Neutral Citation Number: [2023] EWHC 1276 (Ch)

Case No: BL-2020-001435

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

7 Rolls Building,
Fetter Lane, London,
EC4A 1NL

Date: 26 May 2023

Before:

THE HONOURABLE MR JUSTICE RICHARD SMITH

Between:

HENDERSON & JONES LIMITED	**Claimant**
- and -	
(1) DAVID JASON ROSS	
(2) STEPHEN ROGER BARNES	
(3) GERARD HUGH BARNES	
~~**(4) LEILA JAYNE FELLOWS-SAUNDERS**~~	
(5) BARCLAYS BANK PLC	
(6) THE WILKES PARTNERSHIP LLP	**Defendants**

Jeffery Onions KC, Hugh Sims KC, Stefan Ramel and Dan Butler (instructed by **Harrison Clark Rickerbys, Inc. Sprecher Grier**) for the **Claimant**
Ali Tabari (instructed by **Thursfields**) for the **First and Second Defendants**
Rebecca Page (instructed by **Mills & Reeve LLP**) for the **Third Defendant**
Adam Kramer KC and Hannah Glover (instructed by **Addleshaw Goddard LLP**) for the **Fifth Defendant**
Ben Hubble KC and Tom Shepherd (instructed by **Browne Jacobson LLP**) for the **Sixth Defendant**

Hearing dates: 9-11, 14-18, 21-22, 25 and 28-30 November 2022

APPROVED JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10.30 am on 26 May 2023 by circulation to the parties or their representative by email and by release to the National Archives

Mr Justice Richard Smith:

A. INTRODUCTION

1. The Claimant, Henderson & Jones Limited (**Claimant**), is a litigation investment company and assignee of the claim which is the subject matter of these proceedings. That claim concerns the restructure that took place from 30 November 2012 (**Restructure**) of a group of companies (**Group**) of which The Hospital Medical Group Limited (**Company** or **THMG**) was formerly the main trading company. The Group provided various elective medical services, including cosmetic, bariatric and dental surgery as well as certain non-surgical procedures, operating principally from the private hospital at Dolan Park, Bromsgrove (**Dolan Park**).

2. THMG's immediate parent company was The Hospital Medical Group Holdings Limited (**Holdings**), itself wholly owned by TWP (Newco) 66 Limited (**TWP (Newco)**). Other companies within the Group included Surgicare Medical Limited (**Surgicare**) and The Hospital Group (Ireland) Limited. The Hospital Group Healthcare Limited (**Healthcare**) and Dolan Park Limited (**Dolan**) were incorporated shortly before the Restructure.

3. The First Defendant, David Ross (**DR** or **D1**), co-founded THMG (with the majority shareholder, Steven McNerlin (**SM**)). DR was *de jure* director of THMG from 2004.

4. The Second Defendant, Stephen Barnes (**SB** or **D2**) was *de jure* director of THMG between May 2012 and August 2015.

5. The Third Defendant, Gerard Barnes (**GB** or **D3**, no relation of D2) was *de jure* director of THMG between July 2009 and September 2011, later engaged as a consultant between October 2011 and March 2016.

6. The Fifth Defendant, Barclays Bank plc (**Barclays,** the **Bank** or **D5**), was secured lender to THMG. At the relevant time, Brian Sweeney (**BS**) was (and he remains) a director in Barclays' Business Support Unit (**BBS**). Julian Kilsby (**JK**) was Barclays' relationship manager for THMG at the relevant time.

7. The Sixth Defendant, The Wilkes Partnership LLP (**D6**), were THMG's solicitors. At the relevant time, Nigel Wood (**NW**) was the firm's senior partner and head of commercial litigation. Kathryn Hackett (**KH**) was (and remains) a corporate partner at the firm. David Stevenson (**DS**) was a solicitor and head of the firm's personal injury litigation department, later Group in-house solicitor.

(a) The Restructure in brief outline

8. The Restructure is considered in detail below. However, as consummated, this comprised the following transactions entered into on, and from, 30 November 2012:-

(a) THMG transferred the freehold title to Dolan Park to Holdings for a stated consideration of £15 million;

(b) Holdings transferred the freehold title to Dolan Park to Dolan for the same stated consideration;

(c) Dolan granted a five year lease over the property to Healthcare at a stated annual rent of £750,000;

(d) THMG transferred its intellectual property rights (**IP**) to Holdings for a stated consideration of £1.5 million, to be "*left outstanding as an interest free loan owing by the Transferee to the Transferor*";

(e) Holdings granted a non-exclusive licence to a number of companies in the Group (excluding THMG) to use the intellectual property rights in return for royalties;

(f) THMG transferred substantially all its remaining assets to Healthcare at book value, the consideration again to be "*left outstanding as an interest free loan owing by the Transferee to the Transferor*";

(g) THMG declared a dividend of £7.5m in favour of Holdings which took the form of a credit applied to the intercompany balance due from Holdings to THMG; and

(h) The intercompany balances between the Group companies were 'simplified' or 'pooled', including into one balance due from Holdings to THMG.

9. It was common ground that the documents known as the 'Whitehead year end pack' represent the best evidence of the intercompany position within the Group prior to the Restructure and of how the Restructure accounting was actually carried out, 'Whitehead' referring to Mr John Whitehead, a self-employed accountant engaged in July 2012 to assist the Group's UK Financial Controller, Mr Skott Hughes.[1]

(b) The claim in brief outline

10. The Claimant says the Restructure took place against the background of serious problems faced by THMG from 2011, including creditor non-payment, banking covenant non-compliance and significant potential liabilities arising from the Poly Implant Prothèse company (**PIP**) breast implant scandal and the threatened imposition of backdated VAT on cosmetic procedures. The end result of the Restructure was to cause THMG to divest itself of all its tangible assets and trade, leaving significant liabilities within the Company. Following the Restructure, THMG's main asset was a £6,025,808.23 interest free debt from Holdings but Holdings had no readily realisable assets, its net current assets were only £3,364,561, THMG no longer had recourse to Dolan Park, and the intercompany debt in its favour was rapidly reduced to nil through a series of improper transactions. The transfer of value out of THMG was intended to, and did, operate to put its assets beyond the reach of its creditors to their obvious detriment. The Claimant says the Restructure, and the conduct of various participants, were unlawful in the following respects:-

[1] Mr Hughes was himself engaged between November 2011 and September 2013.

(a) The Restructure involved an unlawful distribution under Part 23 of the Companies Act 2006 (**CA06**) and/ or unlawful return of capital and/ or 'informal winding-up' and a fraud on creditors;

(b) The Restructure was also a transaction at an undervalue defrauding creditors contrary to section 423 of the Insolvency Act 1986 (**IA86**);

(c) D1, D2 and (as *de facto* director) D3 breached their fiduciary, statutory and common law duties to THMG in relation the Restructure including, in the case of D3, his tortious duty of care to THMG;

(d) D6 was liable in negligence through its failure properly to advise THMG, including as to the likelihood of the unlawfulness of the Restructure;

(e) D3 (if not *de facto* director of THMG), D5 and D6 dishonestly assisted in D1-D2's breaches of fiduciary duties; and

(f) D1-D6[2] acted in combination to use unlawful means with the intent to injure THMG.

11. The Claimant seeks common law damages and/ or equitable compensation.[3] The Defendants deny liability. They say the Restructure was not unlawful but was reasonably and honestly undertaken for value, for good commercial reason and in THMG's interests, with the Company having sufficient distributable reserves to declare the dividend. As such, no liability can attach to D1-D3 for breach of duty (and D3 not being a *de facto* director in any event). As such, D3-D6 could not be liable as accessories in dishonest assistance but they were not dishonest in any event. D3 and D6 undertook such tasks as fell within the scope of their duties with reasonable care and skill such that no claim lies in negligence. Since the Restructure was lawful, there could have been no *unlawful* means conspiracy. The formulation of the parties' respective claims and defences is much more elaborate (and extensive) than this summary, and a number of further issues are set out in the agreed list of issues, but this reflects their core dispute.

(c) <u>The factual evidence</u>

12. The Claimant did not adduce any factual evidence. DR, SB, GB, BS, NW and KH provided witness statements and gave oral evidence for the Defendants.

<u>David Ross</u>

13. DR was a straightforward witness who made appropriate concessions and whose elaboration in oral evidence was generally measured and warranted. His recollection of specific events and documents was limited. Given the passage of time, this was unremarkable.

---

[2] But not D4, against whom no claim is pursued.
[3] The Claimant confirmed at trial that it does not pursue its alternative claim for an account of profits.

Stephen Barnes

14. SB came across as a reluctant participant in these proceedings, perhaps unsurprisingly given his limited role in the Restructure. On occasion, he sought greater specificity than necessary in the questions asked of him. Nevertheless, I found him a generally straightforward witness. His recollection of events too was understandably limited.

Gerard Barnes

15. GB was a confident but fair witness. He too had a limited recollection of events. This, and his former unrepresented status, may explain why he appeared to have spent considerable time reconstituting events from the documents, albeit he took care in his testimony to distinguish recollection from reconstruction.

Brian Sweeney

16. BS was an impressive witness. His evidence was careful and balanced and his explanation of Barclays' needs and processes, and of his interactions with the Group, authentic and convincing. On a few occasions, his answers were unnecessarily long but this did not detract from his evidence overall. His recollection was limited.

Nigel Wood

17. NW initially took unnecessary issue with some of the questions asked of him, albeit his approach settled to one of 'robust candour'. At times, he offered extensive commentary and imparted views outside his purview. Nevertheless, he asserted with conviction throughout the absence of any impropriety. His recollection was limited.

Kathryn Hackett

18. KH too was an impressive witness. Although nervous and understandably uncomfortable being questioned about her involvement in the Restructure, her evidence was measured and thoughtful. She made appropriate concessions and her elaborations were warranted. Her recollection was limited.

(d) Expert evidence

19. I also heard expert accounting evidence from Amit Arora of AlixPartners UK LLP for the Claimant and Navin Waghe of FTI Consulting for the Defendants. They had been instructed to examine the losses said to have been suffered by THMG by reason of the Restructure, including whether any of the related asset transfers were at an undervalue.

20. Mr Arora gave expert oral evidence for the first time at this trial. He was a careful witness, albeit he often did not answer directly the question asked of him and was prone to unnecessarily long responses, sometimes descending into abstruse points rather than engaging more meaningfully with the particular issue. Mr Waghe too was a careful witness who made appropriate concessions. Although some of his answers were also long, these were generally warranted

for clarity or comprehension and they engaged thoughtfully with the relevant issue.

21. Finally, certain matters that should have been addressed in the respective experts' original reports were not. This was a feature on both sides but was most marked on the Claimant's, particularly its extensive use of the Joint Statement (**JS**) to develop the argument. Although the experts did use the JS helpfully to crystallise areas of agreement and difference, and to narrow some of the points between them, its further use to supplement the evidence was unhelpful, making it unwieldy (running to 76 pages) and more difficult to assimilate the Claimant's position in particular.

(e) Approach to the factual evidence

22. Given the age of the matter, the Claimant urged the approach endorsed by Leggatt J in *Gestmin SGPS SA* v *Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) (at [22]):-

> "… the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts."

23. As to this, I found the evidence of the factual witnesses, at least as to their independent recollection of specific timings and events, to be of limited assistance. There was also extensive questioning of the witnesses about the consequences of some of the individual transactions constituting the Restructure in terms of their extraction of value from, and what was 'left behind' in, THMG. This was often quite sterile and, ultimately, inconclusive. That said, in their different ways, I found that all the witnesses generally did provide authentic and helpful insight into the concerns, motivations and priorities that guided them over the relevant period. Despite the approach indicated by *Gestmin*, the Defendants urged caution in considering 'snippets' of documents in isolation. Although I do not subscribe to the 'snippet' rubric, some circumspection is required: first, a number of the documents relied on are manuscript notes. Although no doubt accurately reflecting the author's thoughts at the time, those documents are by no means complete and, in a number of cases, the context and/ or meaning of a specific comment difficult to discern, particularly at this distance; second, it is common ground that the documentary record is incomplete, particularly with respect to THMG's documents and those of its former auditors, Clement Keys (**CK**); third, a number of documents (such as D5's 'Zeus' forms) were 'live' documents in the sense they were added to on a 'rolling basis' and therefore contained information not necessarily current at the time of their latest iteration.

24. There was clearly a difference of view as to the reason for the incomplete record, particularly in relation to THMG's documents, including a suggestion based on what the liquidators did (or, rather, did not) find that some might have been destroyed or deleted. Ultimately, however, the reasons for the state of the record

could not be explained or discerned with any degree of confidence, perhaps unsurprisingly given the time that had elapsed since the relevant events. The Defendants suggested that, if the incompleteness of the record gave rise to difficulty, any 'benefit of the doubt' ought to be applied in their favour. The Claimant said that the absence of some documents was unfortunate but the record was nevertheless sufficiently extensive and clear to enable it to make good its various claims. The Claimant also pointed to *Nicholas Barnett (as Liquidator of Glam and Tan Limited), Glam and Tan Limited – in Liquidation* v *Mrs Danielle Litras* [2022] EWHC 855 (at [29]) for the proposition that:-

> "The courts acknowledge [a liquidator's] absence of first-hand knowledge of the events that led to the insolvency by placing the burden of proof on a defendant director (who does or should have first-hand knowledge) to demonstrate why or how an event took place, if no minute exists, or where there is no other documentary evidence to support the position of a defendant director."

25. I did not find *Glam and Tan* (or *GHLM Trading Ltd* v *Maroo and others* [2012] EWHC 61 (Ch), also cited) of much assistance here. In those cases, examination of the underlying corporate documents might well have yielded meaningful insight into the transactions under scrutiny. In this case, the transactions constituting the Restructure are better understood and, save perhaps for the dividend, the parties did not identify specific categories of 'missing' THMG documents. Moreover, although the correspondence does indicate the liquidators' concerns about the deletion of some of the Company's records, DR did testify as to his understanding of what became of them before he left the Group. The picture thereafter is unclear. As such, I am unable to reach a concluded view on whether the liquidators' concerns were justified. D5 and D6 were not directors in any event and D3's role as such is disputed. Moreover, all the witnesses did explain their understanding of the rationale for the Restructure. Ultimately, despite the evident gaps, I agree with the Claimant that the record is sufficiently extensive that I can, fairly and with confidence, decide the present dispute.

(f) The 'missing' witnesses

26. At the start of trial, the Claimant also indicated that certain obvious witnesses were absent, inviting the Court to draw adverse inferences from the failure of (i) D5 to call JK (ii) D6 to call DS and (iii) D1-D3 to call CK. *Efobi* v *Royal Mail Group Ltd* [2021] UKSC 33 identifies (at [41]) certain relevant considerations for assessing "[w]*hether any positive significance should be attached to the fact that a person has not given evidence"*, albeit, ultimately, this *"depends entirely on the context and particular circumstances*." Having considered the particular circumstances obtaining here, I am not persuaded that it would be appropriate to draw inferences adverse to the relevant Defendants.

27. Although I understand it would have been possible for Barclays to tender JK as a witness, and he was privy to some of the Bank's discussions concerning the Restructure, it is evident from the documents that BS was the Barclays' representative 'fronting' those and from the Claimant's case that it was BS' knowledge or suspicion of wrongdoing that is said to found D5's liability. To

that end, the Claimant's solicitors' letter of 9 September 2022 states that "[t]*he basic inference that our client will invite the court to draw*" is that JK "*had material knowledge concerning a knowledge or suspicion of wrongdoing which was communicated to Mr Sweeney at the material time*." However, BS gave evidence and was cross-examined about what he knew. On the basis of the limited usefulness of the oral evidence of those more closely involved, including BS, I am satisfied that JK's oral evidence would not have usefully extended much beyond the refreshment of his memory from the Bank's documents, and that his recollection of what he may have known a decade ago about what might have had been imparted to BS then, would not have advanced matters meaningfully.

28. DS no longer works for D6, having left that firm during the events the subject of this claim to join the Group as in-house solicitor. As such, there was always an air of unreality about the suggestion that D6 could have produced him as a witness. The Claimant appears to have recognised this, confirming in closing argument that it was not contending for any related adverse inference.

29. As for CK, the Claimant suggests it has no particular association with either 'side' in these proceedings. Moreover, CK was engaged by the Group (not THMG) and its role limited to preparing financial forecasts and a business plan. There is no written evidence that CK was retained by THMG to advise it on the Restructure and CK has confirmed otherwise. The Claimant has not delved into CK's knowledge in relation to all the matters before the Court and it is not a necessary part of the Claimant's case to make allegations against CK (see *Hotel Portfolio II UK Limited* v *Ruhan* [2022] EWHC 383 (Comm) at [201]-[203]). Although the Defendants make much of its role in the Restructure, they have not called anyone from CK and it now appears they are seeking to have it 'both ways', complaining about CK's absence, at the same time using this to invite findings about its role. The Defendants submitted that CK was the proverbial 'elephant in the room', that firm having been involved in every aspect of the Restructure and related accounting treatment, as both are now sought to be impugned by the Claimant, albeit with no-one from that firm testifying. Had CK attended trial, the Court could have seen the true extent of its involvement and advice to THMG, undermining the Claimant's case as to the unlawfulness of the Restructure.

30. There was an air of unreality about the Claimant's submission: <u>first</u>, CK was clearly closely involved in many important aspects of the Restructure and its accounting treatment was put under the microscope by the Claimant; <u>second</u>, all the Defendants placed squarely in issue the role of, and THMG's reliance on, CK as advisers in the Restructure; <u>third</u>, in my view, it is unlikely that an approach from three former directors (D1-D3) to the former auditors of a now defunct company would have yielded CK's co-operation; <u>fourth</u>, it is apparent from the correspondence between THMG's liquidators and CK (or its successor firm) that the latter co-operated in the provision of certain information. Although CK may well have been reluctant to become involved further in this case, I consider it would have been more amenable to such an approach from the liquidators. As such, there is a more powerful case for any inference to be drawn against the Claimant as assignee of THMG's claim. Ultimately,

however, I am again satisfied that I can determine this claim based on the evidence presented, including as to CK's role, and that it is neither necessary nor appropriate to have recourse to such inferences, not least given the lack of information as to those (former) CK witnesses as might have been available to testify. I should also add that, although no party alleges wrongdoing by CK, to the extent my assessment might require me to consider that possibility, I shall have regard to what Foxton J said in *Hotel Portfolio II* (at [202]) and, more recently, Joanna Smith J in *Popely* v *Ayton Ltd* [2022] EWHC 3217 (Ch), as to the need to ensure the fair treatment of non-parties.

31. Finally, the Claimant also mentioned (briefly) in oral submission the absence of evidence from Mr Peter Geobey (**PG**), Group Finance Director between January 2011 and June 2012, and Ms Leila Fellows-Saunders (**LF**), director of THMG between November 2005 and November 2012. Those submissions were not developed further and I again decline to draw any related adverse inference.

(g) The Court's approach to the dishonesty allegations

32. The Claimant alleges dishonesty against each Defendant, as to which, the Court is required first to ascertain the actual (subjective) state of the person's knowledge or belief as to the facts. Once that has been established, the Court then determines (objectively) whether the conduct of the person was (dis)honest by applying the standards of ordinary decent people. It is not necessary for the defendant to appreciate his or her dishonesty by those standards (*Ivey* v *Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] AC 391 at [74])). In a dishonest assistance claim, the knowledge of a fact can be imputed to a person if that person has turned a blind eye to it or has deliberately abstained from enquiry to avoid certain knowledge of what the person suspects to be the case. For blind eye knowledge to be imputed, it must first be shown (subjectively) that the person suspected that certain specific or 'targeted' facts may exist and, second, that the person then made a conscious decision to refrain from taking any steps to verify the existence of those facts. A person's suspicions, falling short of actual or blind-eye knowledge are still relevant at the first stage of the dishonesty test (*Group Seven Ltd* v *Nasir* [2019] EWCA 614 at [59]-[61]). The parties emphasised certain principles from the authorities as to the Court's approach to serious allegations of wrongdoing including, as here, dishonesty:-

(a) The Claimant has the burden of proving dishonesty. The civil standard of balance of probabilities applies (*In Re B (Children)* [2009] 1 AC 11 at [13]);

(b) In deciding where the truth lies, the Court may take into account any relevant "*inherent improbabilities*" as a matter of common sense (*In Re B* at [14]-[15]);

(c) The more serious the allegation, the more cogent the evidence required to prove it (see in *In Re H (minors) (Sexual abuse: Standard of proof)* [1996] AC 563 at [586], cited with approval in *Three Rivers District Council* v *Bank of England* [2001] UKHL 16 at [181]);

(d) D5 and D6 emphasised the inherent improbability of professionals acting dishonestly (see *Three Rivers* at [182]; *Attorney General of Zambia* v *Meer Care &* Desai [2008] EWCA Civ 1007 at [283]-[284] and [292]);

(e) In a fraud case, motive and overall probability form an important part of the Court's assessment of the evidence (*Armagas Ltd v. Mundogas S.A. (The Ocean Frost)* [1985] 1 Lloyd's Rep 1 at [57]); albeit

(f) The absence of a discernible motive does not preclude a finding of dishonesty (*Webb* v *Solicitors' Regulation Authority* [2013] EWHC 2078 at [47]; [52]).

33. I have had regard to these authorities in my assessment of the evidence, albeit recognising that the appropriate approach in any case will depend on its particular facts and circumstances (see *In Re B* at [14], citing Lord Nicholls in *In Re H* at [586]).

B. THE FACTS - INTRODUCTION

34. It is common ground that this case turns, in large part, on the proper characterisation of the Restructure. Although the parties invite me to draw different conclusions, they also agree that the events of the period and their context and timing all inform that question, including the motives and *bona fides* (or otherwise) of the participants. As such, it has been necessary to re-visit in some detail the chronology of events, related documents and testimony, and to explore the twists and turns relied on by the parties, particularly over 2011-2012. I therefore set out below in some detail the factual narrative, not least because it informs the multiple causes of action asserted.

35. The Defendants also submitted in closing argument that the Claimant had not accurately reflected in its own closing submissions the oral evidence of the witnesses it relied upon. To that end, different schedules of excerpts of the oral testimony were prepared to explain the suggested discrepancies. The Claimant denied any inaccuracy and handed up its own schedules highlighting the Defendants' own suggested errors. To the extent necessary to resolve any issues arising, I have been helpfully equipped with the transcripts. I have re-reviewed these in detail following trial.

36. For convenience, I have divided the evidence into the chronological phases below and, for events prior to 2012 (which are largely uncontentious), I have addressed matters thematically. I have highlighted throughout a number of important disputed evidential issues, albeit I have generally refrained from seeking to resolve these until my later analysis, save for a few aspects more conveniently dealt with earlier.

C. INCORPORATION TO MBO (1993-2009)

Early relevant events

37. Building on their earlier prescription pharmaceutical sales and cosmetic procedures business venture, DR and SM established the Group in 1993, providing elective medical services including cosmetic, obesity and dentistry surgery and non-surgical procedures. THMG was incorporated on 23 April 1993 and operated mainly from Dolan Park although it also leased a national network of around 15 clinics.

38. SB was first employed by THMG as sales consultant between 1993 and 1997.

39. D6 started acting as THMG's legal adviser in the mid-1990s.

40. In 1994, GB qualified as a Chartered Accountant with KPMG. He did not practise as an accountant but worked for KPMG's corporate transaction services team in its Corporate Finance Department until 2002 when he moved to Barclays' Leveraged Finance team as Relationship Director, where he worked until 2004.

41. In 2004, SB re-joined the Group as sales manager in its hair restoration business, later becoming regional Sales Director, managing all product divisions.

42. On 19 April 2004, Holdings was incorporated. DR became director of THMG and Holdings, as well as Group CEO, responsible for operational oversight, strategy implementation and stakeholder communication.

43. In 2008, SB became National Sales Director as well as Group Sales and Marketing Director. GB became Group Finance Director. Neither became THMG board members until later.

Early healthcare-related VAT issues (2003-2009)

44. At the relevant time, the Value Added Tax Act 1994 provided exemption from VAT for medical services comprising supplies by (i) registered health professionals, including doctors and (ii) care, medical or surgical treatment in any hospital or state-regulated institution. On 20 November 2003, the European Court of Justice (**ECJ**) published its decision in *Peter d'Ambrumenil and Dispute Resolution Services Ltd* v *Commissioners of Customs & Excise* (Case C-307/01) concerning the VAT treatment of medico-legal services (in the first category). According to HM Customs & Excise, this "*introduces, for the first time, a purpose test to determine whether a medical service is exempt from VAT or not*."[4]

45. In January 2007, HMRC issued two notices[5] concerning related changes from May 2007 to the VAT treatment of the supply of goods and services by registered health professionals (in the first category). In February 2007, HMRC

[4] HM Customs & Excise Business Brief (29/2003).
[5] VAT Notices 701/57 and 701/31.

issued a separate notice[6] concerning the VAT treatment of goods and services provided by hospitals and other institutions providing medical care and treatment (the second category), explaining that "*performing medical or surgical procedures*" was an example of "*medical care or treatment supplied by a qualifying institution*" and, therefore, exempt from VAT.

46. On 27 April 2007, HMRC provided its 'definitive reply' to a query from the British Association of Cosmetic Doctors (**BACD**), explaining that, for the first category, a 'purpose test' had to be applied from 1 May 2007, with the relevant health professionals only being VAT exempt if the principal purpose of their services was the protection, maintenance or restoration of an individual's health. The reply also explained that the latter category was not affected by the *d'Ambrumenil* ruling and that "*the vast majority of cosmetic procedures performed in hospitals or similar institutions .... will continue to be exempt*". In May 2007, the industry body, Independent Healthcare Advisory Services (**IHAS**), advised its members on the "*updated VAT position*", explaining in relation to the second category that procedures carried out in a hospital or state-regulated institution would be exempt if they constituted 'care or medical or surgical treatment' and that "*most cosmetic procedures carried out in hospitals will fall within this definition, and will therefore be exempt regardless of purpose*".

47. On 29 June 2009, the Tribunal handed down its decision in *Ultralase Medical Aesthetics Ltd* v *The Commissioners for Her Majesty's Revenue and Customs* [2009] UKFTT 187 (TC) concerning the provision of cosmetic surgery in hospitals for aesthetic purposes only. The Tribunal found that, despite there being two relevant categories of exemption, both concerned the provision of 'medical care' (with a specific EU law meaning directed to diagnosis, treatment and cure of disease and health disorders), it made no sense for this to be interpreted differently in a hospital setting and the VAT exemption did not apply to the surgery performed in that case. In *Ultralase*, HMRC supported the application of the VAT exemption. However, HMRC reviewed its position subsequent to that decision.

Attempted sale of THMG/ MBO (2008 – 2009)

48. DR's and SM's long-term goal was to sell THMG's business to a private equity firm and, from 2006 or 2007, there were roughly biennial discussions with advisors and private equity firms concerning a sale or management buyout. GB explained how, to that end, Grant Thornton actively marketed the Group for sale as part of a management buyout process in 2008 and 2009. On 16 December 2008, ECI Partners (**ECI**), a private equity group, made a "*subject to contract*" offer to purchase the Group for a cash consideration of £33-36m (assuming available senior debt of £10-15m), with £6m of that consideration to be deferred contingent on the Group meeting the (£7m) EBITDA forecast for May 2010. The valuation was on a cash and debt free basis and assumed the acquisition of the business with adequate working capital. The offer was based on various further assumptions, including the verification by financial due diligence that

[6] VAT Notice (701/31).

"*the FY08 adjusted EBITDA of £4.855m is reasonable and supports the financial projections as being fair. In particular, the financial due diligence supports the deliverability of the forecast EBITDA to May 2009 of £4.492m*."

49. The plan to sell the Group was derailed by the financial crisis. An internally financed buyout was implemented instead in 2009. TWP (Newco) was incorporated on 16 February 2009, with an authorised share capital of 1000 ordinary shares of £1 each of which one ordinary share was issued and paid up in cash. On 20 July 2009, DR was appointed to the board of TWP (Newco). GB was also appointed to the board of THMG, Holdings and TWP (Newco). On 22 July 2009, Colliers prepared a report on the value of Dolan Park for use in connection with the management buyout. This estimated the market value at £17.25m based on Colliers' view of 'sustainable' EBITDA to which a multiplier of 8.25 was applied based on Colliers' analysis of recent market transactions. On 19 August 2009, TWP (Newco) acquired the entire issued share capital of Holdings. To satisfy the consideration (£30.27m, including acquisition costs), TWP (Newco) issued a further £92,999 ordinary shares of various classes, £23.91m preference shares and £6m of loan notes. According to GB, the buyout valuation was based on the ECI offer which, although conditional, was taken as the sale value, generating a significant goodwill balance (recorded as £24.476m in TWP (Newco)'s audited accounts for the 15 month period to 31 May 2010).

<u>THMG's new banking arrangements with Barclays</u>

50. At the time of this transaction, the Company also moved to Barclays as its bankers. On 20 August 2009, THMG (as borrower), TWP (Newco) (as parent) and Barclays (as lender) entered into a £5.3m sterling loan facility agreement (**Facility**). The Facility contained at clause 20 various financial covenants as to (i) Debt Service Cover (ii) Interest Cover (iii) Loan to Value (iv) Capital Expenditure and (v) Net Tangible Assets. At clause 19, THMG undertook to provide Barclays with (i) financial statements (ii) financial covenant compliance certificates and (iii) budgets. Clause 22 identified various 'Events of Default' under the facility agreement, including the insolvency of any member of the Group. Barclays also entered into (i) a CAS 2000 overdraft facility with various Group entities with an overdraft limit of £500,000 (ii) a guarantee and debenture agreement with Holdings, THMG and other Group entities (iii) a legal charge from THMG over Dolan Park and (iv) an intercreditor agreement with THMG, TWP (Newco), other Group entities and the holders of the £6m loan notes (**Intercreditor**). The Intercreditor subordinated the loan notes to the debt due to Barclays such that payment of the former could be suspended where, for example, there was non-compliance with the financial covenants in clause 20 of the Facility.

<u>THMG's senior management team</u>

51. THMG's senior management team (**SMT**) comprised DR (CEO), SB (Sales and Marketing), GB (Finance), Christine Mozzamdar (Clinical Services) (**CM**) and LF (Customer Services). The SMT had weekly Monday meetings to discuss business in general, any pressing issues or concerns, future plans and forecasts. DR also met individually with each department head weekly or bi-weekly,

focusing on their responsibilities and key performance indicators. According to GB, the board of directors did not play much of a role in key decisions - DR 'called the shots'. SB confirmed that DR was responsible for overall decision-making and the direction of the Group, liaising with the SMT to ensure matters ran smoothly.

D. AUGUST 2009 – DECEMBER 2010

Group VAT issues – 2009-2010

52. On 6 August 2009, GB met KPMG (then THMG's auditors) to discuss Group VAT issues, including group registration. According to the meeting note, no intra-Group charges were then being raised but GB was considering whether this might be prudent going forward. KPMG's follow up e-mail dated 7 August 2009 stated that:-

> "*The VAT liability of "cosmetic surgery" appears to becoming an interesting topic once again... As soon as I can send you a summary of the Ultralase Medical Aesthetics Limited First-Tier Tribunal decision I will do so. I will also keep you posted as to any developments - for example HMRC's reaction when known ..*"

53. A lengthy manuscript note dated 25 August 2009 on KPMG notepaper indicates a further discussion or meeting on Group VAT issues. The Defendants say that this is significant because of the reference to the "*Aim*" to "*split THMG*" into separate business lines, namely (i) cosmetic and non-surgical (ii) other specialist (eg dentistry) (iii) obesity and (iv) hospital, which "*will provide services to the other companies*", with "*commercial & m*[ana]*g*[emen]*t better either separate co's or TT centres*".

54. On 3 December 2009, HMRC confirmed acceptance of the Group's application to be treated as a VAT group, with Holdings responsible for administering the Group's VAT affairs. On 13 January 2010, KPMG wrote to HMRC to explain that THMG had identified a historic error in respect of the VAT treatment of "*acquisitions from the EU*". The Defendants place store by this as well as indicating THMG's voluntary compliance with its taxation obligations, inconsistent with the idea that it used the Restructure to defeat creditors, including HMRC.

PIP developments - 2010

55. On 29 March 2010, the French Agency for the Safety of Health Products (**AFSSAPS**)[7] suspended the market access, distribution, exportation and use of PIP breast implants. THMG had previously used these in its own (principally cosmetic) breast implant surgical procedures.

56. On 31 March 2010, the UK Medicines and Healthcare products Regulatory Agency (**MHRA**) advised UK clinicians not to implant PIP implants. At that stage, AFSSAPS was carrying out urgent testing on the implants. The MHRA

[7] Agence française de sécurité sanitaire des produits de santé (AFSSAPS).

did not know whether the use of unapproved materials affected their safety but undertook to provide further advice when more information was available.

57. On 8 July 2010, the solicitors' firm, Hugh James (**HJ**), wrote to "*The Hospital Group*", explaining it had been instructed by more than 50 PIP recipients implanted between 2002 and 2010, the vast majority of whose implants were said to have ruptured. PIP being in liquidation, HJ had apparently advised its clients that they would have to bring claims against the supplier clinics and/ or their credit card companies. Individual letters of claim would follow.

58. On 26 August 2010, THMG apparently received its first letter of claim in respect of a potential PIP claim concerning a patient to whom, for reasons of privacy, I shall simply refer as "SLT". The documents indicate that two further PIP claims had been intimated by September 2010, by "JH" and "SF".

59. On 3 September 2010, the MHRA issued a press release concerning its PIP implant testing which "*found no evidence of genotoxicity (potential for cancer) or chemical toxicity of the filler material in the implants*", albeit the tests were not as extensive as those being undertaken in France, the latter including testing of a possible increased rupture rate compared with other implants.

60. As at 28 September 2010, THMG's advice to former PIP patients (on its website) was:-

> "*The Hospital Group have not used PIP implants since early 2009, when we chose to switch to Allergan CUI and Natrelle implants. However, if you think you were a PIP implant patient with The Hospital Group and have any concerns about them, we are offering a FREE CONSULTATION with a clinic nurse for initial discussion/assessment (this can be via telephone or in clinic). Please contact your local clinic, or call our central appointment line …. Where necessary or appropriate, the nurse will then refer you to see a surgeon for assessment - again, this is provided free of charge. Each case would be assessed individually, but our priority is to ensure the patients' welfare at all times. If a clear case of rupture was diagnosed and implant removal were advised, our intention would be to REPLACE the implants at NO COST to the patient.*"

61. On 4 October 2010, the MHRA issued a 'Medical Device Alert', requiring implant surgeons and centres to identify women who had received PIP implants after 1 January 2001 and to reassure them that "*there is no current evidence of health risk associated with the filler and there is no indication for routine action in the form of explantation or ultrasound.*" THMG's related internal documents suggest its use of PIP implants between 2008 and 2009 and for a short period in 2005/ 2006.

Nu-Age/ Surgicare acquisitions – October 2010

62. On 19 October 2010, THMG purchased the entire issued share capital of Nu-Age Medical Limited (**Nu-Age**).

63. In October 2010, administrators were appointed over Surgicare Limited. Its assets and business were then sold for £40,000 to RAM 1001 Limited, a subsidiary incorporated by THMG (later renamed Surgicare). There is a dispute (relevant to value and quantum) whether THMG transferred its share in Surgicare to Holdings prior to, or as part of, the Restructure. There was also a dispute at the time as to the extent of the liabilities assumed by THMG in relation to Surgicare's patients under the asset purchase agreement.

The Group's financial position at the end of 2010

64. The relevant Barclays' 'Zeus' form contained an "[u]*pdate following revised budget following quarter ending August 2010*", noting that (i) headroom for covenant compliance over the next two quarters had reduced, with the debt service covenant of particular concern (ii) D5 had received a further quarterly reduction to its loan and there remained no pressure on the bank account (iii) the Surgicare acquisition was anticipated to improve the cash position over time (iv) the board was confident there would be covenant compliance but, if not, (v) THMG was aware the scheduled loan note holder payments could not be made.

D3's draft board paper/ valuations – 31 December 2010

65. On 31 December 2010, GB prepared a draft TWP (Newco) "*Board paper considering the valuation of the Group*". The draft paper explained that, at the time of the shareholder reorganisation in August 2009, Holdings was valued at £35m. However, following subsequent corporate and market developments, the (then) current Group valuation was less than £35m, meaning the ordinary shares had no value. The directors were therefore considering cancelling a proportion of the preference shares.

66. The paper set out two Group valuations on different bases. On the 'earnings' basis, GB calculated the Group EV at £15.2m using 2011 budget EBITDA and a multiple of 5.5 (selected following discussions with KPMG and Gresham Private Equity). On the alternative 'asset' basis, D3 calculated the Group EV at £19m, taking the 'earnings based' Colliers valuation of Dolan Park from 2009 (£17.5m), together with an earnings based approach to the other parts of the business not relating directly to the hospital. GB went on to explain that this alternative valuation was not indicative because (i) the multiples used in Colliers' earnings based valuation had declined since 2009 and (b) the budget forecast provided to Colliers for 2009/10 was £3.7m compared to an actual result of £2.4m.

E. EVENTS IN 2011

Group 'corporate events' - 2011

67. In January 2011, PG became THMG's Finance Director.

68. On 28 February 2011, KPMG provided Barclays with a certificate of compliance with the financial covenants in the Facility.

69. On 17 March 2011, NW e-mailed DR and GB concerning their discussion two days earlier "*about the potential for a re-organisation to split out the trading company from the properties*." Having thought about it, NW was of the view that Barclays was "*likely to go along with it*", subject to cross-guarantees and possibly seeking a report on the Group's activities prior to consent and more onerous "*terms and conditions*". This appears to be the first record of THMG discussing with D6 a possible Group reorganisation. The Claimant notes that the e-mail does not refer to splitting the business of THMG into separate companies which, it says, was not discussed in 2011.

70. On 30 March 2011, Barclays held its quarterly review and update, attended by JK and GB. In relation to the (re)forecasts for the year ended 31 May 2011, the Zeus remarks now indicated a projected loss before tax.

71. In April 2011, GB was considering appointing new auditors for THMG because "*our first year with KPMG did not go well!*".

72. On 20 April 2011, JK and GB met to discuss the 'hair merger' proposal. This envisaged a joint venture with the US hair transplant and restoration business, Ziering Medical Inc. (**Ziering**), to form a new UK company. In his Zeus remarks from May 2011, JK recommended approval be given.

73. On 27 May 2011, KH provided GB with a draft agreement for the transfer to Holdings of the shares in Edgbaston Medical Group Limited (**EMGL**) which operated the Group's existing hair restoration business. KH advised that "[t]*he shares must transfer at market value to avoid any risk that the transaction is one at an undervalue*." KH noted her understanding that the value of EMGL was between £2-3m, including intercompany debt and reserves, the latter to be 'distributed out'. The draft provided for the consideration to be left outstanding as an interest free loan repayable on demand. KH flagged potential Stamp Duty liability on the transfer but said her firm did not advise on tax and that GB would need to speak to KPMG.

74. On 21 June 2011, NW provided DR with notes for discussion with GB concerning the termination of his employment with THMG. Further discussions took place in July 2011 as to GB's severance terms, including his undertaking of 'project work' on a consultancy basis and the 'return' of GB's ordinary shares in TWP (Newco).

75. On 4 July 2011, JK met GB to discuss "*updated fye performance and budget Possible breach on look forward test - loan note holders to postpone payments*."

76. On 13 July 2011, CK sent TWP (Newco) its letter of engagement as new auditors for the Group companies. Mr Gavin Whitehouse was identified as the Senior Statutory Auditor under CA06, s.504.

77. On 22 July 2011, CK provided its covenant compliance certificate to Barclays, reporting that "[i]*t appears that the Debt Service Cover covenant is forecast to be met for Q1 FY12 and Q2 FY12 only if the loan note holders agree to the delay in loan note payments and this position has yet to be formally agreed*."

78. An attendance note prepared by D6 dated 27 July 2011 recorded the following new instructions:-

(a) The proposed Ziering merger was on hold because THMG was on the verge of "*running out of money*";

(b) THMG had a banking covenant to comply with by 21 August 2011 and would be in breach unless something was done;

(c) The issue dated back to 2009 when THMG capitalised the value of its shares through preference shares and the buy-out of Judith Slater's shareholding;

(d) The proposed answer was to cancel some of the preference shares (c.£12m);

(e) NW understood that THMG was solvent and its borrowings not that large. However, it was too highly geared;

(f) GB had failed to negotiate a high enough overdraft from Barclays and had got his accounting forecasts wrong (by not accounting for a large National Insurance liability). THMG had been operating short of money since;

(g) DR, SM and Donna Ross were willing to agree to cancel preference shares;

(h) THMG would also defer the loan note payments to Judith Slater. She was already unhappy with the current situation with the loan notes and could prove a problem in re-negotiating the arrangement;

(i) THMG would also vary the bank account terms so that there would be a minimum account balance with any excess paid to loan note holders;

(j) Draft heads of terms were to be submitted to Barclays by 8 August 2011; and

(k) The Ziering deal would proceed once the matter had been sorted with Barclays.

79. In its note dated 27 July 2011 of a visit to KPMG to review audit files for the year ending 31 May 2010, THMG's new auditors, CK, considered the Group's review of the potential impairment of TWP (Newco)'s goodwill balance (£23.6m). The review revealed potential indicators of impairment, namely below budget prior year performance and the (then) current EBITDA levels. The Group had calculated the 'value in use' of the goodwill at £53.5m,[8] representing the present value of future cashflows obtainable as a result of an asset's continued use, including those resulting from its ultimate disposal,

[8] The relevant accounting standard (FRS 11) allowing goodwill to be carried at the higher of its net realisable value or value in use.

discounted at the company's cost of capital. Following its own analysis, CK concluded that no matters had been identified which caused it to "... *disagree with management's assessment that there is no impairment to goodwill*."

80. On 22 August 2011, Judith Slater's solicitors, Clarke Willmott, wrote to D6 seeking further information to enable its client to consider the proposed loan note payment restructure.

81. On 20 September 2011, GB sought Barclays' consent to the proposed cancellation of 9,073,000 TWP (Newco) preference shares. JK provided this on 22 September.

82. As part of the corporate approval documentation for the preference share cancellation, D6 sent a letter dated 26 September 2011 to DR to circulate to the directors of TWP (Newco), explaining that any special resolution approving the cancellation had to be supported by a statement of solvency, the directors had to consider carefully the financial position of the company before signing the statement and that there was a risk of commission of a criminal offence for making such statement without reasonable grounds.

83. On 30 September 2011, D3 resigned as a director of THMG, Holdings and TWP (Newco). On 3 October 2011, a compromise agreement was executed in respect of the termination of his employment.

84. On 3 October 2011, D3 also entered into a consultancy agreement with THMG (drafted by D6) by which D3 agreed (with effect from 1 October) to "*provide independent advisory and consulting services to the Company in relation to such projects and management issues as shall, from time to time, be assigned to him by the Company …. .*" Consultancy fees were payable at the daily rate of £500-£600 depending on the number of days worked each calendar month. By clause 3.3 of the agreement, D3 agreed that he would not:-

> "*3.3.1 have any authority to incur any expenditure in the name of or for the account of the Company unless the Company shall have agreed in advance to it being so incurred; or*
>
> *3.3.2 hold himself out or permit himself to be held out as having any authority to do or say anything on behalf of or in the name of the Company unless the Company shall have consented in advance to its so doing or saying*."

85. On 21 November 2011, DR, NW, KH and CK met, apparently to discuss "*the proposed re-organisation to create a new holding company (by exchanging the shares and loan notes which David Ross, Stephen McNerlin, Donna Ross and Judith Slater have in TWP (Newco) 66 Limited for shares and loan notes in topco) and to then transfer the shares which TWP (Newco) 66 Limited owns in* [Holdings] *to that newly formed company*." On 23 November 2011, KH followed up the meeting with an e-mail to NW, identifying the need for consent to the proposed re-organisation from Barclays and the share and loan note holders and, even though the trading entities "*are not being moved*", to ensure any existing regulatory approvals were not affected. KH identified the need for

any share transfer to be at market value "*to avoid potential company law problems which carry serious penalties and consequences*". She also flagged the need to check the Stamp Duty position on intra-group transfers. KH shared these thoughts with DR and CK on 28 November 2011.

86. On 9 December 2011, D3 submitted his first invoice as a consultant. His activities (over 8 days) included reviewing the preference share write-off documentation and assisting with impairment testing for the 2011 audit. The invoice was not addressed to any particular Group company.

Healthcare-related VAT issues - 2011

87. On 17 March 2011, IHAS circulated (including to CM) draft HMRC notes on the subject of VAT which, although not finally published, "*may serve to give the industry an indication of the areas in which HMRC are looking to "clarify" their position*."

88. On 1 June 2011, IHAS contacted Deloitte concerning draft HMRC VAT Notices, indicating that these should be issued in August or September 2011 and that the guidance on cosmetic procedures was not yet finalised. IHAS suggested a webinar in July 2011, including a brief update on the "*cosmetic surgery position*" and a seminar once the draft notices had been finalised to discuss the cosmetic surgery guidance, the issue being "*obviously very significant*".

89. On 13 July 2011, IHAS and Deloitte held a webinar on "*VAT and The Healthcare Industry – Important Developments*", including as one of the "*Issues to keep an eye on*", "*VAT & cosmetic surgery – likely changes to the VAT treatment*." The slide bullet points recorded (i) the (then) current exemption from VAT of most cosmetic surgery procedures (ii) the indication in HMRC draft notices of significant changes to its position (iii) the application of the exemption where the surgery had a therapeutic aim and (iv) many surgical procedures becoming standard rated unless appropriate steps were put in place.

90. In its note dated 27 July 2011 of its visit to KPMG to review audit files for the year ending 31 May 2010, CK recorded in relation to VAT the historical error in respect of the VAT treatment of "*acquisitions from the EU*" reported by KPMG to HMRC on 13 January 2010.

91. In October 2011, an IHAS briefing paper anticipated the UK Government "*looking for an opportunity to test the regulations*" and canvassed two elements to the industry's response, namely to (i) challenge any test case brought by HMRC and (ii) lobby to persuade policymakers that it did not make sense to impose VAT so widely on cosmetic surgery. Clarity was required from HMRC but, "*if one day we get caught up in this*", it was hoped that "*an ordered and sensible approach*" would be taken and VAT would not start to be chargeable until some future agreed date.

92. From mid-October 2011, the press began to report that the cost of cosmetic surgery would rise by 20% under forthcoming new VAT guidelines.

93. In November 2011, HMRC issued revised Notices (701/31 and 701/57) providing VAT guidance for, respectively, health institutions and health professionals, replacing those previously issued in early 2007. The former (for health institutions) referred generally to supplies by a qualifying institution potentially being exempt from VAT where they comprised "*care or medical or surgical treatment in connection with the health of the beneficiary*", including "*performing medical or surgical procedures with the aim of protecting, maintaining or restoring the health of an individual*." The emphasis of the new guidance was therefore on therapeutic benefit.

94. It appears that PG attended an IHAS organised meeting at BDO's offices on 4 November 2011 to discuss VAT on cosmetic surgery and treatments. BDO's slides for the meeting indicate that it considered HMRC's approach of "*attacking various* [sic] *practises suggesting they are not providing medical care*" itself to be liable to attack as taking too narrow a view to what was required for the exemption properly to apply in the cosmetic sphere. The meeting indicated unanimous agreement to support the 'main case' involving BACD. IHAS communications later in November 2011 concerning lobbying activity (including one sent to PG), referred to the potential for HMRC to raise assessments for backdated VAT. On 29 November 2011, Deloitte noted in an e-mail exchange with IHAS that "[t]*he VAT cases will not be heard for at least a year*."

<u>Claims activity and provisioning/ PIP developments - 2011</u>

95. In its note dated 27 July 2011 of its visit to KPMG to review audit files for the year ending 31 May 2010, CK noted as a key issue during 2010:-

> "*Claims/litigations provisions – no solicitor's letters were sent. The legal documentation on site is substantive and therefore this was reviewed and no item was considered significant enough to warrant a solicitors letter*"

96. CK also noted the following as a result of its meeting with D3 and LF in relation to the prior year's claims provision (£468,053) and LF's claims spreadsheet upon which it was based:-

> "*How the claims spreadsheet works:*
>
> - *An assessment of the cost, which is based on advice from Wilkes (solicitor) is made. This is broken down into*
>   - *The reserve required – i.e. the payout that will be made; and*
>   - *The patient's legal fees which may have to be paid. The legal fees will be higher* [sic] *is the case is funded through legal aid or a 'no win, no fee' solicitor*
>
> - *An assessment of the "potential to reclaim" from the surgeon is made. This is dependent on whether there is a case for liability*

being joint, and also whether there is still an ongoing commercial relationship with that surgeon.

- *An assessment of*
  - o *The likelihood of the case proceeding*
  - o *The probability of paying out; and*
  - o *The strength of the claim is made.*

  This is based on legal advice from Wilkes along with management experience of similar cases

- *The claims provision spreadsheet multiplies all of the above to give a provision that is deemed appropriate for the case. This is monitored and updated on a monthly basis as the case progresses*"

97. On 28 September 2011, LF e-mailed DR attaching her claims spreadsheet, with the figures apparently compiled on the basis (i) no case would go to trial (ii) of estimates from D6, with a percentage reduction on account of the number of defendants and (iii) the claimants would agree to deferred payments. LF noted that PIP cases were starting to rise and, although they may find themselves "*lucky that there is no avenue for them to progress*", they needed to be aware of this. The cases on the spreadsheet were not all the Group had. LF described the projection as "*utterly dire*". The spreadsheet appears to comprise 43 cases, including three PIP cases each indicating estimated exposure of £150,000. DR forwarded the spreadsheet to NW who responded on 30 September 2011, noting (i) his understanding that LF thought the claims might have peaked and (ii) the forthcoming changes to the relevant costs rules.

98. The Claimant relies on LF's 'utterly dire' e-mail, the high PIP costs figures in the spreadsheet and the subsequent commencement of the first PIP legal action in November 2011 as reflecting rising concerns within THMG about patient claims, including PIP. On 10 October 2011, DS e-mailed LF in relation to a PIP case, explaining "[m]*ore worryingly*" that legal proceedings in relation to PIP had been intimated against 12 defendants by a firm apparently acting for 18 claimants. DS said that the matter was likely to be "*extremely expensive*", albeit it was "*extremely difficult*" at that stage to advise on the extent of costs (both legal fees and settlements) without knowing the number of potential claimants. DS anticipated a group litigation order (**GLO**) might be made. LF's initial view was that they should wait to see what they had to defend before instructing leading counsel.

99. On 18 October 2011, CK performed litigation provision testing for the May 2011 year end audit by reference to a sample set of seven claims to ensure that the provision was fairly stated in THMG's accounts. CK reported that, based on its testing, this objective had been achieved. THMG's audited accounts to 31 May 2011 stated a provision of £649,438 (increased from £468,053 at 1 June 2010). The accounts also contained the following contingent liability note for PIP implants:-

> "… *At this time the Government advice is that these implants should not be routinely removed unless there are signs of rupture or leakage. The company is monitoring the situation on a daily basis, taking legal advice and carrying out those procedures where medically indicated*."

100. On 15 November 2011, DS notified LF (and NW) of the service of a claim form (by JM) in relation to PIP. 27 claimants and 13 defendants were identified, including a claim against THMG based on the unsatisfactory quality of the implant under section 4(2) of the Supply of Goods and Services Act 1982. Surgicare was also identified as an (unserved) defendant. DS' view was that leading counsel's opinion should now be obtained. The JM claim did not have a high value (£5,850, principally comprising the cost of revision surgery), apparently because the implants had not ruptured. However, damages for personal injury, including psychological injury, were also indicated. DS considered it would be difficult for THMG to defend these actions and, despite the non-rupture, that its prospects were no better than 50%. DS anticipated a GLO would likely be made at some point and more claims would come forward once the proceedings were publicly known. On the same day, NW responded, explaining that Surgicare had been bought from its administrators and, as such, "*claims for operations carried out before the purchase die with the insolvency of Surgicare*."

101. On 9 December 2011, DS spoke to David Kidman, then of BLM Solicitors, apparently acting for insurers in the defence of the PIP claims. According to the note of that call, HJ had approximately 270 claimant clients, was anticipating issuing and serving proceedings in January or February 2012 and was considering a GLO. Another solicitors' firm, Freeth Cartwright, had also apparently issued proceedings, albeit it seems it did not represent former THMG clients.

102. On 20 December 2011, in response to the report from France of the death of a PIP implantee from a rare form of cancer, the MHRA issued a public statement, noting that there was insufficient evidence to indicate any association with cancer.

103. On the same day, the BBC reported that "*French authorities say they will decide this week whether to ask 30,000 women given a potentially defective type of breast implant to have them removed*." The Guardian also reported in relation to PIP implants that "*British women to sue over breast implants – 40,000 Britons affected by the scandal, including cancer survivors*".

104. On 22 December 2011, DS reported to NW that he was in the process of instructing Lawrence West QC (**LWQC**) to advise on a specific PIP case, and generally. He also noted that "[t]*he word is that the French Government will announce tomorrow that PIP implants should be removed and that they will pay for the removal. I have no idea what that will mean for the UK, where the advice is still to leave them where they are unless they have ruptured (See attached for the latest info from MHRA)*." NW agreed the need to instruct leading counsel upon D6 being put in funds. On the same day, NW contacted LF about an apparently unrelated matter but noted in closing: "*Finally I hope the PIPs stuff*

has not kept you awake--the report of the MHRA is about as good as its ever going to get I think!--Its now about the way you tell 'em."

105. On 23 December 2011, AFSSAPS announced that, although there was no increased risk of cancer in women with PIP implants compared to those with other implants, the proven associated risks were ruptures and irritation caused by the gel, potentially leading to inflammation and making removal difficult. AFSSAPS therefore proposed the preventative removal of PIP implants even in the absence of clinical symptoms of implant deterioration. On the same day, the MHRA announced that it "*is not recommending routine removal of PIP silicone gel breast implants in the UK.*"

106. On 23 December 2011, DS sent instructions to LWQC to advise and to settle the defence in the PIP claim against THMG, with formal instructions to follow after the Christmas break. DS indicated that he was aware of letters of claim from HJ in relation to four more former THMG PIP patients, that THMG may have received more and that "*these cases are probably only the tip of the* [sic] *iceburg*."

107. On 31 December 2011, the Daily Mail and Daily Telegraph published articles about the PIP scandal.

108. A monthly case report from December 2011, apparently prepared by DS in respect of a PIP claimant whose claim was 'opened' on 6 September 2011 but who had not yet issued proceedings, indicated a reserve of £15,000 (as a "*rough guide*"), a "*best estimate*" of D6's anticipated costs and disbursements of £20-30,000, anticipated claimant's costs and disbursements of £80-100,000, resulting in total anticipated costs including damages (net of VAT) of £130-150,000, "*to be re-evaluated once the extent of this particular claim and all of the PIP litigation matters are considered*". DS also contemplated a possible group action involving thousands of claims. Although not one of the cases shown on LF's 28 September 2011 spreadsheet, DS' (higher) total claims figure (£150,000) corresponds with LF's PIP claimant figures. D6's monthly case reports indicated the same estimated figures going forward.

<u>THMG enters 'EWL2'</u>

109. On 10 August 2011, JK e-mailed his colleague, commenting on developments within THMG, including:-

(a) the preference share cancellation, viewed as a positive step;

(b) THMG's inability to meet loan note payments for the following two quarters in light of a PAYE repayment plan with HMRC; hence the change to the loan note repayment mechanism;

(c) GB's departure as Finance Director, precipitated by an accumulation of issues, including PAYE, the non-completion of the Ziering deal and the desire to have someone "*closer to the numbers*", GB's strength being in corporate transactions;

(d) The change in management, auditors and the "*look forward breach*" for which JK "*would usually recommend EWL1*", albeit the company had reacted swiftly with GB's replacement and the loan note restructure; and

(e) The problem being that the original deal was "*too rich*" and the shareholders had been "*taking too much cash out*", albeit "*trading is holding up on the topline and a/cs are not seeing pressure*."

110. On 5 September 2011, Barclays' Assistant Credit Director e-mailed JK. His reaction to the (then) current profile of the business was less positive than JK's and, given the "*gloomy picture*", he considered "*EWL2*" might be required.

111. On 6 September 2011, Barclays' Zeus form was completed, with JK noting in detail the negative developments within, and proposed mitigation steps by, the Group, albeit also recommending renewal of Barclays' facilities for another 12 months.

112. On 20 September 2011, the case was passed to BS in the BBS. The reasons cited for the 'EWL2' status ascribed included the forecast debt service covenant breach (and required loan note restructure to avoid breach), four months PAYE arrears (albeit with an arrangement in place), EBITDA not meeting budget, lack of credible forecasts, large creditors outstanding for more than 90 days (albeit with THMG confirming no creditor pressure) and the recent replacement of GB with an interim Finance Director.

113. On 30 September 2011, BBS received a 'funds control' request to release three payments, taking THMG's net sterling account balance 'into excess' by about £55,000. BBS asked for enquiries to be made before meeting the customer whether it had "*cash pressure*". In his related exchanges with Barclays, PG stated that the aggregate cash balances held should not have put them above the limit and confirmed receipts totalling nearly £300,000 over two days.

114. On 4 October 2011, BS asked JK to arrange a mutually convenient appointment and to "*positively position the role of BBS*." BS also suggested that "[i]*t would be appropriate to advise the customer that the business is off track against plan and the bank is seeking greater clarity on the May 2012 cash generation and to understand the medium terms plans for all the stakeholders in the business*."

115. BS, JK, DR and PG met on 20 October 2011, as a follow up to which, BS planned to send an e-mail setting out Barclays' "*shared concerns*", namely (i) the cash need of the business to pay all balance sheet commitments (ii) trade creditor pressure (PAYE arrears) (iii) gross margin erosion due to market conditions (heavy discounting by competitors), considered a short term market feature and (iv) a long term agreement with loan note holders. JK had no observations on the proposed e-mail but re-visited Barclays' internal discussion following the meeting with THMG, his understanding being that BS was "*fairly comfortable with this case*" (based on the Bank's position being protected), the main factor being divergence from budget and the need for realistic and accurate forecasting. JK remained of the view that THMG should be EWL1 (not EWL2) but accepted the position of Barclays' Credit on this.

116. On 2 November 2011, Barclays reported another 'excess' on THMG's sterling account and, given the indications of cash pressure, recommended a communication to ensure account limits were maintained.

117. On 9 November 2011, BS produced an "*EWL Strategy Sheet*" for TWP (Newco) and THMG, indicating the "*objective*" as "*turnaround*" rather than "*managed exit*". The "*agreed triggers to hand back to live*" were identified as (i) customer trading in line with budget (ii) covenant compliance and (iii) no cash pressure in evidence on THMG's bank account.

118. On 21 November 2011, BS updated the Strategy Sheet and produced his first Zeus "*report following case adoption*", noting many of THMG's difficulties already noted within D5 when the case was passed to BBS, concluding that "*BBS recognise this case strategy is about early intervention and a robust contingency plan given, weak Balance Sheet / potential over reliance on short-term Creditors and supporting security asset very specialised*".

119. On 21 November 2011, BS informed JK that "*in principle we would renew the facility, however need to ensure cash/ trading on track*". BS sought an update on further expected financial information.

120. On 12 December 2011, JK, BS and PG met at Dolan Park to discuss trading performance. Matters discussed included the engagement of a new internal accountant to support PG, the various reasons for profit margin erosion, supplier creditor 'stretch' (indicated as £550,000 'stretch' out of £1.1m), shareholder objectives and incentivisation of the SMT.

121. On 16 December 2011, CK sent Barclays the covenant compliance certificate for THMG for August 2011, JK forwarding this internally at Barclays and noting that THMG had "[p]*assed just!!*" The certificate anticipated suspension of loan note payments and an adjusted plan for future payments.

122. On 20 December 2011, Barclays noted internally that a petition for the compulsory winding up of THMG had been dismissed on 12 December 2011. On the same day, JK sought further detail from PG. On 22 December 2011, PG responded that he did not know to what this related although there had been an issue with Surgicare two weeks earlier which had been resolved immediately. JK responded that he had no further information but needed to know the background and amounts involved for this "*internal reportable event*."

F. <u>2012 EVENTS LEADING TO THE RESTRUCTURE</u>

123. From early January 2012, national press publicity about PIP significantly increased, focusing on PIP rupture rate, whether this was within industry range, the related expert review of implant data and whether private clinics should meet the cost of removal of PIP implants.

124. On 3 January 2012, JK e-mailed PG for an update call about the dismissed winding-up petition and the "*recent press around the French breast implants*." BS' manuscript note of his call with PG indicates that they discussed various

issues, including a Surgicare PAYE liability of £120,000 and (then) current PAYE arrears of "*circa 1 month £140k*". BS requested various items of financial information. In relation to PIP, the notes indicate that 400 patients were involved and they refer to "*notice of website*", "*contingency plan*" and "*who is responsible for remedial work*". A meeting in January and the issue of "*PIP impact on future enquiries/ sales*" were both canvassed.

125. On the same day, LF e-mailed NW for a call about PIP. An abbreviated manuscript note of that call is difficult to discern but it mentions a percentage figure (1%), numbers of ruptures (26) (apparently reported to the MHRA), a number of patients (2,600) (apparently unvalidated) and, without elaboration, " * *Failure Rate* * ".

126. Further abbreviated manuscript notes in the record indicate that, on 3 January 2012, NW also had separate calls with DR and CK. The former appeared to concern the ownership structure of the Group. The latter mentions "*Valuation Stats*", goodwill impairment, the November certificate (presumably for Barclays) as well as the Group Structure, described as "*unwieldy*", causing "*admin problems*." A follow up e-mail from NW dated 4 January 2012 attaches the Group organisational chart "*we looked at at Clement Keys*" (possibly at their 21 November 2011 meeting). NW also referred in the e-mail to his discussion with CK which "*agrees that there are things which could be done to separate the trading divisions*". The attached chart showed Surgicare as a subsidiary of Holdings, albeit a hand-drawn arrow suggests THMG.

127. On 5 January 2012, apparently in response to one of BS' requests from their discussion on 3 January, PG sent BS the "[p]*urchase ledger ageing for THG*", showing THMG's total creditors of approximately £4.161m broken down on an aged basis as follows:-

90+	**60**	**30**	**Current**
£1,414,765.73	£874,557.97	£1,272,513.17	£599,147.32

128. Three creditors, Allergan, Forward and Spireman, accounted for nearly 80% of the total 90+ day creditors in value (£113,100, £663,243.78 and £338,732.89 respectively).

129. On the same day, PG sent BS and JK a separate e-mail on PIP implants, explaining that THMG was finishing an exercise requested by the MHRA of identifying how many patients had PIP implants. The Claimant says BS was told there were about 3,000 patients with "*defective*" implants. In fact, BS was told that about 3,000 patients were "*affected*" (not that all their implants were defective), albeit not all patients were within the date ranges of the faulty implants. THMG was dealing with a huge number of calls from patients who did not know whether they were affected. Those patients were directed to the Company's website and asked to complete a form, following which, THMG would respond. THMG was liable to replace ruptured implants which they had been doing as they came along. A government statement was due based on industry data. Only Nuffield had volunteered to remove PIP implants although

their volumes were low. As a clinic, THMG was better placed than most, if required, to remove implants since it had its own facility. There was also the opportunity to 'upsell' to any patients, offering to replace at additional cost. THMG did not expect future sales to be materially affected.

130. On 6 January 2012, in advance of their meeting the next week, NW sent DR and LF an update on various negligence cases showing their status, the final column flagged as "*very much a worse case position*" if every case was fought to a full trial and lost. Of the 21 cases, none appeared to concern PIP implants. However, NW 'crossed his fingers' for "*today's announcement on PIPS*". The Claimant says this "*contemplated a potentially heavy spend moving forward on general patient claims as well as PIP*." The former is correct but, as noted, the schedule did not mention PIP.

131. On 6 January 2012, Sir Bruce Keogh, then NHS Medical Director, issued the interim report of the expert group he chaired on PIP implants. In summary, the report concluded that:-

(a) There was no evidence that PIP implants were associated with a higher risk of breast cancer than other silicone gel implants;

(b) The statistical evidence on PIP rupture rates compared with other implants was incomplete and could not be assessed accurately;

(c) The expert group considered that there was a duty of care on surgery providers to offer PIP implantees whatever was reasonably needed to reassure them they would not suffer long-term health effects as a result of PIP's deception;

(d) The NHS would support removal of implants received from the NHS if informed by clinical assessment; and

(e) The expert group expected providers in the private sector to take similar steps.

132. Industry discussion, including by IHAS and its members, then focused on the potential need for PIP removal and, if required, who should pay for it. The Claimant says the interim report did not resolve the uncertainty around PIP and the expert group's expectation of private providers led to THMG's PIP strategy to deal with pressure of removal, albeit that strategy was not the answer to the PIP claims. The Claimant also highlighted in closing DR's written evidence concerning the uncertainty as to "*how many patients were affected throughout*", even speculating that the Company lacked sufficiently robust data to share with the Keogh group of experts "*or chose not to do so*." However, the uncertainty described by DR in his statement was not as to how many women had received PIP implants from THMG but as to how many women *still* had them (in light of further procedures they might have undergone). Moreover, the record shows that THMG *was* engaged in providing PIP patient data to the MHRA.

133. On 6 January 2012, PG sent BS and JK THMG cash flow forecasts through to May 2012. These indicated an opening (positive) cash flow balance of £217,651 at calendar year start with anticipated receipts of £3m in January, rising to £3.46m in May 2012 and anticipated expenditure of £3.36m in January, rising to £3.91 in March (with particularly large payments to Allergan and Forward), before then dropping to £2.08m in May 2012, leaving a closing (positive) cash flow balance (at May 2012) of £1.71m. Although the forecast indicates no payments for "*PAYE catch up*", the PAYE row does indicate two payments of £150,000 each in early January (originally due to HMRC in November and December 2011) before THMG would apparently get 'back on track' with a further £150,000 PAYE payment due on 19 January 2012.

134. On 7 January 2012, CM circulated to DR, SB and LF 'crude' figures for the cost to THMG and patient of undertaking PIP replacement surgery if conducted using a dedicated list of eight PIP patients or by adding individual PIP patients to selected cosmetic lists, the latter appearing to be cheaper for the patient.

135. On 10 January 2012, a meeting took place between DR, SB, LF and NW, with SM attending by telephone, apparently to discuss the liability implications of PIP implants and the need (or otherwise) for their removal. The Claimant says that this was a "*meeting re restructure*" but the relevant manuscript note does not indicate this. The Claimant also says that the "*overall solvency of the Company was being considered*" apparently because of the reference to the amount of its creditors and patient deposits. However, this is the Claimant's speculation. The note also records that, as part of its PIP strategy, THMG would seek patient disclaimers, as to which, there were two elements: (i) making clear that THMG advised against the routine removal of PIP implants and (ii) compromising any tortious or contractual claims against THMG. The Claimant says such waivers were ineffective and, as borne out by later events, only a "*small sticking plaster*".

136. On 10 January 2012, DS provided more detailed instructions to LWQC, DS noting:-

(a) THMG faced more potential claims in respect of PIP implants in addition to the claim already issued;

(b) DS was aware of four more matters originating from HJ, representing 270 claimants against a number of defendants;

(c) THMG may have received more letters of claim but had dealt with these in-house; and

(d) THMG had implanted several thousand PIP implants over the years and DS believed these cases were probably only the 'tip of the iceberg'.

137. On 11 January 2012, SB informed CM that THMG was proposing to offer consultations to all PIP patients. THMG would remove all ruptured PIP implants and replace these free. For others requiring replacement or uplift, THMG would charge a 'non-commercial gain fee.' D6 prepared draft

settlement and confidentiality agreements for signature by those patients who accepted the offer, NW noting his view that the suggested threat of legal claims by the NHS if they removed implants rather than the private clinics concerned was "*legally spurious*". On 17 January 2012, SB described the strategy internally as that of "*a considerate professional sympathetic provider, setting ourselves apart from other providers that are not prepared or are unable to support their own patients*", also offering support to non-THMG patients.

138. On 12 January 2012, Barclays communicated internally concerning Surgicare and its outstanding accession to the Bank's security, JK reporting that the "*business is in chaos at the min with all the PIP issues (dodgy implants). And government requests - So I don't expect a prompt reply*."

139. On the same day, DR asked NW what cross-guarantee Barclays had over "*the international companies*", GB having apparently previously mentioned that these were "*outside the net*". On 16 January 2012, KH advised that a negative pledge in the Facility prevented THMG and Holdings disposing of any assets (including shares held by Holdings in the Group's overseas companies). The Claimant says that "*DR appeared to be looking, with* [D6]*, at whether or not assets could be transferred abroad/disposed of*." From D6's response, it seems that the enquiry was not about transferring assets abroad rather than potential limits on the Group's ability to deal with its international assets. NW's manuscript comments on an e-mail dated 16 January 2012 indicates (renewed) discussion about EMGL and Ziering. NW confirmed in his oral evidence that this was the subject matter of DR's enquiry.

140. On 13 January 2012, BS reported internally that, because of THMG's exposure to PIP breast implants, he wanted to "*be in front of them*" on the proposed meeting date (20 January) rather than move it.

141. On 16 January 2012, CK sent NW the documents on file held by CK concerning the incorporation of Surgicare.

142. On 16 January 2012, NW and LF exchanged e-mails concerning another patient quoting the Supply of Goods and Services Act 1982 to THMG in the context of PIP.

143. On 16 January 2012, DR, NW and CK apparently held a meeting concerning the Restructure. DR did not recall the meeting but NW's e-mail, apparently annotated at that meeting, although not wholly clear, states:-

> "*Property*
> [*Bought at*] *MV & declare a*
> *dividend out.*
> *Realisation Proceeds*."

144. The Claimant noted that the dividend being raised in early 2012 contradicts DR's written testimony that the idea of the dividend was first raised by CK in summer 2012. NW testified that CK suggested in January 2012 that Dolan Park could have been hived-up with a dividend but that this idea "*went out of*

circulation then for several months", only then to be reintroduced by CK. Following the meeting, DR communicated on 19 January his decision concerning the list of trading companies in the Restructure.

145. On 17 January 2012, DS had a preliminary discussion with LWQC in advance of a planned consultation. The latter's view was that claims against the UK and French regulators would be difficult. He considered damages to be contractual with potential for damages for disappointment. However, each claimant would need to show that her implants were faulty. Damages were unlikely to exceed £20,000 but costs would be much greater because of Conditional Fee agreements. He considered the existing claimant had no claim because she had no rupture and, on the pleaded case, no loss. The consultation was scheduled for 26 January at D6's offices.

146. On 20 January 2012, BS, JK, DR and PG met for a presentation of THMG's budget and update on performance. The issues covered at that meeting included:-

(a) PIP, as to which, there were apparently 4000 clients, with 1000 having had a routine replacement, 900 concerned (with 450 booked in and 450 to be booked in) and 2000 who had not expressed interest. Three schemes were offered: (i) free removal (ii) replacement for £1,500 and (iii) premium replacement;

(b) Surgicare which had performed 2,500 PIP surgeries; although there was no obligation to resolve concerns of former Surgicare patients, due to the brand, THMG offered the same schemes (at a higher price) for both replacement types;

(c) The legal action group headed by HJ with 600 clients but only two former THMG clients;

(d) The winding-up petition, apparently relating to a Surgicare debt for £120,000, with correspondence possibly sent to the old address;

(e) THMG's PAYE which was one month behind but would all be up to date by 23 January 2012;

(f) The purchase ledger, with 90+ day creditors representing 34% of the total; and

(g) The new Financial Controller, Skott Hughes.

147. The Claimant says that Barclays' note of the meeting put the number of "*potential PIP claimants*" at 4000. However, the note talks of "*clients*" and DR's related cross-examination the number of "*patients*" who might require replacement surgery, not who might make a claim, albeit some or potentially all of them might, of course, go on to do that. Moreover, although 1000 were potentially being dealt with as routine replacements, the Claimant points out that this would not prevent a contractual claim. Finally, the Claimant says that

DR accepted that such replacement by THMG "*could potentially translate to 8,000 implants or procedures*." However, as I understood DR's evidence, he indicated a maximum of 4000 patients or procedures, with a maximum of 8000 implants.

148. On 23 January 2012, KH and CK had a call in which they discussed DR's list of trading companies in the Restructure. The related abbreviated manuscript note indicates that they referred to (i) completion of an annual return (ii) a share for share exchange and (iii) "*market value ... to avoid preference claim*." The Claimants says this shows an incomplete understanding of insolvency law but that they had creditor avoidance in mind.

149. On 24 January 2012, BS followed up his meeting with PG with an e-mail stating that "*I share your view that taking a long term approach and seeing P.I.P as an opportunity to enhance your brand will prove the right strategy*."

150. On 24 and 25 January 2012, GB, PG, NW and KH exchanged e-mails about the availability of the statutory books for THMG's subsidiary, Nu-Age,[9] and other Group companies required by KH in preparation for the Restructure.

151. On 26 January 2012, LWQC advised in consultation, including in summary that:-

(a) The PIP issue had become a 'political football' and its reporting bordering on the 'scaremongering';

(b) A claim against the UK or French regulatory authorities was extremely unlikely absent their knowledge (actual or constructive) of a problem by August 2008;

(c) With the advent of group litigation, there might be more cases to come;

(d) The cases were all going to be small claims - 'mosquito bites' - but the numbers involved would cause the financial problem;

(e) The cases were pleaded under the Supply of Goods and Services Act 1982, requiring goods to be of reasonable quality and fit for purpose;

(f) If there had been an actual premature failure of one of these implants, the overwhelming likelihood was that THMG would not escape liability;

(g) Absent a real complication, damages in such cases were unlikely to exceed £20,000 and were likely to be less;

(h) Unless there had been a unit failure, there would be no liability. The mere fact that some units were unacceptable did not render them all so;

---

[9] It appears that Nu-Age had been struck off the Companies Register in July 2011 and was later restored by Order of the Court made on 21 February 2012.

(i) There had always been a failure rate associated with implants, albeit at low percentages, and consideration of replacement at year 10 in any event;

(j) A court might yet find the existing claimant's implants of unsatisfactory quality but the £5,800 figure claimed for replacement was "*much too high*";

(k) The cases could have been framed by reference to the Consumer Protection Act 1987 or as personal injury claims but such actions required damage or injury to have occurred;

(l) Simply saying "*I've got a PIP implant therefore it's not satisfactory, therefore I am entitled to damages*" was not going to work. Vague complaints of psychological or physical damage were unlikely to be made out;

(m) Group litigation had a downside for claimants' lawyers who invariably ran the case on a CFA basis and had to persuade insurers of a reasonable prospect of success. In litigation in this area, the case would begin to fall apart like a 'wet tissue' because, for example, no damage was done;

(n) This meant they were likely to press forward with cases of actual failure but the other cases would likely fall 'by the wayside' because insurers would pull cover and clients would then be faced with an unexpected costs order;

(o) The strategy would entail a 'fairly steady' repudiation of liability save for cases where there had been an actual rupture; and

(p) Despite the sums involved being fairly small, it was important to avoid "*the death of a thousand cuts*."

152. The following matters were also noted during the consultation:-

(a) Of the 4,000 potential claimants, 800 had already been seen in the normal way under THMG's 'guarantee' and had received replacements;

(b) Patients were informed that, statistically, the implant would last 10 to 15 years, potentially making the liability case more difficult even with an actual failure;

(c) HJ was claiming to have 600 clients but it was believed that only 12 or 13 were former THMG patients;[10] and

(d) A group litigation proceeding would likely take a long time; THMG should try to keep "*the balls in the air for as long as we can and as cheaply as we can*".

---

[10] A list of claimants represented by Hugh James (apparently from 29 February 2012) indicates 21 THMG patients.

153. Although DR's evidence was that the advice with respect to the 'worried well' was positive, the Claimant points to the significant uncertainty at the time concerning the rupture rate of PIP implants. Damages for rupture cases were likely to be up to £20,000 and there still remained the risk of "*death of a thousand cuts*" through contract claims of smaller value potentially running into the several hundred or thousands in number – given the patient population, possibly up to 4,000. Moreover, there were unlikely to be any viable third party contribution claims. The Claimant says DR accepted that the outcome of the litigation was uncertain. Although that was DR's testimony in the context of provisioning for liabilities, when questioned more generally about the suggested "*wide uncertainty as to the outcome*", DR did not accept the premise, explaining that LWQC's advice was positive and that THMG was not experiencing hundreds of patients coming into clinic with a rupture. DR also pointed to it not being known which batches THMG had used in its procedures. NW made a similar point in his evidence. The Claimant said the record did not support a belief that some batches were unaffected. The risk therefore depended critically on rupture rate evidence and whether rupture would cause pain and suffering. However, the time it would take for a GLO to get to trial gave time for DR and the Group to implement their Restructure plans to prejudice and frustrate future claims.

154. After the consultation, DR, NW and KH met to discuss the Restructure. The Claimant has identified in the record what it believes to be the manuscript note of the meeting, indicating the movement of the two properties (Dolan Park and Cambridge) out of THMG to be held in separate companies. The note indicates the equipment to be worth £1m, the cash and stock £1m and liabilities (comprising creditors and patient deposits) £7m. The Claimant says that the document is concerned with the "*overall financial position and solvency*" of THMG but the discussion appears more concerned with the Restructure than solvency issues. There is also reference in the note to litigation and the figure of what appears to be £2,000 or £2m (not including PIP claims), followed by a reference to a figure of what appears to be £16,000 or £16m. The Claimant says the former is reference to the worst case scenario of £2m overall patient claims admitted by DR in evidence, albeit earlier in the same evidence DR recalled the number being £1m, not £2m. The Claimant also says the latter figure was reference to potential PIP claims of £16m. DR said that £16m was not a figure he recognised but denied it was a possible PIP claim figure. The Claimant says £16m (before costs) was plausible based on 4,000 claimants seeking £4,000 in contractual damages or other alternative permutations, including based on rupture claims.

155. Accordingly, the Claimant says that, by the end on January 2012, the purpose of the Restructure was evident: PIP was the number one issue within THMG, DR had decided to separate out the Company into separate business streams and cause it to cease trading and to use a dividend to extract value out of THMG. NW was party to DR's "*plan*", understanding DR's desire to identify a solution to control the historic claims problem. The (prejudicial) motivation for these proposed steps was the increased exposure to claims, with value to be moved to other parts of the Group not affected by them to try and exercise control over spiralling costs and fees.

156. On 26 January 2012, as part of its audit procedures for THMG's financial year end May 2011, CK undertook a "[l]*itigation discussion*" to "*ensure that the company has considered all potential provisions / contingent liability requirements*." As well as considering claims that might be taken up against THMG, CK considered PIP implants, including recording its own research that "*… UK testing has not identified any increase in rupture rates, nor has it identified any increased risk from the industrial grade silicon from normal silicon*."

157. CK met PG who explained the litigious nature of the industry, that THMG experienced a claims rate of around 1% of all operations and that ongoing claims were provided for on the basis of likelihood of payout, as discussed with D6. In relation to PIP, even if THMG had to replace all implants, the cost would be vastly reduced compared to their competitors because it already had a hospital and facilities. CK also met LF who explained that "[l]*itigation is provided for in one large spreadsheet. This is split between Edgbaston Medical Group (hair) and The Hospital Medical Group Limited for all other claims. She is confident that all claims have been included and valued at an appropriate estimate of cost*." As for PIP, LF summarised the position as follows:-

> "*In essence, the UK government has confirmed that the implants are not higher risk than standard implants for rupture, and hence have not recommended that any action is required, although they are stating that they expect private firms to 'do the right thing'. Therefore, THG decision to remove for free if the patient wishes appears (and replace at ½ price) seems a reasonable step*."

158. Based on its testing, CK concluded that " *…. there does not appear to be any legal claims or litigation for this company to provide against*." As part of the audit process, D6 also confirmed as reasonable THMG's estimate of liabilities for seven (non-PIP) personal injury claims identified by CK.

159. On 28 January 2012, CK sent KH the proposed Group structure for discussion at a meeting at Dolan Park the following week. This showed the Group companies 'sitting below' Holdings, including a proposed new company called "*Hospital Property Leasing Limited*" and the trading companies identified by DR on 19 January, with the ultimate parent company "*to be confirmed*".

160. It appears that, on 28 January 2012, the Daily Telegraph published an article critical of THMG's requirement for a waiver of rights to be signed by PIP patients. In early February 2012, a journalist approached THMG about this, around the same time a patient was refusing to sign hers. The Irish Independent also wrote an article critical of the requirement. LF later explained of the waiver forms that it was more difficult to 'stand firm' on this requirement for those patients whose implants had ruptured.

161. On 31 January 2012, PG sent BS and JK a Group re-forecast for the period June 2011 to May 2013. The accompanying assumptions included:-

(a) An increase in professional fees in November and December to reflect additional PIP legal fees, before returning to current levels of spend;

(b) Cash flows showing stretching of suppliers "*a little*" at each quarter end but at a reduced amount over the next 18 months, the conservatism of the budget expected to generate additional cash flow available further to reduce the credit stretch; and

(c) The business being one month behind with PAYE, to be caught up immediately and maintained throughout the forecast period

162. The commentary to the Group's January 2012 management accounts (sent by PG to the Bank on 7 March) explained that "*January has been a particularly challenging month with the PIP crisis within the industry*." Despite this, the Group managed to achieve forecast EBITDA, supported by Surgicare PIP patients who had elected to have their implants replaced.

163. On 3 February 2012, PG also sent BS and JK "*PIP workings*" showing (i) 1000 "*active patients*" for THMG and 700 for Surgicare (ii) a range of procedures from removal, revision, replacement, scan to "*patient reassured*" and (iii) a combined net effect of £13,880 profit on the 'worst case' scenario and £276,350 on the 'base case'. Although there were fewer Surgicare cases, its forecast profit contribution was significantly higher due to its better pricing.

164. On 3 February 2012, DR, PG, NW, KH and CK met. The manuscript note records as the apparent rationale for the proposed Restructure:-

> "*REASON*
>
> - *Capture the litigation in the subsidiaries going forward*
>
> - *VAT issue – will be subject to VAT @ cosmetic surgery Hospital Services are not*"

165. The note also records:-

> "- *Charge on the Assets past debt*
>
> - *still subject to preference rules"*

166. The Claimant says that the reference to "*preference rules*" means that there was clearly a discussion about some debts being paid and not others. However, this is speculation - as the Claimant also says, "*the precise discussion is unclear from the note*." The Claimant says that the note identified "*two reasons which could be put forward <u>to others</u> (i.e. <u>as a pretence of half-truth</u>) to justify the Restructure – but without expressly mentioning what would happen to the Company*." The suggested premise of that part of the discussion which is recorded is, again, speculation although the Claimant is correct to say the note does not mention THMG. The Claimant goes on to say that the inference is obvious: THMG was 'cut out of the equation', leaving behind in THMG the

litigation claims which already existed there, DR 'conceding' in oral evidence that he would also have been "*interested in capturing the litigation, to the extent you could, isolating that in the Company .. .*" However, it is perhaps rather obvious that DR would not want (even if possible) the existing litigation to move to one of the new trading companies. It does not mean that any liabilities that might be found would not be paid. DR had also denied earlier in his evidence that the Restructure was intended to deal with a "*growing problem*" in relation to THMG's historic claims book, saying that "*whatever in the history was history, we couldn't change that*" but they could change "*the future going forward in resolving complaints quicker, so they didn't lead to a kind of CFA or going to solicitors*" but they "*couldn't do anything about the historic claims because they were already in*." Value could be moved out of the Company into other parts of the Group but "*that wasn't a contemplation*." The past creditors "*were there and they were going to get settled*." Later still in his evidence, DR confirmed that, at this meeting (and in the whole period to 30 November 2012), he did not suggest that "*a reason for the restructure was so the Company could avoid paying anything that might become due to a PIP claimant.*"

167. On 6 February 2012, KH sent NW a draft letter for THMG to send to Barclays explaining the creation (subject to Bank approval) of five new entities to separately trade the business. The draft explains the intention of the proposal as "*to "ring fence" and protect the trading businesses from any potential claims and to permit the separation of cosmetic services (which may in the future be subject to VAT) and hospital services (which are not, and are unlikely to become, subject to VAT).*" The letter ends by explaining the desire to conclude the Restructure as soon as possible and welcoming the opportunity to discuss this with the Bank. KH forwarded the draft to DR and CK. However, in a subsequent version of the draft, the references to 'ring-fencing' and the protection of the trading businesses from potential claims were removed (apparently at the instigation of NW), and replaced with reference simply to the restructure permitting the "*division of the trading entities*". The Claimant says this shows NW's 'sensitivity' to the Restructure being about 'ring-fencing' the trading businesses from potential claims residing in other companies, including those sat in THMG. However, this begs the question whether the potential liabilities mentioned were those which had already arisen or which might arise in the future. DR later indicated that he considered the approach too formal and that he would rather send an e-mail to the Bank, albeit ultimately he appears to have raised it in a meeting on 8 March 2012. The Claimant says he did so in a way which "*disguised the full extent of the true intentions of the Group*" and asks rhetorically whether this 'careful handling' was required "*not to spook the Bank?*"

168. On 9 February 2012, HJ sent D6 notice of application for a GLO in respect of the PIP litigation.

169. On 10 February 2012, Companies House received Surgicare's Annual Return showing the transfer on 27 October 2010 of the single ordinary share in that company from THMG to Holdings. The form indicates that it was presented to Companies House by D6.

170. On 13 February 2012, GB submitted his second invoice, again not addressed to any particular Group company. His activities (over 7 days) included reviewing Ziering documentation and assisting with impairment testing for the 2011 audit.

171. On 13 February 2012, DR and CM attended a meeting at the Department of Health to discuss PIP implants. The summary of key issues to note identified the following:-

(a) The importance of not releasing new data before the sector was informed of the consequences;

(b) The financial context that 90% of patients now wanted the implants removed and replaced;

(c) The requirement for clarification of insurance; and

(d) The need for negative publicity to stop given the adverse effect on patients.

172. As at 21 February 2012, 1,160 PIP patients had made enquiries of THMG, with another 2,678 not having done so. THMG had booked (since 1 January) 364 consultations for PIP replacement procedures and 185 PIP post-operative reviews. 30 patients had already undergone surgery and a further 92 had been booked in.

173. On 21 February 2012, DS attended a call of solicitors acting for PIP defendants in advance of the hearing of the application for a GLO. In addition to discussing procedural and evidential matters, DS' note records that "[w]*e all agreed that the Court will probably find that the implants were not of satisfactory quality but that we were still going to argue the point*."

174. A note of a call with LF on 21 February 2012 indicates that THMG had received 30 requests from PIP patients for their medical notes.

175. On 22 February 2012, in his communication with D6 concerning the GLO, LWQC stated that "*I think that, whatever happens, we would not wish to be drawn into the expectation suggested by some that all of the implants will be declared faulty. I simply do not accept that the evidence will go that far*."

176. On 22 February 2012, NW forwarded to DR, CK and PG a Court order reinstating Nu-Age to the Register of Companies, stating that it appeared the reorganisation plans could be progressed, enquiring whether the Bank had yet commented on the proposal.

177. On 27 February 2012, BS spoke to PG to 'drill down' into the Group forecasts.

178. On 29 February 2012, D6 submitted its invoice for "*ascertaining existing group structure, review of statutory books and information filed at Companies House. Preparing all rectifying paperwork"* and *"discussions and advice surrounding proposed group reorganisation including all attendance at meetings*"

(representing 20 hours of KH's time). This invoice appeared to cover the preparatory corporate work in relation to Surgicare and Nu-Age.

179. The Claimant says that, by the end of February 2012, the Restructure involved the (admitted) cessation of trade of, coupled with a transfer away of value from, THMG (and its creditors) to protect the value of the Group. This was not, or not just, about controlling future liabilities and 'de-risking' future claims but seeking to control, and prejudice, creditors by moving assets out of their reach or otherwise making matters more difficult for them. As such, the Restructure reflected a 's.423 purpose' and an intentional unlawful return of capital. The same prejudicial purpose persisted, albeit with "*increased sophistication and veneer*".

180. On 8 March 2012, DR, PG, BS and JK met to discuss budget, performance and outlook. The (dated) notes of that meeting record:-

(a) The receipt of draft statutory accounts for the financial year to May 2011;

(b) The £9m (plus) write-off of preference shares would take place in financial year 2012;

(c) Cash was described as "*OK*", with "*key suppliers stretched but ok*" and HMRC apparently paid;

(d) Surgicare turnover was up at £30-40,000, with profit before tax up £15-20,000 "*due to PIP rework*."

(e) The Group was moving into a "*good trading period*";

(f) Sufficient claims budget had now accrued such that there was no increase to the claims provision and new legislation might limit legal claims expenses;

(g) The "*PIP Hangover*" might impact "*value/ saleability*" (which DR testified meant the "*stigma*" or "*publicity*" of PIP rather than necessarily the PIP claims themselves);

(h) A PIP update against budget was being prepared; and

(i) A potential restructure of Group VAT registration was contemplated, albeit there would be no VAT registration for the hospital which would charge "*services to each division*."

181. The Claimant says that the meeting included a "*gentle float of* [the] *disguised version of the Restructure concept with BS/ the Bank*," offering the Bank the 'carrot' - in fact, false narrative - of the write off in 2012 of TWP (Newco)'s preference shares, and majoring on the context of VAT as the justification, albeit not suggesting the movement of assets at this time. The Claimant also suggests that DR and PG may have shown the Bank a post-Restructure chart at

this meeting. The version of the chart identified shows all but one of the Group companies (including THMG and various newcos) sitting directly beneath Holdings, with annotations (suggested to have been made by JK and BS), including to the effect that:-

(a) Issues were to be "*fenced*";

(b) VAT was proposed on cosmetic surgery (currently exempt), with no VAT on the hospital service;

(c) Hospital care and implants were to be split, limiting VAT, restricting claims and enabling the measurement of returns for each business stream;

(d) According to both annotated versions, Dolan Park would continue to sit within THMG, with a re-charge to the individual entities, those entities contracting with the patients; and

(e) The implementation of the Restructure was proposed for 1 June.

182. Finally, the hearing bundles contain further undated manuscript notes apparently prepared by BS,[11] bearing uncanny similarity to part of the content of BS' dated manuscript note from 8 March 2012, noting in relation to the Restructure:-

> "*1) changes in VAT. – cosmetic surgery.*
>
> *1) No VAT on hospital services.*
>
> *2) Claims - service. –*
>
> *- surgical. –*
>
> *- Will improve profitability for each division*
> *H.M.G. ….*"

183. Looking at these documents together, it therefore appears that there was, in fact, discussion on 8 March 2012 of a broader range of motivations for the proposed Restructure beyond VAT, to include restricting claims, splitting the provision of surgical and care services and improved profitability. A follow-up e-mail from the Bank after the meeting confirmed that it had agreed to "*mark forward*" the Group's overdraft facilities for 12 months. Action points included CK providing compliance certificate workings and working with PG to make proposals for any covenant reset. The Bank was also to be provided with organisation charts showing the Group pre and post-Restructure. According to DR's subsequent e-mail to CK and KH on 12 March 2012, having discussed the proposed Restructure with Barclays, "*they have no objections and thought very sensible*". DR asked for the reorganisation charts to be put together. KH

[11] G651.1.

prepared these and forwarded them to DR and CK, subject to CK's comments. The pre-Restructure chart shows Surgicare as a subsidiary of Holdings (not THMG). The post-Restructure chart showed five newcos sitting directly under Holdings (itself under TWP (Newco)). Those newcos comprised four trading companies (cosmetic surgery, obesity, dentistry and non-surgical) and (in square brackets) a property owning company. EMGL would be directly owned by Holdings (rather than through an intermediary company), with the existing overseas companies (Ireland, Spain and USA) and Surgicare also under Holdings and the Group's dormant companies removed. On 20 March 2012, DR forwarded the charts to the Bank, indicating that, ideally, he would like the process completed by the end of May 2012, the Claimant noting that, at this stage, the industry still did not know what the final Keogh report would say. The Claimant also notes that no good reason has been offered for why the various newcos could not have been set up as subsidiaries of THMG. The placing of these companies directly beneath Holdings (and, later, Dolan holding Dolan Park as TWP (Newco)'s direct subsidiary) shows the same prejudicial purpose.

184. On 9 March 2012, a GLO was made in respect of the PIP litigation. One of the "*common or related issues of fact or law*" was whether any of the statutory implied terms as to satisfactory quality, fitness for purpose or correspondence with description had been breached. DR confirmed in oral evidence that, in the period January to March 2012, he knew that the GLO litigation would take some time – probably years - to come to court.

185. On 12 March 2012, LF told DR that she needed to look at how the PIP situation would be financed "*with the work that will be coming from it*".

186. D5's Zeus form from 13 March 2012 records the rationale for the Restructure in the following terms:-

> "• *Management are proposing a restructure of the group structure from 4 June 2012, essentially to split out services into separate entities. This is to:*
>   - o *Mitigate the impact of VAT being charged on cosmetic surgery, which should be introduced shortly.*
>   - o *Restricts any claims/legal action to the entity.*
>   - o *Enables measurement of returns by business stream.*
>
> • *Management are to provide further details on the proposed restructuring*."

187. On 14 March 2012, LF and NW traded e-mails about the PIP waivers, the former suggesting it was perhaps time to give these up, the latter saying these should be obtained wherever possible.

188. BS' updated strategy sheet dated 14 March 2012 noted that the current FD, PG, appeared to be "*competent but could benefit from guidance*" and that GB had been "*blamed for mishandling covenant breach.*" Management information was described as reliable and forecasts "*more prudent*". On 16 March 2012, BS reported internally that "[w]*e are making progress, better MI, capital and*

interest being repaid. Customer taking solicitors advice about covenant breach. It might be a simple covenant reset and send this back to live."

189. On 20 March 2012, a manuscript note of a call between KH and CK indicates that PG was of the view that there needed to be one company dealing with all the finance (payments, credit card and bank accounts).

190. On 27 March 2012, CK and NW discussed the contingent liability note in THMG's 2011 audited accounts. According to CK's e-mail the following day, DR and PG had seen CK's proposed wording but CK was not happy with it and wanted NW to draft or approve it. NW replied with suggested wording, including reference to (i) the industry-wide advice that there could not be a claim absent clear evidence of a product's failure and (ii) "[a]*ll of the current indicators are that less than 10% of the implants have failed*." THMG's final 2011 statutory accounts adopted an abbreviated version of his suggested wording:-

> "*In January 2012 it became evident that some breast implants used by the company since 2001 and manufactured by PIP, a company registered in France, may contain an unauthorised silicon gel. At this time the Government advice is that these implants should not be routinely removed unless there are signs of rupture or leakage. The company is monitoring the situation on a daily basis, taking legal advice and carrying out those procedures where medically indicated*."

191. On 30 March 2012, TMHG provided its representation letter to CK,[12] including the following specific representations:-

> "*We confirm the following specific representations made to you:*
>
> *• The provisions made within the accounts for litigation claims are our best estimate of the potential liability to be incurred based on available legal advice.*
>
> *• In January 2012 it became evident that some breast implants used by the company since 2001 and manufactured by PIP, a company registered in France, may contain an unauthorised silicon gel. No provision has been made in the financial statements for the year ended 31 May 2011 based on current government and legal advice. We confirm that there is a possible transfer of economic benefit (rather than a probable transfer) and that no reliable estimate can be made of this balance, and therefore according to financial reporting standard 12, a provision has not been recognised but a contingent liability note has been disclosed in the financial statements.*
>
> *• The provisions made within the accounts for potential costs of revisions for procedures performed are our best estimate of the likely future costs of those revisions*."

[12] There does not appear to be a signed copy in the trial bundle.

192. On 30 March 2012, DR approved THMG's accounts for the year ended 31 May 2011. These were accompanied by a letter of support from TWP (Newco) for at least the next 12 months. The Claimant says that PIP liabilities could and should have been provided for in these accounts rather than by way of a mere contingent liability note since LF was able to (and did) estimate these liabilities in her spreadsheet (including three days later on 2 April 2012). DR's testimony that provision was not made in THMG's accounts because the PIP replacement activity was profit-making reflected his focus on the Group to include Surgicare (in which PIP replacement was profitable) rather than THMG (in which it was not). The Claimant also points more generally to DR's acceptance in oral evidence that his focus was on the Group rather than THMG, individual corporate personality being exploited, not respected.

193. On 31 March 2012, GB submitted a third invoice, again not addressed to any Group company. His recorded activities (over 10 days) included reviewing Ziering documentation, briefing Colliers concerning the valuation of Dolan Park and reviewing Barclays' facility documentation.

194. The hearing bundle contains a document labelled "*Leila's spreadsheet*", apparently dated 2 April 2012, containing information about 78 PIP claims or potential claims made or intimated against THMG, the majority notified in February or March 2012. DR confirmed in oral evidence, and SB in his statement, that LF tracked claims information and shared this at SMT meetings. The status of the 'claims' shown on the spreadsheet differed, with some, for example, at the stage of a request for medical records, others of a "*notice of intent*" or "*letter of notification*". Where it was known the patient had experienced a rupture, LF appears generally to have ascribed a reserve of £2,000 for patient indemnity and £1,000 for patient expense, also indicating a "*High*" probability of proceedings and 85% (or sometimes greater) strength of claim. Where there was no rupture (or the condition of the implants was unknown), the reserve was generally £1,000 indemnity and expense also £1,000, with "*Medium*" probability of proceedings and 75% strength of claim. The combined total spreadsheet reserve for all 78 patients was £148,000, albeit the Claimant says that increasing the legal costs in line with the costs/ claim ratio of 90:10 explained by DR in his statement would result in a reserve of £621,000 or in the region of £3m based on the much larger THMG PIP patient population than shown here, consistent with HJ's estimate of £3.5m the following year. A number of the patients (approximately one third) were shown as having undergone (or were scheduled to undergo) replacement surgery. In that regard, the separate document described as a "*comprehensive list of PIP operations booked from January 2012 onwards*" shows more than 450 PIP replacements or removals (including former Surgicare patients).

195. On 19 April 2012, IHAS advised members of information from Ernst & Young concerning a referral to the ECJ of a Swedish case "*seeking to clarify the scope of the VAT exemption for medical care in respect of services which could potentially have a cosmetic purpose*." IHAS anticipated that the proposed UK litigation would be 'stood over' pending the outcome of the Swedish referral.

196. On 23 April 2012, it appears that KH had a telephone call with CK in which a 10% reduction in the valuation of Dolan Park was mentioned.

197. On 24 April 2012, DR e-mailed JK to inform him that GB "*… continues to work with THG on a consultancy basis for 6 - 10 days per month. He researches and provides advice to me on banking,* [sic] *Covernance and similar financial matters so he may set up calls with you to assist*." The Claimant refers to this as DR bringing in GB as a "*friendly face*" (GB being an ex-Barclays employee) and emphasises his *advisory* role to DR, CEO of THMG and the Group.

198. On 27 April 2012, KH sent NW an amended "*Post Re-organisation Group Structure*", now showing THMG as "*Administration company which will hold the leases and employment contracts Responsible for collection of fees*" and "*Dolan Park (Newco)*" to "[h]old *Dolan Park Property (leased to THMGL) and intercompany balances*". It also appears that there was a meeting that day involving DR, GB, D6 and CK to discuss the Restructure. On 30 April 2012, KH then circulated the structure chart to DR, GB and CK. The notes to the chart indicate that customer contracts were to be with THMG (for the surgery) and the relevant new trading company (for the care), with THMG providing an administration and support company, holding the leases and contracts of employment and collecting the fees for both surgery and care. The Claimant also notes that Dolan Park was to be "*separated out*", albeit no dividend or loan write off was referred to. Rather, the costs of the lease arrangements between THMG and Dolan were to be set off against the outstanding intercompany loan in THMG's favour. The Claimant says that the loan write off and dividend ideas were not referred to. As such, they cannot have been driven by CK at the meeting on 27 April and their genesis must have been DR and GB, both of whom were "*sensitive*" at this stage to disclosing the full (prejudicial) plans to CK and the Bank.

199. THMG's performance report for the Bank for April 2012 stated that overall performance for April was very strong (save for the hair division). Although PIP implants were still making news, new patients were minimal and patients were coming through THMG's systems with no strain on clinic resources. PIP patient operations were anticipated to continue at the same rate through to May and June but then significantly diminish "*as the majority of patients have either had operation or are happy with the implants*."

200. On 1 May 2012, DR e-mailed BS, saying that he wanted to ask his advice and appreciating "*his help with understanding a particular situation*". DR also explained that "*I have asked Gerard Barnes to call you on my behalf in the next few days to discuss the matter. I appreciate that a little background on who Gerard is and his role with THG is required. Gerard was the FD of THG for 2 years 2009 to 2011. He now continues his association on a consultancy basis working on specific projects*." DR confirmed that "[t]*his email is my permission to go ahead and talk to him."* BS and GB then 'hooked up', with GB confirming by e-mail on 2 May 2012 (apparently after a prior telephone call) that "*David and I would like to meet with you to go over a few things in advance of the meeting we already have scheduled on 30 May. The main topics for the agenda*

are restructuring and covenants, but I will send you a more detailed list of points nearer the time. I think we will need about 1.5 to 2 hours."

201. On 2 May 2012, KH spoke to GB as she explained in her e-mail to NW of 3 May 2012 in which she identified the latest restructuring proposal as:-

> "*….. to write off the various existing intercompany loans and the new intercompany loan which will result from the transfer of the property from THMGL to Newco (circa £11.000,000 - £15,000,000 less current mortgage £4,000,000). Although we may be able to argue that the initial write offs were for commercial reasons both are potentially subject to challenge as transactions to defraud creditors and could result in an action against the directors for misfeasance / breach of duty in the event THMGL became insolvent*."

202. KH also asked whether NW was "*happy to write to Gerard on this basis*" to which NW responded on the same day that he was and " … *a letter should go private and confidential to the Board of Directors as well*." The Claimant also points to a manuscript note said to be from around this time that states:-

> "*238 Insolvency Act ~~20~~ 1986*
>
> *Gerard Barnes*
>
> ……………..
>
> *Move yr end. - end Aug.*
>
> *Property – £15 mill*
>
> *Loan - £4,0 mill*
> ___________
> *£11 mill.*
>
> *Can we waive repayment of loan*"

203. There is some contention as to whether this represents a note of KH's call with GB on 2 May 2012 or a later such call (also said to involve NW) at which the write-off was discussed. Either way, the Claimant says this note indicates that D6's advice to GB related, at its highest, to IA86, s.238 (transactions at an undervalue) which is not the same as IA86, s.423 (transactions defrauding creditors) or s.239 (preferences). Moreover, the suggested letter to GB and the board of THMG never materialised. The Claimant says that, although the write-off proposal *may* have come as a surprise to KH, it would not have done to NW and this explains why advice concerning IA86, s.423 was never provided. The Claimant also notes that the write-off proposal was not mentioned by DR in his written evidence. Although DR did refer extensively to CK's involvement and advice in the Restructure, close analysis of the documents did not support this proposal coming from CK, but more likely from DR and/ or GB.

204. Later on 3 May 2012, KH and GB played telephone (and voicemail) ‘tag’. On 4 May 2012, GB e-mailed KH, thanking her for her help on this and asking her for a copy of the “*Restructuring checklist*” before he met DR and CK on 9 May.

205. On 8 May 2012, JK and GB met to discuss the new role of the latter and the “*impending meeting to go through covenants*.”

KH’s Restructure ‘overview’ – 8 May 2012

206. On 8 May 2012, KH sent GB a Restructure ‘overview’, explaining that she did not believe consent was required from the loan note holders for the reorganisation, albeit she advised notifying them of what was proposed and of the obligation in any event to send them copies of all shareholder notices. The ‘overview’ envisaged:-

(a) the creation of five new companies (four trading and Dolan);

(b) the transfer of Dolan Park (and any relevant assets) to Dolan for market value;

(c) the transfer of IP to Holdings for market value;

(d) the transfer of the shares in EMGL to Holdings for market value;

(e) the striking off of the dormant companies;

(f) lease arrangements between Dolan and the various trading entities concerning the use of the hospital space;

(g) licence arrangements between Holdings and the various trading entities concerning the use of the IP;

(h) collection arrangements between THMG and the various trading entities; and

(i) a review of client agreements.

207. The ‘overview’ did not mention the transfer of the business of THMG nor any intercompany loan write-off or set-off against lease costs or dividend. Although the Claimant says KH did not advise about IA86, s.423 (or write-offs), the ‘overview’ did advise on the need for the directors to consider their statutory and fiduciary duties, including the following:-

(a) the fundamental principle that each group company must be treated as a separate legal entity and that the directors of a particular company could not sacrifice the interests of that company for those of another, albeit it was reasonable for a board of a wholly owned subsidiary (if solvent) to take into consideration the interests of a parent in considering whether the transaction was in the interests of a subsidiary;

(b) that it would be prudent for the directors of each subsidiary to require confirmation from its parent (by way of shareholder resolution) that the reorganisation was considered likely to promote the success of the parent (and the group) for the benefit of its members as a whole and that the parent as the shareholder of the subsidiary approved the terms of the reorganisation;

(c) the board paper should consider the propriety of the transaction and, where possible, set out the grounds on which it would benefit the company; and

(d) the limits on shareholder sanction, ratification not being possible if the transaction constituted a fraud on the company's creditors and, in those circumstances, each director risking personal liability and the transaction being liable to set aside.

208. KH also advised on the possible need for majority shareholder approval, the transfer of requisite statutory and regulatory approvals to the newcos and the consent of the Bank, including the release of any relevant assets from the Bank's existing fixed charge and a non-crystallisation certificate for those assets subject to the floating charge and a new facility letter to be entered into, and security given by, the newcos. In relation to the transfer price, KH also advised that:-

> "*Transfers at book value (or even less) could expose the group to a number of potential company law problems, all of which carry serious penalties and/or consequences.*
> *All transfers should therefore be at full market value. Ideally this should be supported by a formal independent valuation, or at a price which in the reasonable judgement of the directors, acting in the company's best interests, represents the market value of the assets. I would also record the steps by which the directors reached their valuation in the minutes approving the transfer, setting out the factors taken into consideration*."

209. Finally, KH advised on the need to check with CK on tax issues arising.

<u>The structure changes (again) – 9 May 2012</u>

210. On 9 May 2012, KH and GB spoke, including about an additional newco administration company into which the business of THMG would be transferred, including all employees, supplier contracts, debtors, creditors and contracts with surgeons. Leases, patient claims and (potentially) aftercare would be left in THMG. The notes of that discussion indicate that the administration newco would now enter into lease arrangements with the Dolan Park newco, acquire THMG's business and remaining assets and liabilities (excluding leases, patient claims and aftercare responsibilities which would remain with THMG) and, going forward, enter into contracts with consumers for surgery (with the new trading companies doing the same for care) and collect fees for both. The Claimant says that this proposal reflected a level of "*sophistication*", combining the distribution of assets as if on a winding-up, with the isolation of creditors within the (now non-trading) THMG. After her call

with GB, KH advised NW that the structure had changed again and asked for a brief chat. NW was golfing with CK for the next two days and asked KH to call. According to the Claimant, NW evidently enjoyed close relations with CK and was the "*Restructure pivot person*". The Claimant also says that, with knowledge as to the purpose of this arrangement (which D6 had), any honest solicitor would have been concerned. However, such concern was not reflected in the documents.

211. On 10 May 2012, HJ wrote to D6 with a Request for Information under CPR, Part 18, seeking confirmation whether THMG benefitted from any indemnity for the PIP claims. THMG initially declined to provide this information but later agreed to do so.

212. On 11 May 2012, KH sent GB an updated reorganisation chart and overview. The updated checklist reflected THMG transferring to The Hospital Group Administration Limited (as an additional newco) its business and remaining assets including contracts with suppliers and surgeons and liabilities (other than the existing leases, patient/ client claims and after care responsibilities) for market value less liabilities. The checklist noted the need for collection and administration arrangements between the new administration company and the trading companies, for the former to have a new credit card facility and for consideration of which of THMG's liabilities would transfer to the new administration company (and to what extent). KH also asked GB whether the seven dormant companies were to be used or, as NW preferred, newcos. The Claimant suggests that this reflects NW "*making decisions on newcos*" and THMG's expectation, duly satisfied, that NW would provide commercial and legal advice throughout. This characterisation was overstated: NW had expressed a preference for the use of newcos, D6 sought instructions on, and GB later confirmed on 14 May that DR had approved, their use.

Meeting with Barclays – 16 May 2012

213. On 16 May 2012, GB met BS and JK. The agenda for the meeting (apparently prepared by GB) set out the following discussion items:-

"*1. Covenants*
- *DP valuation*
  - *Loan to value*
  - *Net assets*
- *Adjustments*
  - *Vendor loan notes*
  - *Interest cover*
  - *Total debt service*
  - *Capex*
  - *Net assets*

2. Restructure
- *Proposal*
- *Banking implications/requirements*
  - *Consent*
  - *Security/cross guarantees*

• Year end
• Legals
• Process/timeline

3. Ziering
• License
• Revised structure
• Timeline

4. AOB
• Hedge – Extended Term
• Captive"

214. BS' manuscript note of the meeting includes the following comments (with emphasis supplied in **bold**):-

> "*- Ziering – Hair treatment division. There may be a formal licence*
>
> ***- Restructure reqd a) PIP claim might be successful. £3m based on 4000 procedures***
>
> *- Y/end extended to 31 Aug 2012*."

215. The Claimant relies on this note as evidence of GB's knowledge (shared with the Bank in May 2012) that the Restructure was *required* because it was anticipated that the PIP litigation might succeed, resulting in a liability for THMG of £3m based on 4000 PIP procedures. GB did not remember the meeting but accepted that the note said the Restructure was required because the PIP claims might be successful, albeit he did not believe he would have said this. Likewise, GB acknowledged that the note indicated a potential PIP liability of £3m although, again, he did not believe he would have said that because "*numbers like 3 million*" or 4,000 patients or procedures (which he considered to be "*over the top*") were not being "*bandied about*", albeit he accepted £3m could quite easily be reached on the basis of thousands of claims. BS could not remember the meeting either but accepted that his note would have reflected what the customer told him then. As for the words "*Restructure reqd*", BS did not initially accept that the customer conveyed that the Restructure was *necessary*. Rather, the "*customer had presented to me that a restructure was about VAT being introduced and loan note holders having a different agenda to the growth ambitions of the Group, and that they wanted -- they wanted any divisions to be responsible for their own professional indemnity liabilities going forward*", albeit BS accepted that this explanation did not feature in his notes. He also accepted that it did not feature in his notes from the 8 March 2012 meeting either, albeit, as noted, the record indicates discussion at that earlier meeting of a number of commercial reasons for the Restructure, including those cited by BS in his evidence. As for the reference to £3m based on 4,000 procedures, BS said that, if that amount had been due, it would have had cash implications and would have been an early signal for EWL3 (which it was not). Although he accepted that he had been told about 4,000 procedures in January 2012, his understanding as to liability was that "*the customer was going to try and remediate the – the issue by offering replacements to the ladies that were*

affected." He considered the £3m figure to be the answer "*to the sort of question I would pose: if everything goes against you, how much could this cost?*"

216. On 18 May 2012, BS followed up the meeting with an e-mail explaining:-

(a) BBS' involvement with THMG due to concerns over the quality of management information, budget accuracy and reliability and significant variation to plan and 'creditor stretch';

(b) The usefulness of the discussion about how the Group intended to grow the business, in particular, the hair division and the planned restructuring of the businesses and the need for their respective legal advisers to speak to ensure the Bank was comfortable around the legal implications of the restructuring;

(c) The Bank's desire for a three year plan with robust budgets and showing sufficient cash to meet debt repayments, fund growth and provide headroom enabling the Bank to support a facility restructure and covenant reset; and

(d) The required follow up tasks, including CK providing covenant compliance certificate workings, PG working with CK to make proposals for a covenant reset and THMG providing an integrated financial model.

217. The Claimant says that BS recognised the potential success of the PIP litigation (with a £3m liability) "*could have legal implications*" for the Restructure and was a "*warning sign*" to BS, prompting him to suggest their lawyers speak. Although it did not know at this stage that the transaction would be at an undervalue, it was evident to the Bank that the main motivation for the Restructure (as it was in January 2012) was the PIP claims. BS testified that he did not recall concern about the transaction being impugned (whether as a transaction defrauding creditors, a preference or as a result of insolvency). Nor did he recall a "*warning sign*". All the Bank had at this stage was a proposal from THMG but it would want to understand the legal implications of *any* restructure. However, BS went on to accept that, by 16 May 2012, he knew the Restructure was required because of potential liability for PIP claims and that there were legal implications to be considered as a result.

218. On 18 May 2012, GB submitted his fourth invoice for four days work, again not addressed to a specific Group company, his activities including "[p]*reparation of revised Ziering structure*" and "[r]*eview of* [sic] *Barlcays facility documentation*".

219. On 21 May 2012, GB provided BS with an 'e-mail introduction' to KH and asked him to let her have details of Barclays' solicitors, Cobbetts. JK provided Cobbetts' contact details on 25 May.

220. On 23 May 2012, an IHAS schedule of industry data indicated that 578 THMG PIP patients had been assessed, with 382 opting for, and 49 having already undergone, surgery.

221. On 29 May 2012, BS reported internally on his telephone call with GB in which the latter advised of PG's departure, CK's assistance with the preparation of forecasts and the Group's search for a new financial controller. Various (staged) action points had been agreed, including the provision of budgets "*to show an unwind of the stretched creditor position*." BS also canvassed the potential covenant reset. Under "*Restructure budget*", BS commented "*De risk the business. Potential restructure to mitigate PI claims*". In his written evidence, he explained that:-

> "*I was told that creating different operating companies meant that if there was, for example, an incident in dentistry and that business became unsustainable because of a large claim, it wouldn't impact other divisions, such as cosmetics or hair. I do not remember the customer giving any explanation as to what difficulties they had in mind but I do remember that my understanding was that they were talking about a general future business risk, not a specific or known risk.*"

222. Despite this detailed explanation in his statement, BS confirmed in oral evidence that his internal note did not distinguish past and future "*PI claims*". BS followed up with GB by e-mail that day, confirming these action points and sharing his view that the Group's finance function was stretched and additional resource required, recommending consideration of engaging a temporary non-executive director. To ensure "*clear lines of communication*", BS shared with DR his e-mail to GB.

223. On 30 May 2012, D5 shared the updated Zeus form with two potential non-executive directors under consideration for THMG noting:-

> "*In particular, key areas of concern for the Bank are:*
> - *Lack of strategic plan, albeit Management have plans to de-risk the business via restructuring the group*
> - *Conflicting agendas amongst the shareholders (Management and preference shareholders)*
> - *Weak finance function, lack of integrated forecasts*"

224. Following her telephone conversation with GB and CK on 29 May 2012, KH submitted a revised re-organisation checklist the next day, including at item 3 the cancellation of 9,076,000 preference shares in TWP (Newco) and, at item 11, "[sic] [r]*ight off intercompany loan created by the transfer of Dolan Park and existing intercompany loans*." The Claimant says this shows the same prejudicial purpose as had been evident from January 2012 and, again, D6's lack of concern.

225. THMG's report for the Bank for May 2012 noted performance was extremely strong.

226. On 1 June 2012, GB submitted his fifth invoice (12 days work), again not addressed to a particular company. His activities included attending the

Barclays' meeting, initiating "*strategic review*", initiating financial modelling in conjunction with CK, consideration of the proposed Restructure (including liaising with D6 and CK) and assisting with finalising compliance certificates.

227. On 1 June 2012, CK provided compliance certificates to Barclays for the year ended May 2011 and the quarters to November 2011 and February 2012. A subsequent Zeus form (apparently from 19 June 2012) remarked that a "*high level*" reality check confirmed that all the covenants in relation to these test dates had been met and that BS was content to rely on CK certificates during the ongoing discussions on covenant reset and possible facility restructure.

228. On 11 June 2012, CK sent its engagement letter with respect to the services to be provided in connection with the proposed reorganisation and the preparation of financial forecasts.

229. On 12 June 2012, DR, GB and CK met, with DR and CK providing input for the latest re-organisation checklist (circulated by KH on 30 May 2012). Following the meeting, GB sent KH a revised version, the changes including:-

(a) The administration newco to be known as an operating newco, with that company taking a lease of Dolan Park and concluding supply agreements with the trading companies for the provision of hospital services at an agreed price;

(b) The possible conversion (rather than cancellation) of preference shares into deferred shares (with CK to follow up with KH about this); and

(c) The (two-step) transfer of Dolan Park to Holdings by way of dividend, with the onward transfer by Holdings to Dolan.

230. The checklist continued to refer to (now spelt correctly) the 'write-off' of the intercompany loan created by the Dolan Park transfer and the existing intercompany loans. In oral evidence, NW said that this "*looks like an asset strip if they are writing it off, and this was never an asset strip, and that's why they didn't write it off.*" D6 had already advised in May 2012 not to undertake a loan write-off and none was undertaken. The Claimant says that, despite this, there was no recognition by NW of D6's duty to advise once the write-off re-surfaced. An honest solicitor not involved in the 'plan' would have advised but NW was "*in the thick of it.*" Moreover, NW's suggestion that the write-off was different from the dividend was misplaced: financially, they are to the same end and, when combined with the prejudicial purpose known to D6, both were obviously transactions defrauding creditors.

231. On 13 June 2012, KH e-mailed her colleague at D6 concerning the property aspects of the reorganisation, asking for a fee quote. KH indicated the value of Dolan park at "*circa £15m*". An abbreviated manuscript note of a call between KH and her property colleague also reflects the first proposed transfer of Dolan Park from THMG to Holdings by way of dividend and then from Holdings to Dolan for market value less mortgage. The value was stated in the note at £16m.

232. Later on 13 June 2012, GB circulated a "*project plan*", including to KH, CK and DR. The steps listed covered project administration, D5's requirements, reorganisation action points, the strategic review, forecasts and the captive. The Claimant says this confirms DR's written evidence that GB was "*driving it and controlling it*", albeit DR "*recanted*" on this under cross-examination by GB's counsel. The second page of the plan referred to "*Regulatory considerations*" and the need to inform the CQC of the Restructure. In this regard, the Claimant notes that the explanation in DR's written evidence for the Group abandoning post-Restructure the use of four separate trading companies was itself abandoned. DR had erroneously suggested that the CQC changed its regulatory requirements, the new explanation being that the CQC informed CM of the need for the separate registration of, and therefore a registered manager for, each service. Across the various sites, the CQC registration costs would have been prohibitive such that Holdings continued to be the registered provider. It is notable - the Claimant says - that there was no engagement with the CQC prior to the Restructure to check its practicality from a regulatory perspective.

233. On 15 June 2012, KH discussed with NW the fee quote for D6's work on the Restructure and prepared a related draft e-mail to DR and GB which she sent out that day. On the same day, KH also e-mailed CK indicating that D6 was comfortable with the two stage transfer of Dolan Park provided it did not affect the availability of Stamp Duty relief, asking CK to confirm this (which it did on 19 June).

234. On 18 June 2012, the Keogh expert group published its final report, finding that:-

(a) The PIP silicone gel material was not toxic or carcinogenic;

(b) PIP implants had a higher rupture rate than other implants, by a factor of two to six, detectable within five years; and

(c) Rupture had been found to cause local reactions in a proportion of women such as tenderness or swollen lymph glands but there was no evidence of more significant general health concern.

235. In sum, PIP implants were clearly substandard although there was no evidence of significant increased risks of clinical problems in the absence of a rupture. DS e-mailed NW about the report on the same day, saying it contained good and bad news, the former being that the PIP filler material would not injure patients if it leaked, the latter being that PIP implants were more prone to rupture. Although the report concluded that the implants were substandard, it reaffirmed the advice on removal only upon rupture. NW responded, agreeing with DS' synopsis, albeit observing that "*it certainly won't kill the claims off.*" According to the Claimant, that meant (i) fending off liability would be more difficult (ii) there was a potential for pain and suffering damages claims for the cases which failed (iii) a claim by the 'worried well' and (iv) claims were likely to be in the hundreds, if not thousands. In oral evidence, DR accepted that a proportion of the PIP claims would be successful "[i]*f they ruptured with that industrial silicone* .." (although the Claimant points out that the final Keogh

report did not distinguish between batches of PIP implants). The Claimant also says that THMG did not go back to LWQC for further advice in light of the final Keogh Report. Rather, the Company was implementing another way of 'containing' the claims - through the Restructure.

236. On 20 June 2012, D6 e-mailed LF attaching a list of 31 PIP claimants of which the former was aware, noting the first CMC in the GLO would likely be at the end of October 2012.

237. NW and LF spoke (apparently on 26 June 2012) concerning litigation matters, including PIP, as to which, the abbreviated manuscript note records:-

> "*PIPS – Keogh's report is positive – not carcinogenic*
>
> *- are making a reserve of 2k per case*
>
> *Sensible to change implants on a voluntary basis anyway*."

238. On 28 June 2012, IHAS circulated a message concerning a "*strong example case*" (in relation to VAT) which, it was suggested, should be pushed to tribunal with a request to refer the case to the ECJ on the basis another similar case from Sweden would be heard there. Funding would be required to support the relevant clinic owner in his challenge to HMRC's assessment. There were several further communications involving IHAS in 2012 on the question of funding.

239. On 28 June 2012, Skott Hughes sent BS the 'bank pack' for May 2012, including an updated PIP analysis showing that its strategy for removing or replacing implants for THMG and Surgicare PIP patients was performing slightly behind the 'base case' scenario but well ahead of the 'worse case' scenario. THMG's report for the Bank for June 2012 stated that performance was generally positive (save again for the hair division) and budgets had been exceeded.

240. According to GB, at their 12 June 2012 meeting, Gavin Whitehouse asked his CK colleague, Ms Daly, to prepare an illustrative spreadsheet showing the impact of the Restructure on the Group companies and intercompany loan balances. The Claimant says the June version shows the 'plan' was for THMG to (i) waive intercompany balances of £4.269m (ii) move the property up (iii) move the bank loans up and (iv) declare a dividend of £4.5m, producing a revised balance sheet for THMG of just over £160,000 (reduced from £8.785m). Accordingly, the position at the end of June 2012 was that tens of PIP cases had already been identified, with potential for hundreds more. Despite this, the intention was to distribute THMG's assets to other Group companies, leaving it with practically nothing, an obviously prejudicial purpose.

241. On 1 July 2012, GB sent BS the 'final' iteration of the Group forecasts for the period June 2012 to August 2015.

242. On 2 July 2012, CK sent Barclays the certificate of covenant compliance for the year ended May 2012 and quarters ended August and November 2012. On the

same day, BS communicated internally that the certificate for the Total Debt Service covenant indicated a breach for May 2012 and, later on 9 July 2012, requesting a reservation of rights letter be issued to the customer (sent on 13 July).

243. On 3 July 2012, DR and GB presented to Barclays the Group's strategic review and business plan for 2012 to 2015, including in relation to legal issues facing THMG:-

(a) "*PIP issue considered manageable with limited threat to business*", albeit its "*impact*" was coloured red, rather than amber or green;

(b) "*PIP implant issue may lead to class action type case. Wilkes believe that this is unlikely to be successful. Potential damages estimated at £1-2,000 per patient.* [sic] *MRHA report suggests no lasting damage but rupture earlier*". The response was "[m]*anage remedial work on patients*"; and

(c) "*VAT on non surgical treatments may be imposed. Case being taken to HMRC Commissioners, led by BDO. Advice is that case is likely to succeed.*" The response was identified as "[a]*wait developments*."

244. The Claimant says that, although billed as a "*restructure powerpoint*", it said nothing about the Restructure, supposedly to "*keep things oral as much as possible*." Although BS may have been reassured by the suggested manageability of PIP, he is not likely to have forgotten the reason why the Restructure was required, as identified in his own notes from 16 May 2012. Rather, he is more likely to have thought that "*the risk of any challenge was manageable and low*." The review also showed VAT as the second big litigation issue on which THMG awaited developments. BS' manuscript note of the meeting indicates the following comments:-

(a) "*PIP – positive impact on business*"; and

(b) "*Restructure appears sensible*".

245. On 9 July 2012, BS communicated internally with a view to Barclays obtaining customer consent to Colliers' instruction to revalue its security (as THMG had agreed). BS stated that the valuation instructions were to include:-

"*Enterprise value*

- *Value of the property now*
- *Alternative use value, with loss of licence and F&F removed and 3 month limited marketing period*"

246. BS' manuscript notes apparently from the same day (9 July 2012) refer to "*PIP – crisis - relationship with inspector good.*"

247. On 10 July 2012, BS followed up with GB following the 2 July meeting and a subsequent call with GB. This indicates that further matters discussed at the meeting included (i) the role of an FD and (ii) covenant reset and Bank loan

amortisation over 10 years to free up cash. BS confirmed that the Bank was amenable to such a proposal. GB responded the next day, indicating that the loan amortisation would free up around £50,000 quarterly. GB made an initial covenant reset proposal.

248. On 12 July 2012, NW spoke to Judith Slater's solicitors concerning their client's concern as to loan note non-payment. NW conveyed his understanding that Judith Slater had received some payments even if not 'technically permitted'. When conveying this to DR, NW explained that he and KH were comfortable that enforcement action could not be taken under the loan notes because of the terms of the Intercreditor. DR confirmed that "*you are correct some of the payments made have not been* [sic] *techinically permitted and have been in effect Money from consultancy/salary payments that me or Steve have missed so they have not been "loan note repayments*"." It also appears from the documents from mid-July 2012 that Judith Slater was considering using "*formal routes to recoup the outstanding payments*", including possible winding-up proceedings. She also appears to have been "*Pee'd off about 20k a month to* [SM]." This appears to be reference to the monthly consultancy fee paid to SM which the Claimant describes as "*unlawful distributions*" and a "*convenient, tax efficient way of extracting cash out to* [SM] *in the Cayman Islands (where he was resident), i.e. to him as shareholder*", albeit resulting in THMG's endemic cash flow insolvency as shareholders were preferred over creditors. In oral evidence, DR explained that SM "*was the entrepreneur of the Group, so he spent his time sourcing new products and ideas and service lines*" and that he "*certainly did add value*", albeit DR agreed his fee was "*way in excess of what could be justified on a normal consultancy basis*."

D6's draft terms of engagement – 13 July 2012

249. On 13 July 2012, KH sent D6's terms of engagement to DR and GB, drawing their attention in her covering e-mail to "*…. paragraph 10 (fees) which reflects the estimate I have already given and paragraph 13 (liability) which limits this firm's liability including liability for negligence*." These were addressed to THMG and provided in the terms set out later. The letter asked THMG to "[p]*lease confirm in writing your agreement to these Terms by signing and returning the enclosed copy of these Terms, in the prepaid envelope provided*." It is common ground that these were not signed.

250. On 17 July 2012, BS and JK met GB to discuss the covenant reset, proposed new loan facility and the Restructure. On the latter, BS' abbreviated manuscript note records:-

"- *Strengthen against Future litigate*
- *Wilkes – set up new co. .....*
- *Move property -*
- *Pro forma B/Sheet*
- *Convert Pref Shares to deferred shares £9m. Pref Shares.*
- *31st August*"

251. On 18 July 2012, GB sought clarification on "*timing for credit sanction*", in response to which, BS asked for CK "*to write with a summary of the new structure and brief explanation of the benefits and at the same time request opening of the new bank accounts. I will be able to complete my credit paper*." On the same day, GB summarised to Barclays the matters under consideration, namely (i) loan and covenant restructure (ii) reorganisation (iii) management information and (iv) finance and strategic support. As for the reorganisation, GB noted that "[s]*ummary document to be provided but in principle it seems like you are in agreement with the proposal*." As to the finance function, GB confirmed that "*I will provide support to the business on a consultancy basis. My involvement is likely to be 2/3 days per week, at least one of which will be in Dolan Park. There will be an appropriate notice period to protect the business. ... The role will be to track progress against the strategic plan as well as monitoring the financial performance*." In addition, a qualified accountant had been retained to work with Skott Hughes. On this basis, Barclays apparently did not require the business to hire a full-time Financial Director.

GB's July 2012 draft TWP (Newco) board paper

252. On 18 July 2012, GB sent KH a draft TWP (Newco) board paper. This explained that:-

> "*TWP is considering changing the structure of the trading activities of The Hospital Medical Group Ltd ("THMG"), other trading subsidiaries are unaffected. This would involve transferring the business and assets related to each major revenue stream (cosmetic, obesity, non surgical and dentistry) into a new company. The Hospital business together with related Head office functions will also be transferred to a New co. In addition ownership of Dolan Park hospital will be transferred to a New co*."

253. The draft paper described the benefits of the reorganisation as:-

"• *Separating the trading businesses from each other means that in the event of a future material litigation claim against one business stream, such a claim need not bring down the other businesses. This therefore improves the strength of the Group over all to withstand such claims.*

• *Separating the hospital from the sales businesses should allow each business to achieve greater focus on factors that influence gross margin and profitability, thereby improving the performance of the Group.*

• *Separating the ownership of the Hospital from the trading businesses increases the Group's ability to retain control of the Hospital in the event of the appointment of an administrator to one of the trading businesses.*

• *There may be VAT benefits to the structure, if VAT is introduced on cosmetic procedures*."

254. The Claimant says that, although the draft board paper identified commercial advantages to the Group, none benefitted THMG. The draft also attached (as Appendix 3) the re-organisation checklist, albeit the version sent to KH on 18 July 2012 did not refer to the preference shares, the two stage transfer of Dolan Park (or payment for the first stage by way of dividend) or the write-off of intercompany loans as all these matters had appeared in the latest version. Moreover, the post-reorganisation Group structure (at Appendix 2) showed the effect of "*breaking THMG into its constituent parts*", albeit it continued to refer to the *administration* newco (rather than the *operating* newco) and the lessee of Dolan Park was still shown as THMG. Following receipt of the draft paper, KH asked for a "*quick word*" with NW. On 19 July 2012, KH confirmed to GB that she was happy the draft reflected her understanding of the reorganisation and, having spoken to NW, "*he would prefer not to mention the potential PIP claims in the board paper*." The Claimant says this reflects obvious nervousness about identifying in documents which might become public the real (prejudicial) reason for the Restructure.

255. On 20 July 2012, GB sent BS the same version of the board paper as he had to KH on 18 July, together with a draft letter from CK confirming that the paper represented a fair summary of the proposal, its principal advantages and disadvantages and the principal steps to be undertaken to achieve the proposed organisation. On 25 July, BS confirmed that this was sufficient from the Bank's perspective, albeit Cobbetts - as it turned out, Eversheds - would need to review the structure in due course. BS also asked for CK's confirmation that there were no tax liabilities arising from the Restructure (provided on 31 July 2012 in CK's revised letter).

256. So, the Claimant says, by the end of July 2012, the latest intention of the THMG remained a "*secret plan*", not yet disclosed to the Bank but known to DR, GB and D6. The Claimant also asks rhetorically why D6 did not advise, as competent and honest solicitors would, that they could no longer act for the Company.

<u>Colliers' further valuation of Dolan Park as at 24 July 2012</u>

257. Colliers prepared its further valuation of Dolan Park as at 24 July 2012. This stated (at [3.3]) that:-

"*3.3.1 Our opinion of the Market Value (MV) of the Freehold interest in the property on the special assumption that it is fully equipped as an operational entity and is valued having regard to trading potential, as at the date of valuation, is fairly represented in the sum of:*

£15,000,000
(Fifteen Million Pounds)"

258. The Bank later noted in its Zeus form that this " … *valuation based on a multiple of 7.5x EBITDAR - sustainable EBITDAR £1950k. The business is achieving this*." In this regard, THMG's monthly report for the Bank for July 2012 stated that performance for July had been very strong.

259. On 1 August 2012, GB canvassed with BS the possibility of breaking the existing interest rate hedge contract with Barclays and taking out a new hedge on the extended loan at lower market rates, improving cash flows albeit at the expense of a break fee.

260. On 3 August 2012, for seeking credit approval, BS asked GB to confirm his summary of the Restructure and covenant reset, in particular, "*the legal entity that will own the freehold property*", which BS understood (presumably from the draft board paper and reorganisation chart) to be Dolan with a lease to THMG (rather than to the new administration or operating company). On 8 August 2012, GB confirmed BS' understanding. Barclays' related Zeus form contains the same summary. In relation to the Group's forecasting position, the form also notes that:-

"• *Management appear to have been robust in forecasting and have run the forecasts again applying sensitivities which include:*
  - *o Increased costs*
  - *o Reduced sales in Ziering to 2012 run rate*
  - *o Increased creditor unwind in 2012/13.*"

261. As for the Group's (then) current position, the form also noted that a covenant breach for May 2012 was anticipated (because of the reduction in value of Dolan Park) but this would be waived. Likewise, the actual covenant breach from May 2012 would also be waived. In relation to the Restructure, the form notes that "[t]*he structure appears sensible in line with their objectives. We have asked Cobbetts to review to confirm any issues that may impact the Bank's security*."

262. On 3 August 2012, THMG's former auditors, KPMG, contacted BS to explain that "*we are working with a number of other businesses in the sector right now as they work through a number of challenging issues such as PIP and VAT treatment of their sales given wider HMRC uncertainty on whether treatment is medical or cosmetic in the cosmetic surgery sector*" which "*can make refinancing and exit options challenging, but not insurmountable* ..". KPMG offered to meet up to discuss the sector and "*support you on this asset*". BS responded on 16 August 2012, explaining that "[t]*he business is trading well and professional help is not required at this stage*."

263. On 7 August 2012, NW communicated with KH about his discussion with DR and the likelihood that Judith Slater would not agree a new Intercreditor if required by D5. The Claimant describes this as a potential problem "*looming*". On 9 August, Judith Slater's solicitors asked NW for an update on THMG's negotiations with the Bank. On 10 August 2012, KH shared her view that a new Intercreditor might not be required and would raise this with the Bank's solicitors when instructed. In the meantime, GB raised this with BS on 15 and 30 August 2012.

264. A table apparently dated 17 August 2012 identifies 46 PIP claimants, with another table apparently from September 2012 identifying 56 PIP claimants.

265. On 28 August 2012, D6 received (and forwarded to DR) a "[w]*arning of winding up*" dated 21 August from HMRC addressed to THMG's directors, identifying the debt as £689,315.65, principally comprising National Insurance for the period to 5 April 2012. DR responded that THMG had been dealing with this, the actual debt was for £250,000 and HMRC had been unable to allocate the payments made.

266. On 30 August 2012, GB reported to DR that he had spoken to BS who was expecting "*credit sanction*" tomorrow and would get Cobbetts to "*look everything over*", albeit BS saw this as "*light touch rather than a full reworking*" and appreciated there was "*no desire to get the loan note holders to sign a new intercreditor*."

267. THMG's report for the Bank for August 2012 indicated "*another very strong financial performance*", noting in relation to Ireland that "[w]*e have some external obstacles to overcome with VAT being introduced on cosmetic procedures*." The Claimant says the VAT issue was the same in Ireland as in and the UK, VAT being a matter of EU law.

268. On 1 September 2012, KH informed CK that she was in the process of drafting the transaction documentation and raised various queries with CK, concerning the Restructure, including the following:-

> "*Again the transfer of the intellectual property from THMGL to THMGHL and the transfer of the business and remaining assets (other than the leases, patient claims and aftercare responsibilities) from THMGL to The Hospital Group Administration Limited will need to be at market value less I assume any liabilities and left outstanding as an interest-free inter-company loan repayable on demand. Are you happy with this and could you confirm the assets to transfer and any relevant liabilities. Are we still writing off the inter-company loans?*"

269. The Claimant says that KH received no response at the time about the loan write-off but it was obvious from later events in October 2012 that the same (prejudicial) purpose persisted, also noting the timescale had slipped, completion now contemplated for the end of September 2012.

270. On 12 September 2012, solicitors for one of its landlords wrote to THMG concerning the payment of £55,000 rent arrears which had apparently been authorised.

271. Credit sanction for the Group's loan facility structure took some time due to holiday issues at the Bank's end. However, on 13 September 2012, JK sent GB a copy of the Colliers' valuation report for Dolan Park as well as draft indicative loan terms for TWP (Newco), with BS then confirming on 18 September 2012 Barclays' credit sanction, providing fee quotations from two of the Bank's panel solicitors and indicating that draft terms would need to be re-issued to Dolan as the borrower for the commercial mortgage, with the CAS overdraft in the name of TWP (Newco). THMG confirmed the instruction of Eversheds for the Bank. The new draft terms indicated new security in the form of a first legal charge

over the freehold and leasehold titles to Dolan Park (the latter stated to be held by THMG).

272. On 14 September 2012, DR, GB, Skott Hughes and Steve Simmonds of CK attended a meeting at Dolan Park to discuss the proposed Restructure and outstanding VAT issues. At that point, it was proposed that the former would take place effective 1 November 2012 and that CK would then arrange for the necessary changes to the VAT Group. The meeting noted the historical issue concerning VAT on acquisitions from France and the aggressive pursuit by the Irish tax authorities of VAT on all cosmetic surgery and possible registration of the Irish subsidiary in the UK. The Claimant says it is clear from the notes that the intention to that point was to have Dolan Park separate from the other entities and outside the VAT Group. However, I did not discern this clarity. The Claimant also says that, more accurately, the original hope was "*to have Dolan Park outside the VAT group to put it beyond the reach of HMRC*" but it was only when CK advised there would be a charge to VAT on a sale outside the Group that the 'plan' did not work, albeit Dolan joining the VAT Group did not render it liable for THMG's historic VAT liabilities.

273. On 24 September 2012, KH sought clarification from GB about the Restructure, the assets and liabilities being transferred and how their value was to be determined.

274. On 25 September 2012, Eversheds sent D6 draft documentation. KH provided initial internal comments on 27 September, noting that (i) Eversheds was considering whether the term loan could remain with THMG rather than be placed in Dolan and (ii) Barclays apparently required the existing charge to be released and replaced with a new legal charge. KH suggested it might be worthwhile checking whether the property should be transferred subject to the existing charge.

275. On 26 September 2012, BS and JK met DR and GB to discuss business performance. BS' meeting notes indicate discussion of THMG's better than forecast EBITDA, a one-off benefit of £120,000 from a particular creditor, the working capital 'unwind', covenant compliance and how September's performance was ahead of budget. Less optimistically, they also discussed the ongoing poor performance, and possible closure of, the Irish subsidiary (and related reputational issues). The Claimant points to the possible extension of THMG's accounting period to 30 September (apparently not yet decided) as also extending the timeframe for publication of its accounts, effectively keeping its creditors 'in the dark' longer about the Restructure. The Claimant also says that "[o]*ne of the things DR was concerned about was the growing threat of the PIP litigation, both in UK and Ireland*." Under "[u]*pdate on changes*", BS' notes refer to "*P.I.P. – can it be quantified – improvement*". It is unclear what this means but it does not appear to reflect PIP concerns generally. For Ireland specifically, BS' note records "*litigation claims 20/30 PIP patients*", with JK's contact report indicating that there "*may be a litigation backlash on PIP*" and that THMG was looking at "*potentially selling/* [sic] *pheonix into Northern Ireland coy*", reflected in BS' note as "*discuss pre pack/ Liquidation*." Although not apparent from the meeting notes, the Claimant says that "*DR was*

wanting to get on with things at this time" and had been in touch with JK to let him know that. JK recorded that the refinancing was now targeted for the end of October.

276. On 27 September 2012, DS responded to a communication from LF in which the former explained he did not think it made much difference that she had communicated to some PIP claimant representatives that THMG was self-insured and that it might make some claimants more cautious about suing if they thought THMG could not meet any judgment. DS surmised that this information would have got back to the claimants' lead solicitors despite THMG's refusal to answer the Request for Further Information about whether it was indemnified by others against PIP liabilities. The Claimant says that this appears to have represented a move towards a strategy of dissuading claimants to pursue THMG through its apparent lack of insurance. The difficulty for THMG was that its 2011 accounts showed net assets of £8.785m. DS also canvassed the possibility of THMG not appearing at the forthcoming CMC in the PIP litigation. The Claimant says this indicates that D6 "*do not appear to have had any qualms*", albeit THMG still had to get the Restructure over the line with the Bank before it could take this approach and show the claimants the 'cupboard was bare'. Not turning up to the CMC due to lack of funds would not help secure the Bank's consent to the Restructure. THMG therefore instructed LWQC to attend the CMC, with the strategy of kicking matters into the 'long grass.'

277. On 28 September 2012, CK confirmed to the Bank that the covenants would be met only if the loan notes were not paid in accordance with their terms.

278. THMG's report to the Bank for September 2012 indicated that the Group again exceeded budget, albeit with lower than expected bookings. The accompanying financial information also identified incurred patient expenses of £98,000 against a budget of £36,000, the covering report explaining that:-

> "*Patient expenses are the notable adverse item following a change in the way we are handling some of the patient claims. We are more willing to settle quickly rather than incurring significant legal claims from the patient's solicitors. The law is anticipated to change in April 2013 which hopefully will end a lot of the "no win no fee" type solicitors and will be significantly more favourable for us*."

279. The October 2012 version of LF's spreadsheet indicates 206 PIP cases with a total potential exposure of £388,594.

280. On 3 October 2012, having obtained specific advice from Eversheds on the implications for the new facility, BS e-mailed DR and GB to inform them that closure of the Irish subsidiary through an insolvency process (as canvassed at the meeting on 26 September 2012) would be an event of default under the Facility, albeit one that could be waived subject to managing the Bank's expectations, including - to use the Claimant's words - jumping through the 'hoops' of completing the Restructure, strong financial performance for the covenant reset and no breach and providing clear strategic reasons for the

closure (covering reputational risk in particular). The Claimant says that, at this time, DR was having informal discussions with JK (including at a regional golf day) to see "*how the land was lying with the Bank generally*." However, the documents indicate it was the Bank using such opportunities to "*get the latest*" from DR about the Restructure and loan note holders.

281. On 3 October 2012, KH e-mailed GB to inform him that, when she had chased Eversheds, "*they had still not spoken to the bank re: lending to THMGL rather than Dolan Park*", asking "[p]*lease could you chase the bank*." GB relayed this to BS and JK on 4 October 2012, noting again the desire to avoid changing the Intercreditor. On 8 October, GB told KH that Barclays had 'batted back' to THMG the issue of how changes to the Intercreditor could be avoided, the Bank not wanting to involve Eversheds in the discussion because of their tight fee. On 8 October 2012, JK spoke to GB. Given the number of 'moving parts' to the Restructure and the issues with the Intercreditor, it was agreed to maintain the present structure for the time being and look to refinance and reset the covenants by the end of the month.

282. On 5 October 2012, IHAS and Deloitte hosted a presentation, including about VAT and cosmetic surgery. Deloitte's slides noted that HMRC had historically set a 'low bar' for the need for an underlying health reason for the VAT exemption to apply in this context. They also indicated that, absent a clear underlying health reason for the surgery, the arguments for the VAT exemption to apply might be finely balanced. The slides also raised the question of the scope for retrospective assessment.

283. On 9 October 2012, GB sent KH his curriculum vitae in which he described himself for the period September 2011 to (the then) present as "[c]*onsultant/ director*".

284. On 9 October 2012, KH raised again with Eversheds "*whether instead of the bank lending to Dolan Park Limited, (a new company which will hold the Dolan Park property) the bank would be prepared to continue to lend to The Hospital Medical Group Limited on the basis of a deed of amendment to the existing facility letter*" which, KH surmised, would not require the Bank to amend the Intercreditor. The next day, Eversheds responded that the Bank had agreed "*… subject to obtaining credit approval, to continue the transaction with Hospital Medical Group Limited as the borrower*", albeit still requiring a charge over the lease from Dolan. On 11 October 2012, BS asked GB to confirm Eversheds' understanding that:-

> " *….. the transaction is to continue exactly as they planned to do so before, the only change to the heads of terms is that Hospital Medical Group Limited remains as borrower instead of Dolan Park. Therefore the property will still transfer out to Dolan Park, there will still be a lease back to Hospital Medical Group Limited and all previously offered security will be given*."

285. GB confirmed the same day that this summary "*looks fine to me*." BS communicated this development internally, supporting the use of Barclays

Merchant Services to provide credit card services with an exposure of £1.6m reliant on Barclays' security over the Group. BS confirmed his support for this increase in exposure because:-

> "*a) the business is generating EBITDA £2m b) the business has a good track record in respect of claims* [sic] *(They way they handled PIP is a good example c) it is a good example of BBS working with coverage*".

286. On 10 October 2012, DS instructed LWQC to attend at the CMC, noting in the instructions that "*THG's aim in this litigation is to try to keep it long term. THG do not want an early resolution to this litigation*." The Claimant says this strategy was at odds with DR's evidence about his concerns over the increasing costs of litigation but storing up those costs would be an effective strategy if the value in the Group was divorced from the entity required to meet those legal costs and damages in the future. Alternatively, the Defendants could make a 'call' on that in the future if the sums demanded by the claimants' lawyers were too high.

287. On 12 October 2012, KH e-mailed DR, GB and BS to explain her understanding that "*the leaseback will be to The Hospital Group Administration Limited and not The Hospital Medical Group Limited*." On the same day, KH sent Eversheds amended draft documents, asking "[i]*s the bank proposing to release the existing security*?" On 16 October, GB confirmed to BS that "*the lease will be THG Administration Ltd*." On the same day, Barclays sent THMG revised lending terms showing a new legal charge required over Dolan Park and the new lease (albeit still shown as in THMG's favour). On 17 October 2012, Eversheds confirmed that "[a]*ll existing security (save in respect of the property to allow it to transfer) will remain in place*." On 20 October 2012, KH forwarded Barclays' response to GB and CK, stating "*I assume the bank are aware of the transfer of the assets other than the property. Is the intention therefore to transfer subject to the existing charges?*" On 24 October 2012, KH suggested they discuss whether "*we are transferring subject to the existing charges*."

288. On 15 October 2012, GB submitted four invoices (nos. 6-9), each reflecting the work undertaken for different companies in the Group over a number of days each during June to September. In the case of THMG, GB's assignments included reviewing compliance certificates and meeting Barclays to restructure the existing loan facilities.

289. The Claimant points to LF's 15 October 2012 spreadsheet as indicative of a number of matters: first, the number of cases had increased to 204; second, contrary to the impression created by DR that waivers reduced the number of claims, the spreadsheet shows only a handful of patients who had signed such waivers; third, a number of the women identified on the spreadsheet had recently had replacement implants from THMG only to go on shortly thereafter to make claims. Although the total reserve indicated by the spreadsheet was £389,594, applying DR's 90:10 ratio to the costs figures would (conservatively) increase the required reserve to more than £2m, likely more given that, on LWQC's advice, rupture cases would attract damages of up to £20,000, much

more than the £1,000 or £2,000 (or, now, where it was known that both implants were intact, £500) indicated in the spreadsheet.

290. On 17 October 2012, Skott Hughes asked Barclays about the possibility of opening a deposit account to place money on a "*money market*" on a daily or weekly basis. He made this enquiry because "*our cashflow and daily cash position is controlled in a much better fashion than has been for a while*."

291. On 22 October 2012, Barclays confirmed internally sanction for the term loan in the name of THMG.

292. On 22 October 2012, GB informed KH of a "*couple of things coming out of my meetings last week*", namely that:-

(a) "*Gavin and I agreed that the IP should be sold from THMG to Holdings for £1.5m. The royalty rate should be 1% of revenue from each trading company back to Holdings*"; and

(b) " *… we would like to change the name of THG Administration Ltd to The Hospital Group Healthcare Ltd - it was felt that having "Administration" within the name was likely to lead to confusion*."

293. On 22 October 2012, KH sent GB and CK draft asset transfer, transfer of IP and IP licence agreements.

294. A table entitled "*Issued and Served Claims as at the 23 October 2012*" indicated 21 issued and served PIP claims, including 14 ruptures, the Claimant again noting that LWQC had advised that damages in these cases could cost up to £20,000, with potential exposure according to LF's original spreadsheet or DS' own case summaries of up to £150,000 per case. Although DR's evidence was that many of these 14 rupture cases would have received replacement implants, this would not obviate claims for pain and suffering due to local reactions and/ or additional surgery. Even on the basis of these claims, it was not unreasonable to anticipate liability of £3m plus. Moreover, the number of claims was increasing. According to HJ's witness statement dated 22 October 2012 for the forthcoming CMC, the number of claims expected as a "*general guide*" were 289 against THMG, 1699 for Harley, 594 for Transform, 67 for Spire and 38 for BMI.

295. On 24 October 2012, the CMC in the PIP litigation took place before Thirlwall J. The deadline for adding claims to the group register was fixed for 8 April 2013. The Claimant says it was natural to expect that this would be a catalyst for further claims and the responsible thing for D1-D3 to have done if they were unsure as to the level of claims, and thinking what was best for THMG, would have been to wait for April 2013 before undertaking the Restructure and moving the assets out of the Company, albeit this would not have helped to negotiate down the PIP claims. DS' note of the CMC states that the claimants indicated that 75% of the 3,000 claimants were the "*worried well*", with no rupture. Following the hearing, DS discussed with LF the potential revelation of THMG's (lack of) insurance. DS "*said it may be better to do this now but it is a commercial decision that THG will need to take after advice from their PR*

advisors and maybe our firms commercial department and possibly our insolvency team (re movement of assets)." After NW queried this part of the note, the final version contained no reference to D6's insolvency team.

296. On 25 October 2012, Eversheds asked KH whether everything was "*in place to complete the property transfer*", the former holding a DS1 and deed of release ready for execution by the Bank "*to release the existing security*". On the same day, KH asked GB and CK to confirm that " … *the property is being transferred direct from THMGL to Dolan Park Limited*" at a value of £15m. GB confirmed the value but said the transfer was "*going via Holdings*." KH asked if the Bank knew this. GB did not know but asked "[w]*hat difference does it make to them?"* KH agreed but said the Bank might need to go back to credit. She then spoke to Eversheds who apparently had no instructions that any assets (other than Dolan Park) were to be transferred. Eversheds would speak to the Bank about "*the property transfer and deed of release re: transfer of assets*". It also appears that THMG anticipated completion on 30 November 2012, rather than 31 October as the Bank had been working towards.

<u>The 'spanner in the works' – 25-26 October 2012</u>

297. On 25 October 2012, Eversheds communicated with BS concerning their telephone call with KH, explaining that Dolan Park would not be transferred directly to Dolan rather than through Holdings. Eversheds had not prepared for this step and were not aware of the rationale other than D6's belief that it was for "*tax purposes*." Eversheds also explained that the bulk of THMG's assets were now transferring to Healthcare, with IP transferring to Holdings although they were not aware of exactly which assets were transferring or why. D6 would provide a copy of the SPA but had been under the impression that BS was fully aware of these transactions, on the basis of which, he had obtained credit approval. BS also communicated internally with JK concerning his frustration about the following "*last minute spanner in the works*":-

> "*We have had an email from our solicitors advising freehold property is not transferring directly to Dolan Park Limited and there is a transfer of HMG's assets*
>
> *This is news to me - were you aware?*
>
> *If we are to proceed we will require*
>
> *a)* *credit and legal approval for the property transfer trail*
>
> *b)* *Need details of the HMG's assets* [sic] *of the being transferred - a copy of the SPA*
>
> *c)* *Confirmation the assets are being transferred at market value*
>
> *d)* *We will need details of the current b/sheets and the restructured balance sheets to ensure there is no leakage of our security*"

298. Pausing there, it appears that BS had either forgotten about, did not read or read properly (and either way had not passed to Eversheds), the draft board paper sent to him on 20 July 2012. That version of the board paper had, in fact, referred to the transfer by THMG of its assets. Although it had referred to the transfer of Dolan Park to Dolan, that transfer taking place in two stages was 'news' to BS. On the same day, BS e-mailed GB, noting that "[t]*here appears to be a number of additional steps in respect of the asset transfers*" and asking for a paper to understand the implications of the change that he could share with Eversheds. He also sought clarity on the four points above, adding to point (a) (concerning the property transfer trail) the need for clarity on "*the security implications and the commercial benefit (cost mitigation)*". The Claimant says that BS' queries clearly evidenced "*a suspicion that the transactions in contemplation may be involving a transaction at undervalue and/or defrauding creditors*" since BS asked about the commercial benefit (as well as the security implications). His market value questions would have been irrelevant if his only concern was the Bank's security and all assets were to remain within the security net. In response, GB e-mailed BS the next day stating (with BS's original text **emboldened** below):-

> "*Brian*
>
> *I think the additional stages actually improve your position. Taking your points in turn*
>
> ***a) The property transfer trail - the security implications and the commercial benefit (cost mitigation)***
>
> *1. Property - this is being transferred from THMGL to Holdings at the value of £15m. It is then being transferred from Holdings to Dolan Park Ltd. One effect of this is that there is not a big intercompany balance between THMGL and Dolan Park Ltd., which means that in a worse case scenario, there cannot be a direct claim by an administrator of THMGL against Dolan Park Ltd., hence improving the position with regard to the security on the Hospital. THMGL, Holdings and DP Ltd are all part of your security net.*
>
> *2. Intellectual property - this is being transferred to Holdings. Holdings will license the IP back to the individual trading companies. Holdings, THMGL and the trading companies are all part of your security net. Moving the IP out of THMGL reduces the risk of this IP being compromised should there ever be an insolvency event within THMGL.*
>
> *3. Other assets - other trading assets - stock etc, will be transferred at balance sheet value to either THG Healthcare Limited or the relevant trading company as appropriate.*
>
> *4. Dividend - a dividend will be paid from THMGL to Holdings. This serves to reduce the intercompany balance within THMGL, so further reducing the assets within that company should it come under attack.*

> ***b) Please provide details of the HMG's assets being transferred - a copy of the SPA***
>
> *1. Kate - please provide Brian and Eversheds with current versions of asset transfer agreements.*
>
> ***c) Confirmation the assets are being transferred at market value***
>
> *1. The property is being transferred at £15m which is the value Colliers gave it*
>
> *2. The IP is being transferred at a value of £1.5m. Gavin and I consider this is a sensible/ market value as it will be licensed back to the trading companies at 1% of revenue, so generating income of c£300,000 pa. A five times multiple does not seem unreasonable.*
>
> ***d) We will need details of the current b/sheets and the restructured balance sheets to ensure there is no leakage of our security***
>
> *1. See attached pro forma balance sheets.*
>
> *2. I do not believe there will be any leakage of your security as all recipient companies are part of the security net.*
>
> *I hope this is clear - please let me know if you need further information*."

299. The Claimant says that the only commercial benefit spelt out by GB's e-mail was a detriment to THMG and its creditors. The only purpose it identified was to prejudice THMG's creditors, spelling out that the asset transfers were for this purpose and that a dividend would be declared to reduce the intercompany position further. Only those who did not consider it their concern that the interests of THMG's creditors were being defrauded could fail to see that the transaction should have been stopped there and then. Only one of the questions posed by BS was satisfied - "*the Bank was all right*." Moreover, the *pro forma* balance sheets attached to GB's e-mail showed the position as at 31 May 2011 and the revised Restructure balance for (i) the consolidated Group (ii) TWP (Newco) (iii) Dolan (iv) Holdings (v) THMG (vi) the trading companies and (vii) Healthcare. As DR accepted in his evidence, the balance sheet suggested the reduction of THMG's net assets as at 31 May 2011 from £8,785,041 to £160,077 following the Restructure, including through the waiver of £4.269m intercompany balances and payment of a £6m dividend. So, says the Claimant, the same prejudicial substance and purpose persisted.

300. On 26 October 2012, KH re-circulated to BS the draft board paper sent to BS on 20 July 2012, explaining that:-

> " *…. This sets out the proposed reorganisation including the transfer of the property and the assets. With the exception of the transfer of the property first to the THMGHL before being transferred to Dolan Park very little has changed.*

The pro-forma balance sheets attached to Gerard's initial email show how the intercompany balances work through."

301. On 26 October 2012, Eversheds informed KH that they now understood the position and were just putting together an advice note for the Bank. On the same day, GB noted "*that looks a bit more positive*". BS later e-mailed GB in the following terms:-

> "*Thank you for your email below setting out the proposed structure of the transaction.*
> *We note you have taken legal advice on the proposed transaction and on that basis the Bank will not object to the transfers taking place. The Bank do however require our existing security to remain in place as well as taking the new security as previously planned. Therefore all assets will need to transfer subject to the Bank's security*."

302. Given that there was (near) agreement on the documents, BS anticipated that a 31 October completion date could still be met if these were executed in short order. To that end, BS subsequently told GB on 29 October 2012 that Barclays was geared up to do the Restructure before month end and had a "*very tight deadline internally*" apparently on account of the cost of capital implications of the banking covenants being in default. On the same day, KH asked Eversheds whether Dolan Park would be transferring subject to the existing charge. Eversheds confirmed it would. The documents were executed by the relevant Group companies in escrow on 2 November 2012, albeit it was agreed that completion would not occur until 30 November. In the meantime, GB co-ordinated the progression of various operational issues, including employee and supplier communications, the need for new customer terms and conditions and surgeon contracts, insurance arrangements and the preparation of regulatory submissions for the CQC.

303. On 30 October 2012, it was reported to IHAS that HMRC was taking steps to slow down the UK tax tribunal case to avoid a referral to the ECJ.

304. THMG's monthly report to the Bank indicated that October 2012 had been a "*quiet month*", albeit forecast turnover was "*mainly achieved*". Fixed costs were increased on account of professional fees for the Restructure, the PIP class action defence (£40,000) and a legal claim against a surgeon. Patient expenses were high given the new approach to claims handling.

305. On 2 November 2012, LF resigned as a director of THMG.

306. On 9 November 2012, IHAS reported to members that "*the VAT situation has started to 'hot up' sooner than expected*" with HMRC "*trying their best to slow things down to stop us getting the right evidence to the ECJ. As a result the 'case' which is pending tribunal has been brought forward to Jan 2013 when the court will hear first technical argument. The experts will need to be ready and whatever other evidence available*."

307. On 9 November 2012, KH sent Eversheds copies of the final asset and IP transfer agreements.

308. On 9 November 2012, Harley entered administration, insolvency advice having first been sought in May 2012, with company restructuring not proving to be practical. Grant Thornton's valuation indicated that the business had no value after taking into account contingent PIP claims. The business of the company was sold on 10 November 2012 to another cosmetic surgery company. The administrators' report indicated that the PIP claims were "*contingent*" and the unsecured non-preferential "*contingent medical claims*" were "[u]*ncertain*" in value. The Claimant notes that Harley had more PIP claims than THMG. According to the administrators' report, Harley had fitted approximately 13,100 implants, more than any other UK private cosmetic surgery firm. Moreover, Harley did not have its own hospital. There were therefore some good reasons to differentiate Harley's position from THMG's. THMG could have paid the PIP claims if it had engaged the services of an insolvency expert but it chose not to do so. As DR confirmed in oral evidence, he was looking at the benefit to the Group. However, DR also confirmed in the same part of his evidence that he never envisaged an administrator or liquidator being appointed, he did not contemplate PIP claimants having recourse against Dolan Park and the motivation for its transfer was not to put it out of reach of patient claims.

309. On 12 November 2012, KH sent GB a draft THMG board minute approving payment of a dividend to Holdings. KH advised that:-

> "[i]*t is essential the directors are satisfied that the company has sufficient available profits. I have referred in the minutes to the latest filed accounts as at 31 May 2012, management accounts (please insert the latest relevant date) and advice from the company's auditors*."

310. The draft board minute explained that:-

> "*The Directors were reminded that, under the provisions of the 2006 Act, a company was not permitted to make a distribution except out of profits available for the purpose (being its accumulated, realised profits, so far as not previously utilised by distribution or capitalisation, less its accumulated realised losses, so far as not previously written off in a reduction or reorganisation of capital duly made)*."

311. After setting out the statutory tests for determining the amount of a company's distributable profits, the minute further stated that:-

> "*It was noted that, if a dividend could not be supported in this way, that dividend would be unlawful, with the result that any shareholder receiving such dividend who knows, or has reasonable grounds to believe, that the dividend contravenes the statutory rules is liable to repay it (or that part of it which is unlawful). It was also explained that the Directors of the Company who were party to a dividend which breached the statutory requirements may be exposing themselves to potential liability to the Company.*

> *It was also noted that even if the statutory tests were satisfied, the payment of the dividend would be unlawful if it was paid out of capital or if it was reasonably foreseeable, having regard to the whole of the Company's business, and the actual and contingent liabilities inherent in that business, that the dividend would cause the Company to be unable to pay its debts as they fell due. Again, any Director who was party to the decision to pay an unlawful dividend was exposing himself to potential personal liability for breach of duty in respect of that unlawful payment*."

312. KH chased GB on 30 November 2012 to ask whether the minutes were being signed.

313. On 21 November 2012, BS sent DR and GB an article concerning Harley, noting that "*it is* [sic] *interestingly that you have been able to position the PIP issue as an opportunity, where competitors have had to deal with it as a challenge. In time you will be able use this to demonstrate your brand values - well done*."

314. On the same day, KH advised GB that the (unidentified) "*scenario that we spoke of*" would be caught as an event of default under the Facility on the basis a member of the Group was unable to pay its debts as they fell due or was seeking to restructure its debt. GB informed KH that DR had decided the Bank would not be informed, D5 being aware that the Company had a high level of arrears with a number of suppliers.

315. On 22 November 2012, GB set out his agenda items for his planned meeting with CK, namely accounting for the Restructure transactions, including the property revaluation and transfers, new loan drawdown, new company asset transfers and dividend, whether in the November accounts or with effect from 1 December 2012. The discussions concerning the Restructure accounting was still ongoing in February 2013. The Claimant says that the decision was "*made to do the paperwork after the event*" such that no paperwork existed as at 30 November 2012 which would have enabled a third party to know how much could be recovered by suing THMG.

316. On 25 November 2012, LF indicated in the context of a potential claim that she was experiencing cash flow problems but could authorise settlement up to £50,000, with £10,000 monthly payments starting in January 2013.

317. An aged creditor spreadsheet, apparently prepared for THMG's financial year ended November 2012 indicates creditors over 90 days to the value of £1,565,951.68.

G. THE RESTRUCTURE AND RELATED ACCOUNTING

318. On 30 November 2012, the Restructure transactions, loan restructuring and related security completed. THMG's board minute dated 30 November 2012 recorded (i) the proposed transfer of its assets to Holdings and Healthcare (ii) consideration of the transaction documents and (iii) the need for the directors to consider their duties (in particular, under CA06, ss.171-172), the solvency of

THMG and whether the transactions might constitute a distribution or unlawful return of capital. The board meeting approved the transaction. Separate shareholder approval was also given by way of a written resolution signed on behalf of Holdings. The board minute also described the benefits of the Restructure, namely (i) reduced risks to the trading businesses of future material litigation (ii) separation of the businesses and assets allowed each business to focus on gross margins and profitability (iii) separating ownership increased the ability to control profits in the event of an administrator appointment and (iv) VAT benefits. The Claimant says that this reflected a 'cut and paste job' from the draft board paper. The directors of THMG were clearly not considering or acting in the best interests of THMG. The Restructure was implemented before the GLO deadline of April 2013 and before the number of PIP claimants was known. In fact, the directors were acting to the prejudice of those claimants, as was evident from the economic effect of the Restructure itself. In general terms, all the assets of THMG were transferred (including the IP at a value ascribed by CK and GB with no independent valuation report and business assets at book value), leaving no cash within THMG, only creditors and a wholly uncertain intercompany position.

319. More specifically, the Claimant points out that the "*Excluded Liabilities*" were left within THMG, comprising all patient claims (including PIP), all aftercare responsibilities and a 'catch all' for patient liabilities not already caught by patient claims. In addition, THMG was left with lease liabilities for properties and vehicles for which it had no use (as DR effectively accepted). THMG was also left with its tax liabilities. As a result, THMG had become a 'bad company', its only function to defend claims and deal with liabilities left behind. The intention was to put in a worse position those creditors not required for the Group to carry on trading, giving DR and SM greater control to protect their own commercial interests, albeit they needed to keep THMG going for a period, perhaps hoping they could settle for a low sum.

320. As for the purchase price, there was no document informing anyone how much THMG would receive as consideration on 30 November 2012. Moreover, although clause 5.2 of the TAA provides for the purchase price to be left as an interest free loan owing by Healthcare, the net sum was not identified. The same is true of the Holdings' board minute approving the purchase of Dolan Park and the IP. The Claimant says the best evidence of the intended consideration actually to be received by THMG was the balance sheet sent to the Bank on 26 October 2012 - in short, the Group intended a nil sum.

321. Finally, the Claimant says that, despite KH asking on 30 November 2012 whether the THMG board minute declaring the dividend was to be signed, there is no evidence that it was but the best evidence of the directors' intentions based on the balance sheet sent to the Bank on 26 October 2012 was that they intended a dividend of £6m, combined with a write-off. The former was later increased to £7.5m but not until the directors approved THMG's 2012 year end accounts on 25 October 2013.

322. As for the Restructure accounting, as noted, it was common ground that 'Whitehead year end pack' represented the 'best evidence' of the intercompany

position within the Group prior to the Restructure and of how the Restructure accounting was carried out. This shows existing (pre-Restructure) net intercompany debt due to THMG from other companies in the Group of £2,529,244.72, together with the following Restructure accounting entries:-

(a) The transfer of assets from THMG to Healthcare for £2,979,673.45;

(b) The assumption by Healthcare of £8,582,639.03 of THMG's liabilities;

(c) The resulting net intercompany debt of £5,602,965.58 due from THMG to Healthcare;

(d) The transfer by THMG to Holdings of (i) Dolan Park for £15m (ii) IP for £1.5m and (iii) investments of £99,548.99 (total £16,599,548.99);

(e) The apparent discharge by Holdings of the £5,602,965.58 debt due from THMG to Healthcare;

(f) The payment of a £7,500,000 dividend from THMG to Holdings;

(g) Following the 'simplification' of the Group's intercompany debt position, the sum of £6,025,808.23 due from Holdings to THMG.

323. The Claimant notes in relation to these entries that THMG's assets were transferred to Healthcare at book value only. So, for example, THMG's medical equipment (with a pre-depreciation) purchase value of £1,206,385.10 was sold for £89,811.26 without any independent valuation. Nor was there any overall evaluation of the EV of THMG, albeit that rather begs the disputed question of whether that was accommodated by Colliers' 2012 valuation of Dolan Park (discussed later).

324. The Claimant says that these entries (likely finalised around the finalisation of the year end accounts in October 2013) show that THMG ended up with a net intercompany debt of just over £6m. Even on the Defendants' expert's own figures, this represented an undervalue of £9.4m, £33m on the Claimant's (on a mid-point basis assessment). Nor was the intercompany position documented in a sum or manner readily capable of enforcement or realisation. Moreover, by the time it was recorded, the intercompany debt had already been reduced further and would soon be reduced to nil. In this way, the Restructure protected the Group from attack - "[s]*trategic ambiguity was maintained."*

325. Finally, THMG's report for the Bank for November indicated that it had been a disappointing month due to bookings being moved into future months on account of surgeon and patient illness and the £140,000 hedge break costs incurred. Patient expenses remained above forecast as well as professional fees due to the Restructure and consultants working on the new accounting system. Despite this, November bookings were robust and future order book healthy.

H. POST-RESTRUCTURE EVENTS

326. It was common ground that, in considering the Defendants' liability, I was entitled to have regard to facts and matters post-dating the Restructure. I have done so, albeit keeping well in mind that the relevant knowledge or intent is that the Defendants were said to have held at the date of the Restructure.

327. The drawdown of the new loan facility took place on 3 December 2012. The Bank updated its Zeus form the next day, noting that:-

> "• *The covenant restructure has successfully taken place*
> • *The business trading is on track .....*
> • *Outlook remains stable, the customer will track FY13 budget*"

328. On 6 December 2012, BS reported internally that:-

> "*The business is profitable and ahead of budget. We have successfully completed a covenant amend and reset*
>
> *The account will return to live Jan 2013*"

329. BBS also indicated its support for a lending request from the customer to finance the purchase of certain equipment. On the same day, BS conveyed to DR and GB "[a] *big thank you for all the hard work in getting the refinance over the line. I am pleased you now have the cash and covenant headroom to focus on your strategic plan*."

330. On 11 December 2012, DR, GB, BS and JK met to review the Group Strategic Review and Business Plan 2012-2015. The updated presentation now flagged the PIP issue as amber rather than red and noted that it " ... *seems to have been contained*". The Claimant points out that nothing in the litigation had happened to contain it such that this must be reference to the Restructure. Potential damages in the PIP litigation continued to be estimated at £1-2,000 per patient. The presentation referred rhetorically to Harley as "*insolvency opportunity or threat?*" In relation to VAT, the presentation continued to note the likely success of the case led by BDO against the HMRC. In relation to the "[c]*ase going before ECJ*", the "[o]*utcome* [was] *not expected until late 2013*". The Ireland business was "*to be closed in mid 2013, unless major turn around*." BS followed up the meeting with an e-mail noting that "*it is great to see the positive progress being made. A sincere well done! ... The results are strong when set in the context of a) competitors in stress / distress b) greater public and regulatory scrutiny of the sector and c) consumer discretionary spend*."

331. On 19 December 2012, IHAS sent DR (at CM's request) information about "*the case with HMRC concerning the retrospective imposition of VAT on cosmetic treatments*." The IHAS e-mail attached a note of a telephone conference that included reference to the possible retrospective levy of VAT for the previous four years. There is no indication that THMG attended this teleconference.

332. On 20 December 2012, the CQC wrote to CM concerning the impact on THMG's registration of information it had received concerning the transfer of its business assets to another entity. The CQC asked for an update if changes had been made. On 25 January 2013, CM drafted an e-mail to the CQC seeking advice as to how to notify the CQC of the new Group structure "*to separate the business activity and to make it more transparent to our patients*." CM arranged to meet the CQC on 8 February 2013. The Claimant says that the documents suggest no real interest or concern in establishing the validity of the plan to trade through new companies. To the contrary, the new companies remained dormant with all trade undertaken through Healthcare.

333. On 16 January 2013, HJ wrote to D6 concerning THMG's indemnification for PIP and the Restructure, stating in relation to the latter that, despite pending PIP claims, THMG had transferred all its assets to other companies, beyond the reach of the claimants. NW discussed this with KH who considered that HJ were not in a position to do anything, particularly given the need to demonstrate an undervalue. D6 responded on 23 January, declining to answer HJ's questions and stating that any application to set aside the Restructure transactions would have no basis in law. The Claimant notes that D6's response 'prayed in aid of' Barclays' involvement in the Restructure to say that "*correct procedures had been applied*." On 23 January 2013, HJ replied, stating that THMG was now facing around 150 PIP claims.

334. On 17 January 2013, BS indicated the conclusion of BBS' involvement following the provision of certain financial information.

335. On 22 January 2013, NW was informed that DR wanted a follow up meeting to the Restructure. NW noted to KH that "*I think this request is because they are now coming under some significant creditor pressure*."

336. On 23 January 2013, the IHAS circulated "*some more favourable news than we have had in the past*", attaching BDO's note, indicating its view that the ECJ seemed "*highly unlikely to make a material deviation from the interpretation of the VAT rules enshrined in European case law*" such that "*we will have a good case before the UK courts*."

337. On 5 February 2013, Skott Hughes met CK to discuss the 30 November 2012 transfer of assets "*as this really does need some closure*." Skott Hughes and John Whitehead were to draft the journal movements for internal review before going through these with CK.

338. BS' 14 February 2013 update to the Zeus form confirmed that it had been agreed for the customer to "*go back to live*". This was because the covenant reset had successfully taken place, the business trading was on track, the outlook remained stable and the customer would comply with the revised covenants. On 27 February 2013, BS e-mailed DR and GB to confirm "*completion of the restructure*", stating:-

> "*In view of the positive trends & developments over the last 14 months we are satisfied that the key issues originally discussed at our initial meeting in November 2011 have been resolved and the Company now*

clearly has a stable financial platform to move forward. In view of this progress, my involvement from Business Support will cease with immediate effect and Julian Kilsby will now resume full responsibility for the Company's ongoing relationship with the Bank.

Your success in negotiating a covenant restructure, creating a robust business plan aligned to the recent strategy review is a reflection of the hard work and efforts of the Directors and the rest of the Management team - congratulations & well done to you all."

339. Between 4 and 7 March 2013, D6 exchanged e-mails with LF concerning the preparation for, and costs of, the forthcoming CMC in the PIP litigation on 23 and 24 April. DS anticipated a large number of claims in advance of the 8 April 2013 GLO deadline. NW noted that D6 was owed more than £200,000 and was reluctant to extend the credit line further. In advance of the CMC, HJ applied for an order requiring THMG to provide information about its insurance position. A related e-mail from DR to SM indicates that it was being proposed to tell the PIP claimants' solicitors that THMG was uninsured, that D6 would no longer represent THMG and that THMG would not appear at future hearings. DR asked SM to make the decision since, although it would save costs, it "*could also result in bad publicity*" and could "*jeopardise the company.*" The application was subsequently compromised, with THMG disclosing it held no relevant liability insurance.

340. On 21 March 2013, the ECJ issued its decision in *Skatteverket* v *PFC Clinic AB* (Case C-91/12). CM circulated Deloitte's summary of the decision to DR, SB, LF and Skott Hughes. The decision confirmed that supplies of cosmetic treatments and surgery were exempt from VAT where the procedure was to protect, maintain or restore human health. According to Deloittes, that element of the decision was unsurprising, supporting HMRC's current interpretation. However, the case also decided that the view of the patient was not determinative as to whether a procedure was for a 'medical reason.' That was a medical assessment which had to be based on findings by a medically qualified person. Deloittes noted that the providers of cosmetic procedures were likely to require the sign off from a medically qualified person to confirm that the relevant procedure was for a medical reason. It appears that GB at least also attended a 'live webcast' on 22 March 2013 at which Deloittes discussed the steps that could be taken by businesses in the short term to support the VAT exemption continuing going forward.

341. On 1 April 2013, Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into force, removing the ability to recover CFA uplifts and ATE premiums in future cases (subject to certain exceptions).

342. On 8 April 2013, the deadline for personal injury claimants to register claims under the GLO expired. HJ wrote to THMG on 15 April 2013, stating that 250 claims had been notified against the Company, estimating their value at around £3.5m plus costs and, in light of the Restructure, requesting unambiguous confirmation that THMG would be able to meet its liabilities to the PIP claimants, if successful. The number of claims against THMG was confirmed

internally by LF's review of the PIP Group Litigation register. The Claimant points to the draft instructions to LWQC dated 17 April, including the statement that the 220 served claim forms and schedules had not been looked at in detail due to lack of funds, to say that "*DR had turned off the tap*."

343. On 23 and 24 April 2013, the CMC in the PIP litigation took place before Thirlwall J. LWQC appeared for THMG. At the CMC, the claimants argued that the Court should have regard to the financial stability of THMG when making case management decisions, relying on its lack of insurance and the asset transfers the subject of the Restructure. In this regard, the Claimant says the following part of Thirlwall J's judgment is revealing as to the true purpose of the Restructure:-

> "*Mr West informed the court I assume on the basis of some sort of instruction; that the defendant was seeking to separate its past liabilities from its current and future trading. At one stage, he said in terms that the current company were seeking to insulate itself 'Against what'? I asked rhetorically. It certainly appears that the company has sought to protect its current trading position by putting its assets beyond the claimants. In that regard of course, the claimants must take their chance like any other claimants*."

344. The Defendants say LWQC did not fully understand the position but the Claimant says the conclusions that both LWQC and the Judge reached on the documents are illuminating: the precise financial position could not be ascertained because of lack of evidence of THMG's finances, exactly as the Restructure was intended to achieve. The Claimant also notes the positive effect of the hearing, namely that THMG ceased to be a lead defendant. Although DR says THMG continued to defend the proceedings, in reality it did not.

345. On 23 and 24 April 2013, HMRC visited Dolan Park to check the Group's VAT records.

346. On 2 May 2013, HJ wrote to D6, reiterating its request for information about the Restructure. On 3 May 2013, D6 replied, denying entitlement to the information requested but confirming that "*we can confirm that in the event that there were to be a Judgment against our clients for £3.5 million plus costs (which is a figure you have previously canvassed in correspondence as being the value of your contingent claims) it is unlikely that our clients would be able to meet that Judgment*." On 24 July 2013, D6 ceased to act for THMG in the PIP litigation, with THMG thenceforth acting in person, DS having moved from D6 to go 'in-house'.

347. It appears that, from May 2013 onwards, CK undertook litigation provision testing for THMG for the financial year end November 2012 accounts "[t]*o ensure that the litigation provision is fairly stated within the accounts, and is in line with the definition in FRS 12*." CK concluded that "[f]*rom the testing performed the above objective appears to have been achieved*." Moreover, "*a confirmation letter has been received from Wilkes, agreeing that all the balances we selected for our testing are fairly stated at the period end*", thereby

providing further audit comfort that the litigation provision as stated in LF's spreadsheet was not materially misstated. The Claimant says that the confirmation provided by D6 on 7 August 2013 related to nine (non-PIP) cases only, NW calling LF the same day to sign off on estimated liabilities of £902,000 for these claims (including costs). As explained below, the Claimant says that no provision was made for the PIP claims because LF and DR misled CK about these.

348. On 12 August 2013, a further CMC was held in the PIP litigation at which Thirlwall J ordered that the trial of common issues would start on 6 October 2014, with a provisional trial estimate of 20 days.

349. On 25 October 2013, THMG's directors approved the accounts for the financial year ended 30 November 2012, reporting a profit on ordinary activities of £1,140,381 for the (extended) accounting period compared to the prior financial year (£236,455), albeit only avoiding a loss through the sale of the IP to Holdings for £1.5m. The Claimant focuses on the reduction of THMG's net assets from £8.785m in 2011 to £1.382m in 2012. The balance sheet recorded debtors of £6,053,235, of which £6,025,808 represented amounts due by Group undertakings.

350. The accounts had been prepared on a 'going concern basis', the directors having "*prepared detailed forecasts and projections which show that the Company and Group will continue to operate within the current working facilities for at least the next 12 months*." In this regard, the accounts were accompanied by a 'letter of comfort' dated 25 October 2013 from TWP (Newco) to assist THMG (for a minimum of 12 months) "*in meeting your liabilities as and when they fall due, but only to the extent that money is not otherwise available to you to meet such liabilities*."

351. In relation to THMG's liabilities, the accounts contained a patient claims provision of £1,015,114 (increased from £649,438 the prior year) "*carried for notified legal claims for whom the Company has been unable to achieve a satisfactory outcome at the year end*", such provision being based on "*management's best estimate of the outcome of the claims*." In relation to PIP, the accounts contained the following contingent liability note:-

> "*In January 2012 it became evident that some breast implants used by the Company since 2001 and manufactured by PIP, a company registered in France, may contain an unauthorised silicon gel. At this time the Government advice is that these implants should not be routinely removed unless there are signs of rupture or leakage (as with any other silicone breast implant). The Company is monitoring the situation on a daily basis, taking legal advice and carrying out those procedures where medically indicated. Claims against the Company are being defended and are being managed by the court within the terms of a Group Litigation Order. It is now known that the content of the PIP implant is not toxic*."

352. As noted, the Claimant says that DR and LF misled CK as to the factual position. According to CK's notes, apparently from August 2013, " … *UK testing has not identified any increase in rupture rates, nor has it identified any increased risk from the industrial grade silicon from normal silicon*." DR therefore did not provide true information on the former critical point such that the accounts were not true and fair.

353. The Claimant also says that D1-D3 caused the intercompany debt to be reduced from £6.025m to £769,065 in the space of only a year (to November 2013) through a series of improper charges to THMG, including travel and subsistence costs, finance lease and hire-purchase costs, 'administrative expenses', including for the use of Dolan Park, leasehold liabilities and bank debt. These are examined below.

354. The Claimant also points to the Company making a £1.248m loss in the 2013 financial year. Despite DR and SB knowing in October 2013 that THMG was well on its way to making such a loss, they decided then upon the £7.5m dividend. Although, notionally, the dividend left net assets of £1.382m in THMG as at November 2012, DR and SB already knew of the subsequent losses in the 2013 financial year and that the dividend would leave it with net assets of around £134,344 and THMG would be rendered insolvent, its losses likely to continue into the 2014 financial year. As such, the Claimant says that no third party could have effectively sued THMG to recover a debt, exactly as D1-D3 had intended.

355. On 28 July 2014, HMRC issued VAT Notice 701/57 which explained that services provided by health professionals were exempt from VAT if the "… *primary purpose of the services is the protection, maintenance or restoration of the health of the person concerned*."

356. On 4 August 2014, HMRC met GB and John Whitehead to discuss Group VAT. The view of the Group was that "*HMG provide services which will improve the health and wellbeing of patients, and as such warrant exemption*." HMRC explained that it "*would be seeking evidence that a prospective patients' reasons for undergoing procedures was considered and documented*". HMRC noted that such evidence appeared to take the form of medical questionnaires completed by the patients prior to meeting the surgeon. On 28 October 2014, HMRC wrote to Holdings, seeking further information about its services, also pointing out in relation to the patient questionnaire that "*there appears only one area where what may be termed the customer's psychological well-being is considered*", namely the question asking whether the patient believes the procedure would improve his or her health and well-being. HMRC considered it hardly conceivable that a patient would ever tick 'no' such that it was not a credible basis for determining liability to VAT of the procedure in question. HMRC asked for these concerns to be addressed.

357. Between (at least) August 2014 and July 2015, without prejudice discussions took place between THMG and the PIP claimants' steering committee. The Claimant says THMG's impecuniosity was plainly being used in those discussions to drive settlement, including on 8 August 2014 when DS

apparently emphasised the Group's inability to continue trading if it had to "*meet the claimants damages (as per matrix) and their share of the costs as per the estimate*", DS also noting that "[t]*he company which has the potential Judgment debt has not been trading now for 2 years in November this year*."

358. On 22 December 2014, TWP (Newco) sought the Bank's permission to convert its preference shares into deferred shares, the rationale being incentivisation of ordinary shareholders involved in the management of the business and the improvement of the balance sheet. On 24 December 2014, Barclays consented to the conversion.

359. On 16 January 2015, BDO responded to HMRC on Holdings' behalf, providing further information as to the nature of its supplies but also noting (i) a therapeutic aim had to be present for the responsible doctor to treat the patient and justify the risk of the relevant procedure and (ii) although BDO considered the procedures comprised the provision of 'medical care' within the meaning of the first relevant exemption in the VAT Act 1994, such procedures fell squarely within the second relevant exemption for the "*provision of care or medical or* ***surgical treatment*** *.... in any hospital [or state-regulated institution]*" (emphasis supplied by BDO).

360. On 6 March 2015, further without prejudice discussions were held in which DS indicated that the directors of Holdings had agreed to allocate £250,000 to support a settlement but that " … *there is no other money available and the non trading company will be allowed to die if the offer is not accepted as they cannot afford to be become defendants in the October trial*." Again, the Claimant says the prejudicial effect of the Restructure was being used for settlement purposes.

361. It appears that, by May 2015, an agreement in principle had been reached for settlement of the PIP claims against THMG in return for a cash sum of £250,000, patient vouchers and the assignment of THMG's claims against certain companies, albeit ultimately not consummated.

362. On 7 May 2015, BDO provided further information to HMRC about the Group's cosmetic procedures.

363. On 30 June 2015, Transform entered into administration and its business was sold to Aurelius the same day.

364. On 13 July 2015, Barclays provided the Group with a new £6.7m loan facility.

365. On 21 July 2015, Freeths, wrote to THMG, asserting that the two-stage transfer of Dolan Park to Dolan was a transaction defrauding creditors under IA86, s.423 and that the claimants intended to instigate proceedings to restore the pre-Restructure position. The next day, Freeths e-mailed DS, informing him that it had resurrected its concerns about the manner in which THMG's assets had been put beyond the reach of its creditors and seeking agreement to settle the claims at 80% of the damages and costs previously indicated. The Claimant says that Transform went into liquidation - in fact, administration - around this time but this was not mentioned by Freeths in their communication with DS.

They appeared to be unaware of the administration such that the Defendants' self-exculpatory comments that "*all would have been alright*" but for Transform's insolvency are not borne out by the documents. However, I find it highly improbable that the PIP litigation steering committee solicitors would not have been aware of Transform's administration - a public process - let alone for a period of three weeks. Far more likely, as this communication does bear out, is that Freeths significantly readjusted upwards its settlement expectations of THMG when it learnt the lead defendant had collapsed.

366. On 19 August 2015, BDO wrote to HMRC, declining to put forward a figure for a proportion of Holdings' supplies that should be standard rated, stating that it considered all supplies to be VAT exempt.

367. On 31 August 2015, SB resigned as a director of TWP (Newco), THMG and Holdings.

368. On 26 October 2015, DR approached insolvency practitioners about THMG's financial position.

369. On 26 November 2015, HMRC informed BDO that it proposed to issue an assessment on the basis that 79% of the Group's supplies were standard rated.

370. On 26 November 2015, the THMG board resolved that the Company was unable to pay its debts.

371. On 23 December 2015, HMRC informed BDO of its intention to issue a backdated VAT assessment against Holdings, albeit that decision would be considered by HMRC's Dispute Resolution Board. After further correspondence between BDO, Holdings and HMRC, a VAT assessment was issued against Holdings on 7 October 2016 for the period 1 September 2012 to 31 May 2016 in the sum of £8,671,680.

372. On 9 February 2016, THMG entered creditors' voluntary liquidation. DR's directors' report states that THMG was in advanced negotiations with the PIP claimants' solicitors in July 2015 but these broke down "*after the failure of the other defendants*." Moreover, Holdings was no longer willing to offer THMG support. The Claimant says that these were the natural and probable consequences of decisions from 2012 to place THMG in the position that it needed parental support.

373. On 20 May 2016, default judgment on liability was entered against THMG in the PIP litigation.

374. On 6 October 2016, Healthcare entered administration and its business and assets sold by pre-pack administration. The statement of the joint administrators' proposals from 13 October 2016 indicated in relation to Healthcare's VAT liability that BDO's " … *initial advice was that the Company had a strong case and that there was a very good chance that the challenge would be successful Counsel's opinion was also sought who was also positive*

about the Company's ability to challenge the decision." On 28 October 2016, TWP (Newco) and Holdings entered creditors' voluntary liquidation.

375. On 15 August 2022, Freeths advised the Claimant that creditor claims of £22,423,931.41 had been received in THMG's liquidation (including £8.5m from PIP claimants and £9m from HMRC, both before interest).

376. Based on the evidence, the Claimant concludes in relation to the proper characterisation of the Restructure that it represented:-

(a) a distribution as if on winding up but with insufficient creditor protection, THMG having no independent vitality from the end of November 2012 and the Group acting as 'gatekeeper', having gathered in THMG's assets to itself, then 'picking and choosing' which creditors to pay;

(b) the intentional transfer of value from THMG to the Group - on any view, whether compared on a simplistic before and after basis, or with the benefit of the expert evidence; and

(c) a prejudicial purpose, seeking to benefit the Group to the detriment of THMG and its creditors as was manifest in the conduct of DR and SB (assisted by GB) throughout all relevant periods.

377. As such, the Restructure was a transaction defrauding creditors under IA86, s.423, an unlawful distribution not permitted by CA06, Part 23, an unlawful return of capital, an unlawful informal winding-up and a fraud on creditors.

I. OVERARCHING LEGAL PRINCIPLES

(a) Unlawful return of capital

378. The Claimant argues that the transfer of Dolan Park, IP and other assets as well as the dividend all amounted to unlawful returns of capital, an allegation closely aligned with its allegation that the Restructure represented an unlawful 'informal winding-up'. As to the return of capital generally, a limited company not in liquidation cannot lawfully return capital to its members except by way of a court approved reduction of capital. Profits, however, may be distributed to members by dividend computed in accordance with CA06, Part 23. Members may, of course, acquire assets for full consideration (see Pennycuick J in *Ridge Securities Ltd* v *Inland Revenue Comrs* [1964] 1 WLR 479 (at [495]); *Progress Property Co Ltd* v *Moore* [2010] UKSC 55 per Lord Walker (at [1])). In *Progress*, considering *Ridge* and *Aveling Barford Ltd* v *Perion Ltd* [1989] BCLC 626, Lord Walker noted that:-

(a) Whether a transaction infringes the common law rule against the return of capital is a matter of substance, not form, the parties' label attached to the transaction not being conclusive (at [16]). The essential issue is the *proper characterisation* of the relevant transaction (at [24]);

(b) There is no relentlessly objective rule that there is an unlawful return of capital "*whenever the company has entered into a transaction with a shareholder which results in a transfer of value not covered by distributable profits, and regardless of the purpose of the transaction.*" Such a rule would be "*oppressive and unworkable*" and would "*tend to cast doubt on any transaction between a company and a shareholder, even if negotiated at arm's length and in perfect good faith, whenever the company proved, with hindsight, to have got significantly the worse of the transaction*." (at [24]);

(c) In such cases, "*the court's real task is to inquire into the true purpose and substance of the impugned transaction. That calls for an investigation of all the relevant facts, which sometimes include the state of mind of the human beings who are orchestrating the corporate activity*" (at [27]). Sometimes their states of mind are completely irrelevant as for a distribution described as a 'dividend' but paid out of capital, however technical the error and well-meaning the directors who recommended it. Likewise, for a controlling shareholder who simply treats the company as his own, what he does is enough in itself to establish the unlawful nature of the transaction (at [28]);

(d) By contrast, a distribution described as an arm's length transaction is the paradigm example of where the participants' subjective intentions are relevant. In such a case:-

> "If a company sells to a shareholder at a low value assets which are difficult to value precisely, but which are potentially very valuable, the transaction may call for close scrutiny, and the company's financial position, and the actual motives and intentions of the directors, will be highly relevant. There may be questions to be asked as to whether the company was under financial pressure compelling it to sell at an inopportune time, as to what advice was taken, how the market was tested, and how the terms of the deal were negotiated. If the conclusion is that it was a genuine arm's length transaction then it will stand, even if it may, with hindsight, appear to have been a bad bargain. If it was an improper attempt to extract value by the pretence of an arm's length sale, it will be held unlawful. But either conclusion will depend on a realistic assessment of all the relevant facts, not simply a retrospective valuation exercise in isolation from all other inquiries." (at [29]);

(e) To that end, Lord Walker agreed (at [32]) with Lord Hamilton's *dictum* in *Clydebank Football Club Ltd* v *Steedman* 2002 SLT 109 (at [76]) that:-

> ".… a mere arithmetical difference between the consideration given for the asset or assets and the figure or figures at which it or they are in subsequent proceedings valued retrospectively will not of itself mean that there has been a distribution. If the transaction is genuinely conceived of and expected as an

> exchange for value and the difference ultimately found does not reflect a payment 'manifestly beyond any possible justifiable reward for that in respect of which allegedly it is paid', does not give rise to an exchange 'at a gross undervalue' and is not otherwise unreasonably large, there will not to any extent be a 'dressed up return of capital'. In assessing the adequacy of the consideration, a margin of appreciation may properly be allowed."

379. The authorities do not require the impugned transaction to be a 'sham' - a distribution of capital 'dressed up' as, or with the 'pretence' of, a genuine transaction may also be unlawful. Nor is the 'fraud on creditors' perpetuated by the unlawful return of capital limited to the situation in which the transaction is entered into when the company is insolvent (*Progress Property* at [21-22], citing *Aveling Barford* at [633]).

(b) 'Informal winding-up'

380. In this case, the Claimant says that the substance and true purpose of the Restructure was THMG's 'informal winding-up', including the cessation of its trade and return of capital to its members, those members then deciding which of THMG's creditors would be paid (or not). In this way, the statutory regime to protect the company's creditors was avoided. The Claimant relies, in particular, on *MacPherson* v *European Strategic Bureau Ltd* [2000] 2 BCLC 683 (at [47]-[48], [52]) in which Chadwick LJ found that, although the relevant impugned agreement was supported by contractual consideration in respect of the services by the directors in whose favour payments were to be made thereunder by the company, this did not mean that they could necessarily allow the company to assume the obligations it did. Management powers were to be exercised for the benefit of the company and not, without regard to the interests of the company, for the benefit of the directors (at [37]).

381. In this context, relevant questions included whether the transaction was reasonably incidental to the carrying on of the company's business, *bona fide* and for the benefit, and to promote the prosperity, of the company (at [37]). As to these, relevant considerations included the insolvency of the company at the time the agreement was made, the effect of the agreement to hypothecate and earmark recoveries under existing contracts to the payment of certain liabilities to the exclusion of other creditors (including contingent and future creditors), and that the persons to benefit under the agreement included the directors (at [38]).

382. Given these arrangements, Chadwick LJ was in no doubt that the agreement failed to benefit, and promote the interests of, the company and that what the parties had achieved through an arrangement for the payment of remuneration was "*the distribution of assets as if on a winding up*". Their intention was to "*effect an informal winding up of the business*" (at [46]). That objective could have been achieved through the sale of the business to a new company on appropriate terms or a Court sanctioned reconstruction, in each case with provision for company's creditors before there could be a distribution (at [47]).

To enter into the arrangement without proper provision for creditors was itself a breach of the duties the directors owed the company and an attempt to circumvent the creditor protections afforded by statute. As such, the arrangement was not reasonably incidental to the carrying on of the company's business. The presence of contractual 'consideration' did not obviate the need for 'full consideration' in the sense that the arrangement must be for the benefit, and to promote the prosperity, of the company (at [48]). Nor, again, was it necessary to categorise the agreement as a 'sham' (at [49]).

383. The mischief to which Chadwick LJ's finding was directed was not the contravention of the statutory requirement only to make distributions out of available distributable profits rather than the distribution of assets other than on a formal winding up without making proper provision for creditors (*MacPherson* at [52]). The Claimant relies on Chadwick LJ's focus there to say that common law principles concerning the unlawful return of capital apply regardless of whether there are, in fact, sufficient distributable profits to make a distribution or dividend. The Defendants say that this is not what Chadwick LJ decided; such a proposition would be inconsistent with *Ridge* (at [495], citing *Progress* at [1]). In any event, *MacPherson* is distinguishable from the present case. To a similar end, the Claimant submitted that the decision in *MacPherson* did not depend on the relevant company's insolvency. However, despite the view expressed in *Aveling Barford* on this point, the Court in *MacPherson* thought it "*necessary to have in mind*" as a material consideration the company's insolvency (at [38]).

(c) <u>Unlawful distribution</u>

384. The Claimant also argues that, even if the Restructure arrangements could not be considered an unlawful return of capital, there were in any event insufficient distributable profits within the meaning of CA06, Part 23 to make the distribution that occurred, whether viewed as the entirety of the transactions constituting the Restructure, or just the dividend.

385. Part 23 defines "*distribution*" broadly as "*.. every description of distribution of a company's assets to its members, whether in cash or otherwise ..*" (s.829(1)), albeit certain matters are excepted, including a distribution of assets to members on winding up (s.829(2)(d)).

386. Under s.830(1), a company can only make a distribution to its shareholder out of "*profits available for the purpose*". These are to be determined by reference to the company's "*relevant accounts*", usually the company's last annual accounts (s.836(1)), albeit a distribution may be justified by reference to interim accounts if it would contravene Part 23 by reference to the former (s.836(2)(a)). Whether a distribution can be made without such contravention is determined by reference to the following items in the relevant accounts:-

(a) profits, losses, assets and liabilities (s.836(1)(a));

(b) certain kinds of provisions (s.836(1)(b)); and

(c) share capital and reserves (s.836(1)(c)).

387. A company's profits available for this purpose are "…*its accumulated, realised profits, so far as not previously utilised by distribution or capitalisation, less its accumulated, realised losses*…" (s.830(2)).

388. Section 845 provides for the determination of the amount of a distribution "*consisting of or including, or treated as arising in consequence of, the sale, transfer or other disposition by a company of a non-cash asset*" where, at the time of the distribution, the company has profits available for distribution. Where the amount or value of the consideration for the disposition of the non-cash asset is no less than its book value stated in the accounts, the amount of the distribution is deemed to be zero (s.845(2)(a)). In any other case, the amount of the distribution is deemed to be the excess of the book value of the non-cash asset over the consideration for the disposition (s.845(2)(b)). By s.845(3), the company's distributable profits are treated as increased by the amount (if any) by which the consideration for the disposition of the non-cash asset exceeds its book value.

389. Section 846 is concerned with the situation in which a company makes a distribution also "*consisting of or including, or treated as arising as a consequence of, the sale, transfer or other disposition by the company of a non-cash asset*", and any part of the amount at which that asset is stated in the relevant account represents an unrealised profit. Such unrealised profit is treated as realised for the purpose of determining the lawfulness of the distribution in accordance with Part 23 (whether before or after the distribution takes place). Gower explains the concerns which led to the introduction of ss.845 and 846 (at [18-020]):-

> "The decision in Aveling Barford…. that the transfer was unlawful caused considerable alarm in commercial circles about the legality of intra-group transfers of assets, which are, of course, a common occurrence as a result of the carrying on of business through groups of companies. Such transfers are usually effected on the basis of the value of the asset as stated in the transferring company's accounts (its "book" value), which may not reflect the current market value price of the asset. …. The CA 2006 deals with this concern by laying down rules about distributions in kind which apply to both the statutory restrictions on distributions and any other rule of law restricting distributions".

390. As Lord Walker also stated in *Progress Property* (at [23]):-

> "The fact that the same individuals are interested on both sides is not of course, by itself, a cause for alarm, since company reconstructions are carried out for all sorts of entirely proper purposes (and now have the benefit of sections 845 and 846 of the Companies Act 2006)".

391. Finally, s.851(1) provides that the provisions of Part 23 "*are without prejudice to any rule of law restricting the sums out of which, or the cases in which, a distribution may be made*" save that, reflecting the concern noted above, ss.845

and 846 also apply to any rule of law requiring distributions to be paid out of profits or restricting the return of capital to members (s.851(2)).

(d) Transaction defrauding creditors

392. The Claimant also argues that the transactions comprising the Restructure, whether considered individually or together, constituted a transaction defrauding creditors, as to which, IA86, s.423(1) provides that:-

> "*This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—*
>
> *(a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;*
>
> …………….
>
> *(c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.*"

393. Section 423(3) specifies the required **purpose** for a transaction defrauding creditors, namely that:-

> "*(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or*
>
> *(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make."*

394. As to what is meant by a **transaction** for the purpose of s.423, Flaux J (as he then was) held in *Concept Oil Services Ltd* v *EN GIN Group LLP* [2013] EWHC 1897 (Comm) (at 80-81) that certain steps in a series of changes to a corporate structure constituted transactions, also noting (at [79]) the observation of Jonathan Parker LJ in *Feakins* v *DEFRA* [2005] EWCA Civ 1513 (at [7]) as to the breadth of that term which, by operation of s.436, encompasses " .. *a gift, agreement or arrangement* ..". That term is also wide enough to include a dividend paid by a company to its shareholder (*BTI 2014 LLC* v *Sequana SA & Ors* [2019] EWCA Civ 112 even if otherwise lawful under CA06, Part 23 (at [51]-[63]), a finding unaffected by the subsequent Supreme Court decision).

395. To determine whether the transaction was at an **undervalue**, it is necessary to analyse the consideration given and received by the company. In *Phillips & another* v *Brewin Dolphin Bell Lawrie Ltd & another* [2001] 1 WLR 143 (at [151E-F]), Lord Scott approved the *dictum* of Millet J in *In re M C Bacon Ltd* [1990] BCLC 324 (at [340]) concerning IA86, s.238(4)(b) (corresponding to s.423(1)(c)) that " … *the transaction must be (i) entered into by the company; (ii) for a consideration; (iii) the value of which measured in money or money's worth; (iv) is significantly less than the value; (v) also measured in money or*

money's worth; (vi) of the consideration provided by the company." *Brewin Dolphin* also decided (at [26]) that, in determining the value of the consideration, rather than "*wear blinkers*", the Court was entitled to give "*precedence to reality over speculation*" by taking into account "*ex post facto events*" which would resolve a critical valuation uncertainty - in that case, the future survival of a sublease and whether sums that might otherwise have fallen due thereunder should be brought into account.

396. Finally, as to whether the transaction was entered into for the relevant **purpose** under s.423(3), *JSC BTA Bank* v *Ablyazov* [2018] EWCA Civ 1176; [2019] BCC 96 (at [14]) held that "… [i]*t is sufficient simply to ask whether the transaction was entered into by the debtor for the prohibited purpose. If it was, then the transaction falls within section 423(3), even if it was also entered into for one or more other purposes. The test is no more complicated than that*." The Court of Appeal also noted (at [15]-[16]) the need to avoid conflation of the purposes of a transaction and its consequences (even if the latter were foreseeable or actually foreseen) albeit, depending on the circumstances in the particular case, appreciation of the latter may, but will not necessarily, support an inference as to the former.

397. According to Neuberger J in *National Westminster Bank Pl*c v *Jones* [2000] BPIR 1092 (at [1123]), a defendant who relies on professional advice in entering into the transaction sought to be impugned may still have done so for the relevant purpose under s.423(3). "… [T]*hose who live by the sword die by the sword, and the fact that they lived by a sword which is conceived and manufactured by others does not alter the fact that it is the sword which they used against the Bank*." Likewise, a defendant acting on the basis of legal advice, in the belief the transaction will be legally effective, does not preclude them having the relevant purpose under s.423(3) for entering the transaction in question. In *Arbuthnot Leasing International Limited* v *Havelet Leasing Limited & Others* [1990] BCC 636, Scott J held (at [644]) that " ….[t]*he fact that lawyers may have advised that the transaction is proper or can be carried into effect does not by itself mean that the purpose of the transaction was not the subsec. (3) purpose. It seems to me that, beyond any argument, that was the purpose for which these transactions were made*."

(e) *De facto* directorships

398. It is common ground that D3 was not a *de jure* director of THMG at the time of the events relied upon by the Claimant leading to, and following, the Restructure, D3 having previously resigned as director of THMG on 30 September 2011, becoming a consultant with effect from 1 October 2011. Nevertheless, the Claimant asserts he was, at all material times, a *de facto* director of THMG and, therefore, liable for breach of fiduciary duty in the same manner as D1 and D2. CA06, s.250 provides that a director "*includes any person occupying the position of director, by whatever name called*". *Smithton Ltd v Naggar* [2014] EWCA Civ 939 makes clear (at [45]) that whether a person is a *de facto* (or shadow) director is a question of fact and degree. There is no one definitive test for a *de facto* director; the question is whether he was part of the corporate governance system of the company and whether he assumed the

status and function of a director so as to make himself responsible as if he were a director (*Revenue and Customs v Holland; Re Paycheck Services 3 Ltd* [2010] 1 WLR 2793 (at [93])).

399. *Smithton* helpfully distils from the authorities (including, most notably, *Holland*) a number of relevant considerations in deciding whether a person is a *de facto* director, including (at [33]-[44]) the following:-

(a) a person may be *de facto* director even if there was no invalid appointment. The question is whether he has assumed responsibility to act as director. To answer that, the Court may have to determine in what capacity the director was acting;

(b) the Court will in general have to determine the corporate governance structure of the company so as to decide in relation to the company's business whether the defendant's acts were directorial in nature;

(c) the Court is required to look at what the director actually did and not any job title actually given to him;

(d) a defendant does not avoid liability if he shows that he in good faith thought he was not acting as a director. The question whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief;

(e) the Court must look at the cumulative effect of the activities relied on. The Court should look at all the circumstances "*in the round*";

(f) it is also important to look at the acts in their context. A single act might lead to liability in an exceptional case;

(g) relevant factors include: (i) whether the company considered him to be a director and held him out as such and (ii) whether third parties considered that he was a director;

(h) the fact a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision; and

(i) acts outside the period when he is said to have been a *de facto* director may throw light on whether he was a *de facto* director in the relevant period.

400. More specifically given D3's engagement as a consultant, the fact that a person acts under a consultancy agreement will usually be insufficient in itself to make him *de facto* director (*Richborough Furniture Ltd, Re; Secretary of State for Trade and Industry* v *Stokes* [1996] 1 BCLC 507 (at [524h] and [525a])). However, the presence of a consultancy agreement will not preclude a finding of *de facto* directorship as in *Grosvenor Property Developers Ltd (In Liquidation), Re; Atkinson v Varma* [2020] EWHC 1114 (Ch) (at [56]-[57]) in

which the role performed went much further than stated in the consultancy agreement. D3 also relies on Judge Cooke's rhetorical question in *Secretary of State for Trade and Industry* v *Elms* (16 January 1997, unreported) whether "[i]*s he somebody who is simply advising and, as it were, withdrawing having advised, or somebody who joins the other directors, de facto or de jure, in decisions which affect the future of the company?*", contending that the provision of advice is the antithesis of being the decision-maker.

(f) Breach of directors' duties

Introduction

401. The Claimant asserts as against each of D1-D3[13] various breaches of their duties as directors, as codified in CA06, namely of their duties to:-

(a) only exercise powers for the purposes for which they are conferred (s.171(b));

(b) act in the way they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole (s.172(1));

(c) exercise reasonable care, skill and diligence (s.174(1)); and

(d) avoid a situation in which they have, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company (s.175(1)).

402. As a preliminary matter, the Defendants say that it does not automatically follow from a finding that there has been an unlawful return of capital, unlawful distribution or breach of IA, s.423 that any or all of the directors are in breach of their duties. They rely on *Re Brian D Pierson (Contractors) Ltd* [2001] 1 BCLC 275 (at [299]) to say that each breach of duty with respect to each director must be specifically and separately proved. In that case, Ms Hazel Williamson QC (as she then was), sitting as a deputy High Court judge, held in relation to IA86, s.239 (concerning *preferences*) that "… [i]*t must be a matter of fact, in any particular case, whether the acts of a director which are held to constitute the giving of a preference are also, in their own right, acts which amount to misfeasance and breach of duty. ...*"

403. The Claimant says the directors will be liable for unlawful acts if they know the facts that render them unlawful even if they receive (erroneous) legal advice that those acts are lawful. As to a director's potential liability with respect to an unlawful return of capital, Lord Walker agreed in *Progress Property* (at [32]) with Lord Hamilton in *Clydebank* (at [79]) that whether or not the directors were in breach of fiduciary duty "… *will involve consideration not only of whether or not the directors knew at the time that what they were doing was unlawful but also of their state of knowledge at that time of the material facts.*" Lord

[13] As against D3, as *de facto* director.

Hamilton had not discerned from the authorities a director being held liable " *… unless the payments were made with actual knowledge that the funds of the company were being misappropriated or with knowledge of the facts that established the misappropriation.*"

404. In the context of an unlawful distribution or dividend, Zacaroli J in *Burnden Holdings (UK) Ltd* v *Fielding* [2019] EWHC 1566 (Ch) summarised (at [139]) the effect of the authorities to the end of the 19th Century with respect to potential liability for breach of fiduciary duty with respect to the payment of an unlawful dividend, concluding (at [157]) that the law on the issue remained the same as at the end of the 19th Century such that if the directors " … *were unaware of the facts which rendered the dividend unlawful then provided they had taken reasonable care to secure the preparation of accounts so as to establish the availability of sufficient profits to render the dividend lawful, they would not be personally liable if it turned out that there were in fact insufficient profits for that purpose.*" In that regard, "*... they were entitled to rely ... upon the opinion of others, in particular auditors, as to the accuracy of statements appearing in the company's accounts.*"

405. The Claimant says that, likewise, if a director is aware of the circumstances which render a transaction unlawful under IA86, s.423, he will be liable for breach of duty. In this regard, Lord Briggs noted in passing, and with irony, in *Sequana* (at [182]) that such a claim had not been pursued at first instance in that case.

406. Finally in this context, for a breach of director's duty to be fraudulent (as alleged in this case), it is not enough to show it was deliberate; there must also be an absence of honesty or good faith, albeit this can include recklessness as to the consequences of the action complained of (*First Subsea Limited* v *Balltec Limited* [2017] EWCA Civ 186, [2018] 1 BCLC 20 at [64]).

407. As to delegation, the Court in In *Nicholas Barnett (as Liquidator of Glam and Tan Limited), Glam and Tan Limited – in Liquidation* v *Mrs Danielle Litras* [2022] EWHC 855 held (at [15]-[17]) that a "*.... director is entitled to delegate certain duties as long as the delegation is reasonable.*" However, the directors do have "*.... a collective and individual duty to maintain sufficient knowledge and understanding of the company to enable them to discharge their duties"* such that they are not absolved *"from the duty to supervise the delegate's discharge of the delegated functions.*" The assessment of reasonableness is a fact sensitive exercise.

408. According to Sir Alastair Norris in *Sharp* v *Blank* [2019] EWHC 3096 (Ch) at [629] in the context of the duty of reasonable skill, care and diligence under s.174(1), " *… a director who takes and then acts upon expert advice has gone a long way to performing his duties with reasonable skill and care",* albeit following advice is not a substitute for the exercise of the duty rather than a part of its discharge. In *Manolete Partners Plc* v *Nag* [2022] EWHC 153 (Ch), Mr David Halpern QC (sitting as a deputy High Court judge) agreed with this (at 62[ii]), albeit also noting in the context of the (different) duty under s.172(1) that "*a director should not need a solicitor to tell him whether his actions are*

bona fide and likely to promote the company's interests for the benefit of its creditors".

409. Also in the context of CA06, s.172(1), Popplewell J (as he then was) held (at [92]) in *Madoff Securities International Ltd* v *Raven* [2013] EWHC 3147 (Comm) that the division and delegation of responsibility for particular aspects of corporate management is legitimate and often necessary, albeit " … *each individual director owes inescapable personal responsibilities*", including " … *to inform himself of the company's affairs and join with his fellow directors in supervising them.*" As such, it is a breach of duty for a director to allow himself to be "*dominated, bamboozled or manipulated by a dominant fellow director where such involves a total abrogation of this responsibility* ….". However, Popplewell J held further (at [193]) that " … *a director is entitled to rely upon the judgment, information and advice of a fellow director whose integrity skill and competence he has no reason to suspect*", recognising that opinions legitimately differ, the commercial wisdom of a transaction may be decided by majority (without the minority being in breach of duty or required to resign) and, even if not personally persuaded, a director may defer to the views of his co-directors if persuaded that they are advanced in what they perceive to be the company's best interests.

410. The Privy Council in *Byers* v *Chen* [2021] UKPC 4 held (at [92]) in the context of potential breach of duties corresponding to those under ss.171(b) and 172(1)) that "*a director may not knowingly stand by idly and allow a company's assets to be depleted improperly*". If he knows that a co-director is acting in breach of duty or an employee misapplying corporate assets, he must take reasonable steps to prevent those activities.

Duty to act within powers (s.171(b))

411. *Extrasure Travel Insurance* v *Scattergood* [2003] 1 BCLC 598 explained (at [92]) that the duty to exercise powers for proper purposes does not require a claimant to prove that a director was dishonest or that he knew he was pursuing a collateral purpose. In that sense, the test is objective and required the court to:-

(a) identify the power the exercise of which is in question;

(b) identify the proper purpose for which that power was delegated to the directors;

(c) identify the substantial purpose for which the power was in fact exercised; and

(d) decide whether that purpose was proper.

412. The third stage of that test involves a question of fact, turning on the actual motives of the directors at the time.

Duty to promote the success of the company (s.172(1))

413. The objective test described immediately above with respect to the use of powers for collateral purposes under s.171(b) contrasts with that for the duty under s.172(1) to act *bona fide* in what the director considers to be the best interests of the relevant company. As explained in *Re Regentcrest plc* v *Cohen* [2001] 2 BCLC 80 (at [120]), the latter is subjective in nature:-

> "… The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. …."

414. In the context of companies forming part of a group, Pennycuick J held in *Charterbridge Corporation Ltd* v *Lloyds Bank Ltd* [1970] Ch 62 at [74] that it would be "*an unduly stringent test*" for directors who had looked to the benefit of the group as a whole and did not give separate consideration to the benefit of the company, *ipso facto*, to be treated as not having acted with a view to the company's benefit. That said, it was not sufficient for the directors to look to the benefit of the group as whole - each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice its interest. In the absence of actual separate consideration, the "*proper test*" was whether "*… an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company..*" This (*obiter*) reasoning was endorsed in *Extrasure*. *HLC Environmental Projects Ltd* [2014] BCC 337 explained (at [92]) the approach in *Charterbridge* (and *Extrasure*) as a qualification to the "*general principle of subjectivity*" where there is no evidence of actual consideration of the best interests of the company. A further qualification was where the duty extended to consideration of the interests of creditors, considered below.

415. Referring to Australian authority, Mortimore, *Company Directors 3rd ed* (at [13.15-16]) suggests that, in practice, it may be possible for the directors of a subsidiary to take into account the interests of the group more than *Charterbridge* suggests since, in the case of a solvent company, the interests of the subsidiary are likely to include the interests of its shareholders generally and, although consideration must be given to the interests of the particular company concerned, most commercial transactions inevitably involve the balancing of benefit and detriment.

Duty to consider the interests of creditors (s.172(3))

416. CA06, s.172(1) is couched in terms of the promotion of the success of the company. Although s.170(1) makes clear that this duty is owed to the company, it is expressed to be for the benefit of "*its members as a whole*". However, s.172(3) qualifies that by reference to "*… any enactment or rule of law*

requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company." In the Supreme Court in *Sequana*, the most fundamental question was whether there was a rule of law (the so-called rule in *West Mercia*[14]) that, in certain circumstances, the interests of the company, for the purpose of the director's duty to act in good faith in its interests, were to be understood as including the interests of its creditors as a whole. The Supreme Court answered this question affirmatively, Lord Reed holding (at [77]) that the rule did not create any new duty rather than 'adjusting' this long-established fiduciary duty to include consideration of the interests of the general body of creditors.

417. As to when the (modified) duty is engaged, the Supreme Court unanimously rejected the submission that this occurred when there was a real rather than remote risk of insolvency or when insolvency was likely or even probable. Lord Reed was inclined to the view (at [88]) that it was sufficient for the company to be "*insolvent or bordering on insolvency*". Lord Briggs considered (at [203]) a sufficient trigger "*either imminent insolvency (ie an insolvency which directors know or ought to know is just round the corner and going to happen) or the probability of an insolvent liquidation (or administration) about which the directors know or ought to know*." Lord Hodge agreed (at [227]). Lord Reed was also inclined to agree (at [88]) that the probability of insolvent liquidation or administration would suffice but was "*less certain*" (at [90]) as to the need for the director's actual or constructive knowledge. Lady Arden explained (at [279]) that the requirement for directors to consider creditors' interests arose "*whenever a company is financially distressed*", meaning when "*the company is insolvent or bordering on insolvency, or an insolvent liquidation or administration is probable, or the directors plan to enter into a transaction in question would place the company in one of those situations*."

418. Lord Reed explained the nature of the duty (at [11]) as:-

> "to require the directors to consider the interests of creditors along with those of members. The weight to be given to their interests, insofar as they may conflict with those of the members, will increase as the company's financial problems become increasingly serious. Where insolvent liquidation or administration is inevitable, the interests of the members cease to bear any weight, and the rule consequently requires the company's interests to be treated as equivalent to the interests of its creditors as a whole."[15]

419. Accordingly, when the rule is engaged, the directors are required to balance the respective interests of the creditors and shareholders, weighting these by reference to the seriousness of the company's financial position, how that might reasonably be affected by any course of action proposed by the directors and their appreciation of the related risks involved for the different constituencies.

420. As to the meaning of "*insolvency*", this is properly understood in accordance with the tests laid down in IA86, s.123(1)(e) and (2), namely cashflow or

---

[14] Referring to the leading case of *West Mercia Safetywear Ltd (in liq)* v *Dodd* [1988] BCLC 250.
[15] Lord Briggs expressed matters in similar terms (at [176]).

commercial insolvency, or balance sheet insolvency.[16] I consider later their application in this case.

421. Finally, *Sequana* also noted[17] that (like the general duty under s.172(1)) the duty to consider creditors' interests under CA06, s.172(3) is a 'rule of law' within the meaning of s.851(1) such that it may still be engaged with respect to the payment of a dividend that complies with Part 23.

Duty to exercise reasonable care, skill and diligence (s.174(1))

422. The s.174 duty is concerned with negligence,[18] requiring a director of a company to exercise the reasonable care, skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience that (i) may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company and (ii) the director has.[19] As such, a director is held to an objective standard (that of a reasonable person in the position of the director), although the standard is increased if the director's subjective abilities and skills enable him to meet a higher standard than that of the reasonable director.

Duty to avoid conflicts of interest (s.175(1))

423. For the purpose of the duty to avoid conflicts under s.175(1), the existence of the potential for conflict is to be ascertained by asking "*whether a reasonable man, looking at the relevant facts, would think that there was a real, sensible possibility of conflict*" (*Breitenfeld UK Ltd* v *Harrison and others* [2015] EWHC 399 (Ch) (at [60(f)])). The relevant transaction must therefore be analysed objectively; it is not an examination of whether the director, in fact, "*succumbed to temptation*" (*Breitenfeld* at [67]). CA06, s.180(4)(a) contemplates shareholder authorisation of what would otherwise be a breach of s.175. *Sharma* v *Sharma* [2014] BCC 73 confirms that, absent fraud or insolvency, a shareholder may authorise a breach of s.175 and that acquiescence may suffice (at [52]).

J. THE PROPER CHARACTERISATION OF THE RESTRUCTURE

424. With that detailed exposition of the factual background and summary of the relevant legal principles, I turn to the overarching question of the true substance and purpose of the Restructure or, put another way, its proper characterisation, considering together the matters relevant to the Claimant's allegations that the Restructure represented an unlawful distribution and/ or an unlawful return of capital and/ or an informal winding-up and/ or a fraud on creditors and/ or a transaction defrauding creditors, each of those concepts concerned in their own distinct way with the nature, effect, purpose and genuineness of the transactions constituting the Restructure, the related intentions of the Defendants as well as the value of assets transferred by THMG and consideration received. In doing so, I acknowledge that the mere fact of a transfer of assets at market value is not

---

16 *Sequana* at [88] (Lord Reed).

17 *Sequana* at [158]-[162] (Lord Briggs); [339]-[341] (Lady Arden).

18 See, for example, Lord Reed's explanation in *Sequana* (at [74]) that the duty under s.174 is not a *fiduciary* duty.

19 See, for example, *Re D'Jan of London Ltd* [1994] 1 BCLC 561 (at [563e]).

decisive and that the prior proposed reorganisation structure, resulting intercompany indebtedness, dividend, 'loan simplification' and loan balance reduction all fall to be considered. For convenience, this analysis is broken down under five overlapping headings (purpose, substance, 'informal winding-up', value and insolvency). Inevitably, this analysis foreshadows, and narrows, later discussion of the related liability issues.

(a) The purpose of the Restructure

425. Although THMG started to experience PIP claims in 2011, including its first set of legal proceedings towards the end of that year, these were still few in number, the liability case undeveloped and the GLO not yet up and running. The 'reserve' indicated by LF in her September 2011 spreadsheet (£150,000 per PIP claim) and the (roughly) corresponding figure (to trial) used by DS from the outset in his case summaries were, therefore, little more than a 'finger in the air' at that stage and certainly not an expectation of probable liability. There was no sensible basis yet on which that assessment could be made. In this regard, I accept DR's evidence that the number one issue for THMG at the beginning of 2012 was patient claims generally (not PIP claims specifically) and that the former informed LF's 'utterly dire' rubric. THMG's audited accounts provided for those patient claims. No provision was made for PIP. Although regulatory and press activity around PIP did 'hot up' significantly from the end of 2011, and increased litigation activity was foreshadowed (and later materialised), including a GLO, THMG's potential PIP liability remained wholly uncertain absent further regulatory and legal input to inform the liability case. Although the PIP situation was rightly described as a 'scandal' and a 'crisis', significant litigation exposure for THMG was by no means inevitable.

426. Likewise, D5's description of THMG being in 'chaos' at the beginning of 2012 may well have been apt as the latter scrambled to meet the MHRA's request for implant data and reassure affected former patients. However, such 'chaos' was relatively short-lived and did not itself connote litigation risk. I therefore accept DR's evidence that the concern which led to discussion of the separation of the trading divisions in January 2012 was also the rising level of patient claims generally, not PIP specifically. I am reinforced in that view by the fact the reorganisation discussions in early 2012 were the continuation of earlier such discussions, including as recently as November 2011. Although these now envisaged that THMG would be separated into different business divisions, that too was not a novel idea, having already been canvassed in a VAT context as early as 2009. DR's inability to recall when that prospect had been earlier discussed was unremarkable. So too was DR's (unrelated) awareness that Surgicare's administration broke the chain of causation.

427. Despite continuing uncertainty around rupture rates, the interim Keogh report of 6 January 2012 was positive from a PIP liability perspective, confirming no greater risk of cancer (potential toxicity being the greatest liability risk) and repeating the advice against routine removal absent rupture. The Claimant focused on the large number of THMG PIP implantees (4000). However, that was considerably less than that of two of its main competitors, Transform and Harley. Moreover, not all would be claimants against THMG even if the

liability case was made out. In this regard, I also accept the evidence of DR and NW that they considered material to THMG's potential exposure the original implant batch. Although the Claimant says there is no evidence in the documents of this making any difference to the liability assessment, DR and NW both spontaneously raised the point in their evidence. I accept they held this understanding (at least for part of the period), whether ultimately borne out. THMG and D6 also appreciated that the proactive steps from early January 2012 in the form of its 'PIP strategy' would reduce exposure. By continuing to offer former patients free replacement of ruptured implants and charging others a non-commercial fee, THMG sought to distinguish itself from its competitors unwilling or unable to provide the same support. At the same time, THMG obtained waivers. Although the Claimant describes these as 'sticking plasters', they were not always easy to secure and some patients with replacements did still sue THMG, I accept that they did reduce THMG's exposure. In this regard, I found unduly dismissive the Claimant's treatment of THMG's PIP strategy. This had meaningful impact and THMG, D5 and D6 understood its benefits. Shortly after learning in early 2012 of how THMG intended to handle the PIP situation, BS expressed his positive view that PIP was an opportunity and THMG's approach brand enhancing. BS repeated that view much later when THMG's competitor, Harley, collapsed due to its PIP exposure.

428. The liability picture cleared further towards the end of January 2012 when LWQC advised, with six key points arising, namely (i) the likelihood of more PIP cases (ii) a possible GLO (iii) all cases being small claims or 'mosquito bites' (the number of claims causing the problem) (iv) the absence of liability without unit failure (v) in the case of a rupture, damages reaching up to £20,000 and (vi) the recommendation of a long term strategy. Although rupture rates were still unknown, I am satisfied that THMG were entitled to, and (as DR testified) did, take comfort from this advice and, when viewed in conjunction with its ongoing PIP strategy, believed its exposure would be limited and manageable. In light of that advice, I am unable to accept that the £16m figure in KH's note (apparently) of the Restructure meeting after the consultation with LWQC concerned PIP liabilities. As I have found, the major issue for THMG at the beginning of 2012 was patient liabilities generally. As the same note indicates, these were estimated at only £2m on what I accept was itself a worst case scenario. Liability figures of the magnitude of £16m for PIP cannot be reconciled with that estimate nor indeed with the advice of leading counsel just received. I accept that the £16m figure referred to Dolan Park (as KH had noted that same figure when discussing its value with her property colleague in June 2012).

429. I am reinforced in my view by CK's analysis of THMG's claims position as part of its audit procedures for the 2011 financial year. CK specifically examined the PIP issue and only included a related contingent liabilities note in the accounts. CK's working papers too indicate that LF and PG considered PIP to be manageable. The Claimant says that THMG should have included a provision for PIP liabilities but has not adduced any evidence as to CK's reasons for not doing so and, based on what was (and was not) known about potential PIP liabilities then, I find that it would not have been possible for THMG to

have made a reliable estimate of its probable PIP liability (as required by FRS12). CK's approach was therefore entirely appropriate.

430. In light of these findings, I reject the Claimant's assertion that, by January 2012, DR had formulated a 'plan' to put THMG's assets beyond the reach of its PIP creditors through the proposed Restructure. PIP was, no doubt, a serious headache for THMG in the early weeks of 2012 but there was no basis for DR (or NW) to conclude then that PIP would be a significant liability problem and I find that they did not. I am reinforced in my view by the summary in D6's manuscript note from 3 February 2012 of the reasons for the proposed Restructure, including to capture the litigation in the subsidiaries going forward. Despite the Claimant's efforts at trial to distinguish past and future liabilities and claims, this note self-evidently refers to future claims for future liabilities, the relevant subsidiaries not yet having been incorporated. Likewise, the note indicates that cosmetic surgery (but not hospital services) would be subject to VAT, confirming the understanding of THMG (and D6) that the scope of VAT would be increased in the future, albeit in a limited fashion, and not indicating retrospectivity concerns. The Claimant's suggestion that the note identified reasons to put forward to others as a 'pretence' of half-truth to justify the Restructure was convoluted. I accept at face value that these were two genuine commercial reasons.

431. Similarly unconvincing was the Claimant's attempt to ascribe a surreptitious motive to the words "*"ring fence" and protect the trading businesses from any potential claims*" in the draft letter to D5 prepared by D6 for THMG on 6 February 2012 (and their subsequent removal by NW). Since one of the reasons for THMG undertaking the Restructure was for each product line to be responsible for its own related patient liabilities, the original words were entirely apt. Moreover, it is unremarkable that NW, a litigation solicitor, sought to remove reference to claims from what would in final form be a non-privileged communication. The draft was consistent with the reasons for the Restructure in D6's manuscript note of 3 February 2012, including the potential for future (not backdated) VAT on non-hospital services. Nor was there anything untoward in DR's decision not to send the letter rather than broach the Restructure with D5 informally. This did not connote "*careful handling*" rather than DR's instinct as how best to raise the issue with the Bank. That issue was raised with D5 on 8 March 2012. Although the Claimant suggests that THMG 'majored' on VAT as justification for the Restructure, the documents from the meeting and D5's related Zeus form from 13 March 2012 show that multiple reasons were put forward, including splitting hospital and care services, the future imposition of VAT, restricting claims to the new trading entities and better monitoring of financial performance. These reasons were consistent with, and expanded upon, those already discussed with D6, none of them concerning PIP or backdated VAT. I therefore do not accept that THMG 'disguised' the Group's true intentions from D5.

432. That THMG continued to consider the PIP issue would be manageable is evident from LF's 2 April 2012 claims spreadsheet. This identified 78 claims, almost all pre-action, many requests for medical records. LF was on the 'frontline' of THMG's claims handling. Although medium or high probabilities

were attached to most of them, the estimated indemnity and costs figures were generally between £2-£3,000 in total per claim, yielding an aggregate figure of £150,000. Although the Claimant says that DR's expectation of a 90:10 costs ratio would increase the claim reserve significantly, that assumes litigation would follow in all cases and, if it did, the same costs profile would follow. However, the former was unlikely, not least since a third of the claimants had already received replacements or were scheduled to do so. The latter also seems unlikely in a group litigation context in which other manufacturers would be implicated and costs more widely shared. In any event, LF was acutely aware of the costs regime and that was not LF's assessment. THMG (reasonably) continued to consider the PIP issue manageable.

433. In this regard, the Claimant understandably placed great emphasis on D5's meeting with GB on 16 May 2012 and BS' manuscript note of their discussion to contend that the reason for the Restructure was THMG's concerns about significant PIP liabilities, the relevant excerpt recording that "…. *- Restructure reqd a) PIP claim might be successful. £3m based on 4000 procedures*". The difficulty with this submission is that it is derived from one of the many manuscript documents in the case, the context and meaning of which are unclear. BS himself was evidently confused, on the one hand accepting in oral evidence that his notes supported the Claimant's interpretation, on the other confirming his understanding that the premise of the Restructure was VAT and future liabilities, and that a potential £3m PIP liability would have been an early warning signal that greater intervention by D5 was required. At trial, I indicated my (then) very provisional reading of the (first part of) this excerpt as referring to Ziering, featuring as it did immediately below the start of a discussion about the hair division for which, according to GB's agenda of the meeting, there would also be a "[r]*evised structure*". The Defendants also make the point that it is not clear whether "*reqd*" is shorthand for "*required*" or "*requested*".

434. Having considered the related documents and the parties' submissions, I am unable to accede to the Claimant's interpretation: first, although the Claimant sought to persuade me at trial that this referred to THMG's reorganisation, not Ziering's, either does seem a possibility; second, even if it were reference to THMG's reorganisation, the further reference to PIP liabilities on the same line would not necessarily indicate the latter as the reason for the former; third, the reasons for the Restructure had already been imparted to BS earlier on 8 March 2012; fourth, the notes of that March meeting and D5's Zeus form from 13 March 2012 *are* clear and contain an incisive exposition; fifth, those reasons do not concern PIP or (backdated) VAT; sixth, even if the note did 'join the dots' between the Restructure and PIP, it is much more likely that D3 was talking about a *potential* future PIP-type event, the Restructure limiting its impact to the relevant trading entity; seventh, this accords with how Colliers (as apparently advised by the Group) described the purpose of the Restructure in its 2014 report, namely "*to increase its resilience to external factors of a similar nature to PIP (i.e. a class action as a result of a product failure etc, as opposed to an individual patient claim)*"; eighth, that would be consistent with the reasons imparted to BS earlier. Accordingly, I find that there was reference at the 16 May 2012 meeting to a potential £3m PIP liability and I accept BS'

evidence that this was in response to his invitation of GB's assessment of a 'worst case scenario' rather than an expectation of liability of that magnitude. That was consistent with GB's evidence (which I also accept) that numbers of that magnitude were "*never bandied about*". I also reject the contention that THMG's Restructure was said to be required on account of the ongoing PIP issue. I also reject the Claimant's assertion that this was a 'warning signal' to BS, explaining his suggestion on 18 May 2012 that lawyers be instructed to consider the 'legal implications'. Rather, the instruction of lawyers was canvassed because (as BS testified and I also accept) D5 would involve lawyers in any such reorganisation.

435. On 13 June 2012, GB circulated his project plan document, addressing the various workstreams arising from the Restructure, including, for example, the changes required to give effect to the new contractual structure, the separate invoicing of hospital and care services, the change in credit card facilities, the implications for finance and group VAT, the stationery and IT changes and regulatory considerations. The Claimant suggests THMG lacked engagement with the CQC before the Restructure concerning the four new trading companies and lacked interest in their use thereafter, noting that they remained dormant. It also points out the change in D1's related explanation for this in his evidence. However, the Group management accounts do indicate individual accounting for the trading companies to at least July 2013, suggesting that they were trading in their own right for some time after the Restructure. More generally, the steps envisaged by the Restructure represented a major change of approach in its business as well as considerable preparatory cost, time and effort, including incorporation, forecasting, different financial reporting arrangements and changes to the charging structure and patient contracts. If the purpose of the Restructure had been to let THMG 'shrivel on the vine', this could have been achieved far less elaborately. It is also instructive that the Restructure took place in the context of what was described in this project plan (and related presentations to Barclays) as a 'strategic review', with the aim of the Group operating more transparently and profitably, consistent with the purposes of the Restructure as I have found them to be, and as had been imparted to D5 and D6 in early 2012.

436. In the meantime, the potential PIP liability position had become clearer. The final Keogh report indicated that any significantly increased clinical problems from PIP implants were associated with rupture, PIP implants being more prone by between two to six times. Although NW was, no doubt, right to say at the time that the PIP claims would not be 'killed off', THMG's potential exposure would likely turn in large part on the actual number of patients who had experienced a rupture. Indeed, Keogh's two to six increased rupture rate range itself indicated uncertainty. As to this, I accept DR's evidence that THMG did not see hundreds of patients coming into clinic and was confident in the relatively low number of ruptures experienced. Moreover, on (apparently) 26 June 2012, LF indicated to NW that she was only reserving £2,000 per PIP claim and highlighted the sense in THMG replacing the implants on a voluntary basis. From a financial perspective, Skott Hughes also reported around this time that THMG was nearly matching the PIP strategy base case scenario. Given all these matters, I accept that THMG continued to believe the PIP issue was, and would

remain, manageable. This was also confirmed by the Group's strategic review shared with D5 on 3 July 2012. I reject the Claimant's supposition that, recalling from their 16 May 2012 meeting why the Restructure was required (supposedly PIP), BS was likely to have thought the *risk of challenge* was manageable. I have rejected the Claimant's explanation of that meeting and I accept that, whether considered objectively, or from the perspective of multiple individuals within THMG, PIP presented only a "*limited threat*" to, and on BS' view, a "*positive impact*" on, business, BS reiterating on 11 October that PIP was a "*good example*" of THMG's track record in handling claims. As for VAT, although the Claimant says the 3 July 2012 strategic review described this as the second biggest litigation issue, this overstates matters. Rather, the review suggested the issue to be rather a narrow one of the potential imposition of VAT on non-surgical treatments, with a current case being led by BDO, the advice being likely success, and no action identified beyond awaiting developments. This too does not indicate any concern on the part of THMG about the imposition of future, let alone backdated, VAT.

437. Likewise, THMG's draft board paper from 18 July 2012 described the benefits of the Restructure in the same terms as had already been conveyed to D6 in January and D5 in March 2012, albeit with an additional reason, namely the separation of the ownership of Dolan Park, increasing the ability to retain control of the property in the event of administrator appointment over one of the trading businesses. This meant that the Group could more readily continue its other trading activities if one fell into difficulty in the future. I accept that this was another genuine commercial reason and that it did not mean that THMG contemplated an administrator appointment, let alone on account of PIP. In this regard, the Claimant focused on NW's desire not to mention in the draft paper potential PIP claims but, coming from a seasoned litigator like NW, I again found this suggestion unremarkable. The Claimant also noted GB's failure to append the latest version of the Restructure checklist to the draft board paper (as sent to D5 on 20 July 2012) but the suggestion that this was deliberate, perhaps to hold back from D5 aspects of the Restructure, makes little sense given that GB sent KH the same version first and the Restructure would, in any event, be reviewed by D5's lawyers. I accept this was a mistake. If anything, that omission, and KH's apparent failure to pick up on it, indicate a lack of attention to detail, not the sophisticated plan suggested, as did GB's erroneous confirmation to D5 on 8 August 2012 that THMG would be the lessee of Dolan Park. Finally in this context, the draft letter from CK verifying the contents of GB's draft board paper, as sent to D5 with the draft paper, is significant: first, as the party tasked with giving D5 comfort about the reorganisation rationale and structure, it shows that CK was central to the Restructure process and planning; second, CK is unlikely to have provided the independent confirmation it did concerning the commercial reasons for the Restructure if the real aim had been to prejudice creditors. Given its central role, CK would have known if that had been the objective.

438. BS' exchange in August 2012 with THMG's former auditors, KPMG, is also illuminating. In response to KPMG raising the challenges facing the cosmetic sector, including PIP and VAT, and offering support for THMG, BS' response was that the business was trading well and professional help was not required,

confirming D5's view that these sector issues were being well managed by THMG.

439. The meeting between DR, GB and Skott Hughes and Steve Simmonds of CK on 14 September 2012 is also notable for what it says about THMG's (lack of) concern about a UK charge to VAT. Although the meeting considered the aggressive stance taken by the Irish authorities in levying VAT on all cosmetic surgery performed by the Irish subsidiary, there was no discussion of the UK position. To the contrary, the meeting even considered re-registering the Irish subsidiary in the UK, hardly suggestive of a concern on the part of THMG and its VAT adviser about UK VAT, let alone a backdated charge. The Claimant points to VAT (wherever levied) being based on the same EU law which, of course, it was but that did not mean its uniform application EU-wide. It also points to Dolan (a direct subsidiary of TWP (Newco)) being a new member of the VAT group such that it would not be liable for any backdated VAT levied against THMG. Although that would have made direct recourse to Dolan Park more difficult, the point loses force in light of the existing membership of the VAT group, including perhaps most importantly, Holdings, against which HMRC could (and later did) seek recourse.

440. In relation to Ireland, the note of the meeting between DR, GB and D5 on 26 September 2012 did indicate a potential "*PIP backlash*" albeit, contrary to the Claimant's suggestion, it did not indicate a "*growing threat*" in the UK. It is evident from the record that the future of the Group's Ireland operation had been under consideration for some time. By this stage, THMG was considering, and discussed with D5, an insolvency process for Ireland. D5 confirmed that such a process would represent a breach of the Loan Agreement, albeit one that could be waived if D5's expectations were managed, including with clear strategic reasons for the closure. The Bank's response is instructive. It clearly took very seriously the insolvency of even a small subsidiary, obtaining legal advice about it and indicating on 3 October 2012 that consent to an insolvency process might be forthcoming if its specific concerns, including reputational risk, could be 'covered off'. If, as the Claimant contends, the Restructure resulted in THMG's insolvency and its informal winding-up, and D5 had reason to suspect this (from 16 May 2012 at least), the Bank would, no doubt, have been wary of either prospect in relation to the Group's main trading company and the Bank's borrower. However, D5 was not, indicating that completion of the Restructure would clear the way for the waiver in relation to an insolvency process in Ireland. The Restructure was not, as the Claimant put it, a 'hoop' to jump through but was seen as a positive (and solvent) process which would help facilitate a negative (and insolvent) process in Ireland. This episode is also instructive from the point of view of DR's and GB's intentions. When there was a problem, even in a small part of the business, they raised this with D5 in a transparent manner, not a 'disguised' one (as suggested with the Restructure). Ireland had been under discussion with D5 for months. Moreover, when the subsidiary's demise seemed inevitable, an insolvency process was posited, not its 'withering on the vine.'

441. On 27 September 2012, DS responded to LF's e-mail in which she said she had shared with some of the PIP claimants THMG's uninsured status. The Claimant says this indicated a move towards dissuading them to pursue their claims based on a lack of insurance, albeit it still needed to get the Restructure 'over the line' and show them the 'cupboard was bare.' Again, this was not persuasive. The Restructure had not happened and, on the Claimant's view of its purpose, it would have been far too early to be trailing such information with the PIP claimants. If anything, LF's exchange with DS indicates a co-ordination failure or lack of strategic approach, the decision having previously been taken not to answer the PIP claimants' related request for information.

442. The Claimant also says that, with the order made at the CMC on 24 October 2012 imposing a GLO deadline of 8 April 2013, THMG would have expected more claims to come 'in the door' and should have waited until it knew what it was dealing with before proceeding with the Restructure, taking insolvency advice in the meantime. Again, this was unpersuasive. By this stage, THMG's PIP strategy had been in full swing for some ten months and the GLO litigation running for more than six, having apparently reached some 3,000 claimants. However, according to DS, 75% of those represented the 'worried well' and, as for THMG's own PIP experience, LF's spreadsheet from 15 October 2012 shows that the number of claims had increased (from 78 in April) to 204, with a total reserve now indicated of £389,594. Although the Claimant again sought to extrapolate from that a much larger costs figure (based on DR's 90:10 ratio), as noted, the nature of the PIP litigation was different. Alternatively, the Claimant suggested a much larger indemnity spend based on ruptures but, as also noted, that was not THMG's experience. As at 23 October 2012, there were 21 PIP claims in litigation against THMG, of which 14 were rupture cases. Although HJ foreshadowed around this time significantly more litigation cases (289), LF's spreadsheet already contained more than 200 claims which she knew might well develop. LF was an experienced claims manager who assessed that the PIP claims were within manageable limits. THMG therefore had no reason to seek insolvency advice on account of PIP and that is why NW considered inapposite the reference to such advice in DS' attendance note of the CMC. As NW testified, he did so because, in his view, the Restructure was a solvent process. I accept this and NW's further evidence that he was, in fact, unaware at the time that DS had deleted that reference from the final version of the note.

443. The Claimant also places significant store by the e-mail exchange between BS and GB on 25 and 26 October 2012 following the discovery by the former (through Eversheds) of a 'spanner in the works'. In my judgment, the Claimant's submissions on these exchanges somewhat lose sight of their context. That was one of confusion on both sides. Apparently not having appreciated or recalled from the earlier draft board paper that there was to be a transfer of THMG's assets to Healthcare and not knowing about the two-stage transfer of Dolan Park, BS was trying to work out what was going on. He therefore sought to understand whether there were any implications for the Bank's security (as Cobbetts, later Eversheds, had been tasked to consider back in August), not just as to the scope of the 'security net', but also how the transfer value had been reached. That does not mean that BS expected or suspected a

challenge to the Restructure transactions, let alone on account of PIP (which BS evidently considered was being well managed by THMG), or VAT (which he understood might be introduced on future cosmetic surgery and, again, not a cause for concern). On the other side, GB was, no doubt, confused as to BS' ignorance of the transfer of THMG's assets and, as KH had trailed earlier on 25 October 2012 with GB (and BS himself was now intimating), concerned that new credit approval might be required for a transaction due to complete in short order. GB explained the basis for the transfer value of the various assets, as to which, BS already knew about the Colliers' valuation of Dolan Park, BS having commissioned it. Although the other assets had not been independently valued, as BS said when he gave the 'green light' for the transfers, he knew that THMG was guided in the Restructure process by CK and D6.

444. As for GB's response, with its references to THMG's potential administration, this appeared to miss the point of BS' queries but I accept GB's evidence that he was addressing what he thought might be a hypothetical 'worst case' scenario (as indicated in the response itself), not that he was actually envisaging THMG's insolvency or an 'attack' on the transferred assets. Indeed, had GB revealed some prejudicial purpose to the Restructure, the Bank would in all likelihood have 'run a mile'. That was evident not just from BS' evidence about his role and how he went about it, but from the record showing how he had handled matters with this particular borrower throughout, drilling down into the detail of its business, not hesitating to be blunt with THMG about its shortcomings and demanding in his requests for information, data and compliance with the Bank's requirements more broadly. As shown with his examination of the PIP issue itself, and later in relation to Ireland, BS was closely attuned to potential reputational risks. Moreover, in a sense, his role was to be the 'bad' cop although even the 'good cop' (JK) had paused the Restructure earlier that month when the Intercreditor issue seemed insurmountable. Had BS suspected anything amiss with the Restructure or that it might prejudice the creditors of the main trading company and borrower under the Loan Agreement, he would have said so. Indeed, implicit in his 26 October 2012 e-mail to GB was that the Bank might yet not proceed. If necessary, *he* would have been the proverbial 'spanner in the works'. The idea that BS was put on suspicion on 26 October 2012 of the prejudicial nature and purpose of the Restructure and 'nodded it' through anyway, apparently unilaterally and because the Bank would be 'all right', makes little sense.

445. As for the *pro forma* balance sheets, I accept GB's evidence that these were originally produced by CK, that they were illustrative and that GB amended these (as sent to Barclays on 26 October 2012) to show the change to the intercompany balances as a result of trading. These did not reflect the effect of the actual Restructure. As such, I am unable to draw any meaningful inference from the indicated reduction of THMG's net asset balance from £8m to £160,077. BS testified that he likely opened the document but only reviewed the balance sheets at Group, rather than individual company, level. I accept his evidence. BS would not have been concerned to examine the granular movements at company level rather than ensuring the scope of D5's security net overall remained unaffected. Finally, as for D5 then requiring as a condition of his approval the assets to be transferred subject to existing security, this was

unremarkable in light of BS' realisation of the wider scope of the asset transfer. The record indicates that KH had been scratching her head for some time as to the Bank's related requirements, asking earlier whether D5 knew about the asset transfers and re-visiting whether these should, in fact, take place subject to the existing security, including on 27 September and 12, 20 and 24 October 2012.

446. Following completion of the Restructure, DR and GB presented a strategic review update on 11 December 2012, reflecting confidence that the PIP issue had been 'contained' and that, based on BDO's advice, the prospects for the VAT issue too remained good. As to the former, the Claimant says that nothing had changed in the litigation but the PIP issue was now 'contained' within THMG as a result of the Restructure. I do not accept that characterisation. Although the PIP litigation was ongoing, as BS again acknowledged after that meeting, THMG had positively positioned itself compared to its competitors "*in stress/ distress*", including through the deployment of its PIP strategy.

447. The Claimant also makes much of the comments of Thirlwall J at the PIP CMC on 23-24 April 2013 that it appeared steps had been taken to separate past liabilities from current and future trading and that the current trading company was seeking to 'insulate' itself and put assets beyond the reach of creditors. However, it is clear from the transcript of the hearing that LWQC's observations about the Restructure represented his own interpretation of the documents but, even then, he made clear THMG's entitlement to an enforceable £15m receivable. The reference to 'insulation' is obscure but appears to be his speculation, not about the Restructure, but possible future steps in the event of adverse publicity affecting THMG's performance. Whatever was being conveyed, LWQC had not been involved in the Restructure, but the above analysis concerning the involvement of those who were, shows a more anodyne picture than that painted by the Claimant.

448. In relation to THMG's 2012 accounts, the Claimant says the PIP contingent liability note was prepared based on misleading information from DR and LF in August 2013 about rupture rates such that the accounts were not true and fair. However, the quotation relied upon by the Claimant from CK's 2012 audit notes repeats verbatim CK's notes from the prior year's audit when that statement was correct. Although CK's notes go on incorrectly to record the suggested absence of heightened PIP rupture risk, that further statement too repeats verbatim the same part of the prior year's discussion. As such, the notes continue to record old information. Although the 2012 notes do additionally record LF's indication that "*the issue had not changed*", that begs the question of the exact issue being discussed. I certainly cannot say that LF or DR misled CK or that the accounts were, on this basis, untrue. Nor does it appear that DR was involved in this part of the audit discussion with CK in any event.

(b) The substance of the Restructure

449. As to the substance of the Restructure, I reject the Claimant's assertion that THMG was considering in mid-January 2012 the possible transfer of assets abroad. The evidence shows that the discussion arose in the context of Ziering

and concerned whether D5's security extended to the Group's international assets.

450. Although there was again, some (unremarkable) discrepancy on DR's evidence about when the idea of the dividend was first canvassed, I accept his (and NW's) evidence that CK raised this idea. I find that CK first did so by 16 January 2012. However, there was no evidence before the Court as to CK's rationale for the dividend proposal.

451. The Claimant also focused on the discussion between CK and KH on 23 January 2012 concerning "*market value .... to avoid preference claim*" to suggest an incomplete understanding of insolvency law, albeit with creditor avoidance in mind. However, it is the manuscript note (not the author's understanding) that is incomplete. Moreover, the references to market value and avoidance of preference claims does indicate that consideration was given to the proper structuring of the reorganisation, consistent with KH's refrain throughout that any asset transfer had to be at market value.

452. The Claimant also suggests that DR failed to share with D5 on 8 March 2012 much information about the Restructure. In fact, as noted, the purpose of the Restructure was shared with D5, even if the detail was not. The latter is unsurprising: first, THMG merely introduced D5 to the idea of the Restructuring at that meeting – there would be further discussion if D5 was amenable to the idea; second, there was not much yet to impart – it is evident that the Restructure 'plan' was still a 'work in progress' and developed over many months.

453. Indeed, CK's 28 January 2012 version of the plan showed the various Group companies sitting under Holdings, with the ultimate parent company to be decided. Although a separate property holding company (propco) was identified, this too sat under Holdings. No opco (or Healthcare equivalent) was identified then. A similar (albeit slightly more developed) position obtained in the revised version prepared by KH and sent by THMG to D5 on 20 March 2012. However, PG indicated on 20 March 2012 that there needed to be a single company dealing with the financial aspects. The chart was amended again and circulated on 27 April 2012, now showing THMG as the 'administration' company.

454. Pausing there, if the intention from the outset had been the transfer of value from THMG to the prejudice of certain specific creditors to be 'left behind', the relevant Group structure would in all likelihood have been devised far more quickly than the four months it took to produce a third iteration of the 'plan' on 27 April 2012 and D1 is unlikely to have agreed (as it seems he did at their meeting that day) that THMG would continue to perform such vital Group functions as finance, employment and holding the leases, including the lease to Dolan Park, and the Group intercompany balances, as well as being the contracting entity for the provision of surgical services.

455. The Claimant says that, although Dolan Park was shown in this revised structure as sitting within a new propco sitting directly under TWP (Newco), the dividend or loan write off was not discussed at this meeting on 27 April 2012 (also

attended by CK) such that it must have been DR and GB that drove these matters when they did feature later. This was unpersuasive. As I have found, CK did canvass the dividend idea in January 2012. As I have also found, the formulation of the Restructure 'plan' was an iterative process, CK remained centrally involved throughout and, just because two aspects which later featured may not have done so at this meeting, it does not follow that their source was DR or GB, rather than CK.

456. As to the proposed write-off of the intercompany loans, including that arising from the transfer of Dolan Park, GB raised this with KH on 2 May 2012, with KH then flagging the risk of legal challenge to NW. NW agreed a letter should be sent to THMG to convey these concerns. The Claimant says that a manuscript note of a call with GB (referring to IA86, s.238 (transactions at an undervalue)) shows (again) KH's incomplete legal understanding. Moreover, although the proposed write-off may have come as a surprise to KH, it would not have come as a surprise to NW, explaining why the letter was never sent to THMG. Again, the Claimant's reasoning did not follow. The manuscript note mentioning s.238 was again incomplete. That KH understood the legal position more broadly is evident from her fuller e-mail to NW referring to transactions defrauding creditors and director misfeasance and her subsequent Restructure checklist. Finally, it makes little sense for NW, on the Claimant's case, possibly to have kept KH 'in the dark' for four months about the true purpose and substance of the Restructure. Nor, if NW had been party to the suggested plan to prejudice creditors, would his reaction have been to agree that KH send a letter pointing out that effect, including to THMG's board. Given their evident shared concerns, it is far more likely, as I find, that NW and KH both appreciated that this write-off proposal presented a legal risk and that it needed to be brought to THMG's attention.

457. As to the latter, the Claimant points out that D6 never, in fact, sent a letter of advice to THMG. However, D6 did not need to: first, NW and KH testified that they both spoke to GB and advised him about this. I accept their evidence; second, GB asked KH to prepare a Restructure checklist which she sent to GB on 8 May 2012. The Claimant says that this did not advise about IA86, s.423 (transactions defrauding creditors) or write-offs. In fact, it advised more broadly as to a number of potential legal pitfalls, including that (i) directors could not sacrifice a company's interests for the interests of another group company (ii) transactions defrauding creditors could not be sanctioned by members (iii) such transactions were liable to be set aside and might result in directors' personal liability and (iv) asset transfers needed to be at market value to avoid company law problems and their consequences, including penalties. Such advice is, again, hardly consistent with KH's complicity in a prejudicial 'plan.'

458. It was not until 9 May 2012 that the transfer of THMG's business to a new administration company was canvassed, leaving THMG with the patient claims, leases and, potentially, aftercare, with KH reflecting these changes in her Restructure checklist on 11 May 2012. The Claimant says that this proposal reflected a level of "*sophistication*", combining the distribution of assets as if on a winding-up, with the isolation of creditors within the (now non-trading)

THMG. However, if that had been D1's plan, it does not seem a particularly sophisticated one nor, again, would it have taken more than four months on the Claimant's case to crystallise. The Claimant also says that any honest solicitor, with knowledge of the purpose of the Restructure, would have been concerned. However, that assumes a purpose I have not found.

459. The Claimant places store by the persistence of the write-off proposal in the Restructure plan which GB canvassed again in his telephone conversation with KH on 29 May 2012 and, despite her concerns expressed at the beginning of the month, she then included (as point 11, misspelt) in the revised Restructure checklist circulated the next day. NW accepted in his oral evidence that a reorganisation involving the write-off of the intercompany loans, including that created by the sale of Dolan Park, "*looks like an asset strip*". KH put it more benignly: " *… if they had have written off the intercompany loans, that that would have meant that the assets hadn't been transferred at proper value. THMG would not be receiving market value*." Although the write-off proposal was ultimately not deployed, the Claimant says the dividend was declared for the same purpose and effect. As to the source of the write-off, GB's statement indicated that CK had suggested this and, in oral evidence, GB said this was probably the case but he could not remember and accepted it could be DR. DR testified generally that he did not get involved in the accounting entries and relied principally on CK for related advice. I accept DR's evidence. In light of this, CK's central involvement in the formulation of the reorganisation structure, CK's preparation of *pro forma* balance sheets (including the write-off) and CK being the source of the dividend, I consider it more likely, and I find, that CK was also the source of the write-off proposal. However, there is no evidence as to why (i) CK advanced this (ii) CK's reaction when D6's related concerns were passed on (as I find, based on the various discussions at this time, they must have been) (iii) those concerns notwithstanding, the write-off proposal persisted and (iv) the write-off ultimately formed no part of the Restructure. Given this evidential lacuna, that the record shows clear concerns expressed at the time by (a supposedly complicit) D6, the constantly evolving shape of the Restructure (hardly consistent with a sophisticated effort to prejudice THMG) and the fact the write-off did not ultimately feature, I am unable to draw any meaningful conclusion from its original (and continued) inclusion, let alone infer on this account that other aspects of the Restructure (including the dividend) must have been imbued with the same suggested prejudicial intention.

460. As for the dividend, after CK had canvassed this briefly much earlier in January 2012, the idea re-surfaced in the further version of the Restructure checklist circulated by GB on 12 June 2012 (following a meeting between him, DR and CK that day). The two-stage transfer of Dolan Park also featured for the first time, the Claimant suggesting that this was only necessary to facilitate the dividend in the first stage. KH testified that she believed the two-stage transfer was driven by tax reasons. I accept that this was her understanding - the record shows that she shared that belief with Eversheds on 25 October 2012. I also accept GB's evidence that the changes to the Restructure shown in the checklist, including the dividend *in specie*, reflected CK's advice. The loan write-off also featured in that version of the checklist, albeit KH later asked GB on 1

September 2012 whether this remained the case. It is unclear whether this query reflected ongoing consideration of the write-off in light of the concerns she first raised on 3 May, that the draft board paper circulated to her on 18 July 2012 did not mention the write-off or some other reason. Either way, it again hardly smacks of a prejudicial 'plan' if, eight months on from the start of the process, this key aspect either had still not been 'nailed down' or the corporate lawyer supposedly party to that plan was unsure of this important point. The same is true of KH's enquiry of GB on 25 October 2012 as to whether Dolan Park was to be transferred direct from THMG to Dolan, another key element of the Restructure said to indicate a prejudicial intent and, yet, another about which KH was uncertain. Moreover, in his related exchanges with KH, GB said he did not know whether the Bank was aware of the two-stage transfer of Dolan Park and asked what difference it made to D5. If, as the Claimant suggests, this had been part of a prejudicial plan to put Dolan Park behind the reach of certain of THMG's creditors, GB would have realised its significance (including to the Bank) but his unconcerned response to KH indicates quite the opposite. Likewise, KH's further enquiries of GB on 24 September 2012 also indicate her need for further information on other significant aspects of the Restructure, albeit her working assumption continued to be (as throughout) that the transfer of THMG's assets to Healthcare would be at market value and she asked how this was to be determined. Although I accept that the transfer on this basis would not preclude the present claim, those enquiries (and that advice) too are hardly suggestive of prejudicial intent.

461. Through the auspices of the draft board minute she provided on 12 November 2012, KH also advised of the legal requirements for the declaration of the dividend, pointing out not only the statutory requirements under CA 2006 as to available distributable profits, but also that, even if these were met, the payment of a dividend out of capital or that rendered the Company insolvent, would be unlawful. She also pointed out the consequences of such unlawfulness, including potential repayment of the dividend and personal liability for the directors. Again, such advice was hardly consistent with her being party to a prejudicial 'plan' (said to involve the use of the dividend illegitimately to extract value from THMG). The Claimant also says that the figure of £7.5m for the dividend was not crystallised until much later. Prior to the Restructure, the figure under discussion was £6m, as indicated in the *pro forma* balance sheets. There is no signed board minute in the form sent by KH on 12 November 2012, nor, in fact, is there any evidence that the £6m figure under consideration changed until October 2013 when £7.5m appeared for the first time in the approved statutory accounts to 30 November 2012. By October 2013, D1-D3 were alive to THMG's financial performance for nearly another whole financial year and would also have known that a £7.5m dividend was unsustainable given its rapidly diminishing balance sheet during the 2013 financial year. Although the Claimant is correct that there is no signed board minute in the record, KH clearly prepared that minute in anticipation of completion and chased on 30 November 2012 to check whether this was being signed. Her understanding was therefore that a dividend was to be declared then. That this had, in fact, occurred was evidently CK's belief as well when it prepared the 2012 statutory accounts. These were stated to "*give a true and fair view of the state of the company's affairs as at 30 November 2012*", including the "[d]*ividends paid on*

equity capital" (from reserves). The relevant ICAEW technical guidance[20] explains that the applicable accounting standard at the time (FRS21) only recognised the accrual of a dividend when it was "*appropriately authorised and no longer at the discretion of the entity*." As such, CK must have satisfied itself that the dividend had been declared and paid in the 2012 financial year. I am reinforced in my view by the fact that, as at 22 November 2012, GB was planning for accounting for the Restructure transactions (including the dividend) and, although the journal entries were still being worked on after the Restructure in February 2013, there is no suggestion in the related e-mails from either date that the dividend figure was unknown.

462. In the context of the Restructure process, the Claimant also suggests that the reason for pushing back THMG's accounting period to 30 November 2012 was to delay information coming into the public domain which, if available earlier, might allow creditors (such as PIP claimants) or a liquidator on their behalf to take action to challenge the Restructure. Once sufficient time had elapsed to reduce the risk of such challenge, THMG could then reveal its diminished financial position with a view to settling the PIP litigation on more favourable terms. I found this line of argument unpersuasive: first, if THMG had been thinking in these terms, it would presumably have taken steps to ensure quicker completion of the Restructure (originally envisaged for May 2012). Although the Claimant points to DR indicating his desire to progress the Restructure, that desire was not borne out by the course of the transaction, only completing in November 2012 after an iterative and drawn out process lasting nearly a year, including delay at the end when D5 indicated the 'parking' of the Restructure due to the Intercreditor issue but, once this was cleared, THMG then putting off completion by a month; second, rather than completing the Restructure at the end of the (extended) accounting period, THMG could presumably have done so at the beginning of the new accounting period (extended or otherwise) to similar, if not more advantageous, temporal effect; third, HJ, in fact, found out about the Restructure within a matter of months and, although the information gleaned was incomplete, this did not stop them pressing THMG for more; fourth, THMG had no control over the timing of the PIP litigation; fifth, THMG did not have any control either over the timing of any HMRC intervention; sixth, it is apparent that, as late as 22 November 2012, GB did not know to which accounting period the Restructure transaction was to be 'booked', hardly consistent with this issue being a driver in the 'plan'; seventh, far more likely is that the Group's accounting period was extended so that the Restructure could be accounted for under the old structure, with the revised Group then starting its reorganised trading and financial reporting with a 'clean slate', so avoiding the need to apportion between different entities and accounting periods. That was consistent with GB's testimony about moving the year end to "*start afresh*" which I also accept.

463. Nor did I find persuasive the suggestion that the details of the Restructure were (apparently deliberately) not made publicly available in furtherance of the 'plan': first, the information was commercially confidential. Many companies

[20] ICAEW "*Technical Release: Guidance on the Determination of Realised Profits and losses in the context of distributions under the Companies Act 2006*" Tech 02/10.

would (legitimately) wish to avoid, to the extent possible, public disclosure of the private sale of their assets; second, as with the sale of THMG's assets to Healthcare, where the consideration may change depending on the completion date, it is not uncommon to state this by reference to a completion balance sheet; third, for the same reason, the transaction documents may well not state the net intercompany balances. However, the creation of those intercompany loans was recorded in the transaction documents; fourth, the sale price of Dolan Park was available to the public immediately on completion of registration at HM Land Registry; fifth, the fact the journal entries for the Restructure transaction were still being worked on in February 2013 seems to add nothing – GB had wanted 'closure' on these in November 2012 and, forming part of THMG's internal accounting, they would not be publicly available in any event.

(c) 'Informal winding-up'

464. The Claimant also contends that the Restructure represented an 'informal winding-up', distributing THMG's assets out of the Company and leaving THMG behind as a non-trading, cashless 'shell', containing only those creditors that D1 was happy to cut adrift, the decision to pay them (or not) entirely in the hands of others. As a preliminary matter, although THMG ceased its principal trading activities, it continued to perform aftercare services for former patients. That was an important function which, if not undertaken (and paid for), could have resulted in considerable damage to the Group's business reputation. The Group also carried on providing for, defending and paying, patient claims, albeit the decision was taken in or around September 2012 to settle these more quickly to reduce expense. This new approach (adopted pre-Restructure) indicated an intention to accelerate payment of its related liabilities rather than a prejudicial intent towards the affected creditors. THMG also continued to defend the PIP claims. The Claimant says this merely kept things 'ticking over' pending the best time to disclose THMG's lack of assets and then attempt to settle cheaply rather than continuing to pursue a long term strategy, the latter being inconsistent with DR's concerns about increasing litigation costs. However, the PIP litigation was of a different nature, involving multiple defendants, likely costs sharing and, deliberately, because of the nature of the proceedings and the liability case, a 'long game' (as advised in consultation with LWQC in January 2012). Although DR did seek SM's views in March 2013 on an approach to the PIP litigation of non-attendance at hearings and no longer instructing D6, he recognised the potential reputational damage and THMG continued defending the claims, albeit in an increasingly cost-effective manner as the litigation progressed, including from July 2013, acting in person, DS having been brought in-house.

465. Moreover, if it had been THMG's intention, apparently influenced by antipathy towards the claims regime, to defeat PIP creditors, it seems unlikely that potential settlement would feature in its thinking at all. As to the negotiations with the PIP claimants between at least 2014 and 2015, the Claimant says that THMG's impecuniosity was used to drive a settlement. Although DS did stress in those discussions THMG's non-trading status since 2012, he also indicated that any settlement would be funded by the Group and that, if the claimants' demands were too ambitious, the Group too would cease trading. This is not

suggestive of the Group leaving THMG and PIP claimants 'high and dry' rather than that their corporate fates remained intertwined, leading to the exploration of a compromise over an extended period. Likewise, although various considerations will have informed the course of the settlement negotiations, the fact that a compromise was (nearly) agreed at £250,000, compared to the claimants' earlier much higher demands of around £3.5m (and even larger claims in THMG's liquidation), puts the latter figure into perspective and reinforces LF's view that PIP was manageable. As DR's report in the context of THMG's liquidation confirms, its ability to settle at that much lower number only changed following Transform's collapse in mid-2015.

466. In relation to VAT, as noted, THMG's view was that this might be introduced on cosmetic surgery but that hospital services would continue to be exempt. The position was being tested through litigation (albeit not against THMG) in a domestic tribunal setting and, later, at EU level, and throughout 2012 was one of 'wait and see', but with confidence that the taxpayer would prevail, the record (including the proposal of Healthcare's administrators) confirming that such confidence was supported by professional advice. In the context of the suggested 'informal winding-up', it is notable that, following the Restructure, Healthcare does not appear to have charged VAT on the trading activities previously performed by THMG such that any risk of backdated VAT would increasingly become a Healthcare problem (and decreasingly a THMG one), as the assessments ultimately made by HMRC appear to bear out. As noted, those same assessments also confirm that historical VAT liabilities could not have been 'insulated' within THMG given the Group VAT structure that obtained at the time of the Restructure. Finally, that process of HMRC engagement with the Group concerning the proper VAT treatment did not commence until 2014 (after an apparently uneventful VAT inspection in 2013) and continued into 2016. In relation to VAT, the suggestion that the Restructure achieved THMG's 'informal winding-up' therefore makes little sense.

467. It is also notable in this context that THMG's statutory accounts for 2013 and 2014 confirm its continuing operation as a 'going concern', with TWP (Newco) continuing to issue letters of support for at least the following 12 months. Although these letters were not legally enforceable, and although THMG did not have meaningful cash balances of its own, its debts continued to be funded by the Group and paid through the reduction of its intercompany balances so much so that a positive cash balance in THMG's favour at the time of the Restructure was reduced to a negative cash balance in the Group's favour of £1,421,373 by 2015. Although the Claimant challenges the propriety of a number of the items for which THMG continued to be responsible post-Restructure (addressed below), if an 'informal winding-up' had been intended, this seems an unlikely way of going about it.

468. Finally, returning to the continued intertwined fate of THMG and the Group, it is also notable that this was not a case in which the restructured Group, having freed itself from the THMG 'millstone', then went on independently to flourish. To the contrary, shortly after THMG entered liquidation in February 2016, Healthcare went into administration in October 2016, with TWP (Newco) and Holdings entering liquidation shortly thereafter. I am satisfied that these

dominos falling in quick succession was no coincidence but that, from 2015, they all suffered from the confluence of two principal factors, namely the collapse of Transform that made THMG the central focus of the PIP litigation and HMRC's stance on VAT which meant the Group could no longer support itself, let alone THMG. I reject the Claimant's submission that this was the natural and probable consequence of (Restructure) decisions taken in 2012. Although the PIP and VAT issues were known at the time of the Restructure, they developed in an entirely unexpected manner and I am satisfied that, even if the Restructure had not occurred, the whole Group (including THMG) would always have fallen no later than it did.

(d) (Under)value

469. As noted, the Claimant instructed Mr Arora of Alix Partners LLP, and the Defendants Mr Waghe of FTI Consulting, to value the losses said to have been suffered by THMG as a result of the Restructure and to consider whether the related asset transfers were at an undervalue.

The experts' overall approaches

470. Mr Arora valued THMG's business transferred to Healthcare by preparing a valuation of Healthcare as at 30 November 2012 assuming the transfer under the TAA had taken place. Mr Arora was instructed to use £15 million as the value of Dolan Park, representing Colliers' 2012 assessment of the market value of the freehold interest in the property on the assumption it was fully equipped as an operational entity. Mr Arora did not value THMG's intellectual property rights separately from the overall value of Healthcare. Mr Arora also prepared valuations of Surgicare and Nu-Age. Mr Arora valued Healthcare using the 'Market Approach', selecting a multiple based on market data (4xEBITDAR[21]) to conclude an equity value for Healthcare as at 30 November 2012 of £12.9-14.5m. Mr Arora performed a 'cross-check' of his Market Approach valuation using a discounted cashflow valuation of Healthcare (**DCF**).

471. Mr Waghe also undertook his valuation adopting an EBITDAR market multiple approach based on comparable transactions (4xEBITDAR), albeit he assessed the equity value of THMGL (including its trading business and Dolan Park combined) immediately before the Restructure to be £12.9m, having excluded any assets and liabilities remaining with THMGL. As such, his assessment did not have recourse to Collier's Dolan Park valuation. Mr Waghe did not perform a DCF analysis because he says it would be insufficiently robust, even as a cross-check.

472. The (updated) summary of the experts' respective loss positions shows Mr Arora's assessment of loss as falling between **£32.2 to £33.8m** and Mr Waghe's as **£1.9m to £3m** if Surgicare is included (**£1.9m** if not).[22]

---

[21] Earnings before interest, tax, depreciation and rent.
[22] JS at [2.1].

GBP (million)	Arora low	Arora high	Waghe low	Waghe high
Equity value of Healthcare (prior to working capital adjustment below)	12.9	14.5	n/a	n/a
Equity value of THMGL	n/a	n/a	12.9	12.9
Equity value of Surgicare	0.5	0.5	-	1.1
Value of the property	15.0	15.0	n/a	n/a
Consideration paid by/ (to) THMGL	5.6	5.6	(11.0)	(11.0)
Working capital adjustment	(1.9)	(1.9)	n/a	n/a
Total	**32.2**	**33.8**	**1.9**	**3.0**

473. There was therefore a significant difference between the parties' valuations.

Value out - 'double-counting'

474. The principal difference between the experts (in terms of the figures) concerned the treatment of the value of Dolan Park. Mr Arora says he valued the business of Healthcare (excluding the property) and then added Colliers' 2012 valuation of Dolan Park (£15m) to estimate overall damages. The Defendants say that this represents 'double-counting' since Mr Arora and Colliers both assessed the same future cashflows available to Healthcare. Mr Waghe says he avoided that outcome by valuing THMG, including the property, immediately before the Restructure.

'Double-counting' – preliminary considerations

475. In closing submission, the Claimant argued that, since all the Defendants had positively relied on the Colliers' valuation in response to the allegations of undervalue and had agreed that a property valuation expert was not required, it was not open to the Defendants on their pleaded cases to argue against the value of Dolan Park being £15 million. In this regard, both parties took me in closing submission to parts of the Defendants' respective pleadings of which D3's was perhaps the most explicit in this regard. In the POC (in the section concerned with Barclays' involvement in, and the events leading to, the Restructure), the Claimant pleads (at [80.3]) about the e-mail from D3 to Barclays dated 26 October 2012 that:-

> "*In relation to whether the assets were being transferred at market value, the 3rd Defendant confirmed that the Property was being transferred at £15 million which is the value that Colliers gave it, and that he (the 3rd Defendant) and Mr Whitehouse considered that the IP rights being transferred at £1.5 million represented a "sensible/ market value*".

476. In response, D3 pleaded (at [69.1]) that:-

> "*69. Paragraph 80.3 is admitted. It is averred that:-*
>
> *69.1 The transfer of the Property for £15m was supported by an independent professional valuation by Colliers; ……..*"

477. In the section of the PoC concerned with the Restructure and related accounting documents, the Claimant further pleaded that the latter did not properly reflect the former, concluding (at [101]) that:-

> "*101. In the premises, it was incorrect for the 1st, 2nd and 3rd Defendants to:- …………………*
>
> *101.2. Transfer valuable assets for no value at all and/or at a significant undervalue; ….*"

478. As to this, D3 pleaded in his Defence (at [91.2)]:-

> "*91 Paragraph 101 is denied:- ……..*
>
> *91.2 As to paragraph 101.2:- …….*
>
> *91.2.2 ………………….., it is denied that the Company's assets were transferred for "no value at all" and/ or for a significant undervalue. The Property was transferred at no less than market value supported by an independent valuation by Colliers. Paragraphs 87 - 88 above are repeated in relation to the assets transferred to Healthcare. Paragraph 69 above is repeated in relation to the transfer of the IP to Holdings. Further or alternatively (a) the Property was transferred subject to the Charge; and (b) the Colliers' valuation of the Property dated 24 July 2012 for £15m was on (i) an assumption that it was fully equipped as an operational entity having regard to the trading potential of the business (and thus included the value of the business); and (ii) an unencumbered basis (Appendix 6, clause 16). Paragraph 99 below is repeated.*"

479. Finally, in March 2022, the Claimant denied in its Reply to D3's Defence that Colliers had been instructed, or was qualified, to value THMG's business.[23] Accordingly, D3's pleaded case contemplated not only the 'overlap' or 'double-counting' issue through its assertion that Colliers' valuation included the business of THMG but also that the transfer of Dolan Park was at *no less* (and therefore possibly more) than market value. Although less explicit, the former point was made in D6's Defence[24] and the latter in D5's.[25] As such, I am unable to conclude that the Defendants were 'blowing hot and cold' in their reliance on the Colliers' valuation or that they are precluded from arguing a lesser value for the property than that stated in its report. Nor could it be said that any unfairness arises. To the contrary, that the Claimant was alive to, and had ample opportunity to address prior to trial the 'double-counting' issue and/ or to seek permission to adduce additional expert evidence on property valuation, if so advised, is also apparent from Mr Arora's report (at [8.4.3]):-

> "*My instructing solicitors have highlighted to me paragraph 91.2.2 the Re-amended Defence of* [sic] *Gerrard Hugh Barnes, which states "the Colliers' valuation of the Property dated 24 July 2012 for £15m was on (i) an assumption that it was fully equipped as an operational entity*

---

23 At [82.5.5].
24 At [46.5.1]).
25 At [69(B)(1)].

> *having regard to the trading potential of the business (and thus included the value of the business)…". In other words, I understand this to suggest that combining the equity value of Healthcare with the* [sic] *paid for the Property would be double counting. I have been requested by my instructing solicitors to consider this issue. I set out my consideration below*."

480. In any event, both experts agree that, when assessing the value of individual assets, profits or cashflows associated with one asset should not be included in the valuation of another at risk of 'overlap' or 'double-counting' (JS at [4.5]). Since it values Dolan Park (based on Colliers' £15 million valuation) separately from the business of Healthcare, it still falls to the Claimant to satisfy the Court that that any such 'double-counting' risk has not arisen in this case or, if it has, that any 'overlap' (to whatever extent) has been identified and eliminated from the loss claimed.

<u>'Double-counting' - substance</u>

481. As to the substance of the issue, Mr Arora identified in his report certain "*reasons which suggest that the price paid for the Property has no overlap with the value of Healthcare, which is based on the ongoing potential trading profits of the hospital*", on the basis of which, he concluded (at [8.4.6]) that "[i]*n the absence of clarification from Colliers, I consider that the value of the Property does not include the value of the trading business of Healthcare.*" Mr Waghe took a different view, commenting in his report (at [2.57(1)]) that Mr Arora's "*assessment of THMGL's/ Healthcare's value overlaps with Colliers' valuation and therefore Mr Arora's inclusion of Colliers' valuation double counts the value of THMGL.*" That debate was then taken forward, but not resolved, in the JS. The experts were also questioned extensively at trial on the content of the Colliers' reports dated 24 July 2012 (and from 2009 and 2014), albeit both making clear they are not specialist property valuers. The 'double-counting' issue is a complex one, requiring, as it did at trial, extensive 'unpacking' by reference to Colliers' report, D5's instructions and the applicable guidance (valuation and tax).

482. As to the former, after describing the property and tenure, Colliers summarised the financial performance of THMG in 2010, 2011 and the (partial) financial year to 2012, setting out its revenues, expenses and EBITDA over that period in a "*Performance and Valuation Assumption Summary*", stating valuations of £15 million for "*MV – trading*" and £13.5 million for "*MV – closed, disposal period 6 months*." In the report's covering letter dated 24 July 2012, Colliers described the basis of the valuation as "*the Market Value of the Property for its existing use as a fully equipped and operational acute hospital*." Both valuations were based on the "*special assumption*" the property "*is fully equipped as an operational entity and is valued having regard to trading potential*". Having identified the value at £15 million, Colliers stated (at [3.3.2]) "[w]*e must advise that if the national marketing, clinic and consultant base were not to be maintained or professionally operated the usage of the hospital would*

diminish significantly. This would reduce the value of the real estate and business advised above."[26]

483. The covering letter to the report also describes the approach to valuation as the assessment of an appropriate "*Year's Purchase*" multiplier (being the reciprocal of the notional return required by a hypothetical purchaser in the open market) applied to the calculated net profit to give the value of the property having regard to trading potential. In this regard, Colliers stated that they had had regard to hospital sector deals over the prior 5-6 years. Colliers' projections of trading potential covered the 12 months from the valuation date and assumed the professional operation of the business and stable trading position, noting that the value could vary in the event of future change in trading potential or actual trade level.

484. In addition to the accompanying property report, the valuation contains a "*Business Review*" document providing a business overview, including reference to the publicity surrounding PIP implants, how this had negatively impacted on all operators carrying out these procedures, albeit the proactive approach to Dolan Park patients had apparently limited the reputational damage at the cost of a negative effect on short-term profitability. Colliers analysed the detailed financial data provided by THMG with reference to average levels of income, occupancy and outgoings for similar hospitals, commenting on projected performance compared to industry benchmarks. Colliers assessed sustainable annual revenue, costs and EBITDA based on historic trading performance. In this regard, although Colliers referred repeatedly in its reports to EBITDAR (and EBITDARM[27]), it is clear from the 2014 report that this is an EBITDA figure, the 'R' being rent which "*can be ignored as no rent is payable*."

485. Appendix A.4 entitled "*Operating Concerns*" provided "*details of the appropriate basis of valuation, contents of the report, and other requirements of Barclays*." Barclays required the report to be in accordance with section GN1 of the RICS Valuation Standards (**Red Book**) entitled "*The valuation of individual trade related properties*" of the latest edition. The Guidance Note (in fact, GN2) effective from May 2011, states:-

(a) "*Certain properties are valued using the profits method (also known as the income approach) of valuation*" (at [1]);

(b) "*This guidance note relates only to the valuation of an individual property that is valued on the basis of trading potential. Valuations of businesses will be covered by separate guidance*" (at [1.3]);

(c) "*Certain properties are normally bought and sold on the basis of their trading potential. ..... The essential characteristic of this type of property is that it has been designed or adapted for a specific use, and the resulting lack of flexibility usually means that the value of the*

---

26 To a similar end, Colliers' e-mail of 23 June 2009 explaining the valuation methodology for its 2009 report stated "[f]*urther to our discussion regarding the valuation of Dolan Park Hospital I set out below our methodology in assessing the business*."

27 Earnings before interest, taxes, depreciation, amortisation, rent and management fees.

property interest is intrinsically linked to the returns that an owner can generate from that use" (at [1.4]);

(d) "*Valuers who prepare valuations of trade related property usually specialise in their particular market as knowledge of the operational aspects of the property valuation, and of the industry as a whole, is fundamental to the understanding of market transactions and the analysis required*" (at [1.5]);

(e) "*The use of comparable information may be derived from a wide variety of sources, not just transactional evidence. Also, information may be drawn from different operational entities with regard to the component parts of the profits valuation*" (at [1.6]);

(f) "*Valuers should emphasise within their report that the valuation is assessed having regard to trading potential and should refer to the actual profits achieved. If the trading potential and/or the actual profits vary, there could be a change in the reported value*" (at [1.7]); and

(g) "*This guidance assumes that the current trade related use of the property will continue. However, where it is clear that the property may have an alternative use that may have a higher value, an appropriate comment should be made in the report. ….*" (at [1.8]).

486. GN2 also contains certain definitions, including most relevantly:-

(a) **Fair maintainable operating profit** (**FMOP**), being "[t]*he level of profit, stated prior to depreciation and finance costs relating to the asset itself (and rent if leasehold), that the reasonably efficient operator (REO) would expect to derive from the fair maintainable turnover (FMT) based on an assessment of the market's perception of the potential earnings of the property. It should reflect all costs and outgoings of the REO and an appropriate annual allowance for periodic expenditure, such as decoration, refurbishment and renewal of the trade inventory*" (at [2.4]);

(b) **Fair maintainable turnover** (**FMT**), being "[t]*he level of trade that an REO would expect to achieve on the assumption that the property is properly equipped, repaired, maintained and decorated*" (at [2.5]);

(c) **Market Value**, being "[t]*he estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion*" (at [2.7]);

(d) **Operational entity**, usually including (i) the legal interest in the land and buildings (ii) the trade inventory, usually comprising all trade fixtures, fittings, furnishings and equipment and (iii) the market's perception of the trading potential, together with an assumed ability to

obtain/renew existing licences, consents, certificates and permits. Consumables and stock in trade are normally excluded (at [2.8]);

(e) **Personal goodwill (of the current operator)**, being "[t]*he value of profit generated over and above market expectations that would be extinguished upon sale of the trade related property, together with financial factors related specifically to the current operator of the business, such as taxation, depreciation policy, borrowing costs and the capital invested in the business*" (at [2.9]);

(f) **Reasonably efficient operator** (**REO**), being a "*concept where the valuer assumes that the market participants are competent operators, acting in an efficient manner, of a business conducted on the premises. It involves estimating the trading potential rather than adopting the actual level of trade under the existing ownership, and it excludes personal goodwill*" (at [2.10]);

(g) **Trade related property**, being "[a]*ny type of real property designed for a specific type of business where the property value reflects the trading potential for that business*" (at [2.12]); and

(h) **Trading potential**, being the "*future profit, in the context of a valuation of the property, that an REO would expect to be able to realise from occupation of the property. This could be above or below the recent trading history of the property. It reflects a range of factors such as the location, design and character, level of adaptation and trading history of the property within the market conditions prevailing that are inherent to the property asset*" (at 2.13).

487. In this regard, the parties also referred to HMRC's response dated 30 October 2012 to the International Valuation Standards Council (**IVSC**) discussion paper on the valuation of trade related property, the former noting that:-

(a) HMRC considered that GN2 "*provides greater clarity and detail on the particular issues that arise when valuing individual trade related properties and makes it clear that a valuation in accordance with RICS GN2 is not a valuation of the business*"; [Q1]

(b) "*TRPs are bought and sold in the market based on their trading potential (even when new or vacant) because the buildings are usually to some degree unique (in terms of their location, character, size, planning, level of adaptation or construction) and consequently there is a lack of directly comparable evidence*"; [Q2]

(c) "*TRPs are in our view distinct not only because the buildings are designed (or adapted) for a specific type of business use but also because they are bought and sold in the market based on the trading potential for that type of business. Unlike other properties, it is the property itself and customers use thereof that is the predominant source of underlying income generation*"; [Q5]

(d) "*In our view some business valuers who are not familiar with property valuation fail to understand the distinction between the profits method of property valuation and a valuation of a business using a similar profits approach.*

If the principles in the RICS GN2 are followed we believe valuers should arrive at the value of TRP as an 'operational entity' to a 'reasonably efficient operator' (REO). This is a valuation of the property, reflecting established or future trading potential that will run with or attaches to the property, and is properly reflected in the market sustained bid for such, on a sale or transfer.

It is in our view absolutely clear that a valuation of the property under RICS GN2 does not reflect the value of the current occupier's brand, it does not reflect the current occupier's skills and it is clearly distinct from a valuation of a business as a going concern". [Q6]

488. The parties also referred to HMRC Practice Note dated 30 September 2013 on "*apportioning the price paid for a business transferred as a going concern*" which explains:-

(a) the essential characteristics and unique features of trade related properties that lead to the need for specific valuation treatment, often using a profit-based methodology to determine market value, involving the estimation of the trading potential of the property;

(b) how trading potential is assessed by reference to the future profits an REO would expect to realise from occupation of the property;

(c) how the profits method allows market value to be assessed by capitalising the FMOP at an appropriate rate of return, reflecting the risks and rewards of the property and its trading potential; and

(d) how the profits method of valuation has the advantage of representing the value to an owner occupier.

489. GN2 describes the steps in the profits method of valuation, namely:-

(a) **Step 1**: "*An assessment is made of the FMT that could be generated at the property by an REO*";

(b) **Step 2**: "*Where appropriate an assessment is made of the potential gross profit, resulting from the FMT*";

(c) **Step 3**: "*An assessment is made of the FMOP. The costs and allowances to be shown in the assessment should reflect those to be expected of the REO – which will be the most likely purchaser, or operator, of the property if offered in the market*"; and

(d) **Step 4**: "*(a) To assess the Market Value of the property the FMOP is capitalised at an appropriate rate of return reflecting the risk and rewards of the property and its trading potential. Evidence of relevant comparable market transactions should be analysed and applied. ….*"

490. GN2 also provides that, in assessing the trading potential, a "*trade related property is considered to be an individual trading entity and is typically valued on the assumption that there will be a continuation of trading*" (at [5.7]). Moreover, "[w]*here the property is trading and the trade is expected to continue, the valuation will be reported as: Market Value [or market rent] as a fully equipped operational entity having regard to trading potential subject to any agreed or special assumptions .... [which must be clearly set out]"* (at [5.14]). In that vein, Barclays requested Colliers' opinion of Market Value as a fully equipped operational entity having regard to trading potential under different special assumptions, also stating (at [3.1]) that:-

> "*If the Valuer's assessment of the fair maintainable operating profit (FMOP) differs materially from the EBITDA, then please explain the principal factors/adjustments that make up this difference. In addition, please provide comment as to how the market value might differ if reliance was placed solely on the EBITDA.*"

491. Colliers did not report any divergence of FMOP from THMG's EBITDA, suggesting that THMG's profitability was not considered materially different from that which would be generated by an REO operating Dolan Park.

<u>'Double-counting' - discussion</u>

492. As a preliminary matter, I accept Mr Arora's conclusion (in his original report at [8.4.6] and JS at [7.8(i)]) that the Colliers' valuation was not a business valuation rather than a property valuation. That much is evident from GN2 (at [1.3] and [2.8]) and, more pointedly, from the HMRC Practice Note which states in relation to the Red Book guidance that:-

> "*The guidance makes it clear that a valuation should relate only to the valuation of an individual property valued on the basis of trading potential. The valuation is of the property as a `place to do business', not a valuation of the actual business itself.*"

493. Moreover, as noted, a valuation conducted on the basis of GN2 of the Red Book does not reflect the current occupier's brand or skills and is clearly distinct from a valuation of a business as a going concern. However, in this context, much of the importance of the 'property'/ 'business' distinction lies in the need for the valuer to realise that the profits method valuation approach is concerned with the trading potential of the property in the hands of the *hypothetical* REO, not of the *actual* entity trading from the site. At core, the focus of this valuation approach lies in the unique nature of the property, meaning that its value *is* intrinsically linked with its ability to generate income and make profits. The distinction is therefore not as stark as the Claimant suggests.

494. Mr Arora provided various reasons why he said there was no overlap between his and Colliers' valuations. However, his observations concerning the audited accounts of THMG and Dolan (at [JS 7.8(iii)-(iv)]) did not advance matters meaningfully. Mr Arora noted that THMG's auditors 'signed off' its accounts for 2011 and 2012, showing a freehold property value (or sale price) of, respectively, £17.25m (or £15m), consistent with those stated in Colliers' valuation reports from 2009 and 2012 (both prepared on the same basis). Although true, that observation begs the question of what is represented by those valuations, namely the trading potential of the property as reflected in Colliers' assessments of FMOP or 'sustainable earnings'. Mr Arora also observes (at [JS 7.8(ii)]) that Dolan's audited accounts from 2013 show (as cost of freehold property) the £15 million figure from Colliers' 2012 valuation report. This might seem paradoxical since it was Healthcare (not Dolan) that then traded from the property and generated its associated cashflows. However, any oddity lies in whether the value leaving THMG as assessed by Colliers was later properly allocated elsewhere in the Group post-Restructure, not whether Colliers' original analysis reflected Dolan Park's trading potential. On the terms of the Colliers report, it did.

495. To more direct effect, Mr Arora referred in the JS (at [7.8-7.9]) to the implied rental yield based on the £750,000 annual rent charged by Dolan to Healthcare following the Restructure. Based on the 2012 valuation of £15m, that yield is 5% (or 5.6% based on the alternative Colliers' valuation of £13.5m), not dissimilar to the average yield of 6% for the healthcare sector indicated by a 2012 Knight Frank report. If one were to assume that the value of the property also included the business, it would be necessary to capitalise more than just the profits represented by that rental, demonstrating significant additional value beyond that estimated by Colliers, supporting Mr Arora's view that this is a property (not a business) valuation. To the same end, the 2014 Colliers' report identifies Dolan Park's market rental value as £1.02m based on a value of £15.3m, implying a rental yield of 6.6%, also consistent with market expectations. Again, that £1.02m rental figure does not reflect all the profits available to the business operating the property.

496. The Claimant took the point further in closing submission, pointing out (at [491]) that it was common ground "*that the investment value of Dolan Park was likely to be less than market value having regard to trading potential*." As the HMRC Practice Note stated, "*in cases where there are particular difficulties in arriving at a valuation using the profits method, the investment method may provide a guide as to the minimum value of the property to an incoming purchaser*." Drawing these threads together, the Claimant submitted that the market rent for Dolan Park estimated by Colliers in 2014 was exactly half the estimated sustainable EBITDA of £2.04m. That rental indicates an investment yield of 6.6% to the £15.3m valuation, consistent with yields generally in the sector, equating to a year's purchase multiple of 15x market rent. The actual multiple stated in the Colliers' report was 7.5 but the relationship between the two mirrors that between the total sustainable EBITDA and market rent estimated by Colliers. Accordingly, the logic of Colliers' reports is that, when capitalised, the market rent (reflecting half the sustainable EBITDA), produces an investment value to the owner of £15.3m in 2014 (£15m in 2012). The other

half of the sustainable EBITDA remains available to the operator and produces a capitalised value in approximately the same amount, fitting with Mr Arora's own separate assessment of the equity value of Healthcare. As such, there is no 'double-counting'. I found unpersuasive the Claimant's attempt to explain Colliers' approach (and supposed logic), including for the following reasons:-

(a) First, Colliers did not undertake any market rent assessment in 2009 or 2012. They were first instructed to do so in 2014. It is therefore unclear why rental yields should enter into the picture at all in 2012;

(b) Second, Mr Arora is not a property valuation expert and, therefore, unable to speak authoritatively to whether the rental yields indicated by the market data are, in fact, appropriate for Dolan Park;

(c) Third, the 2014 report's "*General Assumptions & Definitions*" distinguish valuations on the alternative bases of "*Market Value*" and "*Investment Value (or Worth*)" and explain the differences between the two;

(d) Fourth, the basis of the valuation adopted in the 2014 report "*is the Market Value of the property for its existing use as a fully equipped and operational acute in-patient medical / surgical hospital*", not its investment value;

(e) Fifth, the 2014 report did not indicate any "*particular difficulties in arriving at a valuation using the profits method*" as canvassed by the HMRC Practice Note for when an investment valuation might be appropriate;

(f) Sixth, as the HMRC Practice Note also points out, a valuation based on the investment method (capitalising an estimated rental value) requires consideration of comparable lettings, rental yields, lease terms and the profit split with the tenant. None of these matters features in the 2014 report; and

(g) Seventh, the HMRC Practice Note also states that a valuation using the investment value approach represents the value to an investor, not an owner-occupier. In 2014, Barclays again identified the "*Proposed Occupancy*" in its instructions as "*Owner Occupied Commercial*".

497. In summary, although the Claimant (and Mr Arora in cross-examination) were eager to explain the link they discerned between the market rent and the returns generated from the operation of Dolan Park, and their belief that Colliers were demonstrating the sharing of those returns between owner and operator, that is a matter of (convoluted) deduction. On its face, all that Colliers was doing in its 2014 report was to estimate the market value of Dolan Park having regard to its trading potential, using the profits method. Colliers was not instructed to, and it did not, value the property on an investment value basis, whether in 2014 or previously.

498. In this context, the Claimant also pointed out that the multiple applied by Colliers to THMG's 'sustainable EBITDA' was a 'Year's Purchase', not an 'Enterprise Value' nor 'WholeCo' multiple, confirming again that this was a property valuation. In 2009 and 2014, Colliers expressly stated the multiple as 8.25[28] and 7.5 respectively. This was not stated in 2012 but, based on the sustainable EBITDA and value assessed by Colliers, the implied multiple was 7.7. Although Colliers did not explain (save for 2009) the particular reasons for alighting on those multipliers, the basis for their assessment *is* evident:-

(a) In its 2009 report, Colliers stated that "[a]*n appropriate 'Years Purchase' multiplier (being the reciprocal of the notional return required by a hypothetical purchaser in the open market) has been assessed by reference to market transactions. This has been applied to the calculated sustainable net profit to give the open market value of the hospital as 'a fully equipped operational entity having regard to trading potential'*".

(b) Colliers stated in the same report that "*WholeCo (trading freehold businesses)*" transactions completed in 2006 to mid-2007 were being completed at multiples of EBITDA from in excess of 10 to well over 20, albeit, in 2009, they were trading in a very limited market at multiples with 10x being close to the top of the range. A number of such market transactions were identified in section 10.3 of the report;

(c) In its explanatory letter dated 19 October 2009 to Barclays, Colliers explained that "[w]*e have adopted a multiplier of EBITDAR of 8.25 - towards the lower end of the range of multipliers analysed from recent transactions in the market place (8.0 to 11.0). We have analysed these figures without any portfolio premium that may have been considered for groups of hospitals as Dolan Park is a stand alone trading entity.*" Colliers also stated that "[t]*he market activity to which we have had regard is set out in paragraph 10.3 of our report dated 22 July 2009*";

(d) The 2012 report contains the same exposition of the 'Years Purchase' multiplier applied by reference to market transactions and identifies a number of such transactions since 2005, including the Transform transaction in 2010; and

(e) The 2014 Colliers report contains the same exposition of the 'Years Purchase' multiplier applied by reference to market transactions. As to those, Colliers stated that "[r]*elatively few transactions are currently taking place and we have therefore made reference to sales that are now slightly dated. We have taken this into consideration in our valuation and have evaluated the comparable evidence based on our experience in the market in general and our inside knowledge of the transactions in particular*."

[28] The 8.25x multiple was identified in Colliers' explanatory letter on its 2009 report, confirmed in Barclays' Zeus form from June 2011.

499. The Claimant placed much emphasis on the 'Years Purchase' multiple label used by Colliers as indicative of something different from the 'WholeCo' multiple identified in its reports. However, it is evident from Colliers' 2009 report (and explanatory letter) that, in 2009, it adopted a 'WholeCo' multiple from within the range indicated by the relevant market transactions analysed. Its approach then (as in 2012 and 2014) was described as applying a 'Years Purchase' multiple. As such, whatever the label used, it is evident that Colliers adopted the same market multiples approach as Mr Arora in his analysis of the equity value of Healthcare. In this regard, the Claimant suggested that, given the preparation of the 2009 Colliers' report at a "*low point following the global financial crisis*", a logical assumption might be that a WholeCo multiple thereafter would be higher, returning to prior levels as market conditions improved.[29] However, GB's draft board paper from 31 December 2010, informed by discussions with KPMG Corporate Finance and Gresham Private Equity, indicates that, rather than improving, the market subsequently deteriorated:-

> "*The Colliers valuation was prepared in April 2009 and used an earnings based valuation approach. It is therefore likely, given that multiples have declined since then, that if Colliers were approached to repeat this exercise the result would be based on a lower multiple ..*"

500. In 2012, the multiple used by Colliers did indeed decline, from 8.25 in 2009 to 7.7 in 2012 (and then, again, to 7.5 in 2014).

501. Mr Arora also appears to suggest (JS at [7.10]) that the only potential for overlap resides in the difference between Colliers' 2012 valuation of £15m and its alternative valuation on the basis Dolan Park was closed (£13.5m). The assumption appears to be that no cashflows would be available to the property when closed. In that scenario, there could be no overlap with the cashflows used in Mr Arora's analysis of Healthcare. As to this:-

(a) It is clear from Colliers' 2012 report that the starting point of this alternative (£13.5m) valuation is the same as the primary valuation, namely the market value of a trade related property assuming trading potential ie: the ability to generate cashflows;

(b) Certain additional assumptions are then made, namely (i) a timescale for disposal of 6 months (ii) the property being vacant, with inventory removed (iii) the accounts and records of trade not being available to, or relied on by, a prospective purchaser (iv) the business being closed and (v) the registrations and licences being lost or in jeopardy;

(c) As the HMRC Practice Note contemplates, these assumptions may lead to some delay before the REO could achieve the expected FMOP, possibly resulting in an adjustment to the multiple used to capitalise the FMOP, or to the FMOP itself during the period this is expected to build up; and

---

[29] Claimant's closing submissions at [488].

(d) Closure notwithstanding, the same cashflows would still be available to Dolan Park, albeit some would have been lost because of the impact of these special assumptions on this alternative basis. As HMRC's response to the IVSC consultation paper states, "*TRPs are bought and sold in the market based on their trading potential (even when new or vacant).*"

502. Put shortly, Colliers were still valuing the trading potential of a trade related property on that alternative (vacant) basis. The Claimant relies on Mr Sweeney's description of this scenario (apparently following his discussion with Colliers) as a "*valuation in a distress*". However, even with that 'label', the unique feature of the property - the intrinsic link between its ability to generate returns and its value – remained, the £13.5m figure reflecting its trading potential, albeit now diminished.

503. As can be seen, I found that the matters relied on by the Claimant on the 'double-counting issue' either did not meaningfully advance the issue or that its analysis did not engage sufficiently with, and was not supported by, the valuation approach identified in Colliers' reports and the related RICS and HMRC guidance. As such, the Claimant has not persuaded me that there is no overlap. To the contrary, even in the absence of evidence from Colliers or some other property expert(s), I am satisfied that Mr Arora has 'double-counted' in his analysis of the equity value of Healthcare the earnings reflected in Colliers' 2012 report, not least because:-

(a) In 2012, Barclays instructed Colliers in 2012 to prepare a valuation of Dolan Park (i) with the "*Proposed Occupancy*" as "*Owner Occupied Commercial*" (ii) in accordance with GN2 'The valuation of individual trade related properties' (iii) to establish its market value as a fully equipped operational entity having regard to trading potential and (iv) with the reasons for any material difference between FMOP and the EBITDA to be specifically explained;

(b) The focus and emphasis of GN2 is on (i) the unique nature of a trade related property (ii) the use of such property being intrinsically linked to realisable returns (iii) the established or future trading potential that will run with, or attaches to, the property (iv) the continuation of the current trade related use of the property (v) the value of the property as an 'operational entity' (including trade inventory) (vi) the assessment of that entity's FMOP using the profits method and (vii) valuer specialism in the operational aspects of the particular market;

(c) Consistent with GN2, Colliers analysed (i) THMG's financial data with reference to data for similar hospitals (ii) sustainable annual revenue, costs and EBITDA based on historic trading performance; and (iii) projected performance compared to industry benchmarks;

(d) Also consistent with GN2, Colliers opined on (i) the market value of Dolan Park on the special assumption it was fully equipped as an operational entity having regard to trading potential (ii) the significant

diminution in usage of the hospital if the national marketing and clinic and consultant base were not maintained and (iii) such diminution reducing the value of the real estate and business as advised by Colliers;

(e) Colliers did not identify any divergence between THMG's EBIDTA and the FMOP associated with the property; and

(f) Colliers reported a market value for Dolan Park after applying a multiple assessed by reference to comparable market transactions to THMG's sustainable EBITDA assessed in the manner indicated above.

504. The contemporaneous documents prepared by D3 and D5 also reflect the overlap inherent in the Claimant's approach:-

(a) In his board paper dated 31 December 2010, D3 undertook alternative valuations of the Group, including an asset based valuation combined with earnings in which D3 took Colliers' 2009 valuation for £17.25m to which he then added "*earnings based valuations on other parts of the business that do not relate directly to the Hospital*" to obtain an "*Enterprise Value*" for the Group of £18.999 million. Although the EV label may not be strictly accurate, by approaching his valuation in this way, D3 (then Group FD) must have understood Dolan Park to include the business of THMG, not merely the property. D3 confirmed as much in evidence. D3 also recorded Colliers having undertaken in 2009 "*an earnings based valuation approach*" which, if repeated in 2010, would likely yield a lower result given the overoptimistic forecasts used by Colliers and the (then) prevailing (lower) multiples.

(b) Mr Sweeney observed in November 2011 in the context of "*Business Risk*" that, based on Colliers' report from April 2009, Barclays was "*well secured with security £17.25m (going concern value).*" Although the 'going concern' rubric too may not be strictly accurate given that Colliers had assessed the FMOP associated with the property, again, Mr Sweeney clearly thought the valuation referable to earnings; and

(c) On 7 September 2012, Mr Sweeney requested THMG's authority to instruct Colliers, his instructions stated to include "*Enterprise Value*". Colliers then produced its 2012 report.

505. Colliers' 2012 valuation assumes that Dolan Park would continue to generate £1.95m 'sustainable earnings' for the hypothetical REO. Mr Arora's analysis assumes that Healthcare could generate £2.1m EBITDA as the new operator of Dolan Park. Colliers did not identify any cashflows that did not run with the property, ie: 'personal goodwill'. Nor did Mr Arora, although he did comment in oral evidence in general terms on the relationship between Dolan Park and its trade. Both sets of cashflows could not be generated at the same time from the same property. By including the 2012 valuation in his overall loss calculation, I therefore find that Mr Arora 'double-counts' all, or substantially all, the 'sustainable earnings' used by Colliers in its report.

506. I am reinforced in my view by the Claimant's approach generally to the 'overlap' issue. Mr Arora was alive to the risk of 'double-counting' when valuing assets on a 'disaggregated' basis. The Claimant knew that this risk was a 'live' issue between the parties in this case and asked Mr Arora to consider it in his report. Mr Arora did so, albeit in relatively brief terms. Even then, his conclusion as to the absence of 'overlap' was somewhat tentative, appearing to acknowledge that "*clarification from Colliers*" might alter his view. It was not then until the JS (and trial) that Mr Arora engaged more meaningfully with the issue albeit, as I have noted, the arguments advanced were not compelling and Mr Arora repeated at trial the desirability of checking with Colliers "*to ensure that the exact number did reflect the right – the right element of value*." Mr Arora may well have been hamstrung by his instructions but, in my view, this led to an overall approach that was methodologically precarious and justifications for the suggested absence of overlap that were unpersuasive.

Value out - the appropriate comparable

507. Although the parties agreed that the best comparable market transaction was the 2010 sale of Transform for £19.1m (yielding an Enterprise Value/ EBITDAR of 4x), their main point of dispute was whether that multiple was properly applied in the valuation of *Healthcare* (as the Claimant maintained) or *THMG* (as the Defendants maintained). In this regard, the Claimant emphasised the following:-

(a) Mr Arora has valued the correct entity because Transform needed a similar relative level of operating rent costs to Healthcare to achieve its EBITDAR;

(b) The Defendants' focus on Transform *owning* a property as a point of key difference with Healthcare was misplaced. Ownership was not automatically beneficial to value. The higher associated costs may (as with Transform) decrease profitability, albeit this is balanced in terms of value by Transform's lower "*risk profile*" as property owner;

(c) As such, no adjustment to the multiple was necessary. If anything, the multiple applied to Healthcare was conservative given Transform's acquisition at a time of downward trending results, apparently due to its parent company's financial difficulties;

(d) Transform had much higher levels of rental costs and depreciation than THMG. Using the EBITDAR multiple of the former would therefore undervalue the latter - its application to THMG is unsuitable; and

(e) The use of Transform's (better) prior year results (as canvassed by the Defendants) would reduce the multiple below 4x but this would be inapposite given the downward trajectory of Transform's results pre-sale in a rising market.

508. By contrast, the Defendants emphasise the following matters:-

(a) The 4x multiple is derived from Transform's maintainable EBITDAR for the part year-ending 28 May 2010 (Transform's sale date);

(b) That, in turn, was derived (as best possible) from Transform's audited figure to 30 September 2010 (£4.75m);

(c) Only some of the 2010 management accounts would have been available at acquisition, with their inherent pre-audit uncertainties;

(d) Transform had opened a second hospital in June 2009 at £5m investment cost, likely giving rise to one off costs to May 2010, depressing maintainable EBITDAR in circumstances in which full profitability from its use had not yet been reached;

(e) A buyer would therefore likely have ascribed value to the recent (higher) audited maintainable EBITDAR figures (at least for 2009, £6.88m and, possibly, 2008, £7.55m);

(f) Doing so would increase the EBITDAR significantly (and reduce the multiple) such that both experts' use of the 4x multiple likely overstates their respective valuations;

(g) Mr Arora's suggestion that the period 2007 to 2009 was prior to the financial crisis 'trend' revealed in the 2010 figure is unsustainable; one year is not a trend and the prior figures did span the financial crisis;

(h) Mr Arora's use of Transform's post-acquisition (albeit pre-Restructure) figures is impermissible hindsight;

(i) There is no evidence to suggest the Transform sale was distressed;

(j) Although Transform was an appropriate comparable for THMG, the same cannot be said for Healthcare. Transform and THMG both owned substantial multi-million pound hospital properties. Healthcare did not and therefore had a very different risk and asset profile;

(k) Mr Arora failed to grapple with this fundamental point in his report, then defending his position in the JS with extensive new analysis;

(l) Owning assets is of value to a buyer and secures higher value than a business (like Healthcare) without assets but with the same earnings. Asset ownership and the related capital investment increases profitability and affords easier access to debt as well as security to the cashflows associated with the asset;

(m) In this regard, Healthcare only had a five year lease but nowhere in Mr Arora's report did he consider the risk to Healthcare's earnings of having to find a replacement hospital, indicating in oral evidence an "*implicit*

assumption" (he was not qualified to make) that five years was sufficient for that purpose;

(n) Mr Arora's focus on rent costs to justify the suggested similarity of Transform to Healthcare is wide of the mark since (i) not enough is known about those costs, whether they are commitments and, if so, whether ongoing (ii) comparing those costs across the three years prior to the relevant sale/ valuation shows that Transform and THMG are, in fact, more similar, Healthcare's related costs being higher and (iii) EV adjustments on account of operating lease commitments are (as Mr Arora accepted in oral evidence) rarely made due to paucity of information; and

(o) Although Mr Arora reflects Healthcare's greater risk in his higher DCF discount rate, he does not reflect this in the multiple he uses.

Value out - conclusion on appropriate comparable

509. In my judgment, the one thing the parties' respective analyses do have in common is that they show Transform to be an imperfect proxy, whether for Healthcare or THMG. That is perhaps unsurprising. No two businesses are the same and there is often a lack of information to help understand, and adjust for, their differences. However, those difficulties are particularly acute in this case where only one market transaction has been used, that transaction (like the Restructure, to which it being compared) is, by now, quite historical, the figures used to deduce the multiple represent part of a year's performance and the reasons for its reduced performance in that period are poorly understood.

510. Despite these limitations, I am satisfied that Transform transaction is a more appropriate comparable for THMG. First, the Claimant focuses on suggested similarities in operating lease costs between Transform and Healthcare. Although Mr Arora rejected as misleading Mr Waghe's analysis of the operating lease cost profile of all three companies over a longer period, this does indicate that the similarity between Transform and Healthcare is much less clear than the Claimant suggests. The lack of information about Transform's operating lease costs is another confounding feature. I am therefore unable to draw any meaningful conclusion as to this suggested similarity, let alone ascribe it the significance contended for by the Claimant.

511. Second, I am satisfied that its ownership of a significant hospital property would have had a positive impact on THMG's ability to generate, and maintain, future cashflows, that this similarity with Transform was meaningful and that these were matters upon which Mr Waghe was qualified to opine, being concerned with the risk associated with the relevant asset and the related impact on the value of the business. By contrast, I found unconvincing the Claimant's general assertions concerning the impact on value of the incidents of property ownership. Nor was I persuaded by Mr Arora's opinion on the sufficiency of the five year term of the Dolan Park lease to find a replacement hospital which did appear to me to be outside his expertise. Given the greater similarities between Transform and THMG (rather than Healthcare), it seems to me that, by

adopting the Transform multiple, Mr Arora's valuation is much more akin to what Mr Waghe has done - valued THMG.

512. Third, I am again reinforced in my view by the Claimant's general approach in failing to engage more directly in its original expert evidence with this obvious difference between Healthcare and THMG and whether, in light thereof, the application of the Transform multiple was appropriate. In my view, these were material considerations that should have been broached earlier than the JS.

513. Fourth, given my finding that the Colliers' valuation already accounts for all, or substantially all, THMG's cashflows, a finding reinforced by the Claimant's application of a multiple more suitable for a property owning entity such as THMG than for Healthcare, it is difficult to see how the Claimant's valuation of Healthcare (without Dolan Park) usefully advances matters. The Claimant envisages that adjustments could be made to its valuation to address the overlap, as did Mr Arora in his oral evidence but, as the Defendants say, the Claimant has not put forward a case as to how to calculate the overlap and Mr Arora was not instructed to consider the overall value of the "*bundle*" transferred by THMG under the Restructure. It is now far too late to be re-visiting these matters.

Value out - potential adjustments

514. I address more briefly certain potential valuation adjustments canvassed at trial.

Use of an EBITDAR range

515. First, as noted, Mr Arora's valuation of Heathcare fell within a range, the reason being that the agreed adjusted EBITDAR for the three years prior to the Restructure ranged from £3-3.4m. Applying the 4x multiple and adding net cash (£0.9m) results in a valuation within the range **£12.9-14.5m**. Mr Waghe's view is that the appropriate EBITDAR to use was £3m, reflecting the latest 2012 financial position immediately prior to the Restructure, resulting in a valuation using the same method of **£12.9m**. Mr Arora says that, since Healthcare did not receive all THMG's liabilities, "*its EBITDAR may be higher due to lower expenses in relation to such liabilities*." However, Mr Arora (and Mr Waghe) were unable to identify any matters said to have that potential understating effect. Moreover, although Mr Arora indicated in the JS that the "*value stated for the 12 months ended 30 November 2012 may reflect an under-apportionment of the add-back of non-maintainable items*", he had already accounted for this in his report by making certain adjustments. Although he also posits that there "*could be other costs that should be excluded for similar reasons*", this is not, in my view, sufficient to warrant the use of an extended and more historical range of EBITDAR figures. To the contrary, given that both experts have used the latest Transform EBITDAR figures in arriving at the appropriate multiple, I consider a consistent approach should be adopted in identifying the figure to which it is to be applied, namely THMG's latest 2012 EBITDAR. If not, consistency would dictate that a longer historical period of Transform's performance should be considered to derive the appropriate multiple, this would be less than 4x and the resulting range of valuations, likewise, lower than that produced by Mr Arora. Although there might be some merit in this, I do not

take that approach since, no doubt, adopting that more historical basis would throw up further difficulties of its own.

SM's consultancy fees

516. Mr Arora had been instructed to exclude from his valuation (and therefore add back to his 2012 EBITDAR figure) SM's consultancy costs, noting in his report that close examination would be required to consider whether these costs would continue or if they were "*dividend-like*".[30] If the former, "[a]*n arm's length replacement cost would then be included for any services that were being provided to the company and could not be performed by existing employees*." In oral evidence, Mr Arora confirmed that, if there was "*some substance*" behind SM's work and he performed a "*useful task for the business*", it would be reasonable to include a replacement cost. DR testified as to SM's entrepreneurial role in sourcing new products and services for the Group, his related daily interactions with SM, the need for someone else to perform that role (if not SM) and the six figure annual fee that person could command. Based on this evidence, I am satisfied it would be appropriate to reduce the £3m EBITDAR figure by £100,000 on this account.

Legal and professional costs

517. Likewise, Mr Arora excludes from his valuation (by adding back into his 2012 EBITDAR figure) many of the legal and professional costs designated in the 2012 accounts as "*general*" or "*patient claims*".[31] On an annualised basis, those cost groups total £945,343, compared to £146,658 in 2011. Mr Arora excludes the difference between those two figures (£798,685) on the basis THMG's liabilities did not all transfer to Healthcare. The Defendants say that the reasonable notional purchaser would not take such an approach since Healthcare too would face such costs and claims, the best proxy for those would be the 2012 position, the notional purchaser would not overlook a £1m cost in 2012 given its proportion of EBITDAR (or the litigation provision of £1,015,114) and Mr Arora testified that much of the sharp increase in 2012 was accounted for by the non-recurring costs associated with rectification but the PIP analysis for January to May 2012 showed THMG making a profit. They submitted that the appropriate adjustment was to split the difference between 2011 and 2012 years down the middle with the result that only £399,000 is added back to the 2012 EBITDA figure, rather than £799,000.

518. It is apparent that the lack of information concerning the underlying costs drives the somewhat – and I do not intend it disparagingly – 'rough and ready' approach on both sides to these ledger items. My view on the matter has no greater laser focus but, having heard all the evidence in the case, including as to the legal and professional advice being sought within THMG and its claims position, including in 2012, I have been able to form a view as to the appropriate weighting of the countervailing considerations in play and, therefore, the appropriate amount to add back to the 2012 EBITDAR figure. As to the former, no PIP damages or settlements were paid in 2012 but it is clear that not

[30] Mr Waghe took the same approach on the basis he had not been provided with additional evidence to explain SM's services.

[31] Again, Mr Waghe took the same approach in the absence of further evidence.

insignificant PIP legal costs were incurred. It is unclear whether the cost of PIP rectification procedures would fall within these ledger items (concerned with professional and legal costs) but, even if they did, the PIP analysis indicates some limited profitability, albeit perhaps at lower margins than might otherwise have been achieved. THMG also incurred (non-recurring) legal and professional costs in connection with the Restructure itself, including D6's and CK's fees. Although any purchaser would inevitably start to incur personal injury liabilities, it would not have an existing portfolio of claims to 'service' and it would be aware that the costs regime for such actions would be changing in the relatively near future in a more 'defendant friendly' direction. However, patient claims generally would still have remained a significant problem for cosmetic surgery businesses (accepted by DR to be the number one problem for THMG as at January 2012) and could be expected to represent a not insignificant drag on future profitability. Weighing all these matters as best I can, I am satisfied that the Claimant's EBITDAR 'add back' of £799,000 is too high and that the appropriate approach is to split the difference between these cost items in 2011 and 2012 such that the appropriate 'add back' is £400,000.

The impact of PIP claims/ VAT

519. Although Mr Waghe suggests that PIP claims and the introduction of VAT could have had an impact on future performance in terms of brand effect for the former and future sales for the latter, he (and Mr Arora) make no adjustment in this regard because of lack of sufficient information. As to the former, the evidence in fact indicates that THMG considered the PIP issue to have been well managed, including through its PIP strategy, also reflected in the views expressed by Barclays and Colliers in its 2012 report, the latter noting that THMG's approach had "*limited the reputational damage*." There is a paucity of evidence as to the impact of VAT on future sales. I therefore consider that a related adjustment would not be appropriate.

Surgeon/ patient illness

520. Finally, as noted, THMG's November 2012 report to the Bank suggested the deferral of revenues of approximately £200,000 due to patient and surgeon illness, albeit November bookings were stated to be robust and the future order book healthy. There is again insufficient information about the reasons for this 'event' or the incidence of illness relative to normal background rate to identify whether any related adjustment is warranted and, if so, its extent. I therefore decline to make any.

Working capital adjustments

521. Having examined the underlying accounting materials, I am satisfied that net current liabilities totalling £7.3m were transferred from THMGL to Healthcare at the time of the Restructure, representing gross liabilities of nearly £8.6m (principally comprising trade creditors) less current non-cash assets (stock, debtors and prepayments) of nearly £1.3m. Both parties have included an (agreed) adjustment to their respective valuations on account of net cash transferred to THMG (+£0.9m).

522. The parties also agree that adjustments may be required to their valuations to account for the different working capital positions of Healthcare or THMG compared to Transform. The Claimant applied an adjustment to the value of Healthcare of -£1.9m (Transform's working capital position said to be -£5.4m). However, the Defendants contend for a larger adjustment of -£3.7m (based on Transform's stronger working capital position of -£3.6m). The difference between the parties on this aspect appears to be whether certain "*provisions for liabilities*" and "*deferred taxation*" were current liabilities of Transform (as Mr Arora assumes) or not (as Mr Waghe suggested). Based on the treatment of the corresponding items in Transform's earlier financial statements, Mr Waghe considers the relevant liabilities to be non-current. Despite that prior treatment, I cannot be confident on the available information as to the nature of those liabilities. As such, I decline to find that Transform's working capital position was -£3.6m. I consider the appropriate adjustment to be -£1.9m only.

523. Mr Arora also suggested in the JS that any working capital adjustments to be made depended on there being value in the intercompany loans. However, that dependency did not appear to me to be made out, the intercompany loans forming part of the incoming consideration, not of the outgoing assets and liabilities being transferred.

524. Finally, the Claimant suggested in cross-examination of Mr Waghe (and in submission) that the pre-existing intercompany balance due to THMG as at the date of the Restructure (amounting to some £2.6m) should also be brought into account by way of working capital adjustment. Again, this did not follow. Although Mr Waghe was instructed to assess the value of THMG's assets immediately before the Restructure, that was for the purpose of valuing the assets and liabilities *transferred* and the exercise excluded any that remained with THMG (as both experts understood and agreed was an appropriate approach (JS at [4.4])). The pre-existing £2.6m intercompany balance due to THMG did not transfer to Healthcare. Since it did not form part of the 'bundle' being valued, it did not fall to be included in the comparison with Transform's working capital position. Nor did I discern Mr Arora to suggest otherwise in his evidence or in the JS. No related adjustment is required.

Surgicare

525. Finally, there was a factual dispute as to whether the Surgicare shares were transferred to Holdings prior or pursuant to the Restructure. Based on the contemporaneous documents, I have no hesitation in concluding the former. That is best shown by the stock transfer form for the transfer of one ordinary share in Ram1001 Limited from THMG to Holdings dated 29 October 2010, as well as the annual return submitted by D6 to Companies House in February 2012, identifying the date of Surgicare share transfer from THMG to Holdings as 27 October 2010. KH was tasked in early 2012 with regularising the Group corporate position in preparation for the Restructure which, she confirmed in oral evidence, did not involve the transfer of Surgicare.

526. The Claimant relies on other documents, including THMG's 2011 audited accounts, to contend that Surgicare remained its subsidiary until the Restructure.

However, given the above, I am satisfied those accounts contained an error, subsequently corrected. The Claimant also relies on the TAA which provided for Surgicare's 'Business Name' to be transferred to Healthcare. However, I agree with the Defendants that this adds nothing. The TAA also transferred the 'business names' of other entities that were not transferred under the Restructure. The Claimant says that the goodwill of Surgicare was viewed as being an asset of THMG in the IP transfer agreement. However, given that Surgicare undertook a business in its own right (and was a subsidiary of Holdings, not THMG), I did not understand the agreement to have that effect. As such, I find that no value should be ascribed to Surgicare for the purpose of valuing the assets transferred by THMG.

Value out - provisional conclusion

527. Subject to the 'cross-checks' discussed below, taking the adjusted 2012 EBITDAR for valuation purposes at £3m, reducing this by £0.4m (legal and professional costs) and £0.1m (consultancy fees), applying the 4x multiple to the difference (£2.5m), adding net cash (+£0.9m) and applying the working capital adjustment (-£1.9m), therefore, **yields a value of £9m** for the 'bundle' transferred by THMG on the Restructure.

Cross-checks

528. The parties also relied on certain 'cross-checks' to support the respective valuations for which they contend.

DCF cross-check

529. The Claimant prays in aid of Mr Arora's DCF calculation by which he assessed in his original report the 'value' of Healthcare on a discounted cashflow basis at £16.8-19.8m based on Group management forecasts from September 2012. Further DCF analysis prepared on a 'pessimistic' basis (of no real growth from the end of 2012) indicates a 'value' of no less than £9.2m. The DCF calculation was scrutinised closely at trial. However, given my findings above concerning 'overlap', the appropriate approach to the multiples valuation, and Mr Arora's candid acceptance that he did not rely on his DCF to *value* Healthcare, in my judgment, this 'cross-check' adds little to the analysis. In any event, despite Mr Arora's increasing confidence in the reliability of his DCF subsequent to its preparation, and the Bank's increased confidence from 2012 in THMG's forecasting, having heard the expert evidence, I am not satisfied that the effect of the relatively short (2.75 year) forecast period, the basis of preparation of those forecasts (and related 'sensitised' analysis) or any impact on the appropriate discount rate of the relatively short term of the lease in favour of Healthcare was sufficiently well understood or explained to allow me to conclude that the DCF reliably informs the value of Healthcare, even as a cross-check.

The ECI offer (2008)/ GB's draft board paper (2010)/ goodwill

530. The Claimant also says that Mr Arora's valuation of Healthcare is supported by the goodwill reflected in TWP (Newco)'s audited accounts which, for 2010 for example, identified a goodwill balance post-amortisation of £23.456m (in

addition to the separate (fixed) asset comprising the Dolan Park freehold property). By contrast, the Defendants rely on GB's draft board paper from December 2010 which stated that Holdings had been valued at £35m at the time of the shareholder reorganisation in August 2009, albeit since worth less. GB ascribed values of £15.2m on the 'earnings' basis or £19m on a less reliable alternative 'asset' basis. The Claimant says that GB's document cannot be safely relied on since it was only a draft, prepared to support the write off of preference shares (to GB's benefit).

531. GB confirmed in his written and oral evidence that the source of the goodwill figure was the offer from ECI in December 2008. That offer was based on verification of Group EBITDA of £4.855m for 2008 and £4.492m for 2009, with the earn-out element based on a £7m EBITDA forecast. The Defendants say that those figures were around double those achieved and the valuation therefore 100% too high, albeit the multiple of EBITDA implied by those (inflated) figures is consistent with that used by the experts.

532. Finally, the Claimant notes that the Group specifically reviewed whether goodwill should be impaired and concluded it should not. The Defendants say that the recoverability of the goodwill balance was expressly considered and possible indicators of impairment found (on a market value basis), albeit the relevant accounting rules permit goodwill to be carried at the higher of market value and value in use, a calculation of the latter in this case confirming that no impairment was required.

533. In relation to these matters, I find that:-

(a) The goodwill figure carried in the Group accounts was derived from the ECI offer;

(b) ECI's offer was significantly above the actual value of the Group, being based on aggressive EBITDA figures never achieved;

(c) Despite being a draft, and although GB may have prepared this with the write-off of preference shares in mind, his draft board paper reflected a realistic market valuation of the Group as at the end of 2010, informed by the insights of the Group FD (and his corporate finance background) and by independent third party evidence as to the appropriate multiple; and

(d) THMG's high goodwill balance did not reflect its market value. That is evident from the juxtaposition of the draft board paper and impairment review. GB was involved in both. He did not appear to have any issue with that outcome at the time nor, again, in his evidence (which I accept).

534. Given all these matters, goodwill is not a useful 'cross-check' in this case but the valuations in GB's draft board paper are. At trial, the Defendants also handed up a table of different valuations in play which it said were instructive by way of comparison. The Claimant had a number of criticisms of how the

Defendants had presented matters in that table, including for example the use of figures which were not 'like for like' and the misdescription of Colliers' valuations as being of 'EV'. The table was indeed, in some senses crude, attempting to compare market or valuation activity by reference to prices or values of different assets, from different times, obtained using different methodologies.

535. Despite these shortcomings, I did find this table a useful 'sense-check', reinforcing my view that Mr Arora's total valuation of £27.9-29.9m (including £15m for Dolan Park), yielding an EBITDA multiple of 13.4-14.2, is, by some significant distance, an outlier. The only other valuation so high was ECI's from 2008 (£27-33m without deferred consideration) but that was based on unrealistically high EBITDA figures. The remaining 'THMG-related' valuations (including Mr Arora's valuation of Healthcare) all fall within a value range of £12.9-£17.25m and (including ECI) a multiples range of 5-8.25x EBITDA. Although the £9m value falls below that value range:-

(a) The divergence is far less marked than on the Claimant's valuation;

(b) The starting point for the £9m figure is Mr Waghe's £12.9m value;

(c) That is also the lower end of Mr Arora's Healthcare valuation range;

(d) Other valuers such as Colliers were not concerned with the Restructure or the distinction between assets and liabilities transferred and that remained;

(e) Those other valuers were different valuers valuing differently; and

(f) For the reasons given, the valuation in this case was an imperfect exercise.

536. Given all these matters, I find that £9m represents the value of the 'bundle' transferred by THMG as a result of the Restructure.

<u>Value out – THMG's contemporaneous approach</u>

537. Finally, it is appropriate to consider the Claimant's observations with respect to the approach to 'value out' adopted by THMG at the time of the Restructure itself since this too may well inform its true substance and purpose. The Claimant takes no issue with the £15m value of Dolan Park, being based on Colliers' independent valuation from 2012 although, as I have found, the Claimant erroneously included this in, and therefore wrongly inflated, its own valuation. The Claimant does take issue with the value ascribed to the business assets transferred by THMG to Healthcare, namely their book, rather than market value. However, in the absence of any evidence as to the market value of those assets, I am unable to say that the former understates their value - book value may be the same as or more or less than market value. The IP transferred by THMG to Holdings was valued by CK and GB at £1.5m on the basis explained by the latter in his e-mails dated 22 and 26 October 2012 to KH and BS respectively, namely after applying a (x5) multiple to the annual revenues

generated by the licence fee to be charged to the various Group companies. Although not an independent valuation, it was produced with the professional assistance of CK and, in the absence of evidence to the contrary, I am again unable to say that this approach was improper. Accordingly, there is no basis for me to conclude that THMG's approach to 'value-out' adopted at the time was anything other than genuine and appropriate.

Value in

538. The other side of the equation relevant to (under)value is the value received by THMG for the assets and liabilities transferred pursuant to the Restructure. It is fair to say that 'eyebrows were raised' on both sides as to how the opposing expert had presented the consideration 'paid to' THMG. As noted, for the purpose of his report, Mr Arora was "*instructed that the price paid for Healthcare's assets under the TAA was -£5.6m (i.e. a negative amount).*" In relation to the transfer of Dolan Park and the IP to Holdings, Mr Arora was instructed that the consideration provided by Holdings in the form of intercompany debt was "*of zero value*". By contrast, Mr Waghe has valued the relevant intercompany balances at their "*face value*" of £11m. However, neither being a debt valuation expert, both accepted they were unable to take the analysis much further than how one might approach quantification of 'value in' at a level of general principle. Moreover, both parties were agreed that this question was essentially one of intent and fact, part and parcel of, and subject to, my liability analysis and findings. In this regard, I have considered carefully the individual transactions constituting the Restructure, albeit also recognising, as the Claimant submitted forcefully, that it is necessary to step back "*to look at all of the transaction not just the value of assets leaving the Company's hands*". This includes examining those aspects not 'papered' in the transaction documents such as the £7.5m dividend, the assumption of trade creditors by Healthcare, the intercompany loan simplification and how the loan balance in favour of THMG was disbursed post-Restructure.

539. As for the intercompany debt, the Claimant points to the fact that, following the Restructure, THMG's main asset was a £6,025,808.23 interest free debt from Holdings repayable on demand but Holdings had no readily realisable assets, its net current assets were only £3,364,561, THMG no longer had direct recourse to Dolan Park and the intention for some time prior to the Restructure was to write off the intercompany debt altogether. I have already found that I can draw no meaningful conclusion from the original proposal to write off the loans. The loans were properly reflected in the statutory accounts of THMG and Holdings. Moreover, in my judgment, the Claimant somewhat lost sight of the reality of the situation: first, intercompany loans are not uncommon within corporate groups; second, they were used historically in the Group: prior to the Restructure, THMG had a net intercompany receivable of £2,529,224; third, if Holdings had been unable to repay the loan, this would have constituted an event of default under the Loan Agreement; fourth, CK was aware of the financial position of the Group and that the consideration was to be paid by way of intercompany loan. KH specifically asked CK on 1 September 2012 whether it was happy with this arrangement. CK's response is not known but, since the Restructure proceeded on this basis, it can reasonably be inferred that it was;

fifth, Holdings was the parent company for all the Group trading companies, including the cash generative Healthcare and it received revenues in the form of IP royalties from the relevant Group companies. Although Dolan was a direct subsidiary of TWP (Newco), both were members of the same Group, Dolan received rental income from Healthcare and TWP (Newco) provided a letter of support to THMG on an ongoing basis.

540. Finally, Holdings did, in fact, repay the intercompany indebtedness between 2013 to 2015, the relevant part of the record (also prepared by Mr Whitehead) indicating that the balance reduced from an asset of £6,025,808 in 2012 to a negative balance of £1,421,373 by 2015, accompanied by the reduction of THMG's liabilities for tax, provisions (legal and patient claims), hire purchase and bank debt. As noted, the Claimant points to the rapidly reducing intercompany balance to suggest that a number of items were either misapplied to THMG's account or were significantly overstated. In considering these, it is appropriate to adopt some circumspection for two principal reasons: first, the allegations made by the Claimant have not been fully pleaded and subjected to the usual pre-trial processes, let alone any more forensic analysis that the Court might ordinarily expect properly to scrutinise these items; second, these items, or a sample of them at least, would have been considered by CK when it audited THMG's accounts and CK confirmed that the accounts provided a true and fair view, including these items; third, the focus of the Claimant's criticisms was narrowly on certain specific items but it is not known whether these might, in fact, have been accommodated elsewhere in the accounting. Despite these uncertainties, I consider the points as best I am able on the limited evidence.

541. DR accepted in oral evidence that the motor vehicles represented by the finance lease and hire purchase items (£86,758) were used by Healthcare post-Restructure and had been wrongly charged to THMG and that the bulk of the travel and subsistence item (£215,710), apparently constituting motor expenses (car hire, tax and insurance and repairs), should not have been for THMG's account. As to the former, the motor vehicles being "*Excluded Assets*" under the TAA, it seems that the relevant lease contracts could not be transferred to Healthcare such that the lease costs were properly booked to THMG, albeit a recharge would have been appropriate on account of their use by the former. What that recharge should be, I am unable to say. Likewise, in relation to travel and subsistence, it is not clear what these items comprise, why they were booked to THMG or, if DR is right that the *bulk* should not have been, what element did nevertheless properly fall to THMG's account.

542. As for the property costs of £250,000, DR's evidence was emphatically that such a charge was modest for the hospital and theatre facilities they encompassed. I accept his evidence.

543. As for the leasehold costs, DR accepted that these remained with THMG as, indeed, these too were shown as "*Excluded Assets*" under the TAA. However, it is clear from THMG's and Healthcare's 2013 statutory accounts that these were, in fact, transferred to Healthcare in the financial year following the Restructure when THMG's operating lease commitments are shown as

dropping from £688,633 to nil and Healthcare's increasing from nil to £845,879 (with no apparent recharges to THMG).

544. As for the employee costs, it appears to be common ground that THMG employed four employees (including LF and DS). The bone of contention seems to be that (as DR accepted) these employees were not working solely for the benefit of THMG, their salary costs also increasing from 2012 (£143,944) to 2015 (£233,912). However, it is again not possible for me to discern whether any recharge might be appropriate or the reason for the salary increase over the period.

545. The largest item by far bringing down the intercompany balance was the reduction of the overdraft from £225,923 in 2012 to nil in 2013 and the bank loan from £3,404,076 to nil over the same period, with these items then featuring from 2013 in Healthcare's accounts. The Claimant says that THMG, as principal borrower, remained liable for both such that it was inappropriate for the intercompany debt to be reduced. However, CK confirmed that these accounts gave a true and fair view and I accept D3's submission that they reflected the economic substance of the Restructure, my view in that regard reinforced by D5's refinancing of these borrowings in 2015 with the new borrower then identified as Healthcare (with THMG as guarantor only). On any view, whether in 2013 or 2015, a reduction to the intercompany balance was justified by Healthcare assuming responsibility for the loan and overdraft.

546. Finally, as to the £1,015,114 patient claims provision shown in THMG's statutory accounts as matching exactly the cumulative amount spent in 2013, 2014 and 2015 on legal fees and settlement, although it was understandably not easy for DR to work this out in the witness box, I understood his explanation to be that this represented a provision movement, there being no provision at the end of 2015 such that the full amount of the opening balance for patient claims was released. I have no basis for going behind that explanation and I accept it.

547. In light of the uncertainties described and what can (and cannot) now sensibly be discerned from the accounting documents without the benefit of CK's assistance and/ or expert evidence, I am certainly unable to impute any illegitimate intention from the reduction of the intercompany balance on account of these items. Moreover, to the extent there is some basis for the Claimant's criticism, in my judgment, that is properly limited to (part of) the lease and hire purchase (£86,758) and travel and subsistence (£215,710) items and, whatever indiscernible part that might be, it would fall well short of the £1,421,373 debt due from THMG to the Group as at 2015. Accordingly, the £6,025,808.23 debt due from Holdings to THMG as at 30 November 2012 was (more than) fully paid.

548. For the sake of completeness, I should add that, although THMG's trade creditors were excluded from the definition of "*Excluded Liabilities*" in the TAA, it is common ground that Healthcare assumed THMG's trade creditor liabilities to the extent of £8,582,639. That too is evident from the Whitehead year end pack. As for the 'loan simplification' exercise, this merely rolled up various intercompany balances across the Group such that each Group company

had a balance owing to or by Holdings. I am satisfied that there were no related loan write-offs or changes to any Group company's net assets or liabilities or profit and loss accounts. I accept GB's evidence that Mr Whitehead undertook this simplification exercise and that CK verified without qualification the outcome in THMG's and Holdings' audited accounts for 2012 and 2013 and that CK was therefore satisfied that it reflected a correct accounting treatment. As such, neither can be impugned.

549. The Claimant asserts that the £7.5m dividend represented (i) a distribution of THMG's assets in breach of CA06, Part 23 and (ii) an unlawful return of capital at common law. The Defendants say that the dividend complied with Part 23 such that it could not be an unlawful return of capital either. I first address the former by reference to THMG's 2011 statutory accounts as its last "*relevant accounts*", applying the provisions of CA06, ss.845-846 already noted:-

(a) THMG's accumulated losses on its audited profit and loss account to 31 May 2011 were **-£1,049,293**;

(b) The value of the IP was not stated in the 2011 accounts such that, under s.854(4)(b), its book value was **£0**;

(c) Under s.845(3), the profit available for distribution is treated as increased by the amount the consideration for the IP (£1.5m) exceeded the book value (£0). This produces under s.845(1) an accumulated profit of **£450,707**;

(d) Under s.846, that accumulated profit was increased by the revaluation reserve of £9,834,333, producing an available profit for distribution of **£10,285,040**;

(e) The book value of Dolan Park[32] (£16,560,000) exceeded the consideration paid for the property (£15,000,000) by £1,560,000. Under s.845(2)(b), the profit available for distribution was therefore reduced by that excess to **£8,725,040**;

(f) THMG's assets and liabilities were transferred under the TAA for book value such that, under s.845(2)(a), the distribution in respect of those assets and liabilities was **£0**; and

(g) Based on THMG's 2011 statutory audited accounts, the total profit available for distribution was therefore **£8,725,040**.

550. As such, there were sufficient available profits for distribution of a dividend of £7.5m. The Claimant appeared to suggest that this approach was an impermissible attempt to view the matter after the Restructure had occurred. However, given the deeming effect of the relevant parts of ss.845-846, I disagree, as apparently did CK.

[32] As I have found, this includes the value of THMG's business which was not separately stated in THMG's 2011 statutory accounts.

551. As noted, there is a difference of view between the parties as to whether a dividend that complies with the requirements of CA06, Part 23 may yet fall to be treated as an unlawful return of capital at common law. Although it may be that the Claimant is reading rather too much into *MacPherson* (at [52]) as support for that proposition, I proceed on the basis this argument is open to it. As to the dividend, I have already found that this was declared no later than 30 November 2012. I also accept the evidence of DR and GB that it was CK which came up with the £7.5m figure. Although the Claimant places store by the last iteration of the *pro forma* balances sheets before the Restructure indicating a dividend of £6m accompanied by the write off of intercompany balances, I am unable to infer from this that the dividend (later increased to £7.5m) was intended to achieve the extraction of value from THMG (in lieu of the write-off which never occurred, or otherwise) to the prejudice of the Company's remaining creditors. To the contrary, the idea of the dividend had been raised much earlier in January 2012. Moreover, even after accounting for the £8.6m or so of THMG's trade creditors assumed by Healthcare and the £7.5m dividend, THMG still had the £6m or so line of credit into the Group after the Restructure and, therefore, an improved net current asset position over the previous financial year, leaving sufficient working capital available to THMG to fund its much reduced operations going forwards, with TWP (Newco) also having confirmed its financial support for the 2011, repeated in later financial years. Finally, had the intention been creditor prejudice, it might have been expected that a larger dividend would have been declared. As such, I am unable to find that the payment of the dividend was an unlawful return of capital (or otherwise improper).

552. Given these findings, I find further that the intercompany debt of £11m identified by Mr Waghe in his report was worth its face value and, as such, THMG received full value - in fact, more than full value based on my findings with respect to 'value out' - for the assets transferred by THMG on the Restructure.

(e) <u>(In)solvency (issue 5)</u>

553. Albeit relevant to any 'creditors duty' contemplated by CA06, s.172(3), it is also appropriate at this juncture to consider the solvency or otherwise of THMG as at, and following, the Restructure. The Claimant says that THMG was balance sheet solvent at 30 November 2012 and could have satisfied the £3.5m PIP liability indicated by HJ, at least if insolvency advice had been taken. However, THMG was already cashflow insolvent and the Restructure exacerbated matters, also causing the Company to tip into balance sheet insolvency. The test for commercial or cashflow insolvency is satisfied if " … *it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due*" (IA86, s.123(1)(e)). The balance sheet test is met if "… *it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and*

prospective liabilities" (IA86, s.123(2)). Although expressed differently, both tests are concerned with a company's ability to pay its debts.

Cashflow (in)solvency (pre-Restructure)

554. It was common ground that, in considering whether the Company was cashflow insolvent, the statutory test involves an element of 'futurity' in that a company's ability to pay its debts encompasses not only debts presently due but also those falling due from time to time in the reasonably near future. This ties in with the second area of common ground, namely that the Court adopts a commercial, rather than technical, view of cash flow insolvency such that the essential question is not whether the company can pay all its due debts immediately on a particular day but "*whether the company's financial position is such that it can continue in business and still pay its way. The Court therefore has to consider whether any liquidity problem the company may have is purely temporary and can be cured in the reasonably near future*" (Lord Hodge in *Macplant Services* v *Contract Lifting Services* (2009) SC 125 (at [67]), citing Goode on *Principles of Corporate Insolvency Law* (*3rd ed* at [4.16])).

555. As applied to the facts of this case, the Claimant's overarching point is that THMG's underlying business was a good one and it was balance sheet rich but it was misused by DR and SM, leading to an endemic cash flow problem throughout 2011 and 2012, necessitating new (extended) loan facilities and the Restructure. In the absence of expert analysis to guide the Court more directly, I have reviewed the record closely to understand as best I can the financial position of THMG in 2011 and 2012 and to discern its 'commercial' solvency (or otherwise). By way of overview, THMG was a relatively high turnover and cash generative business. However, the management buy-out in 2009 valued the Group too highly, leaving it with an equity and debt structure, particularly the loan notes which, when combined with obligations to trade creditors and the Bank, afforded limited financial 'headroom', at least when budget was not 'hit'. This state of affairs put financial pressure on the Company, resulting in what the papers describe as 'creditor stretch'. Likewise, although not tests of solvency as such, THMG was, on occasion, either forecast to (or did) miss the tests in its financial covenants to the Bank (particularly debt service coverage), at least if loan note payments were to be made, albeit the Bank could suspend these in that event.

556. Drilling down further into the record for 2011 and 2012, THMG's fortunes over that period fell into two broad phases. The period from (at least) mid-2011 (starting with accumulated losses of £1.049m) to early 2012 was unquestionably a difficult time for the Group, albeit the position improved markedly during 2012 in the run up to the Restructure. The issues during the earlier period are perhaps best encapsulated by NW's note of 26 July 2011 in which he reported his understanding that the Group was solvent, albeit the Ziering merger was on hold because of cashflow problems, a forecast banking covenant breach (originating from the shareholder structure) and shortcomings with GB's performance, including a failure to negotiate a large enough overdraft and forecasting being awry due to the failure to account for a large PAYE liability, resulting in cash shortage.

557. As its internal note of 10 August 2011 confirms, Barclays was aware of these developments, identifying the problem similarly as the original deal being too 'rich', resulting in the shareholders taking out too much cash, albeit trading was holding up and its bank accounts not experiencing pressure. In September 2011, the case was passed to BBS for a number of reasons, including forecast covenant breach, PAYE arrears, shortfall against budget, lack of credible forecasting and a sizeable trade creditor balance exceeding 90 days (albeit no creditor pressure). Despite the cashflow issues identified, BS did not question the Group's solvency. It is also notable that BS identified the Bank's objectives for the Group as "*turnaround*" which would be achieved when it was trading in line with budget, complying with banking covenants and no cash pressures were evident on its bank account. BS described the Bank's strategy as "*early intervention*". In this context, it is significant that THMG was not ascribed EWL3 status, one of the features of which was signs of cashflow issues with the potential for the business to fail within the next six months.

558. Going forwards, Barclays scrutinised even more closely than before (and over an extended period of 14 months) the Group's trading and financial performance. Despite the deficiencies elsewhere, the available record provides considerable insight into the Group's performance from the perspective of a financially astute and commercially self-interested third party. As to PIP, BS clearly formed the view early on that the Group's strategy was effective and brand enhancing, THMG making a small profit on replacement surgeries and LF's 'reserving' indicating her view that the related claims were manageable. More generally, the record indicates THMG's healthier financial position throughout 2012, with the Group settling the PAYE arrears in March 2012 and a consistent picture of more realistic forecasting, good or strong trading performance and budgets being met. Key suppliers were still "*stretched*", albeit it seems they remained "*ok*" at least, and Group budgeting encompassed a 'creditor unwind'. The Group also renegotiated its loan facility over a longer period, freeing up more cash, with adjustments to the banking covenants also affording more 'headroom'. THMG also enquired of the Bank as to the opening of a deposit account given the Group's better cashflow controls. In conjunction with its enhanced forecasting and the Restructure, the Group embarked on a strategic review with a view to maximising margin and future profitability. Although PG's tenure as FD was relatively short-lived, the finance function was enhanced in 2012 by Skott Hughes and, later, Mr Whitehead. Significantly, BS also reported to KPMG in August 2012 that the business was trading well and that professional support was not required and, shortly after the Restructure, that it was profitable, ahead of budget, had made positive progress, its results were strong and the key issues originally discussed in November 2011 had been resolved, the Company now having a stable financial platform to move forward, so ending BBS' involvement.

559. The Claimant relied on various matters to support its assertion as to THMG's cash flow insolvency, including TWP (Newco)'s consolidated balance sheets for 2010 for 2011. Although I discerned a deficit on the former, I did not on the latter but both reflect the position at Group, not THMG, level in any event. Nor

did THMG's £1.049m accumulated losses as at May 2011 advance matters. Historical loss does not equate to present cash flow insolvency.

560. More relevant was THMG's so-called 'creditor stretch'. In this regard, by 2011, THMG had accrued significant aged trade creditor balances, this being one of the reasons for D5 moving the Company into BBS. There was limited evidence as to THMG's underlying creditor payment arrangements such that the extent of the 'stretch' was difficult to discern, albeit at one stage at the end of 2011, this was indicated at £550,000 out of £1.1m. As noted, THMG took steps in 2012 to start 'unwinding' that position. An analysis of trade creditors as at THMG's 30 November 2012 year end (apparently prepared from June 2013 onwards) indicated large aged creditor balances, a number of reasons for that state of affairs (in addition to cashflow difficulties) and how steps had since been taken to clear or reduce the largest outstanding balances (others being disputed, settled or payable in instalments). In this context, there was some debate, based on rival legal commentary, as to whether the court should take the original due date of the relevant debts (as the Claimant argued), or any rescheduled payment dates (as D3 argued) for cashflow (in)solvency purposes. Ultimately, however, whichever date is taken, I am satisfied that THMG could have paid these debts, if necessary, including by further Bank borrowing. That much is evident from D5's positive reaction to THMG's progress and performance over 2012, including the renewal of the existing loan and overdraft facilities, the conclusion of new interest rate hedge arrangements, the grant of new credit card facilities (increasing D5's exposure) and D5's agreement to the provision of new asset finance.

561. As to some of the specific points relied on by the Claimant, HMRC did present a winding-up petition in late 2011 but this was dismissed and the record suggests it was Surgicare related in any event. As for the TTP arrangement with HMRC in 2011, this was apparently required because GB had 'taken his eye of the ball' in his forecasting. However, the arrears were cleared by March 2012.[33] A further winding-up warning was issued in August 2012 but the record indicates that the relevant tax charge had been paid, the problem being a funds allocation issue at HMRC's end.

562. Although THMG was forecast in 2011 and 2012 to breach its banking covenants and did so in May 2012, its strong 2012 performance enabled these to be reset and the loan facilities restructured. THMG did enter EWL2 status in September 2011 but on a 'turnaround' basis. D5's 'early intervention' worked, THMG did 'turn around' and it was 'released' from BBS in January 2013. Although the profit in THMG's statutory accounts to 30 November 2012 would have been a loss but for the realisation of the IP, it is difficult to extrapolate from this given the extended accounting period, exceptional costs associated with the Restructure and otherwise strong performance over 2012 indicated by the Group's financial reporting.

---

[33] The Claimant suggested in written closing submissions that PAYE arrears persisted into May and June 2012 although this does not appear to be borne out by the record.

563. LF did share the "*utterly dire*" projections for patient claims in September 2011, with PIP claims then estimated at £150,000 each. As to the former, THMG had accrued sufficient claims budget by March 2012 (and there was no need to increase the claims provision) and, in around September 2012, its approach changed to settling claims earlier and more cheaply. As to the latter, with the benefit of legal advice from leading counsel, LF subsequently 'reserved' only £2-£3000 per claim. The claims did climb in number during 2012 but still within manageable limits. Although there was discussion on 16 May 2012 of a potential £3m PIP liability, I have accepted BS' evidence that this concerned a 'worst case' scenario. THMG's expectation was in the low hundreds of thousands of pounds. Moreover, that THMG was on a "*tight budget*" for its own PIP related legal costs is unremarkable. Finally, PIP (and potential backdated VAT) were contingent liabilities and not, for cashflow (in)solvency purposes, debts presently due, or due in the reasonably near future, in any event.

564. I do not accept the Claimant's characterisation of KH's e-mail of 3 May 2012 as anticipating potential insolvency rather than the risk of challenge *if* the Company became insolvent. Although GB did refer in his 26 October 2012 e-mail to the possible administration of THMG, that was explicitly on a 'worst case' basis. Likewise, DS referring on the same day to the possibility of insolvency advice in the context of asset movements does not indicate anticipated insolvency. DS was not in the 'loop' about the Restructure. NW was. I accept his and KH's evidence that they considered this to be a solvent reorganisation.

565. Judith Slater did make a veiled threat of winding-up in July 2012. As the Intercreditor episode shows, her demands were, no doubt, a nuisance but it is difficult to see on what basis a petition could be issued given the subordination to D5 of her rights as loan note holder. In any event, TWP (Newco) was the debtor, not THMG.

566. The Claimant also points to industry-wide VAT and PIP issues raised by KPMG with BS in August 2012 as potentially affecting THMG. However, this ignores BS's response to KPMG that the business was trading well and that professional help was not required. By contrast, Harley did enter insolvency in November 2012, D5 expressly acknowledging then that THMG had successfully distinguished itself from its competitors through its PIP strategy.

567. It appears that there were certain rent arrears in September 2012 but the circumstances are not clear from the record and THMG authorised their payment in any event.

568. The Irish authorities did require the Irish subsidiary to pay VAT on cosmetic procedures. However, the position in the UK evolved much more slowly, THMG apprehending (on the basis of professional advice) that VAT might be introduced in the future on cosmetic surgery but not on hospital services. Although an insolvency process was contemplated in relation to the Irish subsidiary, with D5 noting on advice the related breach of the Loan Agreement and potential reputational issues, D5 evidently did not consider THMG

insolvent or it would not have restructured the loan facilities, let alone with THMG remaining as borrower.

569. Although a number of the issues highlighted by the Claimant did cause genuine problems for THMG, in my view, its analysis loses sight of the broader context. Despite the confluence in 2011 of the difficulties noted internally by D5 and D6 then, neither considered THMG to be insolvent, even at that low point. I agree. Moreover, despite those problems, D5 did not seek to 'manage an exit' rather than make an 'early intervention' to facilitate a 'turnaround'. In BS' view, this had been achieved by the time of the Restructure. Again, I agree. In addition to the Bank being well disposed to the Company, THMG had parental support, if required. THMG was not cashflow insolvent or 'borderline' insolvent, nor was its insolvent liquidation or administration probable, at the time of the Restructure.

Cashflow/ balance sheet (in)solvency (post-Restructure)

570. The further question arises whether, on a cashflow and/ or balance sheet basis, THMG became insolvent *as a result of* the Restructure. Much of the Claimant's reasoning concerning THMG's post-Restructure (in)solvency turns on its view that, faced with significant potential liabilities, those controlling THMG deployed the Restructure to strip it of its assets and operate an informal winding-up. However, for the reasons given, I disagree with that characterisation. As for THMG's cashflow position, its liabilities continued to be met through its trade creditors being assumed by Healthcare (significantly reducing THMG's cashflow requirements) and through the payment down of the intercompany loan balance of more than £6m. Although that balance did reduce relatively quickly, this was principally due to the Group assuming the Bank borrowing. THMG's other liabilities remained reasonably constant and were paid.

571. As for THMG's balance sheet (in)solvency, s.123(2) is not merely concerned with current liabilities but, on its terms, with contingent and prospective liabilities as well. In that regard, the Supreme Court in *BNY Ltd* v *Eurosail plc* [2013] 1 WLR 1408 endorsed (at [42]) the approach of Toulson LJ that:-

> "Essentially, section 123(2) requires the court to make a judgment whether it has been established that, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to be able to meet those liabilities. If so, it will be deemed insolvent although it is currently able to pay its debts as they fall due. The more distant the liabilities, the harder this will be to establish."

572. Whether a company is balance sheet insolvent "*must depend on the available evidence as to the circumstances of the particular case*" (*Eurosail* at [38]). As for its contingent liabilities, THMG provided as at 30 November 2012 for patient claims costs of £1,015,114 (increased from the prior year), a provision tested and verified by CK in its audit work. No provision was made for PIP but, as I have found, the PIP contingent liabilities note was appropriate from an accounting perspective. However, such accounting treatment is not the same as the assessment of balance sheet (in)solvency envisaged by *Eurosail*. As to the

latter, THMG clearly anticipated some eventual PIP liability (beyond its own ongoing legal costs). This was (reasonably in my view) estimated (as best it could be) in the low hundreds of thousands. As the ultimate settlement value agreed in principle (£250,000) underlines, the figure of £3.5m indicated by the claimants was unrealistic. Although in some senses THMG was operating in a "*closed system*" not dissimilar from the SPV in *Eurosail*, THMG's PIP liabilities were (unlike that SPV) highly uncertain, both as to amount and timing of crystallisation. Any VAT risk was even more speculative, as evident from THMG's contemporaneous view (informed by professional advice) about the prospective (let alone retrospective) imposition of VAT, HMRC not engaging with Holdings about this until 2014. Even then, no assessment was raised until 2016.

573. In the meantime, CK continued to confirm that THMG was operating as a going concern. Although it operated at a loss in 2013 and 2014, and its net asset position turned negative in 2014, it continued to pay liabilities, defend claims and negotiate settlement of the PIP litigation. It did so with financial support from the Group to the extent of £1,421,373 by 2015. That support was only withdrawn with the collapse of Transform (and the PIP in principle settlement) in June 2015 and HMRC's retrospective VAT assessment in 2016, most of the relevant VAT relating to Healthcare's trading, not THMG's.

574. Given all these matters, I am also unable to conclude that THMG became insolvent (or 'borderline' insolvent) (on either basis), or that its insolvent liquidation or administration became a probability, as a result of the Restructure.

(f) Conclusion on the proper characterisation of the Restructure

575. In light of my analysis and related findings, I am unable to accept the Claimant's characterisation of the Restructure. In my view, that would require (i) an intolerable weight to be placed on certain (many partial) documents that do not bear the meaning sought to be ascribed to them (ii) other events and documents to be overlooked or explained in a convoluted fashion (iii) overreliance on isolated parts of the transcript even though, considered as a whole, the witnesses overwhelmingly rejected the Claimant's characterisation (iv) acceptance of many improbabilities and (v) CK's pivotal role in the Restructure to be muted. Rather, I find that:-

(a) The Restructure was not motivated by concerns about PIP or backdated VAT, the former reasonably considered to be manageable, the latter (also reasonably) a remote prospect;

(b) The true substance and purpose of the Restructure was a genuine and *bona fide* group reorganisation with no 'pretence' of such, undertaken for good commercial reason;

(c) The Restructure did not have a prejudicial purpose and was not intended to defraud creditors;

(d) Although D1 and D2 were directors of other Group companies and D1 was a shareholder of TWP (Newco), neither director directly personally benefitted;

(e) Although the Group as a whole benefitted from the Restructure, so too did THMG, including by receiving (at least) market value for the assets transferred, the Claimant's related valuation being significantly overstated;

(f) Despite featuring at one point in the Restructure plan, there was no write-off of loans;

(g) The dividend was properly declared in accordance with CA06, Part 23 and was not a 'dressed up' way of extracting value from THMG;

(h) After payment of the dividend, THMG still enjoyed a large intercompany balance to pay its remaining creditors;

(i) That intercompany debt was a genuine loan, worth its face value and fully repaid by Holdings;

(j) The assumption by Healthcare of THMG's trade creditors and the 'loan simplification' exercise were also genuine and properly undertaken;

(k) THMG was not insolvent at the time of, and did not become insolvent as a result of, the Restructure;

(l) The Group continued to provide THMG with financial support following the Restructure and THMG continued to operate on a 'going concern' basis;

(m) THMG did not enter liquidation until 2016. THMG (and other Group companies) only did so because of Transform's insolvency and HMRC's retrospective VAT assessment (directed principally to Healthcare's historical sales); and

(n) These were not the direct and natural consequence of the Restructure but events not reasonably expected in 2012.

576. In light of the above, I find further that there was no unlawful distribution, unlawful return of capital, 'informal winding up', fraud on creditors or transaction defrauding creditors under IA86, s.423. I therefore reject the Claimant's case on issues 1-2.

K. WAS GB *DE FACTO* DIRECTOR? (ISSUE 3)

577. The Claimant submits that D3 was a *de facto* director of THMG, forming part of the central governance of THMG from May to November 2012 and into 2013, fulfilling the necessary role of Finance Director. Although perhaps not on the same footing as DR in all respects, nor was the Sales Director, SB.

Nevertheless, it was clear from the cross-examination that they were all 'in on it' together and, when it came to finance matters, GB was obviously an equal. The Claimant relied on a number of matters to support these assertions, including:-

(a) GB's consultancy agreement referring to him providing independent advisory and consulting services to THMG, D3's distinction between project management and advisory services said to be unrealistic;

(b) GB's acceptance he did not pay particular attention to whether he was working for the Company or the Group, acknowledging the related confusion 'in the paperwork';

(c) GB's continued discussion with management of various workstreams throughout 2011 and 2012, albeit claiming to have no recollection whether he attended any SMT meetings;

(d) GB's acceptance of working with CK on financial modelling beyond mere liaising;

(e) DR holding out GB to D5 as researching and providing advice on banking, governance and similar financial matters;

(f) GB's acceptance of having *ad hoc* discussions with D5 when PG was leaving the Group and D5 thinking in June 2012 that GB was the replacement FD and, by October 2012, that GB was the 'client contact';

(g) Although Mr Whitehead was recruited in June 2012, GB accepted that he was operating at a level below him;

(h) GB's acceptance in relation to the breaking of the interest rate hedge contract that he had been 'thinking about' THMG's finances;

(i) GB giving directions to Skott Hughes to action a request by BS;

(j) GB's agreement (with CK) of the (£1.5m) consideration for the IP;

(k) GB being unable to recall whether he had spoken to DR before responding on 26 October to BS' e-mail the day before;

(l) GB's 'unguarded candour' in cross-examination about his role, referring to "*we*" and "*me and David*";

(m) GB often not copying DR to his e-mails; and

(n) GB's description of himself in his CV sent to KH as "[a]*n adviser on strategic and financial issues to* [THMG] *and other privately owned companies*."

578. I can address the Claimant's submission briefly since, despite the time spent on it at trial, it was always an ambitious one given the role that, objectively assessed, GB actually performed within the Group. The following are, in my view, determinative:-

(a) GB had resigned as Group FD in September 2011. As D5 itself reported internally in August 2011, GB was perceived as not being sufficiently close to the numbers, his strength being in corporate transactions and, in September 2011, GB was no longer FD but was being kept on as consultant. The Claimant relies on GB's prior role (and salary) but his departure in these circumstances was an inauspicious and unlikely basis for him then to return in short order in an FD role, *de facto* or otherwise;

(b) To the contrary, GB was engaged on a consultancy basis. Although a consultancy is not necessarily incompatible with a *de facto* directorship, the agreement contained express constraints on his authority;

(c) It is also evident from his invoices that GB was not performing an FD role but was working on *ad hoc* projects, some finance-related, for different Group companies. These were discrete tasks that GB was well equipped to manage given his corporate transaction background and familiarity with the Group;

(d) Contrary to the Claimant's pleading, GB was patently not performing the most senior financial position in THMG and the wider Group after September 2011. The Group had its own finance team, initially PG, with Skott Hughes, then Mr Whitehead. Although again not decisive of the issue, GB was only part-time. GB's continued use of a THMG e-mail address was also entirely unremarkable, GB signing himself off as "*Financial Consultant*";

(e) Barclays was in no doubt from the outset that it was DR, not GB, who made the decisions. This is borne out by DR's e-mail introductions of GB to JK on 24 April and to BS on 1 May 2012. BS also forwarded to DR on 29 May 2012 an earlier email to GB "*to ensure clear lines of communication*". The e-mail was about the Group's finance function, as to which, BS clearly thought DR (not GB) was the decision-maker;

(f) Indeed, for a considerable period of time, D5 was concerned about THMG's finance function being weak, even suggesting the appointment of independent directors. In response to that, GB and DR agreed that GB would "*provide support to the business on a consultancy basis*". A qualified accountant (apparently Mr Whitehead) was to work alongside Skott Hughes. GB had clearly not been fulfilling an FD role to that point and his new support tasks (as consultant) were in the nature of financial monitoring only;

(g) That DR was the decision-maker in the Restructure is apparent from the correspondence about his related decisions, for example about the trading companies and execution of the transaction documents, DR's

attendance at important Restructure meetings and GB copying him on many related communications;

(h) GB only became meaningfully involved in the Restructure in April 2012 after the key decisions to proceed with it had already been taken by DR. GB's material involvement ended in November 2012;

(i) GB did not provide accountancy, legal or property advice to THMG or the Group. CK, D6 and Colliers did. CK (not GB) advised as to the use (and amounts) of the dividend, intercompany loans and proposed write-off. Despite qualifying as an accountant years earlier, GB could not have provided this advice. His background was corporate transactional work;

(j) In the course of managing the Restructure and performing his other assignments, GB would naturally have shared his views on issues arising based on his own skills and experience on which DR no doubt placed reliance but GB was not "*handling the Company's finances and corporate governance*" and such 'advice' as he gave would have been *ad hoc* and tendered to inform DR's decision-making;

(k) Nor did GB's involvement with CK in more substantive tasks such as the IP valuation and financial modelling make him *de facto* director. GB 'agreed' with CK an IP valuation but the sign-off on that still rested with DR; and

(l) All the witnesses confirmed GB's limited role as consultant and how DR made the decisions. I accept their evidence.

579. Finally, as to the Claimant's reference in this context to some of the documents:-

(a) D5's Zeus form from August 2012 states that "*Peter Goebey Finance Director has now been replaced back by Gerard Barnes*." The same document states "*FD replaced, involvement of consultant Gerard Barnes to prepare revised budgets and consider a full restructuring*." The latter does not suggest that GB "*replaced*" PG in a director role and BS confirmed in evidence that he was not so suggesting. I accept his evidence;

(b) That GB was one of D5's (multiple) THMG client contacts was unremarkable as was GB's role during the Restructure as principal point of liaison with BS, CK and KH. GB was project managing the process;

(c) In his CV sent to KH, GB does describe himself as "*Consultant/ Director*" from September 2011 to the then current date but in a section concerned with various employers. The next entry confirms that he was (then) currently a non-executive director of a brewery. Nor does GB's description of himself therein as THMG's strategic and financial adviser, or on LinkedIn as a financial consultant until July 2016, indicate that he was *de facto* director;

(d) GB's e-mail to D5 of 1 August 2012 indicates that he had been thinking about the option of breaking the interest rate hedge contract with the Bank. Even if this idea had been instigated by GB, showing initiative in his consultancy role does not make him a *de facto* director. However, the record shows that D5 had, in fact, already raised this issue with DR much earlier on 8 March 2012, indicating that it would share options for the hedge facility and that these were then followed up by GB, including at the 16 May 2012 meeting with D5; and

(e) BS e-mailed GB on 15 August 2012 suggesting a call, also asking him to ask Skott Hughes to complete bank opening account packs. GB later confirmed he had e-mailed Skott Hughes. The Claimant says that this was GB giving 'directions'. It was not: GB passed on a message.

580. GB may have provided *ad hoc* advice about the projects on which he was engaged. Those projects may have concerned strategic issues of importance to THMG. DR and others may also have consulted GB about decisions to be taken. DR may have relied on GB for his informed input. However, GB was not the decision-maker, he played no part in THMG's corporate governance system and at no point did he assume the status and function of a director, let alone so as to make himself responsible as such. I have no hesitation in finding that GB was manifestly not a *de facto* director.

L. WERE D1-D2 IN BREACH OF DIRECTORS' DUTIES? – ISSUE 5

581. Having found that D3 was not a *de facto* director (and the related case against him for breach of directors' duties therefore having fallen away), I consider whether the two former *de jure* director defendants, D1 and D2, were in breach of their duties to THMG, focusing for that purpose on the specific matters relied on, and findings sought by, the Claimant.[34]

(a) D1

582. There was no dispute that D1 (and SB) were *de jure* directors who owed duties to THMG under CA06, ss.171(b), 172(1), 174(1) and 175(1) or that he (and SB) took the decision to commit THMG to the Restructure. However, DR's knowledge, purpose and intentions said to found his breach of duty are disputed. I have already addressed in my factual analysis (and rejected) the Claimant's overall position and I therefore only address here, albeit at risk of some repetition, the Claimant's further points made in closing submission in this context in relation to DR.

583. As to DR's *knowledge*, the Claimant says he knew of THMG's forecast banking covenant breach in July 2011, its PAYE arrears and the 2011 winding up petition. However, THMG could have negotiated a covenant reset independently of the Restructure, it did pay off its PAYE arrears by early 2012, the winding-up petition appears to have been Surgicare-related and this was, in

[34] In its written submissions (at [267]), the Claimant distilled its pleaded case (PoC at [114]).

any event, dismissed. As such, these matters do not advance the analysis. Moreover, although DR knew in November 2012 of the risk of backdated VAT, he considered there was only "*very potentially*" a liability. I accept his evidence, as borne out by the professional advice received, both industry-wide and by THMG individually, as to VAT liability on cosmetic procedures, how slowly the VAT issue advanced over the period (not least in 2012) and the length of time before HMRC engaged with the Group about it, let alone made an assessment.

584. As for PIP, as noted, DR did not agree that it was the "*number 1 item on the agenda*" but recognised it was an important issue which (like VAT) was "*certainly discussed*". Despite this, and DR's knowledge of the number of THMG PIP patients (not of defective implants), the number of potential claims in a group litigation and of LF's PIP updates, I accept that he too considered the issue to be manageable, as borne out by LWQC's advice, LF's reserving and BS' independently formed view that the PIP strategy turned the issue into a positive. Accordingly, although DR confirmed that THMG would not have had the cash to pay a substantial PIP judgment, he reasonably did not contemplate one. In this context, DR also confirmed in evidence that the motivation for moving Dolan Park was not to put it out of patient creditors' reach. I accept this. Although the July board paper envisaged a propco/ opco structure enabling the continued use of Dolan Park if one of the new trading companies failed, I accept DR's further testimony that THMG could not simply 'walk away' from liabilities already incurred.

585. As to DR's suggested *motive*, considering his evidence as a whole on the point, it is not correct to say that he accepted the 'trigger point' for discussion of separate trading divisions was after the PIP scandal exploded. Moreover, DR's knowledge that administration of a company would 'break the chain of liability/ causation', that the payment of a dividend would extract value from THMG, increasing the value of the rest of the Group, and that DR held the commercial objective of protecting the value he and SM had built up, add nothing. They are statements of the obvious. DR did accept that, by 19 January 2012, the intention was for THMG to cease those operations now to be carried out by the new trading companies and that it would "*mainly*" (not "*only*") deal with aftercare. However, aftercare was an important continuing function. Moreover, moving value into parts of the Group so that other parts of the Group were not affected by rising patient claims and litigation cost and risks controlled was entirely consistent with limiting claims to the relevant trading subsidiaries as I have found to be one of the genuine purposes of the Restructure. DR accepted that there may have been other ways to achieve greater financial transparency but that was only one of the purposes. DR's interest in keeping or 'capturing' within the Company the (existing) litigation against THMG was also rather obvious but, as noted, DR also testified, and I accept, that it did not mean historical liabilities could be avoided. Likewise, although DR said he knew that the PIP litigation would take time and would allow him to get on with the Restructure, he had no recollection of any discussion about transaction avoidance and confirmed that "*pushing the GLO back*" was not in THMG's gift.

586. As to the specific documents relied on by the Claimant as establishing DR's "*dishonest knowledge, motive and purpose*", these come nowhere close to doing so. That NW sent an e-mail to DR on 9 January, stating that Surgicare's administration broke the chain of 'causation' again says nothing about DR's motives in relation to THMG. Moreover, the desire expressed in the manuscript note of the meeting of 3 February 2012 to "*capture the litigation in the subsidiaries going forward*" is entirely consistent with one of the purposes of the Restructure being to limit future claims to the relevant trading companies. The reference to the preference rules in the same note is less clear but it is not possible to deduce an improper motive. Likewise, as DR repeatedly said in oral evidence, the reference in GB's e-mail of 26 October 2012 to THMG's potential administration was a hypothetical one. Finally, HJ's letter of 3 May 2013 identifying a total claim figure of £3.5m says little, if anything, about HJ's or THMG's actual views of any potential PIP liability. LF's spreadsheets and the settlement figure agreed in principle in 2015 (£250,000) are far more instructive.

587. DR accepted in oral evidence that "*the Group was …. the focus rather than the individual entity*" and that the reasons for the Restructure set out in TWP (Newco)'s board paper and in the final THMG board minute did not benefit THMG. The Claimant also says that DR accepted that he did not take his 'group hat' off and reflect on THMG's interests. Although D1 was candid about his consideration of matters principally at a Group level, he also explained that he ensured THMG received fair value for the assets transferred. I accept this and, in that way, he did, in fact, pay important regard to THMG's distinct interests. In the context of the dividend, DR also accepted that 'pushing value up' benefitted the Group to the detriment of THMG. However, this was again a statement of the obvious and adds nothing if, as I have found, THMG received full value for the transfer of assets and the dividend paid to Holdings was neither an unlawful distribution or return of capital. The Claimant relies in this context too on the *pro forma* balance sheets attached to GB's e-mail of 26 October 2012, identifying a reduction of THMG's net assets to £160,000. However, the course of the Restructure did not follow the balance sheets and, as I have found, it is not possible to deduce from these that its substance and purpose were prejudicial.

588. Accordingly, having regard to the specific matters relied on by the Claimant in this context (which I found unpersuasive) but, more particularly, my analysis of the true substance and purpose of the Restructure upon which D1's suggested liability is largely premised, DR did not act in breach of his duties to THMG. Whether viewed as a whole, or by reference to its constitutive elements, the Restructure was not:-

(a) detrimental to the Company, at an undervalue or of no benefit ([267.1]);

(b) such as to give rise to a conflict of interest on D1's part or his preference of the interests of the Group over those of THMG ([276.2]);

(c) a transaction defrauding creditors contrary to IA86, s.423 ([267.3]);

(d) an unlawful distribution and/ or an unlawful return of capital and/ or an informal winding up and/ or a fraud on creditors ([267.4]);

(e) undertaken in disregard of the interests of THMG's creditors [(267.5)]; or

(f) undertaken dishonestly by D1.

589. To the contrary:-

(a) I repeat my findings with respect to the true purpose and substance of the Restructure;

(b) As for those liabilities retained by THMG, D1 reasonably considered the PIP claims manageable and prospect of the imposition of backdated VAT remote;

(c) D1 did not believe that the Restructure was or might be prejudicial to its creditors, let alone have fraudulent or dishonest intent, and he did not approve the Restructure for an unlawful or otherwise improper purpose;

(d) D1 acted with reasonable skill, care and diligence in connection with the Restructure, including by causing to be obtained, and reasonably relying upon, expert advice, including from CK, D6 and Colliers (see *Sharp*);

(e) Specifically, D1 reasonably relied on CK to determine the appropriate level of distributable profits available for the dividend (see *Burnden Holdings*);

(f) Although D1 considered the interests of the Group, he was entitled to do so, Holdings being THMG's sole member (see *Charterbridge*). However, D1 did give separate consideration to THMG's interests, and honestly and reasonably believed the Restructure to be in the Company's best interests, including by ensuring receipt of full value for its assets, discharge of its trade creditors and ongoing Group financial support to meet its remaining liabilities. An intelligent and honest man in D1's position would reasonably have shared his view;

(g) A reasonable person would not consider D1 to be in a real sensible position of conflict with THMG in relation to the Restructure. Although D1 was an officeholder of different companies in the Group and a shareholder of TWP (Newco), the success of the Restructure was in the mutual interest of them all;

(h) In any event, had it been necessary, I would have found that Holdings had, by acquiescence at least, authorised a breach of CA06, s.175, Holdings being aware of D1's role in the Group and of the transactions contemplated by the Restructure (see *Sharma*);

(i) D1 did not consider that THMG was insolvent or that it might become so as a result of the Restructure; and

(j) No duty to creditors therefore arose but D1 did have regard to the interests of THMG's creditors, including by ensuring fair value for THMG's assets and discharge of its remaining liabilities.

590. As such, I reject the claim against D1 for breach of his duties to the Company.

(b) D2

591. Although the Claimant invites the Court to make the same findings of breach of duty with respect to D2, the suggested basis for those findings is couched in different terms from D1, perhaps unsurprisingly given the different roles they played. Whereas D1 was said to be 'in the thick' of the Restructure, D2 was said to have abrogated his duties to THMG by failing to give any or much thought to the separate position of THMG and its creditors or whether the Restructure was in the best interests of THMG and 'going along' with what D1 wanted. Although not at the heart of D1's prejudicial scheme, D2 was said to know enough about the threat of the PIP claims and about the Restructure, particularly the extraction of value through the dividend, that he acted in dishonest breach of duty by committing THMG to that course.

592. As to D2's suggested *knowledge*, *purpose* and *intentions*, the Claimant relies on D2's 2004 bankruptcy, his close personal relationship with D1, their ongoing conduct of business together after the Restructure and the insolvency of Healthcare. In my view, these matters represent an extremely thin basis for D2's suggested motive for breaching his duties to THMG, let alone dishonestly so. Likewise, the Claimant again relied on D2's knowledge that the proposed dividend would extract value from THMG but that is again a statement of the obvious. Finally, the Claimant relied on D2's knowledge of PIP claims and the risks they presented. However, D2 testified that he did not know in January 2012 that the PIP claims were viewed as a serious issue and that he understood the legal advice to be positive and value of the claims low. I accept his evidence.

593. D2 too fairly explained in various parts of his evidence that he did not differentiate between THMG and the Group. However, I also considered genuine, and I accept, his evidence that he believed the Restructure was of benefit to the whole Group, including THMG, and that he did not 'go along' with the shifting of assets around the Group to avoid THMG's creditors being paid. In this regard, the Claimant's summary of D2's testimony as to the benefits of the Restructure was incomplete. Importantly, given how the Claimant has put its case, D2 testified repeatedly to his understanding that all THMG's liabilities would be paid. Again, I accept his evidence.

594. Many of the specific matters relied on by the Claimant to support its case as to D2's abrogation of responsibility as a director also did not advance matters. The fact that overall decision-making was made by D1 was unremarkable. DR was CEO. Likewise, that D2 did not perform a finance function, may not have understood certain accounting concepts, did not recall reading the statutory

accounts on joining the Group or was not involved in planning the Restructure did not connote abrogation of responsibility. Those functions were performed by others, both internal and external, qualified to do so. D2 did attend SMTs at which senior management discussed important issues cross-departmentally. I also accept D2's testimony that important matters, such as the statutory accounts, were explained to him, that he would ask questions and that he was comfortable with the information and advice he received. Although D2 said in oral evidence that he did not know about certain specific issues, I consider it more likely that some of these at least were raised at SMTs at the time, albeit he does not recall them ten years later. As to his recall, the Claimant criticises D2 for saying that the meeting on 10 January 2012 was memorable but not recalling the discussion of THMG's "*overall financial position*" then. This criticism too was unwarranted. The meeting was about the PIP strategy (for which D2 was responsible) and was attended by D6 which he did not meet often. That was why he recalled the meeting. The suggestion of a financial discussion was the Claimant's incorrect surmise from an incomplete manuscript note. Finally, the Claimant points to D2 not remembering when the dividend was declared. That too was unremarkable after ten years. However, it is incorrect to say that he testified that he did not consider why THMG was transferring value by paying the dividend. D2 testified that he knew the amount of the dividend and was advised (by CK, the Group's "*financial people*" and D6) of why and how it was to be declared. He was comfortable with that explanation. Again, I accept his evidence.

595. Accordingly, having regard to the specific matters relied on by the Claimant in this context (which again I found unpersuasive) but, more particularly, the analysis of the true substance and purpose of the Restructure upon which D2's alleged liability is also largely premised, I find that SB was not in breach of his duties to THMG. I do so for substantially the same reasons as those given for D1, albeit given D2's more limited role in the Restructure, they apply to him with greater force. In this regard, I reject the Claimant's suggestion of D2's abrogation of responsibility. Although SB was not the originator of the Restructure and he did not drive it, based on his testimony, I am satisfied that he did not simply 'go along' with what DR wanted, that he took steps to ensure his own proper understanding and consideration of the Restructure, including asking appropriate questions and that his honest and reasonably held belief at the time was that it benefitted the Group, including THMG.

M. REDUCTION OF INTERCOMPANY BALANCES TO £0 (D1-D3)

596. Although the focus of its submissions was very much directed towards DR, the Claimant also contends that D1-D3 breached their duties to the Company through the reduction of the intercompany indebtedness due from Holdings to THMG as at 30 November 2012. This alleged breach too is largely premised on the purpose of the Restructure being to prejudice creditors and the intercompany debt being worthless, a premise I have rejected. The intercompany loan was worth its face value, it was appropriately reduced to £0 and, with the further support provided by the Group, THMG then became a creditor of Holdings by 2015 to the extent of £1,421,373. The Claimant also pointed to DR's acceptance of the likelihood of THMG being loss-making but,

as DR testified, the trading loss incurred was not "*entirely predictable*". However, the Group agreed to, and did, fund THMG for a significant period post-Restructure and its creditors were paid, hardly redolent of a prejudicial scheme.

597. More specifically, the Claimant denies that the intercompany loan was paid off in the sense of THMG receiving any real benefit. I have already analysed that issue in some detail, finding that only one element of the credits applied to the loan balance was potentially irregular, namely the vehicle and travel items. As to those, part of the expense was properly chargeable but the correct apportionment is unknown. However, on any view, any related amount incorrectly applied would have been much less than the balance due from THMG to Holdings on the intercompany account as at 2015. As such, the original loan balance in favour of THMG was properly paid down to zero such that there was no breach of duty by D1 or D2 on that account.[35]

N. DISHONEST ASSISTANCE D3, D5 AND D6

598. Having found that D1 and D2 did not breach their duties to THMG, no question of accessory liability in dishonest assistance arises. However, given the seriousness of the related allegations against D3, D5 and D6 in this context, it is only appropriate that I set out my findings with respect to the alleged knowledge and dishonesty of each defendant said to have formed the basis for their dishonest assistance. I do so again most conveniently by reference to the specific matters relied on, and related findings sought by, the Claimant in closing argument. As a preliminary matter, I accept the Claimant's submission that the absence of a discernible motive does not preclude a finding of dishonesty (*Webb* v *Solicitors' Regulation Authority* [2013] EWHC 2078 at [47] and [52]). That said, as noted, the authorities recognise that motive and overall probability form an important part of the assessment of the evidence in a fraud case and that it is inherently improbable, absent some financial or other incentive, that professionals would act dishonestly.

(a) Dishonest assistance (D3) – issue 12

599. The Claimant asserts that GB had actual knowledge or 'targeted suspicion of', or turned a 'blind eye' to, the fact that the Restructure (i) was obviously detrimental to THMG and a fraud on creditors (ii) had as its purpose creditor avoidance (iii) was intended to defraud creditors or (iv) was intended to write off or reduce THMG's intercompany receivables "*by declaring a dividend or moving around inter-company loans*".[36] As to GB's suggested motives, the notion that he was a "*central figure in the development and implementation of the Restructure*", and therefore "*heavily invested*" in it, was overstated. GB was a consultant and the Restructure one of the many projects assigned to him which he did not join until around April 2012. By that stage, he was no longer FD and, having resigned that position, had relinquished his shareholding in the Group. The payment of his consultancy fees and, no doubt, professional desire to see

---

[35] D3's position in relation the reduction of intercompany debt is considered below.

[36] In closing submissions (at [377]), the Claimant distilled its pleaded case (PoC at [125A]).

the project to successful completion were not compelling motives for his alleged dishonesty.

600. As to BS' manuscript notes of the meeting of 16 May 2012, I have already rejected the suggestion that there was discussion then of the need for the Restructure on account of potential PIP liabilities. Moreover, BS' reference in his e-mail to GB of 29 May 2012 to the purpose of the Restructure being to "[d]*e risk the business*" and to "*mitigate PI claims*" is entirely consistent with the reasons discussed on 8 March 2012 between D1 and D5, as recorded in BS' related notes and D5's Zeus form. Although those reasons (also described in the draft board paper prepared by GB and sent to the Bank on 20 July 2012) benefitted the Group, and GB accepted that he looked at matters at Group level, that did not mean that a further purpose of the Restructure was to avoid paying past liabilities or to mitigate PIP risks. GB too denied this and I accept his evidence. Moreover, it was not GB's evidence that he did not consider THMG's interests but that he did not recall if he did. However, to a similar end as DR and SB, GB testified that THMG received market value for the assets transferred as well as ongoing parental support for years after the Restructure. I accept his related evidence as well. Finally, in relation to the draft board paper sent to D5, the Claimant places store by the attachment of the wrong appendix 3 (without reference to a dividend or write off), suggesting that GB took the positive step of its deliberate editing. This was a difficult submission: first, it is far from clear why GB would seek to disguise matters from D5. The Bank's lawyers reviewed the proposed reorganisation and there would have been little point in such concealment; second, GB sent KH for review the draft paper (including the same version of the appendix) two days earlier on 18 July 2012. It makes no sense for GB to conceal matters from D6. Finally, the Claimant says the valuation of IP by GB and CK was not supported by an independent valuation. However, GB explained to KH the basis for the valuation, there is no evidence that the approach was erroneous and KH testified that accountancy valuations are not uncommon in such corporate transactions.

601. The Claimant also says that, although he did not recall discussion of IA86, s.238 (transactions at an undervalue), GB did recall discussing the 'two year rule' (in an insolvency context), apparently with D6. However, the timing or context of that discussion is entirely unclear.

602. The Claimant also relies on GB's acceptance that write offs and dividends remove assets from a company in slightly different ways. However, that proposition was again a statement of the obvious. As I have already found, no meaningful deduction can be made from the proposal for the write-off of the intercompany loan (a proposal never taken forward) as to the regularity of the dividend (which was).

603. I do not share the Claimant's incredulity at GB's lack of understanding at this distance of time of the reason for the two-stage transfer of Dolan Park. In evidence, GB could not identify a tax reason but, as I have accepted, that was KH's contemporaneous understanding (as reflected in the documents). I also accept GB's evidence that the changes to the Restructure checklist circulated by GB following the meeting with DR and CK on 12 June 2012 (including the two-

step transfer) reflected CK's advice. The Claimant says GB did not correct D5's summary of the Restructure in its 11 October 2012 e-mail when it omitted the two-stage transfer. However, there was no inaccuracy as such to correct, as noted, 'disguising' matters from D5 makes little sense and, as the Claimant also notes, GB clearly did not think it an important issue since, when asked later by KH, he did not know if the Bank was aware of it or of what consequence it was to D5. If GB had thought the two-step transfer of Dolan Park held the significance suggested by the Claimant, he would have appreciated this and been more alert to the Bank's related understanding. The Claimant also relies on GB's failure to correct the Bank about the identity of the lessee of Dolan Park. However, KH did so the next day. If THMG had been attempting to keep Barclays in the dark, it was hardly a co-ordinated effort. I find that GB failed to pay sufficient attention to detail (just as he had done on 8 August 2012). He did not conceal. Nor did I find significant the fact that GB, in his role as project manager, assisted KH in the drafting process, including as to the "*Excluded Liabilities*" retained by THMG. It was already evident that aftercare and patient liabilities (including PIP) would remain in THMG but the Group continued to fund these (and to defend and attempt to settle PIP claims) for years after the Restructure. Nor did the Claimant's point about GB not valuing THMG's order book advance matters. Colliers' valuation already accounted for the trading potential of the business. Nor did I consider consequential GB's mistaken reference in his witness statement to the mortgage in favour of D5 remaining within THMG rather than the loan.

604. Finally in this context, the Claimant again placed significant store by GB's e-mail to D5 dated 26 October 2012 in which it is suggested he "*stated in terms that the Property and the intellectual property were being transferred to avoid a direct claim by an administrator of the Company in relation to the Company's assets; and that it intended to declare a dividend to reduce the resulting intercompany balance with Holdings*." As to the former, GB was talking in terms of a "*worse case scenario*". He was not anticipating an insolvency event in THMG. Had Barclays understood this, the Restructure would not have been allowed to proceed, let alone a refinancing with THMG as borrower. GB's focus was to assure BS (and D5's credit committee standing behind him) that Barclays' security would not be affected. GB had already set out in the draft board paper sent to BS on 20 July 2012 the commercial benefits. There was little to add here save to explain how the value of the consideration to be paid to THMG had been reached. As for the dividend, the e-mail did explain that its payment would reduce the intercompany balance (and therefore the assets within THMG in the event of attack) but that did not mean GB anticipated such an attack. Indeed, although GB confirmed that the Restructure (including the dividend) would be prejudicial to THMG if it entered an insolvency process, this was, again, a statement of the obvious and, as his further testimony made clear, he considered that prospect very remote. As for the *pro forma* balance sheets, as I have found, these were illustrative documents, they did not show the effect of the Restructure and no meaningful deduction can be made from the significant reduction they indicate to THMG's net asset position. Although (like DR), GB anticipated THMG would be loss making, he also anticipated ongoing Group support, including in relation to PIP (as, in fact, occurred). As for PIP, I also found unpersuasive the suggestion that reference in the December

2012 strategy update to PIP being "*contained*" was to the effect of the Restructure rather than of the PIP strategy and legal advice received. Finally, I accept GB's evidence that he considered the prospect of backdated VAT to be "*vanishingly remote*".

605. Accordingly, having regard to the specific matters relied on by the Claimant but, more particularly, my analysis of the purpose and substance of the Restructure and the exaggerated and weak motive suggested for GB's dishonesty, I am unable to accede to, and I reject, the Claimant's submission in this context that GB did not act as an honest person or that he failed to make the enquiries that a reasonable person would have in his position. As such, I would have rejected the dishonest assistance claim against D3 (issue 12).

(b) Dishonest assistance (D5) – issue 16

606. The Claimant asserted that BS knew or had a 'targeted suspicion' of, or turned a 'blind eye' to, the Restructure (i) being detrimental to THMG (ii) having as its purpose creditor avoidance and its effect fraud on creditors (iii) being intended to defraud creditors as suggested by the 25 and 26 October 2012 e-mails (iv) reflecting an intention to declare a dividend and write off intercompany balances and (v) depleting THMG's assets and being vulnerable to avoidance as a transaction at an undervalue or defrauding creditors, unlawful distribution and/ or return of capital and/ or breach of directors' duties.[37]

607. The suggested motive for D5's dishonest assistance was that the Bank was amply secured for its exposure to THMG's business and that it was only interested in the THMG loan refinancing. According to the Claimant, D5 realised the dishonest design intended for THMG but, since BS's only concern was to complete the refinancing as soon as possible, it made no sense for him to ask questions and, inconsistent with the conduct expected of a reasonably honest person, he did not do so. There are a number of problems with this suggested motive: <u>first</u>, although D5's security net was sufficiently widely cast across the Group that its liabilities would always be repaid, that did not connote a lack of interest on Barclays' part as to how they would be. To the contrary, it is evident that D5 took a significant interest in its customer, THMG, over an extended period of 14 months to ensure its business was 'turned around' and its strategic review (including the Restructure) successfully implemented to place the Group on a sound financial footing; <u>second</u>, to that end, BS took a close interest in those matters that might have impacted THMG's brand, including PIP, concluding that this, in fact, had had a positive impact on its business; <u>third</u>, where a negative was identified as, for example, with the possible liquidation of the Irish subsidiary, BS did not simply 'wave this through' but took specific legal advice, considered its impact on the Bank's facilities and proposed actions consistent with the maintenance of THMG's business standing; <u>fourth</u>, even if D5 had only been interested in the refinancing, the Restructure was not required for that purpose. Indeed, at one point in October 2012, JK explained that the Restructure was to be placed on hold due to the Intercreditor issue, with the refinancing and covenant reset still proceeding; <u>fifth</u>, BS was a highly

[37] In closing submission (at [389]), the Claimant distilled its pleaded case (PoC at [127]).

experienced, and as I found to him to be, honest banker (and witness) with experience spanning decades. Although his innate honesty might not preclude a lapse, this seems inherently improbable and, as I have found, inconsistent in any event with what, in fact, occurred.

608. As to the specific matters relied on in this context in relation to D5, the Claimant says he was aware of the facts that "*caused the need for the Restructure*". As to these, it is correct that BS took an active interest in January 2012 in the PIP issue, including learning at the meeting with THMG on 20 January of the number of patients potentially affected, the steps being taken by the Company to address the issue and the existence of a legal action group. BS also rightly accepted in his oral evidence that PIP was a potentially serious issue. BS was also aware from 8 March 2012 of the Restructure proposal. However, as I have found, the reasons for the Restructure were those featuring in BS' notes of that 8 March meeting and D5's Zeus form (as developed in GB's draft board paper sent to Barclays on 20 July 2012). I have already rejected the suggestion that the Restructure was required on account of potential PIP liabilities or that GB imparted this to BS on 16 May 2012. Although GB did impart then the potential for PIP liabilities of £3m on a worst case scenario, it is evident that BS too did not think this scenario to be realistic. This is confirmed by BS' expressed view that THMG's handling of the issue was to be applauded. BS also responded that professional assistance was not required when KPMG approached BS about THMG, specifically raising PIP and VAT as two sector issues. Moreover, despite mention of that £3m figure, BS did not look into the cash implications further or view this as an advance signal to EWL3 status. I accept BS' evidence that he would have considered the PIP issue much more closely than he did if he had thought there was a realistic possibility of such a significant potential liability. That he would have done so is clear from just how closely he examined other aspects of THMG's business that were of concern over the 14 months or so the Company remained in BBS. As it was, BS understood from THMG that the PIP claims were being managed, the legal advice on liability was positive and limited reserves were being made for each case. BS was also aware of the possible introduction of VAT on non-surgical treatments but one of the purposes of the Restructure was to mitigate that prospect by splitting the business into its different product lines. As for the prospect of backdated VAT, I accept BS' evidence that he believed he only learnt of this later.

609. The Claimant also relies on BS' contemporaneous understanding of the steps set out in GB's draft board paper. As to this, although the draft explained the transfer of assets by THMG, this evidently came as a surprise to him in late October 2012 when he identified this as part of the 'spanner in the works'. Whether he failed to take in (all) the Restructure steps then indicated, or failed to recall them in October is unclear. However, BS explained convincingly in evidence that he had little more than a proposal from the customer in July 2012, including an explanation of its underlying strategy that made sense. I accept BS' evidence that he would have been looking at matters 'holistically' at the level of the Group, and not of the individual companies within it. I also consider such an approach entirely reasonable from D5's perspective.

610. The Claimant also relies on JK's e-mail of 3 October 2012 concerning D5 not wanting the "*restructure/ reset*" to drag on beyond October "*with all the developments*". In relation to those developments, the Claimant says "*it is clear that this was probably* [sic] *referenced to PIP, VAT and the position of Harley*". However, this is anything but clear. Far more likely is that JK was referring to THMG's breach of banking covenant and related cost of capital implications for D5 as later indicated by BS in his e-mail of 29 October 2012 to GB when the former explained D5's eagerness for that reason to complete the "*restructure*" by month end, "*the restructure*" more likely referring to THMG's banking facilities (and covenant reset) than to the Group Restructure.

611. The Claimant also says that BS knew from GB's e-mail of 26 October 2012 that the Restructure was intended to make more difficult a subsequent claim by an administrator of THMG against Dolan Park. However, as noted, that was, in fact, already known from the reference in the 20 July 2012 draft board paper to the opco/ propco structure. Such structures are common and perfectly legitimate. It does not mean that GB (or THMG) anticipated the insolvency of the Company or such a claim. These were explicitly posited on a "*worse case*" basis. Nor did BS know from the e-mail that THMG's other assets were being transferred at book value "*rather than market value*". The former may be less than, the same as or more than the latter. There is no evidence about this. Moreover, as noted, I have accepted BS' evidence that he likely only looked at the attached *pro forma* balance sheets at Group level. Although BS would still have appreciated from GB's covering e-mail that a dividend was to be declared, as also noted, his focus was the transfer of assets that he either had not previously appreciated or did not recall. Nor was BS concerned by Harley's administration. To the contrary, shortly thereafter, BS wrote to DR and GB on 21 November 2012, noting that THMG had managed to position PIP as an opportunity compared to its competitors (like Harley) which had been challenged, having also told KPMG earlier on 16 August 2012 that THMG did not need professional help to deal with the sector challenges of PIP and VAT.

612. As for the so-called 'spanner in the works', the reason BS asked the questions he did was not because he was suspicious or (initially) reacted to events as an 'honest banker' would have done but because he was confused about what he understood to be new transaction steps and wanted to understand them. Nor did Eversheds' original e-mail reporting these matters to BS indicate any suspicion as opposed to possible additional work and documents if the Restructure was to include those steps. As for D5 now requiring the existing security to remain in place, as noted, this was entirely unremarkable given its understanding as to the extended scope of assets to be transferred. KH herself had already envisaged the Bank might require this. D5 would, no doubt, have wanted to consider the risk of an avoidance claim given the greater transactional complexity not previously understood but that risk might implicate *any* company involved in the Restructure (not limited to THMG). It certainly does not mean that D5 anticipated the hypothetical "*worse case scenario*" of THMG's insolvency or an attack on its assets as that prospect was canvassed by GB. If it had, D5 would (as noted) in all likelihood have withheld consent to the Restructure and refinancing of a loan with THMG as (potentially insolvent) borrower. The Claimant also says that D5 did not receive all the answers to the questions asked

by BS but GB had already explained the commercial rationale for the Restructure and, now, the basis for the value of the consideration ascribed to the asset transfers. It is also apparent from KH's further exchanges with Eversheds later on 26 October 2012 that Eversheds and D5 quickly got up to speed with what was envisaged. With the information he had about the Restructure, his knowledge that THMG was being advised by accountants and lawyers, CK having already verified for D5 the nature of, and rationale for, the transaction, and no basis for D5 to consider the Group was seeking to act prejudicially towards its creditors (whether PIP claimants or HMRC or creditors of the other Group companies involved), BS had no reason to believe that anything was, or suspicion that it might be, amiss. It is also significant, in my view, that this e-mail exchange went to seven different persons. D5 did not turn a 'blind eye' or fail to act as a reasonably honest person by not asking further questions. To the contrary, BS expressly broached with GB the perceived 'spanner in the works' and only confirmed that D5 did not object to the asset transfers after making enquiries to ensure he understood the perceived 'changes'.

613. Accordingly, in light of my findings on these specific matters and, more particularly, my analysis of its true substance and purpose and the very thin motive suggested for a banker of more than 30 years' standing at the time to act dishonestly, I am unable to accede to, and I reject, the Claimant's submission that D5 did not act as an honest person or that he failed to make the enquiries that a reasonable person would have in his position. As such, I would have rejected the dishonest assistance claim against D5 (issue 12).

(c) Dishonest assistance (D6) – issue 14

614. In relation to its claim in dishonest assistance against D6, the Claimant asserted[38] that D6 had actual knowledge or a 'targeted suspicion' of, or turned a 'blind eye' to, the fact that (i) the PIP claimants represented, and were believed by the directors to be, a serious threat to THMG (ii) the Restructure was obviously detrimental to THMG in light of the cessation of trade and transfer of assets (iii) the intention was to transfer assets, leaving liabilities but not the assets to discharge them save for an interest free loan from Holdings (iv) the intention was to keep the PIP litigation 'long term' to delay payment of PIP claimants pending the Restructure taking place (v) the intention was to write off or reduce the inter-company balance position by declaring a dividend and moving inter-company loans around and (vi) the purpose of the Restructure was to prejudice THMG's creditors (including the PIP implant claimants and HMRC) through an unlawful distribution, return of capital or transaction at an undervalue. The Claimant says again that motive is not a prerequisite to liability but, relying on *Mortgage Agency Services Number One Limited (trading as Britannia Commercial Lending)* v *Cripps Harries LLP* [2016] EWHC 2483 (Ch) (at [89]-[90] (*MASNOL*)), also that it may be a plausible motive in some cases for a solicitor who does not benefit directly from the relevant transaction to want a client to succeed in it with a view to continuing business then coming to the firm.

[38] In written closing ([at 409]), the Claimant distilled its pleaded case (PoC at [126]).

NW

615. As to the specific matters relied on by the Claimant to assert dishonesty as against NW, NW testified that, in September 2011, patient claims were a real threat to the business and that the PIP claims would make that worse. However, despite LF's "*utterly dire*" e-mail that month, it appears that NW understood from LF that the former may have reached their peak, the future prognosis was better given the anticipated changes to the costs regime, by 8 March 2012 sufficient claims budget had accrued such that there was no increase to the provision and, by September 2012, THMG had changed its approach to patient claims to settle them more quickly. NW also testified that, in January 2012, PIP was not a problem financially rather than from a publicity perspective, the issue being managed, including by replacements and waivers, through the PIP strategy. Although DS described the PIP claims then as the "*tip of the iceberg*", he only had two cases. NW accepted that, by November 2012, the PIP liability was potentially significant but he saw this as a "*500,000 liability*" (not inconsistent with LF's own reserving), with the landscape changing significantly (in THMG's favour) following regulatory confirmation of the non-toxicity of PIP implants and the position settling down by the end of 2012 with over 1000 replacements undertaken and it being "*easier to see the future*". I accept his evidence.

616. NW accepted that the Restructure would have had to address past claims (including PIP), "*in general terms*" that DR wanted to "*protect the future business from the past*", that DR was concerned about the effect of all the claims (including PIP) on value and saleability, that there was to be a cut-off point to claims coming into the Company, that THMG was to cease business, that past liabilities were to be (and were) separated from future trading and that THMG would have remained vulnerable to claims if it had been the parent of the new trading companies. However, many of the propositions put to NW were again statements of the obvious and consistent with the further testimony of NW (and other witnesses) that the intention of the Restructure was to have a "*fresh start*" with the new trading companies taking their own risks on their own product lines. That did not mean the past liabilities would not be paid. As NW testified, DR "*couldn't get away from those claims*". I accept this was his belief.

617. NW confirmed that he was aware that VAT might be charged on procedures providing an aesthetic rather than health benefit. However, one of the purposes of the Restructure was to address that possibility. NW and KH both testified that they were not aware of the potential for backdated VAT. I accept their evidence.

618. As to the Restructure itself, NW accepted that the dividend extracted value from the Company and was part of the same reorganisation but these too were statements of the obvious. NW also testified that, if there had been a write-off as indicated in the checklist from 12 June 2012, the Restructure would have been an asset strip, a transaction at an undervalue and a transaction defrauding creditors. However, he also said that D6 gave advice about the inadvisability of the write-off, he believed the advice was understood and that "*this was never an asset strip, and that's why they didn't write it off*". As also noted, he

explained that CK originally canvassed the dividend in the context of the propco/ opco discussion, that idea disappeared for a number of months and there was then discussion about potential write-offs before CK re-introduced the dividend. I have accepted that evidence too.

619. As to the financial position of THMG, NW accepted that the covenant reset was required to free up more cash, 'creditor stretch' meant others were prioritised over the payment of D6's fees and Bank support would have been required (both before and after the Restructure) to pay a judgment debt of £3.5m. However, as noted, the covenant requirements were not solvency tests and their adjustment afforded THMG more cashflow 'headroom', the prospect of a £3.5m PIP liability was reasonably not considered to be a realistic one and, although THMG did experience 'creditor stretch', that position started to be unwound in 2012. As noted, I am also satisfied, based on THMG's good trading over 2012, its 'turnaround' and the positive disposition of the Bank after 14 months in BBS that, had it been necessary to accelerate creditor payments, THMG would have had access to the necessary funding. Finally, NW (and KH) testified to their understanding the reorganisation was a solvent one. I accept their evidence.

KH

620. As to the specific matters relied on by the Claimant in relation to KH, I have already rejected the Claimant's assertion that £16m figure in (apparently) KH's note of the Restructure meeting on 26 January 2012 referred to PIP claims rather than to the value of Dolan Park. To the extent claims figures were cited, this was a £2m worse case figure for patient claims (excluding PIP).

621. KH also accepted that, following the further iteration of the Restructure indicated by GB on 9 May 2012, the intent was to leave THMG with the patient claims, with the Company no longer carrying on any cosmetic surgery business, albeit it would carry on aftercare and collect its debts. She also testified that there was no contractual obligation on the Group to settle patient claims. The Claimant says that KH also agreed that THMG did not have the assets to settle claims unless the Group chose to do so but I understood KH's evidence to be more equivocal. More importantly in relation to all these points, KH also testified as to her experience that companies in a group commonly support others without this being specifically documented and her understanding that the Group intended to (and did) discharge THMG's liabilities. I accept her evidence.

622. KH also testified as to her concern that, if the intercompany balance had been written off, there would have been no "*real value*" to the transfer of Dolan Park and the transaction might be challenged as a transfer at an undervalue. The Claimant also relies on KH's testimony that she probably did not know until this litigation that there were no write-offs. However, she clarified her understanding that there would be none because D6 had advised against them. As the evidence shows, there was none.

623. Finally, although she initially accepted that the payment of a dividend would result in the reduction of the value received by THMG (whether or not lawfully declared), she went on to explain that THMG still received market value for Dolan Park (as valued by Colliers), albeit satisfied partly by loan, partly by dividend.

624. I found that the Claimant's specific (but often partial) reliance in this context on the extensive and at times abstruse debates with NW and KH in cross-examination about the result of the different transactions constituting the Restructure did not meaningfully advance matters. The Claimant's principal point was that their evidence 'over-compartmentalised' those transactions, relying excessively on the asset sales being at market value but ignoring the dividend and, importantly, its attainment of the same (improper) extraction of value as the abandoned write-offs. However, what matters is not how NW and KH 'visualise(d)' the sequence or effect of the individual transactions, rather than their true substance and purpose. The same is true of the somewhat arid (and largely uncontroversial) exchanges about the position in which THMG would find itself post-Restructure.

625. Having regard to my findings on these specific matters and, more particularly, my analysis of the substance and purpose of the Restructure, and the weak motive suggested for two solicitors, each with decades of legal experience to act dishonestly, I am unable to accede to, and I reject, the Claimant's submission that D6 did not act as an honest person or that it failed to make the enquiries that a reasonable person would have in its position. As such, I would have rejected the dishonest assistance claim against D6 (issue 14).

O. NEGLIGENCE (D3) – ISSUE 5

626. The Claimant relies on D3's Consultancy Agreement dated 3 October 2011 under which the latter agreed to provide independent advisory and consultancy services to THMG to assert that D3 owed the Company a tortious duty of care in their provision.[39] The Claimant says that the standard of skill and care that GB had to meet was that of an experienced chartered accountant and finance director.[40] As a preliminary matter, I accept that D3 owed a tortious duty to perform his services with reasonable care and skill. There was some debate as to whether that duty was owed to THMG or to TWP (Newco). In that regard, D3 relied on certain invoices for GB's work apparently on the Restructure identifying TWP (Newco) as recipient of those services as well as the evidence of DR that GB provided services to the Group. The Claimant simply relied on the terms of the Consultancy Agreement which provided for D3 to provide his services to THMG. It seems to me that the position may be more complex than either party suggests in the sense that I find D3 did owe THMG a tortious duty of reasonable care and skill concurrently with his contractual duty under the Consultancy Agreement, albeit for some projects, his services may have been provided for the benefit of other Group companies, possibly giving rise to legal duties to them. In this case, the position is further clouded by the accounting, some potentially relevant invoices identifying THMG as the recipient of the

[39] PoC at [110.4].
[40] C's Response 36 to D3's Request for Further Information dated 20 February 2020.

relevant services, others TWP (Newco). Ultimately, however, despite its threshold nature, the issue is not decisive for the reasons explained below.

627. As to the scope of the duty, as noted under the discussion of GB's suggested role as *de facto* director, the Claimant places store by the advisory aspects of GB's function, as to which, I accept he would have 'advised' on issues arising in the sense of imparting information and views informed by his knowledge of the Group and corporate finance background. However, GB was project manager, not an advisor on legal, accountancy or property valuation issues. Those professional advisory roles were performed by, respectively, D6, CK and Colliers. As such, it was no part of the purpose of GB's duty (as explained in *Manchester Building Society* v *Grant Thornton UK LLP* [2021] 3 WLR 81) to protect THMG against the risk of losses arising, for example, from the potential unlawfulness of, or improper accounting for, the Restructure, or any undervaluation of Dolan Park. In my view, this point is decisive (in D3's favour) of this claim.

628. I also reject the Claimant's suggestion that D3's standard of care was that expected of an experienced chartered accountant and finance director. Although D3 had qualified as the former, he had not practised as such. Nor did he any longer perform the role of Finance Director. He provided independent advisory and consultancy services and, although 'labels' are not decisive in this context either, described himself consistently with that as financial consultant. GB worked on various *ad hoc* projects. On the Restructure, his principal role was project manager.

629. As to the breaches of tortious duty alleged, these were pleaded in the same terms as those alleged against each of D1-D3 as directors of THMG.[41] Given the different nature and source of the underlying duties, this conflated matters unhelpfully, D3's duties as consultant being different from those of THMG's board (save perhaps under CA06, s.174(1)). As project manager, GB was responsible for co-ordinating the various workstreams to get the Restructure 'over the line'. Although delayed, D3 achieved this outcome. The Claimant suggested in closing that, even if the Court were to conclude that GB was a project manager, no project manager "*manages his client off a cliff, or* [sic] *leave him hanging with a recalcitrant parent ready to drop him if he becomes too heavy*." However, as I have already found in relation to the purpose and substance of the Restructure generally, and in relation to the duties of D1 and D2 specifically, that characterisation is wide of the mark. I reject it in the context of D3's tortious duty as well. Moreover, to the extent it was being suggested that D3 also breached this duty through the implementation of the Restructure or the reduction of the intercompany debt, I accept D3's evidence that he was not involved, or materially so, in either. Furthermore, to the extent any conflict of interest was said to found the Claimant's breach of his tortious duty of care, this too was not made out. As consultant, GB did not stand to gain from the Restructure beyond his fee.

[41] PoC at [114].

630. Finally, the Claimant says that no "*competent project manager*" would "*carry out back of the fag packet and undocumented valuations of goodwill*", an apparent reference to GB 'agreeing' the value of IP without reference to an independent expert. However, this characterisation too is inapposite. GB had a corporate finance background, he 'agreed' the value of the IP with CK, CK were accountants and THMG's auditors, the IP was an asset unique to the Group, the valuation was on the basis of a multiple of royalties to be generated from Group licensees, KH was aware on 22 October 2012 of this valuation and, in broad terms, its basis and KH had also advised earlier on 8 May that, ideally, an independent valuation should be obtained but that a market value price in the reasonable judgment of the directors was acceptable and, in oral evidence, that it not uncommon for a company's accountants to value assets to be transferred. Given these matters, I am unable to conclude that an independent valuation of the IP was required, let alone that GB, as project manager, should reasonably have appreciated this. In any event, the Claimant has put forward no case that the £1.5m valuation was wrong or, if it was, what loss (if any) THMG sustained as a result.

631. For all these reasons, I reject the claim in negligence against D3, itself based on the same allegations I have already rejected in relation to D1 and D2 in the (more apposite) context of their duties as directors.

P. NEGLIGENCE – D6 (ISSUES 7-8)

632. The Claimant also claims against D6 in negligence, asserting that, based upon the knowledge of NW, KH and DS at the relevant time, D6 should have advised THMG about various matters.[42] At trial, the Claimant's focus was on D6's alleged failure to advise on the likelihood of the Restructure being a transaction defrauding creditors within the meaning of IA86, s.423 - at its highest, D6 only advised on IA86, s.238, a section premised on the liquidation or administration of the relevant company and a two year 'lookback' period. Neither requirement features in s.423 such that D6's related failure to advise about it led the directors erroneously to conclude that the only risk to the Restructure was if THMG entered an insolvency process within two years.

633. There is no dispute that THMG was the 'client' for this purpose and that D6 therefore owed its duties to the Company. Likewise, there is no dispute that the retainer was governed by the terms of the draft engagement letter sent by KH to GB on 13 July 2012, save for the limitation of liability clause, the incorporation of which, the Claimant disputes. The engagement letter provides relevantly that:-

(a) THMG's instructions were stated as having been given "*in connection with the proposed reorganisation of the*" Group;

(b) THMG's objectives were described as "[i]*n conjunction with your advisers to reorganise the existing*" Group "*to permit the division of property and the various trading entities*" (clause 1);

[42] As pleaded at PoC [118]-[119].

(c) D6 agreed to "*consider the normal legal issues arising from this type of transaction and any specific issues which may be identified as the matter progresses*" (clause 2);

(d) D6's responsibilities included (in conjunction with THMG's "*other advisors*") the creation of companies, preparation of all transaction paperwork, putting in place supply, licence and collection and administration arrangements and liaising with the Bank's lawyers (clause 4);

(e) D6 also agreed to "*advise you of any circumstances and risks of which we are aware or consider to be reasonably foreseeable that could affect the outcome of your matter*" (clause 4(o));

(f) D6's duties and responsibilities were "*limited to those expressly set out in these Terms*" and stated not to include "*Tax, Financial or Pensions Advice*" (clause 5), a carve-out developed later (clause 12);

(g) D6's fees were estimated at £32,000 (excluding VAT and disbursements); and

(h) The letter contained a limitation of liability (£5m) "*for any loss or damage suffered by you arising out of or in connection with the provision of our services, however the loss or damage is caused, including our negligence but not wilful default …*" (clause 13).

634. The letter concluded by requesting THMG to "[p]*lease confirm in writing your agreement to these Terms by signing and returning the enclosed copy of these Terms, in the prepaid envelope provided.*" THMG did not sign or return the letter.

635. There is also no dispute that it was an implied term of D6's retainer that it would act with reasonable care and skill in the performance of its duties. It is also common ground that D6 owed these duties of care concurrently in contract and tort, this claim being framed in both.

636. Given its involvement in the Restructure, CK was clearly one of THMG's "*other advisors*" referred to in the engagement letter even though not expressly identified as such. CK's role is therefore relevant to the scope of D6's duties to THMG. As to this, the Claimant relies on CK's own engagement letter dated 11 June 2012 that describes its services in connection with "*the proposed reorganisation of the group trading structure and preparation of financial forecasts for the revised group*" as working "*with the management team in the preparation of financial forecasts and a business plan for the purpose of securing group finance for the continued development of the business.*" Although this might suggest that CK's role on the Restructure was limited to financial modelling, it is evident from the record that this was much more extensive. So, for example, I am satisfied that it was CK that worked closely with DR and GB to devise the reorganisation structure, including the companies

involved and the nature of the transactions required to give effect to it. As I have found, CK came up with the idea of the dividend in January 2012 (and later) as well as the loan write-off also featuring later. D6's principal related role was to ensure the relevant company records were up to date, companies incorporated and transactions properly papered. That the structure was being driven by others than D6 is shown by KH repeatedly chasing for related updates. CK was also involved at the more granular level of the Restructure accounting, having prepared the *pro forma* balance sheets to illustrate how the proposed transactions might look from an accounting position. CK also came up with the final dividend figure. Perhaps most tellingly of all, it was CK (not D6) that confirmed to D5 that GB's draft board paper represented a fair summary of the Restructure and its principal advantages and disadvantages and steps to achieve the proposed organisation. CK also agreed with GB the IP valuation. Finally, CK understood much better than D6, and was closer to, the 'drivers' for the Restructure as I have found them to be, including the potential administrative and VAT benefits.

637. I found unconvincing the Claimant's attempts in this context to downplay CK's role. For example, the Claimant says that CK was absent from the key meeting on 26 January 2012 at which DR "*discussed the unlawful purpose of the Restructure*" with NW and KH. However, that assumes an unlawful purpose not present. It is also unsurprising that THMG met D6 without CK. THMG was already in consultation with LWQC at D6's offices that day. CK attended a number of THMG meetings without D6. The Claimant also says that THMG "*misled CK*" as to the factual basis on which provision for PIP claims was omitted from the 2012 accounts. As I have found, that allegation is unwarranted. CK's notes for the litigation audit discussion with THMG prepared on 26 January 2012 were reproduced verbatim (and apparently not updated) in CK's corresponding notes from August 2013 for the next year's audit. Finally, the Defendants did not "*seek to implicate CK in their wrongdoing*". The Defendants' position is that there was no wrongdoing by them (as I have found to this point) or by CK. Accordingly, although entitled to its 'agnosticism' with respect to CK being a defendant, the Claimant's position with respect to CK's role as it relates to D6's liability in this negligence context is, again, unrealistic.

638. The Claimant relies on the suggested knowledge of NW and KH of various matters which it is said gave rise to a duty to advise THMG. Since I have addressed most of those matters already, I do so here more briefly:-

(a) As to **PIP claims**, NW's evidence was that he envisaged PIP liability of approximately £500,000, roughly consistent with, albeit higher than, LF's own reserving and the proposed PIP settlement figure. The witness evidence overall (including NW's) was that the claims were considered manageable. I have accepted that. As to KH, the reference to £16m in her manuscript note of (apparently) 26 January 2012 was to the value of Dolan Park, not PIP liabilities, as to which, she had little meaningful knowledge;

(b) As to **VAT**, NW and KH were both aware of the possible future introduction of VAT on cosmetic procedures. One reason for the Restructure was to mitigate the potential impact. Both testified that they were unaware of the risk of backdated VAT. I have accepted their evidence;

(c) As to the **purpose of the Restructure**, I have already accepted that this was undertaken for genuine commercial reasons, including limiting future claims to the relevant trading entity and mitigating possible future VAT, as borne out by the contemporary record, understood by the parties (including D6) and verified by CK in its letter to D5 on 20 July 2012; and

(d) As to the suggested **transfers of THMG's assets at an undervalue**, KH advised throughout that these should take place at market value, the loan write-off proposal was CK's, D6 specifically advised GB against it, the write-off did not go ahead, the dividend proposal was also CK's, conflation of the two is inapt and D6 did not know, and had no reason to believe, that the purpose of the Restructure was creditor prejudice or fraud (which it was not).

639. Given these matters, and my more detailed analysis of the true purpose and substance of the Restructure, there is no basis to assert that D6 knew of, or considered reasonably foreseeable, "*circumstances and risks ... that could affect the outcome of your matter*" (within the meaning of D6's engagement letter (clause 4(o)) so as to require D6 to advise THMG about the risk of the Restructure being considered a transaction defrauding creditors under IA86, s.423 or about the other matters pleaded. Nor, more generally, would a reasonably competent solicitor having regard to normal professional standards consider such advice reasonably incidental to the services to be performed (*Minkin* v *Landsberg* [2015] EWCA Civ 1152 at [33] and [38]).

640. The one exception to that is CK's proposal for the loan write-off about which GB and KH spoke on 2 May 2012. KH then e-mailed NW on 3 May 2012 with her related concerns, suggesting a letter be sent to GB. NW agreed, suggesting a further letter to the THMG board. It is common ground that no letter was sent, albeit NW and KH say there was a later telephone conversation with GB involving them both when the write-off was discussed. The Claimant does not accept this and says that KH's manuscript note referring to IA86, s.238 was from her initial call with GB on 2 May. Moreover, the reference in KH's note was to s.238 such that, even if advice had been proffered, the risk of challenge identified was limited to an insolvency context and a two year timeframe.

641. Attempting to unravel this episode, I have already accepted the evidence of NW and KH that they both spoke to GB in a later telephone call about the write-off issue. I am not able to identify the precise provenance of KH's note given its brevity and lack of date but I consider it more likely that it was made during KH's call with GB on 2 May 2012. Although that note refers to s.238, her brief, but complete, e-mail to NW the next day identifies the write-offs being "*potentially subject to challenge as transactions to defraud creditors*", a

reference to s.423. That is not qualified by reference to insolvency. The further reference to potential "*action against the directors for misfeasance/ breach of duty*" is so qualified, albeit that seems to be a statement of practical reality (and does not suggest any 'lookback' period). Moreover, although write-offs were not mentioned, KH's Restructure overview from 8 May 2012 expressly noted that a transaction constituting a fraud on the Company's creditors was not amenable to shareholder ratification, was liable to set aside and risked personal liability for the directors. It continued that transfers at book value (or less) exposed the Group to a number of potential company law problems with serious consequences and possible penalties. KH therefore had in mind a broad range of company law difficulties and she was most explicit in writing about those associated with s.423. Given these matters, I find that D6's advice in its later call with GB was not constrained by s.238 or an insolvency situation. Indeed, although I was not assisted by the oral evidence as to the precise content of that discussion some ten years ago, I accept that the 'thrust' of the advice to GB was that the write-offs were vulnerable to challenge, they should not be undertaken and the assets should (as KH communicated throughout) be transferred at market value. These statutory differences were not significant in the context of what D6 needed to impart to GB in this relatively brief telephone conversation. They are significant to the Claimant's theory of THMG pushing the PIP litigation beyond a two year 'look back' period but I have already rejected this.

642. Nor did I find persuasive the Claimant's reliance on *Middleton* v *Steeds Hudson* [1998] 1FLR 738 (at [741]) to the effect that a letter of advice might have been expected where the client, as here, disregarded the solicitors' advice. As to this, the write-off did not feature in KH's Restructure overviews sent on 8 and 11 May 2012 shortly after D6 advised GB. It is unclear why it surfaced again on 29 May 2012, why it was included in CK's *pro forma* balance sheets or why KH asked on 1 September 2012 about its continued inclusion. GB and KH could not now explain these matters and CK did not testify. However, the write-off proposal did not ultimately feature in the Restructure. D6's advice in early May 2012 therefore either had its desired effect or the idea was not pursued for other reasons. Either way, I find that the proposed write-off was a risk or circumstance of which D6 was aware within the meaning of clause 4(o) of D6's engagement letter that might have affected the outcome of the Restructure and D6 properly advised about it as a reasonably competent solicitor would do. However, the circumstances of this case (as envisaged by *Newcastle International Airports* v *Eversheds LLP* [2013] EWCA Civ 1514) were not such as to require separate advice to THMG's board on this issue. As project manager on the Restructure, GB was authorised by THMG to instruct, and receive advice from, its solicitors and he had no personal conflicting interest. I therefore find that D6 properly discharged its duty to THMG in this respect.

643. As for the suggested duty to advise THMG with respect to the risk of its insolvency or to recommend that specialist insolvency advice be sought, I have accepted that NW and KH understood, and reasonably believed the Restructure to be, a solvent reconstruction (and that it was). However, D6 did flag the issue for the specific consideration of THMG's directors in the draft board minutes approving the Restructure, thereby ensuring their compliance with their own duties.

644. The Claimant also says that D6 did not advise about unlawful distributions or breaches of directors' duties and failed to check whether THMG had received market value for the assets transferred, including ignoring the dividend, in respect of which, legal analysis was required to check whether (i) there were sufficient distributable reserves and (ii) even if they were, the Restructure was still a transaction defrauding creditors, unlawful return of capital or informal winding up. I found this submission unrealistic: first, it fell squarely within CK's responsibilities to determine the sufficiency of THMG's distributable reserves. It was no part of, nor reasonably incidental to, the services that D6 agreed to provide. CK came up with the dividend idea, CK was THMG's auditor and intimately familiar with its accounts and, as I have found, CK established the level of dividend ultimately declared. CK was able to consider whether the statutory distribution requirements were met. D6 was not.

645. Second, KH did, in fact, explain in the draft board minutes sent on 12 November 2012 that (i) sufficient distributable profits were required and, even if the statutory tests were met, a dividend could not be paid (ii) out of capital or (iii) if insolvency would follow. The related risks for directors were also explained.

646. Third, as I have found, D6 did not understand, and had no reason to believe, that the Restructure (including the dividend) was a transaction defrauding creditors, unlawful return of capital or informal winding up (which it was not), that its purpose was prejudicial or fraudulent (which it was not) or that it would result in the directors being in breach of their duties (which it did not).

647. Fourth, despite the Claimant's incredulity, I accept KH's evidence that she did not review CK's *pro forma* balance sheets or would not have properly understood them if she had. CK prepared these. Although KH told Eversheds that they showed the worked through intercompany loans, I accept that GB told her this. The same e-mail shows that she had spoken to GB.

648. Fifth, that is not to say that D6 did not advise THMG of the need to ensure it received market value for its assets. KH made this clear throughout, including in her Restructure overview and her various communications about how the assets were to be valued. It was no part of D6's duties to verify that value.

649. Sixth, in this way, D6 did, in fact, ensure appropriate separate consideration of THMG's interests and that the benefit of the Restructure also enured to THMG. KH also advised in her overview of the need for THMG's directors to consider these matters, thereby again ensuring compliance with their own duties.

650. Seventh, nor was there any reason, whether generally or specifically in this case, for D6 to question the incoming consideration paid by way of intercompany loan, the covenant of the relevant Group companies in this regard or their willingness or intent to meet their debt obligations.

651. Eighth, KH also advised more broadly on directors' duties in her overview and in THMG's draft board minute approving the Restructure, including the risks associated with a transaction constituting a fraud on creditors.

652. Given my findings on the specific matters relied on by the Claimant but, more particularly, my analysis of the true purpose and substance of the Restructure, I find that D6 properly discharged its duties to THMG. I therefore reject the claim in negligence against D6.

Q. UNLAWFUL CONSPIRACY – ISSUE 17

653. Finally, the Claimant asserts that, by no later than the end of October 2012, all the Defendants had a combination and/ or understanding to use unlawful means with the intent of injuring THMG and its creditors. That is said to have taken the form of the Restructure, with the effect of divesting it of all of its principal assets and trading business (including by paying a dividend) in return for an unsecured and interest-free loan from Holdings which it would not be able to pay on demand. The (at least) reasonably foreseeable, if not intended, result was to cause injury to THMG and its creditors. The means used were unlawful since THMG entered the Restructure which amounted to an unlawful distribution and/ or return of capital and/ or transaction defrauding creditors and/ or involving breaches of duty by D1-D3.

654. Given my findings as to the true substance and purpose of the Restructure, the related (non-injurious) intent of each of the Defendants and the absence of any breach of duty by D1-D3, this claim does not 'get off the ground'. I reject it as well.

R. OVERALL CONCLUSION/ DISPOSAL

655. In light of my findings, it is not necessary for me to consider the further issues in the list of issues. The claim is dismissed.