Neutral Citation Number: [2021] EWHC 3209 (Ch)

IN THE HIGH COURT OF JUSTICE **CASE NO: CR-2017-006695**

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (CHD)

IN THE MATTER OF DORMCO SICA LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE INSOVENCY ACT 1986 **Remote Hearing**

Date: 01/12/2021

Before :

INSOLVENCY AND COMPANIES COURT JUDGE JONES

- -

BETWEEN:

(1) DORMCO SICA (IN LIQUIDATION)

(2) RICHARD HOWARTH TOONE

(3) ROBERT NEIL STARKINS

(4) ADRIAN PAUL DANTE

(IN THEIR CAPACITY AS JOINT LIQUIDATORS OF DORMCO SICA LIMITED (IN LIQUIDATION))

Applicants

-and-

S B L CARSTON LIMITED

Respondent

-and-

(1) KENNETH MUNN

(2) RUTH MUNN

Part 20 Respondents

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Mr David McIlroy (instructed by Glaisyers Solicitors LLP) for the Respondent
Mr Munn and Mrs Munn in person

Hearing dates: 4, 6-8 and 11-12 October 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....CHJ 1/12/21.....

INSOLVENCY AND COMPANIES COURT JUDGE JONES

I.C.C. Judge Jones:

JUDGMENT SUMMARY

This is one of those cases for which many hoops have to be jumped through before the outcome can be determined. The result is a lengthy judgment showing how I have reached my decision. However, I am conscious that Mr and Mrs Munn are not represented and, bearing in mind the impact this judgment will have upon them, I have decided to provide the following summary of the outcome of the judgment below. I must emphasise, however, that my decision is reached for the reasons stated within the judgment.

In summary:

Mr and Mrs Munn and Mr Rees, ETL, SICA and SBL entered into a series of inter-linking contracts. The overall arrangement was that ETL would buy 40% of CHL's shares when CHL owned two subsidiaries, SICA and SBL and (in essence) SICA had "hived across" its business to SBL whilst retaining its liabilities.

Under the terms of the Share Purchase Agreement, Mr and Mrs Munn and Mr Rees received the initial consideration for their CHL shares from ETL totalling circa £2.3 million between them and the possibility of further consideration of circa £0.575 million to bring the total to circa £2.875 million. This valuation of CHL's shares was attributable to the fact that although SBL now owned SICA's business assets and SICA retained the liabilities, SBL had paid relatively little for the business. In particular it had purchased the Goodwill sold by SICA for only £1.00. The price paid for those CHL shares would have been substantially reduced otherwise. This occurred in the context of SICA having substantial creditors who would not be paid because only £1.00 was received for this intangible asset.

I cannot accept that the Goodwill was only worth £1.00. The defence seeking to justify that consideration by distinguishing between the Goodwill sold and the personal goodwill of or attributable to Mr Munn and Mr Rees has to be rejected. The reasons include the facts that: there is no reference to this distinction in the contemporaneous documents including the 6 February 2015 contracts; the accounts record that SICA had purchased goodwill from two businesses in 2013 for over £3 million; and the factual evidence does not support the existence of personal goodwill either in terms of ownership belonging to Mr Munn and Mr Rees or in terms which would produce the result that the value of the Goodwill sold should be reduced to £1.00 because of the consideration needed to be paid to ensure they remained with the Business.

That being so, the creditors of SICA have lost out because SICA did not receive the money it ought to have received for the purchase of its Goodwill. Instead, Mr and Mrs Munn have benefited by the amount of the consideration paid for their CHL shares which is attributable to the fact that SBL only paid £1.00 for the Goodwill. Whether viewed from the perspective of the contract for the sale of the business (including the Goodwill) between SICA and SBL only or from the perspective of the overall arrangement, the wide discretionary power conferred by ***ss.423-425 of the Insolvency Act 1986*** enables the Court to order Mr and Mrs Munn to pay to SICA the amount of that benefit. It is right to make that order.

Mr Rees has not been sued and is not a party. However, that does not prevent the order to be made. It is not dependent upon any decision being reached concerning the liability of Mr Rees to contribute.

In addition, Mr Munn, as a director of SICA, must bear responsibility because he breached his duties by allowing SICA to enter into a sale at an undervalue. He must provide compensation for that breach, namely the amount SICA ought to have been paid less £1.00.

There is no need to refer here to the breach of warranty claim.

In these circumstances SBL is able to claim a contribution having settled the claim against it by SICA. I am satisfied it is a bona fide settlement.

The judgment follows:

JUDGMENT

I.C.C. Judge Jones:

A) Introduction and the Application to Adjourn

1. On 6 February 2015 a series of agreements ("the Agreements") were entered into to achieve: (i) a "hive across" sale of the accountancy business ("the Business") of Dormco SICA Limited ("SICA") to SBL Carston Ltd ("SBL") for £141,201; and (ii) to enable ETL Holdings (UK) Ltd ("ETL") to become a 40% shareholder of the parent of SICA and SBL, Carston Holdings Ltd ("CHL"). ETL purchased those shares from Mr and Mrs Munn and Mr Rees for a circa £2.3 million initial payment rising, subject to performance, to potentially just under £2.8 million. ETL is ultimately owned by the ETL Group, apparently one of Germany's largest accountancy practices.

2. Mr Munn was a director of SICA, SBL and CHL at the time of and after the Agreements. Mr Rees, who is not a party to this claim, was: (i) a director of CHL before and after the Agreements; (ii) a director of SICA from its incorporation on 13 August 2010 until completion of the Agreements; and (iii) appointed a director of SBL on completion of the Agreements on 6 February 2015, from which date it started trading. He is SBL's managing director and remains a CHL shareholder. Mr and Mrs Munn's CHL shares have been forfeited in circumstances which fall outside the scope of this trial.

3. On 30 October 2017 the Court ordered that SICA should be compulsorily wound up. From the perspective of its joint liquidators the sale of the Business was a transaction at an undervalue designed for the purpose of putting assets beyond the reach of SICA's creditors. In particular, SBL had paid a mere £1.00 for the goodwill purchased ("the Goodwill") when it was worth substantially more than £2 million. That was because, they asserted, the true value of the Business had been included in the share purchase price paid to Mr and Mrs Munn and Mr Rees, an initial consideration of circa £2.3 million, potentially increasing to circa £2.8 million. In 2019 the liquidators started proceedings against SBL relying on ***section 423 of the Insolvency Act 1986*** ("***s.423***"). That required them to prove that its purchase of the Goodwill was for a consideration significantly less than its value and for the purpose ("the Prohibited Purpose") of placing that asset and value beyond the reach of a person who is making, or may at some time make, a claim against it or for the purpose of otherwise

prejudicing the interests of such a person in relation to the claim which they are making or may make.

4. The claim was defended by SBL but without prejudice to their defence on 3 December 2019 they brought a Part 20 claim for an indemnity or contribution from Mr and Mrs Munn, not Mr Rees. SBL relies on the ***Civil Liability (Contribution) Act 1978*** ("***the 1978 Act***") by asserting that Mr and/or Mrs Munn are responsible for the same damage as SICA alleged against SBL. That liability arose under ***s.423*** and/or because Mr Munn breached his fiduciary duty as a director of SICA by causing it to enter into a sale of the Business ("the Asset Sale Agreement") at an undervalue and for a Prohibited Purpose. In the further alternative, SBL claims Mr and Mrs Munn should provide an indemnity or contribution under ***the 1978 Act*** because they breached various warranties provided by them to SBL in the Asset Sale Agreement. In summary, four warranties were breached by the failure to disclose that a connected company, Dormco Candco Limited ("Candco"), was still owed a liability of £1.8 million at the time of the Agreements. This was the consideration for the goodwill it had transferred to SICA in 2013. Further or alternatively breach resulted from the non-disclosure of facts which gave rise to the potential for a **s.423** claim.

5. This is not the only litigation resulting from the Agreements. On 23 April 2021 ETL obtained summary judgment for an assessment of damages against Mr and Mrs Munn in a claim alleging fraudulent misrepresentation concerning the CHL Share Purchase Agreement and/or breaches of their warranties. The headline descriptions of the breach of warranty claims addressed in the judgment are: breach of warranty in failing to disclose a debt owed by CHL to Candco; breach of warranty in failing to disclose that CHL had declared and paid an unlawful dividend; breach of warranty in failing to disclose the fact of investigations by HMRC; and breach of warranty arising from the failure to disclose that the 2014 Dividend could give rise to a dispute with HMRC. The assessment was listed over two days starting 3 November 2021.

6. On 24 September 2021 SBL accepted SICA's Part 36 offer made on 27 July 2021 whereby it would pay £2,650,000 in settlement of SICA's claim. That left the Part 20 claim by SBL against Mr and Mrs Munn for this trial. On 29 September 2021 SBL issued an application to adjourn the trial and for it to be heard instead by the Chancery Master determining the ETL assessment of damages. Mr and Mrs Munn agreed to this course of action. The application could not be listed before the first day of this trial, 5 October 2021. In fact it was not pursued. At the trial Mr McIlroy, counsel for SBL, acknowledged during his opening that an adjournment to the Master would be inappropriate even though it was an agreed course of action. He proposed there should instead be case management to ascertain whether this trial could continue or would need to be adjourned in the context of the late settlement.

7. I considered that to be the correct approach. Adjournment to the Master hearing the assessment of damages in ETL's case would have been inappropriate. In particular because the matters decided on summary judgment, in a case with a different claimant and to which SBL and SICA were not a party, whilst arising within a common factual background, did not address the issues raised by SBL's Part 20 claim. In addition, the Court had provided the resources to hear this trial and it would be contrary to the overriding objective (including consideration of the interests of other litigants and of the use of those resources) for this trial to be adjourned presuming it was otherwise fair and just for it to continue; a matter to be decided within case management. Mr

Munn's argument that the Master who determined the application for summary judgment should hear the matter because he was familiar with the background did not alter that conclusion. Oral judgment was delivered finding against that proposition but it is self-evident that this was not sufficient cause to justify an adjournment.

8. It is to be noted that the common factual background could lead to different findings of fact between the two cases. However, this trial must be decided on the evidence before the Court in these proceedings. There has been no submission on behalf of SBL to the effect that any estoppel or abuse of process results in Mr and Mrs Munn being bound by any of the findings within the ETL judgment (see the principles explained in ***Shierson v Rastogi (A Bankrupt)*** [2007] EWHC 1266 (Ch), [2007] B.P.I.R. 891, in particular at [38]).

9. There was discussion with Mr McIlroy during the course of this issue of adjournment as to whether the compensation claimed in these proceedings would effectively be part of the compensation ETL would claim on the assessment. If so, whether these proceedings were required by SBL. Mr McIlroy appreciated that whilst the two proceedings dealt with separate matters between different claimants, the outcome of each might affect the quantum to be sought in the other. However, in the context of this being an issue which was not clear cut, SBL wanted to pursue and not to discontinue (even if subject to costs arguments) its Part 20 claim. It may be noted that at that stage of the trial there was no indication that SBL might not pay the settlement sum it had agreed to pay.

10. Case management followed the decision not to adjourn and judgment was delivered setting out the conclusions. They need not be repeated here but essentially provided time and further information concerning the settlement to enable Mr and Mrs Munn to prepare for the trial to start as a remote hearing. It was clear that it would be fair and just for this trial to proceed with those various directions. The trial started on Wednesday 6 October. On Monday 11 October, the fifth day, Mr McIlroy informed the Court on instructions that SBL had very recently been placed into administration. SBL would not be able to fulfil the settlement in full. The administrators were now providing SBL's instructions and had decided to continue this litigation.

B) The Part 20 Claim and Defence

11. SBL having settled the claim brought by SICA relies upon ***ss.1(1) and 1(4) of the 1978 Act***. They provide:

> *1. Entitlement to contribution.*
>
> *(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).*
>
> *(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.*
>
> And

Subsection (6) provides that *"References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage …"*;

Section 6 interprets the phrase "liability in respect of any damage" as follows:

> *"A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise)".* (my underlining for emphasis)

In addition, ***Section 2*** addresses: *Assessment of contribution.*

(1) … in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.

(2) … the court shall have power in any such proceedings to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

(3) … the person from whom the contribution is sought shall not by virtue of any contribution awarded under section 1 above be required to pay in respect of the damage a greater amount than the amount of those damages as so limited or reduced.

12. SBL's Points of Claim contain many matters not pursued at trial. The following sets out SBL's claim as presented in its statement of case and through the submissions of Mr McIlroy using headings which will be referred to within the decision below:

a) Application of the 1978 Act

12.1 As a matter of law based upon Court of Appeal authority referring to obiter dicta to the contrary from Lord Stein, ***the 1978 Act*** applies to ***s.423*** claims even though the relief is restitutionary.

b) Has SICA suffered damage for which SBL is liable?

12.2 SBL's settlement of the "damages" claim against it means it is to be assumed pursuant to ***s.1(4) of the 1978 Act*** that the factual bases of the claim alleged by SICA could be established against SBL, the settlement having been entered into in good faith in circumstances explained within a third witness statement of Mr Rees. That factual basis can be summarised as:

i) The Asset Sale Agreement requiring only £1.00 to be paid for the Goodwill was a transaction with another company for a consideration the value of which was significantly less than the value of the consideration provided by SICA.

ii) The transaction was entered into for the Prohibited Purpose.

iii) As a result SICA should be compensated by SBL because it did not receive consideration for the asset transferred of the same or not significantly less than it was worth.

c) Are Mr and/or Mrs Munn liable to SICA for the same damage?

12.3 Those same facts can be established on the balance of probability against Mr and Mrs Munn in the context of the "linked" Agreements which Mr Munn intended and which in any event resulted in them obtaining a higher consideration for the sale of their shares because of the value SBL gained by purchasing the Goodwill for £1.00. In support of that case SBL can rely upon a history of Mr Munn's failing to disclose full facts and matters and leaving companies insolvent and HMRC in particular unpaid. Their liability for the same damage as claimed against SBL arises from the claims summarised in paragraph 4 above. In particular:

a) The Court should exercise its discretion under ***s.243*** to grant relief which will make them liable for the same damage as SBL.

b) Mr Munn's breach of duty results from permitting SICA to enter into a transaction at an undervalue and for a Prohibited Purpose. The damages will be the same and the Court should not relieve Mr Munn from liability as a director for breach of duty.

c) Damages to be awarded for breach of warranty will be the same damage, albeit limited for Mrs Munn to £141,201 in accordance with clause 2.2 of the Asset Sale Agreement.

d) Relief

12.4 Compensation under ***the 1978 Act*** should require Mr and Mrs Munn to pay the sum SBL has agreed to pay by settlement (including costs) or such other amount as the Court thinks fit. It is just and equitable for a contribution to be ordered and there should be no exclusion of liability under ***the 1978 Act***.

13. Mr Munn's "Points of Defence" consists in large part of general traverses denying the claims and allegations made. However, this statement of case also challenges the concept that he is to be viewed as the designer of the structure of the Agreements. He points to the roles of Mr Rees, as a co-director of SICA and co-vendor of CHL shares, and of Mrs Brassington, then a director of ETL, and to the fact that lawyers retained by ETL were responsible for the drafting. Their roles also meant, he alleges, that SBL and ETL were fully aware of the facts and matters now relied upon to allege breaches of warranty.

14. Mr Munn in his statement of case disputes the relevance of many of the matters pleaded by SBL but, as to the ***s.423*** claim, asserts that it was ETL through Mrs Brassington who decided, virtually at the last minute, that the consideration for the Goodwill should be £1.00. His case is that the Sale and Share Purchase Agreements were entered into in good faith and both considered to be at market value by all parties. There was no purpose to place assets beyond the reach of creditors as alleged, no Prohibited Purpose.

15. It is also pleaded by him that:

> *"33. The value of SICA's intangible assets acquired by ETL rested with the individuals working in the firm and the directors. That value was reflected in the price paid for the shares in [CHL] and the related contracts of employment for all the staff. It is contended that there was no 'enterprise value' residing in SICA.*
> *In a scenario, where all the personnel working for SICA left and worked for another company, the enterprise value would be negligible. It is contended therefore that there was no transaction at undervalue.*
>
> *34. The Applicant's claim seems to be misconceived. It assumes that the journal entries for goodwill in the SICA balance sheets had a value capable of being realised. All the parties involved in this matter are experts in valuing goodwill in accountancy firms. It is highly unlikely any third-party expert could provide any evidence that the enterprise value of SICA's good will was more than £1."*

16. If that is correct, the first limb of ***s.423***, the requirement for a transaction to be at an undervalue, cannot be established. In the alternative, there was no Prohibited Purpose. His case is that there was always the intention to pay SICA's creditors after the sale of its Business and the belief SICA would and could pay them. Mr Munn does not accept that SICA was insolvent as at 6 February 2015 or that he considered that to be the case at that time. The purpose of the Agreements was to hive across the assets of the Business in the context of a share sale. The Goodwill was properly valued once personal goodwill belonging or attributable to himself and Mr Rees was excluded. The personal goodwill reflected their importance to the Business and the need for ETL to ensure that they tied themselves to SBL's future in particular by entering into employment contracts and agreeing non-competition covenants and the like.

17. Mrs Munn's Points of Defence also contains many general traverses. It starts with the general denial of any knowledge of the matters alleged and with the complaint that information has not been provided. She also asserts that the Asset Sale and Share Purchase Agreements were entered into without her receiving independent legal advice and in circumstances of speed which made her feel coerced into entering into legal obligations in respect of which she had no knowledge or understanding. Mrs Munn too relies upon the roles of Mr Rees and Mrs Brassington and upon their knowledge of the Agreements, their purpose and the surrounding facts.

18. Mrs Munn's evidence is equally straight forward. She, as a joint owner with her husband, sold her shares and received the agreed price for them. She had no knowledge of the details of the Agreements and was not concerned with the negotiation or agreement of the sale of the Business. She had no idea whether SICA was solvent or would become insolvent as a result of the sale. It would not be fair or just to seek a contribution from her.

19. Mrs Munn made clear when giving evidence that she also objects to and relies in support of her defence upon the difference in approach adopted by SBL between herself and Mr Rees, who remains its managing director. She backed this up with rigorous and effective cross-examination of Mr Rees along the following lines: SBL has chosen not to seek a contribution or indemnity from him even though he too similarly received payment for the purchase of his shares. If SBL accepts that he has

no responsibility for repayment, whether by contribution or indemnity or otherwise, it must follow that Mrs Munn should be treated in the same way. Indeed, she is in a stronger position for that conclusion to apply. Her knowledge and involvement will have been considerably less than his, a director of SICA and a director to be of SBL.

20. Mr Rees during that cross-examination could only observe that she was joined because she had held the shares jointly with Mr Munn. He sought from time to time to intimate that she might have more knowledge than he knew because she was Mr Munn's wife but that is no part of SBL's case and was no more than speculation in the face of demanding cross-examination. No reason for Mr Rees's apparent release from any liability has been provided.

C) Witnesses

C1) Generally

21. Both sides have referred me to authorities providing guidance over the weight to be given to contemporaneous documentation and the potential difficulties arising from oral evidence reliant upon memory. I will bear this in mind including the guidance of Floyd L.J. in **Martin v Kogan** [2019] EWCA Civ 1645, [2020] FSR 3, at [88].

22. I have been asked by both sides to consider treating witnesses of fact as unreliable and in effect to apply bad character directions. Albeit for different reasons, I have decided that it is appropriate to treat all witness evidence of fact with caution and to test the evidence carefully against the facts which can be established by contemporaneous evidence. The exception to this approach is the evidence of Mrs Munn whose character has not been placed in issue by SBL. Overall, however, the outcome has been that I have not found it necessary to rely upon that caution as a reason for rejecting any evidence. The facts flow to the surface in any event.

C2) SBL's Witnesses

23. The first witness called by SBL was Mrs Brassington. She is now a director of SBL and at all material times a director of ETL, now its Managing Director. She is a qualified accountant who joined the Association of Chartered Certified Accountants in 2008 and is now a Fellow. Although I have criticisms in particular concerning her evidence in chief, I wish to make clear that I am satisfied that she tried to give her evidence at trial clearly and concisely and with the purpose of assisting the Court. Nevertheless I remain critical of and have not accepted parts of her evidence, as explained during this judgment.

24. I should also add that it is clear from her evidence during cross-examination that she has a strong, antagonistic approach towards Mr Munn having formed the view that he has been dishonest in his dealings with ETL over the sale of his shares within the context of the Agreements as a whole. Whether she is right or not, a matter for the Court to decide insofar as it is necessary to do so, it raises the apparent potential for conscious or unconscious bias in her evidence. I have borne that in mind when considering her evidence.

25. The criticism of the content of her witness statement falls under three heads, although I would first observe that it has been drafted under the regime of the new Practice Direction and it may be that this has caused difficulty. In addition, that it is to be remembered that she was acting for ETL not SBL at the relevant times and that the statement is drafted for the primary purpose of defending SICA's claim against SBL.

26. The first head is that too often there are assertions without supporting factual evidence being referred to or identified. For example, the mere assertion that Mr Munn manipulated EBITDA figures. This is one example of many within a statement which appears too quick to raise issues alleging misconduct by Mr Munn in a wide variety of circumstances whether they are relevant or not. Second, when addressing the Agreements she avoids explaining why £1.00 was agreed for the Goodwill. Indeed there is a general failure to address the process of the negotiations and the role and investigations of ETL during its due diligence. Her evidence seeks to downplay ETL's involvement including her role. Those matters are plainly of potential relevance. I will address this further to the extent necessary within the findings of fact. Third, her evidence concerning the financial picture of SICA, namely that her view from the financial information received was that SICA was and would remain solvent, fails to address the substance of the financial information available to her during the due diligence process, even purely from the filed accounts. That remained the position during the trial.

27. My assessment of SBL's second witness, Mr Rees, is similar. His witness statement can be criticised for trying to hide his involvement in and extent of his knowledge of the Agreements. For example, he refers in outline terms to meetings he attended with ETL (including Mrs Brassington) but then states he was not involved in the Agreements. As another example, he too omits any reference to his reaction to and assessment of the £1.00 valuation for the Goodwill. In addition, the failure to explain why he has not been asked to contribute towards SBL's liability has to be noted.

28. It is also to be noted that whilst his witness statement spends some time asserting that he had no knowledge of specified financial dealings within CLH, in particular concerning goodwill until he saw its financial statements, subject to one matter and two exceptions he makes no reference to his knowledge of the financial position of SICA. The exceptions are that he was not involved with VAT returns and that he relied upon the accounts produced by Mr Munn when giving his warranties under the Share Purchase Agreement. The reference to accounts produced by Mr Munn, however, is at best opaque and potentially misleading. I assume he intends to refer to SICA's accounts both filed and management and to the underlying books and records to which he had access as a director. In any event, he does not assert that he was unaware of SICA's financial position whilst he was a director.

29. The "one matter" referred to concerns his asserted denial that he was aware of employees being transferred to SC Personnel Limited ("SC") until HMRC became involved. I assume this intends to refer to employees of SICA (although it is not expressly stated). Bearing in mind he was a director of SICA and of SC, that assertion requires explanation if it needs to be accepted. In fact it is irrelevant except to the extent that it supports my approach of caution for his evidence. Whilst the first and third of the observations made in respect of Mrs Brassington at paragraph 25 above probably also apply to his evidence as a whole, there is plainly cause from the examples addressed for the caution I have previously referred to.

30. The third witness was SBL's expert witness, Mr Stringfellow. There has been criticism of his lack of experience as an expert assisting the Court and as a professional able to provide the valuation evidence he has. I have not reached any adverse conclusion and have not found that criticism of assistance. It is the content of his report and the bases for his opinion which matter.

31. Mr Stringfellow agreed a joint valuation of the Goodwill with SICA's expert, Mr Bellamy, in a joint report placed before the Court. Mr and Mrs Munn have not relied upon expert evidence. The joint report values the Goodwill to be paid by a hypothetical purchaser as at 6 February 2015 at £2,755,000. This was calculated from a multiplicand of £3.8 million, being the calculated maintainable amount of SICA's Annual Gross Recurring Fees, and a multiplier of 0.725 based upon comparables used for the valuation of the goodwill of substantially similar businesses. Mr Munn's challenges to this valuation will be addressed within the decision below.

32. SBL has also relied upon witness statements of Mr Starkins (joint SICA liquidator) and Mr Brown (former joint SICA liquidator and liquidator of Candco) exchanged and filed on behalf of SICA. I have read them and borne in mind that their evidence has not been tested. I have only referred to that evidence to the extent that I consider it necessary and appropriate to do so and neither featured to any significant extent during the trial.

C3) The Evidence of Mr and Mrs Munn

33. Mr Munn's evidence needs to be treated with caution because of a variety of factors including criticisms that can be made of questionable evidence in other proceedings. For example, the passages referred to at trial to be found in his witness statement in the disqualification proceedings of Mr Rees. There is also the factor of contradictory evidence. For example, his previous evidence that inter-company debts relevant to the companies in issue in this claim were written off, which he now retracts at least to the extent relevant to this case. I am not going to dwell on this because it is quite obvious that his evidence should be tested with rigour. In doing so, I have effectively given myself a bad character direction. In practice, however, I would have reached the same conclusions that I have without identifying bad character.

34. I also need not dwell on the character and evidence of Mrs Munn. It is clear she has provided her evidence truthfully, as well as forcefully.

D) The Facts

D1) Establishing SICA and the Roles of Mr Munn and Mr Rees

35. The origins of SICA's accountancy business existing at the date of the Agreements can be traced back to Mr Munn's company, Shepherd Hallett Associates Limited. It was formed in the 1980s with a business in Cardiff. Mr Rees joined that company in 1992 as a trainee accountant. He qualified in 1995 and continued to work there. On 30 April 2004 its shares were purchased by CHL and its business transferred to Candco.

Mr Munn was a director of Candco from 1 May 2000 (shortly after its incorporation) until 6 March 2017 and Mr Rees from 8 May 2000 until 31 October 2013. The inter-company position concerning CHL, which was always a non-trading holding company, and Candco is murky and confusing because of purported agreements transferring Candco's goodwill to CHL in 2004 for £1 million and also in 2009 for £469,586. However, that is not a problem for this case because in 2013 CHL transferred the goodwill to Candco for £975,670.

36. SICA was incorporated on 13 August 2010 and was at all material times a wholly owned subsidiary of CHL. In 2012/13 it purchased the business of a London accountancy firm, "Sinclairs". It was called "Sinclairs Carston Ltd" until 31 August 2016. During September/October 2013 Candco's business was transferred to SICA for circa £1.8 million. The precise dates for the purchases are slightly unclear but that makes no difference to this case. The end result was that by the date of the Agreements the Business was carried out from offices in Cardiff and London. Neither side's witness evidence provides a detailed description of SICA and its business as at that date. However, by then the turnover of the two offices was (in the roundest of terms) comparable at circa £2 million each. Inevitably there would have been many staff for this small to medium sized accountancy business and they included managers with fee earning responsibility whose income would include bonuses for their results.

37. The growth in Candco's business before its transfer to SICA and the expansion of the Business from September/October 2013 led to Mr Munn, as he accepted in evidence, reducing the work he carried out for clients and becoming more and more involved in the work required of a managing director. That was his principal role for SICA by the date of the Agreements.

38. Mr Rees was primarily concerned with fee earning work for Candco and then SICA. However, he was also a SICA director and plainly, as a qualified and practising accountant, he will have understood that role and his fiduciary and other duties. Although subsequently disqualified, in the light of his professional training and experience it is to be concluded that he will have fulfilled those functions by ensuring (amongst other matters) that he had a reasonable working knowledge of the financial position of SICA. As mentioned, he does not assert otherwise in his witness statement, even though he is shy about disclosing that knowledge. I am satisfied that this must have been the factual position even though it is clear that Mr Munn was his senior, had (with Mrs Munn) the larger shareholding, exercised overall managerial control and was principally concerned with financial matters. This finding of fact is relevant to SICA's knowledge insofar as the actions of Mr Rees as a director are to be relevant and will be borne in mind accordingly.

39. In reaching that finding I also rely upon the fact that Mr Rees accepted during cross-examination that he attended three meetings on behalf of SICA concerning the proposed purchase of the Business, was copied into purchase documentation and agreed with the structure of the Transaction. As a professional and with his accountancy knowledge and experience, he would not have done so without ensuring he had relevant knowledge. This would inevitably have included financial information available to him as a director from SICA's accounts, books and records, whether within the SAGE computer records or otherwise. This conclusion of fact is also implicit from his statement that he believed SICA was solvent at the time, whatever view is taken of the merits of that opinion.

D2) SICA's Financial Position at the Date of the Agreements

D2i) Introduction

40. There are issues between the parties concerning the accuracy of SICA's financial statements, although not in the expert reports. However, for the purposes of background the differences are not material, as will become apparent from the findings to be drawn from them. I will not dwell on those issues as a result. Details of SICA's business can be identified from the accounts.

41. There is also the feature that the 2014 financial statements and abbreviated accounts will not have been drafted by 5 February 2015. However, the SAGE management accounts and ledgers combined with the abbreviated accounts of SICA for the year ended 31 December 2013 (filed at Companies House on 7 June 2014) and the 2013 financial statements were available to the boards of SICA, SBL and ETL at the time of the Agreements. I will address those 2014 accounts, therefore, from the basis that the main features of their content would have been seen (at least substantially) within the underlying accounting information. I will also bear in mind, as will be explained, that the relevant themes to be drawn from the 2014 financial statements and abbreviated accounts can also be found within those for 2013.

D2ii) 2014 Accounts

42. The abbreviated accounts of SICA for the year ended 31 December 2014, filed at Companies House on 30 September 2015, present a company whose net assets totalled just under £250,000. Its balance sheet solvency principally depended upon the value of its fixed assets (£3,051,102) and stocks (£545,475) and upon its ability to recover debts owed to it (£1,277,325). As with any business, its ability to pay its debts falling due within the year (£1,182,517) would be in part dependent upon recovery from its debtors and in part from profitable trading during the following year. However, from the face of the accounts, the cash flow insolvency test could be viewed with reasonable confidence. Debtors exceeded creditors and the profit to be carried forward into 2015, as recorded in the balance sheet of the abbreviated accounts, stood at £274,380.

43. The very obvious potential problem, however, for future cash flow and current/future balance sheet solvency was the question of SICA's future ability to pay its debts falling due after more than one year (£3,426,179). There would have to be significant improvement in profit to be able to pay those debts, subject to the sale of fixed assets or the raising of sufficient funds secured by them. The fixed assets were principally intangible assets and their current valuation, bearing in mind they are valued in the accounts at cost less depreciation in the accounts, was obviously very important in the context of testing balance sheet solvency. Plainly, it would be necessary for any director considering SICA's financial position and for any potential purchaser to look to the details both of the debts to be paid after more than one year and the value of the fixed assets.

44. The 2014 abbreviated accounts describe the intangible assets valued at £2,955,000 as: *"customer relationship intangible assets … recognised at fair value on the acquisition*

of a business and amortised on a straight-line basis over the expected economic life of the relationship, typically three to ten years". The balance sheet depreciation charged at 1 January 2014 was £746,258 and for the year of £448,600. The original cost for those two dates, therefore, is recorded as £4,149,858.

45. Tracing back to the source of that value, the notes to the SICA abbreviated accounts for the year ended 2012, filed 30 September 2013, record a total book cost as at 1 January and 31 December 2012 of £2,300,000, depreciation of £230,000 and a net intangible value of £2,070,000. This intangible asset is described as: *"Positive purchased goodwill arising on acquisitions [which had been] capitalised, classified as an asset on the Balance Sheet and amortised over its estimated useful life up to a maximum of 10 years ..."*. This refers to the acquisition of the business of "Sinclairs".

46. The value of the goodwill within the abbreviated accounts for the year ended 2013, filed on 7 June 2014, increased to £3,403,600 after depreciation totalling £746,258. This was attributed in the balance sheet to fair value of the "customer relationship" derived from a new acquisition during the accounting year. This was the fair value purchase from Candco of an intangible "customer relationship" asset costing £1,849,858.

47. There are no agreements in writing concerning the Candco purchase and I have not been referred to any agreement in respect of "Sinclairs". Based on the accounts referred to above, which have been approved by SICA's directors, SICA purchased and became the owner of the goodwill transferred to it by "Sinclairs" and Candco.

48. SICA's financial statements for the 2014 year state that they were approved by the Board on 28 September 2015. There are differences between their balance sheet and the filed abbreviated accounts referred to above but the overall conclusions concerning balance sheet and cash flow solvency made in paragraphs 42-43 above are the same. The profit and loss account records a turnover of £3.9 million and a gross profit of £3.85 million. The operating profit was £528,947. The profit after provisions and before taxation was £342,451. The profit for the financial year caused the balance brought forward to move into profit, £219,109.

D2iii) 2013 Accounts

49. The 2013 filed accounts present a similar balance sheet picture to that of 2014 except for significant reductions in debtors (£335,034 as opposed to £1,227,325) and creditors falling due within one year (£691,622 as opposed to £1,182,517). It is plain from these and the filed 2014 balance sheet (i.e. their underlying management accounts) that the directors of SICA and any purchaser of the Business at the time of the Agreements carrying out due diligence will have appreciated the importance of the value of the fixed assets for balance sheet solvency in particular for the payment of the debts falling due after more than one year (over £3 million). In addition, they will have appreciated the need to scrutinise and analyse the accounting records carefully, including the profit and loss management accounts and records.

50. The 2013 profit and loss account within the financial statements, which on their face were approved by the board on 5 June 2014, when compared with those for 2014

draw attention to a significant increase in the later year in both turnover (from £2,546,473 to £3,903,642) and in administrative expenses (£1,577,152 to £3,325,146). This resulted in a reduction in operating profit of near to £500,000. It is plain that these changes during 2014 would have been appreciated by the directors of SICA when considering the management accounts from time to time towards the year end. Also that any purchaser with access to the 2013 accounts and to their and 2014's underlying management accounts and ledgers would have appreciated the need to scrutinise the causes of those changes and the circumstances which gave rise to losses having been carried forward into 2013 of (£930,736). Those investigations would have identified and, therefore, drawn attention to the purchase of Candco's goodwill and to the resulting £1.8 million debt. Candco was named as the vendor and creditor in SICA's goodwill ledger.

D2iv) Knowledge

51. Overall, therefore, from the face of those 2012-2014 accounts/records but subject to the results of due diligence, SICA's directors and any purchaser at the time of the Agreements would have appreciated, as a general proposition, that SICA's existing debtors and its anticipated profit from the following year's trading (2015) would reasonably appear to be able to cover the payment of the liabilities falling due within 2015. It would be apparent that the potential problem to address was the payment of long term liabilities. These would include the £1.8 million debt owed to Candco traceable in SICA's books unless a record of its repayment existed. It did not (a matter to be addressed in further detail later). It would have been obvious to the directors and to a purchaser carrying out basic due diligence that if the intangible assets had significantly lower realisable value than those liabilities, especially if the goodwill/customer relations element was only worth £1.00, it would be difficult to see how payment of those liabilities would occur without a significant capital injection.

52. It has to be concluded, therefore, that this and the other facts mentioned above would have been in the minds of the Directors of SICA at the time of the Agreements. They must have appreciated that if SICA was to be sold (i.e. its shares), the issue of how long term creditors would be paid in the context of anticipated future trading would have been of considerable significance not only to the valuation of its shares but to whether those shares would be marketable. Equally, they would have appreciated that a "hive across" transaction (on its own) would enable a sale of SICA's business at a price which did not have to take account of the creditors left behind. There is no evidence from Mr Munn or Mr Rees to lead to a different conclusion.

53. In this case, of course, the intended purchaser, SBL, had the same parent as SICA. In reality ETL was scrutinising the sale not SBL because it would be investing its money to obtain an indirect 40% interest in SBL through its ownership of shares in CHL. The evidence of SBL establishes that ETL is part of a group of multi-national companies with experience of investing and an expectation for any purchase that usually the initial investment plus interest at the rate borrowed would be returned within six years. It is to be concluded that ETL was a sophisticated investor.

54. SBL's evidence does not give much away concerning ETL and its decision making processes during the Agreements. Mrs Brassington's witness statement seeks to play

down her role concerning ETL's due diligence. Her explanations for this range from: the fact that she was a "conduit" between Mr Munn and those who acted for the ETL Group, Mr Victor Wood and Mr Walter Schmidt; the fact that she took the data provided by Mr Munn "at face value"; and/or the fact that she had limited acquisition knowledge at that stage.

55. However, I do not accept that it is plausible to suggest (if indeed this is what SBL is doing through her evidence) that ETL did not carry out the due diligence reasonably to be expected of an experienced investor and multi-international group. If she was a "conduit", the absence of any evidence from Mr Victor Wood and Mr Walter Schmidt concerning due diligence is noted. Whilst SBL's evidence concentrates upon matters said not to have been disclosed by SICA, there is no evidence that they (i.e. ETL as opposed to SBL through Mr Munn) did not appreciate what appears on the face of SICA's accounts and accounting records as described above. Their evidence is that the financial picture was worse than as disclosed rather than that the information received presented a different picture to the one identified above.

56. Knowledge of the £1.8 million debt owed to Candco is denied by SBL. In my judgment (for reasons explained above and appearing further below) it is inconceivable that ETL would not have known from the accounting information provided to them of the £1.8 million liability. Candco is named within SICA's goodwill ledger as the creditor. Minimal due diligence would have resulted in them identifying the creditor and that the debt had not been repaid. There is no suggestion in the evidence that ETL concluded from the accounts/records that it had been paid.

57. I have reached that conclusion of fact having considered Mrs Brassington's evidence very carefully. She does not address her due diligence in any detail. She refers to discrepancies found in the documentation received from Mr Munn but does not include the £1.8 million within this category. She refers to Mr Brown's evidence in which he identified a "hanging credit" (i.e. unattributed) for goodwill of £1.8 million in SICA's accounts; entry 2306 for 2013/2014. He was not tendered for cross-examination and this part of his evidence was not expressly referred to at the trial. However, the evidence he is presenting is not that the existence of the debt of £1.8 million could not be identified or that it was paid. His point is that its attribution was hidden in the accounts as a result of it being treated as a hanging credit. There is no evidence from Ms Brassington dealing with whether ETL saw entry 2306 in SICA's accounts or with the conclusions Mr Brown drew from it. However, even assuming ETL did, it would still have known that the debt was unpaid and that the goodwill ledger originally identified Candco as the creditor. For completeness it can be noted that she makes no reference to even a suggestion from Mr Munn (or any other source) at the time of the Agreements to the liability having been written off. The conclusion that SBL and ETF were aware of a £1.8 million liability has to be maintained and will be further sustained when the identity of SICA's creditors is addressed within paragraph 60 below).

58. In all the circumstances described above and in the absence of any evidence to the contrary, it is reasonable to conclude that ETL's due diligence (even if basic) would have identified the facts and conclusions set out in the previous paragraphs. This would have included the long-term creditor problem, the source of SICA's goodwill recorded in its balance sheets, the importance of the valuation of the

goodwill/customer relations and the existence of the £1.8 million debt (see in particular paragraphs 43 and 49-57 above).

D2v) Creditors at the Date of the Agreements

59. Mr Munn's evidence is that SICA was at all material times able to pay its liabilities as they fell due. This needs further consideration. The notes to the 2014 financial statements record the creditors:

    a) Falling due within one year (£1,182,517) as: Bank loans (£60,179 – similar to 2013); Trade Creditors (£71,007, as opposed to £27 for 2013); Other loans (£122,997, a new entry); HMRC (circa £400,000, compared with circa £156,000 in 2013); Customer Relations Payable (£470,007, carried forward from 2013); and a small amount of other creditors.

    b) Falling due after more than one year (£3,426,179) as: Group undertakings (£1,199,532); Debenture Loans (£250,000); and other creditors (£1,976,647).

60. It is to be observed from that breakdown of the figures that if the £1.8 million debt to Candco is included, it has to be within the figure for other creditors whose debts fall due after more than one year (a further factor to support the findings above concerning the SICA directors' and ETL's knowledge). The fact that it is becomes apparent from the following sources of evidence:

    a) First, this liability is recorded in the Goodwill ledger of SICA as a sum owed to Candco and no-one has found an entry for its payment. Instead, the "hanging entry" identified by Mr Brown's appears to explain how it came to be within "other creditors" in the accounts.

    b) Second, Mr Munn accepts in these proceedings that the debt has not been repaid and does not seek to assert that it was written off. This is consistent with contemporaneous documentation recording or concerning meetings with HMRC addressing the potential method of payment for Candco's tax liabilities. As to their content, in summary the circa £1.8 million liability of SICA was not in dispute. As appears within a record of a meeting on 13 December 2016, Mr Munn's witness statement in other proceedings on behalf of CHL which assert that *"any and all inter-company balances were in fact written off on or around 1 November 2013"* is incorrect. He now admits there was no write-off, at least to the extent relevant to this case.

    c) Third, the evidence of Mr Starkins is that SICA's liabilities as at 5 February 2015 including the £1.8 million owed to Candco for goodwill totalled circa £4.4 million which is lower than the £4.7m identified in the 2014 accounts. The £1.8 million must be included in that total and this debt be known to ETL at the time of the Agreements.

61. Mr Munn's evidence during this trial concerning the Candco liabilities was that he controlled that company and payment by SICA was not required until it went into liquidation in 2016 and fell out of his control. During examination he raised the

suggestion that the circa £1.8 million value did not in fact accurately reflect the true acquisition price because that value will have included the value of the personal goodwill that did not belong to Candco and was not assigned to SICA. That is plainly a difficult assertion to make in the face of SICA's accounts but its validity will depend upon the decision below concerning that issue.

62. In any event, his evidence at trial was that at the time of the Agreements he believed that sum would be paid when, in due course, it was demanded. That is because he would have been able to inject the required capital into SICA whether personally using the money to be received from the sale of his CHL shares or by refinancing.

63. As to that evidence, I accept as a fact that he controlled Candco before its liquidation, although as a director he would have had to act in the paramount interests of its creditors for any period whilst Candco was or was likely to be insolvent and that would have required recovery of the debts owed to it. It is also a fact that he has not provided SICA with funds to repay the debt owed to Candco. The reason given was that Candco's liabilities increased significantly as a result of HMRC assessments made during its liquidation making payment in full by Candco to its major creditor impossible. The difficulty for that evidence as an explanation for the absence of repayment by SICA is that the £1.8 million liability of SICA to Candco had to be paid whether or not Candco's liability to HMRC increased to a larger amount. These are all problems for his claimed belief to be addressed further when deciding whether there was a Prohibited Purpose.

64. There is also the question of the other Candco liability identified by Mr Starkins when listing SICA's liabilities, the sum of £514,908.17 included in the following list of liabilities as at 5 February 2015:

> HMRC (£144,665) and (£169,033.95 – joint and several with Cathedral Road Management Limited ("CRML")); Candco (£2,314,908.17 consisting of £1,800,000 for the goodwill acquisition plus £514,908.17 on the inter-company account); Dormco SCP Limited (£412,879); SC Personnel Limited (£183,648.07; SBL Professional Services LLP (£99,501.87). As to the £169,033.95 concerning CRML, there is also a Personal Liability Notice recording an offer by SICA and Mr Munn to pay HMRC £205,033.95 for National Insurance Contributions unpaid by CRML dated 5 June 2014. I have not sought to trace the extent to which this liability is included within Mr Starkins's figures but the underlying point is the existence of this liability amongst the other liabilities of SICA at the time of the Agreements. It is not suggested that it has been paid.

65. Candco raised an invoice addressed to SICA and dated 29 February 2014 for management services in the sum of £920,314.45 including VAT. Mr Munn refers to this in the last page of a letter, which I am told was addressed to HMRC. He states that the *"pro-rata charge as at the [2013] year-end was estimated at £541,096"* and was for the provision of staff to SICA from 1 May to 31 December 2013. I make no finding concerning the correctness of that reduction but will proceed on the basis that the total liability of SICA to Candco at the time of Agreements and known to Mr Munn and Mr Rees (or which ought to have been known to him in performance of his duties as a director) was in the region of £2.5 million or slightly less.

66. SBL's case also contends that a significant contingent liability for dilapidations in respect of property demised to SICA should have been included in the accounts and in any calculations concerning insolvency. Mr Munn does not dispute the existence of the claim but contends that he considered it, in effect, to be "a try on". The fact that the landlords would be gutting the property for their own purposes established this. SBL on the other hand refers to contemporaneous legal advice to the effect that the prospects of a successful defence would be in the region of 65%. The evidence before me does not enable a decision upon the merits of such a claim. There is certainly an argument from Mr Munn's evidence and from the legal advice that a note concerning this claim should have appeared in the accounts at least, if not a provision. However, Mr Munn appeared very genuine when he explained his understanding of its merits and I have no cause to reject that evidence of his belief and understanding.

D3) The Negotiations and The Structure

67. There is relatively little evidence before the Court in these proceedings concerning the negotiations resulting in the Agreements. SICA, SBL, Mr and Mrs Munn and Mr Rees were unrepresented. Mrs Munn took no part and had no knowledge about the negotiations or the financial background. Mr Munn led the negotiations with ETL on behalf of SICA and SBL, whilst Mr Rees was also involved (as I have found above) on behalf of SICA. Mr Munn presumably also led the negotiations with ETL concerning the share purchase but Mr Rees would obviously have been involved to the extent, at least, that the price of his CHL shares was in issue even if it was limited to discussions with Mr Munn. I do not accept his evidence that he simply left it to Mr Munn if that is intended to mean that all he did was sign on the dotted line. Far clearer and unequivocal evidence would be required in the context of it being his asset and he being a chartered accountant with business experience to persuade me otherwise bearing in mind my stated views of his evidence generally. As to ETL, it was legally represented and the relevant decisions appear to have been taken by Mr Victor Wood and Mr Walter Schmidt whether with the guidance of Mrs Brassington or by her acting as a "conduit".

68. The structure of the Agreements was proposed by Mr Munn. It can be traced to an email sent on 22 September 2014. The essence of that proposal was accepted and worked upon by ETL and their legal advisers. It is a structure which reflects the fact that best value will be obtained for SBL and the best price for SICA if the Business could be sold without having to include existing liabilities. Subject to Mrs Munn's lack of knowledge, it would have been plain to all involved from the accounting information considered above (see in particular paragraphs 51-52 above) that a purchaser would pay far more if SICA could sell the most valuable parts of its business without the liabilities. The structure proposed this by effecting a hive across not a hive down. That was a purpose of the Asset Sale Agreement.

69. Similarly, all involved (SICA, SBL, ETL, Mr Munn and Mr Rees) will have appreciated bearing in mind their knowledge of the financial position found above and their qualifications and experience the following facts and matters concerning the structure:

a) Whether under a hive across or hive down structure, SICA would have to use the net proceeds of sale (whether received from the new subsidiary as the purchase price or as a distribution) to pay its creditors including the long term creditors and that this would be its main source for payment (excluding capital injection) having sold the Business. The lower the net proceeds, the lower its ability to do so.

b) The important distinction between the two methods of sale was that CHL's value would directly benefit from the value to its new subsidiary of the hived across business having taken into account the purchase price paid to SICA. That would not occur for a hive down when SICA's liabilities would remain relevant for the purposes of its and, therefore, CHL's valuation. A subsidiary which retained the short and long term liabilities that if included in a sale would seriously affect not only the price but marketability (see in particular paragraph 52 above).

c) The hive across benefit to CHL would increase if the consideration to be paid to SICA was less than the value of the Business transferred to SBL whether that was achieved because a purchaser achieved a "good deal" or by manipulation. Whilst a lower price would mean less money for SICA to pay its creditors, the greater would be the benefit for CHL as SBL's parent.

d) The greater CHL's benefit, the more ETL would need to pay as a fair market value for the 40% shareholding being sold by Mr and Mrs Munn and Mr Rees.

70. I find as a fact that it is inconceivable that Mr Munn and Mr Rees (bearing in mind their offices, their roles, their qualifications and accountancy/business experience over the years) would not have analysed the proposed Agreements accordingly and relied upon that analysis when deciding whether to enter into them. There is no evidence from them to establish otherwise.

71. The same conclusion has to be reached in respect of ETL based upon the fact that it is part of a group of multi-national companies with experience of investing, albeit that they would have been concerned from a different perspective. Both sides of the Agreements needed to "number crunch" using such analysis ultimately to reach an agreed valuation of CHL's shares. The fact that the evidence before me does not deal specifically with that analysis and number crunching does not avoid these conclusions. Mrs Brassington's evidence in chief that it made "no material difference to ETL how the structure was arranged" is plainly wrong and I reject that evidence. It was significant whether this was a hive down or a hive across as found above. ETL has provided no evidence to raise doubt over those conclusions.

72. Mrs Brassington during cross-examination accepted Mr Munn's evidence that the price for the Goodwill emanated from ETL. This is sustained by an email from ETL's solicitors sent to Mr Munn on 3 February 2015, having earlier in the afternoon sent the draft Asset Purchase Agreement. It encloses the draft deed of assignment for the Goodwill and other documents. His answer that day was: *"These look fine. £1 for goodwill!"*. The exclamation mark is telling for its implication of good news for the purchase price of the shares. Mrs Brassington responded by asking if he wanted to change the amount. His reply shortly afterwards was: *"Ignore my previous email – book value at 31 12 14 is £2,955,000"*. Mr Munn fully appreciated that implication.

73. It is plain from this, the financial circumstances, findings and conclusions above and from their terms, that the Agreements effected an arrangement to achieve payment of ETL's funds to Mr and Mrs Munn and Mr Rees and not to SICA via SBL. The price to be paid for CHL's shares left no room for any payment to SICA for the Goodwill above a nominal sum. The cart was placed before the horse, in the sense that CHL's share price was calculated first and the price for the Goodwill followed. That is wholly inconsistent with the fact that the value of the share price should have depended upon the value of SBL which should have depended upon the market value of and paid for the Business to SICA.

74. This finding is sustained by the absence of any contrary witness statement evidence dealing with the negotiations between the parties concerning the consideration under either of those Agreements. It is further sustained by Mrs Brassington's acceptance during cross-examination that £1.00 was proposed because of the consideration ETL was paying for the shares. She added that it did not matter whether £1.00 was an undervalue or not because SICA was represented and thought to be solvent. Bearing in mind the financial position shown in the accounting information which ETL would have received, that additional evidence at best indicates a lack of regard for the consequences of this arrangement for SICA (see in particular paragraphs 43, 49-52 and 58 above). However, that does not alter the findings.

75. Those findings signpost a route to the conclusion that the purchase of the Goodwill for £1.00 meant the Asset Sale Agreement was a transaction at an undervalue. However, Mr Munn's defence signposts a different route and conclusion. He justifies the resulting value of £1.00 for the Goodwill because it excluded the personal goodwill of himself and Mr Rees. The value of the personal goodwill was attributed to CHL's share price and to be found within it and the terms of the new contracts of employment including their non-competing covenants etcetera.

76. There is no written evidence of personal goodwill being addressed in the negotiations. There is no evidence of any such oral discussions. whether in the context of principle or when agreeing price. Mr Munn contends that it can be inferred from the contracts of employment entered into and from the no competition covenants and restraints agreed. He also contends that it is evidenced by the fact that the proposal for the payment of £1.00 for the Goodwill was made by ETL in its last minute email. Whilst the last minute valuation is surprising when viewed in isolation, it is apparent that it resulted from the negotiated consideration for the Share Purchase Agreement. There is no evidence of negotiations to suggest otherwise.

77. That means Mr Munn's justification must rely upon two connected but potentially alternative propositions. The first is that the terms of the Asset Sale Agreement upon their true construction exclude the personal goodwill even though this was not discussed in negotiations. That is obviously unlikely but those terms need to be addressed. The second is that the Asset Sale Agreement could not have included personal goodwill because it was not owned by SICA or could not be assigned by it due to its existence depending upon Mr Munn and Mr Rees's continued involvement with the Business. The next issue to turn to, therefore, is whether there was or might have been personal goodwill.

D4) Did Personal Goodwill Exist?

78. Mr Munn accepted that the growth in business over the years and its expansion to include London as well as Cardiff offices led to a significant reduction in the work he carried out for clients and to him becoming more involved in the work required of a managing director. However, his evidence was that he and Mr Rees were known to be the key players of SICA's business. He had developed close relationships with clients over the years. He remained the main point of contact for many clients. If the fees booked by managers for work from clients with whom he was the main point of contact were added to the £240,000 he personally was billing by the date of the Agreements, he estimated that about half of SICA's fee income would be attributable to that contact. His evidence under cross-examination was that whilst he could not be treated as a one man band and was part of a team, the client relationships were his and Mr Rees's. If he decided to leave, many clients would leave, especially if he took a handful of senior managers with him. His personal relationship with senior managers would enable him to recruit them. There would be no contractual obligations to prevent this should he resign as a director and leave his employment unless he entered into new agreements upon the sale of SICA's business. He and Mr Rees held personal goodwill relating to staff and clients.

79. Mr Rees makes no reference to this in his evidence in chief and his failure to even address the £1.00 consideration is stark. In cross-examination he stated he was comfortable with the valuation agreed in last minute emails and that he considered SICA to be solvent. I have previously dealt with his knowledge of SICA's financial position and the Agreements. His absence of reference to personal goodwill could be considered evidence to weigh against the evidence of Mr Munn. However, in the circumstances of Mr Rees's obvious preference for avoiding the issue of the £1.00 consideration and my views of his evidence expressed to date, I have decided to treat that omission as a neutral point.

80. I accept as fact that if Mr Munn and Mr Rees had chosen to leave, it would have had an impact upon the business, particularly Mr Munn. However, there is no evidence to establish that this would or would have been likely to have led to SICA being unable to continue in business. There is no evidence to establish that they could not have been replaced and a reasonable percentage of the business retained. I conclude from the facts that SICA plainly had valuable goodwill. It was a substantial company with a circa £4 million turnover. Some clients may well have considered themselves tied by their relationship with Mr Munn and/or Mr Rees, although there is no specific evidence of that. However, nevertheless SICA will have built up a relationship with its clients through its employees and the services they provided on its behalf. That relationship will have led to repeat fee generation and to valuable goodwill for SICA. Mr Munn's attribution of half the turnover to his own contacts has no factual basis and has to be viewed as hyperbolic. However, even if accepted it would leave £2 million of turnover to which SICA's goodwill valuation would be applied.

81. In addition account must be taken of the 2012/13 goodwill acquisitions recorded in the accounts. It cannot be the case that personal goodwill can be attributed to the business purchased from "Sinclairs" when this was a separate business. Further, whilst (at least in principle) the value recorded in the accounts may not have subsisted at the date of the Agreements because it is an historic acquisition value subject to

depreciation, a total of circa £4 million will not have evaporated after some two years when the Business turned over in the region of £4 million gross.

82. Nevertheless, it is clear that the issue of the continued involvement of Mr Munn and Mr Rees would be a matter for a purchaser to address when deciding whether to purchase SICA or its business and one which a purchaser would factor into when assessing the consideration to be offered. Whether for the purposes of SBL that would be in terms of reducing the value of SICA's goodwill because of personal goodwill and/or by acknowledging the existence and importance of that involvement within new terms of employment and/or by agreeing any other consideration to be provided to them is a matter now to be viewed by considering the terms of the Agreements.

D5) The Agreements

83. The Asset Sale Agreement sold to SBL "the business of an accountancy firm now carried on by the Seller" as a going concern free from all charges, liens, equities and incumbrances. The sale listed the following assets: £1.00 for the Goodwill; £141,185 for the Business and the Assets; £1.00 for the benefit (subject to the burden) of any contracts SICA could assign; £1.00 for equipment leases and £1.00 for the intellectual property rights.

84. "Goodwill" is defined as the goodwill of SICA in connection with the Business and the exclusive right for SBL (or its assignees) to use the names and represent itself as carrying on the Business in succession to SICA including the benefit of all pending contracts, orders and engagements and the right to all lists of customers and suppliers of the Business.

85. There is no doubt, therefore, that the Business was being sold on the basis that it would be continued by SBL. On the face of the Agreement, the Goodwill to be assigned would achieve that. There is no suggestion of any additional sale of personal goodwill whether in the Agreement or any other agreement for the Transaction or in the disclosure letter addressed to ETL.

86. The fact that the Asset Sale Agreement anticipated that its sale would result in the Business continuing is confirmed by other clauses which provide that: the sale included all documents relating to the Business that SBL might reasonably require to enable it to effectively carry it on in succession to SICA (cl.2.1.8); SBL was entitled to receive (in summary) all books, records and documents of the Business including those concerning suppliers, clients and customers, distributors and tax (sub-clauses of 2.1.8); The sale included all SICA's rights and claims against third parties with respect to the Business (including book debts, see also clause 8) so far as they could be assigned and all assets employed in the business but subject in both cases to specified excluded assets (cl. 2.19-2.10).

87. As to the liabilities of the Business, clause 5 provided for an apportionment so that SICA would remain liable until the transfer date for all periodical charges and outgoings of the Business, SBL becoming liable for them thereafter. The retained liabilities specifically included tax and national insurance contributions as well as other expressly identified items including liabilities in respect of employees (cl 5.1

and 5.4). Prepayments and payments in advance would be paid by SICA to SBL (cl.5.2). This apportionment would be agreed within 30 days of the transfer or become the subject to dispute resolution mechanisms. SICA and SBL also provided cross-indemnities in respect of employee liabilities in the context of the sale being a relevant transfer for the purpose of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (cl.7.1 and 7.2 and see also 7.5). In other words (in summary), all provisions which evidenced that the sale passed to SBL the existing business including the Goodwill leaving SICA with existing liabilities.

88. Similarly SBL assumed the obligations of contracts which remained to be performed by SICA and (subject to exceptions concerning obligations or liabilities attributable to SICA's breach). It was required to carry out, perform and complete all obligations and liabilities and provided an indemnity to SICA in respect of non-performance or defective or negligent performance (cl.10). Their assignment was subject to third party consent as detailed (cl.10.2-10.3) but until then SICA held the contract on trust for SBL who would perform the obligations assuming that was permitted by the contract (sub-clauses of cl.10.3).

89. All "Liabilities" remained with SICA and were included within the excluded assets (Sch.4). Liabilities were defined as: "the aggregate amount owed by the Seller in connection with the Business to or in respect of trade creditors as recorded in the books of account of the Business as at the Transfer Date and all other claims against the Business, but not including liabilities for VAT or taxation on profits or chargeable gains save for those liabilities the Buyer has expressly agreed to assume or be responsible for" (cl. 12 and 1.1.27). SICA and SBL executed a separate deed of assignment for the Goodwill but nothing turns on that.

90. The Share Purchase Agreement for the sale of 40% of the shares in CHL, which also included a wide range of indemnities and warranties (subject to a Disclosure Letter), was for an initial consideration of circa £2,304,000 and further consideration dependent upon future turnover of circa £575,000, which would be paid if various conditions were met ("the clause 8 additional consideration").

91. Mr and Mrs Munn sold 280 jointly owned shares and Mr Rees 120. Mr and Mrs Munn received £1,612,800 on completion and their potential clause 8 additional consideration would be £403,200 to be paid, if appropriate, on 31 January 2017. Mr Rees received £691,200 on completion and potentially would receive £172,800 on 31 January 2017. In addition, there were a Shareholders Agreement between Mr and Mrs Munn, Mr Rees, Mrs Rees and Carston Holdings and ETL but no-one has relied upon it for the purposes of this trial.

92. The Asset Sale Agreement included (amongst others) the following joint and several warranties by Mr and Mrs Munn:

    a) SICA was not engaged in any litigation in connection with the Business (Schedule 6 at 19.1) and to the best of SICA's knowledge and belief there are no facts likely to give rise to any legal proceedings.

    b) There is no dispute directly or indirectly relating to any of the Assets, which include the Goodwill (Schedule 6 at 19.2).

c) To the best of SICA's knowledge and belief there is no fact or matter material to the value of the Assets, and no fact of matter materially affecting the trading of the Business that has not been disclosed to SBL, the disclosure of which might reasonably be expected materially to affect the willingness of SBL to purchase the Assets at the aggregate price or the terms upon which the purchase is made (Schedule 6 at 25).

d) They, and each other, and SICA had made all due and careful enquiries into the subject matters of the warranties (clauses16.1 and 16.3).

93. What is clear from a review of the Agreements is that none refer to the existence of personal goodwill or establish that the £1.00 value attributed to the Goodwill resulted from recognition that the goodwill of the Business was of nominal value because of the personal goodwill of Mr Munn and Mr Rees.

D6) Subsequent Events

94. There have been many disputes following completion of the Agreements. It is only necessary to mention here that on 30 October 2017 SICA was wound up for non-payment of its debts to HMRC. Mr Munn had been the sole director of SICA from 6 February 2015 until his resignation on 28 March 2017. The figure of £641,056 includes assessments which have not been appealed.

95. That leaves the evidence concerning the Settlement Agreement. This is set out in the third witness statement of Mr Rees. The cause of settlement is stated to be the conclusion based on legal advice that the SBL defence would not succeed. Matters relevant to this conclusion were in particular (in summary): the joint opinion of the experts valuing the Goodwill; recognition of the debts owed by SICA to Candco; and SICA's insolvency. Previous attempts to settle had failed and settlement by acceptance of the Part 36 offer would stop costs running.

E) Submissions/Law

96. Both sides provided "speaking notes" for the purposes of closing consistent with the summaries of the cases and arguments already provided. As a result I will only refer to the submissions and arguments to the extent necessary when reaching the decision below. The law will also be addressed within the context of the decision.

F) Decision

F1) Introduction

97. I will address each of the limbs of the Part 20 claim identified within paragraph 12. In doing so I will apply the findings of fact above. Insofar as I have not referred within this judgment to other facts and/or issues raised by the parties that is because I have decided it is unnecessary to do so in the context of my decision.

F2) Application of the 1978 Act

98. The common law has always recognised that there will be circumstances when a person should be able to claim a contribution from others who are subject to the same obligation. However, limitations upon that ability grew including, for example, in the case of joint tortfeasors and several tortfeasors. The ***1978 Act*** was passed to extend the rights to a contribution by enabling any person liable to another, whether in tort, contract, breach of trust or otherwise (see ***s.6(1) of the 1978 Act***), to recover contribution from any other person liable in respect of the same damage regardless of the basis of the latter's liability.

99. The statutory background is explained in far greater detail within the speech of Lord Bingham in ***Royal Brompton Hospital NHS Trust v Hammond and others*** [2002] UKHL 14, [2002] 1 WLR 1397. He concluded that the ***1978 Act*** continued the common law's *"constant theme"* that the right to claim to share one's liability with others depends upon there being a common liability. He identified three questions: (i) What damage has A suffered?; (ii) Is B liable to A in respect of that damage? and (iii) Is C also liable to A in respect of that damage or some of it?

100. The decision emphasised that the statutory words requiring *"the same damage"* have their natural and ordinary meaning. They are to be applied to an evaluation and comparison of the claims which are said to give rise to a right to contribution. As Lord Bingham expressed it, the right to contribution depends *"on the damage, loss or harm for which B is liable to A corresponding (even if in part only) with the damage, loss or harm for which C is liable to A".*

101. However, Mr McIlroy in accordance with his duty to the Court, has very properly drawn attention to a passage in the speech of Lord Steyn in that case where he agreed with criticism by the editors of "Goff & Jones, The Law of Restitution" (5th ed, at p.396) of an observation of Auld LJ in ***Friends' Provident Life Office v Hillier Parker May & Rowden*** [1997] QB 85 at 102 to the effect that a claim for restitution was a claim for compensation for damage. Mr McIlroy has explained that this raises the question whether ***the 1978 Act*** applies to ***s.423*** which provides restitutionary relief.

102. The Court of Appeal in the ***Friends' Provident Life Office*** case decided that a tortfeasor could rely on ***the 1978 Act*** to claim a contribution against a person liable in restitution because the liability was in respect of the *"same damage"*. Lord Steyn by acceptance of the above-mentioned criticism stated that a claim for money back could not in principle be a claim for damage suffered. As a result, he was of the opinion that ***section 1(1) of the 1978 Act*** could not apply to restitutionary claims because they did not claim to recover compensation within the meaning of its provision (see ***section 6 of the 1978 Act*** at paragraph 11 above).

103. For my purposes this is an issue of precedent. The Court of Appeal in ***Niru Battery Manufacturing Company v Milestone Trading Ltd*** [2004] EWCA Civ 487, [2004] 2 Lloyd's Rep. 319, did not demure from the agreement of counsel before them that Lord Steyn's observations were *"obiter dicta"* and that, as a result, the ***Friends' Provident*** decision remained binding upon the Court of Appeal. Although this conclusion of precedent followed from *"common ground between the parties"* rather than a decision of the Court of Appeal on the point, it is plain that the words of Lord

Steyn are *"obiter dicta"*. That being so I am bound by the ***Friends' Provident*** decision to conclude that the restitutionary claim under ***s.423*** can be the subject of ***the 1978 Act's*** remedies.

104. It follows that I need not consider whether the relief could be sought by joinder of Mr and Mrs Munn under ***s.423*** in any event. This alternative was not addressed in any detail before me. However, it is difficult to see why the Court would not in principle have power to join a person against whom relief could be ordered at the instigation of an existing respondent on the ground of common liability. Nevertheless, it is unnecessary to develop this further when SBL's case has been presented on the basis of ***the 1978 Act***. I turn to its first requirement.

F3) "Has SICA suffered damage for which SBL is liable?"

105. ***Section 1(4) of the 1987 Act*** applies as a result of SBL having agreed a settlement with SICA before this trial. SBL is entitled to refer to the facts relied upon in SICA's Amended Application Notice and Amended Particulars of Claim to establish that it is liable for the sum agreed to be paid for the damage it is pleaded SICA suffered provided the settlement is bona fide.

106. The settlement agreement was reached through the use of ***Part 36 of the Civil Procedure Rules***. There is no evidence from which to conclude it is not a genuine and lawful settlement. There is no evidence of any collusion between SICA and SBL and facts to the contrary are that SICA acts by its liquidators and that the sum agreed to be paid accords with SICA's claim.

107. Mr Munn challenged the bona fide nature of the settlement on the basis that a reason stated by Mr Rees for SBL agreeing to it was the fact that the joint experts had opined that the transaction was at an undervalue when their opinions were in fact flawed for their failure to distinguish between personal and enterprise goodwill. In my judgment that issue is a matter relevant to the subsequent question of whether they should be liable to make a contribution. It is not a ground for challenging the settlement as one which was not bona fide. That is because the facts pleaded by SICA are assumed. They are not being tested by reference to the expert evidence for the purpose of applying ***section 1(4) of the 1978 Act***.

108. Mrs Munn contends that the settlement cannot have been bona fide when SBL agreed to pay costs without first enquiring what those costs may be. This is not a ground to sustain a case that the settlement was not bona fide. It is a challenge to the reasonableness of the settlement not to whether this is a genuine and lawful settlement, a settlement entered into in good faith.

109. Mrs Munn also mentions in the context of that argument the fact that the Court, herself and Mr Munn were only informed on the fourth day of the trial that SBL had been placed into administration shortly before. The Part 36 offer was accepted on 24 September 2021 and nowhere in Mr Rees's third witness statement explaining that acceptance does he suggest that this occurred in circumstances of SBL being unable to pay the agreed sum. I am concerned by that omission. I had previously inferred from Mr Rees's third witness statement that the settlement sum was or would be paid. However, that does not mean the settlement was not bona fide. SICA's claim

continues to exist and will be proved in the administration and any subsequent insolvency for the purposes of voting and, if relevant, distribution. An absence of funds may raise questions as to the reasonableness of the settlement because the exact sum agreed was (potentially) academic but it does not make it a settlement which was not bona fide.

110. Accordingly, the settlement being bona fide, the following pleaded facts (amongst others) are assumed to have been proved:

a) The payment of £1.00 by SBL for the transfer of the Goodwill was an undervalue compared with the value of the consideration it received. The Particulars of Claim rely upon the facts that the £1.00 valuation was at odds with the previous purchases of business, goodwill and other assets by SICA in 2011 and 2013 and with the value attributed to goodwill in SICA's accounts. The true value asserted and for which expert evidence would be adduced is identified at not less than £3,135,000 based upon a multiple of SICA's recurring fees.

b) There were significant creditors of SICA at the time of sale (including Candco, a debt owed to HMRC concerning Cathedral Management Limited, and debts to Dormco SCP Limited, SCP Personnel Limited, SBL Professional Services LLP) and insufficient assets to pay all creditors without payment of full consideration at market value for the Goodwill.

c) £2.88 million was paid to Mr and Mrs Munn and Mr Rees for their shares in CHL when the value of CHL's shares depended upon the value of SBL. SICA was worthless after the transfer of the Business because the creditors could not be paid. The valuation of CHL's shares was only justified because SBL had paid £1 for the Goodwill, which was an undervalue.

d) The purpose of the Agreements was to enable the value of the Business without its liabilities to be transferred to SBL with that value being paid to CHL's shareholders and with the Goodwill having been put out of the reach of SICA's creditors. SICA has suffered the loss of the true value of the Goodwill.

111. Those assumed facts satisfy me for the purposes of SBL's claim for a contribution under ***the 1978 Act*** that SBL was liable under ***s.423*** to compensate SICA in respect of the damage it suffered as a result of the transfer at an undervalue of the Goodwill sold to SBL for £1.00.

112. The conclusion, therefore, is that SICA suffered damage for which SBL is liable. In summary, the *"same damage"* for which Mr and/or Mrs Munn must also be liable is the loss incurred by SICA agreeing to sell the Goodwill at an undervalue subject to any maximum sum required to protect the creditors of SICA who are the ultimate victims of that sale.

F4) "Are Mr and/or Mrs Munn liable to SICA for the same damage under s.423?"

F4a) Introduction and The Law

113. Behind this short question lie many issues ranging from the matters to be proved by SBL to establish the liability of Mr and/or Mrs Munn to the issue of the terms of the order that should be made if they are liable for the same damage.

114. SBL asserts that Mr and Mrs Munn are liable for the same damage under ***s.423*** because it can prove on the balance of probability that: (i) The transaction was at an undervalue not, as Mr Munn asserts, a transaction for value because the Goodwill sold excluded his and Mr Rees's personal goodwill; and (ii) SICA entered into the Asset Sale Agreement with a Prohibited Purpose. That being so, its case is that the Court has power to make an order of liability even though Mr and Mrs Munn received no direct benefit from SICA and benefited instead through the payment for their shares in CHL sold to ETL. That is because that payment would not have been made but for the fact that the Goodwill was valued at £1.00 and SICA did not receive the value to which it was entitled. The Court should exercise its discretion to grant relief requiring payment by Mr and/or Mrs Munn of the same damage for which SBL is liable under the settlement.

115. As an observation, it might be thought that SBL's alternative *"same damage"* case relying on breach of fiduciary duty is the more natural route for a claim by SICA when addressing the potential liability of Mr Munn. However even if that is the case, the case relying on ***s.423*** must still be applied to Mrs Munn. In addition, even if she is liable for the same damage for breach of warranty, that liability is capped in quantum by the contractual terms.

116. The following are key legal tests/principles to be applied for the ***s.423*** case:

a) A "transaction" includes "a gift, agreement or arrangement" (as defined by ***section 436(1) of the Insolvency Act 1986)*** and, therefore, can include an agreement or understanding between parties, whether formal or informal, oral or in writing. This wide definition is entirely consistent with the statutory objective of remedying the avoidance of debts (see ***Feakins v Department for Environment Food and Rural Affairs*** [2005] EWCA Civ 1513, [2007] B.C.C. 54). It will be particularly relevant to the submission that the Agreements are to be viewed as one transaction

b) Whether the transaction was at an undervalue is to be decided by looking at value from the point of view of SICA (see ***Delaney v Chen*** [2010] EWCA Civ 1455, [2011] B.P.I.R. 39 at [15]). SICA obviously did not receive any benefit from the sale of CHL's share.

c) When deciding whether SICA, acting by Mr Munn and/or Mr Rees, entered into the Asset Sale Agreement for the Prohibited Purpose:

i) It is the purpose of SICA which is to be addressed not that of the person who received the benefit (see ***Moon v Franklin*** [1996] BPIR 196).

ii) The question whether the transaction was entered into by SICA for the Prohibited Purpose must be judged as a decision of fact based on an evaluation of all relevant facts. There may be more than one purpose. It is sufficient to prove that the Prohibited Purpose was a (not the) purpose positively intended rather than a consequence (see ***Inland Revenue Commissioners v Hashmi*** [2002] EWCA Civ 981, [2002] B.C.C. 943 and ***JSC BTA Bank v Ablyazov*** [2018] EWCA Civ 1176, [2019] B.C.C. 96 at [8-16]).

iii) Insolvency is not a prerequisite, although the financial position may be evidence relevant to the decision of purpose and (depending on the facts) the absence of insolvency may make a Prohibited Purpose unlikely (see ***Moon v Franklin*** (same) at 198 and ***BTI 2014 LLC v Sequana SA*** [2016] EWHC 1686 (Ch), 2017 1 BCLC 453 at [494], upheld [2019] EWCA Civ 112, [2019] 1 BCLC 347)).

d) As to the relief which may be ordered:

i) The Court's very wide discretionary powers of relief are required by ***s.423(2)*** to be exercised (a) to restore the position to what it would have been if the transaction had not been entered into and (b) to protect the interests of victims of the transaction (defined by ***s.423(5)*** as *"a person who is, or is capable of being, prejudiced by it"*). In other words, exercised to achieve restoration to the extent appropriate to protect the interests of creditors (see ***Chohan v Saggar*** [1994] 1 B.C.L.C. 706 at 714).

ii) Although the purpose of the relief is expressed within ***s.423*** to be restoration, where the position cannot be restored in the literal sense, it can be appropriate to require payment of a sum to compensate for the transaction at an undervalue (see ***New Media Distribution Co SEZC Ltd v Kagalovsky*** [2018] EWHC 2876 (Ch)).

iii) Mr David Phillips Q.C., sitting as a Deputy Judge of the Chancery Division, decided in ***Griffin v Awoderu*** (23 January 2008) that those requirements for relief exclude the possibility of placing victims *"... in a better or more secured position than if the transaction had not been carried out"*. In addition, the relief should not *"punish or otherwise prejudice those involved in carrying out the transaction any more than is a necessary and inevitable consequence of restoring the position and protecting victims"*.

iv) In ***3EngLtd v Harper*** [2009] EWHC 2633 (Ch), [2010] B.C.C. 746, Sales J., as he then was, pointed out that the objective of ***s.423(2)*** can be achieved by exercise of the Court's *"wide margin of judgment [when deciding] what order is appropriate"* having regard to the non-exhaustive list of relief within ***s.425***.

v) In ***Akhmedova v Akhmedov*** [2021] EWHC 545 (Fam) at [86-87], Gwynneth Knowles J citing ***3EngLtd v Harper*** (above) emphasised that the relief *"carefully tailored to the justice of the particular case"* would

depend greatly upon the particular facts and that it may be appropriate to consider whether a respondent still holds the relevant assets or has changed their position even though that would not provide a defence. Such considerations, if relevant, would need to be addressed within the context of the mental state and degree of involvement of the respondent.

vi) Mr Justice Trower in ***Re Fowlds (a bankrupt), Bucknall and Roach (joint trustees) v Wilson*** [2021] EWHC 2149 (Ch) identified three reasons why it may be appropriate to carry out a balancing exercise between the interests of the creditors or victims of the transferor on the one hand and the transferee on the other. First because although it is a class remedy, ***ss423-425*** contemplate the potential for individual victims to claim and be compensated with the result that it may be appropriate to strike a balance between the victim and the innocent transferee. Second, the absence of a statutory claw back period. Third that the power to restore and protect is expressed in terms of *"may … make such order as it thinks fit"* which is consistent with a balancing exercise.

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F4b) Identifying the Transaction

117. The straightforward approach to this claim is to identify the Asset Sale Agreement as the ***s.423*** "transaction" with the issue of whether it was a transaction at an undervalue relating to the Goodwill. However, SBL also asks the court to address a wider picture. Mr McIlroy puts it this way in his speaking note: *"The Transaction is the whole suite of agreements entered into on 6 February 2015. Those agreements were a package. The individual agreements were component elements of one transaction … There would have been no transfer of the goodwill from SICA to SBL except as part of the purchase by ETL of its shares in Holdings from Mr and Mrs Munn. Viewed as a whole, the Transaction was not the disposal of the goodwill of SICA as a going concern to a third party purchaser. The Transaction was a minority investment by ETL into an accountancy practice which ETL believed to be solvent."*

118. The reason why this alternative move from the straightforward approach may be necessary is because the remedy for a transaction in breach of ***s.423*** is restorative. If the Court only considers the Asset Sale Agreement there will be an argument that there is nothing for Mr and Mrs Munn to restore because they did not receive anything from SICA or, indeed, SBL. They were party only to the separate Share Purchase Agreement and their consideration was paid by ETL. Mr McIlroy has submissions to the effect that such an argument is wrong even if the Asset Sale Agreement alone is the ***s.423*** "transaction". However, his submissions will be more straight forward if the Agreements are the ***s.423*** "transaction" as a package.

119. It is to be emphasised that at this stage of the judgment the only concern is to identify the ***s.423*** "transaction" by applying the facts to the statutory definition of "transaction" (see paragraph 116(i) above). Mr McIlroy when addressing the statutory definition in his speaking note relies upon the decision of ***Griffin v Awoderu*** (above) at [23, 25-27], which itself relies on the Court of Appeal's decision in ***Feakins v Department for Environment Food and Rural Affairs***. Although I am bound by both decisions and the learned Deputy Judge makes clear that the term "transaction" is

capable of embracing various arrangements which constitute a continuing event made up of a series of individual components, I will respectfully concentrate upon the Court of Appeal's decision for the additional guidance to be found within the lead judgment.

120. That judgment of Lord Justice Jonathan Parker refers in particular to two cases where (albeit in totally different facts and circumstances) the distinction between different agreements with different parties was kept and submissions to view the matter as a whole rejected:

a) ***National Westminster Bank Plc v Jones*** [2001] EWCA Civ 1541; [2002] 1 B.C.L.C. 55 where the ***s.423*** transactions were the grant of an agricultural tenancy and the sale of assets by the debtors to a company they had purchased. The debtors' argument that the transaction and, therefore, its consideration should take into account the overall asset position including the value of their shares in the company was rejected. That was because the purchase of the company was not part of the transactions which put their assets beyond the reach of creditors. That was the grant to the company by the debtors of an agricultural tenancy and the sale to it of agricultural assets. The undervalue and Prohibited Purpose tests applied to those transactions on their own. As Neuberger J., as he then was, had said: the purchase *"of the company was a separate transaction from the tenancy and the agreement, not least because it was entered into between the defendants and third parties and related to the company as the subject matter of that transaction, whereas the transaction or transactions under attack in the present case consist of the tenancy and the sale agreements entered into between the defendants and the company itself"*.

b) ***Phillips (Liquidator of A J Bekhor & Co) v Brewin Dolphin Bell Lawrie Ltd*** [1999] B.C.C. 557, [1999] 1 W.L.R. 2052 in which the similarly worded ***s.238 of the Insolvency Act 1986*** (adjustment in administration or liquidation of prior Agreements at an undervalue) was considered. The definition of "transaction" in ***section 436(1) of the Insolvency Act 1986*** also applied. In that case Morritt L.J., as he then was, [at 564H-565D] emphasised that: *"the transaction must be identified by reference to the person (or persons, for the singular must include the plural) with whom the company entered into it. Only the elements of the transaction between the company and that person may be taken into account. Thus, without more, a contract between the company, A, and B cannot be part of a transaction entered into by the company, A, with C. I introduce the caveat 'without more' to guard against cases where the transaction is artificially divided."*

c) In that case the Court of Appeal decided on the facts that weight should be given to the intention of the parties to structure the deal by using two separate agreements, a share sale agreement and a lease. Although they were linked agreements, they could not be treated as one transaction when (amongst other matters) the parties were different. It is important to note, however, that this decision on the facts resulted from findings that the parties acted at arm's length and for readily understandable commercial reasons when choosing the structure. In other words, the facts of each case must be scrutinised when identifying the ***s.423*** transaction.

121. That was made clear in ***Feakins*** (above):

a) The Court of Appeal concluded that the House of Lords when hearing the appeal of the ***Brewin Dolphin*** decision ([2001] B.C.C. 864, [[2001] 1 WLR 143 (HL)) approved the Court of Appeal's approach to identification of "the transaction" (as set out in the above-quoted passage from the judgment of Morritt LJ). Although they decided the issue in the case was not about the identity of the transaction but about the composition of the consideration, their conclusion is plainly binding upon me.

b) The Court of Appeal having accordingly considered the judgment of Morritt LJ decided that when identifying "the transaction" for the purposes of ***section 423***, each case must turn on its own facts and in some cases it will be correct and in other cases wrong to treat a single step in a series of linked dealings as the relevant "transaction" (see [78]). That is a decision binding upon me. It recognises that the words of Morritt LJ have to be read in the factual context of the case before the Court.

122. In principle, therefore, the case of ***Feakins*** (above) could have been decided on the basis that the ***s.423*** "transaction" was to be viewed as a single agreement or as a series of linked dealings. It would depend upon the facts. In practice that choice did not arise because the Court of Appeal identified a different ***s.423*** "transaction". To explain that it is necessary to refer to the facts.

a) The Court of Appeal was concerned (in summary) with the following dealings: (i) a sale of the freehold land owned by the debtor for market value (circa £450,000) by a bank to the debtor's fiancée pursuant to the powers conferred by its registered charge, which sale necessarily was subject to an agricultural tenancy granted previously to a company owned by the debtor; and (ii) a post-sale surrender of the tenancy resulting in the freehold land now owned by the fiancée being valued at circa £1 million. The claim was that those agreements defrauded creditors because the result was that the £1 million value of the land was retained by the debtor's fiancée after only paying £450,000. The potential problem for the applicants for the purposes of ***s423*** was that the debtor was not a party to either transaction.

b) The Court of Appeal did not find that those two dealings together constituted "the transaction". Instead an agreement to which the debtor was a party was identified. Namely, the pre-sale plan or arrangement between the debtor and his fiancée to achieve through those dealings the result that she would gain a freehold valued at circa £1 million leaving the debtor's remaining secured and unsecured creditors without recourse. Although he did not own the tenancy to be surrendered, under this plan he procured the surrender by his company (which only he could do) to gain her land valued at circa £1 million when she had only paid circa £450,000.

c) The Court of Appeal therefore identified the ***s.423*** transaction as a particular arrangement to use the proposed sale by the bank as a necessary step to procure the transfer of his freehold title and the surrender of the tenancy at an undervalue. They also decided this was for a Prohibited Purpose. They restored the position to how it had been including restoration of the tenancy.

123. The very different facts of this case establish that the Asset Sale Agreement and the Share Purchase Agreement were between different parties and that SICA was not required to transfer the Goodwill or any other benefit to Mr and Mrs Munn and Mr Rees. This was not an artificial division. It was an inevitable consequence of the parties agreeing to a hive across. The words of Morritt L.J. in ***Brewin Dolphin*** potentially apply (see paragraph 120(b) above). However, the Court of Appeal in ***Feakins*** requires the Court to decide whether that is the correct approach on the facts of the case before the Court (see paragraph 121b above). As Mr Phillips Q.C. observed in ***Griffin v Awoderu*** [2008] EWHC 349 (Ch), it depends upon the facts whether the ***s423*** "transaction" consists of one agreement or embraces various arrangements which constitute a continuing event made up of a series of individual components

124. In this case the facts establish: i) that the Agreements were designed to achieve a hive across (paragraph 68 above); ii) the knowledge of all those involved concerning the benefits of a hive across and the relevance the consideration to be paid to SICA would have for the value of CHL's share price; iii) that within that context the valuation of the Goodwill resulted from the valuation of the share price in the Share Sale Agreement; and iv) that the Agreements effected an arrangement ("the Arrangement") to achieve payment of ETL funds to Mr and Mrs Munn and Mr Rees and not to SICA (see paragraphs 68-74 above).

125. In my judgment SBL can present their case in reliance upon alternative ***s.423*** "transactions": first the obvious case, the Asset Sale Agreement; and second the Arrangement to which SICA was a party. In the second case, the sale of the Goodwill for £1.00 was not a single step for the Asset Sale Agreement alone but a step in the Arrangement which was achieved by the Agreements as a whole.

F4c) Was It A Transaction at an Undervalue?

F4ci) The Submissions/Arguments

126. Whether "the transaction" is the Asset Sale Agreement alone or the Arrangement, the next question is whether the sale of the Goodwill for only £1.00 was a sale at an undervalue as defined by ***s.423***. This issue turns on Mr Munn's case that the Goodwill was of nominal value because it did and could not include the personal goodwill of himself and Mr Rees (see paragraphs 75-77 and the findings of fact at 78-82 above).

127. Mr McIlroy submitted that it is incontrovertible that the Goodwill was sold at an undervalue. The Goodwill recorded in the accounts as the consideration agreed to be paid to "Sinclairs" and Candco by SICA was of substantial value, circa £4 million. The Business by 2015 was significant in terms of offices, employees and turnover. The Goodwill as defined in the Asset Sale Agreement clearly included all the customer relationships of the Business. Mr Munn and Mr Rees did not have substantial personal goodwill. The experts jointly agree the valuation at circa £2.75m.

128. Mr Munn in support of his case that £1.00 properly reflected the value of the Goodwill because of personal goodwill and for the purposes of his cross-examination of Mr Stringfellow relied upon the "International Valuation Standards" ("the Standards") produced by the International Standards Council, effective from 31

January 2020. It is exhibited to Mr Ballamy's expert report. He put to Mr Stringfellow that his valuation wrongly failed to apply the "With-and-Without Method" identified as one of the possible measures to be used when valuing intangible assets.

129. The Standards make clear that the measure to be used depends upon the nature of the intangible asset and the purpose of the valuation. The With-and-Without Method is said to be frequently used in valuation of non-competition agreements and *"may be appropriate in the valuation of other intangible assets in certain circumstances"*. In essence, using this method the valuation results from the differential between the value of the business and/or the difference between projected future profits using the intangible asset and not using it. The valuation may be "probability weighted", for example in the context of non-competition agreements to take into consideration that the individual or business subject to the agreement may choose not to compete even if the agreement did not exist.

130. The real issue for this case, however, is not one of methodology. It is principally one of fact. There are two bases for Mr Munn's case:

a) First, that he and Mr Rees owned the goodwill which was attributable to their personal involvements in the Business. That being so, it was not assigned with the Goodwill but was separately purchased through the sale of their shares and by their commitment to new employment contracts which contained a variety of no-competition covenants etcetera.

b) Second and alternatively, that even if SICA owned significant goodwill, it was of nominal value because its existence depended upon the future involvement of Mr Munn and Mr Rees in the Business and it could only be assigned, therefore, once the terms of that future involvement had been agreed. That future involvement had to be and was purchased by the share purchase price and the consideration to be paid for the contracts of employment including no competition clauses etcetera. Once that consideration was deducted, the Goodwill had no value. For convenience I will call this "the Internal Personal Goodwill".

131. For the purpose of the case on ownership, reference can be made to ***Re Sofra Bakery Ltd (in Liquidation)*** [2013] EWHC 1499 (Ch), [2014] B.P.I.R. 435). In summary, the Judge on appeal, Mr Andrew Sutcliffe Q.C., ordered a retrial because the original decision should not have dismissed an argument that ownership of the goodwill was retained by its owner when he transferred his business to his limited company. If that was established on the facts, the sum paid in due course by a purchaser of the company's business for the goodwill was a payment due to the owner. The underlying question, therefore, is whether ownership can be established as a matter of fact by SICA or (with a shift in the evidential burden of proof) by Mr Munn.

132. As to the Internal Personal Goodwill case, Mr Munn's proposition reflects the fact that there will be businesses where the name and reputation together with customer relations and other connections which produce turnover and are intangible assets will depend upon the personal qualities of its management and/or workforce. In those circumstances the value of the goodwill on a sale will likely be reduced unless those with the personal qualities move with the business. Alternatively, a purchaser will often need to ensure that those persons are retained by offering them new contracts

with golden handcuffs. The value of the goodwill is also likely to reduce if consideration needs to be paid to them to achieve that end (see ***Re CSB Limited (In Liquidation), Reynolds v Stanbury*** [2021] EWHC 2506 at [319-333].

F4cii) The Ownership Decision

133. Starting with the case of ownership: The goodwill in SICA's accounts is valued at the cost price of the purchases of the businesses of "Sinclairs" and "Candco". It has been found as a fact that on the face of SICA's accounts, which have been approved by SICA's directors, it was the owner of the goodwill transferred to it by "Sinclairs" and Candco (paragraph 47 above). It is also obvious from the facts that there was no personal goodwill belonging to Mr Munn and Mr Rees concerning "Sinclairs". They had no previous connection with this west London firm.

134. As to Candco, there is no contemporaneous evidence of any personal goodwill belonging to or otherwise retained by Mr Munn and Mr Rees upon the transfer of its business. There was no written agreement for the transfer but there is no evidence to suggest that the valuation of £1.8 million involved or was derived from a distinction between goodwill belonging to Candco which was transferred and goodwill belonging to them which was not and remained in their ownership. Nor is there any post transfer evidence within SICA's accounts, other documents, the negotiations for the Agreements or in the Agreements themselves (see paragraph 93 above) sustaining or supporting a finding that the ownership of any personal goodwill had been retained by Mr Munn and Mr Rees.

135. It has to be concluded that the goodwill of those businesses was owned by SICA as recorded in the accounts signed by Mr Munn. There is no evidence of that ownership altering or of Mr Munn and Mr Rees establishing new goodwill owned by themselves before the Agreements. This conclusion derived from a lack of evidence is sustained by the positive fact that the Business was sold and the Goodwill assigned under the terms of the Asset Sale Agreement on the basis that it would be continued by SBL. The case of Mr Munn's and Mr Rees's ownership of personal goodwill fails on the facts.

F4ciii) The Internal Personal Goodwill Decision

136. As to the internal personal goodwill: The findings of fact (in particular at paragraphs 78, 80 and 82 above) establish that Mr Munn and (albeit probably to a lesser degree) Mr Rees would have been key players within SICA. They would have been known to those in contact with the business as SICA's directors and indirect shareholders. No doubt their presence would have been significant for some, maybe many clients. Their continued involvement with the Business after its sale to SICA would be an important requirement for SBL and ETL when negotiating the Agreements.

137. Those facts certainly give rise to the possibility that the value of the Goodwill would have been affected by the quantum of any consideration that SICA and ETL would have to pay to procure that involvement. However, that possibility needs to be

addressed in the context of the other facts concerning SICA's business and the Agreements and also the expert evidence. In doing so it is to be borne in mind that the issue is not whether the value of the Goodwill was affected but whether the effect was to reduce the value to £1.00. At this stage it is unnecessary to address the further potential complications that would arise in the context of insolvency.

138. It has been found as a fact that SICA had its own goodwill irrespective of the personal involvement of Mr Munn and Mr Rees (paragraphs 78-82). The Business was far larger than just them. It had a circa £4 million turnover with offices in two capitals and many employees including managers who would have established their own client links. Clients would identify SICA as an incorporated entity and as the person who provided all the services required. Even though a purchaser of the Business may have to take into consideration the cost (if any) of ensuring that Mr Munn and Mr Rees transferred with the Business upon golden handcuff terms, the Goodwill would still have significant value.

139. The first and fundamental point, therefore, is that SICA had goodwill of a significant value to sell to SBL even if the price would need to take account of the terms they would negotiate to stay with the Business. The payment of £1.00 was clearly an undervalue. This conclusion is entirely consistent with the valuation of goodwill/customer relations in the accounts. Although this results from historic cost, there is no cause to conclude that the value represented by cost had declined to £1.00 since purchase because of Internal Personal Goodwill cultivated by Mr Munn and Mr Rees.

140. That conclusion is sustained by a second point, the fact that there is no express reference within any of the negotiations or agreements of the Agreements to the value of the Goodwill being affected by the decisions of Mr Munn and Mr Rees to remain as employees under new terms including no competition covenants etcetera:

    a) No-one has been able to point to any evidence concerning the negotiations to establish that the price of the Goodwill was reduced to £1.00 because of the terms offered to Mr Munn and Mr Rees to ensure they stayed with the Business and that the Business would be protected in the event of a future departure (see the finding of fact at paragraph 76 above).

    b) There was no exclusion of Internal Personal Goodwill within any of the Agreements (see paragraph 93 above).

    c) In the Asset Sale Agreement, as previously mentioned, the Goodwill was defined in the Asset Sale Agreement in the widest of terms including the exclusive right to use the names and represent that the Business continues "in succession", which I emphasise. The payment for the Goodwill was for the right and ability to continue in succession and therefore to use (amongst other assets) the relationships built up with clients and other intangible assets which together formed its goodwill (see paragraphs 83-86 above).

    d) Mr Munn proposes that the evidence to support his case can be found in the fact that there was a need to retain himself and Mr Rees and that the consideration for the purchase of their shares reflects the fact that ETL valued their future involvement accordingly and, as a result, valued the Goodwill at

£1.00. He proposes support for this is provided by the facts that the £1.00 valuation came from ETL, it was a last minute valuation and was not discussed. However, not only is there no evidence as mentioned above or evidence to sustain the result that the Goodwill was only worth £1.00 even if that was correct but that proposal must be pushed off the wall by the finding of the existence of the Arrangement (see paragraph 124 above).

As a result, it is to be concluded that the Goodwill was the whole of the goodwill owned by SICA and was to be valued accordingly. Based upon the accounting evidence, it was obviously worth significantly more than £1.00.

141. The final point, which is a cross-check for the conclusion reached, is that there is a joint expert report valuing the Goodwill at circa £2.75 million. Mr and Mrs Munn did not take the opportunity provided by directions to present expert evidence. As I understand it Mr Munn instructed an expert at some stage of the proceedings but no report followed. That does not mean the Court should accept the expert evidence without question but if accepted, it leads to the conclusion that the Goodwill owned and assigned by SICA had significant value.

142. The reports can potentially be criticised for the fact that they do not address the question whether the value of the Goodwill opined should be reduced by because of personal internal goodwill. There is an argument that this possibility is covered by the choice of multiplier for, as expressed by Mr Stringfellow, a *"mid-tier practice based in Cardiff and London with a traditional range of clients and fees which substantially consisted of recurring annual accounts preparation and tax compliance fees"*. However, the issue is not expressly addressed.

143. Nevertheless, even if there should be some reduction in the price to be paid for the Goodwill at a market value to reflect the consideration which would have to be paid to Mr Munn and Mr Rees for their continued involvement, it cannot possibly be argued that this would reduce the Goodwill to a nominal value. This would be entirely unrealistic, contrary to the evidence and to the first two points, which this cross-check supports.

F4civ) Conclusion

144. Taking all those matters into consideration, in my judgment the Asset Sale Agreement sold the Business on the basis that the Goodwill being purchased included all of the intangible asset which would enable the Business to be continued by SBL in succession to SICA. It did so in the context of the Goodwill assigned being protected, to the extent that it needed to be, by Mr Munn and Mr Rees agreeing to new employment contracts in the context of them continuing to be significant shareholders of the parent company. However, that protection was protection for the Goodwill sold by SICA. It was not a sale excluding personal goodwill or of an intangible asset of nominal value. It is plain that the payment of £1.00 for the Goodwill was a consideration significantly less than the value of the consideration received by SBL. I accept Mr McIlroy's submission.

F4d) Was there a Prohibited Purpose?

145. The next issue is whether SICA sold the Goodwill for £1.00 for a Prohibited Purpose pursuant to the Asset Sale Agreement and/or the Arrangement. Key facts forming the foundation for the decision appear at paragraphs 43 and 49-58 concerning knowledge of the financial position, paragraphs 59-66 concerning knowledge of creditors and paragraphs 67-77 concerning knowledge of the structure of the Agreements.

146. It is an issue also to be addressed within the context of the facts establishing that the Goodwill was sold at an undervalue and that SICA's creditors were victims of the transaction because the result was that SICA had substantially less assets from which to pay them. Even if one limited the creditors to the £1.8 million owed to Candco, it would have been apparent to SICA (by its directors) from the balance sheets in existence at the time of the Agreements (whether in the 2013 filed accounts or financial statements or in the management accounts and records for the 2014 year end) that a reduction in the value of goodwill/customer relations from circa £3-4 million to £1.00 would have a significant impact on SICA's ability to pay that debt, even accepting it fell due after more than one year.

147. Furthermore, there is no reason to limit the creditors to the £1.8 million of the debt owed to Candco. SICA's ability to pay its debts falling due within the year (£1,182,517) could potentially be covered by recovery from its debtors (assuming their payment). However, there would be no further income for SICA once the Business had been sold to pay its debts falling due after more than one year which stood at circa £1.2 million in addition to the £1.8 million. It is plain from the facts that there were creditors who may at some time make a claim against SICA even if they were not making them at the time and that the Goodwill had been put beyond their reach and that they were otherwise prejudiced.

148. Mr McIlroy submits that it is obvious that one of the purposes of the transaction was to put the goodwill of SICA, which was its only substantial asset, beyond the reach of SICA's creditors. Two creditors in particular were in view: Candco and HMRC.

149. Mr Munn's evidence and defence includes his belief at the time of the Agreements that the £1.8 million owed to Candco would be paid when demanded. He relies upon SICA being cash flow solvent until September 2017 and upon his assertion that the only liability not addressed in the accounts was the dilapidations claim. The purpose of the Agreements, he says, was to enable ETL *"to acquire a 40% stake in a growing accountancy firm"* whilst securing his and Mr Rees's personal goodwill. It was not to put assets beyond the reach of creditors. The £1.00 valuation had not been discussed and was unimportant in those circumstances.

150. A problem with that evidence and case is that if the purpose was only to ensure that ETL obtained a 40% stake in the Business, it would have been unnecessary to hive SICA's assets across to SBL. ETL could have purchased CHL's shares with CHL remaining the parent of SICA. It does not explain the purpose behind the hive across to SBL. In addition, there is the difficulty of the finding that the negotiations for and the terms of the Asset Sale Agreement together with the Share Purchase Agreement did not address and were not for the purpose of securing personal goodwill.

151. However, the fundamental problem for that evidence and defence is the finding that the Agreements effected the Arrangement, namely to achieve payment of ETL's funds to Mr and Mrs Munn and Mr Rees and not to SICA (see paragraph 124 above). Mr Munn and Mr Rees and, therefore SICA, will have known that the more that was paid for their shares, the less would be available for SICA to pay its creditors. The fact that the sale of the Goodwill was at an undervalue leads to the inevitable conclusion that the or at least a purpose of the Arrangement and the valuation of the Goodwill at £1.00 in the Asset Sale Agreement was to achieve a higher price for the sale of CHL's shares than would otherwise have been agreed if more was paid for the Goodwill. SICA through Mr Munn and Mr Rees knew that by agreeing to the consideration of £1.00 for the Goodwill, an undervalue, its true value was put beyond the reach of its creditors.

152. The findings of fact concerning financial knowledge lead to the conclusion that all parties appreciated that the Asset Sale Agreement left SICA not only without the Business to provide future income but also without the value of its intangible assets for the purpose of paying its creditors, in particular the long terms creditors. It being a subjective test for SICA, it does not matter what the purpose of ETL was. However, the findings of fact concerning its knowledge supports my conclusion (see paragraphs 71-74 above), namely, that SICA had a Prohibited Purpose. The purpose of putting the Goodwill and its realisable value out of the reach of persons who may at some time make a claim. I have to reject Mr Munn's evidence of a belief that the £1.00 represented the value of the Goodwill without the personal goodwill of himself and Mr Rees when plainly it did not.

153. That leaves his evidence and case that he believed SICA's creditors would be paid by SICA. He and SICA cannot have held that belief when the Arrangement and the Asset Sale Agreement resulted in the reduction in the value of goodwill/customer relations from circa £3-4 million in the balance sheet to £1.00 with its obvious impact upon SICA's financial position in particular including its long term liabilities as established by the findings of fact. Nor can he claim that SICA did not have the Prohibited Purpose because he intended to provide funds to SICA in the future. Not only did he not do so but the only reason for considering doing so was because the Arrangement and the Agreements including the Asset Sale Agreement were designed to leave SICA's creditors as victims by putting the true value of the Goodwill into SBL and beyond the reach of its creditors. That was one of their purposes even if he anticipated curing the position later.

154. In a document filed after the close of submissions, Mr Munn asserts that one of the dominant purposes of the structure of the Agreements was to achieve taxation benefits and that the tax saved was £1.339 million. This did not feature during the trial. An obvious response would have been that the test is not "dominant purpose" (see paragraph 116c(ii) above). In addition, it might have been observed that this case supports the submission that the Agreements should be considered as a whole and of the existence of the Arrangement. However, the issue here is whether SICA had a Prohibited Purpose and it is plain based upon the facts and for the reasons set out above that it did.

155. In those circumstances I do not consider it necessary to address the case and submission that SBL can rely upon a history of Mr Munn's failing to disclose full facts and matters and leaving companies insolvent and, HMRC in particular unpaid.

The case that there was a Prohibited Purpose for the Arrangement and the Asset Sale Agreement is established by the facts of this case.

F4e) Can Mr and Mrs Munn Be Liable Under s.423 for the Same Damage?

156. The Arrangement and the Asset Sale Agreement being a transaction at an undervalue for a Prohibited Purpose, the next issue is whether the Court has power to grant relief against Mr and/or Mrs Munn which would result in them being liable for the same damage as SBL (or some of it).

157. SBL's primary case relies upon ***s.425's*** non-exhaustive list of relief. It includes the power to make an order under ***s.423*** which requires *"any person to pay to any other person in respect of benefits received from [SICA] such sums as the Court may direct"* (my underlining for emphasis). *"Any person"* includes persons who did not enter into the transaction with SICA subject to the statutory exclusions provided (***s.425((1)(d)***). Mr and Mrs Munn argue that it does not apply because they did not receive any benefit from SICA, having been paid for their shares by ETL.

158. That argument cannot succeed in the context of the Arrangement. The benefit they received from the Arrangement, was the consideration for their shares to the extent that the price was attributable to the fact that £1.00 only was paid for the Goodwill. That was a benefit received from SICA because it was party to the Arrangement and the Arrangement resulted in it transferring the Goodwill for a sum which enabled the payment by ETL to Mr and Mrs Munn for their shares. A payment from which it would otherwise have benefited had the Goodwill not been sold at an undervalue. An order can be made against them to restore that benefit pursuant to the power conferred by ***s.425(1)(d)***.

159. If it had been right to consider the Asset Sale Agreement on its own, I would have reached the same decision but by a different route. I would have concluded that ***s.425(1)(d)*** did not apply because Mr and Mrs Mann received their consideration from ETL. True there would remain an argument that the benefit was nevertheless derived from SICA but it would be too convoluted an analysis for the purposes of the language of ***s.425(1)(d)***. However, that decision would have been based on the specific wording of this particular power. As previously stated, ***s.425*** is not an exhaustive list of relief that can be granted. I would have reached the conclusion that the general power to order relief under ***s.423*** enabled such an order to be made.

160. That is because (assuming it is right to grant such relief - to be considered individually below) an order requiring them to pay SICA a sum equal to the benefit they received, namely the amount paid for their shares by ETL attributable to the value of the Goodwill which SICA did not receive, would meet the purpose of ***s.423*** and, therefore, the intention of Parliament in the context of a transaction at an undervalue for a Prohibited Purpose. It achieves restoration to SICA and protection of SICA's creditors to the extent of the value of the benefit SICA had put beyond their reach. It is an order permitted by the language of ***s.423***, which provides in the most general terms that the Court may make such order as it thinks fit to restore and protect.

161. I therefore conclude that the Court has power to order payment to SICA by Mr and Mrs Munn of the consideration paid for their shares which is attributable to the value of the Goodwill, the benefit put beyond the reach of its creditors.

F4f) Should Mr Munn Be Liable Under s.423 for the Same Damage?

162. The facts leading to the decision that the sale of the Goodwill was a transaction at an undervalue for a Prohibited Purpose identify the role of Mr Munn in the Arrangement and in the structure of the Agreements. The facts concerning his role, involvement and resulting personal benefit lead inevitably to the conclusion that the Court should exercise its discretion to make an order for restoration and protection against him under **s.423**.

163. The same conclusion must be reached to the extent that SBL also requires the discretionary power under ***the 1978 Act*** when assessing his contribution to be applied. It is just and equitable in all the circumstances for him to pay the consideration paid for his shares which is attributable to the value of the Goodwill. There is no reason to exempt him from liability when account is taken of his role as a director of SICA and SBL, his knowledge, his purpose and/or his personal benefit.

164. In reaching that decision I have considered the argument that there should be no contribution because the effect of the settlement is that SBL is paying the consideration it ought to have paid SICA in the first place. I do not consider that argument to be sound. First because the order is for the benefit of SICA and SICA may not be paid by SBL. Second because SBL was never intended to pay the consideration attributable to the Goodwill other than £1.00.

F4g) Should Mrs Munn Under s.423 Be Liable for the Same Damage?

165. Neither side has suggested that Mrs Munn did not receive a benefit from the sale of the CHL shares jointly owned. It has not been proposed by her, for example, that she was only a trustee of the shares and her husband was the sole beneficial owner. That being so, the case has proceeded on the basis that she received the benefit of half the consideration paid.

166. Mrs Munn's defence that she had no knowledge of the undervalue and the Prohibited Purpose places her in a different factual position to her husband and she contends (amongst other matters) that she can rely upon ***s.425(2)(b)*** which provides that an order under ***s.423***:

> *"shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances [by which an order under s.423 may be made in respect of the transaction] to pay any sum unless [she] was a party to the transaction [at an undervalue for a Prohibited Purpose]"* (my underlining for emphasis).

167. However, because Agreements effected the Arrangement and achieved the payment of ETL funds to Mr and Mrs Munn and Mr Rees and not to SICA, she was a party to

the transaction. As a party, she cannot rely upon that statutory exception whatever her position concerning good faith and notice.

168. The outcome would not alter even if the transaction is treated as the Asset Sale Agreement on its own. Considering each element of the statutory exception: This judgment has decided for the reasons set out above that she received a benefit, the increase in the price paid. It is not suggested that she had notice either that the sale of the Goodwill was at an undervalue or that SICA had a Prohibited Purpose. She received the benefit without notice. In addition, there has been no enquiry into her motives and state of mind which could lead to the decision that she was not acting in good faith. However, she did not provide value for the benefit received. The benefit she received was the consideration paid for her shares which was attributable to the value of the Goodwill. She did not provide value for that benefit.

169. It is just and equitable to order restoration for the protection of creditors. Whilst Mrs Munn's defence that she had no knowledge of the undervalue and the Prohibited Purpose places her in a different position to her husband, she still received the benefit at the expense of SICA and its creditors and that should not have happened. She gained from the sale of the shares jointly held with Mr Munn, the benefit of the value of SICA's asset as a result of the transaction at an undervalue. She would not otherwise have received the consideration paid for the shares which is attributable to the value of the Goodwill. In those circumstances it would not be right to exercise any power of exemption. It is to be noted that she has not raised any change of position or similar case for consideration.

170. It is to be acknowledged that this outcome now leaves her in a different position to Mr Rees. He retains the benefit he received despite, as Mrs Munn argues, the fact that he had greater knowledge and involvement than her. However, that does not provide a ground for reaching a different decision as between herself and SICA when the order is limited to the benefit she received without providing value. Whether steps should be taken by SICA to remedy that situation concerning Mr Rees is a matter for them and for any Court which may in due course have to address that issue. Mr Rees is not a party to this litigation. There was a request by Mr Munn at the beginning of the hearing for an adjournment to enable joinder but that application was far too late in the context of the first day of this trial.

F4h) Is Mr Munn liable to SICA for the same damage for Breach of Duty?

171. Once it is established that Mr Munn was a director who caused SICA to enter into a transaction at an undervalue in the circumstances set out above, it must follow that he acted in breach of his general statutory director's duties under ***ss171-177 of the Companies Act 1986*** (in particular ***ss171-172***) and in breach of his fiduciary duties. The damages will be the same as SBL's liability for SICA's damage, namely the difference in value between the true value of the consideration provided by SICA and the sum of £1.00. ***Section 1157(1) of the Companies Act 2006*** empowers the Court to exercise a discretion to relieve a director from liability for breach of duty but only if it appears that he acted honestly and reasonably and, if so, he ought fairly to be

excused having regard to all the circumstances. It cannot be argued that Mr Munn acted reasonably and, therefore, the provision cannot be applied.

F4i) Are Mr and/or Mrs Munn liable to SICA for the same damage for Breach of Warranty?"

172. This further alternative claim has been very much the makeweight of the trial. If needed, it would raise interesting questions which in the circumstances of the case having concentrated upon the matters addressed above have not been developed before me either in evidence or submissions and argument. First, the question and effect of the attribution of Mr Munn's knowledge as a director of SICA to SBL of which he was the sole director in the context of the Asset Sale Agreement. Second, the application of the findings concerning the evidence of Mrs Brassington and ETL's knowledge of SICA's financial position including knowledge of SICA's liability to pay the £1.8 million owed to Candco for the goodwill it assigned. Third, the concept of damage in the context of SBL entering into an agreement at a substantial undervalue and having to pay a settlement sum agreed to represent the damage suffered by SICA for that undervalue whilst retaining the assets purchased.

173. It would not be right for me to opine on those matters without first having heard from and considered the submissions for and arguments of the parties. In this context I bear in mind that Mr and Mrs Munn have been unrepresented.

174. I have reached that conclusion despite the fact (as found) that ETL knew of the £1.8 million debt and that it was obvious from the accounts/accounting records that it would not be repaid if the consideration for the Goodwill was £1.00 appear to be a fundamental difficulty for SBL's case. It could be argued that I should reach my decision and simply take the view that SBL has failed to prove its case. It seems to me, however, that principles of justice and fairness mean that this route cannot be taken without asking if SBL want to take this matter further and, if so, to seek permission to make further submissions. However, this now appears to be a matter of academic interest only.

F5) Relief - Conclusion

175. My first decision, therefore, is that it is right to order a contribution from Mr and Mrs Munn pursuant to the ***s.423*** claim in the amount the consideration paid for their shares by ETL was attributable to the true value of the Goodwill. Payment will restore the value of that Goodwill to SICA and as a result protect its creditors.

176. The parties have not sought to quantify this amount in submissions or argument and the quantum will need to be assessed. It would not be right for me to do so without the parties having the opportunity to address the Court. That opportunity will also enable argument, if considered appropriate, as to whether liability should be limited to their respective beneficial interests. It is not a point raised previously and it is mentioned without any indication of merit but bearing in mind that Mr and Mrs Munn are unrepresented.

177. My second decision is that Mr Munn will also be liable (without double counting) to contribute in a sum equal to the damages which he should be ordered to pay as a result of his breach of the statutory and fiduciary duties owed to SICA. I will provide the parties with the opportunity to argue this quantum too, although it seems reasonably apparent subject to one particular matter that the contribution should be the total sum of SBL's settlement figure. That appears to be the case because it is lower than the value agreed by the experts. There is no expert evidence on behalf of Mr and Mrs Munn to challenge the agreed valuation. I consider the methodology to be sound and I have no cause to reject either the multiplier or the multiplicand.

178. However, a matter which may undermine that conclusion (which I mention in the context of Mr and Mrs Munn being unrepresented but without indications of merit) is the argument that the value of the Goodwill opined by the expert failed to take into account the amount SICA/ETL had to pay to procure the continued involvement of Mr Munn and Mr Rees in the Business. Some reduction may follow, although obviously nothing like the sum required to produce a £1.00 valuation.

179. It is not for me to develop any such argument. It is to be noted, however, that if this argument is advanced, there may also be a counter issue that Mr Munn would have had to account to SICA for any such payment or other benefit received whilst SICA was insolvent. I will hear what the parties have to say with regard to this at or following hand down of the judgment.

180. At this stage I do not consider that costs should be addressed in terms of contribution but should be decided under the Civil Procedure Rules.

Order Accordingly