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Case No: BL-2019-000814

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 06/05/2022

Before :

INSOLVENCY AND COMPANIES COURT JUDGE JONES
SITTING AS A HIGH COURT JUDGE

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Between :

GARY JAMES KEANE	**Claimant**
- and -	
(1) DAVID SARGEN	
(2) MICHAEL FRANCIS BEATON	
(3) SEAN MACGLOIN	
(4) JONATHAN MARTIN	
(5) DOCUMENT RISK SOLUTIONS LIMITED	
(6) DERIVATIVE RISK SOLUTIONS LLP	**Defendants**

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Mr John McDonnell Q.C. (instructed by **Richard Slade and Company**) for the **Claimant**
Ms Lesley Anderson Q.C. (instructed by **Brabners LLP**) for the **1-5 Defendants**

Hearing dates: 21-28 February 2022

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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.

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INSOLVENCY AND COMPANIES COURT JUDGE JONES

I.C.C. Judge Jones:

A) Introduction

1. The business known as "DRS" provides financial services for those engaged in the global derivatives market. It first belonged to Document Risk Solutions Ltd ("**DRSL**"), which was incorporated on 12 February 2009. The business was transferred to Derivatives Risk Solutions LLP ("**the LLP**"), which had been incorporated on 2 April 2012, by deed ("**the Business Transfer Agreement**") dated 14 May 2012. By that date DRSL's registered shareholders were Mr Sargen, Mr Beaton, Mr MacGloin and Mr Martin (together for convenience to be called "**the 1-4Ds**", although Mr MacGloin has recently died and the definition must be read in that circumstance).

2. By 18 June 2012 the Claimant ("**Mr Keane**") had left his employment with Bank of America Merrill Lynch to join the LLP. This is the date of "**the LLP Agreement**" entered into by him, the 1-4Ds and DRSL. It is the agreement which governed (subject to statutory provisions) the mutual rights and duties of the LLP and its six members pursuant to ***section 5 of the Limited Liability Partnership Act 2000***. He and the 1-4 Ds were the LLP's designated members.

3. Mr Keane's main case is that either through a partnership or a constructive trust he had and continues to have an equal beneficial interest in the issued share capital of DRSL of which the 1-4 Ds were the legal owners. As a result, he and the 1-4 Ds had in practice an equal interest in the LLP and he would benefit equally with them, indirectly, insofar as it made distributions to DRSL as well as from the value of DRSL's interest as a member. This is disputed by the 1-4 Ds who contend that they alone were the legal and beneficial owners of DRSL's issued share capital.

4. In 2013 Mr Keane twice transferred part of his interests in the LLP to DRSL, as did the 1-4 Ds in equal shares by Members' Interest Purchase Agreements ("**the MIPAs**"). If he had a beneficial interest in DRSL's shares, he would continue in practice to have an equal interest in the LLP with the 1-4 Ds. If not, they alone would indirectly retain the interests sold to DRSL (his and theirs) because of their ownership of DRSL. They alone would continue to benefit indirectly from any future distributions to DRSL by the LLP.

5. The 1-4 Ds contend that Mr Keane never had an interest in their shares in DRSL because at a meeting on 10 May 2012 ("**the 10 May 2012 Meeting**") he decided for tax reasons to reject their offer to become an equal shareholder of DRSL when joining the LLP. It is their case that in 2013 he willingly transferred his interests for good consideration knowing that he would reduce his interest in the LLP to 4.5% and not benefit from DRSL's purchase. The 1-4 Ds in the alternative contend that in any event Mr Keane settled this dispute when by deed ("**the Deed of Asset Transfer**") dated 30 November 2017 he sold his remaining interest in and ceased to be a member of the LLP. The Deed of Asset Transfer also sold the LLP's DRS business back to DRSL and the 1-4 Ds gifted their interests in the LLP to their company.

6. The level of heat generated between the parties by this dispute has increased significantly because of the alternative claim of Mr Keane that he has been treated unfairly, even if the 1-4 Ds are correct in law to conclude that he never held a beneficial interest in DRSL's issued share capital. He asserts that they entered into the LLP Agreement knowing he understood that he was becoming an equal partner with them.

They did not draw to his attention the fact, as they now assert, that this was not the case because he held no interest in the DRSL shares. He trusted them, they are experienced lawyers and he was misled, if what they now assert is correct.

7. The existence of any duty to advise or even any request for advice is denied by the 1-4 Ds and they strongly object to their professional reputations being besmirched by such an allegation. They in turn have fanned the flames by asserting that Mr Keane has throughout deliberately sought to mislead the Court concerning not only his general ability to understand legal documents but also specifically about his understanding of the LLP Agreement. The true facts being that it was his position from the 10 May 2012 Meeting that he did not want to become a shareholder of DRSL because of adverse taxation consequences. That he at all times knew when entering into the LLP Agreement that he had no interest in the DRSL shares they each owned.

8. I will make clear from the beginning in the light of that conflagration, first that Mr Keane's claim that he was misled was not pursued at trial. Second, that I do not accept that Mr Keane has sought to intentionally mislead the Court as alleged by 1-4 Ds.

9. There are two other claims to refer to. They concern the terms of the LLP Agreement and the Deed of Asset Transfer. In summary, Mr Keane claims an account of sums due on his capital and current accounts within the LLP, which has since been dissolved as a result of its removal from the register at Companies House. In addition, he claims repayment of the sums due from his loan account with DRSL.

B) The Pleaded Cases

B1) The Partnership Claim

10. It is not unusual for the contents of parties' statements of case to diminish in importance the nearer a case comes to trial. Sometimes they are rarely mentioned at trial, whether because they have been effectively superseded by a list of issues or because the parties fully understand each other's cases. That is not so here where it is necessary to analyse Mr Keane's statement of case in detail. That is because the 1-4 Ds contend that the case asserting a beneficial interest in the DRSL shares through partnership presented at trial bears little resemblance to the Claim Form and Particulars of Claim. Ms Anderson Q.C., their leading counsel, submits in the absence of amendment and on grounds of unfairness that the Court is not permitted to reach a decision which falls outside their ambit.

11. It is to be noted that this is not a case for which the List of Issues has assisted. The list was not agreed, although it is fair to observe that Mr McDonnell Q.C.'s widely drafted issues on behalf of Mr Keane would have offered him all the scope he might possibly have required for the widest of submissions had they been agreed.

12. Ms Anderson Q.C. correctly pointed out that the Claim Form seeks a declaration that there has been a partnership carrying on the business of holding the DRSL shares since 20 August 2012. Her first submission as a result was that any claim of a partnership existing before that date can only be made with permission to amend. She also referred to the fact that the Claim Form seeks in the alternative a declaration that the shares are

held by 1-4 Ds on constructive trust for themselves and Mr Keane in equal shares. Ms Anderson Q.C. correctly observed that this was not argued by Mr McDonnell Q.C. in opening or during closing submissions.

13. The Particulars of Claim drafted by junior counsel, who no longer appears, can be summarised for these purposes as asserting:

    a) The agreement that Mr Keane should join 1-4 Ds in the DRS business as part of a joint venture reached in 2012 was on terms that he *"would have a profit and equity interest in the DRS business which would have parity with the profit and equity interest of each of [them]"*. This was agreed in about March/April 2012 in the context of him receiving an equal equity stake in the then owner of the business, DRSL (paras 2 and 15-16).

    b) The LLP was formed as part of a plan to restructure the DRS business model and *"to ensure that the ... five ... had an equal interest in the joint venture it was agreed at the time of setting up the LLP and/or it was their common intention and/or understanding that the shareholding of DRSL would be held by the [1-4 Ds] for the benefit of [Mr] Keane and the [1-4 Ds] and that such holding of the shares of DRSL would be effected by a partnership between [Mr] Keane and the [1-4 Ds] in which they would be equal partners"* (para 19).

    c) *"It ... was the common intention and/or understanding ... deduced from their express agreement and/or conduct that they would equally enjoy the equity and the benefits and suffer the losses of the joint venture"* (para 20).

14. The particulars supporting paragraph 20 of that statement of case include the matters summarised at paragraph 13(a) above, refer to email correspondence of 10 May 2012 and rely upon both the Business Transfer Agreement and the LLP Agreement. By reference to paragraph 20 and its particulars it can be observed, therefore, that the claim does not refer to 20 August 2012 but pleads a case of an entitlement to the beneficial interest in the DRSL shares existing by the date of the LLP Agreement, 18 June 2012 and resulting from an agreement concerning Mr Keane joining the DRS business in March/April 2012.

15. The pre-penultimate particular of paragraph 20, sub-paragraph 20.6, pleads that the parties agreed the terms of a partnership set out in a draft partnership agreement between the 1-4 Ds and a draft deed of adherence adding Mr Keane to the partnership. It is pleaded that their terms recorded the common intention that the DRSL shares were to be held by the 1-4 Ds on trust for the partnership of themselves and Mr Keane.

16. This sub-paragraph has its own particulars. An email sent on 6 August 2012 by Mr Sargen to the 1-4 Ds and Mr Keane is quoted to establish the background for those drafts being produced. Mr Sargen's email reminded them that the idea was for the DRSL shares to be held in a partnership. He explained that *"at long last"* the agreement implementing that idea had been produced by Kingston Smith LLP, the accountants advising ("**Kingston Smith**"). It is pleaded (with more detail) that the terms of those drafts record an equal partnership of the five carrying on the business of holding DRSL's issued share capital. It is asserted (subject to further pleading after disclosure) that Mr Keane believed the drafts were signed, although this has not been maintained.

The date of 20 August 2012 appears in the pleading as the date of a chasing email asking for comments before the drafts were sent to be finalised by Kingston Smith.

17. The remaining particulars of paragraph 20 (sub-paragraphs 20.7-20.8) plead facts and matters to support the existence of the beneficial interest being held by the partnership of which Mr Keane was also a member. The pleading relies upon an asserted purpose of the transfer of the DRS business to the LLP. Namely, that this would allow each of the 1-4 Ds and Mr Keane in due course to sell their respective interests to DRSL for tax purposes. That would allow all of them to be able to draw value from the LLP as capital gains. It was not to enable the 1-4 Ds to be unjustly enriched by them alone indirectly retaining the interests they sold through their shareholdings in DRSL.

18. The Reply need only be referred to insofar as it adds to or alters the case summarised above:

    a) It denies that the advice of Kingston Smith was that an adverse tax consequence would arise from *"simply having a beneficial interest"* in DRSL's shares and that the advice concerned the consequences should Mr Keane be appointed a director or become an employee of DRSL.

    b) It denies that Mr Keane declined to take equity in DRSL for tax reasons. In support, reliance is placed on Kingston Smith's email of advice sent on 10 May 2012 (referring to directorship/employment) and to Mr Sargen's 6 August 2012 email. It is pleaded that the email is admitted by 1-4 Ds and that it confirmed *"that the documents provided by Kingston Smith LLP (attached thereto) simply sought to formalise the agreement or common understanding/intention reached between [Mr] Keane and the First to Fourth Defendants at the time the LLP Agreement was entered into that the shares of DRSL were held beneficially for [Mr] Keane and the First to Fourth Defendants in equal shares"*.

    c) It is pleaded that Mr Keane had been unaware that DRSL was receiving large sums for being a service company acting for the LLP.

    d) It is pleaded that Kingston Smith did not act for Mr Keane personally until 13 June 2013 and then only for tax returns.

    e) It is pleaded that it was Mr MacGloin and Mr Martin who first stated in 2017 that Mr Keane was not part of the *"limited structure"*.

    f) The MIPAs entered into in 2013 were not intended to result in Mr Keane's disposal of his interest in the LLP benefiting 1-4 Ds alone.

19. That summary of the case within paragraphs 13-18 above is the analysis to be addressed when considering, in due course, whether the case presented at trial differed from Mr Keane's claim as pleaded and, if so, whether it would be unfair to apply such a case within this judgment unless there is a successful application to amend.

20. However, at this stage it can be concluded in the light of the pleaded case summarised above, that the 1-4 Ds would or should have addressed events from the beginning of 2012 and through to and including August/September 2012 for the purposes of their Defence, disclosure, witness statements and the trial. In particular (amongst other

matters) that 1-4 Ds would have addressed the issues of: (i) an agreement by March/April of an equal equity stake; (ii) the agreement/common intention/understanding *"at the time of setting up the LLP"* that Mr Keane and the 1-4 Ds would hold an equal beneficial interest in DRSL's issued share capital through partnership; and (iii) the relevance and consequence of the draft August 2012 partnership documents, including the case that they formalised an existing agreement or understanding that the shares were held beneficially by the 1-4 Ds and Mr Keane.

21. In addition, it can be concluded that the 1-4 Ds would or should have addressed the transfers of interests in the LLP to DRSL during 2013 by the MIPAs. The pleaded claim relies upon advice to the effect that Mr Keane would suffer no disadvantage from this advantageous tax scheme or upon the absence of disclosure of the disadvantages he would suffer assuming he had no beneficial interest in the DRSL shares. This gives rise, as pleaded, to the alternative constructive trust claim (paragraph 25 of the Particulars of Claim).

B2) The Other Extant Claims

22. Mr Keane's above-mentioned claims in respect of capital, current and loan accounts address the MIPAs and the Deed of Asset Transfer. It is claimed that at that date DRSL owed him £194,933 as the balance of the consideration to be paid under the MIPAs which he had loaned to DRSL pursuant to their terms. It is also claimed that the Deed of Asset Transfer did not affect his entitlement to an account and payment of all sums due on his current and capital accounts with the LLP.

B3) The Defence

23. Mr McDonnell Q.C. has not raised a pleading point during his submissions and, as a result, the 1-4 Ds' defence of the partnership claims can be summarised without the analysis required of Mr Keane's pleadings. It is to be noted that this is not a Defence for the LLP. The reason being that it currently no longer exists. It was struck off the register at Companies House voluntarily and dissolved on 7 May 2019.

24. The starting point for the Defence (including the Reply to a CPR Part 18 request) is that by 2012 the DRS business had become a joint venture of the 1-4 Ds. Once the LLP had purchased the DRS business, DRSL became a service company for the LLP. Mr Keane was not a co-venturer. Whilst it is admitted within paragraph 4.1 of the Defence that the DRS business was carried on by 1-4 Ds with Mr Keane together, at paragraph 19 it is pleaded that he was not involved in the DRS business when it was carried on by DRSL.

25. It is pleaded that Mr Keane's involvement in the DRS business emanated from discussions beginning in mid-February 2012 concerning the terms upon which he would join DRSL. A six-month probationary period was discussed for a financial package which would include a 5% equity share, subject to him achieving performance criteria yet to be agreed. No such or similar agreement was concluded because Mr Keane declined equity for tax reasons. That refusal of their 1 March 2012 offer was at

a meeting on 10 May 2012 (as specified in a Reply to a Request for Further Information).

26. In June he joined the LLP, after the Business Transfer Agreement, and his contractual rights and obligations are governed by the LLP Agreement. It contains an "entire agreement" clause. There was no separate joint or equal venture. There was no separate agreement, common intention or understanding concerning a beneficial interest in 1-4 Ds' DRSL shares. The fact that he had no interest in DRSL's shares resulted from his refusal to accept equity in DRSL for his own tax reasons. There was no constructive trust.

27. The capital contribution into the LLP of each member was set out in Schedule 3 to the LLP Agreement and Members were to share any profits on the bases set out in clauses 9 and 10 and Schedule 3.

28. It is 1-4 Ds' case that the draft partnership documentation considered in August 2012, including a draft deed of adherence for Mr Keane, was proposed for the purpose of enabling Mr Keane to be *"part and parcel of the decision-making within [DRSL] but [he] wasn't required to pay to join [DRSL]"*, as stated in Mr Sargen's above-mentioned 6 August 2012 email. The drafts were not agreed, never executed and would not give or were not meant to have given him a beneficial interest in DRSL's shares.

29. In all those circumstances, it is pleaded, the MIPAs were entered into in 2013 when Mr Keane had no interest in the shares of DRSL, the purchaser of his LLP interests. The MIPAs were an essential part of the business structure introduced with the LLP in 2012 to give effect to the tax advice from Kingston Smith. It was his decision whether to enter into them and no advice was given to him and no non-disclosure occurred as he alleges.

30. It is also pleaded that Mr Keane has *"exaggerated the nature and effect of his work in promoting the business of [the LLP]"*. However, that did not feature as an issue at trial.

31. The Defence asserts that the DRS business was sold by the LLP to DRSL by the Deed of Asset Transfer for good consideration. Mr Keane was paid the price for his remaining 4.5% interest in the LLP in full and final settlement and ceased to be a member of the LLP. By clause 3 in particular, the Deed of Asset Transfer in any event settled and released the claims relied upon in these proceedings including payment of his current/capital accounts.

32. In any event clause 21.3 of the LLP Agreement confers an absolute discretion upon the remaining members of the LLP whether to pay an outgoing member. Mr Keane has never requested that discretion to be exercised. He is not entitled to payment. Under clause 21.2 the remaining members succeed to his interest in the LLP.

33. As to the loan to DRSL, clauses 3 and 5 of the MIPAs respectively include an absolute discretion provision and limit repayment of the loans resulting from the sale of Mr Keane's LLP interests for the purpose of enabling capital gains tax to be paid in respect of the transfer of his interests under the relevant MIPA agreement. The exercise of that discretion has not been requested and no capital gains tax has become payable. He is not entitled to payment.

C) The Witnesses

C1) Approach To The Evidence

34. At the start of the trial both sides relied upon the guidance of Mr Justice Leggatt, as he then was, in ***Gestmin SGPS SA v Credit Suisse (UK) Ltd*** [2013] EWHC 3560 (Comm) and ***Blue v Ashley*** [2017] EWHC 1928 (Comm) concerning the approach the Court should adopt to oral evidence in particular bearing in mind the lapse of time and its effects upon memories. Ms Anderson Q.C., perhaps encouraged by her assessment of the oral evidence, moved away from such reliance during submissions, seeking to persuade the Court that this was a case where her clients' recollections should be trusted as wholly reliable.

35. Bearing in mind that crucial parts of this case deal with the period 2012-2013, there is no doubt that I must assess the evidence with the guidance provided in mind and appreciate that memory may well be affected. That may be not only by the simple fact of time expiry and the need to recreate (as opposed to replay) events within the memory but also because of the potential for false memory. In doing so, I will appreciate that this is not a matter upon which I have any expert evidence to the effect that false memory may or may not have arisen. Nevertheless, the guidance makes clear that the evidence should be assessed in circumstances where contemporaneous documentation is likely to be the best or most reliable guide to the truth. "Likely" because there will be many, usual caveats and because I must still bear in mind the facts and matters presented to me orally. In all the circumstances I will approach all oral evidence with caution because of the expiry of time and I will assess it against the contemporaneous documentation.

36. Both sides, to establish the terms of their agreement in 2012, rely from time to time upon evidence of what occurred after the agreement might have been or was made. Obviously evidence of what occurred leading up to and at the time of the (alleged) agreement will normally be the primary evidence. However, subsequent admissible words, actions or events may also provide evidence of or shed light upon what, if anything, the parties agreed. Such evidence can be admitted for the purpose of deciding whether there was a contract and what its terms were (assuming the contract is not wholly in writing). I will adopt this approach without repeating this basic proposition.

37. However, such evidence cannot be relied upon for the purpose of construing what was agreed. The parties' intention is to be identified objectively from the words used, the subject matter and the circumstances (to the extent admissible) existing at the time the contract was made. Subsequent words, actions or events may establish a variation or a new/collateral agreement or even an estoppel, although those possibilities are not relied upon in this case, but cannot affect the true construction of the contract (see generally Lewison, ***"The Interpretation of Contracts"***, 7th edition, Chapter 3, Section 19) ***Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd*** [1970] A.C. 583, H.L.). I will equally apply that approach.

C2) Mr Keane

38. Mr Keane's evidence has been decried on behalf of the 1-4 Ds on the basis that he has deliberately hidden the truth of his knowledge that he had no interest in the DRSL shares and that he sold the whole of his interest in the LLP through the MIPAs and the Deed of Asset Transfer. I accept that some of his evidence was unsatisfactory, particularly when he sought to suggest that he really did not understand the difference between fundamental concepts such as a limited company and a limited liability partnership. However, the reality is that he honestly recognised that he did not have a good memory of the detail which surrounded and gave rise to him joining the LLP. Furthermore, as will be seen when I address the evidence, in round terms his recollection of the general position was nevertheless more accurate than the recollection of the 1-4 Ds.

39. That really is all that I want to say as a summary of his evidence because I will address it in more detail when necessary whilst dealing with the evidence and making findings of fact. However, in the light of the serious challenge to his veracity and the overall allegation that he deliberately sought to mislead the Court, I need to expand further upon a number of matters.

40. First, Mr Keane was subject to forceful cross-examination including express allegations that he was deliberately lying. That is, of course, legitimate and required in accordance with instructions and I do not criticise it. However, some of his answers must be read in that context. For example, the suggestions of limited knowledge of the concepts to which I have referred were not just plainly wrong but were so wrong that they had to be attributable to the context of the pressure he felt under and which he expressed at the end of his evidence. I do not consider it fair to describe him as having *"played a bit of a fool"*.

41. Second, it did not help that some of the questions were based upon assertions resulting from instructions which have proved to be in error. For example, it was not untrue for him to recollect that it had been agreed before the 10 May 2012 Meeting that he would join the DRS business with an equal share of the equity and profits. The allegation put to him that he had chosen to recollect that such an agreement had been reached with Mr MacGloin because Mr MacGloin could not now give evidence was an extremely challenging and pressurised accusation based on the inaccurate instructions that no such agreement had been reached with anyone. That was not a one moment pressure zone for him but was part of the build-up of pressure and strain that he undoubtedly felt even though I tried to diffuse it.

42. Third, there was more than one occasion when challenges were made to his evidence in a context where in fact there was a disconnect between his answers and the understanding of those answers. For example, questions concerning a passage in a document he had written reading: *"DRS has been up and running for seven years, as a limited company for three years"*. The reality was that he answered the first question and then found it difficult to deal with follow up questions based on the premise that he had not answered it. It was in that context that he finally resorted to: *"I am not a lawyer, it was just a term for what came prior to the LLP"*. The reality is that this series of questions were confusing to him. I found it necessary to intervene on a number of occasions because of confusion.

43. Fourth, he should not be criticised in circumstances where there was room for finding the question lacked the necessary clarity. For example his response that a question was

"beyond his pay grade" when the question was based on the concept that there had to be a transfer of shares with stock transfer forms from1-4 Ds before the shares could be owned by a partnership. That answer is unsatisfactory. However, it was not fair to expect him to draw the distinctions between membership, legal title and beneficial title when considering the circumstances in which share transfers are needed.

C3) 1-4Ds

44. It is plain that the 1-4 Ds are highly qualified, intelligent and experienced in providing specific legal services for the global derivatives market. I do not intend to say a great deal about their evidence at this stage but will wait until addressing the evidence and making findings of fact. That is because I approach their evidence from the perspective that they have sought to assist the Court but do not have the accuracy of recollection that they probably think they have. Insofar as that is thought surprising, ten years or so have passed and they will each have been extremely busy providing services for others during that period, as they will have been during the relevant periods. In addition they will have been discussing and no doubt debating the claim, as they ought to have done, but with the result that false memory can easily arise. I obviously do not know if that is the cause of their lapses of memory but it certainly appears a reasonable one to propose.

45. I will now turn to the evidence for which I will make findings of fact both in context and also within the sections containing my decisions.

C4) Absence of Evidence from Kingston Smith

46. At the beginning of the trial I refused to permit Mr Keane to call Mr Hughes of Kingston Smith except for a limited purpose which was not pursued. The reasons have been set out in a separate judgment and will not be repeated. This means neither side has presented evidence from those who were advising upon and drafting agreements for and relevant to the transfer of the DRS business from DRSL to the LLP, Mr Keane joining the LLP, the MIPAs and the Deed of Asset Transfer. Although one might have anticipated that such evidence would have assisted, both sides made that choice and the point will not be taken against either of them.

D) The Evidence and Findings of Fact

D1) Tax Advice

47. On 12 January 2012 Kingston Smith issued their engagement letter to carry out a tax review for DRSL of its business structure and to advise upon a tax efficient re-structuring path. The 20 February 2012 report ("**the KS Report**") proposed (in summary):

a) If DRSL transferred its business to a limited liability partnership, this would provide an opportunity for the members (of which it would be one) to sell their interests to it from time to time after 12 months. The aim would be that DRSL would become the principal member and, therefore, recipient of distributed profits with the advantage that corporation tax would be paid by it, instead of income tax by the other members. The transfer of business would itself be tax efficient and potentially, corporation tax could be avoided by using book values.

b) The subsequent sales of members' LLP interests to DRSL would also enable value to be removed from the LLP as a capital gain rather than through the distribution of profits. The members would potentially be able to claim entrepreneurs' relief and the gains might be taxed at the 10% rate with payment potentially being deferred with HMRC's agreement. This would be far more tax efficient than an allocation of profits which for the individual members would attract income tax and national insurance contributions.

c) The value available to be removed would depend upon the effect of the LLP's growth upon its valuation. However, the lower the purchase price for the business transferred, the greater the potential for capital value in the future. This might be achieved, for example, by using a purchase price which would exclude any goodwill attributable to the members personally (assuming it would be factually correct to do so). On the basis that such goodwill existed, it would be brought into the LLP by the members as a result of them taking part in its business. This in itself would increase the value of the LLP's goodwill (assuming it would own it) and, therefore, the capital gains when members' interests were sold to DRSL after 12 months instead of profits being distributed.

d) Payment by DRSL for future sales of members' interests could be achieved by the purchase price being lent to it by the vendor members. Repayments of the loans would not incur tax (except to the extent that income tax would apply to interest) and might in practice reduce the need for taxable dividends. DRSL would be able to gradually write off the purchase prices against its profits by annual amortisation, insofar as the prices would be attributable to goodwill.

e) If the LLP business was in due course to be sold to a third party, individual members would incur a capital gain but the sale of DRSL's interest would be treated as profit for corporation tax purposes.

D2) Bringing Mr Keane On Board

48. At around the same time as this advice was being obtained and considered, discussions were ensuing between 1-4 Ds and Mr Keane for the purpose of securing his move from Bank of America Merrill Lynch. Based on the contemporaneous correspondence referred to below, there can be no doubt that at this stage the "end game" was to have him involved as an equal partner with the 1-4 Ds in the DRS business provided performance criteria would be met within an initial period of his engagement.

49. This was explained to him in an email sent to him by Mr Sargen on 21 February 2012. It confirmed a proposal discussed with him the previous week in the context of the package offered tying in with the introduction of a model starting to be operated by DRSL within which directors would *"share equally in the profits of DRS"*. The package involved a profit share which would be performance linked for six month periods until, assuming the criteria were met and a "walk away term" was not activated, he would have *"equal parity with the existing DRSL directors after 18 months"*. The same approach would be taken for shareholdings with the result that he would have *"equal [DRSL share ownership] parity with the existing DRSL directors after 18 months"* provided the performance criteria were satisfied. The email *"reiterate[d] [the] enthusiasm for getting [him] on board"* and stated the belief that he would be *"a great fit to DRS"* and that his involvement would *"greatly enhance"* the DRS business by expanding the services offered.

50. By 1 March 2012, as evidenced by an email of that date, the proposal was changed to the extent that the above-mentioned parity for profit share and equity would be achieved within a year subject to the specified performance criteria. The proposal set out in the 21 February 2012 email was copied and pasted into that email with the necessary changes made.

51. The case of the 1-4 Ds, as put in cross-examination to Mr Keane, is that the 1 March 2012 proposal was the only offer made and it had not been accepted before the 10 May 2012 Meeting. Mr Keane's response was that this was the only written offer but that matters had moved on as a result of discussions he had with Mr MacGloin. His recollection was that they had agreed before the 10 May 2012 Meeting an equal 20% partnership to start immediately he joined. That is disputed and this led to the allegation that Mr Keane had deliberately chosen Mr MacGloin because he could no longer give evidence. Mr Martin's evidence during cross-examination, for example, was that to the extent there were discussions between Mr Keane and Mr MacGloin agreeing to parity, of which he could have no direct knowledge, Mr MacGloin never reported them and in any event he had no authorisation to reach such an agreement. The 1-4 Ds remained resolute that the 1 March 2012 offer remained on the table going in to the 10 May 2012 Meeting

52. I find that there is no doubt that the 1 March 2012 email proposal was made on terms that Mr Keane was being asked to join with the 1-4 Ds in DRSL (the LLP not having yet been formed) on the basis that he would receive 20% of the equity (then meaning DRSL shares) and 20% of the profits within 1 year (subject to performance criteria). It is also apparent from the correspondence referred to that this was considered justifiable on the part of 1-4 Ds because they saw Mr Keane as someone who could provide considerable value to the business. His expertise and experience would mean that additional, complementary services could be offered by the DRS business. Although

there is reference within the statements of case and evidence to 1-4 Ds seeking to undermine Mr Keane's importance and potential/actual influence upon the business, this was not seriously pursued at the trial. I consider that to be the correct course in the light of the contemporaneous evidence. I need not address the question arising from his evidence as to whether the business was in a good financial shape at this stage.

53. I also accept, as a background fact, Mr Keane's evidence that equity and profit equality with the 1-4 Ds was an important factor for him when deciding to leave Bank of America Merrill Lynch. He was earning a reasonable income (a salary of £110,000 with bonus expectations in the region of 30-80% of that base) but, as he explained, this move was attractive for him because it gave him the opportunity to profit as a partner not just an employee (i.e. in terms of equity as well as profits). I accept his evidence that he was looking towards a future in which he would benefit from growth in the value of his equity as well as from his share in the profits.

D3) Agreement to Join

54. I also find, contrary to 1-4 D's recollection, that there was significant change between 1 March and the 10 May 2012 Meeting. This is apparent from the contemporaneous documentation referred to below. In particular, the terms of the 1 March 2012 proposal were agreed on or before 27 April 2012.

55. In addition, I find that this occurred after the 1-4 Ds had formed a partnership to own the DRSL shares and to carry on the business of controlling the future DRSL and LLP group ("**the Group**"). This occurred in the context of Group VAT registration issues as also explained below.

56. I turn to the evidence establishing those facts: Email correspondence during March 2012 reveals that the 1-4 Ds and Mr Keane were working hard together to form and arrange the future operations of the DRS business within the LLP intended to be formed to implement the KS Report. I refer, for example, to the communications concerning the 20 March "Offsite Agenda" for discussions which would include Mr Keane.

57. The day before, 19 March, a draft LLP Agreement intended to identify members' rights and obligations and insofar as it does to replace the default rules within the ***Limited Liability Partnerships Regulations 2001*** (SI 2001/1090) ("**the Regulations**") was provided by Kingston Smith to the 1-4Ds. It appears to be in internal precedent form. Whilst the names of the members were not yet included and their capital contributions not yet identified, it is apparent from clauses 9 and 10 and Schedule 3 that membership would consist of both individuals and the company which would transfer its business to the LLP. In this draft each member would receive *"a share"* of the LLP in accordance with the amount or value of their capital contribution. Capital profits realised would be shared as agreed by the designated members. Profits and losses would also be divided as agreed by the majority of the designated members, who in this and in all subsequent versions would be the individual members.

58. It would have been obvious to the 1-4 Ds when considering the draft (which at this stage was not sent to Mr Keane) that each of the individual members would need to

have an equal interest in the company member if equality of capital and profit share was required, whether in accordance with the 1 March 2012 proposal or otherwise.

59. The LLP was incorporated on 2 April 2012 and its name changed on 3 April. In due course Mr Keane's membership would be backdated to 2 April 2012, as filed at Companies House.

60. On 5 April 2012 the process of Group VAT registration began. The application form included a page signed by each of the 1-4 Ds the day before, 4 April 2012, as *"partners"* representing that they had established themselves as a partnership which would control the Group. There was no express reference to whether the DRSL shares were then beneficially owned by the partnership but, as will be seen, this was a necessary requirement for the Group registration application. Mr Keane was obviously not included. He was not yet a member of the LLP and had no interest in the four issued DRSL shares for which each of the 1-4 Ds was registered as a member.

61. On 24 April Mr Keane was invited to a meeting with the 1-4 Ds between 10.00 am and 12.00 on 27 April 2012. Mr Keane stated during cross-examination that he had no real recollection of the meeting. Although an important meeting, it occurred at what must have been a very busy time and I do not find that surprising ten years later. If anything, this candid admission goes to Mr Keane's credit. In any event, and for the avoidance of doubt, it was certainly not established that this stated absence of recollection was untrue.

62. The meeting is referred to in the witness statement of Mr Martin, now his evidence in chief. He described it as a meeting led by Kingston Smith (Mr Hughes) to address the tax structure. Mr Martin during examination recollected comments by Mr Hughes to the effect that Mr Keane might incur a tax liability ("**the Taxable Event Issue**") should he take shareholder equity and be a director or employee of DRSL. He did not refer to any agreement being reached with Mr Keane in respect of the 1 March 2012 offer (varied or otherwise) either before or at this 27 April 2012 meeting.

63. That summary of the meeting fits with the evidence of Mr Sargen and Mr Beaton. However, Mr Sargen in his witness statement, evidence in chief, specifically stated that the proposal previously made and acceptable to 1-4 Ds, which he described as subject to determining the business structure, was not formally accepted by Mr Keane. The 1-4 Ds maintained that recollection at trial. The problem for their recollection is that it is contradicted by the contemporaneous correspondence.

64. It was put to Mr Keane during cross-examination that the assertion (described when put to him as one suggested by Mr McDonnell) that it was agreed from 10 May 2012 that he was to be an equal partner was wrong because the 1 March 2012 letter evidenced that at best he had only been offered 5% to rise to 20% and, more importantly, there was no agreement. It is apparent from the findings of fact below, however, that matters had moved on from 1 March 2012. Mr Keane's evidence that it had been agreed that he was to be an equal participant with 1-4 Ds in terms of entitlement to equity and profits when he joined the DRS business was correct, subject to fulfilment of the first twelve months' criteria.

65. By email sent to Kingston Smith (Mr Hughes and Mr Barker) on 27 April 2012 at 12.35pm, presumably after the meeting with Mr Keane rather than during it but that

matters not, Mr Sargen provided details of *"the general package agreed with [Mr Keane]"* ("**the Agreed General Package**") (my underlining for emphasis). It was not written whether this was derived from previous conversations between Mr Keane and Mr MacGloin. Again, however, that does not matter. Mr Sargen acting on behalf of the other 1-4 Ds plainly recorded their acceptance of the fact that the Agreed General Package was in place. Mr Sargen, an intelligent and careful lawyer, would not have referred to the package being agreed without meaning it.

66. In his witness statement Mr Sargen described the agreement as an outline proposal. I do not accept that description. Plainly it was an agreement which was open to further discussion and variation until Mr Keane joined the DRS business. However, at that stage it set out the agreed terms upon which Mr Keane would join the business. If nothing changed, they would be contracting on that basis.

67. The terms were: Subject to an option to walk away after six months and assuming specified performance criteria were achieved, Mr Keane would receive parity in terms of equity and profit share within twelve months: 5% equity representing a 5% share in the value of DRSL upon joining, a further 7.5% after six months and another 7.5% after twelve months. It is unnecessary to set out the further, precise details of Mr Keane's rising entitlement to profit share but sufficient to identify the end result, namely, *"equal [profit sharing] parity with the existing DRS directors after 12 months"*. In other words, the 1 March 2012 proposal had been accepted including its equal parity provisions in respect of equity and profit share.

68. The fact that the terms set out in the 27 April 2012 email copied and pasted the 1 March 2012 proposal meant they did not address the position for the purposes of the LLP. However, plainly the fact that Mr Keane would join the LLP would not in itself change the substance of the Agreed General Package, including the equity and profit sharing provisions. Their application would simply need to be adapted (insofar as necessary) to give effect to those provisions. For convenience I will refer to these agreed equity and profit sharing provisions within the Agreed General Package, as varied by their application to the LLP: "**the Equal Parity Agreement**". Their implementation would need to be given effect, at least in part, within the inter-linked LLP Agreement and the current draft, sent 19 March 2012, would need to be amended accordingly. As an example, looking at the draft LLP Agreement then existing (see paragraph 57 above), it would have been obvious (not only to 1-4 Ds as lawyers but also to Mr Keane, with or without advice) that Schedule 1 would now need to identify the members as the 1-4 Ds, Mr Keane and DRSL.

69. It would also have been obvious from the draft LLP's terms that Mr Keane would need to have a 20% beneficial interest in DRSL's issued share capital (subject to applying the 12 month transition terms) in order to implement the Equal Parity Agreement as well as to achieve the tax efficient results advised by the KS Report, which would now be for the benefit of all six members (see paragraph 58 above). Whilst that could have been included expressly within the LLP Agreement, one would expect ownership of DRSL's issued share capital to remain the subject of a separate agreement (whether in terms of transfer, trust or a partnership). That is because it would not normally be the subject of the document which sets out the mutual rights and obligations of members of the LLP. On the other hand, that is a drafting point and not too much should be made of it except to observe that as at 27 April 2012 there were indeed intended to be two

agreements: the Agreed General Package and the draft LLP Agreement, which would be read as inter-linked agreements.

70. By the beginning of May 2012 draft marketing material had been produced for DRSL, which provided an overview of the backgrounds and expertise of the 1-4 Ds and Mr Keane together with an overview of the services to be provided to clients. The business with Mr Keane to be involved was afoot.

D4) The 8 May 2012 Draft LLP Agreement

71. A revised draft of the LLP Agreement was disseminated by Mr Sargen to the other 1-4 Ds and Mr Keane by email on 8 May 2012. He observed that its Schedules 3 and 4 (which were substantially re-drafted) had been drafted *"as best we can"* and could be discussed in further detail at the 10 May 2012 Meeting. Mr Beaton sent round his comments the next day and Mr Martin responded on 9 May. No one has identified the responses as being significant. Mr Keane was included in the emails.

72. The draft included the following terms within clauses 9-10, 13-14 and 21 and Schedules 1, 3 and 4:

a) There would be six members of the LLP, the 1-4 Ds, Mr Keane and DRSL. Under clause 9.2 each would acquire "*a share"* in the LLP in accordance with the amount or value of their respective capital contribution as shown in Schedule 3. Namely, £1,000 in respect of each of the 1-4 Ds and Mr Keane and for DRSL *"The transfer of those assets set out in the Transfer Agreement"* by which it would transfer its business to the LLP. Although referring to *"a share"* and apportioning it according to capital contributions, there would obviously be no share capital. The term applied to the totality of the contractual and statutory rights and obligations of membership including each members' respective entitlement to share in the capital and profits (which but for the LLP Agreement would be governed by ***Default Rule (1) of the Regulations***).

b) As to that entitlement: Subject to allocated losses not exceeding the total capital contribution shown in Schedule 3 (in aggregate), profits or losses of a capital nature would be shared in the same proportion as the capital contributions and be agreed with the designated members. The need for Mr Keane to have an equal beneficial interest in DRSL to implement the Equal Parity Agreement remained obvious.

c) The allocated annual profits and losses would be credited or debited to members' current accounts upon approval of the respective annual accounts except that DRSL's allocated profits would be posted to its capital account.

d) The profits and losses would be divided in accordance with a contractual waterfall ("**the Contractual Waterfall**") set out within Schedule 3. The need to have an interest in DRSL's issued share capital to implement the Equal Parity Agreement would also have been self-evident in the context of this priority provision:

i) DRSL would be paid first. The amount would be a sum of £10,000 multiplied by such multiplier of not less than 2 to be decided by the 1-4 Ds and Mr Keane as the designated members.

ii) Next, the designated members would decide the fixed allocation to be paid between the remaining members plus any bonus share. The bonus share was an entitlement to be calculated in accordance with the express provisions unless the designated members decided otherwise.

iii) Any remaining balance would first be allocated to the members excluding DRSL and then to DRSL with a special provision should the allocation of losses allocated to DSRL exceed its capital account credit.

e) Voting at meetings would be by majority except for those resolutions identified as requiring unanimous approval of the designated members or approval by all but one of the members. They did not include decisions pursuant to Schedule 3 concerning distributions, which were subject, therefore, to majority voting. There was provision made for all cases of deadlock.

f) If someone ceased to be a member, they would no longer be entitled to any share or interest in the LLP arising after the leaving date. Subject to an absolute discretion provision, the leaver would receive payments to which they were entitled including the amount credited to their capital accounts and sums agreed in accordance with Schedule 4. Payment would be made in four equal instalments to be paid every six months with potential provision for pensions.

g) However, DRSL would also benefit from the following specific provisions within Schedule 3 upon it ceasing to be a member and in the event of a sale or transfer of the LLP's business. These provisions also emphasise the importance of having an interest in its issued share capital to achieve equality of interest in the LLP:

(i) *"Subject to [the next sub-paragraph], upon DRSL ceasing to be a Member of the LLP the goodwill of the Business shall be valued at the Leaving Date. The LLP shall pay to DRSL an amount equal to 110% of the market value of the assets of the Business included in the Transfer Agreement at the date of the Transfer Agreement. The value of the goodwill of the Business shall be determined by an independent valuer appointed by the Designated Members."*

(ii) *"In the event of a sale or transfer of the Business by the LLP, any consideration attributable to the goodwill of the Business shall first be applied in crediting to DRSL an amount equal to the lower of 110% of the market value of the assets of the Business included in the Transfer Agreement at the date of the Transfer Agreement as determined by an independent valuer appointed by the Designated Members or the consideration received on that sale"*.

h) Upon liquidation any surplus after payment of expenses and creditors would be distributed in accordance with the respective proportions to which the members shared profits according to the Contractual Waterfall.

73. The draft made no provision for performance criteria. No-one was able to recollect when or in what circumstances those criteria were dropped. However, there is no dispute that the Agreed General Package had been varied accordingly as at the date the LLP Agreement was executed and no practical point arose as a result. Nor is it disputed (even though the 1-4 Ds' recollection is incorrectly based upon an offer rather than agreement having been reached on or about 27 April 2012) that at this stage the parties were proceeding on the basis that it was intended that Mr Keane would receive an equal share of capital and income thereby giving effect to the equity and profit sharing provisions of the Equal Parity Agreement. As stated, it is and would have been obvious from the terms referred to in paragraph 72 above that the draft LLP Agreement's framework would only implement the Equal Parity Agreement if Mr Keane was to have an equal beneficial interest in DRSL's issued share capital.

74. As a result, it remains apparent that the parties were proceeding on the basis that two, inter-linked agreements would be in place when the LLP Agreement was executed. The LLP Agreement was drafted and to be read in the context of the Agreed General Package in order to implement both the Equal Parity Agreement and the fundamental reasoning behind the LLP. Namely, that it was to be used to achieve tax efficiency for all of its members in accordance with the KS Report. The LLP Agreement was drafted in a form considered necessary to achieve those purposes. The intention for there to be equality between the 1-4 Ds and Mr Keane through inter-linked agreements was clear.

75. I should add that the matters above lead me to reject the very serious allegation that Mr Keane chose in cross-examination to identify Mr MacGloin as the person with whom he had conversations agreeing to parity with the 1-4 Ds (see paragraph 51 above) because he knew Mr MacGloin could no longer defend himself in the witness box. Mr Keane may have incorrectly remembered how the Equal Parity Agreement was reached on or before 27 April 2012 but his evidence of a 20% equality agreement was ultimately correct subject to what occurred at the 10 May 2012 Meeting. He should not have had to face the added pressures that this instructed allegation plainly added to him whilst in the witness box.

D5) 10 May 2012 Meeting

76. Shortly before the 10 May 2012 Meeting, Mr Sargen by email sent at 8:24am reminded Kingston Smith (Mr Barker, cc Mr Hughes) that they should have circulated after a previous meeting (presumably 27 April 2012) *"a one-pager dealing with the potential taxable event for [Mr Keane] joining us and being granted equity"* ("**the Tax Event Issue**").

77. By reply at 8:47, Kingston Smith (by Mr Barker) informed Mr Sargen that a taxable event should not arise *"as long as [Mr Keane] is not going to be a Director of [DRSL] (and cannot be seen to be acting as a director) and is not an employee of [DRSL]"* but otherwise income tax would have to be paid on the difference between the price paid for the DRSL shares and their market value. Mr Barker concluded: *"Hopefully, with the LLP structure he will not feel the need to be a Director of [DRSL]"*.

78. That is consistent with the recollection of Mr Martin concerning the discussion of the Taxable Event Issue at the meeting on 27 April 2012 (see paragraph 6 above). Whilst

there had been no other suggestion either in the contemporaneous documentation or in the oral evidence, that I have seen, that he might become a director or employee of DRSL in addition to being a member of the LLP, one can understand this point being made by Kingston Smith. Plainly equality could lead to such appointments if he was to have not only an equal beneficial interest in DRSL but also an equal say in DRSL's decision making concerning the LLP.

79. Mr Keane was copied into this email and it is to be concluded on the balance of probability that the 10 May 2012 Meeting was approached by all five from the perspective of that advice (insofar as they concerned themselves with its contents). Mr Keane within his witness statement, his evidence in chief, described the way he saw the transaction as *"very simple"* because he was *"joining as an equal partner"*. He could not recollect the process leading up to the LLP Agreement being executed except by refreshing his memory from the documents. As a result, he could not, and in any event did not, deal with any meetings. His recollection in effect moved from his understanding of equality to the signing of the LLP Agreement and his statement that *"before very long [he] became aware that [DRSL] would be kept open and that [it] was, in some way, a part of the tax-saving scheme"*. His statement then moved to August 2012 leaving the contemporaneous documents as read.

80. This absence of recollection is unfortunate because it means that any analysis of the factual position must be made on the basis that Mr Keane cannot assist further. As previously mentioned, that includes what was said at the 10 May 2012 Meeting for which there is no contemporaneous note of the discussions. It also means that I attribute the vagueness of his statement concerning DRSL being *"kept open"* and having some part to play in the tax scheme to his lack of memory. The role of DRSL would or should have been as evident to him at the time from the terms of the draft LLP Agreement which he had been sent, as it would have been to the others. It had also been the subject of discussion at the 27 April 2012 meeting. For the avoidance of doubt, however, I find nothing sinister in the vagueness of his statement taking into consideration my assessment of his evidence as a whole. I simply reject it as reliable evidence.

81. The evidence of the 1-4 Ds concerning the 10 May 2012 Meeting is reasonably consistent, although it has to be borne in mind (without criticism and, indeed, as disclosed during cross-examination) that they had been discussing this matter together for the purposes of the litigation. They recollected that Mr Barker explained there would be a tax liability for Mr Keane upon joining DRSL. That Mr Keane *"immediately and categorically refused to entertain that option"*, as Mr MacGloin described it in his statement (accepted into evidence). He also recalled Mr Beaton's look of incredulity, which is consistent with Mr Beaton's evidence at trial. Mr Sargen's description is that Mr Keane's response was *"quick and unequivocal"*. Mr Sargen recollected he was surprised by the response because it would mean Mr Keane would have no say in DRSL's corporate decision making. In cross-examination he said:

> *"At the point at which Gary said he didn't want shares in the LLP, that offer of shares in the limited company effectively went out of the window"*.

82. Mr Sargen's evidence was given in the context, therefore, of his recalled understanding that the 1 March 2012 offer had not been agreed. Mr Martin did not refer in his witness statement to the Agreed General Package or to the Equal Parity Agreement. His position during cross-examination was that he was unaware of any such agreement. In cross-

examination he explained that he also considered the offer of 1 March 2012 to have been rejected by Mr Keane on making his unequivocal statement. He did not address the position from the perspective of an agreement having been made by 27 April 2012. Mr Beaton was in the same position.

83. Mr Martin explained in his witness statement that he assumed Mr Keane would have spoken further to Mr Hughes after the 27 April 2012 meeting in respect of the Taxable Event Issue. He also assumed that was why Mr Keane's response was *"so unequivocal"*. His recollection was that the meeting lasted for a further two hours during which time the potential tax planning was discussed. Nothing more was said by him in the statement on the topic of Mr Keane and the DRSL shares until he turned to August and the draft partnership agreements.

84. The conclusion to be drawn from this evidence is that the 1-4 Ds' recollection and understanding is that as a result of Mr Keane stating that he would not want the DRSL shares on the basis that they would be accompanied by a tax liability, the proposal of 1 March 2012 was rejected and, therefore, removed from the table. There was no suggestion within their evidence of any renegotiation or of any other offer being made then or being required before they could conclude an agreement with Mr Keane. Instead, their evidence was (really by implication) that the parties proceeded on the terms of the draft LLP Agreement alone subject to their revision from time to time before execution. Terms which did not provide for the equality envisaged by the 1 March 2012 proposal in terms relating to DLRS, it then owning DRS. Terms which instead provided greater benefits for DRSL and, therefore, for the 1-4 Ds as set out in paragraph 72 above subject to any variations being agreed between 10 May and 18 June 2012.

85. The fact that 1-4 Ds have misremembered important matters occurring between 1 March and 10 May 2012, as set out above, does not necessarily mean their recollection of what occurred at the 10 May 2012 Meeting will be unreliable. However, it emphasises the need for caution and the importance of contemporaneous documents. On the other hand, Mr Keane at trial no longer disputed that he said he would not take the shares with a tax liability. He recollected during cross-examination that this flowed from the content of Kingston Smith's email (Mr Barker) earlier that day. Ms Anderson Q.C. relied upon this as establishing that Mr Keane's claim must fail.

86. I do not agree that this is the inevitable conclusion as she proposed in her final submissions. The evidence and case of 1-4 Ds, that his statement was a final decision that rejected their 1 March 2012 offer of parity, needs to be addressed further for three reasons. First because their evidence, including their conclusion, is based upon their incorrect understanding that there was only an outstanding offer and, therefore, that the parties were not proceeding on the basis of two agreements, namely the Agreed General Package and an LLP Agreement. Second, although directly connected, the concept of the Equal Parity Agreement being rejected potentially jars. In particular, the fact that someone says they do not want the shares with a tax liability does not necessarily mean (subjectively or objectively) they reject an existing agreement of equality. It could simply mean, for example, that they want the position further investigated and for the agreement to be varied to avoid a significant tax liability insofar as that is necessary. Third, because the contemporaneous documentation following the 10 May 2012 Meeting needs to be considered and, as will be seen, presents a different picture to 1-4 Ds' recollection.

87. Expanding upon the second reason, it "potentially jars" because the concept of a conclusive rejection of the shares does not really make sense in the context of the findings of fact to this stage. Looking at the position objectively, rejection of the method of implementation of an agreement of equality does not necessarily mean the parties rejected the fundamental concept of equality. It would be far more likely that the parties and Kingston Smith would need to reconsider how the Equal Parity Agreement could still be achieved and, if appropriate, identify an alternative method of implementation or, if that was not possible, enter into renegotiations. In support of that outcome are a number of matters which raise doubt over the accuracy of 1-4 Ds' recollection of final rejection:

    a) This was a statement made in the context not only of a change of advice from that set out in the email that morning but also without any apparent reference to the method of calculating or to the possible quantum of the potential tax liability (there having been no evidence to that effect). To treat such an uninformed statement, one also made after a change of advice, as a final decision would be objectively surprising. Particularly when the parties were not negotiating but were seeking to implement the Equal Parity Agreement. The natural reaction to such a response would be to seek to identify an alternative method or to renegotiate.

    b) That more natural reaction would also be consistent with the fact that an absolute rejection would produce a very significant reduction in the consideration to be received by Mr Keane for his move to join with the 1-4 Ds and DRSL as a member of the LLP unless the existing terms of the LLP Agreement were significantly varied. In particular when DRSL's capital contribution and, therefore, membership interest was so substantial and it benefited so significantly from its priority status within the Contractual Waterfall of the draft LLP Agreement. More fundamentally, perhaps, it did not fit with and basically undermined the reasons for Mr Keane wanting to move, namely to have equal equity and profit sharing, as found in paragraph 53 above.

    c) It is potentially unrealistic to suggest that the conclusion of his rejection of the method of achieving equality resulted, without anything more being said or discussed, in the LLP Agreement now being construed as a stand-alone agreement which not only did not provide for equality but which created an imbalance between 1-4 Ds in terms of entitlement to capital profits, the Contractual Waterfall, the entitlement of DRSL upon ceasing to be a member and upon sale or transfer of the business and in the event of winding up.

88. Mr Sargen's evidence during cross-examination (given with hindsight, as he noted, not to reflect what he thought at the time because he could not recollect it) was that there was no obligation to renegotiate the 1 March 2012 proposal after rejection of the offer of an equal interest in DRSL's shares. Obviously that was based on his incorrect recollection that there was no agreement by 27 April 2012. However, even if there had only been a rejection of an offer or had he been correctly referring to the Agreed General Package, this retrospective evidence appears unlikely to be correct. On the face of it, rejection would have meant that an overhaul of the terms of Mr Keane's joinder was required at or after the 10 May 2012 Meeting for two main reasons:

a) First, on the face of it (i.e. subject to considering the evidence of what subsequently occurred) the parties needed to discuss whether the 1 March 2012 offer (as amended to take into account the use of the LLP)/the Agreed General Package remained on the table but with red lines to exclude equity parity. That outcome certainly could not be presumed since equality in terms of equity and profit share was a fundamental part of the consideration identified within the 1 March 2012 offer and would be lost by such deletion. Of course such a revised package could have been agreed, but on the face of it the parties needed to address it. There is no evidence they did or that any other variation was considered.

b) Second and inter-linked, on the face of it the LLP Agreement would need to be revised. If left as it was, the 1-4 Ds would gain and Mr Keane would lose the equality and all tax benefits previously envisaged to be received by him as a result of being equally entitled to a beneficial interest in DRSL's issued share capital. Without revision, Mr Keane would be at a significant disadvantage and one of his main reasons for leaving his current employment would have been adversely affected. No-one suggested at trial that was intended but if it was, this required renegotiation even if it was for the parties to say no more than that this is the way the draft LLP Agreement was now to be construed.

89. The 1-4 Ds' evidence did not acknowledge those factors. Their evidence was that the only problem they identified at the time from Mr Keane's 10 May 2012 Statement for the parties going forward was that he would not have a say in DRSL's decision making. I do not accept that they would have identified this as the only problem had there been a binding rejection. They would have appreciated that rejection meant Mr Keane would not have parity, that implementation of the Equal Parity Agreement would need to be reviewed and/or that the terms of the Agreed General Package would need to be renegotiated substantively and not just by addressing members' voting rights. That is not least because otherwise (as explained above) they would in practice be gaining a far greater interest than him in the LLP based on the above-mentioned terms of the draft LLP Agreement.

90. Inevitably, Mr Sargen had to accept this during cross-examination. He said that whilst he could not recollect it, he was willing to accept that *"it is more than likely that [the effect upon parity] was raised at the meeting"*. Yet there is no other evidence from the 1-4 Ds that the impact upon equality was raised or even to the effect that Mr Keane's refusal meant that the terms of the draft LLP Agreement addressing members' interests needed to be reviewed, assuming a solution was not found. This is unrealistic.

91. Whilst I consider this in terms of mistaken recollection and not of suppression of memory, it really is difficult to understand how they could have proceeded after the 10 March 2012 Meeting on the understanding that the draft LLP Agreement would be entered into on the same terms if, as they asserted, Mr Keane was no longer to have a beneficial interest in DRSL's issued share capital. Indeed they did not do so, as the events after the 10 May 2012 Meeting will establish.

D6) Events After The 10 May 2012 Meeting

92. Later that afternoon on 10 May 2012, Mr Sargen informed insurance brokers (Chase Templeton Limited, Mr Crispin) in the context of life insurance that Mr Keane was joining them. It is plain, therefore, that his understanding was that Mr Keane's statement concerning the shares had made no difference to that future outcome. He also emailed some revisions to the draft LLP Agreement to Kingston Smith (including Mr Barker and Mr Hughes) with observations upon a new Schedule 4 concerning the formula for sums to be received on sale of the LLP. No-one has suggested that those changes are material to the Taxable Event Issue. There was no reference to Mr Keane refusing an interest in DRSL's shares. The position remained that its terms were drafted from the perspective that it would implement the Equal Parity Agreement provided Mr Keane had an equal interest in DRSL's issued share capital. Kingston Smith provided the revised Schedule 4 on 16 May 2012 but nothing turns on that or its subsequent consideration by the parties. That drafting did not alter.

93. Emails of 11 and 14 May 2012 between the parties did not address the Taxable Event Issue or refer to the 10 May 2012 Meeting but concerned details of the LLP Agreement and the drafting of Mr Keane's entry on the LLP's website. It is apparent from a later email of Mr Sargen (sent 28 May 2012) that the LLP *"went live"* on 14 May 2012, although Mr Keane was not yet a member and the LLP Agreement remained in draft.

94. 14 May 2012 was the date of the Business Transfer Agreement by which DRSL's business and assets were transferred to the LLP and the LLP assumed DRSL's outstanding liabilities and obligations. The consideration was to be determined by a valuer based on the market value of what was transferred with that value to be credited to DRSL's member's capital account in the LLP (see clause 5.1(b)). Applying the then existing draft LLP Agreement, that would measure DRSL's *"share"*, its membership interest, in the LLP. A share which involved all of the advantages for DRSL identified in paragraph 72 above subject to the effect of Mr Keane's 10 May 2012 Statement or to any future variation of the Agreed General Package agreement resulting from it. Completion of the Business Transfer Agreement took place at 23:59 that day.

95. In those circumstances, if 1-4 Ds were correct in their recollection and understanding (albeit in the incorrect context of the 1 March 2012 offer not having been accepted) that Mr Keane had rejected any interest in the DRSL shares, the Agreed General Package would have altered significantly without any apparent discussion concerning its terms which did not relate to the shares or those consequences. It would have altered without: any change to the benefits for DRSL within the draft LLP Agreement which would now be to Mr Keane's detriment not his advantage; account being taken of the fact that he would not benefit from the DRSL:LLP tax advantages which caused the LLP to be set up; him having the equality in terms of equity and profit share which had been an important factor when deciding to join the DRS business. Despite those alterations to the disadvantage of Mr Keane and to the advantage of the 1-4 Ds as members of DRSL, there was no suggestion within their evidence of any variation of the terms of the Agreed General Package, including the Equal Parity Agreement, or of any amendment to the LLP Agreement. There was no need for any renegotiation and there would now be only one agreement, the LLP Agreement. That being their evidence despite those alterations and the fact that they resulted purely from Mr Keane's 10 May 2012 Statement relating to DRSL's shares.

96. There is no dispute DRSL became a service company for the LLP following the transfer. If the 1-4 Ds' recollection as to the outcome of the 10 May 2012 Meeting is

correct, Mr Keane would now also have agreed not to benefit from any income earnt by DRSL as a result despite no-one suggesting this had been discussed or agreed.

97. A redraft of the LLP Agreement was disseminated by Mr Sargen on 16 May 2012. There were no significant changes for the purposes of the Agreed General Package or the Taxable Event Issue. There is nothing within the redraft to suggest rejection of the Equal Parity Agreement upon which the inter-linking terms of the previous drafts were based. Amendments to clause 9.2 only clarified that the initial members would acquire a share in accordance with the amount or value of their capital contribution shown in Schedule 3. The only real change to Schedule 3 was the addition of paragraph 6. It provided that the distribution allocations may be overridden with agreement of "*the Applicable Majority*" (defined as all but one of the members with mental and physical capacity to vote). This has not featured in evidence or during argument and it has not been suggested it had any relevance to Mr Keane's 10 May 2012 Statement. Schedule 4 was amended in full but not to suggest any changes to the Agreed General Package or relevant to the Taxable Event Issue. There were also amendments to clause 21 addressing entitlement of outgoing members.

98. Further email traffic between the parties and with Kingston Smith ensued towards the end of May 2012 concerning the drafting of the LLP Agreement without reference to anything connected with the Taxable Event Issue. There is no suggestion in writing or orally that the Agreed General Package had been the subject of renegotiations or that it or the Equal Parity Agreement had been rejected or amended. On the face of it (i.e. subject to considering the further evidence and assessing from the evidence as a whole the effect of Mr Keane's 10 May 2012 Statement) there remained the two inter-linked agreements. Nor did this alter before the execution of the LLP Agreement on 18 June 2012.

99. However, it is apparent from later documentation and from Mr Sargen's evidence, that during May and/or June 2012 Kingston Smith were instructed to draft a partnership agreement and related board minutes. I refer in particular at this stage to: the reference in Mr Sargen's witness statement to telephone conversations with Kingston Smith after the 10 May 2012 Meeting; an email from Kingston Smith to Mr Sargen sent 31 May 2012; a Kingston Smith fee note of 26 June 2012; an email from Mr Sargen to Kingston Smith sent on 3 July 2012; and to the terms of the draft partnership agreement. These will be considered below in chronological order.

100. By 30 May 2012 Mr Keane produced a "Training Academy" brochure for DRSL. It provides an insight into his general knowledge and abilities and I have borne this in mind when reaching my assessment of his evidence.

101. An email from Kingston Smith (Mr Barker, cc Mr Hughes) to Mr Sargen sent 31 May 2012 addressed the mechanism for the transfer of the DRS business from DRSL to the LLP. This included application of an 85% discount to the value of the business to be transferred. This was based on DRSL's current goodwill not being sold with the business but remaining with the 1-4 Ds for them to take with them and provide to the LLP. Whilst that is (perhaps) contentious when in reality 1-4 Ds had agreed to be tied into the business transferred to the LLP bearing in mind accounting standards' principles, it is not a matter I am asked or need to address.

102. The 31 May 2012 email also referred to the need for DRSL board minutes, a new shareholders' agreement and a transfer of the shares to a partnership. There was no written explanation but it appears to be consistent with Mr Sargen's above-mentioned email sent 3 July 2012 and I will refer to that further below in the context of later documentation. Mr Barker wrote that those matters *"are not time pressured and can wait until after the bank holiday week and do not stop [execution] of the LLP Agreement"*.

103. By email sent on 6 June 2012 Mr Sargen provided a month-end review for the LLP and Mr Keane observed that he would like to be paid for the current month/quarter. Mr Sargen informed Kingston Smith (Mr Barker) by email sent 19 June 2012 that they would like the LLP to continue with roughly quarterly partnership drawings, in line with how DRSL drawings had been made, but with the need for a retention tax account for the LLP members.

104. It appears from a letter from HMRC dated 14 June 2012 that the application for VAT Group treatment had not been sent to HMRC until that month. Neither side takes a point concerning the unexplained delay. HMRC's letter pointed out certain requirements for registration and asked for a description of how the control conditions within ***section 43(A) of the VAT Act 1994*** were met. Essentially, the following applied: (i) the partnership evidenced by the 4 April 2012 signatures had to have at least 51% of the DRSL voting rights in joint names (it was not sufficient just to add up individual entitlements); (ii) the business had to be more than ownership of a shareholding; and (iii) the business had to further the business activities of the Group. As will be seen below, the existence of those requirements was accepted by the 1-4 Ds.

D7) The LLP Agreement

105. The executed LLP Agreement is dated 18 June 2012. Mr Keane candidly confirmed in answer to my questions at the end of his cross-examination that he had not read it before signing it. In one sense that does not matter. There is no suggestion that he should not be bound by its terms and there is no claim for rectification. In any event, in essence, the terms addressed at paragraph 72 with the variations referred to in paragraph 97 above remained as previously drafted. In particular, clauses 9-10 and Schedule 3 concerning membership *"shares"*, interests, based upon capital contributions and entitlements to distributions of capital and profits and liability for losses remained substantially the same. Although there was no valuation for the purposes of DRSL's capital contribution written within Schedule 3 and there does not appear to have been a formal valuation at the time, the parties by reference to the consideration described within clause 5.1 of the Business Transfer Agreement and to the LLP's abbreviated accounts for the period ended 31 May 2013 identify a value of £639,450 (i.e. £644,450 – 5,000). The members' capital is based upon assets without goodwill and, therefore presumably after the 85% discount, although it matters not for the purposes of this judgment.

106. There was no suggestion within the drafting or, indeed, from events after 10 May 2012, that the terms agreed as at 27 April 2012 had altered because of the Taxable Event Issue, whether because of Mr Keane's 10 May 2012 Statement or anything else said or written at or after the 10 May 2012 Meeting or otherwise. Even clause 13 (which

addressed meetings and voting) and clause 14 (deadlock) remained unchanged. Although Schedule 4 had been revised for the purposes of clause 21, nothing has been raised before me to the effect that anything turns on that.

107. In addition to the absence of any material changes to the LLP Agreement, there is no reference in any of the documents identified to me or that I have identified within the core bundle to termination and/or renegotiation of the Agreed General Package or of the Equal Parity Agreement. Nor even to a binding decision by Mr Keane not to accept a shareholding in DRSL. There is nothing other than 1-4 Ds' oral evidence to identify an alternative agreement by which he would hold a significantly diminished or imbalanced interest in the LLP and would be subject to DRSL's contractual priority with regard to distributions or any of the other DRSL benefits identified within paragraph 72 above with the resulting disadvantages for Mr Keane and advantages for the 1-4 Ds referred to within paragraphs 95-96 above.

108. No-one has suggested that such a diminution or imbalance was intended or agreed. Mr Keane's case and evidence is that each of the five held 20% including their respective beneficial interests in DRSL with the result that the percentage of its share in the LLP should have been of academic interest for the purpose of the Equal Parity Agreement.

109. The 1-4 Ds identify, at least in the context of the position as at the date of the first MIPA, DRSL having a 20% share and the other members 16%. No evidence has been produced or submissions made to explain that calculation in the context of clause 9.2 and Schedule 3 of the LLP Agreement. When Mr Martin was asked by me to do so and when, at the same time, I asked the lawyers to identify its source or how it can be identified within the LLP Agreement, no-one was able to assist. Whilst it is not an acknowledgment that Mr Keane had an interest in DRSL, the fact that those percentages were used for the purpose of the MIPAs rather than reliance upon the terms of clause 9.2 and Schedule 3 of the LLP Agreement is, if anything, consistent with implementation of the Equal Parity Agreement and with the intention for all to benefit from the tax advantages intended by the introduction of the LLP.

110. Whether that last observation is correct or not, on the face of the LLP Agreement and in the absence of any discussion concerning its continuing implementation, clauses 9-10 and Schedule 3 continued to give effect to the Equal Parity Agreement on the basis that Mr Keane would be an equal member of DRSL. That is currently an observation not a finding of fact because it remains necessary to further consider the effect of Mr Keane's 10 May 2012 Statement and 1-4 Ds' recollection and understanding of its effect within the context of the evidence as a whole and to move to events and evidence after 18 June 2012.

D8) Events and Evidence After 18 June 2012

111. On 21 June 2012 Mr Sargen emailed Kingston Smith (Mr Barker) as follows:

> *"Just received the attached [14 June 2012] letter [referred to at* paragraph 104 above*] from HMRC. Any idea how we should answer this? I would have thought it is the partnership that owns the Ltd Co, which no longer has 25% voting share*

> *splits, but if you have any suggestions as to how to explain this, it would be much appreciated!"*

112. The submissions of Mr McDonnell ask me to construe this email as evidence that the shares of DRSL were by this stage held by a partnership consisting of 1-4 Ds and Mr Keane. That was why, he submitted, there were no longer 25% voting share splits. Mr Sargen when taken to this during cross-examination acknowledged the force of that construction and could provide no other acceptable explanation. He said: *"I have to confess I simply don't understand what I am talking about here …"*. He stated that it was not clear from the email who the partners of the partnership to which he referred were and he could not identify them.

113. The evidence of Mr Martin concerning the VAT Group registration to which this email referred and the creation of a partnership to hold the beneficial interest in DRSL's issued share capital can be summarised as being that he had no real recollection of either. He explained that whilst the 1-4 Ds had discussed the 21 June 2012 email for the purposes of the litigation, he was confused by it and he did not understand the reference to partnership. He was not aware of a partnership at the time and the scenario described did not fit his understanding of the facts.

114. However, but without criticising him (it being a matter of memory), it is to be borne in mind that he did not recollect the existence of the partnership acknowledged by his signature on 4 April 2012. The factual position was that a partnership had been formed by that date. Therefore, the email of Mr Sargen cannot be construed from the premise that Mr Martin or indeed any other of the 1-4Ds did not understand there to be an existing partnership of the four of them (at least). Its construction will need to bear the above-mentioned evidence in mind but will also need to be addressed further in the context of the evidence as a whole.

115. Kingston Smith, with the authorisation of Mr Sargen, discussed this VAT matter with their specialist and filed the answer required online in circumstances of Mr Sargen starting his holiday. Its approval by Mr Sargen, and through him the LLP and DRSL, is to be inferred from the fact that he gave no subsequent instruction to alter it. It was submitted on 26 June 2012. It only identified a four person partnership, although that was in the context of responding to an application for Group registration which had relied in April 2012 upon the partnership of the 1-4 Ds. It read:

> *"[DRSL] and [the LLP] are both controlled by the four individuals in partnership and therefore form a group for VAT purposes. Both [DRSL] and [the LLP] carry on the business of consultancy advice to financial services companies. [DRSL] is also a member of [the LLP]".*

116. The drafting appears to be derived from internal Kingston Smith advice of 26 June 2012 (from Mr Houston). The statement was written in the context of 1-4 Ds seeking Group registration on the basis of the partnership they had formed by 4 April 2012 beneficially owning DRSL's issued share capital as partnership property.

117. The advice mentioned the need for a partnership deed to evidence that the partnership was not simply share owning but included business activity. However, subsequent correspondence, including an email from Mr Sargen sent 6 August 2012, establishes

that the need for a partnership agreement was also identified earlier in the context of the Tax Event Issue.

118. A Kingston Smith fee note dated 25 June 2012 referred to professional services rendered of: *"Fee for March 2012 accounts, mortgage letter, initial drafting of Partnership Agreement for shareholding of Limited company and Board Minutes"*. The email sent on 3 July 2012 by Mr Sargen to Kingston Smith (Mr Hughes and Mr Barker) referred to that invoice and wrote that this *"jogged [his] memory"*. He recorded that he did not think he had the draft and asked for it to be sent to him.

119. In his witness statement Mr Sargen said this:

> *"On 3 July 2012, I emailed Chris Hughes and his colleague Chris Barker as I had just received an invoice which included a charge for drafting a partnership agreement for the holding of a limited company and we had never received such a draft. The partnership agreement had been mentioned by Chris Hughes of Kingston Smith in telephone calls that we had as we finalised matters after our 10 May 2012 meeting as something that might help address the issue that as Gary didn't have a shareholding in DRSL, he could participate in the decision-making of DRSL by a partnership being set up the sole function of which would be to make decisions for DRSL".*

120. On 4 July 2012 further Kingston Smith's emails indicated they were considering a draft deed. An internal draft of the partnership agreement was based upon there being a five person partnership. It is unclear whether this was seen (other than internally) and it was in any event superseded.

121. By letter dated 5 July 2012 HMRC accepted the VAT Group application.

122. It was not until 27 July 2012, after chasing, that Mr Sargen was sent a draft partnership agreement for the 1-4 Ds, a deed of adherence for Mr Keane and other associated documents. Mr Sargen disseminated this by email sent 6 August 2012 explaining:

> *"As you might recall from discussions near to the end of the LLP set-up process, the idea was that the shares of [DRSL] would be held in a partnership, largely due to the fact that this was the best way to ensure [Mr Keane] retained the ability to be part and parcel of the decision-making within [DRSL] but wasn't required to pay to join [DRSL]. [Kingston Smith] have at long last produced the partnership agreement ….*
>
> *You'll see I've added comments on both the partnership agreement and the deed of adherence – yell if you have any others and please give me your views as to clause 6.4 of the partnership agreement. Equally, let me know if you have any comments on the board minutes ….".*

123. None of the other 1-4 Ds were able to recollect those "*discussions near to the end of the LLP set-up process"* and Mr Keane's evidence did not assist. Mr Sargen also stated in evidence that he believed he had a conversation with Kingston Smith (Mr Hughes), he suggested in late August or perhaps early September 2012. His evidence was that doubts were expressed as to whether the partnership proposed would achieve avoidance of the liability which might flow from the Tax Event Issue. His recollection was that

Mr Hughes did not think the draft partnership agreement was needed and that he himself felt it would not work but would be more likely seen as a device to evade a tax liability.

124. There is no evidence of anyone else being informed of Mr Hughes's thoughts but Mr Sargen also said this (in summary):

a) He and the other 1-4 Ds had understood the partnership deed to address the problem of decision making but the "beneficial interest [sat] uncomfortably with me alongside that, because … there could potentially be a tax risk".

b) It *"[felt] like a classic tax avoidance trap, whereby if you are holding something indirectly, when holding it directly you would have been eligible for tax, that sits very uncomfortably with me"*. However, he was not stating in evidence that a tax risk existed or that a partnership would in law result in tax evasion, just that this was his *"immediate feel for that situation"*.

125. Mr Sargen's subsequent answers to his further cross-examination sought to retreat from acceptance of the fact that the partnership solution was suggested to address the Tax Event Issue and instead to identify equal decision making as the sole function of the partnership discussed. In addition, he later said that Kingston Smith had never stated that the *"new partnership would definitely work"*. When asked by Mr McDonnell what he meant by the reference to the partnership definitely working, he explained that he meant they did not state that the partnership would successfully *"deal with the decision-making aim that it was designed for"*.

126. This later response produced the one occasion Mr McDonnell put to him that he was lying. I agree that it would be wholly inconsistent with his earlier evidence, particularly his reference to the beneficial interest and to the "feeling" that tax avoidance would not be achieved. I cannot accept his later evidence to that extent. However, I am satisfied that this later evidence was attributable to the general confusion that exists in the context of the lapse of ten years rather than to deceit.

127. Returning to the drafts, the person responsible for the draft partnership deed appears to have been guided by the terms of the existing, draft LLP Agreement. This probably explains why Schedule 1 incorrectly retained Mr Keane's name in accordance with the earlier draft referred to in paragraph 120 above. Mr Keane would instead be bound to its terms by his deed of adherence, which was also provided. Under its terms he would join their existing partnership, which was obviously correct in the light of its formation by 4 April 2012.

128. In any event and taking into consideration the comments/amendments proposed:

a) The draft recited that its purpose was to address the organisation of the partnership and the rights and obligations of the partners. It also recorded within a recital that the partnership owned the DRSL shares and it expressly provided that *"partnership property"* consisted of all property owned for the purposes of its business.

b) Clause 2 of the draft partnership deed acknowledged a pre-existing partnership and included a deeming provision to the effect that the original partnership was

to be treated as having continued upon the deed's agreed terms, including during the period before the deed's execution.

c) Each partner would have a capital and current account. The capital account of each of the 1-4 Ds would be credited with their respective contribution of 1 ordinary share in DRSL. Whilst Schedule 3 still included Mr Keane with a capital contribution of £1, this in any event appeared within the draft deed of adherence. Profits and losses would be divided as agreed by the applicable majority (all but one) or otherwise be divided equally.

d) Clause 19 provided that an outgoing partner (i.e. someone who ceased to be a partner for any reason) would not be entitled to any share or interest in the property of the partnership arising after the date of departure. The remaining partners would succeed to his interest in the same proportions as they shared profits in accordance with schedule 3.

e) Subject to an absolute discretion provision, the outgoing partner would receive any capital credited to his capital account and (in summary) sums due on his current account or as lender together with the sums agreed in accordance with Schedule 4. That schedule identified a formula by reference to a sale of the LLP and (effectively) repeated Schedule 4 to the LLP Agreement but based on the profit and loss reserves at the time of sale. It included a discount factor, (in summary) it divided those reserves between the members according to the proportion of the outgoing member's interest and applied "ramp up" and "ramp down" factors (which addressed length of membership as a designated partner). Any outgoing partner would have to accept non-competition covenants.

f) Clause 21 (in summary) prohibited dissolution by one partner. Subject to that exclusion, it appears that dissolution could be achieved by the methods prescribed by ***the Partnership Act 1890*** and that ***section 44*** would apply to distribution. That would lead (after payment of creditors and to rateable payment of sums due to partners as advances) to each partner being paid rateably what is due in respect of their capital accounts. The ultimate residue would be divided in the proportion in which profits would be.

g) Any incoming partner would be required to execute a deed of adherence.

129. As mentioned, the deed of adherence to be executed by Mr Keane provided for a £1.00 capital contribution. He would not be entitled to share in profits or liabilities or be liable for debts and liabilities existing prior to its execution.

130. The draft partnership minute recorded Mr Keane in attendance at a meeting of the 1-4 Ds which reviewed the stock transfer forms transferring their shareholding in DRSL into the new partnership (although they were already held in partnership). It noted: that the beneficial interests would be held by the partnership; DRSL was a member of the LLP; and Mr Keane joined as a partner from the close of the meeting in accordance with the terms of the deed of adherence.

131. The DRSL board minute approved its execution of the LLP Agreement and the Business Transfer Agreement with reference to reports recording the matters to be relied upon to reduce the value of the transfer because of the personal connections of

the directors, including their decisions not to produce and deliver the business model referred to in the LLP Agreement if it continued to belong to DRSL.

132. Mr Sargen's email received very little comment upon the drafts, which he had spent time considering and commenting upon. Mr Martin had nothing to add over and above Mr Sargen's comments. There was no response from Mr Beaton and no response identified to me within documents from Mr MacGloin. Based upon the answers to cross-examination, I accept their evidence that they each expected at least one further redraft and that the terms within the draft disseminated were not progressed or, it follows, agreed.

133. Mr Martin explained in his witness statement that the partnership agreement was not considered by him to be critical to the operation or administration of the LLP nor the tax planning. He understood it to be *"proposed by Kingston Smith … to mitigate the risk to [Mr Keane] in the mixed partnership structure that had been put in place (i.e. that [Mr Keane], alone amongst the members, had no interest – whether as shareholder or officer – in DRSL"*.

134. Quite what he meant by *"mitigate the risk"* remained unclear from his evidence. However, if mitigation referred to inequality in voting power within the LLP, that could have been resolved by altering the voting power in the LLP Agreement. He as a lawyer must have appreciated that. If mitigation referred to the risk of inequality in equity and profit share because of the many benefits enjoyed by DRSL, as identified within paragraph 72 above, which appears far more likely, the idea of a partnership would resolve the problem that otherwise Mr Keane had *"no interest – whether as shareholder … - in DRSL"*. In reality this passage also supports the conclusion that the partnership proposed was derived out of an attempt to find a solution for the Tax Event Issue.

135. Mr Keane in answer to a chaser for a response to the draft stated he had not had the opportunity to address it. He assumed everyone else was in the same position and he heard nothing more about the partnership. His evidence was that he *"assumed that it had been put in place as per Kingston Smith's advice"*. He did not have a clear recollection of having signed the deed of adherence, although he thought he did. As he said, *"generally, this aspect of the matter did not seem very important at that time because everyone's focus was on the LLP"*.

136. There is no evidence of the drafts being finalised or executed and it is no longer suggested they were. Their relevance and the evidence concerning their existence will need to be considered further when reaching a decision upon Mr Keane's claim of partnership in the context of the evidence as a whole.

D9) The MIPAs

137. Business progressed and during 2013 consideration was given to the practical implications for tax of the LLP/DRSL structure. I refer, for example, to emails during April 2013. These have not been relied upon by the parties and understandably so. The simple fact that Mr Keane was included within these communications would not take the matter further. The parties' cases moved on to the MIPAs dated 22 May and 22 November 2013.

138. The purpose of the MIPAs was to implement the KS Report's tax advice by achieving transfers to which capital gains tax, not income tax, applied and by moving towards the position of DRSL becoming the main recipient of profit distributions at corporation tax rates (insofar as it would not be already based upon majority voting in accordance with the Contractual Waterfall).

139. The MIPAs are expressed to be sale and purchase agreements with the consideration for each interest sold being set out in a schedule. It was quantified using valuations by Kingston Smith. It was expressly provided in clauses 3 and 5:

> *"CONSIDERATION*
>
> *3.1 The Interest of each Seller shall be sold for the sum set out opposite his or her name in column 3 of Schedule 1 which shall be satisfied by the Buyer by a credit to a loan account in favour of each Seller in the accounts of the Buyer for the same amount.*
>
> *3.2 Subject to clause 5, such loan account shall be repayable in such amounts and at such time as the Designated Members shall determine in their absolute discretion.*
>
> *LOAN ACCOUNTS AND CAPITAL GAINS TAX*
>
> *5.1 Each Seller shall be entitled to be paid from the loan account in his favour in the accounts of the Buyer such amounts as shall be required to repay any capital gains tax that shall become payable or subsequently arise in respect of the sale of such Seller's Interest under this Agreement.*
>
> *5.2 In the event that a Seller dies, such payments under clause 5.1 shall be paid to the Seller's estate.*
>
> *5.3 For the avoidance of doubt, in the event that a Seller ceases to be a member of the LLP, prior to departing such Seller shall be entitled to be paid from the loan account in his favour in the accounts of the Buyer such amounts as shall be required to repay any Capital Gains Tax that have become payable or subsequently arise in respect of the sale of such Seller's Interest under the Agreement."*

140. Those clauses are relied upon for Mr Keane's claim to recover sums unpaid. DRSL contends that: (i) the purchase money was credited to a loan account only for its use as payment of capital gains tax; and (ii) in any event no payment should be made without the exercise of the absolute discretion. These are matters to be addressed further below.

141. Mr McDonnell did not seek to cross-examine upon the MIPAs or the later Deed of Asset Transfer, explaining that he would rely upon objective tests of construction. Ms Anderson QC challenged the concept that Mr Keane did not understand that he would be transferring his interest in the LLP without being a member of DRSL.

142. Mr Keane's recollection was that at a meeting on 15 May 2013 it was explained by Mr Sargen that Kingston Smith recommended the MIPA for tax reasons and that it would be "safe" to sign it. It only affected tax nothing else. He did not appreciate the consequences would be different for him compared with the 1-4 Ds. He thought they were all to be treated equally. He received the draft MIPA with an email sent on 21 May 2013 but did not appreciate he would not (in effect) get back the interest being sold. He did not appreciate he would no longer be an equal partner by transferring his interests to DRSL.

143. He also observed that there would be no reason for him to give away something he was working to create, observing that it just would not have made *"any sense whatsoever"*. It was put to him that he was being well remunerated and, so, would not be working for nothing. His answer was that he was being (or should have been) remunerated at the same level as 1-4 Ds. He was asked how he could expect to be treated equally when he had refused a beneficial interest in DRSL's shares. His response was that he thought he and 1-4 Ds were partners, that the partnership agreement must be in place for Kingston Smith to advise that the MIPAs should be entered into.

144. It was then put to him that if that was correct, he would have had to pay the tax which he had not wanted to pay as stated at the 10 May 2012 Meeting. His response was that he thought all five were paying the same tax. In other words, as I understood him, tax which went with the territory of being a partnership as a result of the advice of Kingston Smith. He was not told otherwise whether by them or by the 1-4 Ds, whom he trusted. Everyone was happy with Kingston's Smith's advice and he was their equal partner. They had explained to him that Kingston Smith had recommended this method of saving tax.

145. There are other email communications around this time referred to by Mr Keane but they do not take the matter further. His evidence is wholly in issue and the conversations disputed. He entered into the MIPA dated 22 May 2013. The 1-4 Ds contend that this reduced each of their and Mr Keane's interest to 10% and increased DRSL's to 50%. As previously mentioned, no-one could assist when I asked where it is recorded that the interests of the LLP membership started as 16% for each of the 1-4 Ds and Mr Keane and 20% for DRSL. No-one has explained how this equated with clause 9.2 and Schedule 3 of the LLP Agreement.

146. On 12 June 2013 Kingston Smith wrote to Mr Keane confirming their engagement as his professional advisers. At this stage the envisaged work appears to be limited to tax returns.

147. There are various emails including reference to meetings during August 2013 which considered consolidated accounts for DRSL and the LLP for the financial year ended 31 May 2013. These were not addressed in any detail during the trial either in cross-examination or submissions. Mr Keane was shown an Excel spreadsheet created for the purposes of the litigation setting out the total sums he received from the LLP and he accepted the document would be accurate.

148. The emails in August 2013 appear to show that Kingston Smith principally discussed the draft accounts with Mr Sargen. However, because the emails did not feature during the trial it would not be right for me to try and decipher, for example, the email to him from Kingston Smith (Becky Shields) sent 6 August 2013.

149. Nevertheless, what can be concluded from a draft consolidated balance sheet for DRSL and the LLP for the 31 May 2013 financial year end, as an overview, is that: Mr Keane was not treated as a director or shareholder of DRSL, which was plainly correct. The 1-4 Ds were each credited with drawings from DRSL of £25,000. As a member of the LLP, Mr Keane's drawings were joint equal highest with Mr Beaton but not dissimilar to the others. Once the DRSL dividends were added to them in the draft consolidated accounts, each of the 1-4Ds and Mr Keane received £135,000 in drawings, except for Mr Beaton who received £160,000. This occurred in the context of the LLP having net

assets of £278,900 and DRSL of £507,171. There were no partnership accounts for a separate partnership between 1-4 Ds and Mr Keane concerning the beneficial interest in DRSL's issued share capital.

150. Mr Sargen's witness statement relied generally upon Mr Keane's failure to make any statement or request concerning his position as a beneficial owner of the shares and/or entitlement to any distribution of profits allocated to the partnership he claims owned the shares beneficially. Mr Keane's explanation in cross-examination was that he received the same remuneration as everyone else and matters such as how the income was calculated and distributed were left to the accountants. He trusted everyone and had no cause to enquire whether this represented payment as a member of the LLP or as a partner. From a practical point of view, it did not concern him. The attributed source of any income was a matter for the accountants.

151. These responses are difficult to address in the absence of specific testing of his evidence by reference to (draft) accounts. However, a cautious observation from the August emails and connected accounting information is that he appears to have been treated as an equal partner of the LLP in terms of drawings including the drawings received by 1-4 Ds from DRSL (see paragraph 150 above). There does not appear to have been any reference to the Contractual Waterfall. This would equate with the concept that it was unnecessary to treat DRSL as a separate member when 1-4 Ds and Mr Keane were to be treated equally whether that was because of an equal beneficial interest in DRSL's shares or not. This might well explain his lack of enquiry but his evidence is too indecisive to reach that conclusion.

152. The LLP's members' report and unaudited financial statements for the period 31 May 2013 do not take the matter further and also did not feature at trial. For completeness I note that: The remuneration of 1-4 Ds of DRSL, which was charged as an expense totalling £1,522,267, extinguished profits; members' capital was valued at £644,450 of which £5,000 will have represented the equal capital contributions of the 1-4 Ds and Mr Keane and the balance the contribution and interest of DRSL; members owed the LLP £467,620; and the LLP's loans and other debts due to members totalled £1,125,745. The share of profit to the member with the largest entitlement was £1,147,267 but without a note of identification or explanation.

153. On 22 November 2013 the 1-4 Ds and Mr Keane entered into the second MIPA dated 22 November 2013. There is no real difference in the evidence between this and the earlier one. The 1-4 Ds contend that this reduced each of their and Mr Keane's interest to 4.5% and increased DRSL's interest to 77.5.%. There is no contemporaneous evidence to suggest that Mr Keane appreciated that only the 1-4 Ds would indirectly receive back the interests they had sold as owners of the DRSL shares.

154. 30 November was DRSL's financial year end. Its 2013 abbreviated accounts record that shareholders' funds stood at £1,998,258 with a called up share capital of £4,00. It was recorded that DRSL was jointly controlled by its directors.

D10) The Deed of Asset Transfer

155. By the end of 2013 pending changes to tax laws gave rise to the need to consider divesting the LLP interests. This was referred to in an email from Mr Sargen to 1-4 Ds and Mr Keane before the 2014/15 tax year. A planning note from Kingston Smith, addressed to all, identified the current interests as: each holding 10% with DRSL holding 50%. It observed that one of the changes would mean that the transfers to DRSL would be treated as income not capital gains and, therefore, the entrepreneur's 10% tax rate would no longer apply unless there was to be a complete disposal. No-one has been able to point to any document concerning this change which might be relevant to the issue of ownership of the DRSL shares.

156. Neither the LLP's 31 May 2014 or DRSL's 30 November 2014 abbreviated accounts or their accounts for later years featured at trial and they need not be mentioned further. The parties did not consider that they assisted the issues before me.

157. Not everything ran smoothly with the business or with the relationships between the 1-4 Ds and Mr Keane. There were a series of emails Mr Keane sent to himself during early February 2016 airing concerns and complaints. Included is the following sent on the 6 February:

> *"Paying back DRS ltd and being punished by tax whilst I have only ever been llp but others have drawn against llp. Net profit is my gross less 20% of cost Short medium term necessity for instant change Actual realised – signed Sow's"*.

158. It was put to Mr Keane this must mean, unambiguously, that he regarded himself as only ever having had an interest in the LLP. Mr Keane could not remember what he intended six years ago but surmised that he was referring to the division between the LLP and DRSL.

159. By April 2016 Mr Keane proposed changes to the business in the terms set out in his document entitled *"DRS LLP Bifurcation Proposal*. It referred to targets not having been met, to disharmony and to the contrast between the legal side of the business, which had been running at an operating loss, and his operations team which had generated the majority of the revenue over the past four years. His solution, described as a change in *"status quo"*, was to create two separately administered businesses, legal and operations, under the umbrella of the LLP. Each entity would pay their own costs and partnership salaries. More detail was provided but in essence the LLP would continue in business subject to the new distinction between the legal and operations businesses.

160. This proposal has been relied upon by the 1-4 Ds for two purposes. First to demonstrate Mr Keane's general business acumen and knowledge. I have taken note of that. Second, to draw attention to the absence of specific reference to his interest in DRSL's shares or to DRSL generally. However, I do not find that to be relevant to the proposal. It concerned a split for the LLP and one would not expect reference to DRSL or its shares to be included. I have not taken the absence of reference into account.

161. I have noted, however, although this does not weigh heavily as a forensic observation, that the proposal is based on the premise that the current system of equality was producing unfair results when viewed from the perspective of identifying who made the profits. One might reasonably have expected Mr Kean to draw attention to this

inequality in the additional context of his interest having been reduced to 4.5% interest without any interest in DRSL if that had been his understanding.

162. By the end of 2016 deteriorating relationships led to the parties discussing Mr Keane's departure. This resulted in the Deed of Asset Transfer. In his witness statement Mr Keane says this:

> *"During my exit negotiations, my partners informed me that the only remaining equity I held in the business was a 4.5% share in the LLP. I was floored. I had gone from believing I owned 20% of the business to being informed that in reality I owned 4.5% of the LLP."*

163. During the period leading up to the Deed of Asset Transfer new issues arose concerning tax liabilities. I was not taken to them and I do not suggest it was necessary to do so. They appear to relate to the previously mentioned changes to tax laws envisaged at the end of 2013. This legislation was duly passed and for some reason there appears to be criticism of Kingston Smith for not advising how to avoid the consequences by returning the business to DRSL with a potentially substantial, upfront capital gains tax charge. Nothing turns on that but it appears to be the background to a meeting held on 13 September 2017. The request by Mr Sargen for a meeting led to an email from Mr Keane of 1 September 2017.

164. It included the following (my underlining):

> *Questions ;*
>
> - *Is there a singular or dual approach to the questions – <u>considering that I was not and still am not part of Limited</u>*
> - *In regards to the original advice given are we addressing fact that I was not given individual advice in the company set up although the end result was markedly different (ie <u>I was not part of the ''limited'' structure</u>)*
> - *Do we have any indication of the potential individual historic liability we each have*
> - *How has this been calculated (eg – have KS advised how and why they have come up with a number)*
> - *IN regards to future advice will this be in regards to 1) the full LLP membership ie 5 people, 2) the split (as proposed) of 4+1, 3) the ''Limited'' company*
> - *Is there a corporate tax liability outstanding (or potentially outstanding) and how has that been calculated and how will that be paid*
> - *IN regards to the above and dependant on the outcome of discussions have we addressed valuation and whether the ''Limited'' company would be taking on the ''value'' of the LLP based on the percentage valuations of each side of the business ? eg will the advice being given look at any liability based on a split between legal and Ops ?"*

165. It was put to Mr Keane in cross-examination that this email contained admissions that he had no part or interest in DRSL. He observed that its content did not mention the partnership and that he was addressing the fact that the others were now presenting him with the *"fait accompli"* that he was not an equal partner. I accept they can be read in

that light. In other words, by reading them with ironic emphasis and implying the words "as you assert". The words underlined are, therefore, ambiguous.

166. It was also put to him that the absence of a reference to the partnership was inconsistent with his claim that it existed. I did not find his answer clear but it is not in any event evidence of his thoughts at the time he wrote the text. Nevertheless, this will need to be considered further.

167. The Deed of Asset Transfer was entered into by DRSL and the LLP pursuant to resolutions by their respective members on 10 November 2017 following a valuation for the LLP's trade at a range between £7.151 million and £8.076 million by Kingston Smith on 8 November 2017.

168. It was put to Mr Keane that he entered into the Deed of Asset Transfer having had the benefit of legal advice from Pinsent Masons LLP and, if that was correct, knowing of his partnership claim. Therefore, this was a fully negotiated exit agreement entered into with the benefit of legal advice. It was put to him that he hid that knowledge, which was first mentioned in a letter from his solicitors sent 27 February 2019 and that he had deliberately suppressed any reference to it to take advantage of the Deed of Asset Transfer.

169. Mr Keane did not accept that he had never mentioned the partnership agreement. He refuted the allegation of suppression. His overall response was that he had always believed he was an equal partner. However, this need not be taken further, insofar as it is part of the defence, because it was not relied upon as an assertion in closing submissions.

170. It was also put to him that he had received approximately £860,000 for his 4.5% share. However, he correctly distinguished between the consideration of £220,000 for that share and the balance of £640,000 odd received from an earn out provision within the agreement. He explained that the £640,000 odd had resulted from the business retained, the provision of operational services to Barclays Bank plc. They had been successful over a 12 month period and 1-4 Ds equally benefited to the extent that the net profit was split 50/50 pursuant to the terms of the Deed of Asset Transfer.

171. It was put that the provisions which enabled him to achieve this consideration, including waiver of a non-compete clause, could only have been agreed had his whole interest in the LLP been sold including any shares in DRSL. Mr Keane did not see it in terms of competition. The earn out resulted from continued business in respect of what had been the operations side of the LLP, his side. His continued involvement was considered beneficial for both sides as demonstrated by the outcome.

172. The Deed of Asset Transfer made 30 November 2017 sold the LLP's business (defined as *"all trade and other debts and amounts owing to the [LLP at close of business on 30 November 2017" in respect of the Business (whether or not invoiced" and including the assets described in clause 2) as a going concern together with "the interests held in the [LLP] by [Mr Keane]"*. It provided in clause 3 that the consideration was:

> *"3.1.1 Transfer to [DRSL] by way of gift of the interests held in the [LLP] by [the 1-4 Ds];*
>
> *3.1.2 Purchase by [DRSL] of the interests held in [LLP] by [Mr Keane] for the Interest Purchase Price [namely, the amount detailed in Schedule 1, £220,000 and further additional payments,*

> *subject to a floor of £160,000 … representing a proportion of gross profits derived by [DRSL] from certain projects delivered for Barclays Bank PLC (or any affiliates thereof) in a 12 month period from the date hereof and determined in accordance with the Contract for Services"* between DRSL and GK Operations Consulting Limited to be entered into on 30 November 2017 in the form agreed;
>
> *3.1.3 The waiver of any right of the [LLP] to repayment of capital or interest of all and any intercompany loan or loans; and*
>
> *3.1.4 [DRSL] assuming all the Liabilities.*
>
> *For the avoidance of doubt, with respect to the sale of [Mr Keane's] interest pursuant to clause 3.1.2 above, each of [DRSL, the 1-4 Ds and the LLP] irrevocably (i) release [him]from any and all known liabilities (whether actual or contingent) which any of them may have against [him] and (ii) waive any rights or claims that they may have against [him] whether under clauses 21.2 and/or (subject to clause 10.4) 22.2 of the [LLP] Agreement or otherwise."*

173. There is no dispute that the interest sold by Mr Keane was and was valued as a 4.5% interest in the LLP. Mr Martin in his evidence observed that its terms would have made no commercial sense if Mr Keane also had an interest in DRSL. His 4.5% would not have been purchased by the 1-4 Ds if that meant he retained an equity stake, including an interest in the 4.5% purchased by DRSL. Whilst that makes sense, the problem is that the Deed of Asset Transfer was concluded by 1-4 Ds on the basis of the sale of Mr Keane's interest in the LLP not in any shares of DRSL. There is no claim of rectification to consider.

174. The practical outcome of the Deed of Asset Transfer was that DRSL continued the legal side of the DRS business previously carried out by the LLP, whilst the operations side would no longer be pursued subject to transitional changes and any new arrangements made in the absence of Mr Keane. He would form a new operations entity but continue to work with DRSL in respect of the services to be provided to Barclays Bank plc. That occurred and led to the above-mentioned net profit, split 50/50.

175. On 6 April 2018 Companies House received a form "LLTM01" recording termination of Mr Keane's membership of the LLP as of 30 November 2017. The claim form was issued on 26 April 2019. The LLP was dissolved on 7 May 2019.

E) Submissions

E1) Mr McDonnell's Submissions

176. Mr McDonnell QC's submissions can be summarised as follows:

a) By the 10 May 2012 Meeting the parties had agreed or intended that Mr Keane would have an equal capital and profit share in the LLP subject to any arrangements required to implement Kingston Smith's tax avoidance scheme.

b) Following the 10 May 2012 Meeting and identification of the problem of a potential income tax charge resulting from Mr Keane holding DRSL shares, the solution found was a partnership. The 1-4Ds intended to and did enter into that partnership. The venture has not ended and Mr Keane's equal beneficial interest in the partnership and, therefore, DRSL remains.

c) The shares were already beneficially owned by a partnership of the 1-4 Ds, as evidenced by the VAT form signed by each of them on 4 April 2012 and by subsequent VAT Group registration documentation. The joinder of Mr Keane as a partner is acknowledged within Mr Sargen's email to Mr Barker sent 2 June 2012 when he identified the partnership which owned DRSL being one for which there was no longer a 25% voting split. Obviously because it was by then 20% including Mr Keane. The addition of Mr Keane to the partnership is also evidenced by the email from Mr Sargen sent to all on 6 August 2012.

d) The existence and terms of the draft deed of partnership provide further evidence, even if the parties did not reach a final draft addressing Mr Sargen's comments and did not execute it.

e) That partnership, which holds DRSL's shares for all five, has never been dissolved and wound up. It was not the subject of the Deed of Asset Transfer, which only related to Mr Keane's 4.5% interest in the LLP.

f) As to the financial claims, the LLP will need to be restored. However, there has never been a winding-up account and one is required. The Deed of Asset Transfer on its true construction did not discharge the current account debt. It is not part of the liabilities which were settled because it does not result from the business of the LLP. It is an inter-member issue. As to the DRSL claim, an account is required to identify the sums owed as loans resulting from the MIPAs. There is no absolute discretion not to repay the debt. The outstanding loan is a debt due and owing.

E2) Submissions for 1-4 Ds:

E2(i) Does the Case at Trial Fall Outside Mr Keane's Statements of Case?

177. Subject to five specific submissions which require further consideration, a comparison of the summary in paragraphs 10-21 above of the matters pleaded with the summary of Mr McDonnell Q.C.'s submissions in paragraph 176 above produces the obvious conclusion that there is nothing in the overall submission that the case presented at trial falls outside the ambit of the pleaded case.

178. The first specific submission of Ms Anderson Q.C.'s to address is that any claim that a partnership existed before 20 August 2012 can only be made with permission to amend because the Claim Form seeks a declaration that there has been a partnership carrying on the business of holding the DRSL shares since 20 August 2012. Strictly she is clearly correct if Mr McDonnell's submissions succeed because the declaration sought will need to be redrafted. However, I am sure that she does not intend this point to stand on its own. Plainly amendment would be allowed in the context of the claim as set out in the Particulars of Claim and the Reply as appears from the summary at paragraphs 10-21 above.

179. The second submission is that the Particulars of Claim and Reply do not refer to the existence of a partnership of the 1-4 Ds from 4 April 2012. Namely, the partnership which held the beneficial interest in DRSL's shares. Nor do they refer to the VAT documentation relied upon by Mr McDonnell in his opening and during his closing submission. Therefore amendment is required to do so.

180. It is of course to be noted that this is not the partnership upon which the claim at trial relies, which is a partnership of the five. On the other hand it featured reasonably heavily in cross-examination. The purpose of Particulars of Claim is to state concisely the facts on which the claimant relies. Strictly, therefore, the existence of a partnership from 4 April 2012 and the additional facts and matters concerning Group registration should have been pleaded. However, they are facts and matters derived from the disclosure of documents which were or should have been provided by the Defendants. Mr McDonnell has made clear that notice of their existence and the intended reliance upon was given in pre-trial correspondence. I have not been taken to that correspondence because that proposition is not disputed. In those circumstances, there is nothing practical to achieve from this submission.

181. The third submission (connected to the second) is that the failure to plead those material facts and matters has meant that investigations were not carried out on behalf of the 1-4 Ds as they might have been. An example proposed concerned investigations into what might have happened to the partnership acknowledged on 4 April 2012 and/or into whether anything happened to change the basis upon which the Group registration had been obtained.

182. A problem for this and the second submission is that Mr Martin during his evidence clearly indicated that the 1-4 Ds had held discussions to address the issues of VAT Group registration and of the 4 April 2012 documentation, as one would expect. In any event investigations could have been carried out when the above-mentioned notice was given in pre-trial correspondence. The merits of the underlying submission of unfairness rather evaporates in those circumstances and when there is nothing positive

suggested to have been missed, even now. That is particularly so when the proposed investigations refer to facts and matters within the knowledge of 1-4 Ds, it being they who formed the partnership for VAT purposes and applied for Group registration.

183. I cannot conclude that the 1-4 Ds have been taken by surprise or that any unfairness arose for the trial. Indeed, if anything it was the responsibility of the 1-4 Ds to disclose the existence of the partnership formed for VAT purposes and the circumstances within which that occurred. No purpose would be served by amendment now.

184. The fourth submission is that the absence of pleading of an agreement existing in May 2012 meant Mr Keane was not cross-examined about such an agreement or the existence of a common law partnership. Now is not the time to address the existence of such an agreement in this judgment. That will be decided below. However, as to the submission, I am not sure I understand what is meant by an absence of cross-examination when Ms Anderson Q.C. certainly cross-examined about the events leading up to 10 May 2012 meeting, the events of the 10 May 2012 Meeting, what occurred afterwards and upon the documents relied upon by Mr McDonnell Q.C. in his submissions.

185. Further, Ms Anderson Q.C. put to Mr Keane that he was not telling the truth when he asserted that there was an agreement of equality by or immediately after the 10 May 2012 meeting. As previously mentioned it was put to him that his statement that there had been an oral agreement with Mr MacGloin after the 1 March 2012 email was false. In addition, after referring to the 27 April 2012 meeting Ms Anderson Q.C. specifically reminded Mr Keane with reference to the pleadings that he had identified March/April 2012 as the period of the relevant agreement or the common intention pleaded by his statement of case. My understanding throughout that cross-examination was that she was disputing the existence of any agreement, understanding, intention or partnership during this period.

186. Nevertheless, even if I accepted that Ms Anderson Q.C. did not in fact cross-examine about the agreement, that would have been her choice when the Particulars of Claim specifically assert: (i) that an equal equity stake in the DRS business had been agreed by March/April 2012; and (ii) that at the time of setting up the LLP it was agreed and/or there was a common intention and/or it was understood that DRSL's shares would be held for all five using an equal partnership (see in particular paragraphs 2, 15-16 and 19-20 of the Particulars of Claim). The LLP Agreement is dated 18 June 2012 and the existence of the agreement at that time was plainly a matter in issue. It may be that the date and circumstances of that agreement were less clear than they might have been within the statements of case but, if so, that would have been a matter for a Request for Further Information or for a decision that this ambiguity would be used as a feature for the purposes of cross-examination.

187. Fifth, Ms Anderson Q.C. also sought to sustain her submission by reference to Mr Keane's answers in cross-examination to questions designed to establish that he relied upon a partnership being created in August 2012 and not before. However, that does not assist this submission. It concerns the contents of his statements of case not whether he established or maintained his pleaded case within the evidence he gave to the Court. Of course, were I to find that the evidence established that Mr Keane admitted there was no agreement before August 2012, I would reject Mr McDonnell Q.C.'s

submissions to the contrary. However, that would not be because they fall outside the ambit of the claim as pleaded.

188. For the reasons set out above, I reject the submission that the claim presented by Mr McDonnell Q.C., whether during the trial or in closing submissions, falls outside the ambit of Mr Keane's statements of case.

E2(ii) Main Submissions

189. Subject to the pleading point already tackled, Ms Anderson Q.C.'s submissions can be summarised as follows:

a) This is a false, contrived claim built initially on the August 2012 drafts and then on the VAT registration.

b) There is no evidence of any intention to form a partnership between 1-4 Ds and Mr Keane. Indeed, the evidence of Mr Keane contradicts its existence, at least until August 2012 when he seeks to rely upon the draft partnership agreement and deed of adherence. He cannot rely on them because they remained drafts. By trying to assert an earlier agreement instead, Mr Keane was shifting his ground after his primary argument based on the drafts collapsed.

c) The fact that he has no beneficial interest in DRSL's shares, whether by partnership or otherwise, results from his decision on 10 May 2012 to reject for tax reasons the offer to have an interest in the shares.

d) There is also no evidence of an agreement that he should have an equal 20% interest with 1-4 Ds except for his evidence that this was agreed with Mr MacGloin and Mr Keane deliberately chose him because he is not able to give evidence. However, even if that evidence of a conversation was to be accepted, Mr MacGloin had no authority to reach such an agreement. Mr Beaton's evidence that he did not think there was such an offer going into the 10 May 2012 meeting should be preferred.

e) The partnership of 1-4 Ds evidenced by the VAT documents was only ever their partnership.

f) Mr Keane is bound by the LLP Agreement, whether he read it or not, although his evidence that he did not should be rejected. There is no other agreement. The offer made by email on 1 March 2012 was rejected by Mr Keane's 10 May 2012 Statement and there was no other negotiation except for addressing the LLP Agreement. Its terms alone apply and it did not confer an interest in the shares of DRSL, the sixth member of the LLP. Mr Keane became a member subject to all the rights of DRSL.

g) The MIPAs had the effect prescribed and Mr Keane is bound by their terms. He sold the interests he transferred to DRSL.

h) His financial claims against the LLP are in any event subject to clause 2 of the LLP Agreement, which applies to outgoing members. Any capital account credit

and any undrawn balance of his current account would only be payable at the absolute discretion of the LLP. He has not asked for that discretion to be exercised. The LLP would be able to justify the exercise of that discretion with reference to factors such as the terms of the Deed of Asset Transfer and the fact that he could act in competition with the LLP. In any event the LLP has been dissolved by the 1-4 Ds.

i) The claim against DRSL for repayment of his loans must fail because clause 5 provides that Mr Keane's entitlement to repayment only applies to amounts required to pay a capital gains tax liability and there is none. Even if there was or in any event, clause 3.2 makes repayment subject to the absolute discretion of the *"Designated Members"*. No request has been made for its exercise. There are grounds to justify its exercise and prevent any liability to pay.

j) In any event all claims have been settled by the Deed of Asset Transfer including any claim to an interest in DRSL's shares.

F) Law

F1) The Existence of a Partnership

190. For a partnership to exist there must be an agreement between two or more persons which has resulted in a business being carried on in common with a view of profit. There does not have to be a deed or other written agreement. A partnership may exist as a result of an express or implied agreement, whether made orally and/or in writing and/or resulting from conduct. Insofar as an implied agreement is relied upon, the Court will appreciate when looking at all the relevant facts that contracts are not to be implied lightly.

191. Normal principles are to be applied when determining whether the parties have reached a consensual arrangement based on agreement. "***Chitty on Contract***" (34th ed) at 4-002-006 explains that an objective test is normally applied to decide whether there was agreement in the same terms on the same subject matter but an agreement will not be imposed where subjectively neither intended to enter into a contract. For example, an offeror who did not intend to be bound cannot rely upon the objective test to avoid that conclusion and nor could a party who knew the other party did not intend to be contractually bound even though the objective test would be satisfied.

192. Whether the agreement has created a partnership is a question of fact and law. Applying the statutory definition of a partnership (***s.1(1) of the Partnership Act 1890***), it must be established on the balance of probability that their agreement has the result that they carry on a business with a view to profit. If so, they are in partnership together. In reaching its decision, the court must consider all relevant features of *"the relation"* between the relevant parties and also the provisions of the statute which provide guidance to assist the court to identify those features that are relevant. ***Section 2 of the 1890 Act*** expressly identifies matters of relevance but others such as ***sections 5, 6 and 9*** concerning agency and joint and several liability also assist.

193. The editors of ***Lindley & Banks, "Partnership"*** (19th edition) have opined at [2-07] in a passage judicially approved that the requirement of a business being carried on in common must refer to a single business between them and the carrying of the business together for their common benefit. As a result, they will normally have accepted mutual rights and obligations in that context, as opposed, for example, to when rights and obligations are accepted in the carrying on of independent businesses. Normally for the purposes of satisfying the definition, there will be a business if shares are held as an investment. In addition, normally the business may be run by one or more persons on behalf of themselves and others who may be "sleeping partners"; a concept recognised by English law. Normally there will be a relation of mutual confidence if the relationship is one of partnership because the partners will be carrying on a business in common.

194. If a partnership exists, the assets of the partnership, the "partnership property", will consist of everything to which the partners are entitled as partners subject to any salaried or fixed share exception. Entitlement will be decided by determining what has been agreed (expressly or by implication) or by applying the statutory rules when agreement cannot be identified (see ***sections 19-21 of the 1890 Act***). The fact that the partnership used the asset does not itself mean it is partnership property. For example the building which a partnership occupies as its place of business may be let by a partner to the partnership.

195. The capital contributed by members will be fixed by agreement and should be expressed as a fixed amount (noting that they may agree to ascribe such value to an asset as they wish for this agreement, although that may produce tax issues). Once a partner has been credited with the value of contributed asset and the agreed value credited to their capital account, the asset will belong to the partnership and fluctuations in value will not affect that credit (subject to agreement). A partner is not entitled to have the asset concerned vested in them whilst the partnership continues, subject to agreement.

196. On distribution under ***sections 39 and 44 of the 1890 Act*** (subject to agreement) each partner of a solvent partnership will be entitled to receive payment of their capital account and the ultimate residue will be divided in accordance with a partner's entitlement to share profits. Subject to agreement, this will be an equal share entitlement. Such agreement may be implied including to the effect that their entitlement will be determined by the proportions to which each partner contributed capital. That will only become relevant (subject to agreement) on dissolution at the stage of distribution arising after payment of the capital accounts because only then does a partner have an entitlement to payment (see ***Popat v Shonchhatra*** [1997] WLR 1367, CA).

197. Mr McDonnell referred the court to the decision of the Court of Appeal in ***Chahal v Mahal and another*** [2005] EWCA Civ 898, [2005] 2 BCLC 655 in support of his submission that the partnership holding the beneficial interest in DRSL's issued share capital was a venture which had not ended and that the beneficial interest in DRSL remains partnership property. That decision concerned the issue whether a partnership continued when the assets and the operation of the business were transferred to a limited company. It was decided that whilst those facts would normally mean the partnership was dissolved (as a matter of common sense, as well as law), that presumption could be rebutted. In that case it was because shares in the limited company had not been allocated to one of the partners and he had not been involved in the decision to transfer.

198. This case has potential relevance, therefore, if a partnership is declared to exist for the purpose of deciding whether it remains extant. Mr McDonnell also drew attention to the fact that the Court of Appeal when considering whether there was evidence to substantiate the case that a partnership continued did not consider the absence of accounts or other documents particularly important. This reflected the fact that whilst accounts may be material for the purpose of determining the existence of an agreement, they are only evidence and their existence or absence will fall to be disregarded if they do not reflect what was agreed and/or was happening.

199. The other area of law raised before me concerns the application of the absolute discretion clauses relied upon by the 1-4 Ds to deny Mr Keane's entitlement to his financial claims.

F2) Absolute Discretion Clauses

200. The Supreme Court in ***Braganza v BP Shipping Ltd and another*** [2015] UKSC 17, [2015] 1 W.L.R. 1661 held:

> *"That, where contractual terms gave one party to a contract the power to exercise a discretion or form an opinion as to relevant facts, it was not for the court to make that decision for them, but where the decision would affect the rights and obligations of both parties there was a conflict of interest and the court would seek to ensure that the power was not abused by implying a term in appropriate cases that the power should be exercised not only in good faith but also without being arbitrary, capricious or irrational in the sense in which that term was used when reviewing the decisions of public authorities; and that it followed that such a decision could be impugned, not only where it was one that no reasonable decision-maker could have reached, but also where the decision-making process had failed to exclude extraneous considerations or to take account of all obviously relevant ones".*

G) Decision - The Partnership Claim

G1) The Position As At 10 May 2012

201. I am satisfied that as at 4 April 2012 the 1-4 Ds were in partnership carrying on the business of holding the beneficial interest in DRSL's issued share capital as an investment. This is established by their documentation presented to HMRC for the purpose of obtaining Group VAT registration (see paragraphs 59-60, 113-116 and 121 above).

202. I have also found as fact that as from 27 April 2012 the 1-4 Ds and Mr Keane were proceeding on the basis of the Agreed General Package (as defined in paragraph 67 above), which included the Equal Parity Agreement (as defined in paragraph 68 above). It was agreed and to be implemented in the context of a decision to transfer the DRS business from DRSL to a limited liability partnership. There was in existence a draft

LLP Agreement which had to interlink with the Agreed General Package in order to ensure its implementation (see paragraphs 48-58 and 61-69 above).

203. The draft LLP Agreement of 8 May 2012 included DRSL as a co-member together with 1-4 Ds and Mr Keane, who would be the designated members. DRSL's addition as a member of the LLP was purely to give effect to the tax efficient route advised in the KS Report. Although the Tax Eligibility Issue needed to be addressed, there is no evidence before the 10 May 2012 Meeting to suggest that Mr Keane was not intended to enjoy the same tax advantages or that he was otherwise to be treated differently from the 1-4 Ds contrary to the Equal Parity Agreement. Indeed it is difficult to envisage that there would have been any future dispute over equal parity but for what occurred at that meeting (see paragraphs 71-74 above).

204. The 8 May 2012 draft LLP Agreement (and its predecessor) did not provide for ownership of the DRSL shares. That was not its purpose, which was to set out the mutual rights and obligations resulting from membership of the LLP. However, because it and the Agreed General Package were inter-linked it is and would have been apparent from the terms of the draft LLP Agreement that Mr Keane would have to receive an equal beneficial interest with 1-4 Ds in DRSL's issued share capital to implement the Equal Parity Agreement. This would be achieved as at 10 May 2012 because there were to be two agreements when Mr Keane joined the LLP, each to be construed taking into account the existence of the other: the Agreed General Package and the LLP Agreement (see amongst others, paragraphs 56-58, 68-69, 71-74, 92, 97-98 and 105-110 above).

205. Had that not been the case, applying clauses 9.2, 10 and Schedule 3 of the LLP Agreement, only 1-4 Ds would benefit from DRSL's membership, not only as a sixth member but also as a member who received preferential benefits from: the terms agreed for distribution of capital; the Contractual Waterfall; the provisions applicable if it was an outgoing member and in the event of sale; and upon winding up (see paragraph 72 above). The fact that DRSL would be a service company added additional cause for that conclusion for otherwise only 1-4 Ds would gain potential benefit from the resulting income which outcome would not accord with the Equal Parity Agreement (see paragraph 96 above).

206. Based upon the evidence set out at paragraphs 76-83 above, I find as a fact that during the 10 May 2012 Meeting Mr Keane stated to the effect (the gist of the words used not having been recorded contemporaneously) that he would not want the DRSL shares if they came with a (by implication) significant tax bill ("**Mr Keane's 10 May 2012 Statement**"). It is plainly right to imply "significant". There is no suggestion within the evidence that his statement referred to any other aspect of the Equal Parity Agreement and, in particular, not to equal profit sharing with the 1-4 Ds.

207. I am satisfied that Mr Keane's 10 May 2012 Statement was not a rejection of 1-4 Ds' 1 March 2012 offer, as they suggest. The obvious reason being that the offer for him to join them in the DRS business carried on by DRSL had become the Agreed General Package by that date.

208. Therefore, the effect of Mr Keane's 10 May 2012 Statement falls to be determined in the context of that extant agreement, which included the Equal Parity Agreement, not in the context of an unaccepted offer. It needs to be decided by applying the balance of probability test to be met by Mr Keane in the context of the evidence as a whole taking

into consideration and applying the general principles summarised at paragraphs 34-37 above. There is, however, no evidence that 1-4 Ds would object to Mr Keane refusing to receive an interest in the DRSL shares should that occur and it can be implied they would not.

G2) The Effect of Mr Keane's 10 May 2012 Statement

209. I find as a fact that the Equal Parity Agreement was not renegotiated and the Agreed General Package was not varied or terminated at the 10 May 2012 Meeting. There is no evidence that renegotiation, variation or termination occurred. It follows that I do not accept the 1-4 Ds case that the parties abandoned the concept of two inter-linked agreements and replaced it with an LLP Agreement to be construed without any reference to the Equal Parity Agreement (see paragraph 84 above).

210. The evidence establishes instead that Mr Keane's 10 May 2012 Statement was not the final word. It is plain, and I find as a fact (as explained below) that the parties decided (whether at the meeting or afterwards, it does not matter, but probably at the meeting) to investigate methods to achieve the Equal Parity Agreement without producing a significant tax liability for Mr Keane.

211. I reach that finding not only because of the deficiencies in 1-4 Ds' recollection (see the summary in paragraph 213 below) and/or because investigation, as opposed to termination, was the most probable outcome (see paragraphs 85-91 above) but most importantly because the decision to investigate is established by the contemporaneous evidence. I refer in particular to: (i) the 3 July 2012 email from Mr Sargen to Kingston Smith, whether read with Kingston Smith's earlier 31 May 2012 email or alone (paragraphs 118-119 above); (ii) the content of Mr Sargen's 6 August 2012 email disseminating the draft partnership agreement and deed of adherence together with the associated documents (paragraph 122 above); and (iii) the existence and terms of those agreements and documents, albeit that they were not agreed (paragraphs 127-136 above).

212. That conclusion is also supported by: (i) the witness statement of Mr Sargen referred to in paragraph 119 above; (ii) Mr Sargen's evidence during his cross-examination referred to in paragraphs 124-127 above; and (iii) the absence of evidence seeking to renegotiate the Agreed General Package or to materially alter the draft LLP Agreement (paragraph 209 above). Plainly, however, the position could change depending upon what resulted from the investigations after the 10 May 2012 Meeting.

G3) Events After The 10 May 2012 Meeting and Before 19 June 2012

213. It is not easy to identify precisely what happened after the 10 May 2012 Meeting. That is in part because Mr Keane's evidence is that he has little specific memory of what occurred. It is also because the findings of fact based on contemporaneous documentary evidence are largely inconsistent with the recollections of 1-4 Ds (except to the extent of Mr Sargen's evidence referred to in paragraph 210 above) and with their defence. That inconsistency starts with their failure to remember the Agreed General Package

and the Equal Parity Agreement (as compared with their recollection of the 1 March 2012 offer being extant and rejected by Mr Keane's 10 May 2012 Statement). It includes their failure to recollect the decision at or shortly after the 10 May 2012 Meeting to investigate solutions to the problem a (significant) potential tax liability would cause.

214. Nevertheless, the 6 August 2012 email from Mr Sargen to Kingston Smith evidences the fact that a new partnership of all five was discussed after the 10 May 2012 Meeting and before execution of the LLP Agreement on the basis that the partnership would be the beneficial owner of the DRSL shares (as the partnership between the 1-4 Ds existing by 4 April 2012 was). It also establishes that the purpose of such a partnership was to resolve the problems caused at the 10 May 2012 Meeting by the Tax Event Issue and Mr Keane's 10 May 2012 Statement (see paragraph 99 and 115-127 above).

215. Whilst the investigations produced the potential solution of a partnership agreement, the evidence establishes that the discussions were not concluded. This is apparent from the facts that a draft partnership agreement and accompanying documentation were only produced after execution of the LLP Agreement and that these were never finalised (paragraphs 133-137 above). The position, therefore, was that whilst the investigations were productive to a degree, they themselves did not produce a conclusion.

216. There is no evidence during the period 10 May to 18 June 2012 of any material variations to or even negotiations of the Equal Parity Agreement addressing the fact or possibility that Mr Keane would not be a beneficial shareholder of the DRSL shares. The only agreed material change was the removal of the performance conditions identified in the 27 April 2012 email. Subject to that, the Equal Parity Agreement remained extant when the LLP Agreement was executed but subject to the effect of Mr Keane's 10 May 2012 Statement.

217. Therefore, it is necessary to decide the effect of Mr Keane's 10 May 2012 Statement in the absence not only of a concluded solution but also of any evidence of a written or oral agreement materially varying the Agreed General Package to exclude the principles of equality which were the foundation of the Equal Parity Agreement.

218. 18 June 2012 is the key date in the absence of any later agreement superseding the agreements existing at the time Mr Keane joined the LLP. However, later events may be relevant evidence to assist or achieve the identification of the consequences of Mr Keane's 10 May 2012 Statement upon execution of the LLP Agreement and I will start with them for the purpose of deciding its effect and whether a partnership was formed as Mr Keane claims.

G4) Events After 18 June 2012

G4(i) Mr Sargen's 21 June 2021 Email

219. As previously mentioned, Mr McDonnell relies upon Mr Sargen's 21 June 2021 email to Kingston Smith as evidence of the fact that Mr Keane had joined the partnership by agreement. Mr Sargen's evidence in cross-examination would suggest this submission is correct insofar as Mr Sargen had no other explanation for what he wrote (see paragraphs 111-112 above).

220. However, whilst the absence of an explanation is to be noted, this too must be appreciated within the context of a ten year gap and the pressures of the court room. It is certainly conceivable that Mr Sargen only had in mind the partnership of the 1-4 Ds formed by 4 April 2012 because he was addressing an HMRC letter which concerned the Group relief application made by 1-4 Ds in April 2012. If so, his reference to there no longer being 25% voting share splits could have been a reference to the fact that ownership by the 4 April 2012 partnership meant the voting rights were now in joint names (see paragraph 104(i) above). I make no decision to that effect because that potential construction is speculative and, indeed, has not been proposed by the 1-4 Ds. However, it draws attention to the potential ambiguity of the email and it would not be right to conclude on the balance of probability that the reference to the change in percentage "split" reflected the effect of Mr Keane's addition to the partnership. I move next to the partnership documentation.

G4(ii) The Draft Partnership Documentation

221. Mr Sargen's 6 August 2012 email attached the draft partnership agreement, which Mr Sargen had plainly considered. It provided for a partnership between the five with the beneficial interest of the DRSL shares being partnership property. Read with the deed of adherence, it valued Mr Keane's capital contribution at £1.00 and described (without valuation) the capital contributions of the 1-4 Ds as their respective, 1 ordinary DRSL shares. As explained when addressing the law above, the value of that share for the purpose of their capital accounts could be agreed and could be anything from the nominal value to a valuation to be agreed or provided by a valuer. The fact that it was expressed in terms "1 ordinary share" might suggest par value.

222. The draft also provided that the profits and losses would be divided equally, subject to agreement by the applicable majority. This might also suggest that each of the five were intended to have an equal share in the partnership's assets upon dissolution (after payment of liability and capital account credits). There was also separate provision for payment of outgoing partners.

223. However, those documents were and remained drafts. Mr Keane wrote that he had not had time to consider it and the 1-4 Ds agree that the drafts needed considerable, further consideration. Plainly their terms needed discussion and no-one suggests that any such discussion occurred. As a result, their provisions cannot be identified as evidence of what had been discussed by the date of the LLP Agreement and do not provide evidence of any agreement afterwards. I turn to the next relevant event when considering what might have been agreed as at 18 June 2012, the MIPAs.

G4(iii) The MIPAs

224. Three matters feature concerning the events leading up to and the execution of the MIPAs which were of potential relevance to the position as at 18 June 2012: first the fact that there was no reference to any interest in the DRSL shares; and second Mr Keane's answers during cross-examination referred to at paragraphs 142-145 above. The third is the allocation of each seller's interest in the LLP for the purpose of its sale.

225. The first is to be noted because it was plainly important to the outcome of the MIPAs whether a transferee had an interest in DRSL. However, there is no evidence to establish that Mr Keane's interest or lack of interest was raised. Overall, therefore, that is a neutral feature but it will be borne in mind (without needing further express reference) that Mr Keane did not check his position.

226. As to the second, the cross-examination concerning his expectations following Mr Keane's 10 May 2012 Statement (albeit not raised in the context of the extant Agreed General Package but in the context of a terminated offer) produced (for what it is worth some ten years later) an answer consistent with his belief of continued equality. The follow up question that such answer would mean he had to pay the tax he wanted to avoid is a point worth noting. However, in practice it draws attention the absence of precise evidence as to the circumstances in which liability would arise and the absence of any evidence concerning quantum. The question presumes a liability to pay tax which has not been established in evidence or addressed in submissions. Overall, therefore, the point is neutral but to be borne in mind without needing further reference.

227. The third concerns the fact that the first MIPA sold 37.5% of each seller's respective interest in the LLP for £267,600 and the second MIPA 55% for £246,400 each. Understandably, it was not considered necessary to address the valuation exercise during the trial. However, a document created for the purposes of this litigation attributes this to the starting point that each individual member started with a 16% interest and DRSL with a 20% interest. That is not in accordance with the LLP Agreement, which identifies each member's share by reference to their capital contributions within Schedule 3 and then provides for entitlement to share in the capital and profits in the manner set out at paragraphs 105-106 above. It appears, therefore, although this has not been the subject of either side's case that the parties agreed that division for the purposes of the MIPAs. Whether that is correct or not, however, the underlying point is that such agreement did not affect any entitlement any of the individual members had to a beneficial interest in DRSL's shares.

G4(iv) 6 February 2016 and 1 July 2017 Emails

228. The 1-4 Ds contend there is express evidence that Mr Keane knows and has admitted he did not have a beneficial interest. The knowledge asserted in this context is inferred from his very delayed assertion of its existence whether generally or in the specific context of (for example) his entitlement to income. There is no doubt that needs to be noted but its weight will depend upon the facts and matters existing as at 18 June 2012. I will bear it in mind when addressing those facts without needing to repeat it.

229. The admission relates to Mr Keane's 6 February 2016 email message and to his 1 September 2017 email (see paragraphs 157 and 163-164 above). The email message quoted at paragraph 157 above refers to him only ever having *"been LLP"*. It has to be concluded, however, that its meaning is entirely unclear in context. It must also be recognised that such emails are often rushed and their evidential quality may suffer from a lack of thought and from the context in which they are typed. Nevertheless, whilst it cannot be treated as an admission, it must be borne in mind when addressing the weight of the contemporaneous evidence. I will do so without re-referring to it.

230. As to the 1 September 2017 email, the words written are: *"I was not and still am not part of the 'limited' structure … (ie I was not part of the 'limited' structure"*. Those words on their own and in the context of the email as a whole cannot be read as an admission. They are ambiguous, not least because it is true he was not part of DRSL's structure. They do, however, mean that I must and will exercise particular caution when considering the contemporaneous evidence leading up to execution of the LLP Agreement.

G4(v) After 18 June 2012 Events - Conclusion

231. Although there are facts and matters occurring which will be borne in mind, the events after 18 June 2012 do not establish whether there was an agreement to carry on a business holding the beneficial interest of the DRSL shares as an investment in common with a view of profit. It is necessary to return to the position as at 18 June 2012.

G5) Was There A Partnership As At 18 June 2012?

232. It has been established within Sections G(1) – (3) above (in summary) that as at 18 June 2012 the Agreed General Package, including the Equal Parity Agreement, had not been terminated or in the context of parity materially varied. On the face of it the LLP Agreement remained inter-linked for the purposes of its application and construction. Mr Keane had not rejected the Agreed General Package, including the Equal Parity Agreement, by stating that he would not want to receive DRSL shares if that gave rise to a significant tax liability. Mr Keane's 10 May 2012 Statement resulted in the parties investigating how to resolve the Taxable Event Issue whilst implementing the Equal Parity Agreement.

233. The parties discussed the solution in terms of Mr Keane becoming an equal partner of a business which owned the beneficial interest in DRSL's issued share capital as an investment. That interest was already held by the partnership of 1-4 Ds established by 4 April 2012. However, those discussions were not concluded before execution of the LLP Agreement. Whilst a draft partnership agreement and deed of adherence were produced in late July 2012, those documents remained in draft (see paragraphs 211-213 above).

234. This means that as at 18 June 2022:

a) The Equal Parity Agreement had only been materially varied to the extent that parity with the 1-4 Ds in equity and profit share (to use the original language of the 1 March 2012 proposal) would start immediately upon Mr Keane joining the LLP subject, however, to the effect of Mr Keane's 10 May 2012 Statement. As to that effect, it is plain from the evidence that the 1-4 Ds' accepted that Mr Keane could refuse to receive any interest in the DRSL shares should that acceptance result in a significant tax liability.

b) The LLP Agreement also remained substantively in the same form as its 8 May 2012 draft in that there was no change to the drafting to alter the conclusion that its terms could only be consistent with and implement the extant Equal Parity Agreement if Mr Keane had an interest in DRSL whether by his ownership of a beneficial interest or otherwise (see paragraph 204 above).

235. Those facts and matters, applying an objective test, lead to the conclusion that on 18 June 2012 the parties entered into two, inter-linked agreements: the LLP Agreement and the Agreed General Package (subject to its variations). Both would be construed in the context of each other, just as had been intended when the earlier drafts were produced (see paragraph 204 above), for example on 8 May 2012, but now subject to the effect of Mr Keane's 10 May 2012 Statement. It remained the case, therefore, that the Equal Parity Agreement would give Mr Keane an equal interest in DRSL which when added to his membership share in the LLP would achieve equal equity and profit share with the 1-4 Ds unless Mr Keane's 10 May 2012 Statement prevented it.

236. Mr Keane's 10 May 2012 Statement would only have an effect if he did not receive an equal beneficial interest in the DRSL shares. That would depend upon whether the tax liability would arise and, if so, whether it would be significant. There is no evidence in respect of either matter other than reference to it at the 10 May 2012 Meeting. However, if that would have occurred, he would not have received a beneficial interest in one fifth of the DRSL's issued share capital. Nevertheless, the Equal Parity Agreement (which required parity in terms of equity and profit sharing) could still be implemented subject to that. For example, he and the 1-4 Ds would still give effect to the Equal Parity Agreement (when applied with the inter-linked LLP Agreement) by sharing equally in the profits of DRSL produced from the distributions of the LLP. Mr Keane's 10 May 2012 Statement did not provide for the exclusion of the agreement to profit share.

237. In other words, there would still be a contractual agreement which produced a relation between him and the 1-4 Ds carrying on in common a business of holding the DRSL shares as an investment with a view of profit. That agreement in law created a partnership ("**the DRSL Shareholding Partnership**"). He did not need a beneficial interest in the shares for that relation to subsist. The only effect upon that relation if he did not have a one fifth interest in the DRSL shares would be that his capital account would not be credited with the value of those shares upon their transfer to the partnership to become partnership property.

238. Therefore, in accordance with the Equal Parity Agreement (as varied) and applying the law of partnership to the DRSL Shareholding Partnership upon execution of the LLP Agreement, as at 18 June 2012:

a) The DRSL shares became partnership property now of a partnership of five not four partners. Each partner should have had their capital account credited with

an agreed equal value attributable to their respective equal beneficial interest in the DRSL shares which they transferred into the DRSL Shareholding Partnership.

b) Subject to the application of Mr Keane's 10 May 2012 Statement ("**Mr Keane's Exception**"), this would include Mr Keane because he would receive an equal beneficial interest under the terms of the Equal Parity Agreement (as varied) upon execution of the LLP Agreement.

c) Mr Keane's Exception was a right to refuse or an automatic exemption from receiving a beneficial interest in the DRSL shares (and, therefore, from receiving a consequential credit to his capital account) if a transfer to him of an equal beneficial interest in the DRSL shares would result in a significant personal tax liability. It did not affect his entitlement as a partner to share the DRSL Shareholding Partnership's profits equally with the 1-4 Ds. That right would continue whether he had a credit to his capital account or not.

d) There being no contrary agreement and consistent with the equal sharing of profit and loss, distribution upon dissolution would be in equal shares after payment of debt and liabilities and repayment of sums credited to partners' capital accounts (applying ***sections 39 and 44 of the Partnership Act 1890***).

239. Paragraph 239(c) above leaves open the question whether Mr Keane's Exception was an option to refuse a one-fifth beneficial interest with the consequence that his capital account would not be credited or whether that would occur automatically if it was established that he would incur a significant tax liability should he receive and contribute as capital an equal interest with the 1-4 Ds in the beneficial title to DRSL's shares.

240. It would appear to be the former option when there is no evidence of anyone having at the time identified whether or precisely when a tax liability would arise and/or, if so, what the quantum would be and, therefore, whether it would in fact be a significant tax liability. It may not be necessary in practice to determine the matter. However, in any event no submissions have been made on this point and the parties are entitled to argue otherwise and upon the consequences should they so wish. This is a question that can be adjourned or addressed upon winding up of the DRSL Shareholding Partnership if appropriate.

241. In reaching the conclusions above, I have taken into consideration in particular the provisions of sections 2 and 5, 6 and 9 of the 1890 Act, noting that no specific reliance was placed upon them by either side. I have also considered the absence of partnership accounts or other records before me. Whilst of concern, this appears to have occurred as a result of omission in the context of facts which establish a partnership in law. I refer back to and rely upon the decision in ***Chahal v Mahal and another***. I also note for the avoidance of doubt that neither side has relied upon the accounting records within the core bundle to establish any opposite conclusion.

242. In reaching the conclusions above, I have rejected the 1-4 Ds' contrary evidence and case that the terms of Mr Keane's joinder with them in the DRS business were governed solely by the LLP Agreement without reference to the Equal Parity Agreement. The first reason for doing so is that it is based upon the incorrect premise that the 1 March

2012 offer had not been accepted and was rejected by Mr Keane's 10 May 2012 Statement.

243. Second, it would be wrong to treat Mr Keane's 10 May 2012 Statement as a final rejection whether of an offer or (materially) of the Equal Parity Agreement. I have found as a matter of fact that this is not what occurred. The parties decided the position concerning the Tax Event Issue should be investigated further.

244. Third, even assuming in favour of 1-4 Ds that Mr Keane's 10 May 2012 Statement had been binding and not subject to investigation, it would only have been a variation of the term of the Equal Parity Agreement entitling him to an interest in the DRSL shares. He did not reject the agreement of parity including his entitlement to share equally in the LLP's profits. Mr Keane's 10 May 2012 Statement made no reference to that entitlement. As explained above, that agreement would in itself have created a partnership. The shares would have become partnership property and the 1-4 Ds would have had their capital accounts credited with their value. He did not have to have been a beneficial owner of and transfer an interest in DRSL shares to become a partner entitled to share in profits and losses. He would be a partner with that entitlement but without an initial credit to his capital account.

245. Fourth, a further problem for the 1-4 Ds is that their evidence assumes a new agreement superseded the Equal Parity Agreement even though there was no such discussion and even though that would mean the terms of the draft LLP Agreement (when read on their own and without being inter linked to the Equal Parity Agreement) would produce a significant imbalance between Mr Keane and themselves. It fails to address the fact that if the Equal Parity Agreement was no longer on the table, there needed not only to be renegotiation of the 1 March 2012 proposal but also revision of the LLP Agreement.

246. That is because the LLP Agreement was inter-linked with the Equal Parity Agreement having been drafted on the premise that Mr Keane would be an equal beneficial owner of DRSL's issued share capital in order to achieve parity of equity and profit share. Even on their case, rejection would not have automatically produced a new unspoken offer and agreement based upon the same relevant terms as the draft 8 May 2012 LLP Agreement but with a construction which ignored the previous intentions of parity of equity and profit share on which it had been based. A construction which would prevent equal parity not only of capital but also of profit share. A construction which would produce imbalance with the 1-4 Ds now alone enjoying the advantages conferred upon DRSL as set out in paragraph 72 above concerning: capital profits; priority under the Contractual Waterfall; specific benefits upon ceasing to be a member and in the event of sale and transfer; and the priority in respect of shared profits when applied to any distribution of surplus in a liquidation. Plainly that would not be the case and indeed it was not. The parties agreed to investigate a solution. I must reject the 1-4 Ds' case.

247. In reaching the conclusions above, I have decided that the events after 18 June 2012 (including the matters I have referred to as to be borne in mind) do not alter them subject to considering the later effects of the terms of the MIPAs and the Deed of Asset Transfer.

H) Decision – The MIPAs

248. An obvious consequence for the conclusions above is that Mr Keane, as a partner of the DRSL Shareholding Partnership, indirectly benefited from the purchases by DRSL under the MIPAs in the same manner as the 1-4 Ds did. It is also clear that the interests transferred under each MIPA did not include DRSL's interest in the LLP or Mr Keane's interest in the DRSL Shareholding Partnership. Each MIPA left the 1-4 Ds and Mr Keane with equal interests in the LLP and as equal partners in the DRSL Shareholding.

249. Mr Keane did not physically receive payment of the consideration for his MIPA transfers because he lent that money to DRSL. There is no dispute that he has not been repaid. The first ground of defence to the claim for repayment relies upon an incorrect construction of clause 5.1 of the MIPAs. Clause 3.2 provided that the loan will be repayable *"in such amounts and at such time as the Designated Members shall determine in their absolute discretion"*. Applying those words on their own and assuming it would be right to decide not to pay, this would mean the designated members could refuse a request for payment even if its purpose was to enable a capital gains tax liability arising from the sale of the relevant interest. To avoid that possibility, clause 3.2 was made *"subject to clause 5"* and clause 5.1 requires payment if it is required to pay that tax liability. The submission that clause 5 is to be read as meaning there is only a requirement to repay if there is a tax liability is plainly misconceived.

250. The alternative submission is that there has been no request for the absolute discretion to delay payment to be exercised by the designated members of the LLP. However, there is no requirement for Mr Keane to make an express request for the discretion to be exercised. It is sufficient to demand repayment of the loan and it will then be for the designated members to decide whether to exercise their discretion to delay payment pursuant to the principles prescribed by the Supreme Court (see **paragraph 173** above).

251. It is also to be noted that the power to be exercised relates to reasons to delay not to refuse payment outright. The power is to decide repayment *"in such amounts and at such time"*. That requires decisions upon date and quantum and is not to be construed as entitling decisions that there will be no date, no quantum and, therefore, no repayment.

252. Having not made a decision, the designated members (assuming the LLP exists) cannot now rely upon submissions to the effect that the LLP would be able to justify the exercise of that discretion with reference to factors such as the terms of the Deed of Asset Transfer and the fact that Mr Keane could act in competition with the LLP. It was for them to have reached a decision and that has not occurred. I also note, sadly, that those submissions indicate that the 1-4 Ds have set their minds against any good faith application of the power.

253. In any event the 1-4 Ds chose not to exercise their discretion, repayment has been demanded and is due and owing subject to restoration of the LLP and to the defence that all of Mr Keane's claims have been settled by the Deed of Asset Transfer (to be considered below). The fact that the LLP has been dissolved by the 1-4 Ds will make no difference if it is restored to the Register because of the statutory consequences of restoration (assuming this is not a case for a winding up petition).

I) Decision – The Deed of Asset Transfer

I(i) Its Application To The DRSL Shareholding Partnership

254. I accept Mr McDonnell's submission that the Deed of Asset Transfer must be construed as executed within the context of its background circumstances, there being no application for rectification. There is no room for arguing that Mr Keane intended to settle all his claims if that was not what the Deed of Asset Transfer provided.

255. There can be and is no dispute that the express terms of the Deed of Asset Transfer did not provide for the sale of Mr Keane's interest in the DRSL Shareholding Partnership or otherwise address the issued share capital of DRSL, whether in terms of legal or beneficial interest. This was an agreement for the sale of the DRS business by the LLP to DRSL such sale to be achieved (in summary): by the sale and purchase of the assets and business identified as a going concern and by the payment of consideration which included payment to Mr Keane of his interests in the LLP (see paragraph 172 above). It is plain and not in dispute that the consideration paid to Mr Keane was only for his 4.5% interest of membership of the LLP (see paragraph 173 above). The DRSL Shareholding Partnership took no part in the transaction and there is no defence of rectification, misrepresentation or estoppel.

256. It was pointed out on behalf of the 1-4 Ds that they gifted their interests in the LLP to DRSL. As a result it was submitted that it is to be implied that the purchase price paid to Mr Keane must include his interest in DRSL or else he will be benefiting from the purchase price and retention of his partnership interest. The extent to which he will benefit will be a matter for resolution applying the terms of membership of the DRSL Shareholding Partnership. Although one would anticipate that the 1-4 Ds will have their capital accounts credited with sums equal to the consideration received by Mr Keane, that is not a matter which has been the subject of submissions. The point for this decision is that unfairness cannot justify rewriting the Deed of Asset Transfer which this submission of implication would require.

257. The Deed of Asset Transfer contained an express *"for the avoidance of doubt"* provision granting Mr Keane a release from any liability he may owe the 1-4 Ds, DRSL or the LLP. There was also a waiver of any claims that may be made against him under clauses 21.2 and/or 21.2 of the LLP Agreement. However, there was no release or waiver from him of any liability owed to him or of any claim he may have.

258. It is to be concluded that the DRSL Shareholding Partnership remains and the terms of the Partnership Act 1890 apply both generally and specifically concerning any account and any distributions.

I(ii) Its Application To The Current Account Debt

259. That leads to the current account debt and the need for the LLP to be restored to the Register in order that an account can be taken. Assuming, as I understand it in the absence of evidence to the contrary, that an account will have purpose, this claim turns upon whether the debt was settled by the Deed of Asset Transfer. This too is a matter to be determined without any claim for rectification (noting that I do not suggest here or above that one should have been made).

260. The Deed of Asset Transfer sold the LLP's business to DRSL. Clause 2.1 identified particular assets but the business was defined as *"the profession, trade or business of consultancy services carried on by the LLP at [close of business on the 30 November 2017]"*. The consideration included DRSL assuming all the liabilities, meaning *"all current and contingent liabilities of the [LLP] relating to or arising in connection with the Business whether before or after [30 November 2017] including the Charged Liabilities"*. In addition DRSL provided an indemnity in clause 6 against *"all and any actions, claims, demands or any liability whatsoever falling upon the Seller or GK arising out of or in any way connected with any debts, costs, claims, liabilities, acts, matters or things due, made, done or omitted or to become due or to be done or omitted by the Buyer in relation to or connected with the Business and/or Assets or under the provisions of this deed or otherwise"*.

261. There are two points that arise. First, insofar as the current account debt was a "liability", the fact that it was "assumed" by DRSL and subject to the clause 6 indemnity did not mean that the LLP had been released from the liability by Mr Keane. Second, I also accept Mr McDonnell's submission that it was not a liability *"relating to or arising in connection with the Business"*.

262. Therefore, returning to the LLP Agreement, Mr Keane having sold his interest in the LLP became an "outgoing member". The provisions of clause 21 applied. He was entitled to be paid in the instalments provided by clause 21.5: (in summary) credited capital, sums credited to his current account, sums due in respect of loans and their interest, and sums agreed in accordance with Schedule 4 subject to the LLP's absolute discretion not to pay all or any of those sums. That entitlement was subject to compliance with restraint of trade covenants within clause 22.2.

263. There is no evidence of the discretion having been exercised or of any breach of clause 22.2. In those circumstances but subject within the appropriate application to joinder and consideration of any views of the Registrar of Companies, which may include attention being drawn to the future management of the LLP, it would appear that the LLP should be restored to the register for an account to ascertain Mr Keane's entitlement.

J) Conclusion

264. I have decided:

a) The beneficial interest in DRSL's issued share capital is the partnership property of the DRSL Shareholding Partnership formed between 1-4 Ds and Mr Keane on 18 June 2012, as defined at paragraph 237 above. Each of the partners is entitled to share equally in the profits/losses of the DRSL Shareholding Partnership and in any residue (i.e. after payment of debts and liabilities and repayment of capital accounts) in a winding up following its dissolution (see paragraphs 232-238 above).

b) The issue whether in the circumstances of Mr Keane's 10 May 2012 Statement he was entitled to have any value credited to his capital account attributable to an entitlement to receive 1/5th of the beneficial interest of the DRSL issued share capital at the date the beneficial interest became partnership property has not yet been the subject of submissions. It can be adjourned or be dealt with in the course of winding up the DRSL Shareholding Partnership as appropriate (see paragraphs 239-240 above).

c) The sums lent by Mr Keane to DRSL pursuant to the MIPAs is due and owing and should be repaid (see paragraphs 248-253 above).

d) An account of sums due upon Mr Keane's current account with the LLP should be ordered if the LLP should be restored to the Register (see paragraphs 254-263 above).

265. The parties need to consider and seek to agree the relief which flows from this judgment (including whether the DRSL Shareholding Partnership has been or should be dissolved and should be wound-up, a matter which Ms Anderson Q.C. understandably did not address in her submissions). The parties have agreed that the judgment should be handed down with all questions of relief and any further required application(s) being adjourned to a date to be fixed. I will make the order in the terms of the agreed draft. I urge discussion in order to try to settle this matter.

Order Accordingly