or awareness in relation to matters favourable to the respondents (such as the likely attitude of HMRC), which leads to what appears to me to be an unduly uncritical approval of the respondents' decision to pursue, and continue to pursue, only the strategy of sale of the company or its business as a whole. I also agree that some of Mr Buchler's evidence is open to challenge as consisting of no more than *ipse dixit* statements. In *Midland Bank Trust Co Ltd* v *Hett Stubbs & Kemp* [1979] Ch 384, Oliver J observed at page 402:

> "Clearly, if there is some practice in a profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to

> no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants is of little assistance to the court …"

Much of Mr Buchler's evidence consisted of exactly what is described by Oliver J. In the discussion that follows, I have borne these reservations as to the weight to be attached to Mr Buchler's evidence in mind.

The noters' claim: (i) failure to manage costs during the administration

Introduction

[56] The noters' case that the respondents failed properly to manage costs during the administration had three strands: failure to make redundancies among playing staff, failure to make redundancies among non-playing staff, and failure to sell marketable players. It was a matter of agreement between the relevant expert witnesses, and between the parties, that these issues were interlinked and could not be looked at in isolation. I shall summarise the evidence in relation to each of them before providing my assessment.

Playing staff costs

The joint administrators' approach

[57] At the outset of the administration, the respondents' intended strategy was to make redundancies among the playing staff. As already noted, Mr McCoist was asked to provide a list of suggested redundancies, and he provided a list of eight players who could either be sold (Nicolae Goian, Alejandro Bedoya, Matthew McKay), released from contract (Sasa Papac, Lee McCulloch, Neil Alexander, Kirk Broadfoot) or have their loan deal cancelled (Kyle Bartley). This proposal was considered by the respondents to be insufficient to meet the anticipated cash flow deficit. At a meeting on 22 February the respondents

suggested 11 first team squad sales/redundancies (the above eight plus Carlos Bocanegra, David Healy and Grant Adam), together with 50% wage reductions for other players and possibly other cuts to youth and coaching staff. Mr Shipperlee prepared sensitivity analyses showing the effect of differing numbers of redundancies combined with wage reductions. Mr Wishart argued at meetings for the savings to be achieved by wage deferrals rather than by redundancies or pay cuts.

[58] In the course of negotiations during the latter part of February and the first week in March with the players and the players' union, the respondents' strategy evolved. The respondents were persuaded that any decision in relation to redundancies should be delayed for a few days because some of the players affected were away from Scotland for international matches. By 29 February, the respondents were still expecting to make redundancies. Meetings were arranged for Thursday 1 March with the intention that they would result in further meetings with players who were to be made redundant, and then with those who would be asked to agree to a wage reduction. Instead, Mr McCoist made further proposals including 75% wage reductions by players. Details of the meetings were leaked to the media, and by the evening representatives of some of the players contacted the respondents to state that they wished to conduct individual negotiations. On Friday 2 March, Mr Clark told Mr McCoist and Mr Wishart that cuts would be made immediately if the first team did not agree to take no pay for the first week of March. By now, however, it had become too late to make cuts in advance of the club's match the following day.

[59] Over the weekend, Mr Wishart emailed Mr Clark stating inter alia that he had been approached by a number of prospective bidders who were concerned at the cost of rebuilding the squad if redundancies were made, and that any potential takeover might be put in jeopardy. Mr Wishart was invited to clarify the identity of those who had approached

him but declined to do so. Mr Clark was also contacted by Mr McCoist who stated that he had not obtained the players' agreement to either a week of no pay or 75% wage reductions.

[60] On Monday 5 March, the negotiations continued. No agreement was reached, and the respondents anticipated making redundancies the following day among the highest earners. On 6 March, meetings took place between Mr Clark, Mr Shipperlee and the representatives of PFAS, by the end of which an agreement in principle was reached with PFAS that all of the first team squad would accept pay cuts to the end of the season of between 25% and 75%, with the higher cuts to be taken by the majority of the first team players. The players had voted and agreed to the cuts almost unanimously. After that vote had taken place, however, and after some players and the PFAS representatives had left, certain players and their agents insisted on additional contract variations, namely (1) that a proportion of any further transfer price should be paid to them; and (2) that they should be entitled to leave the club at a value lower than their perceived transfer value. The respondents anticipated that if it was not possible to reach a suitable resolution of these additional issues, it would be necessary to make a substantial number of redundancies the following morning.

[61] On 9 March, an agreement in principle was finally reached. Wages of members of the playing squad would be reduced by between 25% and 75% for the period from 1 March to 31 May. In return, it was agreed that (i) players agreeing to the contract variations would not be made redundant during this period; (ii) should all playing staff agree to the wage reduction, no playing staff would be made compulsorily redundant, and there would be no significant numbers of compulsory redundancies among non-playing staff; (iii) the company would be immediately obliged to grant free transfers to players if Craig Whyte regained effective day to day control of its management; (iv) the salary reductions were to cease upon

the acquisition of the company by a third party; (v) certain players would be entitled to be paid a proportion of any future transfer fee received by them; and (vi) minimum release, ie buy out, clauses would be included in the contracts of certain players.

[62] In the course of his evidence, Mr Clark identified the reasons for the change in the respondents' strategy in relation to making compulsory redundancies as being that there would have been difficulties in transferring players while the transfer window was closed, and that claims by players for damages for involuntary redundancies might have constituted "football debts" that could have discouraged potential purchasers. The negotiated settlement of wage reductions (and not merely deferrals) had produced, in his view, a result in terms of cash flow that was similar to what could have been achieved by compulsory redundancies.

Expert evidence

Expert evidence for the noters

[63] Expert evidence on the conduct of the administration generally, including this chapter, was given on behalf of the noters by Mr Gordon Christie, chartered accountant and licensed insolvency practitioner, founder and director of Christie Griffith Corporate Limited, a practice specialising in litigation support and working with businesses in financial distress. He has been involved in over 100 trading insolvencies including some that were large, complex and high profile, and is familiar with the pressures of working under media scrutiny and public and political pressure. His personal experience in football club insolvencies is however limited to appointment in 2000 as administrator of Queens Park FC (at that time an amateur team).

[64] Mr Christie considered that the respondents had failed to take steps that any competent administrator would have taken in relation to the playing staff, namely obtaining independent professional advice on player redundancies, assessing the minimum playing staff required to meet the administrator's objective, making surplus players redundant with immediate effect, performing a creditors' cost-benefit analysis in relation to any alternative strategy proposed on behalf of the players, and continuing to monitor the situation to ensure that retained staff were still required.

[65] It was not necessary to retain the whole playing staff to maintain "the fabric of the club". A strategy of wage reductions could have been implemented alongside immediate redundancies. By agreeing a temporary wage reduction the respondents had tied their hands in terms of future actions, in a way that did not benefit potential purchasers. The contract variations could have made the club less attractive. After offers were received it had become apparent that squad size was not a key factor. None of the offers was conditional upon the retention of any particular player. The respondents must also have been aware that unless the company was rescued by a CVA, a sale of the business and assets would trigger a TUPE transfer but, as the players could refuse to transfer, their value could be lost. If the respondents had regarded the impact of redundant players' damages claims as having an adverse effect on other unsecured creditors' claims, a detailed analysis should have been undertaken: given the amount of HMRC's claim, the effect on other creditors would have been insignificant. In view of all of the above, no ordinarily competent administrator acting with ordinary care would have done what the respondents did in respect of player redundancies.

[66] Mr Christie's calculation of the loss caused by the respondents' failure to make redundancies was as follows. He calculated the savings made by wage reductions without

redundancies (after making allowance for the players who did leave in early March, and for the manager's salary waiver) to have been around £2.7 to £2.8 million. He identified eight first team players and 15 reserve (youth team) players whom he considered ought to have been made redundant in addition to the two who were made redundant and the one who left. That would have left a reasonably balanced squad of 41 players, 15 of whom had sale potential. If, for example, seven of these had been sold, there would still have been a sufficient squad to complete the club's remaining 2011-12 fixtures. Although on Mr Christie's approach the post-appointment trading wage costs would have been about £550,000 (exclusive of NIC) higher than they were under the strategy adopted by the respondents, the sale of only one player for at least £550,000 would have rendered the overall outcome better for creditors. The insertion of new buy-out clauses in the retained players' contracts would have been avoided, costs would have been reduced on a permanent and not a temporary basis, and the possibility would have been left open of further redundancies once the level of offers for the business became clear.

[67] In cross-examination, Mr Christie disagreed with the proposition that in the present case the choice between redundancies and temporary wage reductions had been a judgement call for the respondents; he considered that the former would have been the normal and more appropriate course of action. He accepted that in compiling his illustrative list of players to be made redundant or retained, he had not taken account of time remaining on the players' contracts, and in particular that the contracts of nine of the players who were not in his list for redundancy were due to terminate at the end of the season. His opinion on player redundancies proceeded upon the basis that the administration would not require to continue into the following football season.

<u>Expert evidence for the respondents</u>

[68] Mr Buchler's view was that while the respondents could have taken a number of different steps to reduce costs, it was important that the steps they took matched the strategy they had adopted, which was to rescue the company as a going concern via a CVA. If savings had been achieved by other means, such as mass redundancies or wage deferrals, this would have made the club a much less attractive prospect for a potential buyer. Given the closed transfer window, it was not likely to be possible to sell a significant number of players. The result of the agreement reached between the respondents and the players was that the company's cash flow improved, putting it in a position to trade to the end of the season and maximising the overall recovery. While some of the lower value players who were not strictly necessary to continue fielding a full team could have been made redundant, this would have jeopardised the overall cost saving achieved. The negotiation of 25% to 75% wage reductions, as opposed to deferrals, was impressive, and it had been reasonable to make concessions including insertion of the new buy-out clauses. Because of the way events turned out, it was not known whether the buy-out clauses inserted into the players' contracts had a negative effect on the realisable value of the players, as none of the clauses was ever activated.

[69] It was also worth noting that any involuntary redundancy of a player would have been a breach of the football regulations, leading to sanctions including the possibility of forfeiture of membership of the SFA and SPL. This would have forced a cessation of trade. Focusing on their prime objective which was to preserve the fabric of the club, the respondents had to find a method of saving cost which did not place them in breach of the regulations of the SFA and SPL.

[70] Mr Buchler did not consider that independent valuation advice prior to making redundancies would have been relevant or helpful. The person who knew most about the players and their opinions and values was the team manager, and he had been consulted. Overall, the actions taken by the respondents in relation to player costs were clearly within the range of options open to an ordinarily competent administrator.

[71] Under cross-examination, Mr Buchler disagreed with the proposition that if the ordinarily competent administrator could have achieved by way of redundancies the same savings as had been achieved through the wage reduction agreement, then that would have been the rational way to proceed. He maintained that wholesale redundancies would have had such a negative impact on the club, the players and the fans as to make the club very difficult to sell. It would have been disastrous to go down such a conflictual route.

Other evidence

[72] Evidence relevant to the making of compulsory redundancies among the playing staff was given by other witnesses. Mr Andrew Dickson, the company's head of football administration, did not participate in the negotiations with the players and was not asked by the respondents for his views on redundancies. He considered that his knowledge of the players could have been of assistance to the respondents. In his evidence to the court, he expressed the view that there were a number of players who could have been let go, either by redundancy or transfer for a fee, without jeopardising the club's ability to complete its fixtures and comply with its SPL obligations. He considered that a squad of about 26 players (4 goalkeepers, 8 defenders, 10 midfielders and 4 strikers) as suggested by Mr Christie would have been adequate. In Mr Dickson's view, the following could have been made redundant: Neil Alexander (goalkeeper), Sasa Papic and Kirk Broadfoot (defenders), Lee McCulloch

(midfield) and David Healy (striker). Various other players, including Allan McGregor (goalkeeper), Maurice Edu, Steven Davis, Alejandro Bedoya and Sone Aluko (midfield) and Kyle Lafferty and Steven Naismith (strikers) could have been marketed for sale. In the course of cross-examination, Mr Dickson accepted that in expressing his views he had not taken into account how many of the players retained would have been out of contract at the end of the season. He accepted that if all of the marketable players had been sold in addition to the redundancies, the club would have been left with a squad largely comprising its youth players.

[73] Mr Andrew McKinlay, who was appointed by the SFA as its Director of Football Governance and Regulation in April 2012, gave evidence regarding the potential regulatory consequences of compulsory redundancies. He was referred to the SFA, SPL and FIFA Regulations which indicated that compulsory redundancies would be a breach of the rules, leading to the imposition of sanctions which could include forfeiture of membership of the SFA and SPL. His view, however, was that this did not apply to redundancies that were made out of necessity during administration, and that there had been no likelihood of Rangers being sanctioned if redundancies were made by the administrators. He was unaware of any football club administration in Scotland where this had occurred. He also considered that if Rangers had had to apply to the SFA for dispensation in relation to fielding a team in the under-19 league, because the youth players were required for first team duties, it was likely that such dispensation would have been granted. As regards the SPL, the evidence of Mr Rod McKenzie, legal adviser to the SPL and its successor the SPFL, on this latter point was to the same effect. Mr McKenzie also confirmed that the SPL's rules did not require a preference to be given to players' claims for damages in an administration or a CVA.

Non-playing staff costs

The joint administrators' approach

[74] At the date of administration, the company employed a total of 143 non-playing staff allocated across a number of departments. The respondents did not make significant redundancies. At an early stage it was decided to make two senior members of staff (Gordon Smith, the company's director of football, and Ali Russell, the company's chief operating officer) redundant with effect from 29 February. Two further members of staff, one of whom was based in London, were made redundant on 9 March 2012. According to Mr Christie's calculation, the monthly saving from these redundancies (excluding employer's NIC) was £35,518 out of a total monthly wage bill of £460,000. Waivers and reductions amounting to £69,200 per month were also agreed with some of the company's football management.

[75] The question of redundancies among non-playing staff does not appear to have been given detailed consideration during the first couple of weeks of the administration. This may have been because the respondents were informed that significant redundancies had been made prior to administration, and that further redundancies would result in operational difficulties. It appears, according to Mr Dickson's evidence, that any significant redundancies had been made prior to the acquisition of the company by Craig Whyte. On 20 February, Mr Hart had a meeting with Ms Jacqui Gourlay, the company's head of business management, at which staffing arrangements were discussed. By 29 February, however, no further action had been taken. Mrs Bell emailed Mr Hart, stating that "we need to identify the specific personnel to be made redundant on the operations side so that they can be announced tomorrow with the others". Mr Hart and Mr Shipperlee had a meeting that day

with Ms Gourlay, in the course of which Mr Hart is noted by Mr Shipperlee as having said "start with easy to identify cuts – go from there". After the meeting, Ms Gourlay sent Mr Hart a short list of personnel who could be asked to leave, some of whom had already left or agreed to leave. These would have produced a modest monthly saving of around £18,000.

[76] By this time, however, the issue of non-playing staff redundancies had become a key element of the respondents' negotiations with the players. As already noted, one of the conditions of the wage reductions eventually agreed was that there would be no significant redundancies among non-playing staff. This was something about which certain of the first team players felt strongly. After the conclusion of the players' wage reduction agreement, the issue of non-playing staff redundancies was not revisited.

Expert evidence

Expert evidence for the noters

[77] Mr Christie considered that wage reductions and redundancies were normal practice and should be effected as soon as possible in the administration. Trading a business after an insolvency event was different from trading a business under normal circumstances. Certain departments, which were not essential to the operation of the business, would not be required during administration trading. Implementing redundancies of non-key staff did not have an adverse impact on the attractiveness of a business to prospective purchasers. An early redundancy programme normally made a business more attractive as it avoided a purchaser inheriting unwanted staff who would then have to be retained or made redundant at the purchaser's cost. The argument that no further cost savings could be achieved because of an agreement with the players and management was only justifiable if the respondents had performed a cost benefit analysis before agreeing to such a condition. There was nothing

to indicate that such an analysis had been undertaken. In its absence, the respondents had no reasonable justification for not making a substantial number of non-playing staff redundant.

[78] Mr Christie considered that 74 members of staff ought to have been made redundant, including six whole departments, namely charity foundation, community coaching, events, youth development, scouts and sponsorship. Adjusted to reflect the redundancies actually made, and also the management waivers and wage reductions, he estimated the loss to have been £963,000 inclusive of employer's NIC. He emphasised that his views were based on the information available to him and his own experience of approaching an immediate redundancy programme in a trading insolvency. He had not had an opportunity to discuss what each employee actually did or to confirm the potential impact of their redundancy. He noted that a second tranche of redundancies might have been appropriate when it became clear that the going concern offers were not likely to provide a significant recovery for creditors, but his calculation made no allowance for additional potential cost savings in that respect. In a supplementary opinion, Mr Christie also expressed the view that no ordinarily competent administrator acting with ordinary care would have bound themselves not to make further significant redundancies amongst non-playing staff. By doing so, they tied their hands before knowing what final offers were likely to be received for the business, which could not have been in the best interests of creditors.

Expert evidence for the respondents

[79] Mr Buchler's view was that Mr Christie's opinion failed to take account of the standards to which the company was subject in order to continue to host matches. He had provided no evidence that over half of the non-playing staff could have been made redundant without impacting upon the ability of the company to trade in compliance with its

legal and regulatory obligations. Mr Christie's estimate of possible staff redundancies was therefore of little value. The evidence from the respondents' team suggested that certain members of the company's senior management team whom Mr Christie suggested should have been made redundant, including Ken Olverman (financial controller), Ms Gourlay, and Claire Rinkes (HR manager), were key in assisting the joint administrators and that their contribution was invaluable in managing the complex aspects of the administration.

[80] Mr Buchler observed that Mr Christie suggested that the entire events and sponsorship teams could have been made redundant, as well as all but one member of the press office and marketing teams, but did not explain how the company could continue to comply with its contractual obligations, such as advertising upcoming matches and compliance with the agreement with its sponsors, without these staff members, or what impact this might have had on the company's brand value. If these roles had had to be performed by the respondents' team, this would have increased their workload and would have been more costly to creditors.

[81] In Mr Buchler's opinion, the actions taken by the respondents were reasonable and appropriate in all the circumstances and were those of an ordinarily competent administrator. The actions taken by the respondents were evidence of a carefully thought-out strategy to deal with the position of non-playing staff costs.

Other evidence

[82] In relation to the requirement to retain non-playing staff in order to fulfil regulatory requirements, Mr Dickson's evidence was that for a UEFA club licence it was necessary to have a general secretary, a managing director, and a qualified accountant. On the football side it was necessary only to have a manager, an assistant manager and a goalkeeping coach.

However, he did not think that the club could have continued as a going concern until the end of the season if all of the individuals in Mr Christie's list had been made redundant. An appropriate number would have been somewhere in between that list and the two whom he had identified at the time to the respondents as suitable for redundancy. He noted also that community coaching was a commercial operation and that analysis would have been needed to determine whether it was incurring cost or generating income.

[83] Mr Fred Popp is the chief executive of Teamup Consulting Ltd, a sports consultancy business, with extensive experience of advising clients in the football business. He was engaged by Mr Miller as an adviser in relation to the possible purchase of the business and assets of Rangers. In the course of cross-examination, he was referred to the email sent by Mr Miller's solicitor on 4 May 2012, withdrawing Mr Miller's interest in the purchase. One of the reasons given for withdrawal was that "the structure of the salaries in the coaches and senior management are way above market and they all have one year notice periods meaning that the right sizing costs are significantly more than expected". Mr Popp's view was that this salary structure rendered the club "nearly unbuyable".

Player sales

The joint administrators' approach

[84] On 20 February, Mr Dickson gave Mr Shipperlee a schedule of player valuations (to which I shall refer as "the January schedule") that had been drawn up for the purposes of the January 2012 transfer window. It showed the values attributed to individual players by four football agents and the club's chief scout respectively. The respondents did not at any time during the administration take a proactive approach to the sale of players, or obtain their own valuation of the players. They effected one sale (of Matt McKay to Busan, South Korea,

on 20 February) and responded to interest in another (Dorin Goian) which did not lead to a sale. In their oral evidence, Mr Clark and Mr Whitehouse stated that they did not proactively pursue sales because their strategy was, so far as feasible, to keep the nucleus of the team together as this in itself, and the positive effect of such a strategy on the attitudes of both players and fans, would be likely to lead to the best price being obtained for the company. There is, however, little contemporaneous evidence that this was expressly decided to be the strategy to be pursued. Mr Shipperlee accepted that he had not been aware, at least until an offer was made for Steven Naismith (discussed below), that there was a possibility of effecting sales of players outside the transfer window applicable to a purchasing club. At an early stage, the respondents' team identified countries where there was an open transfer window; these did not include Scotland or England and Wales. Mr Clark acknowledged that on this matter he had had no greater knowledge than that of Mr Shipperlee, and Mr Whitehouse did not claim to have such knowledge. No specialist advice was taken on whether it was practicable to sell players outside the transfer window. In these circumstances I am unable to accept that the respondents pursued an express strategy of retention; rather, it seems to me that they proceeded without awareness that there might be an alternative. By the time the offer for Steven Naismith was received from WBA, the wage reduction agreement had been concluded and there is no evidence that the respondents at that time gave consideration to the possibility, let alone the desirability, of taking active steps to generate interest in the purchase of other players.

[85] As regards the attitude to player sales of potential purchasers, Mr Whitehouse stated that purchasers had indicated that there were a small number of key players who were essential to their interest in the club, and that those players had taken the attitude that "we are all in this together". Again there is little contemporaneous evidence to support the first

part of this statement. Mr Popp's evidence was that Mr Miller wanted the club as a whole, including "the whole squad" but did not recollect any differentiation being made between one player and another. Mr Popp also stated that he did not think that it had been essential for all of the players to come across, so long as there was a critical mass of the fans' favourites. The agenda for a telephone conference call with representatives of the Singapore consortium on 2 April included, under the heading "Players' Contracts", a sub-heading "Risk of squad depletion prior to completion", although there was also a sub-heading "Ability to cancel certain contracts (if required) pre-transaction". I find that these adminicles of evidence demonstrate a desire on the part of two of the main bidders that there should not be a substantial diminution in the playing squad but did not exclude the possibility of a few sales if this was thought to be advantageous to the club. In any event they are of no relevance to the strategy adopted by the respondents during the period prior to receipt of those parties' expressions of interest.

Steven Naismith

[86] The contributors to the January schedule had valued Steven Naismith at around £4 to £5 million. In his wage reduction agreement, the amount in his buy-out clause was reduced to £2 million, meaning that if the company received an offer of at least £2 million on terms that were acceptable to the player, it had to be accepted by the company. On 17 March, WBA's sporting and technical director, Mr Dan Ashworth, expressed an interest to Mr Clark in acquiring the player. Mr Ashworth had confirmed with the English FA and Premier League that there was a means by which this could be done. The prospect of an offer was discussed among Messrs Clark, Whitehouse and Shipperlee. Mr Shipperlee

suspected that WBA had been made aware, by the player's agent or otherwise, of the amount in Mr Naismith's buy out clause.

[87] On 24 March, WBA submitted an offer to purchase Mr Naismith for £1 million, payable immediately in one instalment upon the player passing a medical and agreeing personal terms. His registration would pass over to WBA when the transfer window opened on 1 July. On 26 March, Mr Shipperlee replied on behalf of the respondents, rejecting the offer because it did not meet their valuation of the player. There followed a conversation between Mr Ashworth and Mr Shipperlee in which Mr Shipperlee gave Mr Ashworth "the steer to £2 million". On 29 March, Mr Ashworth submitted an increased offer of £1,250,000, together with entitlement to 10% of a sell-on above that figure. The offer was rejected on 5 April, Mr Shipperlee stating expressly in his email to Mr Ashworth that "Any revised offer would need to be at the £2,000,000 level". This prompted a further offer from WBA, but of £1,500,000. Mr Ashworth commented:

> "I understand there is a release clause of £2m which you have confirmed. The player is injured and cannot play this season, with the wage savings, cash guaranteed and up front 3-4 months early and a guaranteed sale gone through I feel this is a very attractive deal. I cannot see any more movement now from WBA. If this offer is turned down we now may as well save 4 months wages, see if the player re-habs effectively and pay the clause in July or move onto another player."

[88] Although Mr Ashworth was clearly aware of the reduction of the amount in the buy-out clause, he appears not to have been aware that Mr Naismith had agreed a 75% wage reduction for the three months to 31 May, and based his calculations on the full salary that he understood Mr Naismith to be receiving. On 10 April Mr Clark reiterated to Mr Shipperlee that £2 million should be the price, but that "… if they reach halfway, say £1.75m presumably it starts to make sense to us to save his salary and collect almost the full sum". Mr Shipperlee calculated that a sum of £1.85 million would, after taking account of the wage saving, equate

to a transfer fee of £2 million. Mr Shipperlee did not share this calculation with Mr Ashworth.

[89] On 13 April, Mr Ashworth made what turned out to be his final offer of £1.7 million, subject to the same terms and with the same comments as the previous offer. He considered this to be effectively equivalent, taking account of the wage saving to the company, to an offer of £2 million. The deadline for acceptance was stated to be 5pm on 17 April. The deadline passed without any further communication between the respondents and WBA. Mr Clark and Mr Whitehouse adhered to their view that £2 million was the minimum amount that they should accept.

[90] In his evidence to the court, Mr Ashworth explained his reasons for making an offer for Mr Naismith at a time when he could not be registered as a WBA player. He thought that there would be significant interest in the player when the transfer window opened, and that WBA, who were not big payers compared to other Premier League clubs, would probably be outbid in relation to wages, bonuses and signing-on fee by a larger club. Most clubs would not know that it was possible to navigate around the transfer window restrictions. He could not recall how he had heard about Mr Naismith's buy out clause. He never spoke directly to Mr Naismith. His explanation for not increasing the offer to £2 million, which would have triggered the buy out clause, was that at the time the player was unable to play because of injury, and that if WBA were unable to obtain a discount, they might as well wait until the window opened and have less risk because the medical situation would be less uncertain by then.

[91] Mr Naismith gave evidence that he had not been aware of the offers by WBA at the time when they were made, although he was made aware of them some time afterwards. He thought it likely that his agent would have known of the offers, but he could not recall

having any conversations about them with his agent or with Mr Dickson. He could not speculate on what he would have done if the respondents had been minded to accept the WBA offer. He was not, however, at that time contemplating the possibility that he would end up leaving the club as a free agent, as in fact occurred.

Expert evidence

[92] Evidence in relation to the respondents' approach to player sales was given by Mr Christie and Mr Buchler. There was also, however, specialist evidence on player transfers and valuation. On behalf of the noters, evidence was given by (i) Mr Paolo Lombardi, a former head of FIFA's Disciplinary and Governance Department, whose company, Lombardi Associates, offers consultancy services advising football clubs, players, agents, football associations, football leagues and law firms on transfer-related and regulatory issues; and (ii) Mr William Pethybridge, a football players' agent employed by World in Motion. On behalf of the respondents, evidence was given by Mr Joel Pannick, a football players' agent employed by CAA Base Ltd (formerly Base Soccer Agency Ltd).

Expert evidence for the noters

[93] Mr Christie considered that on appointment the respondents ought to have conducted an immediate review of player values, and to have taken objective professional advice. Any alternative approach should have been the subject of a cost/benefit analysis and monitored on an ongoing basis. The respondents had been aware from the January schedule that the players had value which was likely to depreciate as time went by. The fact that there was cash available to continue to play the full squad was not a reason to retain players not required for a going concern sale. The fact that pre-appointment attempts to sell players had

met with limited success did not mean that post-appointment attempts would not succeed. The respondents would have been unable to assess without specialist advice the extent (if any) to which player values were impaired by the company's administration.

[94] The transfer window being closed was a relevant factor but it did not mean that a sale strategy could not be pursued. Available options included agreeing conditional sales for implementation when the next window opened, selling to clubs where there was no restriction on transfers, selling players on the basis that they could train with their new club albeit they could not yet register or play, or negotiating loan arrangements. The offer from WBA of £1.7 million for Steven Naismith ought to have been accepted. There was no evidence that retention of this player was considered by any of the bidders to be critical to their continuing interest. When added to the wage differential identified from a player redundancy (rather than wage reduction) strategy, this sale alone would have resulted in a significantly better outcome for creditors than the strategy adopted by the respondents.

[95] Had the respondents sought appropriate advice, they would also have identified the risk of value being lost in the event of a sale of the business and assets or a liquidation. In either of these scenarios, players could decline to transfer to the new owners. For the most valuable players, this was likely to be in their own interest as it would effectively allow them to leave on a free transfer and negotiate a better remuneration package with the acquiring club.

[96] Based on Mr Lombardi's evidence as to the values at the material time of individual players, Mr Christie estimated that a loss of £15,329,000 in transfer fees had been caused by the respondents' failure to sell seven players identified by the noters (McGregor, Whittaker, Davis, Edu, Wylde, Naismith and Lafferty). Sale of those players combined with the player redundancies that Mr Christie considered ought to have been made would not have affected

the overall balance of the team available to complete the remaining fixtures. Mr Christie made no additional allowance for a saving of players' wages because the company might have required, in order to secure the sales, to agree to continue to pay the wages during the administration period, although he noted that in Steven Naismith's case WBA had offered to assume responsibility for payment of his wages.

[97] Finally, in view of the fact that none of the interested parties made it a condition of their offer that specific players were retained, Mr Christie considered that the value allocated to the playing squad (of £2.75m) in the sale agreement eventually reached could still have been obtained on a sale of the business, even if some of the players had previously been sold.

[98] In relation to sales of players outside the transfer window (or, more properly, the "registration period"), Mr Lombardi confirmed that it is common for clubs to hold negotiations outside the transfer window and sign a contract for the transfer of a player, and even to pay and receive compensation. However, registration of the player with the new club can only be completed after the commencement of the registration period. It is most common for a player to stay at the selling club until the transfer is completed, allowing him to complete the season and fulfil his commitment to the club. In the case of Rangers, it would therefore have been possible for the respondents to reach agreements with other clubs prior to the opening of the summer transfer window, with the caveat that the transfers would be effected immediately upon the opening of the window.

[99] It was also possible for a player to relocate as soon as a transfer agreement was concluded. This was less common because the player could not be fielded until the player had been registered with the new club upon the opening of the registration period, but it would allow the player to train with his new teammates, acclimatise himself to his new

environment, and relocate his family more comfortably. In this situation, the transfer fee would usually be discounted to reflect that the buying club had committed to the transfer but was not yet able to field the player.

[100] Mr Pethybridge considered that there had been a substantial market for players in February 2012. If the respondents had wished to attempt to sell players, they could have spoken to the players' own agents and incentivised them to source deals for their players, or they could have instructed an independent agent to act on the club's behalf and incentivised them to generate sales, or they could have used a combination of both. If the agent was being financially incentivised to reach a certain target, he would do his best to get as many clubs interested as possible in order to drive the price up. If, however, the agents and the players were aware that there was a possibility that the company was going to be wound up, the players would wait to become free agents. The players' agent would stop co-operating with the administrators and pursue that strategy instead.

[101] Mr Pethybridge considered that if the club had engaged an agent to go into the market during February to April 2012 to attempt to sell some of the top players, it was quite likely that they would have generated offers. It had not been readily apparent at that time that Rangers would not be playing in the SPL the following season and so there had been no urgency for the players' agents to take the initiative to try to move them on.

Expert evidence for the respondents

[102] In Mr Buchler's view, the respondents' approach to player sales was consistent with their strategy, which was to achieve the rescue of the Company as a going concern via a CVA. Attempting to realise funds from player sales would have faced considerable difficulties: the transfer window was closed during the majority of the administration, and

even if a sale was achieved, any payments might have been deferred until the start of the upcoming season; because players were being transferred in the context of an administration, any sales achieved were likely to be for relatively low values; selling players for a depressed sum might have decreased the interest of potential buyers of the company; and selling the best players would have impacted on the attitude of the fans who might have withdrawn their support for the club, resulting in lost revenue. The decision not to actively market the players for sale was accordingly a reasonable approach to take.

[103] The transfer of players was a market driven exercise. It could not be assessed in the abstract or in the absence of actual offers for the players concerned. A cost-benefit approach would have been of doubtful practical relevance, as the benefit to be analysed included the value of retaining the player, both from a playing perspective, which was subjective, and from the perspective of the company being more attractive to potential bidders, which was impossible to assess during the early stages of the administration. The respondents were entitled to proceed on the basis of the January schedule and had no need to instruct further valuations.

[104] When a club like Rangers entered into administration, word spread in the football community that the club was in financial distress, and there would be an expectation amongst other clubs that the respondents would be open to offers for players. Despite this, the respondents received only a handful of expressions of interest from prospective buying clubs. This lack of interest was caused not by the respondents' approach, but rather by a culmination of factors outside their control: primarily (i) the closure of the transfer window, and (ii) the need to seek player agreement. Mr Christie's suggestion of forward selling a player's registration during the closed period was unrealistic. The salary of the transferred player would have had to be paid by either the buying or selling club with neither getting the

benefit of the player's services, which would impact on the value achieved. In addition, it did not account for the views of the player, who might not wish to commit to another club three months before the transfer window opened. The market cannot be forced and there always has to be a willing buyer and willing seller in order for a deal to take place. Any other club or agent would be aware that should the company end up in liquidation, players might become available at no transfer cost.

[105] As regards Steven Naismith, Mr Buchler disagreed on balance with the decision taken by the respondents not to sell the player to WBA for £1.7 million. That said, it was a close judgement call: either option would have been open to an ordinarily competent administrator. Mr Naismith was regarded as one of the most valuable players within the squad and it was Mr Buchler's understanding that it would have made the company a less attractive prospect if he had been sold. This would also have been contrary to the respondents' strategy of retaining the key players within the team to maintain the company's attractiveness to buyers.

[106] Mr Pannick stated that the majority of football transfers were completed during the transfer window registration periods. There was no clear benefit to a club from signing a player outside one of these windows because they would not be able to register the player as their own. The selling club would not normally receive payment until the registration was completed when the next window opened. Clubs usually waited until close to the transfer window opening before confirming their exact targets and beginning negotiations. This might be for various reasons: they might need to wait to see whether they would retain their status in the league in which they currently played; whether they expected to qualify for European competition in the following season; whether they expected their current head coach/manager to stay or leave; or whether they expected to sell any key first team players

and have additional funds to strengthen the squad. It was very uncommon for a transfer deal to be completed before a transfer window began.

[107] In the case of the Rangers players, it was highly probable (i) that they (and their agents) would have been aware that it was in their interests and likely to be to their advantage not to sign any new employment contract with the company or with any other club until they became free agents; (ii) having regard to the insertion of the buy-out clauses without an offer of new contracts, that the players would not in the circumstances have signed any new contracts had they been offered by Rangers; and (iii) that the players' agents would have realised that their clients held a position of considerable power in terms of their negotiating position. They would have focused on acting in the interests of the players and not the company.

[108] In his oral evidence to the court, Mr Pannick reiterated that he did not think that it would have made any difference to the likelihood of player sales if the respondents had adopted a proactive approach and engaged an agent to attempt to achieve sales. Every potential purchaser in the UK would have been well aware of the company's situation, and the assumption would have been that the players were all for sale at a discount because funds were needed quickly. There was no question of the top players not being good enough to play in the English Premier League, or that prospective purchasers would have been unaware of the buy-out clauses. The important factor was timing: purchasing clubs would not have had to act, and would not have acted, until the summer transfer window opened, and players could be obtained without payment of a transfer fee. There would have been a very low probability of selling any of the club's most valuable players during February to April 2012.

Other relevant chapters of evidence

[109] In addition to factual and expert evidence directly related to the respondents' approach to playing and non-playing staff redundancies and player sales, there were two chapters of evidence relevant to the respondents' decision-making process. These concerned (i) the position adopted by HMRC regarding the outcome of the administration, and (ii) the attitudes to the administration demonstrated by supporters of the club.

The position adopted by HMRC

[110] Throughout the administration it was known by all concerned that HMRC were likely to be by far the company's largest creditor, even assuming the amount due to them to be at the lower end of the scale of estimates. It was similarly understood by all concerned that without HMRC's vote in favour, there would be no CVA, and the exit from administration would have to be by way of a liquidation.

[111] Ultimately, HMRC voted against a CVA, but their decision to do so was not taken until 31 May, and it was not until 8 June that the decision was intimated to the respondents. There had previously remained a possibility that HMRC would support a CVA if its terms were sufficiently favourable. However, although there was regular contact throughout the administration, HMRC gave very little encouragement to the respondents to treat a CVA as a likely outcome. Following a meeting on 24 February, Mr Grier reported to Mr Clark:

> "My interpretation of key areas for HMRC are (1) getting their money back (2) exercising full power of prosecution etc (where appropriate) against company officers (3) no adverse PR or security issues.
>
> …
>
> Liquidation was noted as a preferred outcome to allow for full investigation."

This was reflected in a note entitled "Draft Note for HMRC" prepared by Mr Clark on 8 March, in which he observed:

> "In an attempt to preserve the Company's status as a member of the SPL with a view to maximising returns to creditors, the most financially beneficial result for the Club is likely to be that the Company will exit Administration via a CVA. We know that HMRC are keen to ensure that a full and proper investigation is undertaken with 'no stone left unturned' and so at present you regard liquidation as a likely result. We would like to continue to review these options with you please."

[112] On 5 April, the respondents finalised their Report to Creditors and Statement of Proposals. The resolutions proposed included the following:

> "Resolution (1) 17.1.4 – That the Joint Administrators can explore any and all options available to realise the assets of the Company without recourse to creditors. The Joint Administrators be authorised to conclude a sale of the whole, or part of the business, property and assets of the Company without having to obtain the sanction of the Company's creditors at further creditors' meetings, upon such terms as the Joint Administrators deem fit and they be authorised to liaise with all relevant parties, bodies or organisations which they deem relevant for achieving that purpose.
>
> …
>
> Resolution (2) 17.1.6 – That the Joint Administrators may propose such CVA(s) or Scheme(s) of Arrangements as they deem appropriate and see fit, subject to the outcome of offers."

The draft report, including the proposed resolutions, had been sent to HMRC in advance of the creditors' meeting for any comment that they might have. HMRC voted in favour of the resolutions.

[113] Following a further meeting on 11 May, Mr Grier prepared a draft note for comment which contained the following:

> "DD asked for comment from MB and his view of HMRC voting against a CVA. MB confirmed at this time a liquidation is HMRC's preferred route. MB noted that as a strategy it is important to demonstrate compliance with tax is important liquidation also provides the opportunity to investigate those responsible for non compliance.
>
> …

> DD asked for confirmation from HMRC and in particular MB that the department would not agree to a CVA. MB explained that should an offer of say circa £50m be received versus an offer for liquidation at circa £5m then this would need to be given consideration, but at this time the preferred route is liquidation. DD said he understood this position."

In this meeting note the initials "MB" refer to Mr Mike Baird, who in 2011-12 was the head of the Finance Professionals Unit in HMRC's Specialist Investigations ("SI") directorate, providing specialist insolvency and accountancy advice to teams in SI as well as to HMRC's Local Compliance and Debt Management & Banking ("DMB") directorates. Mr Baird was one of the administration team's principal contacts within HMRC and he gave evidence at the proof. Those present at the meeting on 11 May also included Mr Whitehouse (referred to in the meeting note as "DW") and Mr Des Dolan, a member of HMRC's DMB directorate (referred to in the meeting note as "DD"). It seems to me that the references in the draft note above to "DD" ought to be to "DW", which would appear to make more sense.

[114] It was Mr Baird's consistent view throughout the period of the administration that HMRC ought not to support a CVA, and he frequently made this clear to the respondents and their staff. There were a number of reasons for this; he had concerns about "non-compliance", which I understand to mean intentional non-payment of taxes during the period prior to the company entering administration, and Mr Baird wished to preserve the possibility of pursuing recovery proceedings against company officers. He was also concerned that Rangers should not be seen to be receiving preferential treatment as compared with other football clubs. There was additionally a desire to be able to continue to pursue the EBT litigation. But Mr Baird's principal reason was that he judged that, taking all of the above into account, it was likely that a liquidation would produce a better financial outcome for HMRC than a CVA.

[115] Mr Baird's involvement with the company had pre-dated its entry into administration. His understanding at that time, and during most of the administration period, was that his colleagues in the DMB directorate shared his opinion as to the preferable outcome. Latterly, however, in about May, he became aware that at least some of the officers in DMB, including its director, favoured a CVA. For this reason, and having regard to the high public profile of the case, the decision on whether or not to vote in favour of a CVA had to be taken by members of HMRC's executive committee ("ExCom"). At a meeting with two ExCom members on 31 May, Mr Dolan presented DMB's view that a CVA would produce a better recovery for HMRC. Mr Baird argued on behalf of SI that the CVA should be rejected and a creditors' voluntary liquidation sought instead, so that an investigation could be carried out to maximise recovery and review what had happened at the company. The ExCom members decided that any CVA should be rejected and that HMRC should vote accordingly.

Attitudes of the club supporters

[116] Rangers FC has a passionate support who reacted with predictable anger to the club's insolvency. The respondents engaged proactively with representative members of the club's supporters' groups, including the Rangers Supporters' Assembly, the Rangers Worldwide Alliance and the Rangers Supporters' Trust. Throughout the administration period, however, the respondents and their staff were subjected to disruptive, abusive and threatening communications from individual supporters. Measures had to be taken, on police advice, to assure the security of the respondents and the members of their team when they came to Glasgow. Details of administration decisions taken were frequently leaked to the press before the respondents' staff had had time to inform the persons affected. Press

reports were often inaccurate and much time had to be spent attempting to correct false assertions in the press and in social media. Supporters' anger came to a head in early April when press reports suggested that liquidation was a likely outcome, with the business and assets of the club being sold to a Newco. This prompted a demonstration against liquidation by fans during a match at Ibrox.

[117] I do not underestimate the difficulties caused for the respondents and their staff by the supporters' behaviour. However, as the respondents themselves readily acknowledged, it is not uncommon for administrators to have to deal with abusive conduct on the part of individuals with an interest, financial or otherwise, in the company concerned, and an administrator must not allow himself or herself to be deflected by it from fulfilment of his or her statutory duty to creditors. It is obvious that in the case of a football club administration, the interests of the fans are unlikely to coincide with those of the creditors. This does not however mean that the views of the fans could or should be ignored. A prospective purchaser will be reliant upon them for future income from season tickets, branded merchandise and other sources. Alienation of the fan base could make the club less attractive to prospective purchasers and thus damage the outcome for creditors. Interference by fans in the bidding process could also affect the attitudes of prospective purchasers and drive down the selling price of the business. These are considerations that it was right for the respondents to bear in mind when making decisions in relation to matters such as player and non-player redundancies and player sales.

Assessment: were the respondents in breach of their duties to the company?

Obtaining of information and consideration of alternatives

[118] I address firstly the steps taken by the respondents to inform themselves of the factors relevant to their decision-making in relation to player and non-player redundancies and player sales. In my opinion the respondents' actings in this regard fell below the standard reasonably to be expected of an ordinarily competent administrator in a number of respects. To the extent that my view relies upon expert opinion, I prefer, at this general level, the opinion of Mr Christie to that of Mr Buchler.

[119] Firstly, I am satisfied that the respondents acted without having taken independent advice on certain critical matters about which they required to be informed. As regards player redundancies, they relied upon the opinion of the manager, Mr McCoist, whom they ought not to have regarded as being in a position to offer a dispassionate opinion as to the number of possible redundancies that could be made while leaving the club with a squad capable of fulfilling its fixtures, or the identities of the players who could be released. It is noteworthy that his list included only four players proposed for release from contract, three of whom were in any event out of contract in three months' time, and one (Alexander) in the twilight of his career. The respondents regarded Mr McCoist's proposal as insufficient but failed to follow through the implication of this, ie that they needed to obtain advice from someone else. Even Mr Dickson would have recommended a slightly longer list, had he been consulted. The consequence was that by the time of the negotiations of wage reductions, the respondents did not have a reliable list of potential redundancies to use when making a comparison with the savings obtainable from wage reductions.

[120] Allied to this are what in my view are certain other failures by the respondents adequately to inform themselves of the possibilities available to them. I have already observed that I do not accept the respondents' evidence that they considered and rejected a

strategy of player sales because they wished to keep the squad intact for prospective purchasers. It is in my view much more likely that they did not fully investigate player sales because they proceeded on the assumption that none could take place except to clubs playing in countries whose transfer window was open, but which were not markets in which Rangers players would usually be sold. The evidence of Mr Ashworth demonstrates that sales outside the transfer window, although uncommon, are not prohibited, provided that both clubs and the player are content with a situation in which the player remains unregistered with the purchasing club until the opening of the next window.

[121] Another matter upon which the respondents were not adequately informed was in relation to the application of a "football creditors" rule in Scotland and, specifically, the risk that the application of such a rule could result in claims being made by players made redundant against the new owner of the company or against a Newco that acquired its business. The SFA Rules contain no such rule. On this matter, Mr Clark received advice in an email dated 28 February from Mr Michael McLaughlin, a solicitor with relevant expertise, that the SFA "could in theory" make a Newco's entry to the SPL conditional upon it undertaking to fund the redundancies. This advice was not however followed up either in terms of assessing the likelihood of the SFA attempting to impose such a condition, or in terms of calculating the financial consequences, both of which had been the subject of queries by Mr McLaughlin in his email. In relation to the first of these, the evidence of Mr McKenzie was that the SPL's rules did not require a preference to be given to players' claims. I find that the respondents were not in possession of information that entitled them to proceed on the basis that the risk of claims by football creditors against prospective purchasers was to be regarded as a reason not to make redundancies among playing staff.

[122] I also find, accepting Mr Christie's evidence in this regard, that the respondents failed to give adequate consideration to savings by means of redundancies among the non-playing staff. It is striking that almost none was made. Again this does not appear to have been the consequence of a deliberate strategy. It was not until the end of February that the company's department heads were asked for suggestions for redundancy, whereupon the issue of non-playing staff redundancies became subsumed within the players' wage reduction negotiations. As a consequence, the matter of which non-playing staff could or should be made redundant was never given detailed consideration.

[123] The consequence of this was that when Mr Shipperlee drew up a sensitivity analysis on 8 March, in which the scenarios included, inter alia, player wage reductions very similar to those actually agreed (Sensitivity 9) and "various player redundancies" (Sensitivity 10), he did so without reliable information as to what redundancies could in fact be made.
Mr Shipperlee's analysis showed that the cash deficit was some £565,000 lower under Sensitivity 9, suggesting that wage reductions produced the better outcome, but the value of this comparison is diminished by the fact that it is unclear how the figure for redundancies was arrived at. In an email of the same date, Mr Shipperlee observed that 16 or 17 players would need to be made redundant to equate to the wage reduction savings; it does not appear that that particular scenario was further investigated. Nor was the sensitivity analysis set up to take any account of the terms demanded by the players in return for the wage reductions, notably the buy out clauses, and the effect of those terms on the value of the players and hence the outcome for creditors.

[124] Finally in this context I find that the respondents failed to take adequate account of the consequences of the administration ending with a liquidation and not a CVA. The noters do not criticise the respondents for proceeding on the basis that a CVA remained a

possibility, and neither do I. As I have narrated, it was not until a very late stage in the administration that HMRC made and intimated their decision not to vote in favour of a CVA. That said, the indications that the respondents received at various times from HMRC, and from Mr Baird in particular, were clearly to the effect that for the reasons I have mentioned, HMRC's preferred outcome would be a creditors' voluntary liquidation. I have seen no evidence that until the point was made to them by Fraser Wishart on 5 April the respondents were alive to the risk that if the outcome was liquidation, some or all of the players might elect not to exercise their right under TUPE to transfer to the new company. That was not, of course, a certainty, and I bear in mind that throughout much of the administration the respondents proceeded in the expectation that even following a sale of the business and assets to a new company, the club would continue to play in the SPL in the following season, thereby providing the players with a stronger incentive to transfer to the new company. At the very least, however, it seems to me that when making their decision at an early stage not to take a proactive approach to player sales, the respondents failed to give any consideration to the fact that in the event of a liquidation the entire squad would become available for transfer without a fee and therefore not contribute to the value of the company to prospective purchasers. This was a risk of which, in my view, they ought to have been aware. Had they given the matter consideration, they would or ought to have realised that the players most likely to decline to transfer would be the most marketable players who would attract interest from wealthier clubs in England and elsewhere.

[125] In relation to the above matters, I found the evidence of Mr Buchler unsatisfactory. The opinion expressed in his written report that the respondents' strategy of not marketing players for sale was reasonable failed to take account of the risk just discussed of the players becoming free to transfer without a fee. In cross examination he accepted that the risk

existed and that administrators should take account of the terms of TUPE regulations. As regards obtaining player valuations, Mr Buchler expressed the view that this was unnecessary because the respondents already had the January 2012 valuations, and there was no proven method to differentiate a player's valuation in an insolvency context as compared to a solvent context. The evidence of Mr Lombardi and the players' agents made clear that there would be a significant difference, and in my opinion it was the respondents' duty to inform themselves of the players' values in the circumstances which prevailed. In these circumstances I consider that Mr Buchler's view that the respondents could only have regard to actual demand from prospective purchasers, without obtaining their own advice, cannot logically be supported.

[126] In certain important respects Mr Buchler's opinion proceeded upon the basis of assumptions of fact for which there was no evidence. Most notably it proceeded upon the basis that redundancies would have had an adverse effect on the value of the club to a prospective purchaser. That proposition is not self-evident: if a player's wage cost exceeds his value then his redundancy will have a positive effect on the value of the club.
Mr Buchler's contrary opinion amounts to unsupported assertion, and appears to me to conflict with what is accepted to be normal practice in the conduct of an administration. His view that the respondents were entitled to rely upon the manager's opinion on player values and redundancies does not address the question whether he could provide a disinterested assessment. In relation to non-player costs, Mr Buchler's opinion was almost entirely reactive to Mr Christie's opinion, and although Mr Buchler agreed that a company in administration does not operate, and should not operate, as it did pre-administration, he offered no view of his own as to the extent to which redundancies among non-playing staff

could or should have been made without putting the company in breach of any legal or administrative requirements.

Did the respondents' failures cause loss?

Redundancies versus wage reductions

[127] The breaches of duty identified above are all concerned with failure to obtain information and to give due consideration to redundancies as an alternative to wage reductions, and to possible player sales. It is not necessarily the case that these failures of themselves gave rise to losses for which the noters are entitled to compensation. I turn now to consider what courses of action would have been open to a reasonably competent administrator who had obtained the requisite information and given due consideration to these matters. I begin by considering the arithmetic, taking as my starting point the figures helpfully agreed by parties in a supplementary joint minute. These figures are not dependent to any extent on the application of hindsight, and I make the assumption that the same calculations could have been carried out by the respondents at the time when decisions were being made regarding redundancies and wage reductions.

[128] The figures in the supplementary joint minute comprise, for the period from February to May 2012, the full wage entitlements of, and the amounts actually paid to, three categories of personnel, namely (i) 64 non-playing staff (out of a total of 134) whom Mr Christie considered ought to have been made redundant, including the four who were in fact made redundant; (ii) 23 players (13 first team and 10 youth players) whom the respondents, based to some extent on Mr Christie's opinion, contend ought to have been made redundant, including one (Celik) who was made voluntarily redundant; and (iii) 10 players, including one (Wylde) who was made voluntarily redundant, whom the respondents contend were

marketable for sale. The figures for category (i), taking account also of the fact that the manager waived his salary for three months, are:

Full salaries and NIC if no redundancies or waiver	£1,299,827
Total actually paid	(955,623)
Saving on full salaries	344,204

For category (ii), the figures are

Full salaries and NIC if no wage reductions	£2,848,864
Total actually paid	(1,409,299)
Saving on full salaries	1,439,565

In this latter calculation it is common ground that the salary of one player (Ortiz) who was on loan was in fact met by his parent club, and that the total actually paid should be £1,253,852. For category (iii), the figures are

Full salaries and NIC if no wage reductions	£2,019,409
Total actually paid	(608,063)
Saving on full salaries	1,411,346

The total saving on those categories of players' wages achieved by the wage reduction agreement was accordingly £2,850,911. The respondents calculated (and I accept) that there were additional savings of £19,581 in respect of reductions of wages of players not included in either category (ii) or (iii).

[129] On the noters' approach, there would have been further savings of all of the wages paid to both non-playing staff in category (i) and players in category (ii), ie a figure of £(955,623 + 1,253,852) = £2,209,475. From this there must be deducted the savings made by the wage reductions of the other players, ie £(1,411,346 + 19,581) = £1,430,927, leaving a net further saving of £778,548. Account must also be taken of the saving actually made by

waiver of the manager's salary. I have no basis upon which to assume that Mr McCoist would have agreed to the waiver if the respondents had chosen to follow a strategy of compulsory redundancies; Mr Clark's evidence was that it would have been difficult to encourage him to do so. Mr Christie's approach appears to assume that in that eventuality he too would have been made redundant. It is sufficient for present purposes for me to find that it would have been within the options open to the respondents to retain Mr McCoist as manager, even if he had not agreed to a salary waiver. He was an important and popular figurehead, and the respondents would have been entitled to take the view that his enforced departure, and the likely reaction among supporters, would have damaged the value of the club to prospective purchasers. I accordingly consider that a further deduction (based on the parties' agreed figures) of £213,117 falls to be made, leaving a net saving of £565,431 by adopting redundancies instead of wage reductions.

[130] This figure may be contrasted with the conclusion in Mr Shipperlee's sensitivity analysis (above) that wage reductions would produce a cash deficit some £565,000 lower than that produced by redundancies. This very significant difference is clearly the consequence of conflicting approaches to what would have been an appropriate and practicable level of redundancies. The respondents contend that the redundancies advocated by Mr Christie would have been neither appropriate nor practicable, and would have left the company with insufficient players to be able to fulfil its fixtures (especially if the administration continued into the following season) and also with insufficient non-playing staff to operate effectively and in accordance with FIFA and SFA regulations.

[131] In the course of cross-examination, Mr Christie accepted that the comparison that he had used with the administration of Portsmouth FC to support his proposition that the making of player redundancies was a normal practice demonstrated that savings were in fact

made not from player redundancies but from non-playing staff redundancies combined with player sales. He agreed that his lists were "illustrative" rather than definitive as to the appropriateness of making specific individuals redundant, taking account, in the case of the players, of the number available for each position and their respective values. He did not take account of the length of time remaining of the contracts of the players retained, or of any regulatory obligations that the company might have to field a youth team as well as a senior team. His list did not take account of requirements for the following season as he regarded that as a matter for the prospective purchaser to determine. In relation to non-playing staff, he had not discussed his list with any of the club's senior administrators, some of whose names were included in the list. He accepted that it was arguable whether the latter should be included. He did not accept that it was over-optimistic to expect redundancies to have been made in time to save the cost of the February payroll, but did concede that it would have been challenging.

[132] In relation to non-player redundancies, I am unable to accept Mr Christie's evidence in its entirety. Whilst I accept that it was difficult for him, some years after the event and without personal knowledge of the duties and relative importance of particular staff members, to identify individuals whose services could or had to be dispensed with in the context of the company's insolvency, I find the concept of an illustrative list to be of limited assistance. I am, of course, in no better position to make an assessment, on an individual basis, of the employees whose retention was essential to the company's operation. The respondents' evidence, including that of Mr Buchler, provides me with no help in this regard. It does, however, seem to me that some of Mr Christie's inclusions are obviously questionable: for example, Ms Gourlay provided assistance to the respondents in relation to the day to day operation of the club, and assumed the responsibilities of a much more highly

paid executive director who was made redundant. If Mr Olverman, the financial controller, had been made redundant, his workload would presumably have fallen upon the respondents' staff, thereby increasing the costs of the administration. Mr Christie provided no comparative evidence that the proportion of the total staff included in his list was in accordance with usual practice in a football company insolvency.

[133] I am, nevertheless, persuaded that if the respondents had fully investigated the scope for non-playing staff redundancies, they would have identified possibilities in addition to the very modest list provided by Ms Gourlay. I bear in mind the view of Mr Popp that the remuneration structure of the coaches and senior management was above market rates and made the club unattractive to a purchaser, and the view of Mr Dickson that there had been scope to make staff redundant from various departments. It is not in dispute that a club in administration cannot be operated in the same way as it would in more normal circumstances, and that difficult decisions have to be taken. I accept Mr Christie's opinion that in the company's circumstances there were whole departments that could have been dispensed with: specifically, the charity foundation, youth development, scouts and sponsorship. I exclude community coaching from this list because Mr Dickson suggested, though he was unable to confirm, that it was productive of revenue rather than cost.

[134] Using the figures in the supplementary joint minute, the savings that would have resulted from making all of the individuals in these four departments redundant would have been £223,314. That figure assumes that four months' wages would have been saved. I am, however, satisfied that the respondents' early decision to meet the February payroll was a reasonable one. This was clearly going to be a complex administration, and even if the respondents had pursued a policy of making a significant number of redundancies, they would have had a considerable amount of work to identify players who could be released

and non-playing staff who were not crucial to the operation of the business. It does not appear to me to be unreasonable to allow the remainder of February for such investigations. It follows that the savings that I find could have been made in the four departments referred to is 75% of the above figure, ie £167,485.

[135] I am satisfied, on the basis of the evidence of Mr Dickson and, from a different perspective, Mr Popp, that further redundancies could have been made without jeopardising the capacity of the company to meet its fixture obligations for the remainder of the season or breaching FIFA, SPL or SFA regulations, or damaging its attractiveness to a prospective purchaser. These would have included, but not been restricted to, the individuals identified for redundancy who were not in fact made redundant. The saving for three months in relation to those individuals would, according to my calculation, have produced a further saving of £47,596. Beyond that, I can do no more than proceed on a broad brush basis and find that further redundancies could have been made which would have resulted in total salary and NI savings for non-playing staff of at least around £250,000.

[136] Turning to player redundancies, the respondents criticised Mr Christie's approach in a number of respects. It was submitted that (i) the exercise that he carried out was a theoretical one; (ii) he had not taken account of the risk that the administration might continue into the following season with the consequence that his much reduced squad would need to compete in the SPL for all or part of another season with the registration prohibition imposed because of the club's insolvency position still in place; (iii) he had not taken account of the risk that the SPL would not relieve the company of its obligation to compete in the youth league; (iv) he had not taken account of the fact that nine of his retained players would be out of contract on 31 May 2012 and thus free to leave the Club while it might still be prohibited from registering new players; (v) he planned to retain only two goalkeepers

other than Allan McGregor, who was to be offered for sale, even though one of them was almost out of contract and facing a criminal trial which in fact resulted in him leaving Rangers that summer.

[137] I consider that there is force in these criticisms, except that I find on the evidence that there was no real likelihood that the SPL would have refused a waiver of the obligation to compete in the youth league if the company was having to use its youth players to fulfil its senior fixture obligations. The goalkeeper point can be addressed by removing Allan McGregor from the list of marketable players. I agree, however, that in deciding whether to proceed by way of redundancies rather than wage reductions, the respondents would have been entitled to have regard to the potential consequences for the company if the reduced squad had had to continue to compete into the next season without reinforcement because new registrations were prohibited. If the playing squad had been depleted to the extent that the club was unable to compete effectively because the team was largely comprised of youth players, that could have had an impact on its value to purchasers and hence on the return to creditors. I also accept the respondents' submission that where the noters are seeking compensation linked directly to the players whose contracts should have been terminated, it is incumbent upon them to provide more than an illustrative list.

[138] There is, however, a difference between making redundancies on a scale that would lead to the fielding of a team consisting largely of youth players and making selective redundancies among players whose continued employment was not critical to the value of the company. I have noted that a list (Papac, McCulloch, Alexander and Broadfoot) was provided by Mr McCoist which the respondents considered to be insufficient, and that in his evidence to the court Mr Dickson offered his view as to players who could have been made redundant (Mr McCoist's four plus Healy). There was no evidence that releasing any or all

of those first-team players would have reduced the value of the company to prospective purchasers. Nor was there any suggestion that releasing some of the youth players would have had such an effect.

[139] I find therefore that if, during the first week of March when the wage reduction negotiations were in progress, the respondents had carried out an assessment of whether equivalent or greater savings could have been made by means of redundancies, they would reasonably have concluded that at least the five players mentioned by Mr Dickson could have been made redundant, along with some of the youth players, without adversely impacting upon the eventual return to creditors. I calculate the saving of three months' salary for these five players to be £403,191. Allowing, say, an additional £42,000 as a saving on eight youth players (ie 75% of 8 x £7,000), I find that player redundancies could have been made that would have produced an additional saving of at least £445,000. I do not consider that the evidence permits me to go any further.

[140] Aggregating the foregoing savings made by non-player and player redundancies produces a total of around £695,000. If applied to Mr Shipperlee's sensitivity analysis, that would convert a benefit of £565,000 from proceeding by way of wage reductions into a benefit of £130,000 from proceeding by way of redundancies. That is not, looked at in proportion, a large difference. Had they carried out a calculation which produced a difference of this order, one way or the other, the respondents would in my opinion have been entitled to regard the arithmetic as effectively neutral, and to proceed to make the choice between wage reductions and redundancies on the basis of other considerations.

[141] Those considerations would not, in my view, have included the question whether player sales ought to have been made. Although the wage reduction agreement reached with the players precluded player redundancies, it did not prohibit sales. The respondents

were not therefore, by entering into the agreement, precluded from taking – or continuing to take – a proactive approach to marketing players for sale. The advantages identified by the respondents of proceeding by way of wage reductions included:

- By retaining a larger squad, the value of the company was enhanced and the options available to the purchaser for the season ahead were retained;
- Any risk of the football creditors rule being applied by the SFA to players' claims was removed;
- Damaging conflict with players and supporters was avoided.

The disadvantages identified by the noters of proceeding by way of wage reductions included:

- The loss of an opportunity to reduce the monthly wage bill to be inherited by a prospective purchaser;
- The fact that reduced buy out clauses were negotiated as part of the wage reduction agreement;
- The creation of an artificial deadline on the date when wages returned to pre-reduction levels.

[142] In my opinion, none of these considerations is sufficiently powerful to be decisive one way or the other. There was no convincing evidence that the value of the club was enhanced by retaining almost the whole squad; equally there was no evidence that any of the credible bidders was discouraged by there being an excessive number of players on the payroll. At the time when the decision to proceed by way of wage reductions was being taken, there was no certainty as to what size of playing squad would be required for the following season, and the respondents were entitled to regard that as a matter to be addressed by the purchaser once the situation for 2012-13 became clear. Although conflict with players and supporters

would have been undesirable, it was accepted by all concerned that in an administration difficult and unpopular decisions often have to be taken. For the reasons already stated, I do not attach significant weight to the risk of the SFA attempting to enforce a football creditors rule against a purchaser of the business in respect of players' redundancy claims.

[143] In the absence of any decisive considerations in favour of redundancies, I conclude that the decision to proceed by way of wage reductions, including the contract variations in relation to buy out clauses, was an option reasonably open to the respondents, and that they were not in breach of their duty to the company's creditors in choosing to go down that route.

Player sales

[144] I turn next to player sales, leaving aside for the moment the particular case of Steven Naismith. I have held that the respondents were in breach of their duty to creditors by failing to seek advice with regard to the prospects of realising value by player sales. What advice, then, would the respondents have received had they sought it? If they had sought advice from a football agent sharing Mr Pethybridge's views, they would have been told that selling players outside the transfer window was possible, but would not be easy to achieve. If they had sought advice from an agent sharing Mr Pannick's views, they would have been told that it was very unlikely that they would succeed in selling players quickly because although clubs will conduct negotiations, they will normally make no final decisions until shortly before the transfer window opens. They would also have been told that even if a sale was agreed, it was unlikely that any money would be paid until the player could be registered with the purchasing club when the transfer window opened in the summer.

[145] It was ultimately a matter of agreement between Mr Pethybridge and Mr Pannick that if the respondents had engaged an agent early in the administration to attempt to sell the marketable players, they would have been advised that although there was a prospect of attracting interest by the end of March, no sales were likely to be concluded until closer to the opening of the summer transfer window. Mr Pannick regarded it as standard practice for exclusive authorisation to be sought for a period that included the next transfer window. Mr Pethybridge would have been reluctant to accept appointment on the basis that sales had to be achieved by, say, the end of March. Although they differed as to the likelihood of achieving sales, both would have been happy to accept instructions on the basis that their authorisation would continue into the summer transfer window.

[146] On the basis of this evidence, I find that if the respondents had sought to engage an agent on behalf of the club to attempt to sell the marketable players, it is unlikely that they would have found an agent willing to accept instructions to effect a quick sale, especially on the basis that a fee would only be paid in the event of success. On the other hand, I find that they would have had no difficulty engaging an agent on the latter basis if the authorisation were to continue into the summer transfer window. (I accept the evidence of Mr Lombardi and Mr Pannick that due to conflict of interest the respondents could not, as Mr Pethybridge suggested, have "incentivised" the players' own agents to source deals for their players.) The next question is therefore whether an ordinarily competent administrator exercising reasonable skill and care would have done so.

[147] In my opinion there are strong reasons why a proactive strategy ought to have been pursued. Taken as a whole, the evidence did not suggest that sale of a few of the club's most highly valued players would have had a significant effect on the valuation placed on the club by prospective bidders. Although Mr Miller expressed a desire for the playing squad to be

retained, the level of his bids did not indicate that he was attaching substantial value to individual players. Even with the (modest) player redundancies that I have found could have been made, the playing squad would have remained sufficient for the club to fulfil its fixture obligations for 2011-12 and, if necessary, to continue to do so in the following season. If an agent were to be engaged on the basis of a success fee, there would have been little or nothing to lose by attempting sales. On the other hand, there was a real risk that the value of some or all of the players would be lost altogether. Although the prospect of a sale of the business and assets instead of a CVA does not appear to have received public attention until about the beginning of April, it was a possibility to which the respondents were or ought to have been alive from the outset, given the stated preference of HMRC for a creditors' voluntary liquidation. The eventual outcome, in which some of the most valuable players declined to transfer to the Newco, was reasonably foreseeable, even before the SPL Board resolved to pass to its members the decision on whether to allow the company's SPL share to be transferred to Sevco. For these reasons, I am satisfied that the respondents were in breach of duty by failing to engage an agent to attempt to realise the value of some of the club's top players.

[148] I do not find Mr Buchler's contrary opinion on this matter persuasive. I do not accept that sale of a few players would have jeopardised the company's ability to meet its match day obligations. The fact that player valuations were likely to be depressed during the administration has to be set against the risk that their value would be lost altogether, as in fact occurred. Although sales would undoubtedly have been unpopular with fans, I have no difficulty rejecting the proposition that this would have caused them to cease to support the club. I accept Mr Pannick's evidence that, for the reasons he gave, it was very unlikely that player sales would be completed during the months of February to April, but I do not regard

this as a barrier to adopting what was the common practice of seeking to generate interest during that period with a view to concluding a deal as the summer transfer window approached. Although this would have been unlikely to have any beneficial effect on the monthly cash deficit, as the players would probably have continued to be paid by the company, it would at least have created the possibility of receipt of funds when any deals came to fruition.

[149] Nor do I find that the fact that only one player was sold during the January transfer window ought to have been regarded as an indication that there would be no demand for other players a few months later. As Mr Pethybridge noted in his report, the main transfer window is the summer window. I accept his analysis that clubs who buy players in the January transfer window are likely to be panic buying because they are either in a relegation spot or trying to push for promotion, and that this gives no reliable guidance as to the marketability of the members of the Rangers playing squad.

[150] For the sake of completeness, I should add that I reject the noters' alternative argument that even if the respondents had been entitled initially not to pursue a strategy of active marketing of players, this changed in early April when they became aware (i) that the level of "best and final" bids received did not indicate that substantial value was being attributed by bidders to the squad of players; (ii) that the bid by Mr Miller was based on a sale of the business and assets, opening up the risk that players would decline to transfer to the new company; and (iii) that such a risk existed, this having been made clear to them by Mr Wishart. There is no evidence that the respondents conducted such a review but, as Mr Pannick pointed out in his report, and as Mr Pethybridge agreed, the prospect of becoming free agents would enhance the players' bargaining strength and render it less likely that they would agree to a transfer for a fee. It follows, in my opinion, that if the

respondents had taken advice on, and given proper consideration to, the possibility of actively marketing players for sale during April and May 2012, it would have been open to them at this time to decide that there was no realistic prospect of achieving any sales and that there was therefore no point in changing strategy.

[151] What, then, would have been the likely outcome of a proactive strategy of selling players with a view to realising their value, at the latest when the summer transfer window opened? In addressing this question I focus on the players listed as "marketable playing staff", ie category (iii), in the supplementary joint minute. I exclude Allan McGregor on the ground that with Grant Adam's contract due to expire and the possibility of Neil Alexander being made redundant, Mr McGregor's departure could have left the club unable to field a first-team goalkeeper. Again leaving Steven Naismith aside, the players concerned are therefore Whittaker, Davis, Edu, Wylde, Lafferty, Aluko, Wallace and Fleck.

[152] The primary evidence on player valuations was provided by Mr Lombardi, who took as his starting point article 17(1) of the FIFA Transfer Regulations, which specifies the method of calculation of compensation to be applied where a contract between a club and a player is terminated without just cause, ie breach of contract. In Mr Lombardi's view, this article provided the only objective and globally recognised criteria by which to calculate compensation upon a player changing clubs (whether in contentious or non-contentious circumstances) and therefore, ultimately, for assessing a player's value. Article 17(1) required the calculation of compensation to take into account, inter alia, "the specificity of sport" and any other objective criteria, including the remuneration and other benefits due to the player under his existing contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract), and the remuneration and other benefits due to the player

under his new contract. Similar criteria were to be found in Schedule 6 to the standard SPL players' contract.

[153] Mr Lombardi recognised that article 17(1) was specifically applicable to compensation for breach of contract, and that in Schedule 6 to the SPL contract the relevant provisions were expressly disapplied to non-contentious player transfers. He nevertheless considered that they had to be taken into account when valuing a player. This view was supported by the consistent jurisprudence of the Court of Arbitration for Sport and the FIFA Dispute Resolution Chamber. The method had been used, for example, in 2006 when a player (Andy Webster) had breached his contract with Hearts to move to Wigan Athletic. The requirement to have regard to the specificity of sport allowed certain subjective elements, such as performance and a player's role in the club, to be taken into account.

[154] Applying the valuation criteria to the Rangers players, Mr Lombardi considered that a discount of around 40-50% was appropriate because the company was in administration. This recognised the weakened bargaining position of the seller where the transfer window was not open, so that competition for the acquisition of players was reduced, and the risk that the players might choose, in the event of liquidation, not to transfer to the new company. At paragraphs 9.21 and 9.23 of his report, Mr Lombardi included what seem to me to be important acknowledgments:

> "9.21 For the sake of clarity, I wish to re-confirm that this approach to valuation calculates a <u>value, which would reflect the compensation required to induce the Club to transfer the player to another club</u>. In my opinion it is impossible to assign a valuation of a player from the point of view of a potential purchaser in general, as clubs who wish to sign a player have a unique set of circumstances which influences their purchasing strategy, or their thoughts about individual players.
>
> …
>
> 9.23 From the point of view of the purchasing club, a player is therefore worth what such prospective new club is prepared to pay for the player."

(Emphasis in original.)

In his valuation of each of the members of the Rangers playing squad, Mr Lombardi began by calculating a value produced by applying the article 17(1) criteria. In some cases, he then adjusted that value up or down to take account of "notable specific circumstances". In the case of players who would be out of contract in the summer, he reduced the value to nil. In the case of others, he applied a discount which in most cases was of 50%. For the players listed above, this produced the following valuations after the discount:

Whittaker	£2,597,859
Davis	£4,068,548
Edu	£714,192
Wylde	£483,526
Lafferty	£1,500,000
Aluko	£1,500,000
Wallace	£2,076,161
Fleck	£500,000

[155] Mr Pethybridge considered that Mr Lombardi's method was a reasonable way of approaching valuations and afforded a useful starting point, but not the final value. The actual price for a player would only become apparent after going to market. He considered that there was a high possibility of sale of Davis, Edu, Lafferty and Aluko, a medium to high prospect of sale of Whittaker and Wallace, and a medium prospect of sale of Wylde and Fleck. He did not propose different valuations in respect of any of the players.

[156] Mr Pannick's opinion was that there was no single objective way of valuing a player. He agreed that the factors identified by Mr Lombardi were relevant but there were many

others. He did not agree that the article 17(1) method was useful in non-contentious circumstances. It did not take account of the fact that a club in administration was a more-than-willing seller, or of player power, or of the ability of the prospective purchaser simply to walk away. In his experience, no selling or buying club had used this method to value a player. It was not even useful as a starting point. The only way to assess a true valuation was to see what a buyer was willing to pay, and even that valuation approach was conditional on the player agreeing to the transfer to the bidding club. He did not offer his own valuations of the players listed above. He accepted in cross-examination that his starting point would be his own subjective view of what the player was worth.

[157] I regret that I have not found the valuation method adopted by Mr Lombardi to be of assistance in the circumstances of this case. I readily accept that it is a carefully crafted method of valuation for use in the circumstances for which it is designed, namely dispute resolution. I also acknowledge that it is the only objective method of valuation suggested by any of the experts in this case. But the essence of dispute resolution, as opposed to negotiation, is that having become bound to participate in the dispute resolution procedure, neither party can simply decide to walk away. As Mr Lombardi fairly acknowledged, the article 17(1) method takes no account of the value of the player from the point of view of the prospective purchaser. Mr Pethybridge's support for use of article 17(1) was expressly qualified: he emphasised that he saw it as a starting point, although he did refer to Mr Lombardi's discounted values in his assessment of the likelihood of sale of each of the players, and did not offer alternative values of his own.

[158] My concern as to the appropriateness of the article 17(1) method to the valuation of players generally is heightened for two reasons. Firstly, although Mr Lombardi placed importance on the objective nature of the method, he himself found it appropriate, for

reasons explained in his report and unrelated to the club being in administration, to substitute subjective assessments in respect of a number of players, including, in the list above, Aluko, Lafferty and Fleck. He also found it appropriate to apply discounts of 40-50% in recognition of the reduced bargaining power of a club in administration. It is not in dispute that a discount is appropriate but the percentages selected by Mr Lombardi appear to me to rest entirely upon his own assessment. For these reasons I am unable to regard the valuations produced by his method as having a truly objective character.

[159] Secondly, my confidence in Mr Lombardi's figures is diminished by the striking difference between them (before the discount for administration) on the one hand, and, on the other, the valuations provided by five individuals with relevant knowledge and expertise in the January schedule, which were not discounted for administration. Although there are significant differences among the valuations of the four agents and the chief scout, including one or two notable outliers, they are generally closer to one another than to Mr Lombardi's valuations. In relation to certain players, including Aluko, Whittaker and Wallace in the list above, even Mr Lombardi's discounted value exceeds the highest valuation of any of the consulted individuals. Although there is less or no difference in relation to certain other players, the very large differences in some cases is, in my view, an indication that use of the article 17(1) method cannot be relied upon to produce results that reflect the likely sale prices of the club's marketable players during the administration period.

[160] Having rejected Mr Lombardi's methodology, I am left with limited material with which to make my own assessment. The respondents did not obtain a contemporaneous valuation of the players which took account of the effect of the company being in administration. The best evidence I have is therefore the January schedule, subject to the

adjustments that have to be made for the company's administration and the events that occurred as a consequence.

[161] In carrying out my calculation, I have made two assumptions. Firstly, I have assumed that sale negotiations would have been carried out against the background of the wage reduction agreements actually reached, including the buy out clauses, and that potential purchasers would be aware of the latter. It would not be consistent with my decision (above) that it was reasonably open to the respondents to pursue the wage reduction route to assume sale negotiations that did not take account of the agreement. Secondly, I have assumed that regardless of the market interest created, not all of the players would have been sold. I am satisfied, having regard to the number of (non-marketable) players who were out of contract in summer 2012, that there would have been a real risk that sale of all of the eight players in the list, in addition to Steven Naismith, would have left the company in difficulty in fulfilling its obligations if the administration had continued into the following season, and adversely affected the value of the company to potential purchasers. I therefore proceed on the basis that if the respondents had succeeded in effecting up to four sales of the eight players in the list, they could reasonably have decided to go no further and to terminate any other negotiations in progress.

[162] With those assumptions in mind, my calculation proceeds as follows:

(i) I have calculated an approximate average valuation of each of the eight players from the January transfer window list, discarding only one "outlier" (in the valuation of Aluko);

(ii) I have adopted Mr Lombardi's 50% discount to recognise the reduced bargaining power of the club in administration;

(iii) In relation to those players who agreed buy out clauses containing a figure lower than the discounted valuation calculated at (ii), I have substituted the amount in the buy out clause;

(iv) I have reduced the total of the eight valuations thus produced by 50% to reflect my assumption that no more than four players would be sold;

(v) I have reduced the resulting figure by 15% (as proposed in the respondents' submissions) as an allowance for agents' fees and solidarity payments;

(vi) I have then reduced the resulting figure by a further 50% as a "loss of a chance" reduction, to reflect uncertainty as to whether sales at the discounted/buy out valuation would be made, including uncertainty as to whether the players concerned would decline to transfer, either because they wished to remain at the club, or because they wished to retain the possibility of transferring as a free agent on liquidation.

[163] The calculation of loss thus produced is as follows:

Player name	Average value per January schedule £	50% of average value £	Buy out clause £	Lesser of column 3 and column 4 where applicable £
Davis	4,800,000	2,400,000	1,650,000	1,650,000
Aluko	250,000	125,000	No	125,000
Whittaker	2,000,000	1,000,000	850,000	850,000
Wallace	1,200,000	600,000	No	600,000
Lafferty	2,000,000	1,000,000	575,000	575,000
Edu	1,000,000	500,000	300,000	300,000
Wylde	700,000	350,000	N/A	350,000
Fleck	300,000	150,000	N/A	150,000
Total				**4,600,000**

Whereof one half sold £2,300,000

Whereof 85% after deduction of agents' fees etc	£1,955,000
Whereof 50% for loss of a chance	**£977,500**

[164] I therefore find the noters entitled to compensation amounting to £977,500 in relation to the respondents' breaches of duty in relation to failure to market players for sale. I make no additional allowance for salaries paid to the player or players sold, because I regard it as more likely than not that the company would have retained liability for their salaries until registration with the purchasing club could have been effected when the transfer window opened. I should also confirm, for the avoidance of doubt, that my finding will not affect my assessment of the noters' second chapter of arguments addressed below, because I do not consider that the value of the company would have been materially affected by the sale of between one and four players (as the case may be) in the table above, whether or not accompanied by the redundancies among playing staff that I have found could have been made as an alternative to wage reductions.

Steven Naismith

[165] In my opinion the respondents were in breach of duty in failing to decide to accept the final offer of £1.7 million made on 13 April. As Mr Shipperlee calculated at the time, the offer to relieve the company of Mr Naismith's wage bill meant that the offer was worth about £1.85 million, as compared to the figure of £2 million in the buy out clause which in practical terms was the highest amount for which the company could have sold the player. Indeed the gap was slightly smaller because if Mr Naismith had been sold for £2 million, a sell-on fee of £20,000 would have been payable to his former club, Kilmarnock FC. When one bears in mind the risk (of which the respondents were aware by 13 April) that in the event of

there being no CVA Mr Naismith's value could be lost altogether, as in fact occurred, I can see no good reason for waiting to see if an offer worth, in effect, an additional £130,000 would be made. Mr Buchler defended this as a "close judgment call", on the ground that it would have made the company a less attractive prospect to purchasers if one of its most valuable players were sold. This ignores the fact that Mr Naismith's availability to a purchaser could not be guaranteed if a CVA could not be achieved. I accept the opinion of Mr Christie that the respondents' decision not to pursue this sale more vigorously cannot have been in the best interests of the creditors, because a successful sale would have recovered cash value, reduced trading costs and had no material impact on any going concern sale.

[166] Parties were in dispute as to the basis upon which any loss caused by the respondents' failure to accept the WBA offer ought to be assessed. The noters contended that this was a straightforward loss of the sum offered, and not the loss of a chance. There was an actual offer. It was possible to complete the sale. The prospect of Mr Naismith not accepting the move was remote: Mr Ashworth had spoken to Mr Naismith's agent; the contemporaneous view was that the agent was orchestrating a move to the Premier League. If Mr Naismith had not been prepared to move, it was unlikely that the agent would have been encouraging bids. There was evidence of the relative attractiveness of a move to the Premier League in financial and career terms. Mr Naismith had not said that he would have been unlikely to move or that he would have refused to move.

[167] The respondents submitted that this was properly to be approached as the loss of a chance. Three factors required to be taken into account: the prospects of the regulatory authorities acceding to the proposed deal; the prospect of Mr Naismith and WBA reaching agreement; and whether Mr Naismith would pass a medical. Mr McKinlay's evidence was

that he did not know how the proposed deal would work outside a transfer window. Mr Naismith had been reluctant to commit himself on the hypothetical question of whether he would have been agreeable to the move. Mr Ashworth's evidence was unsatisfactory: he had provided no reasonable explanation of why WBA had not been prepared to increase their offer to £2 million which, as he was aware, would have triggered the buy out clause. His explanation that WBA preferred to wait and assess Mr Naismith's injury in three months' time was illogical.

[168] I accept the respondents' submission that the noters' loss in respect of the failure to sell Mr Naismith to WBA is properly categorised as the loss of a chance. I do not attach any weight to the risk that a sale might have been precluded by either English or Scottish football regulations. Mr Ashworth had confirmed that the deal could be done so far as the Premier League and FA were concerned. There was no evidence that it would have fallen foul of SPL or SFA regulations so long as registration as a WBA player was deferred until the next registration period, which is what Mr Ashworth proposed. It was not suggested that the question of which club paid Mr Naismith in the meantime had regulatory implications. Nor do I attach weight to the risk that he might have failed a medical examination. Mr Ashworth was well aware of the injury that was expected to prevent Mr Naismith from playing for the remainder of the 2011-12 season. It would be speculative to allow for the possibility that the player might have had some other medical problem that would have precluded the transfer.

[169] I do, however, accept the respondents' submission that even if the offer of £1.7 million had been acceptable to them, it was far from certain that the sale would have proceeded to completion. This appears to me to be a case clearly falling within the second category identified in *Gregg* v *Scott* and *Perry* v *Raleys* (above), as being dependent upon the actions of third parties, namely Mr Naismith and also, to some extent, Mr Ashworth. Despite the

apparent involvement of his agent in promoting the deal with WBA, Mr Naismith might have decided (or been advised) to keep his options open for a few weeks longer. If the members of the SPL had decided to allow the transfer of the company's share to Sevco, he might have chosen to transfer under TUPE and remain with Rangers. I have no evidence of the personal terms that WBA might have offered him. I agree also that Mr Ashworth's explanation for not offering a further £300,000 in order to trigger the buy out clause is difficult to understand. Either Mr Naismith would have been almost as much of a bargain at £2 million as at £1.7 million or (because of his injury) he would not have been a bargain at either price. I am left with some doubt as to whether WBA were fully committed to the purchase.

[170] On the other hand there are reasons why the chance should not be assessed at too low a level. It was not in dispute that a move from Rangers to the English Premier League was an attractive one for a player like Mr Naismith, or that he was likely to earn considerably more there. WBA's interest was more than passing: they increased their bid three times in attempts to reach an acceptable figure. Having regard to all of the above, I conclude that 50% is an appropriate percentage to apply.

[171] It was submitted on behalf of the respondents that deductions fell to be made from the transfer fee in respect of a solidarity payment (£68,000) and agent's commission (£170,000), leaving a balance of £1,462,000. On the face of it, however, this was an unsolicited approach by WBA. Mr Naismith's agent may well have been in contact with WBA but there was no clear evidence that the circumstances would entitle him to a commission payable out of the transfer fee. Deduction of the solidarity payment alone leaves a balance of £1,632,000. To this falls to be added the (reduced) salary saved if WBA's offer had been accepted by the deadline of 17 April which, using the salary figure in the supplementary joint minute, would

have amounted to about £22,000, bringing the total up to £1,654,000. 50% of that figure is £827,000.

[172] I therefore find the noters entitled to compensation amounting to £827,000 in relation to the respondents' breaches of duty in relation to failure to accept WBA's offer to purchase Mr Naismith for a fee of £1.7 million.

The noters' claim: (ii) failure to obtain best possible sale price

Introduction

[173] The noters' case that the respondents were in breach of duty in failing to obtain the best possible sale price of the business and its assets had three strands: (i) failure to obtain advice as to the value of the Rangers brand and to realise its value; (ii) failure to investigate possible means of maximising the sale value of the company's heritable property, and to take steps such as sale and lease back of Ibrox stadium and sale of Murray Park that would have led to a greater realisation of value for creditors; and (iii) failure to take steps to secure the availability to a potential purchaser under a CVA of the shares in the company controlled by Craig Whyte. There are further contentious issues in relation to whether in any calculation the sum received for the sale of the business and assets ought to be reduced to take account of (a) the value of commercial revenues that were claimed to be owed to the company by the SPL and (b) the value of a debt due to the company by its subsidiary Rangers Youth Development Limited ("RYDL").

Value of the Rangers brand

The joint administrators' approach

[174] The respondents were aware that there was value in the Rangers brand and in the company's intangible property. The Information Memorandum for prospective purchasers released on 19 February began by stating: "Founded in 1872 and based in Glasgow, Rangers is one of the most successful and most recognisable football brands in the world", and went on to emphasise the global nature of the club's fan base. The company's registered trademarks were detailed in a schedule. In terms of the Memorandum of Offer prepared on 15 March, indicative offers by prospective purchasers were required to include a breakdown showing sums attributed to, inter alia, goodwill, brand/intellectual property, and trademarks.

[175] It is agreed that the respondents gave consideration to obtaining a valuation of the Rangers brand but took the decision not to do so. According to a note made by Mr Grier of a meeting with representatives of HMRC on 9 March,

> "DW [ie Mr Whitehouse] accepted that there may be value in naming rights and the Rangers Brand and would arrange a Brand valuation.
>
> HMRC asked for a Brand valuation but also commented that the Brand has significant 'baggage' with recent fines and sanction from UEFA and the SFA."

Mr Walder identified a brand valuation specialist within D&P (Mathias Schumacher), and emailed him on 14 March, stating:

> "We will need the brand valued on a going concern basis i.e. on a normalized basis discounted significantly as the company is in Administration.
>
> We will also need the brand valued on a Liquidation basis i.e. what a purchaser would pay for the brand if the club ceased playing football and the brand was sold."

[176] Mr Schumacher's work, however, proceeded no further than the drafting of an engagement letter. On 16 March, Mr Saunders emailed him to say:

> "Thanks for putting together the EL at such short notice. I'd be grateful if you could just hold off on starting any work on this matter as it was at the request of a major stakeholder in the business and now may not be necessary. We will let you know when we find out."

The instruction to put the valuation on hold appears to be the result of a decision taken by the respondents during a team conference call on 15 March to "tell HMRC [that a brand valuation] won't mean anything ultimately". The matter was not raised again.

Expert evidence

Expert evidence for the noters

[177] Expert evidence was given on behalf of the noters by Mr Thayne Forbes, director of Intangible Business Ltd, a brand valuation and strategy consultancy founded in 2001. He was asked to advise on the value of the Rangers brand as at 14 February 2012.

[178] Mr Forbes noted that the club's revenues derived from four key segments: revenues on match days, such as sales of tickets; sponsorship and advertising, such as from shirt sponsors; commercial and retail activities, such as merchandising; and UEFA and other prize money, as a result of competing successfully. In his view the Rangers brand played a key role in generating these revenues and was highly valuable.

[179] The appropriate basis of valuation in this case was market value, ie the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion. The main approach to be employed was the income approach, based on converting future economic benefits into a present value, applied using a discounted cash flow ("DCF")

method. Using the cash flow forecast in the Information Memorandum produced by the respondents, this produced the following valuations for the Rangers brand:

As a going concern	£38 million
In administration	£20 million (47.4% discount from going concern)
In liquidation	£8 million (78.9% discount from going concern)

Mr Forbes supported the going concern value by cross-referring to other valuation methods producing a similar result. The assumptions made for the valuation of £8 million on liquidation were that the company would have been liquidated, the team disbanded, and Ibrox and Murray Park sold for alternative uses, with the brand being purchased as part of an attempt to resurrect the club.

[180] In Mr Forbes' opinion, a normal sale process for the Rangers brand would have identified a number of potential buyers prepared to pay for the brand at levels around the values in his report, so long as it came with access to Ibrox and the football team. He considered that the Information Memorandum was insufficiently detailed, and that more effort should have been made to follow up expressions of interest in purchases of assets on a piecemeal basis. Mr Forbes noted that in the audited accounts of Rangers International Football Club plc (the acquiring company) for the year to 30 June 2013, the Rangers brand was valued by independent valuers (Jeffreys Henry) at £16,042,000, as at 14 June 2012.

[181] In the course of cross-examination, Mr Forbes confirmed that in order properly to market the brand, a period of 6 to 12 months would be required, with the consequence that the administration would have required to continue into the following season.

[182] Mr Christie considered that the respondents ought to have obtained an independent and objective professional valuation, by a suitably qualified independent third party, of the brand value, including an assessment of the options available to maximise recoveries from

this asset. The reason was to provide creditors and other stakeholders with confidence and evidence that appropriate value had been realised. He did not consider that a valuation carried out by the respondents' own firm would be sufficiently independent, and would not be normal practice. It was beyond the scope of his knowledge to comment in detail on Mr Forbes' valuation.

Expert evidence for the respondents

[183] Expert evidence was given on behalf of the respondents by Mr Andrew Wynn, a senior managing director in the London office of FTI Consulting LLP, a global business advisory firm, specialising in, among other things, litigation support and economic and financial analysis, including intellectual property valuations.

[184] Mr Wynn's opinion was strikingly different from that of Mr Forbes. He did not offer a brand valuation of his own because he had not been instructed to do so. Instead, his reports consisted of criticism of Mr Forbes' methodology and conclusions. He did not consider that there was anything in Mr Forbes' report that demonstrated that the Rangers brand was sold by the respondents for less than its market value.

[185] The Rangers brand was inextricably linked to the Rangers football club; its value derived from the ongoing activity of playing professional football and could only be preserved as long as the club continued to play football. Realistically, the brand would only ever be sold in combination with the rest of the club. The market value of the brand therefore had to reflect the value that could be achieved in a sale in combination with the club. It had to reflect both future financial benefits from exploiting the brand and all the associated investments required to maintain the competitive performance of the club. Mr Forbes' analysis ignored the substantial costs which had to be incurred to generate the

expected revenue of the club. His assessment did not represent a market value of either the club or the brand.

[186] Mr Wynn made further detailed criticisms of Mr Forbes' approach. The cash flow forecast in the Information Memorandum was not an appropriate estimate of an investor's expectations for the business's future performance. Mr Forbes had made arbitrary assumptions about the rate of recovery of the business following upon administration and liquidation. His assessment of the discount rate was non-standard, including adjustments for "specific risk" which were an attempt to compensate for his implausibly high forecast cash flows. The Jeffreys Henry valuation for the 2013 financial statements provided no support for Mr Thayne's brand valuation: the Jeffreys Henry assumptions should have resulted in a higher value if applied to the same cash flows. Mr Forbes' estimate of cash flows must therefore have been materially higher than assumed by Jeffreys Henry.

[187] Mr Buchler's view was that the respondents' conduct was consistent with the standard of an ordinarily competent administrator. They had approached the open market for an indication of brand value, rather than adopting a theoretical and hypothetical approach. In his view, that was reasonable. It was not clear what substance a brand valuation would have added to the respondents' approach.

Assessment

[188] The starting point of the noters' criticisms was, once again, that the respondents had been in breach of duty by failing properly to inform themselves by obtaining a brand valuation from an independent expert. It was submitted that obtaining a brand valuation at the outset of the administration would have made three key differences: it would have allowed a more confident assessment of whether the bids received for the company

represented appropriate value for the basket of assets being sold; the respondents would have been in a better position to negotiate with bidders and avoid the downward spiral in bids which occurred; and it would have obliged them to confront the issues that faced them in considering the objectives of administration and to acknowledge that if liquidation produced a better outcome for creditors than the available offers, it would have been necessary either to take that route, however unpalatable it was, or to consider an alternative strategy of disposal of individual assets.

[189] There was no evidence that it would be normal practice in a football club administration to obtain a brand valuation. Such evidence as there was, including that of Mr Clark and Mr Whitehouse, suggested the contrary. Although Mr Christie and Mr Buchler agreed in principle that it would be normal practice to obtain valuations of valuable assets, Mr Christie cited no examples and had no personal experience of this being done in relation to the brand of a football club in the course of an administration. Mr Forbes' experience consisted of having given advice in 2014 on the value of overseas football club brands for proposed privatisation. The "key differences" proposed on behalf of the noters do not appear to me to amount to exceptional circumstances which might lead to the conclusion that normal practice required to be departed from in the case of the Rangers administration. That being so, it would be difficult for me to conclude that the respondents were in breach of their duty in failing to do so. I can go further, however, because I am satisfied on the basis of Mr Wynn's evidence that no loss was sustained as a consequence of any failure by the respondents to obtain a brand valuation.

[190] A difference of opinion emerged between Mr Forbes and Mr Wynn as to whether the Rangers brand was inextricably linked to the Rangers football club. Mr Wynn considered that it was; Mr Forbes's view was that ownership of the brand did not require ownership of

assets such as properties and a team; the brand would then have a value separate from the club. I find Mr Forbes' view difficult to accept. It is common ground that part of the value of the brand is to be found in its availability for licensing in marketing and sponsorship. I agree with Mr Wynn that in the case of a football club the value of the brand lies in its relationship with the club which plays football and therefore attracts supporters. As Mr Wynn observed in his supplementary report, that relationship would not automatically transfer to a third-party buyer who acquired the brand separately from the rest of the club. Instead, fans would be likely to transfer their allegiance to whatever club they perceived to be the legitimate successor to the club they supported, regardless of legal rights. The removal and re-naming of Wimbledon FC in England affords an example of a situation in which the fans' allegiance did not transfer. If in the present case the respondents had attempted to sell the Rangers brand as a standalone asset, I agree with Mr Wynn that it is unlikely that it would have been perceived as having a value of the order of £8 million. As he observed, there would be a significant risk to the buyer of the brand that the club's fans would decide that another entity was the true successor and transfer their allegiance accordingly, leaving the purchaser of the brand with a largely worthless collection of legal rights. For these reasons I accept his opinion that, realistically, the brand would only ever be sold in combination with the rest of the club.

[191] One matter on which Mr Forbes and Mr Wynn appeared to agree was that the value of football clubs to their owners and prospective purchasers is not directly linked to projections of profitability. In his supplementary report, Mr Forbes noted:

> "… (F)ootball clubs generally have significant value even if they are not profitable. This is because they are unique assets that attract significant commercial and emotional value from the passionate loyalty of their fans, and not because of expected profits. The Rangers Brand's value derives from the loyalty of 5m Rangers fans worldwide who have built up an allegiance to the brand over many years.

> Such football clubs and their respective brands are valuable, not because of the profits or losses they make, but because they possess trophy value, influence value, and emotional value for their owners. Such owners are proud to own clubs that are revered by so many fans across the world and allow the owners to mix with the European elite in football. This is why many such football clubs have been purchased for in excess of £100m, and have then still required further funding to support subsequent losses. They would not have fetched that if there was a disconnect with the brand, as they would then not own the most important asset that enables a club to operate at these levels.
>
> Football clubs and their brands generally have significant values even though the clubs generate losses. In general terms they make losses because funds generated are applied for the purpose of playing football …"

In my opinion these observations are consistent with Mr Wynn's view that account must be taken of the substantial costs that must be incurred to play professional football, and that Mr Forbes' DCF methodology fails to do so. I agree with Mr Wynn's opinion that the "specific risk" adjustments that Mr Forbes considered it appropriate to make to his DCF calculations are indicative not of fine-tuning but suggest rather that they have been unable to produce a credible result.

[192] There are no doubt circumstances in which it is appropriate to carry out a valuation of the brand of a football club: for example, in order to comply with financial reporting standards when preparing the company's annual accounts. I am not, however, persuaded that instructing and obtaining a value of the Rangers brand in the context of this administration would have served any useful purpose. I have accepted that the value of the brand was inextricably linked to the value of the business as a whole. I also accept Mr Wynn's conclusion that the price any investor would be willing to pay for the brand in combination with the club would reflect their expectation of both future financial benefits – including those from exploitation of the brand – and the associated required investments and

unavoidable costs, and that accordingly it does not make sense to value the economic benefits associated with the brand without considering the costs required to generate them.

[193] It follows that I also reject the proposition that the respondents ought to have done more to bring the value of the brand to the attention of prospective purchasers. As was stated in the Information Memorandum, Rangers is one of the most recognisable football brands in the world. As a matter of fact the sale did attract interest in North America and Asia. Prospective bidders would have needed no education regarding the opportunities available to an owner of the club through exploitation of the brand. There was no evidence to suggest that there would have been other prospective purchasers if only they had been aware of the true value of the Rangers brand, or that those who did bid would have been persuaded to increase their bids by many millions of pounds if they had been provided with a valuation along the lines of Mr Forbes' report. I have already rejected the contention that in the event of a piecemeal sale of assets on liquidation, it is likely that a sale of rights to the brand would have realised £8 million.

[194] For these reasons I hold that no breach of duty was committed by the respondents in relation to brand valuation.

Heritable property

The joint administrators' approach

[195] The respondents' approach to the company's heritable property (ie Ibrox Stadium and its adjacent car park, and Murray Park) was directed by their view that the best price for the company or its business was likely to be achieved by selling all of its assets together as a going concern. As already noted, the respondents instructed and obtained valuations by LSH of Ibrox Stadium and the Albion Car Park and of Murray Park. They did not seek

specialist advice on available options for realisation of the value of any of the heritable property separately from the sale of the company's business and other assets, and did not take any active steps to market any of the heritable property separately. In the course of cross-examination, Mr Clark observed that if any credible offers for Murray Park had been received, they would have had to be pursued, but no such offers were received.
Mr Whitehouse, however, considered that the training facility at Murray Park was integral to the club and that it was highly unlikely that a decision would have been taken to sell it separately.

[196] Expressions of interest in acquisition of the company's heritable property were received during the administration period. On 15 February, DTZ contacted the respondents with an expression of interest in purchasing Murray Park. They were told by Mrs Bell that the respondents' strategy was to sell all of the company's assets as a going concern, but DTZ would be informed if anything changed. There was no further contact. On 1 March, McGrigors LLP contacted the respondents on behalf of a client with an expression of interest in Murray Park. They were given the same answer and again there was no further contact.

[197] Over a lengthier period, contact took place with a Mr Steven McKenna and his business partner Mr Allan Stewart. At a meeting with Mrs Bell on 6 March, Mr Stewart spoke of offering £8-10 million for land at Murray Park. On 3 April, Mr McKenna's solicitor emailed Mr Walder to say that they had "Heads of Terms agreed for the proposed sale of 22 developable acres of ground at the above site at a resultant price of £10 million".
Mr McKenna's offer would be conditional on the granting of planning permission, with deferred payments, and 15 acres of land would remain available for training purposes. The respondents had concerns over the credibility of the offer, especially in relation to planning and title restrictions. Murray Park lay within a Green Belt area and was subject to title

conditions prohibiting its use otherwise than as a sports ground without the written consent of the neighbouring proprietors and a charitable trust. No proof of funding was provided. On 17 April Mr McKenna emailed Mr Walder intimating various possible deals. Mr Walder replied on 23 April, stating that the respondents were "seeking to sell the business and assets as a going concern at present with the preferred deal being cash on completion".

[198] By 11 May, Mr McKenna's offer had become one for the company, with a CVA being the preferred route. The total price would be £9.5 million, some of which would be deferred for up to two years. Attached to Mr McKenna's email was an email from Mr Moishe Rothbart, described as "one of our funders". That email stated inter alia:

> "As mentioned, on behalf of a private client we are prepared to submit an offer on the following:
>
> Ibrox Stadium Car Park Murray Park Training Ground. The offer would be on the basis of purchasing the above for a 12% net initial yield (£14.185m) and leaseback the Stadium and car park to the club for a period of 20 years at an annual rent of circa £1.8m per annum. Rents would be guaranteed by (Capita Plc. In addition to) and/or having season tickets revenue charged to the landlords. The club would be entitled to a buy back option on the Stadium and its car park within the first 10 years based on a purchase formula starting at £10m and increasing annually by 12%, thereafter reverting to OMV.
>
> Rent reviews would be instigated every 5 years with minimum uplifts of 2% or RPI whichever the greater.
>
> Should a proposition of this nature be of interest, our client would be in a position to proceed with the purchase in an off shore Special Purpose Vehicle with a view of completing the purchase within 14 days."

[199] Mr Rothbart gave evidence at the proof. He is the managing partner of a property financing business with a client base that he described as "only ultra-high net worth individuals, a selection of private equity funds and institutions". The offer in his email was an opening offer; the figures would be subject to negotiation. It was made on behalf of a specific individual client. His understanding of the likelihood of obtaining planning

permission for development of Murray Park was informed by a letter received from a national house building company. He had been disappointed to discover that shortly after his offer was made, the business and assets of the company, including the heritable property, had been effectively sold to Sevco. He had tried to renew his interest in June but to no avail.

Expert evidence

Expert evidence for the noters

[200] Mr Keith Hutchison is a partner in Montagu Evans LLP, chartered surveyors, with almost 30 years' experience in the Scottish commercial property market. He was instructed on behalf of the noters to provide an opinion on various property related matters.

[201] Mr Hutchison used the depreciated cost method to derive market values of Ibrox Stadium and Murray Park on a going concern basis. For Ibrox, he calculated a net replacement cost of £26.3 million, to which he added £2.7 million for the value of the land, giving a market value on a going concern basis of £29 million. Using the same method for Murray Park, he calculated a net replacement cost of £8.15 million, to which he added £550,000 (a modest rate reflecting the current open space use and Green Belt location), producing a market value on a going concern basis of £8.7 million. However, with the company in a "distressed" situation, he considered that the maximum total amount that could have been realised from the sale of the heritable property was somewhere between £13.8 million (£10.2 million for Ibrox Stadium and £3.6 million for Murray Park) and £26.35 million (£22.75 million for Ibrox Stadium and £3.6 million for Murray Park).

[202] Mr Hutchison also valued the heritable property on a break-up basis, ie on the assumption that the company ceased to trade and its assets were sold individually. On this basis he assumed that the stadium would be demolished to enable the site to be used for

commercial or industrial purposes. He estimated the value of Ibrox to be £3 million, and valued Murray Park also at £3 million.

[203] As regards Ibrox Stadium, Mr Hutchison considered that any reasonably competent property advisor would have advised that a better option than acceptance of the Sevco offer for the entire business would have been to separate the ownership of the stadium and the ownership of the club via a leasing arrangement. There were two potential leasing options: fan ownership and third party ownership. In the case of fan ownership, the club would take a long lease (35-45 years) of the stadium on a full repairing and insuring basis. The level of the rent "would require careful consideration". There were a number of practical issues that would have to be addressed, such as what would happen in the event of a lease default by the club. Having regard to the novelty of the arrangement, it would take around 6 to 12 months to set up.

[204] In the case of third party ownership, the investor would require a commercial return. As regards the adequacy of the tenant's covenant, it seemed likely that the club would remain in existence and continue playing football at Ibrox under the Rangers name, albeit there would be uncertainty over the new lease terms and rent. The long lease would have been attractive to investors, and would have raised significantly more than the £1.5 million allocated to heritable property in the sale to Sevco. The most likely buyer in the real world would have been a speculative investor or a fan of the club, who would have sought to reach agreement with the club to keep playing football at Ibrox. In both of the above scenarios it would have been possible to include an option for the club to buy back the stadium in the future, at a pre-agreed price. If the respondents had agreed a lease of the stadium to the purchaser of the business of the company, and then sold the stadium to a fan ownership body or third party investor, this could have generated between £10.2 million and

£22.75 million. A lease followed by a sale would have allowed sufficient time for the respondents to secure a successful sale and maximise the sale proceeds.

[205] Murray Park was different from Ibrox Stadium in that it was not so critical to the viability of the club. It would have been possible to sell Murray Park to a third party or consortium of organisations, with no ongoing occupation by the club who could have found alternative training facilities at lower cost, or alternatively with the club agreeing to lease back only those parts of the facility that were essential to them. It might also have been possible to dispose of Murray Park on a sale and lease back transaction if there was a desire by the club to retain use of the property in its entirety. This could have generated sale proceeds of around £3.6 million.

[206] In Mr Hutchison's opinion the sum of £1.5 million allocated to heritable property in the Sevco sale agreement grossly undervalued these assets.

[207] Mr Christie's opinion was that the respondents' acceptance of an offer which allocated a value to the heritable property that was below forced sale value would have been justified only if alternative strategies had been properly considered and determined to be less attractive. He had seen no evidence that the respondents had considered alternative strategies, despite their being aware of the possibility of sale and lease back (or more accurately lease then sale). As regards Murray Park, Mr Christie would have expected the respondents to have fully explored the alternative realisation strategies with their property advisors to ensure that the value being recovered for creditors was maximised. In his view, no ordinarily competent administrator acting with ordinary care would have done what the respondents did having regard to all the facts and circumstances.

Expert evidence for the respondents

[208] Expert evidence on behalf of the respondents was given in a joint report by two directors of Savills, namely Mr Alan Plumb, a director in the leisure and trade related property team, based in Oxford, and Mr Craig Timney, head of Savills valuation team in Scotland.

[209] In the view of Messrs Plumb and Timney, where there is a distressed sale scenario and there is doubt as to whether the property will have a viable future in existing use, or the local planning position is such that there is a reasonable prospect of redevelopment of the site into alternative use involving stadium demolition, then the appropriate method of valuation is to undertake an assessment of value in the best and most likely alternative use. The figure arrived at is then discounted for risk and costs of achievement.

[210] As the spiritual home of Rangers FC, Ibrox Stadium had little or no value to anyone else for use as a sports facility, and its only value in the market was its underlying alternative use value. The lack of clarity around planning, design and density of future uses, together with the need to incorporate the listed Main Stand into the development were such that the level of uncertainty attached to any valuation would be substantially greater than for other more mainstream asset classes or development/redevelopment opportunities. Any opinion of value could only have been an unsupported "guesstimate".

[211] Although Murray Park was probably of too large a scale for most buyers, there was likely to have been a demand at the time from gym operators for the built facilities, and from sports clubs for the pitches and related facilities. Whilst the prospects for residential or commercial development in the Green Belt were remote, there might have been educational or hospitality based buyers. However, there was likely to be a greater degree of uncertainty

over the accuracy of the valuation than would conventionally be the case with mainstream commercial assets, and a sale would have required a timeframe of at least 18 to 24 months.

[212] A lease and subsequent sale of Ibrox Stadium would have raised a number of issues. Given that some entity associated with the club would be the only realistic tenant with current use, the landlord would be in an unattractively weak bargaining position. There would be significant concerns regarding the strength of the tenant's covenant, with the risk of a series of defaults in the future. A timeframe considerably in excess of six months would have been required to secure a sale to a third party investor. There were no existing examples of the fan ownership alternative that were comparable in scale to Rangers. It was difficult to conceive that a fan-based group would have come forward in sufficient numbers to render such a scheme viable. Messrs Plumb and Timney accordingly disagreed with Mr Hutchison's view that any reasonably competent property advisor would have advised the respondents to pursue a sale and leaseback strategy. Whilst such a strategy might have been theoretically possible, its delivery would have been outside a timeframe consistent with the objectives of the administration, and it was hard to understand why any property advisor would recommend pursuing such a strategy.

[213] Mr Buchler considered that even where an agent is appointed to advise on property matters, the strategy is ultimately the responsibility of the administrator as to how to get the best overall value for the company. Advice relating to this overall strategy, and the role of any heritable property within it, is outside the expertise of a property agent. Mr Buchler would expect an administrator to seek any strategic input needed on the specific valuations, but not necessarily to seek general advice on the strategy of realisations from property and business as a whole. He noted the comments in the Savills report that, had they been appointed at the time, they would not have been able to give a firm recommendation that a

sale at the £6 million gross break-up figure would have been achievable. Given the lack of certainty in achieving this break-up value, combined with the holding costs involved in doing so, it was reasonable for the respondents to pursue, and maintain their existing strategy to realise money from the sale of these assets as part of a going concern sale. As regards a sale and lease back option, such a strategy might have impacted upon the club's ability to meet the SPL membership criteria. There was no evidence of a fans' group with the resources needed to buy the stadium for its market value. Sale of Murray Park would have necessitated the acquisition of a new training ground, which would not have been easy to achieve quickly.

Assessment

[214] As with other aspects of the noters' case, the first question to address is whether the respondents were in breach of duty in failing to consider and obtain specialist advice upon alternative strategies which included disposal of heritable property – or an interest therein – otherwise than as part of a sale of the whole of the business as a going concern. Mr Clark accepted that sale and lease back – or more accurately lease then sale – of the company's heritable property was a strategy that the respondents could have considered but did not. Neither Mr Clark nor Mr Whitehouse suggested that the concept was unfamiliar to them. Mr Clark's position, which appeared to me to be more of an expression of his current view than a recollection of his contemporaneous view, was that a lease and sale arrangement could have given rise to conflicts between the future owners of the heritable property and the business respectively, and that awareness that the respondents were pursuing this strategy as an alternative might have scared off the going concern bidders.

[215] On this issue I prefer the opinion of Mr Christie to that of Mr Buchler. The respondents were in possession of the LSH valuation, which valued Ibrox Stadium and Murray Park, on the most pessimistic basis, ie discontinuance of all existing uses and disposal for development, at £3,400,000 and £4,420,000 respectively. By about the beginning of April, when bids of around £10 million for the entirety of the company or its business were being received, it must have been apparent to the respondents that the bidders were offering no more than forced sale value for the heritable property. In these circumstances I accept Mr Christie's opinion that it was their duty to explore alternative means of realising the value of that property for the benefit of creditors, and that those alternatives included (i) lease and sale of Ibrox Stadium; and (ii) sale of all or part of Murray Park, with or without a lease back of all or part of it. The existence of such a duty became, in my view, all the more apparent as the level of bids continued to fall during April and early May. I do not go so far as to say that the respondents' duty necessarily extended to obtaining independent advice on a lease and sale option; it would have been a matter for them, having decided to explore that alternative, to judge whether such advice was required.

[216] I reject Mr Buchler's contrary view for a number of reasons. It appears to proceed to some extent on the basis of Savills' opinion, which was not of course available to the respondents. It fails to address the possibility of exploring a lease and sale option in parallel with the favoured option of sale as a going concern by a CVA. The concern he expressed regarding SPL membership criteria appears to have no solid foundation.

[217] In relation to Ibrox Stadium, it cannot, in my view, be maintained that the respondents were in breach of duty in failing to pursue the fan-based option. As Mr Hutchison acknowledged, this would have been a novel arrangement; Mr Timney described it as "pioneering". It was not negligent, in my view, for the respondents not to

explore a strategy that had never been implemented successfully in connection with a football club comparable to Rangers. In any event there was little evidence to suggest that such a strategy would have appealed to the club's supporters. Mr Gordon Stewart, who was secretary of the Rangers Supporters Trust in 2012, considered that fans would have been willing to purchase the stadium at a price higher than £1.5 million if that prevented it from being sold to a third party investor. In his oral evidence, however, he described it as a difficult sell, and referred to the problems that might arise if the tenant company refused to pay rent. Mr Mark Dingwall, a longstanding Rangers supporter and fanzine editor who was secretary of the Rangers Fans' Fighting Fund, formed in March 2012, was similarly unenthusiastic, describing separation of ownership of the stadium from the club as a last resort to save the club. The fans' preference was to support the prospective purchaser whose acquisition they perceived to be in the best interests of the club going forward. For my part I can envisage difficulties arising if disputes were to arise between a fan based owner of the stadium and a future owner and operator of the business of the club. Although as I note below the possibility of sale of the stadium to a fan based owner may have had some relevance in the context of negotiation of a sale to a third party investor, I reject the submission that the respondents were in breach of duty in failing to pursue fan based ownership of the stadium as an alternative strategy.

[218] Turning then to the possibility of a sale to a third party investor, I accept that a significant disadvantage of this strategy would have been that it would have prolonged the administration while the stadium was marketed for sale subject to a lease already granted in favour of the entity running the business of the club. I also accept that there was a risk that adoption of this strategy would have discouraged bidders who wished to acquire the whole assets including the heritable property. I am not, however, persuaded that this option was as

unviable as Messrs Plumb and Timney sought to present it. The amount realisable from a sale would obviously depend, inter alia, upon the level of rent charged in the lease to the tenant company. That would have been a matter of negotiation, taking account of what was affordable, but the amount of the rental would have been known at the time when the stadium was marketed for sale. Setting the rental at an affordable level would also reduce the risk of future default, thereby strengthening the tenant's covenant.

[219] As to whether a prospective purchaser of the club would be discouraged by being offered a lease of the stadium rather than ownership, I agree with Mr Hutchison that with the rental at an appropriate level it would be as affordable as the cost of outright purchase. I further agree with him that the Savills opinion fails to take proper account of the revenue generating potential of the Rangers fan base and of the unlikelihood of Rangers ceasing to exist as a football club. Like Mr Hutchison, I find it difficult to understand why an alternative use value of the property should play any part in this exercise, because the hypothesis is that the stadium would continue to be used for playing football.

[220] This is not the only respect in which I have found the evidence of the Savills witnesses unhelpful. I note from their written report that their instructions did not include the provision of valuations – on any basis – of the heritable property, which I would have found useful. I find their reasons for rejecting Mr Hutchison's depreciated cost method of valuation unconvincing because they were based upon an assumption of redevelopment of the stadium for an alternative use, which was not what the respondents contemplated at the time and not what Mr Hutchison envisaged in his valuation. The same applies *mutatis mutandis* to their observations regarding Murray Park. I had the impression that Messrs Plumb and Timney avoided mentioning any figures lest these be used by the noters to assist their case. Instead, their report is framed in almost entirely negative terms, and I

find it to be lacking in objectivity. I regard Mr Hutchison's report as having provided a more balanced assessment. I should note, however, that in the course of his oral evidence Mr Plumb did agree with certain propositions put to him: for example that £1.5 million was not an appropriate price for the heritable property; that Murray Park would have sold, in whole or in part, as a standalone asset; and that a sale of the whole of Murray Park followed by a lease back of part was a possibility, albeit one that might have upset a potential purchaser of the business.

[221] In assessing what might have been the outcome if the respondents had taken the decision to lease the stadium to a prospective purchaser of the business, with a view to sale to a third party investor, I also bear in mind two possible outcomes. The first is that the prospective purchaser would have increased its offer in order to obtain ownership of the heritable property. The second is that if the lease and sale arrangement proceeded, the prospect of third party ownership of the stadium would have proved so unpalatable to fans that they would after all, as suggested by Mr Stewart and Mr Dingwall, have raised funds to acquire the stadium through an appropriate vehicle as a last resort. I do not consider that either of those outcomes was probable, but rather that they were at least possible, so as to affect the calculation of loss of a chance.

[222] In deciding whether the respondents ought to have pursued sale or lease and sale options in respect of Ibrox Stadium and Murray Park, I am influenced by the fact that in the agreement for sale of the business and assets to Sevco, the amount notionally attributed to the heritable property was only £1.5 million, a sum described by Mr Hutchison as derisory. Having received advice from LSH that the value of the heritable property on a break-up basis was £7.8 million, significantly more than Sevco were offering for the entire business and assets (regardless of the sum subsequently allocated to heritable property), I consider, in

agreement with Mr Christie, that it was the duty of the respondents at least to explore alternative strategies. It ought, in my view, to have been apparent to the respondents at least from the time when indicative bids of around £10 million were being received, that there was a likelihood that a sale of the entirety of the business as a going concern would not maximise the return for creditors. Exploration of other options would have lengthened the period of the administration, with cost implications, but in the predicament in which the respondents found themselves, it seems to me that it was something that had to be done, and that the respondents were in breach of their duty in failing to do so.

[223] It was common ground that any loss attributable to this head of claim fell to be evaluated as the loss of a chance. In making that evaluation I attach no material weight to the expressions of interest actually received during the administration period. I accept Mrs Bell's contemporaneous assessment that Mr McKenna was not a credible bidder. Prior to disclosure of Mr Rothbart's involvement, Mr McKenna supplied no details of the identity of his client and provided no proof of funds. His proposal for residential development of Murray Park was questionable given its Green Belt location. His change in tack from interest in purchasing heritable property to interest in acquiring the company was reasonably considered by Mrs Bell to be odd, especially as he sought the respondents' assistance in arranging finance. It is unclear how his offer of £9.5 million for the company would have interacted with Mr Rothbart's offer of £14.185 million for the heritable property.

[224] The position of Mr Rothbart is somewhat different. I accept that his offer on behalf of a client was genuine and serious. I am not, however, satisfied that a concluded agreement could have resulted from it. A number of its terms, including the level of rent and the reference to a guarantee of rent by Capita plc or security over season tickets, would not have been acceptable to the respondents and although Mr Rothbart made clear that he would have

expected negotiation, it is far from likely that this particular deal would have come to fruition. It was not, as I understood the noters' argument, presented as an offer that (subject to negotiation) ought to have been accepted, but rather as demonstrating that a lease and sale strategy would at least have been a viable alternative. I accept that Mr Rothbart's offer constitutes evidence to that effect while stopping short of proving, on balance of probabilities, that an acceptable offer would have been received had the respondents chosen to adopt such a strategy.

[225] In quantifying the loss of a chance it is appropriate to address Ibrox Stadium and Murray Park separately. For Ibrox Stadium, I take as a starting point the figure at the lower end of Mr Hutchison's valuation range in a "distressed" situation, ie £10.2 million. From that figure it is necessary to deduct the holding and selling costs that would be incurred during the period when the property was being marketed for sale. In an estimated outcome statement dated 28 May, the respondents appear to have allowed approximately £3.3 million as holding costs, on the assumption that the heritable properties would be disposed of for alternative use and would take up to two years to sell. As I am envisaging a sale of the stadium which continued to be used for Rangers playing football, I need not make the most pessimistic assumption. I allow £2 million as an allowance for the various costs identified by the respondents: rates, security, insurance, marketing costs and selling agents' costs, leaving a balance of £8.2 million. I consider it appropriate to make a further deduction in recognition of the fact that the heritable property would not be included in the sale to the purchaser of the business. Although I acknowledge that the figure of £1.5 million was a notional figure attributed to the whole of the heritable property in the sale agreement with Sevco, and was not agreed at the time when Sevco's bid was accepted, I see no reason to substitute any other figure in this calculation. As there appears to have been no apportionment of the £1.5 million

as between Ibrox Stadium and Murray Park, I shall allocate one half, ie £750,000, to each. That produces a balance in respect of the stadium of £7,450,000. This is the figure that I shall use in quantifying the loss of a chance.

[226] Assessment of the appropriate percentage to award for loss of a chance requires an exercise of subjective judgment. I am satisfied that the prospects of achieving a lease and sale of Ibrox Stadium were more than speculative and accordingly that the chance must be evaluated. In so doing, I take account of the following factors:

- A football stadium is not a standard form of commercial investment, and so there would have been a limited number of prospective investors;
- Sale of the stadium separately from the remainder of the business would undoubtedly have been unpopular with the club's supporters, who would have made their views known and could have further dissuaded potential purchasers;
- Although I have concluded that it was very unlikely that Ibrox would cease to be the home of Rangers FC, there was a risk that from time to time the tenant might encounter financial difficulties that would affect its ability to pay rent. This prospect would affect assessments of the value of the tenant's covenant, especially as SFA rules would have severely restricted the availability of irritancy as a remedy for an unpaid landlord;

Having regard to all of these factors, I consider that the chance of achieving a successful sale of Ibrox Stadium subject to a lease in favour of an entity carrying on the business of the football club was at the lower end of the scale of likelihood. I assess it at about 10% and accordingly find the noters entitled to compensation of £750,000 in respect of the loss of a chance.

[227] It is common ground that the prospect of obtaining a sale of Murray Park, with or without a lease back, was stronger than that of obtaining a sale subject to lease of Ibrox Stadium. Again I take as a starting point Mr Hutchison's figure of £3.6 million. In their estimated outcome statement, the respondents made deductions for holding and selling costs amounting to about £1 million. I am prepared to assume that a sale of Murray Park could have been achieved within 12 months and I shall therefore allow a deduction of £500,000. On the other hand, I note that the Scottish Sports Council held a security for £650,000 over Murray Park which I understand to have related to a grant which would presumably have been repayable if the subjects ceased to be used for the purposes for which the grant was made. After deduction of a further £750,000 (the other half of the allocated £1.5 million), the balance remaining is £1.7 million. This is the figure that I shall use in quantifying the loss of a chance.

[228] I have mentioned a number of possible outcomes in relation to Murray Park – outright sale; sale and lease back of the whole subjects; or sale of the whole subjects and lease back of a part sufficient to enable the company to continue to use it as its training ground and facilities. I am unable to select one of these possibilities as the most likely. Having regard inter alia to the planning uncertainties, I conclude that there was a 50% chance of achieving one of them, and I therefore find the noters entitled to compensation of £850,000 in respect of loss of a chance.

Shares under the control of Craig Whyte

The joint administrators' approach

[229] At the time of the respondents' appointment, 85.3% of the shares in the company were owned by RFCGL which, through its parent company (Liberty Capital Limited), was

effectively controlled by Craig Whyte. For the sake of brevity I shall refer to these shares as Mr Whyte's shares. It was clearly understood at all times by the respondents that for their preferred solution of a CVA to be achieved, there would have to be an acquisition by the purchaser under the CVA of Mr Whyte's shares.

[230] The respondents did not take, or contemplate taking, any steps at or prior to the date of their appointment to attempt to obtain from Mr Whyte an irrevocable mandate undertaking to transfer his shares to a CVA purchaser. They formed the view that Mr Whyte was unlikely to want to be seen by Rangers supporters as the man who blocked a CVA that would rescue the club, and that if a transfer of his shares was necessary, he would "do the right thing", as Mr Clark put it. They accordingly maintained a co-operative relationship with him, while bearing in mind that if they became aware of any wrongdoing on his part, this would have to be reported to the appropriate authority. Their view was that the primary responsibility for negotiating with Mr Whyte for the transfer of his shares rested with the prospective purchasers, and that their role consisted of doing what they could to facilitate such a transfer.

[231] The respondents also took legal advice as to what, if anything, could be done to compel Mr Whyte to transfer his shares, should he prove unwilling to do so. They received written advice on 17 April from London solicitors Taylor Wessing, although Messrs Clark and Whitehouse both explained that there had been previous oral discussions.
Taylor Wessing identified two possible alternatives to consensual transfer of shares:

(i) an application by the administrators to the court for sanction of a scheme of arrangement between the company's creditors and members, in terms of which Mr Whyte's shares would be cancelled or ordered to be transferred. Based upon

certain observations made by Lord Hoffmann in 2006, Taylor Wessing considered that

> "… the jurisdiction is therefore available for the scheme we desire. However, the courts may not have sanctioned a scheme such as this before, and so it may take some persuasion. Particularly so in the event that the application must be made before the Scottish Courts (which is likely) as they are less versed in scheme cases."

(ii) An application for an administration order in respect of The Rangers FC Group Limited. Taylor Wessing acknowledged that

> "… It does not appear that Club has any liquidated claims against Group and therefore we may face an uphill struggle to prove that there are grounds for making an administration order …"

[232] Mr Whyte was kept informed of the level of bids being made by prospective purchasers. Unknown at the time to the respondents, two of their telephone conversations with Mr Whyte, on 1 May and 6 June respectively, were tape recorded by him, and transcripts of the calls were among the productions for the proof. Reference was made in the course of the 1 May call to Brian Kennedy's then current bid; one of the respondents observed that "his is the only deal that needs your shares", and Mr Whyte replied that he had been trying to get hold of Mr Kennedy but had been unsuccessful. Mr Whyte also mentioned in the course of the 1 May call that he had been contacted by a group fronted by Charles Green who were "very keen to do a very quick deal". In the course of the 6 June call, Mr Whyte indicated that if the respondents could assist him in getting out of a personal guarantee that he had given to Ticketus, he would do a deal with Mr Green for the sale of his shares. In the end, of course, because a CVA did not proceed, there was no need for a transfer of Mr Whyte's shares to anyone.

[233] In his evidence to the court, Mr Clark stated that he did not think that Mr Whyte would have agreed to provide a mandate as a condition of the appointment of the

respondents as administrators. His view nevertheless remained that Mr Whyte would have transferred the shares to any of the prospective bidders. In the event that he had refused, the respondents would have done what they could to take enforcement action, including persuading the court that the matter had to be dealt with urgently if a CVA were to be delivered. Mr Whitehouse, for his part, observed in the course of his evidence that each of the bidders who were considered to be credible had said at various times that they had reached an agreement with Mr Whyte for the procurement of his shares. He considered that it had been necessary to keep Mr Whyte informed of the detail of the bids, in order to persuade him to transfer his shares, because he was the key to unlocking a CVA. The respondents were not negotiating with him to transfer the shares because they did not know whether a CVA would be acceptable to the creditors and could not therefore agree terms with him.

Expert evidence

Expert evidence for the noters

[234] Mr Christie's opinion, expressed in his supplementary report, was that the respondents had had no clear strategy for delivery of Mr Whyte's shares to a purchaser or at what cost. As a result, they were effectively passing control over whether a CVA could be achieved to Mr Whyte as he alone could determine whether (and at what cost) the shares could be transferred to any new owner. In the absence of any agreement with Mr Whyte, the respondents should have sought legal advice immediately on their appointment as to the best way of securing control of the shares.

<u>Expert evidence for the respondents</u>

[235] Mr Buchler considered that shares would always be an issue in a CVA. A risk of the respondents seeking to finalise a deal with Mr Whyte for his shareholding might have been that the terms of that deal would not suit the aims of some of the bidders. It was better to enable the potential bidders to try to structure a deal with Mr Whyte which satisfied their aims, whilst leaving open the trade sale route for bidders who did not want to deal with him at all. There was no indication that Mr Whyte behaved in a difficult way; indeed the reverse seemed to be true, in that serious bidders were able to reach agreement with Craig Whyte for the transfer of shares. The respondents' strategy of attempting to keep Mr Whyte "on side" while investigating alternative legal avenues had been reasonable.

Assessment

[236] On this aspect of the case I find Mr Buchler's views persuasive. There was no evidence that Mr Whyte could have been compelled to grant a mandate for the sale of his shares as a condition of the respondents' appointment, or that there is a usual practice of demanding such a mandate. Neither Mr Christie nor Mr Buchler had ever done so. I accept Mr Clark's evidence that if Mr Whyte had been asked to grant such a mandate it was unlikely that he would have agreed to do so. As Mr Buchler observed, it is not abnormal in a CVA for an issue to arise regarding the transfer of the owner's shares. There seems to be no reason to assume that every owner will be co-operative, or at least more co-operative than Mr Whyte. In the circumstances of the present case, I accept that it was reasonable for the respondents to expect prospective purchasers to negotiate with Mr Whyte (as they did), while doing what they could to steer Mr Whyte in the direction of co-operation. It would have been difficult for them to do this without keeping him informed of the details of the

bids received. In so far as bidders complained of difficulties in obtaining clarity as to the availability of the shares, particularly in view of complications arising from the involvement of Ticketus, those were difficulties not of the respondents' making and about which they could do very little. The options put forward by Taylor Wessing for non-consensual acquisition of Mr Whyte's shares were acknowledged (in my view correctly) to have very uncertain prospects of success. I conclude that no breach of duty has been demonstrated in relation to Mr Whyte's shares.

Conclusion regarding the bidding process

[237] The submission on behalf of the noters draws together various alleged breaches of duty by the respondents and alleges that, taking the respondents' failures individually and cumulatively, they lost control of the bidding process and left themselves in a position whereby their ability to obtain the maximum value for the company's business, or its individual assets, was compromised. The alleged failures referred to are:

- failure to make redundancies at the outset of the administration;
- agreement to wage reductions rather than making redundancies;
- failure to obtain a brand valuation;
- failure to take advice as to alternative strategies regarding the heritable properties, and to test the market for a lease and sale of Ibrox Stadium and/or Murray Park, and/or a partial sale of Murray Park;
- failure to obtain control of Craig Whyte's shares;
- provision of information to Mr Whyte regarding the level of bids received, which information was probably passed to Mr Green to assist him in deciding how much to offer.

I have addressed all of these strands of the noters' argument individually above. It remains to consider whether, when looked at collectively, the actions taken by the respondents in relation to these matters compromised their ability to obtain the maximum value for the company's business and assets. The noters invited me to conclude that the respondents lost a real and substantial chance of securing a total amount that was around £25 million more than the net figure paid by Sevco for the company's business, either through an increased bid that took account of the heritable property or by realising the heritable property separately if no bidder would pay that amount.

[238] I am unable to reach that conclusion. In the case of the heritable property I have held that the noters are entitled to compensation amounting in total to £1.6 million based upon the loss of a chance principle. In respect of the other alleged failures, I have found no breach of duty established. It is certainly the case that the price achieved for the sale of the company's business and assets was much lower than the expectation of the respondents at the outset of the administration. It was equally disappointing by comparison with the level of the initial expressions of interest received.

[239] An analysis of the reasons why such a low price was achieved is beyond the scope of these proceedings except in so far as the reasons are the consequence of breaches of duty by the respondents. It can at least be said, however, that the explanations given by bidders for reducing their bids or dropping out altogether do not imply fault on the part of the respondents. The reasons for withdrawal given by the Singapore consortium to Mr Walder were concerns regarding deliverability of Mr Whyte's shares (and in particular the position of Ticketus in relation to this), the tight timescale of a CVA before the start of the following season, and, somewhat inconsistently, the length of time for which the bidding process had gone on. I have addressed the issue of Mr Whyte's shares, and I do not find that any breach

of duty was committed by the respondents in relation to the other two reasons given by the Singapore consortium. As regards the Blue Knights, the evidence supports the view held contemporaneously by Mr Whitehouse that despite the favourable media coverage and vociferous fan support that it received, this was never a credible bid. The reason for withdrawal given to Messrs Clark and Whitehouse by Mr Miller's London solicitor was a financial one: having spent time examining the club's finances, he had concluded that the work needed for the business to break even was too substantial: again not an explanation that implies fault on the part of the respondents. It may be that, as he suggested in the press release announcing his withdrawal, the hostile attitude of Rangers fans to his bid also played a part in his decision. At an earlier stage, the sanctions imposed on the club by the SFA appear to have led to a reduction in the level of his bid.

Quantification of the noters' claim

Introduction

[240] In the prayer of the note, the noters invite the court to pronounce an order under paragraph 75 (set out at paragraph 37 above) requiring the respondents, jointly and severally or severally, to contribute the sum of £47,690,410, with interest at the rate of 8% per annum from the date of the first order in this application (6 February 2017) until payment. As I understand the noters' case, that sum is derived as follows:

Failure to make non-playing staff redundant	£971,386
Failure to make playing staff redundant	£443,546
Failure to market playing staff: salary saving	£570,595
Failure to market playing staff: sale value	£19,704,883
Failure to obtain higher price for business	£25,000,000

(By my calculation these figures add up to £46,690,410 and not £47,690,410, but this is not ultimately of any significance.)

[241] The figure of £25,000,000 in the above calculation for failure to obtain a higher price for the business raises two final matters. The noters submit that in calculating the loss caused by this alleged failure, the purchase price received from Sevco should be treated as having been £4 million and not £5.5 million, for two reasons. Firstly, the assets sold included a right to receive an instalment of commercial revenues from the SPL, quantified by the noters at £1,272,546. Secondly, the assets sold included a debt owed by RYDL, quantified by the noters at £292,000. It is submitted that because those two assets were not retained, the benefit to the company's creditors was reduced to around £4 million.

SPL commercial revenues

[242] Every club in the SPL was entitled to a share of the SPL's annual net commercial revenues, often referred to as "club fees". The amount receivable depended upon the club's finishing position in the league. The fees were paid in instalments, with a major instalment usually being paid in about July.

[243] The entitlement of the company to receive its instalment in July 2012 was subject to two uncertainties. Firstly, the SPL, through its solicitor, Mr McKenzie, wrote to the company on 6 July intimating that because the company would clearly be unable in season 2012-13 to implement its obligations in terms of the SPL Rules, having sold all of its property and players, it was in breach of contract. As the SPL would sustain significant loss and damage, in part because of commercial contracts entered into by the SPL which required the participation of Rangers in SPL competitions, it was stated that no further fees would be paid to the company, but would instead be retained and set off against the SPL's losses. Secondly,

the company owed monies to certain other SPL clubs (including an £800,000 instalment of a transfer fee due to Hearts) which, it was anticipated, might be set off against the company's entitlement to club fees as the instalments fell due.

[244] It is common ground that no provision was made in the agreement for sale to Sevco for retention by the company of any entitlement to club fees. The respondents' staff had attempted, prior to receipt of Mr McKenzie's letter (which post-dated the Sevco agreement), to obtain clarification from the SPL regarding the company's entitlement to the instalment about to fall due but had received no substantive response. The eventual outcome was that on 27 July, the company, the SFA, the SPL, The Scottish Football League Ltd and Sevco entered into an agreement (subsequently referred to as the "five-way agreement") which provided inter alia for Sevco to be admitted as an associate member of the Scottish Football League Ltd to play in the third division, for the transfer to Dundee FC of the company's share in the SPL, and for an irrevocable waiver by the company and Sevco of any right to unpaid club fees due to the company in relation to the 2011-12 season.

[245] In his witness statement, Mr McKenzie expressed surprise at the ease with which the respondents had agreed to waive all entitlement to club fees due by the SPL to the company, observing that the sum payable would have been "not far off £1 million". He appeared to have expected the respondents to use their bargaining position in relation to the transfer of the company's SPL share to Dundee FC to argue for payment of at least part of the sum due. He considered that once that transfer was effected, there had been no continuing basis for the claim for loss and damage that had been made in his letter of 6 July. He had not considered it necessary to intimate any change in the SPL position to the respondents or to Sevco because the matter had been resolved by the five-way agreement.

[246] It was submitted on behalf of the respondents that this aspect of the noters' claim had not been proved. Given the stated position of the SPL, the club fees would not have been recovered by either the company or Sevco. There was no clear evidence of what sums might have been payable to the company (or Sevco) but for the five-way agreement. Monies due to other clubs would have been set against any sum due to the company by the SPL. The claim, insofar as it was said to reduce the value of Sevco's bid, should be rejected.

RYDL

[247] At the time of the administration, the company held funds amounting to around £292,000 that belonged to RYDL. RYDL was in turn, according to RYDL's accounts for the year to 30 June 2010, a debtor of the company to the extent of £1,455,000. Another creditor of RYDL was a Mr Ian Hart who had lent £250,000 to RYDL some years earlier. It appears that Mr Hart came to a private agreement with Sevco to invest in Sevco. On that basis, Hart sought repayment of his loan by asking RYDL to release the funds due to him directly to Sevco. The mechanism by which this was achieved consisted of two letters sent on 14 June. The first, sent by Mr Dickson in his capacity as a director and secretary of RYDL to Sevco, stated that RYDL released its rights to the funds to Sevco for the specific purpose of enabling Sevco to use them in part satisfaction of the proceeds required to enable Sevco to purchase the company's business and assets. The second, sent by Sevco to the respondents, confirmed that Sevco unconditionally released the funds held by the respondents in part satisfaction of the purchase price of the company's business and assets.

[248] The noters' contention, as I understand it, was that because the company was a creditor of RYDL, it could have utilised its debt either by requiring Sevco to purchase the debt as an addition to the purchase price, or by excluding its share in RYDL from the sale

with a view to recovering the value that its debt would have had on liquidation of RYDL (approximately 15.5p in the £, amounting to £225,000).

[249] On behalf of the respondents it was submitted that the noters had not established that, as a matter of fact, the company was entitled prior to completion of the Sevco sale to a sum of £292,000. In any event, the receipt of the money as part of the settlement funds had not amounted to a subsidy from the company to Sevco. The respondents had merely given effect to a private transaction agreed between Mr Hart and Sevco by acting on the letter issued by Mr Dickson.

Assessment

[250] In relation to the SPL commercial revenues, I accept in principle that the respondents could have sought to retain some or all of these for the benefit of the company's creditors, either as part of the negotiation of the purchase agreement with Sevco or in the course of negotiation of the five-way agreement. However I would find it impossible on the evidence to reach any satisfactory conclusion as to what amount they might have been able to retain. There was no evidence, beyond Mr McKenzie's reference to "not far off £1 million" of the amount that would have been due to the company by way of fees payable in the summer 2012 instalment. It appears (though there was never any formal indication from the SPL) that deductions from the fees could have been made in respect of sums of over £800,000 due to other clubs. Nor is it possible to assess what sum the SPL might have been willing to agree to pay if the matter had been pressed during the negotiation of the five-way agreement. Mr Clark's evidence, moreover, was that Mr Green had insisted on being in control of this claim during negotiations with the SPL. In all the circumstances I am not persuaded that if

the respondents had sought to pursue the matter any significant sum would have been recovered from the SPL for the benefit of the company's creditors.

[251] As regards the RYDL monies, I agree with the respondents' submission that this was in essence a private deal between RYDL, Sevco and Mr Hart. I accept that the respondents could have sought to exclude the company's share in RYDL from the sale of the business to Sevco, but that would have been dealt with as a separate matter for negotiation. There was no evidence as to what the outcome of such a negotiation might have been.

[252] More importantly, however, none of this affects my assessment of the amount of compensation payable to the noters. Neither of these matters is now raised by the noters as a breach of duty by the respondents. Rather, as I have explained, they are presented as reasons for treating the sum paid by Sevco as £4 million instead of £5.5 million in the calculation of the loss arising from the respondents' failure to obtain a higher price for the business. Presumably without these two matters the sum claimed would have been £1.5 million lower. But I have held that with the exception of the compensation that I have held to be due in respect of loss of a chance in relation to realisation of the value of the heritable property, there was no such failure. It follows that the question whether the adjustments sought by the noters in respect of the commercial revenues and RYDL funds should be made does not strictly arise for decision at all.

Summary and disposal

[253] For all of the foregoing reasons, I hold that the noters are entitled, in terms of paragraph 75 of Schedule B1, to an order that the respondents contribute the following sum to the company's property by way of compensation for breach of duty:

Loss of chance of sale of marketable players £977,500

Loss of chance of sale of Steven Naismith	£827,000
Loss of chance of lease and sale of Ibrox Stadium	£750,000
Loss of chance of sale of Murray Park	£850,000
Total	**£3,404,500**

[254] I would intend to award interest on this sum at the rate of 4% per annum from 6 February 2017.

[255] Before pronouncing an interlocutor I shall put the case out by order in case parties wish to address me on any matters (arithmetic or otherwise) arising from this opinion. I am grateful to all counsel for their very thorough and helpful presentation of their respective cases.