Case No: CR-2017-006366

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

IN THE MATTER OF ICONIC HOTELS LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Court of Justice
No.7 The Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date: 21 June 2018

Before :

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE SCHAFFER

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Between :

(1) STEVEN LESLIE SMITH AND FRANK WESSELY
(As Joint Liquidators of Iconic Hotels Limited)
(2) ICONIC HOTELS LIMITED

Applicants

- and -

(1) CLIVE OLIVER TRAVERS
(2) E. GREENHAM LIMITED
(3) OLIVER CLIVE TRAVERS

Respondents

- - - - - - - - - - - - - - - - - - - -

Mr Peter Shaw QC (instructed by Debenhams Ottaway LLP) for the **Applicants**
Miss Marcia Shekerdemian QC (instructed by Irwin Mitchell LLP) for the **Respondents**

Hearing dates:
6 and 7 June 2018

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FINAL JUDGMENT

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Introduction

1. The matter before me is that of an application by the Joint Liquidators ("Joint Liquidators") of Iconic Hotels Limited ("the Company"). They seek declarations and orders under section 212, section 239 and section 241(2) of the Insolvency Act 1986 ("the Act") against three respondents, the director of the Company, Clive Oliver Travers ("Mr Travers"), a company controlled by Mr Travers, E. Greenham Limited ("Greenham"), and Mr Travers' son, Oliver, ("Oliver"). Representing the Joint Liquidators was Mr Peter Shaw QC and for the Respondents, Miss Marcia Shekerdemian QC. I am grateful to them both for their detailed submissions.

Background

2. The Company was incorporated on 3 March 2006, its principal object being the operating of a hotel business. Its first directors were Graham Spark ("Mr Spark") and Helen Gail Payne ("Ms Payne"). Mr Spark resigned on 31 July 2012 at which time Mr Travers, the First Respondent, was appointed in his place. Ms Payne also resigned as a director on 26 July 2012, although this was not registered at Companies House until 9 April 2013. The shareholders of the Company were originally Mr Spark and Ms Payne, each holding 50 shares. Mr Spark transferred his holding to Mr Travers when he resigned. Ms Payne also transferred her shares to Mr Travers but he held these on trust for her.

3. The Company entered into a company voluntary arrangement ("CVA") in April 2009. That completed in February 2013 (I shall deal with the way its terms were fulfilled later in this judgment). Following the resignation of Ms Payne as a director, Mr Travers was the Company's sole director until the Company was placed into creditors' voluntary liquidation on 5 June 2014 at which time the Joint Liquidators were appointed.

4. Greenham was incorporated on 21 December 1949. It was a building company although its objects were wide enough for it to deal and offer bridging finance. Mr Travers was its majority shareholder and a director, its other director being a Miss June Hickey ("Miss Hickey") who I understand to be his partner.

5. Thorne Barton Estates Limited ("TBE") was incorporated on 1 February 1984 as a property development company. Miss Hickey was its majority shareholder and it had two directors Mr Travers and a Mr Peter McGregor. As will be seen when I deal with this matter further below TBE was involved, although in a rather peripheral way.

Prologue to the relevant transactions

6. To gain an understanding as to the transactions which the Joint Liquidators seek to impeach by this application I have necessarily to outline in some detail how the history of this matter evolved over a period of about 18 months or so and where all the various parties feature in that narrative.

7. The Company originally operated a hotel known as The Black Lion Inn in St Albans ("the Property"). It had entered into a CVA in 2009 but found it difficult to meet its obligations under it and was by 2012 in default. Its then directors, Mr Spark and Ms Payne, decided to develop the site by building upon it residential dwellings. Planning permission was obtained in 2011 but finance was required to undertake the proposed development. Mr McGregor and Mr Travers were approached and it was agreed that Mr Travers and Ms Payne (Mr Spark dropping out of the picture) would, through the Company, build three houses at the Property numbered 194, 196 and 196 Fishpool Street, St Albans. Various agreements were put in place where in summary:

    7.1. Mr Spark's shares and loan account in the Company were transferred to Mr Travers.

7.2. Arrangements were regulated between Mr Travers and Ms Payne by a sale and purchase agreement and joint venture agreement whereby Mr Travers became the Company's sole director.

8. It was agreed between Mr Travers and Ms Payne that Mr Travers would facilitate the advance of funds to the Company to enable the development to proceed and he was to engage contractors to build out the three houses. The shareholders' agreement placed certain restrictions on both Mr Travers and Ms Payne as to what they could or could not do. At this point of my judgment I do not intend to refer to them and will only do so insofar as they are material to my decision.

9. Mr Travers, as he said he would do, arranged a funding facility between the Company and Greenham. This is set out in a Heads of Terms Secondary Lending Facility dated 7 August 2012 ("the Heads of Terms") whereby Greenham was to arrange an advance of £1.58m exclusive of fees to the Company. It is important to note that the Company was to give a second ranking legal charge to secure the advance, a first charge already being in place to Santander UK plc who had made monies available when the Company originally bought the Property.

10. The Heads of Terms were followed by an "Offer of a Mortgage Contract" dated 14 August 2012 ("the Offer Letter") by Greenham to the Company. That offer appears to have been accepted by the Company – I say appears because in cross-examination Mr Travers could not identify who signed the Offer Letter on the Company's behalf, he having endorsed it on behalf of Greenham. The material terms of it were:

10.1. An advance of £1.58m together with fees for a period of 12 months;

10.2. The Property was estimated at a value of £4m;

10.3. The overall cost of repayment, included amongst other things arrangement fees, a monthly management fee and 5% of the sale proceeds of the three houses;

10.4. Security for the loan was to be a **second legal mortgage** [my emphasis] over the Property and a mortgage debenture over the Company;

10.5. Before the loan could be drawn down consent to the security as set out in 10.4 above had to be provided by, one would assume, the first mortgagee.

I would add for the sake of completeness that there is reference in the document to "Loan Account Terms and Conditions" (see paragraph 11.8.2.a of the Offer Letter). These were not produced to the court.

11. To enable Greenham to make the advance the following arrangements were put in place by Mr Travers whereby:

11.1. He and Oliver personally borrowed just over £1m with fees from United Trust Bank Limited ("UTB") following a letter of offer from UTB dated 12 September 2012.

11.2. To secure that loan UTB took mortgages over, inter alia, the Property. That particular mortgage was dated 9 November 2012.

11.3. Mr Travers and Oliver lent the UTB money to Greenham.

11.4. Greenham onward lent that money together with other funds totalling around £1.56m to the Company which, as can be seen above, pre-dated the UTB offer (bundle 1, page 119-127).

11.5. The Company entered into a building contract with TBE on 3 September 2012 for a fixed price of £1.4m. I would observe here that although the building contract appears to have been entered into before the UTB funds were made available, I have no doubt that because TBE was under the control of Mr Travers that contract may well have been cancelled had the UTB funds not materialised.

11.6. A Deed of Priority was agreed between Santander UK plc, the first mortgagee, UTB and the Company. It can be seen that there is no reference in that deed to any security in favour of Greenham (bundle 1, pages 148-152).

11.7. With the funds made available to the Company it discharged all its obligations under the CVA which was then concluded and in addition cleared the mortgage arrears which had accrued to Santander.

12. Although the Property, in its developed form, had been valued prior to the commencement of the building out of the houses at £4.5m it was discovered during the course of the work that the square footage had been overstated by 500 sq ft which materially affected its value. Within this narrative I must make mention of a Mr Martin Olley ("Mr Olley"). He was engaged, in the words of Mr Travers at paragraph 16 of his witness statement as "a consultant I have used on a number of other transactions that required funding, especially where insolvency of a company was an issue". Mr Travers directed Mr Olley to take over negotiations with the Company and Ms Payne. Additionally Mr Olley was primarily involved in the development in all aspects as can be seen from the documentation.

13. The first house in the development, 194 Fishpool Street was sold on or around 12 August 2013 for £1m and the net proceeds of sale of £983,650 were sent to Santander. Three days later the second house, 198 Fishpool Street was sold for £1.475m (excluding fixtures) of which £589,350.04 was remitted to Santander which discharged in full the Company's liability to it. The net proceeds of sale of that realisation totalling £860,160.55 were sent to UTB; this left 196 Fishpond Street to be realised.

The Transactions

14. By this time in mid-August 2013 the one remaining property, 196 Fishpool Street had received an offer of £1m. UTB were then owed £245,359. In an undated UTB internal note which was probably prepared around then (bundle

1, page 168), UTB mentioned the offer, that on the sale of 198, Santander's security would fall away therefore leaving UTB as first chargee and that Greenham wanted "to create 2nd charge". The note flagged another advance which had been made to Mr Travers and Oliver ("the Saracens Head Advance") and that UTB would require a further "circa £210,000" "to be held" and that "they" (by which I take to mean Mr Travers and Oliver – see paragraph 11.1 above) would have to "provide" for this.

15. At this time a series of correspondence, by email and letter, was sent by Mr Travers and by Mr Olley on behalf of Greenham to Mr Travers' solicitors, Williams & Co., chasing the putting in place of a legal charge in favour of Greenham to be given by the Company. This was considered by Mr Travers to be "vital". In one email dated 30 August 2013 it was said:

> "Every day that goes by Greenhams are progressively more exposed to potential losses and dangers. We must secure our position" (see bundle 1, page 181)

16. The charge to Greenham was given by the Company on 11 September 2013 ("the Greenham Charge") and delivered for registration to Companies House two days later. 196 Fishpool Street was sold on 15 November 2013 for £1.046m. There were two features of the completion statement prepared to which I refer now - £255,492.21 was forwarded to UTB to clear the balance due under its third party security over the Property and £787,830.59 was paid to Greenham from which it forwarded, direct or through Mr Travers, the sum of £210,000 to UTB to cover the liability that Mr Travers and Oliver had on the Saracens Head Advance.

17. At the time of the taking of the Greenham Charge a Deed of Priority was entered into by UTB, Greenham, the Company, Mr Travers and Oliver. The one produced to the Court is undated (bundle 2, pages 199-212) but necessarily must have been created after the Greenham Charge was completed. This specified a "Priority Sum" to be paid to UTB of £463,714

plus interest. As can be seen from paragraph 16 above payment of the Priority Sum was made on or around 15 November 2013.

18. Prior to the sale of 196, the Company's last remaining asset, the Company owed to its principal creditors just over £2m, UTB (secured for around £255,000), Greenham (£1.242m), Mr Travers (approximately £271,000) and Ms Payne (£233,000). Following the payments to UTB and Greenham the outstanding indebtedness of the Company to its major creditors was in the region of £1m comprising of Greenham (£1.242m minus £787,830), Mr Travers and Ms Payne. When the Company was placed into liquidation in June 2014 its statement of affairs, relying on figures given to the Joint Liquidators by Mr Travers, identified creditors of £742,000, the primary ones of which were Greenham (approximately £220,000), Ms Payne (as above) and Mr Travers (as above). There were no assets. That figure has increased by reason of further claims but these changes are not material to my judgment and I do not intend to analyse their content or sustainability.

The Witnesses

19. Before I turn to the witnesses I would like to make some general observations. I have considered the consistency of the witness evidence with what is agreed, or is clearly shown by other evidence, to have occurred. It is not so much the witnesses' demeanour but the presence of contemporaneous documentation which is of importance in assessing credibility not only by those documents which are present and can verify what is said in court but also in respect of any documents which may be conspicuous by their absence and where inferences by such absence can be drawn.

20. For the Joint Liquidators there were three witness statements, one by Steven Leslie Smith, one of the Joint Liquidators, dated 15 August 2017, one from Frank Wessely ("Mr Wessely") the other Joint Liquidator dated 26 March 2018 and one from Ms Payne dated 26 March 2018. Mr Smith was not called, it being agreed, enshrined in order of Deputy Registrar Briggs dated 21 September 2017, that (absent any written notice to the contrary) his evidence would not be subject to cross-examination and would therefore be taken as

read. Mr Wessely was tendered for cross-examination but in my view his evidence was limited, his responsibilities in the liquidation being primarily for creditors' claims and compliance. As was submitted by Miss Shekerdemian, Mr Wessely had no primary knowledge of the facts of the case and so I have given relatively little weight to what he contributed.

21. As for Ms Payne I bear in mind that she was recalling events from some years ago. Her evidence, in my view, was, for the main part, honestly given. Where she admitted matters, in circumstances where she could have flowered her answers, she did so, even if such admission was to her detriment. There were parts of her evidence where clearly she could not recollect matters but I am satisfied that in answer to my questioning of her that she was telling the truth when she said no one told her that the loan by Greenham to the Company was secured.

22. Two witnesses were tendered on behalf of the Respondents, Mr Travers and Oliver. I took into account that Mr Travers clearly was not well and that he might have difficulty following quickly any documents which were put to him, giving him time to respond when he needed it to the questions asked of him. I regret to say that I did not find him a witness upon which I could have confidence in accepting what he told me was true, particularly when seeking to recall conversations which took place six or seven years ago. His evidence was unreliable for the main part due to his own reconstruction of events being tainted by advancing, as much as he could, his perspective position. I therefore place little reliability on his memory adopting the observations made by Leggatt J (as he then was) in *Gestmin SGPS v Credit Suisse (UK) Limited [2013] EWHC 3560 at paragraphs 16 to 20.* I found Mr Travers evasive at times, changing his answers on occasions when he thought that such changes better served his purpose and deliberately vague when challenged on propositions which formed the substance of the Joint Liquidators' case. On balance I took the view that unless anything he said was supported unequivocally by documents I would treat his evidence with considerable caution.

23. Oliver's evidence was brief and not challenged to any material degree by the Joint Liquidators.

The Law

24. Before I turn to the parties' submissions, as I indicated earlier, the claims advanced identified certain sections of the Act and I will set out each in turn. As to preference, section 239 states as follows:

> "(1) ...
>
> (2) Where the company has at a relevant time (defined in the next section) given a preference to any person, the office-holder may apply to the court for an order under this section.
>
> (3) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference.
>
> (4) For the purposes of this section and section 241, a company gives a preference to a person if—
>
> (a) that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities, and
>
> (b) the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.
>
> (5) The court shall not make an order under this section in respect of a preference given to any person unless the company which gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (4)(b).
>
> (6) A company which has given a preference to a person connected with the company (otherwise than by reason only of being its employee) at the time the preference was given is presumed,

unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (5)."

Section 240 states:

"(1) Subject to the next subsection, the time at which a company enters into a transaction at an undervalue or gives a preference is a relevant time if the transaction is entered into, or the preference given—

(a) in the case of a transaction at an undervalue or of a preference which is given to a person who is connected with the company (otherwise than by reason only of being its employee), at a time in the period of 2 years ending with the onset of insolvency (which expression is defined below),

(b) in the case of a preference which is not such a transaction and is not so given, at a time in the period of 6 months ending with the onset of insolvency, and

(c) ....

(d) ...

(2) Where a company enters into a transaction at an undervalue or gives a preference at a time mentioned in subsection (1)(a) or (b), that time is not a relevant time for the purposes of section 238 or 239 unless the company—

(a) is at that time unable to pay its debts within the meaning of section 123 in Chapter VI of Part IV, or

(b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction or preference;

but the requirements of this subsection are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by a company with a person who is connected with the company.

(3) For the purposes of subsection (1), the onset of insolvency is—

(a) ....

(b) ....

(c) ...

(d) ...

(e) in a case where section 238 or 239 applies by reason of a company going into liquidation at any other time, the date of the commencement of the winding up."

Section 241(1) states:

"Without prejudice to the generality of sections 238(3) and 239(3), an order under either of those sections with respect to a transaction or preference entered into or given by a company may (subject to the next sub-section):

(d) require any person to pay in respect of benefits received by him from the company, such sums to the office holder as the court may direct."

Section 241(2) insofar as is relevant states:

"An order under section 238 or 239 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the company in question entered into the transaction or (as the case may be) the person to whom the preference was given; but such an order—

(a) shall not prejudice any interest in property which was acquired from a person other than the company and was acquired in good faith and for value, or prejudice any interest deriving from such an interest, and

(b) shall not require a person who received a benefit from the transaction or preference in good faith and for value to pay a sum to the office-holder, except where that person was a party to the transaction or the payment is to be in respect of a preference given to that person at a time when he was a creditor of the company.

Section 241(2A) states:

> "Where a person has acquired an interest in property from a person other than the company in question, or has received a benefit from the transaction or preference, and at the time of that acquisition or receipt–
>
> (a) He has notice of the relevant surrounding circumstances and of the relevant proceedings, or
>
> (b) He was connected with, or was an associate of, either the company in question or the person with whom that company entered into the transaction or to whom that company gave the preference,
>
> then, unless the contrary is shown, it shall be presumed for the purposes of paragraph (a) or (as the case may be) paragraph (b) of sub-section (2) that the interest was acquired or the benefit was received otherwise than in good faith."

25. Turning to misfeasance, reliance is placed on section 212 of the Act which states insofar as is relevant:

> "(1) This section applies if in the course of the winding up of a company it appears that a person who—
>
> (a) is or has been an officer of the company,
>
> (b) …
>
> (c) …
>
> has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company.
>
> (3) The court may, on the application of the official receiver or the liquidator, or of any creditor or contributory, examine into the conduct of the person falling within subsection (1) and compel him—

(a) to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or

(b) to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.

Various authorities were relied upon by the parties and I shall refer to them in my judgment where I think it appropriate to do so.

26. I also need to refer to various sections of the Companies Act 2006. Section 172 states insofar as is relevant:

> **"Duty to promote the success of the company**
>
> (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
>
> (f) the need to act fairly as between members of the company.
>
> (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

Section 175(1) which was relied upon by the Joint Liquidators states:

> **"Duty to avoid conflicts of interest**
>
> (1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

Section 860(7)(a) which deals with charges created by a company states:

"(7) This section applies to the following charges-

(a) a charge on land or any interest in land, other than a charge for any rent or other periodical sum issuing out of land,"

Section 870(1) which deals with the period allowed for registration insofar as is relevant states:

"(1) The period allowed for registration of a charge created by a company is-

(a) 21 days beginning with the day after the day on which the charge is created ..."

Section 874(1) which deals with the consequences of failure to register a charge created by a company states:

"(1) If a company creates a charge to which section 860 applies, the charge is void (so far as any security on the company's property or undertaking is conferred by it) against-

(a) a liquidator of the company,

(b) ...

(c) ...

unless that section is complied with."

Section 1157(1) which deals with the power of the court to grant relief in certain cases states:

"If in proceedings for negligence, default, breach of duty or breach of trust against-

(a) an officer of a company, or

(b) ...

it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his

appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit."

The Applicants' submissions

27. It is said by the Applicants that the Greenham Charge created by the Company on 11 September 2013 was a preference pursuant to section 239 of the Act and that, absent that charge, the payment of £787,830.59 made pursuant to it should be repaid to the Company.

28. Mr Shaw identified four component elements to any preference:

28.1. As a matter of fact whether Greenham was placed in a better position as a result of the subsequent winding up.

28.2. Whether there was the requisite desire on the part of the Company to prefer.

28.3. Was the preference made within the relevant time period.

28.4. Was the Company unable to repay its debts at the time of the granting of the charge.

29. Each of those components, he said, was met. The first limb, namely whether Greenham had been put into a better position, in his view it clearly had, as by the granting of security to it, he contended Greenham had promoted itself over and above other unsecured creditors. Greenham could not claim an equitable charge was put in place by the Offer Letter because that was void under section 864 of the Companies Act 2006 as it had never been registered. Even if it was claimed that the Offer Letter identified a promise to create a legal charge sometime in the future once the first mortgagee had been paid, that ran clearly contrary to the views expressed in *Jackson & Bassford Limited 1906 2 Ch 467* per by Buckley J where at pages 476-479 he found that if a promise (as in this case) could not be given legal effect the security provided was a

preference. On the facts here there was a clear preference whether it was in respect of the Greenham Charge or the promise to grant a legal charge.

30. On the second limb Mr Shaw pointed out that given Greenham was a connected party, it was presumed to have the requisite desire unless it could prove to the contrary. In this case the desire to prefer was clearly shown in granting the Greenham Charge. As to the promise, this could not shift the burden, relying as he did on the views of Pennycuick J in *Eric Holmes (Property) Limited [1965] Ch 1052 at 1067.* This was not a tidying up exercise as the Respondents contended. There was clearly anxiety on their part to ensure the legal charge was granted. Further evidence of that desire was the payment of £100,000 to TBE from the proceeds of sale of 198 Fishpool Street on 19 August 2013. This showed that, as far as Mr Travers was concerned, he wanted to ensure, if he could, payment to anyone or entity connected to him. To suggest, as he did, that the connected creditors, including Ms Payne, had agreed to subordinate their claims behind Greenham could not be supported on the evidence.

31. The relevant time was, Mr Shaw submitted, September 2013. The position of the Company as at August 2012 should be ignored. The relevant date was when the security was given. Greenham had no rights before then. The Company had a choice at that time in September 2013, namely pay the money to its creditors or grant the security – it chose the latter. There was no legal obligation on the Company to give the charge. There was a clear distinction on timing between a decision to grant the charge and having an enforceable obligation to enter into it. The latter circumstance always prevailed – see the comments of David Richards J (as he then was) in *re Stealth Construction Limited 2011 EWHC 1305 Ch at paragraph 60.*

32. Finally, Mr Shaw said that there could be no argument that the Company was anything other than balance sheet insolvent. That was confirmed by paragraph 54 of Mr Travers' Witness Statement of 29 January 2018. Therefore in all of the above circumstances the Greenham charge was clearly a preference and should be set aside as a consequence of which Greenham should repay all the

money it had received from the proceeds of 196 Fishpool Street, namely £787,830.59.

33. Turning to Mr Travers, Mr Shaw submitted that the payments of £577,830.59, which repaid loans which Mr Travers and Oliver had personally made to Greenham and the £210,000 (making a total of £787,830.59) were preferences in the hands of Mr Travers, relying on section 241(1)(d) and section 241(2) of the Act which provided the basis upon which a preference claim could be made against a third party. He referred me to *Oxford Pharmaceuticals Limited [2009] EWHC 1753 Ch* which he argued was a case on similar facts to this. The Company's money had been used to pay ultimately Mr Travers personally (see file 1, page 233) and it should be repaid. There was no question that Mr Travers had acted in good faith.

34. As for Oliver, he fell into the same category. The UTB facility had been granted to both he and his father. £210,000 of the money paid by the Company had been applied to the debt which he and his father owed to UTB in connection with the Saracens Head Advance. The Joint Liquidators did not know if Oliver had benefited from that development but even if he was innocent it was not his state of mind which determined the validity of the transaction but that of the payor. His failure to make any enquiries as to the transaction was not a showing of good faith. Oliver should therefore be fixed with the same knowledge that his father had of the transaction.

35. Having dealt with the preference claim Mr Shaw then turned to the claim against Mr Travers for misfeasance. He submitted that there were two transactions which needed to be considered, the Greenham Charge and the subsequent payment, which took place in September 2013 and November 2013 respectively. Where a company was insolvent, as in this case, the interests of creditors were paramount and an objective approach had to be taken. There was no evidence that Mr Travers had taken into account, at the time, the interests of the Company.

36. Dealing first with the Greenham Charge, Mr Travers owed duties to the Company to act in its best interests and not to act in his interests, which in this

case, conflicted. He relied on Sections 172 and 175 of the Companies Act 2006. Mr Travers had clearly breached his duties in this case making assets unavailable which would otherwise have been distributed to all creditors. That breach did not increase the Company's losses but affected a pari passu distribution.

37. He went on to submit that the payment of £210,000 remitted towards the Saracens Head Advance was a clear misfeasance. This was Mr Travers' personal liability. The Company took no benefit from it. Mr Shaw relied on the observations made in *HLC Environmental Services Limited [2013] EWHC 2876 Ch* of John Randall QC at paragraph 92.

38. The last claim, in the alternative, was that of an indemnity sought by the Company alone. The Company had discharged Mr Travers' and Oliver's personal liability to UTB and on ordinary principles in discharging that liability it stood in the shoes of UTB for the sum of £210,000. The Company had nothing to do with Saracens Head. Where it was Greenham who was the direct creditor of the Company and not Mr Travers and Oliver personally (therefore abrogating any possibility of a material set-off argument which could have been advanced) the Company should clearly be indemnified for that sum.

The Respondents' Submissions

39. Miss Shekerdemian accepted at the outset that Mr Travers and Greenham were connected parties but submitted they were significant creditors of the Company in Liquidation. When Mr Travers arrived on the scene the Company was in a financial crisis; there were arrears on the CVA and to Santander. The only hope was the development of the Property. Mr Travers had saved the Company and arranged the completion of the Company's obligations under the CVA and cleared the arrears to Santander coupled with a payment to Ms Payne of her outstanding wages. This was a venture which had gone wrong but that could not be foreseen in July-September 2012. The development looked profitable. Nothing was hidden from Ms Payne. It was

obvious any funding had to be secured and Ms Payne knew, or ought to have known, that this would be the case.

40. She went on to make some submissions on the witnesses. I have taken those comments into account in the observations I made under paragraphs 19 to 23 above and I do not intend to dwell on that topic here. I will revisit it, in the context of my conclusions, later in this Judgment.

41. She identified the key transactions, all of which I have referred to above, save that she specifically drew to my attention Mr Travers' evidence that there had been a meeting between Mr Olley and Ms Payne in August 2012 when Mr Travers **had been told by Mr Olley** (my emphasis) that he, Mr Olley, had gone through everything with her. Miss Shekerdemian submitted that it was a matter for Greenham as to how it financed the development. The Company had the benefit of that finance and Mr Travers had incurred a liability to UTB with Oliver charging his home.

42. She submitted that an equitable charge was clearly created in August 2012. It complied with Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. It was an immediate binding valid equitable charge. There was not, she said, an agreement to grant a charge in the future. Equity treated that as done which ought to be done. She referred me to *National Provincial and Union Bank of England v Charnley [1924] 1 KB* 431 at pages 440, 445, 446, 449 and 450. She expressly made clear that she was not contending that the arrangement put in place in August 2012 included a promise to give security in the future. This was immediate security – *Jackson & Bassford Limited* (see ante) was not relevant.

43. She drew to my attention that the Deed of Priority entered into between the parties in or around September 2013 (see paragraph 17 above) identified the Priority Sum that had to be paid to UTB, namely £463,714 plus interest. That incorporated the balance of the debt on the Property to UTB and the £210,000 with regard to the Saracens Head Advance. The Heads of Terms (see paragraph 9 above) had a "waterfall" clause and stated that secured lenders

had to be paid first. Ms Payne knew about this and mentioned it in her email to Mr Travers and Mr Olley of 22 May 2013 (see bundle 2, page 540).

44. She then turned to the Applicants' case. She maintained that the preference payment could only be for the sum of £577,830 if the balance of the money (£210,000) had to go to UTB. The Court should ignore that secondary sum. The Company had no choice but to pay it as it was always caught by the UTB Charge. The Court had to adopt a subjective test – see *re MC Bacon Ltd [1990] BCC 78 at page 87*. She accepted the burden of proof was reversed and was on Greenham but the relevant date when the decision was made, was in her submission, 14 August 2012, the date of the Offer Letter.

45. She drew my attention to Mr Travers' evidence. He said the Greenham Charge could only be registered once UTB had been paid. The existence of other creditors was not something which had occurred to him – he realised all stakeholders in the venture would take a hit. The Company had entered into a binding agreement to create a legal charge with Greenham. Its subsequent registration in September 2013 was not an operative feature of the case bearing in mind the pre-existing equitable charge and the "waterfall" provisions which put other creditors at the back of the queue.

46. She accepted the equitable charge was void against the Joint Liquidators but she maintained it still gave Greenham security because the September 2013 charge was made as a consequence of the equitable charge. It being void did not play on the mind of Mr Travers at that time and he therefore did not have the requisite desire. The fact that Mr Travers did not disclose to UTB the equitable charge when he executed the UTB Charge and was therefore in breach of warranty (see bundle 2, page 600) only went to "credit" – nothing more.

47. Insofar as the preference claim against Oliver and Mr Travers personally was concerned, Oliver acted in good faith and gave value. The court had a wide discretion. She referred me to *Oxford Pharmaceuticals Limited* (see ante) and to the comments of the Judge at paragraph 84. Oliver received no direct

tangible benefit – UTB had to be paid and his liability to it was discharged as an indirect consequence of this. No order should be made against him.

48. As to Mr Travers, he was admittedly in a different position to Oliver as he was involved in the transaction but for the same reasons he should not be found liable. It was Greenham that was preferred not Mr Travers. On the basis of the evidence the court could not possibly make a finding that Mr Travers acted anything other than in good faith – he was entitled to rely on Section 241(2) of the Act.

49. Turning to misfeasance, the Joint Liquidators had to prove their case. Here no breach of duty had been identified. If the relevant date was August 2012, then that part of the case must fail as the Joint Liquidators relied solely on the events of September 2013. She accepted that the Company was insolvent and that Mr Travers was obliged to consider creditors' interests but the test was a subjective one. Subjectivity was not ousted for all purposes, although objective criteria are engaged. The Court had to consider Mr Travers' state of mind in the light of subsequent events – and not assess it with the benefit of hindsight.

50. On the question of quantum, the Court had to look at the causative effect of any action. If the £463,000 had to be paid to UTB it could not be found that Mr Travers would be liable for the £210,000 – he had no choice – it had to be paid. There could not possibly be a breach of Section 212 of the Act and it could not be said that the loss to the Company by paying it was caused by Mr Travers.

51. Finally, on the indemnity claim, this was an equitable remedy. The Court has a discretion. The payment was made bona fide. Both Mr Travers and Oliver had given value and UTB were paid under its all monies charge. It followed that the Company was not using its money to discharge the debt of Mr Travers and Oliver. No order for an indemnity should be made.

My Findings

52. In reviewing the detailed submissions made (which I have summarised above) and the various authorities to which I was referred the starting point of my determination is to make findings which will form the platform for my conclusions on the claims the Applicants advance.

53. I do not find the Heads of Terms add anything of materiality to the issues for the following reasons:

53.1. They were clearly marked "discussion purposes only".

53.2. Any commitment was said to occur, if at all, on the signing of an offer letter or joint venture documentation.

53.3. They were intended for review by the Company, TBE and its advisers, both legal or otherwise.

53.4. They were unsigned – it committed the Company to nothing.

In my judgment they were not seen or shown to Ms Payne in August 2012. I reject Mr Travers' evidence that Ms Payne read them then (paragraphs 24 and 25 of his Witness Statement). He thought she knew about them because Mr Olley told him. Mr Olley did not give evidence and Mr Travers' second hand version of events is totally unconvincing. I accept Ms Payne's evidence that whilst the Heads of Terms were probably given to her by Mr Olley at his house in a bundle of papers in August 2012 no explanation was provided to her at the time. Insofar as they were of any relevance to her by reference to the "waterfall" payments, I will deal with that later.

54. Turning to the Offer Letter, I accept that this was signed by someone on behalf of the Company. I cannot identify who that was and neither could Mr Travers in his evidence. Notwithstanding that anomaly I find that the Company did accept the offer and that it did agree to provide a second legal mortgage and mortgage debenture over the Property. The letter, drafted by Mr Olley, copied the terms of the offer from UTB (see by way of comparison clause 11.4.1 which refers to clause 3 of the loan account terms and conditions at bundle 1,

page 126 and clause 15.2.1 of the UTB offer at bundle 1, page 137a). The offer required the consent of the first chargee as a pre-condition to the loan. I find this was never sought, let alone obtained at the time.

55. Notwithstanding the absence of consent Greenham did make an advance to the Company but it was largely with funds borrowed from UTB. I am satisfied that an equitable charge was put in place but that equitable charge was not registered within the requisite 21 day period pursuant to Section 870 of the Companies Act 2006 and I find in those circumstances that the equitable charge is void as against the Joint Liquidators under Section 874(1) of that Act.

56. I am satisfied that:

56.1. The Company did not seek the consent of the first mortgagee to the equitable charge being created.

56.2. The Company did not disclose the equitable charge to UTB when the UTB Charge was created either before or after its execution. That Mr Travers admitted to me in his evidence.

56.3. The Company did not disclose to Ms Payne the equitable charge at any time. Mr Travers told me that he could not recall doing so. That was an obfuscatory answer. I am certain he did not and I am not prepared to assume that Mr Olley did either. I believe Ms Payne when she says that she knew nothing of this.

57. Critically I am satisfied that it never occurred to Mr Travers that he had equitable security either by reason of the Offer Letter or the advances made. I do not believe him when he said he discussed the equitable charge at his first meeting with his solicitor, Mr Turner. That was, I regret to say, but find, untrue. Why – because:

57.1. Mr Travers never mentioned that discussion in his Witness Statement.

57.2. There is not one single document produced which refers to the equitable charge before the Greenham Charge was granted.

57.3. I have been told by Mr Shaw and accept that there is nothing on the solicitors' files which refers to an equitable charge.

57.4. There is nothing in the Santander papers which refers to an equitable charge.

57.5. There is nothing in the UTB papers which refers to an equitable charge.

58. A close reading of paragraph 33 of Mr Travers' Witness Statement suggests that the question of whether an equitable charge was enforceable was only raised by Mr Travers' "current solicitors", not by those solicitors instructed at the material time. It follows that I reject Miss Shekerdemian's submission that Mr Travers did not have the requisite desire to prefer because he did not realise the equitable charge was void – he had that desire because he did not realise an equitable charge existed. It never occurred to him or his solicitors at the time otherwise it would have been mentioned and the question of the registration of an equitable charge would have been raised in all probability in conjunction with UTB so that the Company could be a party to the Deed of Priority discussed at that time with Santander and UTB.

59. Even when the question of registering the Greenham Charge came to the fore after the sale of the first two houses, Mr Travers did not tell Ms Payne. He told the Court that he held this information back from her because he did not want to fall out over the repayment of the Steed loan. He told me that this was not a deliberate omission on his part but how could it not be? Indeed in an email sent by Mr Travers to Ms Payne on 29 August 2013, dictated it would appear two days previously, he confirmed the Steed loan was in the repayment schedule but "until 196 is sold" he did not know whether funds would be available. If, as Mr Travers well knew, there would be no monies to be distributed as he was pressing the solicitors to register the Greenham Charge, why did he not just raise the "waterfall" arrangement. He did not because he

knew Ms Payne would never have agreed to it. I therefore find she never agreed to subordinate her claims and that in the circumstances the Company was certainly insolvent after the sale of the second house in late August 2013.

60. I would add that the keeping of Ms Payne in the dark about the development and its financing was a clear breach of clause 5.1 of the Shareholders' Agreement between Mr Travers and Ms Payne. The Reserved Matters linked to clause 5.1 which required Ms Payne's written consent included, amongst other matters, any non-bank borrowing, any transactions with connected parties and any creation of a mortgage, charge or encumbrance. The history of this unfortunate case shows numerous (and I believe deliberate) breaches on Mr Travers' part. This supports the clear view I had of him as a witness as set out in paragraph 22 above.

61. I am sure Greenham initially wanted to take security but that wish was overtaken, in my judgment, by the introduction of the UTB monies. At that stage any such wish to put in place a legal charge was placed very firmly on the backburner. This was a deliberate decision on the part of the Company acting by Mr Travers. He knew that by seeking to advance the prospect of a third charge it might (I say might, not would) put the UTB funding in jeopardy. It was only after at or around the time of the sale of 198 Fishpool Street and the redeeming of Santander's first charge that the possibility of Greenham securing a charge was raised. I reject the Respondents' contention that the relevant time to agree the charge was back in August 2012. I do not regard the legal charge as a "tidying up" exercise. If Mr Travers had approached Ms Payne to secure her consent, as he should have done, to the granting of a legal charge at that stage she would have undoubtedly refused given that the Company at that time was insolvent. Testing that view, if a petition had been presented then, the Greenham Charge would not have been given, the equitable charge would have fallen away and the promise to give a legal charge was just that, a promise which could never be fulfilled.

62. Insofar as I have not determined any other material facts which may need to be addressed I am not glossing over them but will refer to them if I have to in reaching my conclusions to which I now turn.

Was Greenham preferred by the legal charge made on 11 September 2013?

63. I have taken on board all the arguments made by Miss Shekerdemian, innovative or otherwise, but I am in no doubt that there was a preference here and that all the requirements of section 239 are met.

63.1. Greenham was an unsecured creditor of the Company – see section 239(4)(a).

63.2. The charge had the effect of putting Greenham into a position which in the event of the Company going into insolvent liquidation would be better than it would have been if the charge had not been given – see section 239(4)(b).

63.3. The charge was given within 2 years of the date of liquidation, Greenham being a connected party – see section 240(1)(a).

63.4. The Company was clearly unable to pay its debts as they fell due at that time – see section 240(2)(a).

64. I am also in no doubt, on the facts of this case that the Company positively wished to improve Greenham's position. That desire materially influenced the decision to give the charge. The Company was desperate to do so, ignoring all other creditors. Given that I have found Ms Payne, as a principal creditor, did not and would not have given her consent, the runaway train of desire was not one which could be stopped in its tracks. As to the relevant time, I have already indicated that I am not convinced that the desire to grant the charge emanated from the Offer Letter of August 2012. As it was put in *Stealth* (see ante) at paragraph 60 and 61:

> "60. Most preferences involve the payment of some debts in preference to others. All debts stem from an enforceable obligation to make the payment. If the decision to incur the debt, rather than the later decision to pay it, was the relevant time at which the Company's desire was to be judged, the payment of debts would rarely constitute a preference under section 239.
>
> 61. It might be argued that there is a distinction between the payment of debts on the one hand and other obligations, such as an obligation to grant a security, on the other. I do not see why in principle that should be so. Even if there had been an enforceable obligation incurred in October 2007 to grant a charge, there would in ordinary circumstances after a delay of 12 or so months be a further decision to comply with the obligation, just as in the case of a debt there would be a further decision to comply with the obligation to pay the debt. Precisely the same considerations would apply in the former case as Lloyd J said would apply in the latter:
>
> > "It was necessary for the board to review at the time whether to honour that obligation. If the company had known that the company was insolvent or would be made insolvent by honouring that obligation, it could not have made the payment." "

Following this, the relevant time was September 2013 and the claim to preference is made out as the Company was clearly insolvent at that time.

65. However, when it comes to the consequence of avoiding the Greenham Charge I am not persuaded that the full amount of £787,830.59 should be repaid by Greenham. If one goes into Dr Who's time machine back to September 2013 the Company was faced with an unchallenged secured claim by UTB under its all monies charge. It had no option but to pay it. This

totalled, by reason of the Priority Payment, £465,492. The Company had no choice. The fact the payment was channelled through Greenham does not in my judgment, enhance the value of the preference claim against Greenham. UTB had security over the Company's asset. The Company had to pay it and chose to remit it through Greenham which passed it to UTB. Had it not done so the sale of the last remaining house could not have been completed. It follows that I order Greenham to pay the sum of £577,830.59 with interest on that sum from 13 November 2013 to date.

Were Mr Travers and/or Oliver preferred?

66. Both Mr Travers and his son Oliver were third parties who had the benefit of the Company's funds to the value of £210,000 insofar as these were remitted (as I found they had to be) to UTB to discharge its all monies charge granted to it by the Company. They both clearly fall within the Joint Liquidators' sights under section 241(2) of the Act and in addition, so far as Mr Travers is concerned, under section 241(2)(A).

67. Dealing first with Oliver, I am satisfied on the facts of this case he took the benefit of the payment of £210,000 in good faith and for value – see section 241(2)(b). He was not a creditor of the Company and not a party to the transaction so the exception under sub-section (2)(A) does not apply. It was argued that being an innocent party was not enough citing, as Mr Shaw did, *re Stealth* (ante) in support. That case is distinguishable as there the innocent recipient of the payment was a creditor of the relevant company. Here Oliver had no connection with the Company. In good faith he offered a charge over his own property at his father's request to support the lending by UTB. That lending included an advance on the Saracens Head development where on the evidence Oliver was purely a nominee for his father. Oliver's evidence in this matter was not challenged – I find that he had no involvement and as such he fulfils the criteria under Section 241(2)(b) and I therefore make no order against him, whatever my findings against Mr Travers may be, as I set out at paragraph 68 below.

68. That view cannot be said for Mr Travers. He clearly was involved with all the transactions. He took a direct benefit from the payment to UTB in removing a liability he had in respect of a development of his, namely Saracens Head. Mr Travers knew the financial circumstances of the Company – whether he, as was said, was one who had "deliberately engineered" that payment was neither here nor there. He cannot say he took the money in good faith – he knew the payment was being made and that it would relieve him of a liability which he would otherwise have to fund personally but chose, for whatever reason, not to do so. However, notwithstanding all this, having found the Company could not have the requisite desire to pay Greenham the £210,000, I cannot depart from that view if the money eventually found its way to benefit Mr Travers. He may have wanted that outcome but he could not influence it. The test under section 239(5) is not made out and fortunately for him Mr Travers has discharged the burden under section 239(6) in my view.

69. I also have considered whether Mr Travers is liable under Section 241(2) for the balance of £577,830.09. I find, for the sake of completeness, he is. Section 241(2) requires as a pre-requisite the benefit of the preference to Greenham passing to Mr Travers. The email from Martin Olley of 13 November 2013 confirms that payment was made. This was pointed out by Mr Smith in his witness statement at paragraph 57 which was not challenged nor addressed by Mr Travers in his witness statement. Section 241 (2A) is engaged and that further sum is due.

Was Mr Travers' conduct misfeasant?

70. Given all the circumstances of this case and the facts I have found, in my view he was in breach of his fiduciary duties to the Company in the following ways:

70.1. He allowed the Company to provide security to UTB for the benefit of a connected third party without taking any corresponding security of its own to protect its position.

70.2. He distributed Company funds to a connected party to the disbenefit of the general body of creditors.

70.3. He sought and did put in place a legal charge in favour of a connected party, over the Company's property when he knew the Company was insolvent.

70.4. He failed to disclose to the other member of the Company the Company's true financial position with regard to the security it had given.

70.5. In taking the steps referred to above he had a clear conflict of interest and was in breach of section 175 of the Companies Act 2006.

70.6. I have found he could not prevent in November 2013 the payment of £465,492 to UTB but he took no steps to pay £210,000 of that sum back to the Company which represented a personal monetary benefit to him in respect of a third party development in which the Company had no interest.

70.7. As I have referred to above it was argued by Miss Shekerdemian that the test I had to adopt was subjective. The Joint Liquidators have to prove Mr Travers neither considered what was in the best interests of the Company nor honestly believed that his action was in its best interest. In her Skeleton Argument she referred to *re Regent Crest plc v Cohen [2001] 2 BCLC 80 at paragraph 91*:

> "The duty imposed on directors to act bona fide in the interests of the company is a subjective one (see Palmers Company Law paragraph 8.508). 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 directors' state

of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test."

71. However, that passage has to be looked at in the context of the comments made by John Randall QC in *HLC Environment* (ante) to which I have previously referred. At paragraph 92 he said when referring to the comments made by Mr Justice Jonathan Parker in Regent Crest plc above the following:

"92. However, this general principle of subjectivity is subject to three qualifications of potential relevance in this case:

(a) Where the duty extends to consideration of the interests of creditors, their interest must be considered as "paramount" when taking into account in the directors' exercise of discretion (per Mr Leslie Kosmin QC in the Colin Gwyer case supra at [74]). Although I note the contrary view expressed by Owen J in the Supreme Court of Western Australia that although "the directors must "take into account" the interests of creditors it does not necessarily follow from this that the interests of creditors are determinative" (Bell Group Ltd v Westpac Banking Corporation [2008] WASC 239 at [4438]–[4439] applying the judgment of Mason J in Walker v Wimborne [1976] HCA 7, 137 CLR1), so far as English law is concerned I respectfully agree with Mr Kosmin QC loc sit that his use of "paramount" was consistent with the judgment of Nourse LJ in Brady v Brady [1988] BCLC 20 (CA) at 40h-i, where he observed that "where the company is insolvent, or even doubtfully solvent, the interest of the company are in reality the interests of existing creditors alone". I also note that this passage from Mr Kosmin

QC's judgment was cited with apparent approval by Norris J in Roberts v Frohlich [2011] EWHC 257 (Ch), 2011 2 BLC 625 at [85];

(b) As Miss Leahy submitted, the subjective test only applies where there is evidence of actual consideration of the best interests of the company. Where there is no such evidence, the proper test is objective, namely whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company (Charterbridge Corpn Limited v Lloyds Bank Ltd [1970] Ch 62 at 74E-F obiter per Pennycuick J; Extrasure Travel Insurances Ltd v Scattergood [2003] 1 BCLC 598 at [138] per Mr Jonathan Crow"

72. Here there is no compelling evidence that Mr Travers gave any thought as to what was in the best interests of the Company but even if he did, which in my judgment was probably no earlier than August 2013 (see the self-serving email of 30 August 2013 at bundle 1, page 177) by this stage he had to recognise the interests of creditors as a class and in not doing so this was a breach of Section 172 of the Companies Act 2006 – see *GHLM Trading Limited v Maroo [2012]qa EWHC 61 Ch.* Plainly on any view at that time the Company was insolvent. Objectively no director acting reasonably would have done what he did, namely press hard for security to be given to a connected creditor. His conduct was, in my judgment, plainly a breach of fiduciary duty culminating in the Company paying £787,830.59 to Greenham. He has to pay the full amount because whereas he escaped the preference claim, his conduct put the Company into the position where it had to pay the additional £210,000 as well which assisted him – see my observations under paragraph 68 above. He cannot avoid that liability. Insofar as this clearly overlaps with the payments to be made by Greenham, how those parties deal and meet that liability is a matter for them.

73. I should also deal with whether there should be any relief from liability under Section 1157 of the Companies Act 2006. This was touched upon in Miss Shekerdemian's Skeleton Argument although (I am sure not borne out of over confidence on her part) not mentioned to me in oral submission. I am not, however, prepared to relieve Mr Travers from liability as I do not believe he acted reasonably and honestly. That relief is discretionary. The burden is on Mr Travers and he has not discharged it. On the facts I have found in this case he should not be reasonably excused which to my mind would be counter intuitive.

Should the Company be entitled to an indemnity

74. Although one could perceive this claim as a belt and braces approach by the Joint Liquidators insofar as it trammels the earlier claims, it is, in my judgment sustainable. Put simply the Company paid a liability of a third party, namely £210,000 to a secured creditor. The Company discharged an indebtedness owed by Mr Travers and Oliver to UTB. In doing so the Company stands in UTB's shoes. This Court has no information as to what other security was held by UTB. It is not for me to speculate. That may be a matter for further action if payment of the £210,000 is not made. I reject the argument that it was not the Company's money which discharged a liability of Mr Travers' and Oliver's – it plainly was and in the circumstances the Company is entitled to the indemnity.

75. I shall hand this judgment down when convenient – can I ask the parties to liaise and agree a form of order for consideration at that time when the matter of costs can be considered.