Neutral Citation Number: [2014] EWHC 1845 (Ch)

Case No: HC11C00780

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9 DJ

Date: 13/06/2014

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

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Between :

(1) ENERGENICS HOLDINGS PTE. LTD. (a company registered in the Republic of Singapore) (2) NEUFTEC LTD. (a company registered in the Commonwealth of Dominica)	**Claimants**
- and -	
RONENDRA NATH HAZARIKA	**Defendant**

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Mr. H. Boeddinghaus (instructed by Penningtons Manches LLP and Spenser Underhill Newmark LLP) appeared on behalf of the Claimants.
Mr. W. McCormick QC and **Mr. A. Briggs** (instructed by Carter-Ruck) appeared on behalf of the Defendant.
Hearing dates: 7-9 and 12 May 2014 (Rolls Building, London)

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Judgment

HH Judge Pelling QC:

Introduction

1. In these proceedings as they are now constituted there are two claims advanced by the Claimants being:

   i) A claim by the First Claimant ("EHPL") for damages for breach of contract; and

ii) A claim by the Second Defendant ("NL") for an account of profits or equitable compensation in respect of alleged breach of fiduciary duty or dishonest assistance in breach of fiduciary duties or knowing receipt of trust monies.

The trial took place between 7-9 and 12 May 2014. I heard oral evidence called on behalf of the Claimants from Messrs Nayan and Nakul Jagjivan (whose role I describe further below), Mr Stuart Anderson, a director of Energenics Europe Limited ("EEL"), a company that became a subsidiary of EHPL in the circumstances that I explain below, and Mr Douglas Hall FCA who gave some expert accounting evidence concerning EHPL's damages claim. The Defendant gave evidence in answer to the claims. I had hoped to hand down judgment earlier than this but the parties' representatives were only available to attend a hearing on 13 June 2014. Although the Judgment is being handed down in Manchester, the trial took place at the Rolls Building in London.

2. In relation to the claim for damages for breach of contract, the Defendant maintains that it is unsustainable. It is submitted that no evidence in support the wasted expenditure claim has been adduced and thus that element of the claim must fail (something that is not now in dispute), and the alternative way in which the claim is put – which is to claim losses allegedly suffered by EEL as the loss suffered by EHPL – is unsustainable as a matter of law given the way in which the claim has been pleaded and the evidence that has been adduced to prove the claim. This led Mr McCormick QC to submit at the start of the trial that I should strike out this element of the Claim. I ruled that this was not appropriate because there was no formal application for such relief, such an application could have been made many months and indeed years ago but had not been and because it would be better in the circumstances for all the factual evidence to be heard and all relevant findings to be made before reaching a conclusion on the point of law that the Defendant relies on. I reached this conclusion because if I acceded to Mr McCormick's submission and there was a successful appeal from such a decision, the parties would be faced with the avoidable cost and inconvenience of a further trial, whereas if all relevant findings of fact have been made that outcome could be avoided even if ultimately Mr McCormick's legal submissions succeed before me but fail in any appeal.

Factual Background

3. EHPL is a company incorporated in accordance with the laws of Singapore. Its sole shareholder is Mr Nayan Jagjivan. He and his brother Mr Nakul Jagjivan are directors of EHPL. Its business is carried on either exclusively or principally through a network of subsidiaries and other companies in which it has interests in the alternative energy sector. Those subsidiaries currently include EEL. EEL was formerly known as Oxonica Energy Limited ("OEL") and before that as RMBKNE5 Limited.

4. NL is a company incorporated in accordance with the laws of the Commonwealth of Dominica. Its sole commercial purpose is to hold (and receive royalties in respect of) the intellectual property rights relating in particular to lipophilic-coated fuel additives designed to enhance the efficiency and cleanliness of diesel engines ("IPR"). Prior to the commencement of these proceedings its shares were held as to 400 each by the Defendant and Mr Bryan Morgan and as to 200 by Mrs Anne Morgan. As a result of the events to which I refer below, NL became owned as to 80% by EHPL and as to the balance by the original shareholders in the same ratio that they held all the shares

previously. Following the settlement of these proceedings as between the Claimants and Mr and Mrs Morgan in February 2012, their shares in NL were transferred to EHPL. In consequence it owns in excess of 90% of NL. The Defendant owns the balance of the shares.

5. It is the Claimants' case that the Defendant was a *de facto* director of NL from 30 November 2001 (the date of its incorporation) until 9 October 2009. The Defendant strenuously denies that such was the case. He was, he maintains, a minority shareholder whose focus was to develop the commercial exploitation of the IPR. He maintains that he left the management of NL entirely to Mr Morgan. His case is that he did so not least because he was down to September 2005, a statutory director of Oxonica Materials Limited and he had undertaken to that company that he would not participate in the management of NL until he ceased to be a statutory director of that company. It is common ground that the Defendant was a *de jure* director of NL from 9 October 2009 until 26 June 2011.

6. The Defendant was employed by EHPL as its Chief Executive Officer ("CEO") and sole director from 5 September 2006 until 4 August 2009 and continued as its CEO thereafter until the final quarter of 2010 when (on EHPL's case) he was dismissed in December 2010 following the discovery of alleged misappropriation by the Defendant or when (on the Defendant's case) he resigned in October 2010. The Defendant's case is that since then Nayan Jagjivan and Nakul Jagjivan have maintained a vendetta against him that has resulted in both this litigation and in no less than five separate claims being brought against him in Singapore. This belief on the part of the Defendant led to a number of very charged responses from him in the course of his cross examination by Mr Boeddinghaus.

7. The background events relevant to these claims are as follows. The IPR is concerned with a lanthanide additive (Cerium Oxide) to diesel fuel. The additive reduces fuel consumption and thus fuel costs and greenhouse gas and other exhaust emissions. The difficulty with lanthanide additives historically has been that they could cause abrasion and blockages within engines. The solution that was developed initially by the Defendant, and then the Defendant and Mr Morgan together, involved coating nanoparticles of Cerium Oxide with lipophilic coatings which could then be used to manufacture a liquid suspension of such nanoparticles suitable for addition to diesel fuel. The IPR is the formal embodiment of the solution they arrived at.

8. Mr Morgan had formed Celox Limited ("Celox") in 1996 to carry out business in an allied area. The Defendant joined Celox as a director in 1999 and ultimately in 2001 Mr Morgan and the Defendant assigned their interest in the IPR to Celox and Celox was then substituted as applicant in a European Patent Application originally issued in the name of the Defendant and Mr Morgan. It was first this application and then the patent that was granted on this application in 2005 that constituted the IPR.

9. In or about July 2000, Celox developed a commercial relationship with a company that ultimately came to be called Oxonica Limited ("Oxonica"). The purpose of this relationship was to enable Celox to benefit from the expertise that Oxonica claimed to have in the field of nanoparticle technology. Thereafter there was a debate as to how the relationship between Celox and Oxonica should be formalised. The detail surrounding this debate is immaterial for present purposes. However it was agreed in

principle that Oxonica would exploit the IPR commercially in return for various payments to Celox including a royalty, a profit share and initial and milestone capital payments. A risk was identified that Celox might become involved in litigation commenced by Nanophase Inc., a US based supplier of the raw material which the IPR exploited. The Defendant's evidence was that in order to avoid any risk to Celox's main asset (the IPR) from such litigation, he and Mr Morgan decided to transfer the IPR to a new corporate entity. This was not disputed and I accept it. In fact Celox did become involved in such litigation ("Nanophase Litigation") and Mr Morgan incurred some personal expenditure in funding the defence of that claim. Later he sought to recover those costs from NL. His recovery of those costs from NL is the foundation of one of NL's claims in these proceedings. The Defendant's evidence was that he left it to Mr Morgan to handle the incorporation of an appropriate corporate entity to hold the IPR and that it was Mr Morgan who chose the Commonwealth of Dominica as the jurisdiction in which it was to be incorporated. I accept that evidence. There is no evidence to contrary effect. Why Mr Morgan chose that jurisdiction is not at all clear but I consider it is likely that he chose it because he considered it to be tax efficient. On 30 November 2001, NL was incorporated and on 3 December 2001 Celox assigned the IPR to NL.

10. At about the same time Oxonica incorporated RMBKNE5 Limited. The purpose of this was to enable NL to licence RMBKNE5 Limited to use the IPR in return for a royalty and other financial benefits. The licencee could as easily have been Oxonica but those controlling Oxonica decided against that. The Defendant's case is that he was told at the time that this step too was taken in order to shield the licence agreement that was to be entered into concerning the IPR from the risks of litigation posed by the Nanophase Litigation. There is no evidence other than what the Defendant says that supports this but again it was not disputed and I accept his evidence on this issue.

11. On 7 December 2001, effect was given to the arrangement I have described by various commercial agreements including a Licence Deed to which RMBKNE5 Limited, NL, the Defendant and Mr Morgan were each parties, and by which NL licensed RMBKNE5 Limited to use the technology the subject of the IPR in return for a royalty of 5% of net sales, amongst other benefits. I refer to this agreement hereafter as "Licence". RMBKNE5 Limited (which changed its name as I have said to OEL after the Licence had been entered into) exploited the IPR by licensing the manufacture and sale of a product that became known as Envirox 1 ("E1"). An Australian-based third party manufacturer called Antaria Limited (formerly Advanced Nanotechnology Limited) manufactured this product for OEL.

12. Between 7 December 2001 and 30 September 2005, the Defendant was employed by OEL and other Oxonica subsidiaries including Oxonica Materials Limited, of which he was a statutory director, to develop and expand the market for E1 in the Asia – Pacific region whilst remaining a shareholder in NL. During this period he lived first in Hong Kong and, from 2005, in Singapore. It is not disputed that the Defendant's shareholding in NL was disclosed to Oxonica or that he was asked for and gave the undertaking referred to earlier in this judgment.

13. The Defendant maintains that an oral agreement was entered into by the NL shareholders in 2001 (prior to the formation of NL) whereby it was agreed between

them that Mr Morgan was entitled to receive the sum of £250,000 notionally due to NL from what became OEL under what was to become the Licence and further that, since NL would simply be a vehicle for the receipt of royalties, the royalty stream would be split between them in the ratio represented by their respective shareholdings less any administrative costs and all other liabilities.

14. NL maintains that there was such an agreement but that it is contained in Clauses 1 and 4 of a disputed document ostensibly dated 28 January 2002 (that is, after NL's incorporation) entitled "*Deed In Respect Of Ownership Of Assets Held By Neuftec Limited"* ("Assets Deed"). Although the Assets Deed appears to have been signed by the Defendant, he maintains that someone – presumably Mr Morgan, since it was he who passed the document to the Claimants following the commencement of these proceedings - forged his signature on the document. NL challenges this assertion. I return to the authenticity of this document later in this judgment.

15. NL maintains that at least Clauses 1 and 4 of the Assets Deed were not in NL's best interest and that by entering into an agreement containing those terms the Defendant acted in breach of the fiduciary duties he owed to NL by reason of him being one of its *de facto* directors. NL alleges that even if (contrary to its primary case) the Defendant was not at any material time a *de facto* director of NL, the Defendant knowingly assisted Mr Morgan to breach his fiduciary duties owed to NL by reason of him being a *de facto* director by executing the Assets Deed. In any event NL alleges that all sums received by the Defendant pursuant to Clause 4 of the Assets Deed are recoverable as monies that the Defendant dishonestly received knowing them to be company monies to which he had no entitlement. Aside from denying that he was a *de facto* director of NL, and that he executed the Assets Deed as I have said, he also denies that Clauses 1 and 4 of the Assets Deed breached any fiduciary duty that he might have owed.

16. It is common ground that the sum of £250,000 referred to in Clause 1 of the Assets Deed was eventually paid by OEL to Mr Morgan albeit in two tranches of £125,000. The Defendant says, and it does not appear to be disputed, that NL did not have a bank account at the time that the payments were made to Mr Morgan. Mr Morgan acknowledged that this payment had been made to him in the letter to which I refer in the following paragraph of this judgment and thus before the date of that letter. Aside from its case concerning the Assets Deed, NL's case is that this payment was one that the Defendant sanctioned or permitted in breach of the fiduciary duties he owed to NL by reason of him being a *de facto* director. Aside from denying this allegation, the Defendant maintains that NL's claim based on the payment of the £250,000 to Mr Morgan is statute barred. I return to the detail of that claim below.

17. On 22 September 2005, Mr Morgan wrote a letter to the Defendant addressed to him at his home in Singapore. It refers to a number of payments by NL to Mr Morgan including each of the payments in respect of which NL makes claims in these proceedings, other than the distributions of NL's income. In so far as is material that letter reads:

> "…

> I thought it appropriate to update my situation with respect to outstanding monies I have paid in connection with [NL].
>
> Initially I was paid £250,000 to repay the monies that I had paid into Celox. … Obviously the £250K has been paid out …
>
> In the year 30.11.01 to 29.11.02 we had start up costs and incidental charges etc amounting to £3872.35. Year 30.11.02 to 29.11.03 I had paid out company charges etc but I also had to pay the legal costs in respect of Celox which were not recoverable either through Celox or Oxonica and I feel justified to claim these through [NL]. Year 30.11.03 to 29.11.04 I paid two lots of company renewals, one being for 04/05 and there were other incidental costs as shown.
>
> Year 30.11.04 to 29.11.05 mostly covered the costs for the banking documents, but I have also put in for admin expenses of £6000 which was to cover not only general out of pocket expenses but also to defray the costs of covering the money and travelling to Monaco several times. …
>
> …
>
> There is also the £3000 I paid for you to go to Manila in 2002. I have never been able to recover these expenses from Oxonica and I therefore again feel it is reasonable for [NL] to bear the costs.
>
> Our loan agreement of 31 October 2000 has never been dealt with (amounting to £39,000) but I think that perhaps [NL] could pay this to me at some future date. I want to straighten out these outstanding issues so that I do not have to finance [NL] anymore which I think is understandably the right way forward.
>
> …"

18. The Defendant first met the Jagjivan brothers while he was employed by OEL and at a time when they were interested in establishing a commercial relationship with Oxonica for the purpose of exploiting E1 in India. That relationship flourished and ultimately led to the Defendant leaving the employment of OEL on 30 September 2005. EHPL was incorporated and the Defendant thereafter undertook various business activities on its behalf while at the same time continuing to market E1. How this dual role worked is not entirely clear but it was I think anticipated that EHPL would win contracts to supply E1 that in turn would be sourced from OEL thereby benefitting both EHPL and NL. There was an obvious risk of potential conflict because NL's interests lay in OEL obtaining as high a price as possible for E1 whereas it was in EHPL's best interests to buy at as low a price as possible. However all parties appear to have been aware of the Defendant's dual role, no objection appears to have been taken to it at the time and no claim based on this apparent conflict has been advanced against the Defendant by NL.

19. In August 2006, Oxonica entered into a major supply agreement with Petro Ofisi SA ("Petro Ofisi") in Turkey. However at a meeting that took place on 5 October 2006, the representatives of OEL informed the Defendant that the bulk of what was being supplied to Petro Ofisi was not E1, but another Envirox product (known as Envirox 2 ["E2"]) manufactured for OEL by Nyacol Nano Technologies Inc., a US corporation. They asserted that E2 did not come within the scope of the IPR and thus that OEL would not be paying royalties to NL in respect of its E2 sales to Petro Ofisi.

20. The Defendant and Mr Morgan did not accept this analysis. In February 2007, NL terminated the Licence, alleging that OEL had wrongfully repudiated it and OEL commenced proceedings in the Patents Court in which NL contended that irrespective of whether E2 came within the scope of the IPR it came within the scope of the Licence and thus royalties were payable in respect of its sale by OEL ("the OEL Litigation"). The OEL litigation ultimately came to trial before Mr Peter Prescott QC sitting as a deputy High Court Judge in June 2008 and by a judgment handed down in September 2008 he found for NL. An appeal followed in which Mr Prescott's judgment was upheld.

21. On 26 February 2007, shortly before the commencement of the OEL Litigation, NL terminated the Licence on the basis that OEL's refusal to pay royalties was a repudiatory breach which NL accepted. There is a dispute between the parties concerning the right of OEL to sell E1 after termination of the Licence. One effect of termination of the Licence was that OEL ceased to be entitled to sell E1 because by doing so it would infringe the IPR. This was the position that the Jagjivans maintained during this trial for the purpose of advancing EHPL's breach of contract claim. I return to the point when considering that claim in detail hereafter. I note at this stage however, that such was not the position of Mr Nayan Jagjivan at an earlier stage in these proceedings when EHPL applied to Vos J (as he then was) for various interim remedies. He swore an affidavit in support of that application in which he said at Paragraph 70 – 71:

> "Although to the best of my information and belief, [NL]'s intellectual property remains vested in [NL], its shareholders have since 2007 licensed or permitted its use to members of the Energenics Group …
>
> 70.3 On 18 August 2009, while preparing the documentation for the [NL]/Oxonica settlement agreement … [the Defendant] sent an email to …[NL]'s then solicitors … that "[NL] *licences its technology to Energenics and I am the majority shareholder of* [NL] *at the moment.*"
>
> 70.4 On 27 August 2010, during an email exchange with Dr Robert Paulmer (EHPL's chief technical officer) [the Defendant] stated that [NL] had given an exclusive licence of its patents to Energenics in 2007.
>
> 71. Energenics has in fact thus far chosen to make only minimal use of that licence or permission (choosing at present

> not to release any further amounts from its accumulated stock of the [E1] product. Nevertheless, in return for this arrangement and in order to protect its indirect interest in the intellectual property, Energenics has since 2007 been funding [NL]'s patent fees …"

Mr Jagjivan said in Paragraph 70 of his witness statement in these proceedings that the NL shareholders had licensed or permitted the Energenics Group to use the IPR since 2007 but then said in Paragraph 71 of his statement that "*... Energenics did not have permission to make use of [NL]'s technology until after EHPL had gained control of [NL] on 8 August 2011"*.

22. NL did not have the resources to litigate against OEL. Ultimately, in October 2006, Mr Nayan Jagjivan met with Mr and Mrs Morgan at a meeting that had been arranged by the Defendant. Mr Jagjivan offered to fund NL's litigation with OEL if he could purchase shares in NL. It was agreed that the existing shareholders in NL would sell 33% of the NL shares to EHPL, and Mr Jagjivan would directly or indirectly fund the OEL litigation. The Defendant maintains that at the end of the discussions that led to this agreement being reached, it became apparent that the parties had been at cross purposes as to the currency of account that was to apply to the purchase because the Morgans had thought the sale price was to be denominated in Pounds whereas the Defendant informed them his understanding was that it was to be denominated in US Dollars. The Defendant maintains that Mr Morgan conceded this point only reluctantly and in consequence asked that the existing shareholders be permitted to keep the royalties (then unpaid) for sales down to the date of the share sale. He maintains that Mr Jagjivan agreed to this proposal because it was not the entitlement of NL to income from past transactions that interested him but control of the IPR. Mr Jagjivan disputes this. I refer to this issue further below when considering NL's claims in relation to distributions of NL's income in 2006 and 2007.

23. The share sale was the subject of a formal written agreement. Lawyers instructed on behalf of EHPL by the Defendant prepared the agreement. It is dated 27 October 2006. I refer to this agreement hereafter as the "2006 SSA". The 2006 SSA provided for the sale of shares by each of the NL shareholders to EHPL. It also provided for the incorporation of a new company in Singapore with an identical shareholding to that of NL following the sale of NL shares to EHPL to hold the IPR. This was never implemented. Transfer of the shares was to take place on 10 November 2006. The Agreement was expressly made subject to English law and contained an entire agreement clause by which it was agreed that the written agreement "*... contains all the contractual arrangements of the parties with respect to the sale and purchase of the shares."*.

24. The 2006 SSA did not contain anything about finance of the OEL litigation nor did it contain anything about royalties. Both of these omissions are striking. The first is striking since the sole reason why the sale of the shares was taking place was because NL could not afford to conduct the OEL Litigation. Whilst it is true that the OEL Litigation had not been commenced at the date when the 2006 SAA was signed, it was nonetheless the case that it was entered into in contemplation of litigation with OEL and on the basis that the sale of the shares would secure a source of finance for litigation as and when it was commenced. This omission of any reference to income

entitlement is striking because the Defendant maintains that Mr Morgan's requirement to keep all royalties that had become due down to the date of the sale but were unpaid was as he put it a "deal breaker" for Mr Morgan.

25. Notwithstanding that the 2006 SSA fixed completion for 10 November 2006, and notwithstanding that Mr and Mrs Morgan had been paid for their shares, neither they nor the Defendant transferred the shares they had agreed to sell to EHPL. The Defendant's explanation for this is that it was to avoid exposing EHPL and/or the Jagjivans to the risk of third party costs orders being made against them. So far as I can see there was no mention of such a risk before August 2007 – see Paragraph 34 of Mr Nayan Jagjivan's witness statement. Indeed the Oxonica proceedings were not commenced until February 2007. Thus whilst I accept that by August 2007, EHPL had agreed to a postponement of delivery for these reasons, I do not accept that there was any such agreement prior to that date.

26. There were difficulties in obtaining funding for the litigation from the Jagjivans. Initially, they had provided funding in the form of loans to EHPL. However, by June 2007, Singapore $1.2m was due to the lawyers acting for NL. Oddly, the Defendant says of this in paragraph 146 of his statement that he "*... knew that Bryan Morgan would terminate the deal if he knew what trouble we were in…"*. I am not sure what that means. If by "*the deal"* he means the 2006 SSA then it was not obviously open to Mr Morgan to terminate it. It was he and the other shareholders that were in breach of it by failing to deliver up the shares that EHPL had paid for. More importantly the Defendant says that he embarked on a negotiation with the Morgans in order to persuade them to sell more of their shares to EHPL. I do not understand this part of his case. He says in his statement that the reason why the Jagjivans were not injecting more money into EHPL in order to fund the OEL Litigation was because at that time they were asset rich but cash poor. I do not see how that was going to be assisted by persuading the Morgans to sell more of their shares in NL to EHPL. It certainly would not assist EHPL to pay NL's legal bills – if anything the contrary was the case since NL's only source of funding was EHPL and EHPL's funding was dependent on the Jagjivans.

27. Ultimately however, the Defendant instructed lawyers to draw up a further share sale agreement. This agreement is dated 25 July 2007 and I refer to it hereafter as the "2007 SSA". The ostensible purpose of this transaction is described in Recital D as being that the shareholders in NL "*... wish to protect and enhance the intellectual property owned by ..."* NL. The completion date was fixed to be 25 July 2007 (that is the date of the 2007 SSA). Clause 3.2 of the 2007 SSA provides that "*... from time to time and as required by* [NL] [EHPL] *shall advance the Loans to the Company"*. "*Loans"* was defined as meaning such sums as were or would be advanced by EHPL to NL for the purpose of finding the Oxonica litigation capped at US$1 million. As I say, how EHPL was in a position to offer this commitment when on the Defendant's own case EHPL could not get funding from the Jagjivans is not clear. This agreement contained no mention of entitlement to royalties. This omission is striking given the ostensible importance to the Morgans of that commitment when the 2006 SSA was under negotiation.

28. It is common ground that in August 2007, EHPL was advised to delay the transfer to it of the shares in NL until after the conclusion of the Oxonica litigation in order to

minimise the risk of a third party costs order being made against it in the event that NL lost and it agreed this course with the NL shareholders.

29. Following the dismissal of the appeal against the Order made by Mr Prescott, negotiations took place between NL acting by the Defendant and Oxonica concerning settlement of all outstanding issues. Oxonica was not in a position to meet NL's legal costs. Following negotiations a settlement was agreed in the terms set out in a Settlement Deed dated 29 September 2009 ("the Settlement Deed"). It is not necessary that I set out the detail of the provisions contained in the Settlement Deed. In summary however, the parties to the Settlement Deed included EHPL, NL, OEL and the Defendant. EHPL acquired all the shares in OEL (which was subsequently renamed EEL as noted earlier in this judgment) subject to the releases that were granted by the Settlement Deed to OEL by NL. EEL continued to be the entity through which E1 and E2 was sold.

30. It was suggested by Mr McCormick that the effect of these releases was to licence OEL to use the IPR as and from the date of the settlement. I am not able to accept that submission. What was waived was any "Claim" or "Claims" as defined in the Settlement Deed. "Claims" was defined as all claims "*... subsisting at the date of Closing ...*" and "Closing" was defined by reference to the meaning of that word in the agreement for the sale of the shares in OEL to EHPL and was the date of completion of that transaction. Thus any infringement that took place after that date was not waived. If and to the extent that OEL had a licence to use the IPR after the termination of the Licence by NL prior to the commencement of the OEL Litigation, it continued to have that benefit following the transfer of the shares in it to EHPL.

The Contract Claim

Overview

31. EHPL alleges that the Defendant should have transferred the NL shares that he sold to EHPL on or after 29 September 2009 but in breach of contract he failed to do so. In consequence it is alleged that EHPL was caused loss and damage. It is common ground that credit must be given by EHPL for £35,000 it recovered from the Morgans in relation to a similar allegation. I conclude that EHPL has established a breach of contract by the Defendant in failing to transfer the shares in NL that he sold to EHPL under the 2006 SSA and the 2007 SSA on or after 29 October 2009, but has failed to establish the loss it claims to have been caused by that breach. Whilst EHPL is entitled to recover nominal damages, its entitlement to recover even that sum is defeated by the need to give credit in the sum referred to above. In the result therefore EHPL's claim for damages for breach of contract fails and must be dismissed. My reasons for reaching these conclusions are as follows.

Breach

32. The Defendant's pleaded case in relation to the issue I am now considering is that no loss has been incurred by EHPL as a result of the breach – see Paragraph 6 of his amended Defence. It is unclear from his pleading whether he also denies breach of contract. The terms of Paragraphs 7 and 8 of the amended Defence suggest that he does. Paragraphs 20 – 24 of Mr McCormick's skeleton are unclear as to whether breach is admitted or not.

33. In Paragraph 23 of his skeleton, Mr McCormick says:

> "While it seems clear that … [EHPL] was not the legal owner of any shares, there was no doubt in [EHPL]'s mind that it was in substance 80% owner of [NL]. "

If by this it was intended to suggest that there had been no breach of contract then in my judgment that is mistaken. That EHPL was the beneficial owner of the shares, or was entitled to call for their transfer at any time after the date when they should have been transferred, does not mean that the failure to transfer the shares was not a breach of contract. Each of the 2006 SSA and the 2007 SSA contained completion dates by which the shares should have been but were not transferred to EHPL. Time was extended down to 29 September 2009 but in my judgment the Defendant came under an absolute obligation to transfer the shares that he had sold to EHPL as and from that date at the latest. These proceedings were commenced on 22 March 2011. It is common ground that the shares were eventually transferred to EHPL only on 8 August 2011.

Loss - Overview

34. EHPL's case as to the loss it alleges it was caused by the breach is that between 29 September 2009 and 8 August 2011, "*... EHPL was deprived of a secure interest in [NL]'s IPR (and the means of controlling them as majority beneficial owner) to which it would otherwise be entitled, and hence was unable to exploit the economic value of those rights ...*" – see paragraph 23 of the Claimants' opening submissions. EHPL's pleaded loss is set out in Paragraph 29 of the Amended Particulars of Claim as being:

> "29.1 loss of profits that would have been earned had EHPL been able to secure control of [NL]'s [IPR];
>
> 29.2 expenses thrown away by the failure to proceed with the proposed enterprise including but not limited to the out of pocket expenses incurred in building up and then having to dismantle the marketing and distribution infrastructure created by EHPL in the expectation that it would be able to procure the production of or distribute the products covered by [NL]'s intellectual property rights."

As I said earlier, no evidence in support of the claim pleaded in Paragraph 29.2 has been adduced and Mr Boeddinghaus made clear in his closing submissions that this sub-paragraph was not any longer relied on by EHPL. Why no evidence was adduced in support of it, or how the claim came to be pleaded if no evidence to support it was available, was not explained.

35. At trial, EHPL's case was that EEL had suffered loss between October 2010 and August 2011 because in that period it was forced to supply E2 to customers who would otherwise have been supplied with E1, a large quantity of which EEL had in stock. The alleged reason for adopting this course was that EEL did not have the benefit of a licence to use the IPR vested in NL and was not able to obtain one prior to the actual transfer of the shares in NL that had been sold to EHPL under the 2006 SSA and the 2007 SSA. In consequence, it is alleged that in October 2010, Messrs

Jagjivan issued an instruction to EHPL and/or EEL, and/or an instruction was given internally within EEL, not to supply any further E1 but to fill all orders with E2. It is further alleged that as a result in March 2011 EEL had to place an order for a minimum quantity of E2 from its manufacturer. It is alleged that EEL thereby suffered loss because (a) the margin it was able to make supplying E2 rather than E1 was lower and (b) because it had to store E2 when otherwise it would not have had to do so. It was submitted on behalf of EHPL that if I found these facts proved I should without more assume that the loss suffered by EEL was the loss suffered by EHPL.

36. The sums that it is claimed EEL has lost comes to £103,844, being the extra cost of using E2 instead of E1, and £4,162.50, being storage costs that would otherwise have been avoided. The storage charges element was originally quantified at twice this figure but Mr Hall accepted that this figure should be halved in order to recognise that storage charges would have reduced rateably over time as the E2 was used to fill orders. This was not in the end the subject of dispute. The calculation of the sum of £103,844 was not in the end disputed either as a calculation. The mechanics are all set out in Mr Hall's report and were not challenged by Mr McCormick.

37. There is no mention in the amended Particulars of Claim of this claim being advanced by reference to losses allegedly suffered by EEL. It was submitted that it was or should have been apparent to the Defendant that this was the basis of the claim from the witness statements of Mr Anderson and the expert evidence of Mr Hall and thus it was not open to the Defendant to complain about the manner is which the claim has been pleaded. I do not agree. If evidence has been served that does not support a damages claim as pleaded, a defendant is fully entitled to proceed to trial and take that point.

38. It was suggested that this approach was contrary to the overriding objective. I do not agree. There is nothing within the overriding objective that obliges a defendant in effect to inform a claimant that his or its evidence does not prove the case that has been pleaded. It is the pleadings that set the agenda for trial, not the witness statements that follow, usually months after pleadings have closed. In my judgment if a claim was to be advanced in the form that in fact EHPL has advanced its damages claim at trial, then the amended Particulars of Claim ought to have pleaded each of the elements that I have summarised above. In particular it seems to me that the basis on which it was alleged that the Court should conclude that the alleged losses of EEL should be treated as being a loss suffered by EHPL ought to have been pleaded, even if it was contended (as it is) that the court should assume that such is the case.

39. Aside from the pleading point mentioned above, the evidence that has been adduced in support of this claim is deficient if and to the extent that it had to be proved that the losses of EEL were pound for pound the loss suffered by EHPL. It was common ground that there was no evidence to make good that link. There has been no disclosure given or evidence adduced concerning what if any dividends would have been paid by EEL to EHPL but for the losses allegedly suffered by EEL. No expert accounting evidence has been given that explains what tax if any would have been payable by EHPL on dividends received from a foreign registered subsidiary (EEL is an English registered company and EHPL is a Singapore registered company). There is no evidence either as to what if any dividends would have been taken from EEL but for the losses it alleges that it suffered. This would have depended in part on the

financial state of EEL during the relevant period. EHPL submits that all this is unnecessary and irrelevant because it is to be assumed that EEL's losses were suffered by EHPL. I turn to the legal basis for that submission below. If, as the Defendant submits, a claim advanced on this basis needs to be both pleaded and proved properly, then it is plain that this has not been done in this case.

EEL's Alleged Losses – Factual Findings

40. The evidence in support of the claim comes from Mr Anderson and Mr Hall. In essence the point made by Mr Anderson is that EEL had a very significant stock of E1 in various locations when it came into the ownership of EHPL. However, following the termination of the Licence, EEL ceased to be entitled to sell E1. This was the case because although OEL had been obliged to pay royalties on the sale of both E1 and E2 on a true construction of the Licence, only E1 exploited the IPR vested in NL. Thus OEL/EEL infringed NL's IPR by offering E1 for sale after termination of the Licence. Whilst those breaches down to the date of "Closing" as defined in the Settlement Deed had been waived under the terms of the Settlement Deed, sales thereafter would constitute further infringements. Mr Anderson's evidence is that this became apparent by October 2010 and followed the taking of legal advice. In consequence, he said, the Jagjivans took the decision that EEL should stop supplying E1.

41. It was I think common ground that no formal licence was granted by NL to EEL or any other Energenics company at any stage after termination of the Licence, by which EEL was authorised to exploit the IPR. Although it was suggested by the Defendant that there was an informal licence in place, when and by whom on behalf of NL it was granted has never been explained. The material that is referred to by Mr Nayan Jagjivan in Paragraph 70 of his affidavit in support of EHPL's application for interim relief is little more than an assertion of a belief in the existence of an informal licence on the basis of assertions or assurances given by the Defendant. The reality is that notwithstanding those assurances or assertions there was no such licence.

42. The more telling questions are whether in fact EEL ceased using E1 when it discovered there was at least a risk that NL had not licensed it to exploit the IPR and whether that was the result of the breach of contract relied on by EHPL. I remind myself that it is for EHPL to prove that it ceased using E1 because of the absence of a licence. On this issue the oral evidence that such an embargo was imposed and for that reason is unsupported by any contemporaneous written material.

43. The only contemporaneous document relevant to the issue I am now considering is an email from Mr Anderson to Mr Nakul Jagjivan dated 26 October 2010. In that email, Mr Anderson refers to a conversation he had with Mr Morgan. The fourth bullet point refers to Mr Morgan saying that there was no licence in place between Energenics and NL. It is noteworthy that Mr Anderson does not suggest in this email that Mr Morgan is wrong in what he says. This is consistent with the conclusion that I have already reached concerning whether in fact there was in place an informal licence that permitted the Energenics Group to exploit the IPR. The email finishes with a note in which Mr Anderson says:

> "We have sold this year some 20 drums of [E1] … the rest … being [E2]. It might be wise for us to continue to focus on [E2] until things clarify …"

44. This is in my judgment a significant comment because it suggests willingness on the part of Mr Anderson for EEL to continue as before in its dealings with E1 notwithstanding his apparent acceptance of the absence of a licence. It certainly does not refer to or suggest that dealing in E1 should cease. There is no reference to any legal advice to the effect that EEL ought to cease dealing in E1. It is apparent from the final bullet point within this email that Mr Anderson was aware that the shares in NL that should have been transferred to EHPL had not been. There is no internal documentation that suggests that legal advice should be, or had been, sought or given or indeed that instructions not to sell E1 should be, or had been, given either by the Jagjivans to anyone or by anyone at EHPL to EEL or by anyone within EEL.

45. Mr Anderson suggested in the course of his cross examination that EEL had or may have such documents. When Mr McCormick sought to explore why such material – if it existed – had not been disclosed, Mr Boeddinghaus objected because he maintained that it had been made clear in the disclosure statements that no EEL documents had been disclosed by the Claimants. That might be so but in my judgment is not the point. If the intention had been to prove a damages claim by reference to what had been done within EEL and documents existed within EEL that established that claim, then such documents could and should have been disclosed and the Defendant is entitled to rely on their absence in support of a submission that EHPL has not proved critical elements of its damages claim. Equally documentation that did not support the assertions made concerning the imposition of an embargo on the sale of E1 after October 2010 ought to have been disclosed. In my judgment it is indefensible to maintain a reflective loss claim whilst at the same time failing or refusing to give any disclosure relevant to the alleged losses from the subsidiary that is said to have suffered the loss.

46. Although it is said that EEL ceased using E1 following legal advice, that advice is not in evidence. It was I think accepted by Mr Boeddinghaus in the course of his closing submissions that the effect of the oral evidence given on this issue was to waive privilege in respect of the advice that was being relied on. Even if the advice was not given in writing, there is no reason why the lawyer who gave the advice could not confirm in a witness statement that he or she had given such advice whilst making clear that privilege was not waived in relation to any unconnected advice that had been given by him or her to either EEL or EHPL.

47. Although as I have explained, I do not regard what Mr Nayan Jagjivan said in Paragraph 70 of his affidavit as necessarily inconsistent with EHPL's case that there was no informal licence in fact in place, Paragraph 71 is much more significant in relation to the point I am now considering. In that paragraph (the text of which is set out above) Mr Jagjivan does not say that EEL ceased selling E1 in October 2010. He says that "*thus far*" Energenics has chosen to make only minimal use of the product. That suggests that the product had been used down to or very shortly before the date when the affidavit was affirmed – that is 18 March 2011. This is consistent with the position as described by Mr Anderson in his note continuing as he contemplated in the concluding note in his 26 October 2010 email referred to above. Mr Jagjivan does not

say that E1 was not being used because of a concern about the absence of a licence. Indeed the effect of his evidence was that he considered that either EEL or the Energenics group had the benefit of an informal licence. It is much more likely that the position was as described in paragraph 71 of the affidavit for the commercial reasons described by Mr Anderson and which I summarise in paragraphs 51-53 below.

48. That this is what in fact happened is supported by Mr Hall's evidence that E1 was being blended in 2011 – at a time when supposedly no such material was being sold. This evidence is contained in Paragraph 3.2.11 of Mr Hall's report. Blending involves diluting concentrated E1 into the form delivered to customers. The effect of blending is to expand the volumes of material that would have to be stored pending sale. It makes no sense for EEL to be blending E1 in 2011 (and thereby incurring the cost of that process and storing the finished product) other than on the basis that they were intending to supply it to customers.

49. In these circumstances, I conclude that EHPL has not proved on the balance of probabilities the imposition of an embargo against the sale of E1 in October 2010 imposed by reason of the absence of a licence that permitted it to exploit the IPR belonging to NL.

50. If (contrary to the conclusion I have reached) EHPL had proved that EEL had ceased supplying E1 to customers in October 2010 and had to fill orders that could have been filled with E1 by supplying E2, I would have accepted that any loss of margin thereby resulting would in principle be recoverable subject to the reflective loss recoverability point that I refer to below and subject also to being satisfied that the test of forseeability of loss relevant to a claim for damages for breach of contract was satisfied. However it is submitted by the Defendant that EEL was willing and able to supply only limited quantities of E1 during the period prior to October 2010, that this position would not have altered in any event and thus any such loss would in any event have been very limited.

51. Mr Anderson says at Paragraph 13 of his witness statement that in the period between April 2010 and October 2010 EEL supplied only small quantities of E1. Mr Anderson accepted that as far as he was concerned his belief prior to October 2010 was that EEL was entitled to sell E1 without restriction – see T2/45/17-21 and 37-43 to T2/46/13 – but that the policy was to focus on E2 for "*... pragmatic quality and customer reasons"* – see T2/45/30-35. He further explained this as being a deliberate decision to sell only small quantities of E1 for these commercial reasons – see T2/57/23-27. A little later he confirmed as correct what he had said in the email of 26 October referred to earlier namely that only 20 drums of E1 had been sold down to that date in 2010 – see T2/57/43 – which he later confirmed amounted to 24 drums in a year – see T2/65/16-23. Mr Anderson made it clear that in some respects E1 was a less sellable product than E2 – see T2/63/27 – 64/1. Mr Anderson also accepted that the strategy of EEL throughout 2010 never changed – it was to focus on E2 – see T2/66/10-23. He also accepted that the substance of that strategy would not have altered – see T2/67/1-11. He accepted that the E1 that was being sold was exclusively to one customer (Stagecoach Plc ["Stagecoach"]) – see T2/67/20-24 – and that the E2 that was bought in March 2011 was bought in to service more than just that customer – see T2/67/26-36. He also accepted that had EEL been able to order a smaller quantity, it

might have done so – see T2/69/22-35. This suggests that EEL was ordering more than it needed but that what it needed exceeded what was required in order to substitute E2 for E1 for supply to Stagecoach.

52. Mr Anderson confirmed that what had been ordered in March 2011 were 30 drums of E2 at 20% concentration. The product supplied to customers was at 2% concentration and thus the 30 drums purchased equated to about 300 drums of product for supply to customers. It was then put to Mr Anderson that of this only about 10% was attributable to the alleged inability of EEL to supply E1, based on the annual supply of that material down to the end of October 2010. Mr Anderson agreed with this – see T2/71/20-21.

53. Two further points emerged that are relevant to the issue I am now considering. First, EEL had embarked on a policy of careful quality checking of the E1 stock before it was passed on to customers. This was because the stock was old and there was a lower level of confidence in the material compared to the existing stocks of E2, which was newer and in which confidence was greater. The other point that emerged was that by March 2011, the Government of China was restricting the amount of the raw material needed to manufacture E2 that could be exported. It was this that drove up the price of E2. Mr Anderson said and I accept that this would have provided an incentive to use more E1 at the expense of E2. The point that he made about Stagecoach was that it ordered in excess of 200 drums of material in the course of a year. It was willing to take either E1 or E2. The choice to supply limited qualities of E1 thus was EEL's and was I conclude driven by the quality testing issues that I have mentioned.

54. All this led Mr McCormick to submit that the loss claimed had been grossly exaggerated because although EEL had been forced to order the minimum quantity that the manufacturer of E2 was willing to sell, it was simply incorrect to suggest that the only reason that the order was placed was because of the embargo on the use of E1 by EEL. This was so because all EEL's customers other than Stagecoach would only accept E2 due to the qualitative factors mentioned by Mr Anderson. In other words, the order that was placed in March 2011 was an order that it would have to have placed in any event. Mr Anderson says Stagecoach represented 85% of EEL's business and that business totalled about 200 drums of product supplied by EEL to that customer each year. Thus it is conceivable that EEL could have increased the volume of E1 supplied to that customer so as to reduce the volumes of E2 that was required. The difficulty about this from EEL's point of view is that whilst there is evidence that the supply of E1 increased in 2012, there is no evidence of any plans to increase the supply of E1 beyond the volumes supplied during 2010 for either the remainder of 2010 or 2011. There is no evidence as to when that policy would have changed but for the alleged embargo. There is no evidence that if the supply of E1 could have been increased, EEL had sufficient stock of E2 to avoid having to place the order in March 2011 in order to service the needs of customers who would not accept E1 or when but for the alleged embargo such an order would have to have been placed. There is no evidence as to when the price of E2 started to increase as a result of the restrictions on the availability of the raw material needed to manufacture E2 that led to the increase in its wholesale price and for how long that trend was maintained.

55. Further it was clear from Mr Anderson's evidence that the major limitation on the use of E1 down to the end of October 2010 was the need to carry out extensive quality control checks on E1 before it was supplied to customers. There is no evidence available to me as to whether those processes could have been speeded up sufficiently in 2010-11 to enable EEL to increase materially the quantities of E1 that could be supplied to Stagecoach. If the position is no more complicated than that when stocks of E2 ran out, E1 would have been substituted, there is no evidence as what if anything would have been done about the 15% of EEL's business that was exclusively E2. It is possible that those sales would have been given up if those customers would not take E1 or that the increased cost of supplying that material would have been absorbed by EEL either in whole or part. These factors would I think have to be taken into account in assessing what losses were suffered by EEL in the event that I had concluded that it had proved the embargo it alleges was imposed in October 2010. There is however no evidence that enables any conclusions to be reached on these points.

56. In those circumstances I accept the submission made by Mr McCormick that it has been proved by EHPL only that no more than 10% of the March 2011 order was needed to replace the E1 then being used by EEL. However this point is academic because the imposition of the embargo on the use of E1 from October 2010 has not been proved.

Forseeability

57. The principles relating to foreseeability and remoteness applicable to a claim for damages for breach of contract are well established. They are founded on the formulation in Hadley v. Baxendale (1854) 9 Ex 341 and the cases that follow it. In principle, the victim of a breach of contract is only entitled to recover such part of the actual loss caused by the breach as was reasonably foreseeable at the time the contract was made as liable to result from the breach. Any loss that falls outside this definition, even if shown to have been caused by the breach alleged, is too remote and thus is irrecoverable as damages.

58. What is treated as foreseeable depends on the knowledge of the contract-breaker. The first rule in Hadley v. Baxendale is concerned with losses that may reasonably be supposed to be in the mind of both parties, at the time the contract is made, as the probable result of a breach. The second rule is concerned with losses arising from special circumstances outside the reasonable contemplation of the parties at the time that the contract is made, which can be recovered only if the contract-breaker had actual knowledge of the special circumstances at the time when the contract was made. It is also trite that the knowledge required is of the type of loss suffered rather than precise knowledge or imputed knowledge of the mechanisms by which loss is caused or its extent.

59. On the claim as it was advanced at trial, EHPL would have to show that its reflective loss described above was foreseeable within one or other of these formulations. At the time when the 2006 SSA and the 2007 SSA were entered into EHPL did not own EEL. It was not contemplated by any of the parties at that stage that EHPL would ever own EEL. EHPL did not acquire EEL until 2009 when the Settlement Deed was agreed between the parties to it. That being so, I do not see how the reflective losses

claimed in these proceedings could be said to have been within the reasonable contemplation of any of the parties to those agreements at the time those contracts were respectively made, as the probable result of a breach of them or either or them. It was equally unforeseeable that EHPL would itself suffer losses of the type suffered by EEL as a result of the breach by the sellers of either the 2006 SSA or the 2007 SSA. It was not contemplated that the IPR would be transferred from NL to EHPL or otherwise come under the exclusive control of EHPL.

Reflective Loss

60. I now turn to the point of law on which Mr McCormick relies namely that in the circumstances of this case I cannot assume that the alleged losses suffered by EEL were pound for pound a loss suffered by its parent EHPL. The point is an academic one in light of the conclusions that I have reached so far and thus I set out by conclusions shortly.

61. Mr Boeddinghaus accepts that there is no evidence that supports such a conclusion but submits that I should nonetheless assume that such is the case. In support of that proposition he relies on Gerber Garment Technology Inc v. Lectra Systems Inc [1997] RPC 443. Mr McCormick submits that on proper analysis that case does not support the proposition for which Mr Boeddinghaus contends and in the absence of any evidence that shows the loss suffered by EEL was suffered pound for pound by EHPL the damages claim must fail as a matter of law even if I had rejected all his factual submissions concerning the alleged EEL loss.

62. The detailed facts of Gerber Garment (ante) are not material for present purposes. The relevant part of the judgments of the Court of Appeal concern the conclusion of the trial judge that it was self evident that losses suffered by wholly owned subsidiaries were dollar for dollar the loss suffered by the parent Claimant. A majority of the Court of Appeal concluded that this approach was erroneous. Hobhouse LJ summarised the law in the following terms:

> "The position of parent companies and their subsidiaries vary widely. At one extreme there is a simple group of companies all operating within a single country and a single tax system … such a group as long as it remains fully solvent, probably only has consolidated accounts and all financial consequences are directly felt by the holding company. In such a situation it may be possible to say that a pound lost to the subsidiary is a pound lost to the group and therefore to the holding company. At another extreme one can have a subsidiary which operates in a third world country where strict exchange control, an inflating local currency and a local tax regime means that a gain or loss in a local company has only very limited significance for the holding company; profits may be heavily taxed; the scope of transfer pricing may be very limited; remittance of profits or capital may be severely circumscribed or even prohibited. … There is no "self evident" truth. It all depends on the circumstances. Where as here the relevant companies are carrying on business in different countries, the starting point

> must be that an income loss suffered by one company will not normally translate directly into an equal monetary loss to the other company.
>
> …
>
> The root principle which must be adhered to is that each company is a separate legal entity. The property of one is not the property of another. The Plaintiff must prove its own financial loss in its own pocket and quantify it. ”

Hutchinson LJ agreed with this outcome. In doing so however he said:

> "I accept that there may be very simple and straightforward cases in which, upon proof that a wholly owned and solvent subsidiary company has suffered a loss in a certain sum, it would be legitimate to infer an equivalent loss by the parent even in the absence of any other evidence.
>
> …
>
> … where the owner of all the shares in a company asserts that by reason of the wrong done to him he has suffered loss, it must be possible to adduce evidence from expert accountants as to the level of that loss."

63. In my judgment this authority must be read subject to what is now the leading case on the recoverability of damages for reflective loss, which is Johnson v. Gore Wood & Co [2002] 2 AC 1. The general rule that precludes the recovery of reflective loss by a shareholder was clearly restated in that case by Lord Bingham at 35F-36E, where however he also said that where a company suffers a loss but has no cause of action to recover that loss, the shareholder may sue in respect of it by reference to a diminution in the value of the shareholding. As Lord Cooke emphasised at 45H, even in such a case the Plaintiff must prove the amount of his own loss and that it cannot be assumed that this is the same as the loss suffered by the company.

64. Mr Boeddinghaus submits that the simple case exception identified in Gerber Garment (ante) survived the judgments in Gore Wood (ante), that this is a simple case of the sort contemplated by Hobhouse and Hutchinson LJJ and that the losses suffered by EEL (in respect of which it has no cause of action) ought to be recovered pound for pound by its holding company EHPL without the need to prove anything other than the loss suffered by EEL.

65. I am not able to accept that submission for the following reasons. First, the possible exception identified by Hobhouse and Hutchinson LJ is not reflected in any of the judgments in Gore Wood (ante) and was in any event clearly *obiter*. Indeed, Hobhouse LJ did no more than to acknowledge the possibility of the argument. I question therefore whether there is an exception to what is otherwise the clear general rule and I do not see what principled basis there is for distinguishing between the simple cases referred to by Hutchinson LJ and others. In every case a claimant ought

to have to prove the loss he or it suffered though that task may be more straightforward in some cases than in others.

66. In any event, assuming that there is a residual category of case where it is not necessary to plead and prove that the loss of the shareholder was equal to the loss suffered by the subsidiary in cases where the subsidiary could not itself recover that loss, this case is not one that falls within the category of case identified by Hutchinson LJ.

67. EEL is an English registered company. EHPL is a Singapore registered company. There is no evidence as to what if any tax would be applied to EHPL in relation to any dividend that might be received from EEL nor whether it is possible or desirable or in accordance with the policy that was applied within the Energenics Group at the time the loss was allegedly suffered to remit any part of the profits earned by foreign registered subsidiaries to Singapore or whether some more tax efficient distribution is adopted. There is quite simply no pleaded case on any of these issues much less any evidence in relation to any of them.

68. Even if in principle the nature of and relationship between EEL and EHPL could trigger the asserted Gerber Garment exception, the evidence that is available does not suggest that it is self evident that the EEL loss would have been suffered by EHPL. There is limited financial information available in relation to EEL and none in relation to EHPL for the period I am now considering. None of the witnesses spoke to such information as is available and neither counsel made submissions in relation to that material. There is a bundle of information disclosed to Mr Hall but not apparently to the Defendant. This material includes what would appear to be financial statements for EEL for the years ending 2010 and 2011. This material suggests that it made a loss for the year ended 31 December 2010 of £160,421. A loss would have been made in the year ending 31 December 2009 but for the waiver of an Oxonica inter-company debt on the sale of EEL to EHPL. This was treated in the 2009 accounts as an exceptional item valued at £687,689. The 2011 material suggests that in the year to 31 December 2011, EEL made a loss of £30,359. The notes to those accounts suggest that EEL owed £678,756 to EHPL as at 31 December 2011.

69. None of this material self evidently suggests to me that EEL would have paid a dividend to EHPL or that the profits made by the company in either of these years was reduced simply because of the losses claimed in these proceedings or that the value of EHPL's shares in EEL was reduced in value pound for pound as a result of the losses supposedly suffered by EEL as a result of it not having a licence to use the IPR. There is no evidence that the level of support needed by EHPL for EEL would have varied materially over the period if the losses the subject of this claim had not been suffered. It might have done but I cannot conclude that such is self evidently so on this material, particularly when EHPL did not seek to rely on it.

70. Whilst I do not suggest that the profit and loss figures to which I have referred show that EEL was insolvent in the technical sense during either of the relevant accounting periods (the balance sheets for each year are technically positive), it is not self evident what difference would have resulted had the losses that it is claimed EEL suffered not occurred.

71. In my judgment it was incumbent on EHPL to plead and prove the loss it alleges that EEL suffered and that it alleges it suffered as a result and it has not done either. In those circumstances, the claim for damages for breach of contract can succeed only to the extent of nominal damages. Since the sums that EHPL accepts it must give credit for exceed the sum recoverable by way of nominal damages, it follows that the claim must fail.

The NL Claims

The Applicable General Principles

72. At the outset of my consideration of these claims, I record that it was accepted by Mr Boeddinghaus that each of the allegations made by NL against the Defendant depended upon me finding that the Defendant was dishonest in the manner in which he conducted himself in relation to each of the claims (other than the knowing receipt claims) that have been made. It follows that NL must prove that (a) the act or omission concerned was dishonest by the standards of reasonable and honest people and (b) that the Defendant must have been aware that by those standards he was acting dishonestly. This principle was stated authoritatively in relation to those alleged to be dishonest assistants in a breach of trust in Twinsectra Limited v. Yardley [2002] UKHL 12 [2002] 2 AC 164 and it was common ground between the parties that this was the test that ought to be applied to all the allegations that arise in this case where dishonesty has been alleged. A claimant must demonstrate as Lord Hoffmann put it at [20] that the Defendant had a "*… dishonest state of mind …"* – that is consciousness on the part of the Defendant that in acting as alleged he was transgressing ordinary standards of honest behaviour.

73. The legal onus of proof rests throughout on NL and the applicable standard of proof is the civil standard – that is the balance of probabilities. However, as Lord Nicholls observed in Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 at 586:

> "The balance of probabilities standard means that a court is satisfied that an event occurred if a court considers that on the evidence the occurrence of the event was more likely than not. In assessing the probabilities, the court will have in mind as a factor to whatever extent it is appropriate in the particular case that the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence before court concludes that the allegation is established on the balance of probabilities. Fraud is usually less likely than negligence… Built into the preponderance of probabilities standard is a generous degree of flexibility in respect of the seriousness of the allegation."

I remind myself also that the evidential burden rests on a party who seeks to advance a positive case to establish that case on the balance of probability. It follows at least in theory that a defendant who fails to discharge the evidential burden on him of proving the positive case he asserts may nevertheless succeed because the Claimant fails to discharge the legal burden he she or it bears.

74. The final general point I should make is this – during his submissions and during his cross examination Mr McCormick referred to the settlement that had been reached with the Morgans in these proceedings that did not appear to include any payment for any of the NL Claims notwithstanding that most were for the benefit of them or Mr Morgan. In my judgment that is entirely immaterial. It was and remains open to the Defendant to bring Contribution Act proceedings against Mr Morgan in relation to those claims. That in fact he has not done so, and the reasons why he has not done so are likewise immaterial.

The Claims in Summary

75. In summary the claims made by NL are as follows:

i) A claim in relation to the £250,000 paid out by NL to Mr Morgan referred to above at Paragraph 11 and following. I refer to this claim hereafter as the "*£250,000 Claim"*;

ii) A claim that £39,000 apparently loaned to the Defendant by Mr Morgan was discharged by Mr Morgan taking that sum from NL in 2005. I refer to this claim hereafter as the "*Loan Claim*";

iii) A claim that £15,864.13 was paid by NL to Mr Morgan in respect of solicitors fees incurred in relation to the affairs of Celox and for which Mr Morgan apparently had some personal liability. It is alleged that Mr Morgan told the Defendant that he intended to recover that payment from NL in the 22 September 2005 letter referred to earlier in this judgment. NL's case is that the Defendant acted in breach of duty or knowingly assisted Mr Morgan to breach his duty by not objecting or otherwise preventing this transaction from taking place. I refer to this claim hereafter as the "*Celox Legal Expenses Claim*";

iv) A claim in respect of £3,000 paid out by Mr Morgan to finance a business trip by the Defendant to Manila, which Mr Morgan then recovered from NL as foreshadowed in the 22 September letter. It is alleged that this trip was not on NL's business and that the Defendant acted in breach of duty or knowingly assisted Mr Morgan to breach his duty by not objecting or otherwise preventing this transaction from taking place. I refer to this claim hereafter as the "*£3,000 Claim*";

v) A claim in respect of £6,000 which Mr Morgan gave notice he intended to pay to himself from NL's funds in the 22 September letter, supposedly in respect of miscellaneous expenses incurred by him on behalf of NL. NL maintains that there was no legitimate basis for this withdrawal, and that the Defendant acted in breach of duty or knowingly assisted Mr Morgan to breach his duty by not objecting or otherwise preventing this transaction from taking place. I refer to this claim hereafter as the "*£6,000 Claim*";

vi) A claim in respect of the sum of £24,230 which its alleged was distributed by Mr Morgan as to 60% to himself and 40% to the Defendant which were royalty payments that should have been retained by NL and not distributed because – it is alleged – NL had insufficient distributable reserves at the time to meet such payments. This sum is claimed from the Defendant on the basis that by concurring in the payment he acted in breach of fiduciary duty or assisted Mr Morgan to breach his fiduciary duties and to the extent that he received 40% of the sum distributed he knowingly received trust monies. I refer to this claim hereafter as the "*2006 Royalties Claim*";

vii) A claim is made on the same basis for the sum of £50,000 supposedly paid out from royalties received by NL in the 12-month period ending 29 November 2007. I refer to this claim hereafter as the "*2007 Royalties Claim*".

The £250,000 Claim

76. There is a significant amount of detail that surrounds this issue that simply does not matter for present purposes, though most of it is common ground. In summary however this sum was payable by OEL to NL under the terms of the original agreements entered into by NL with Oxonica in 2001 and NL alleges that by entering into the agreement contained in Clause 1 of the Assets Deed, and thereafter not preventing Mr Morgan receiving the payment, the Defendant either breached the fiduciary duties he owed to NL by reason of him being a *de facto* director or in any event dishonestly assisted Mr Morgan to breach his fiduciary duty by entering into that agreement – see Paragraphs 31, 41.1 – 41.3 and 44 of the amended Particulars of Claim.

77. It is common ground that it was agreed between Mr and Mrs Morgan on the one hand and the Defendant on the other that this sum would be paid to Mr Morgan direct rather than to NL and that it was so paid, inferentially sometime before 22 September 2005. There is an issue between the parties as to when the agreement was made. The Defendant alleges it was made orally before NL was incorporated. NL alleges that it is contained in the Assets Deed. Since it is not suggested that either the Defendant or Mr Morgan owed fiduciary duties to NL prior to the date when NL was incorporated, if this claim is to succeed NL has to prove both that the Assets Deed was the relevant agreement and that the Defendant was a *de facto* director of NL at the time he signed it and when it is alleged he should have but failed to prevent Mr Morgan receiving the payment. It is now common ground that the dishonest assistance and conspiracy claims are statute barred. In relation to the breach of fiduciary duty claim the Defendant maintains that too is statute barred. NL relies on s.21 of the Limitation Act 1980.

78. The real issues that arise in relation to this claim therefore are (a) to what extent is this claim statute barred, (b) when the agreement was made, (c) whether the Defendant was a *de facto* director at the time when the agreement was made or when it is alleged that he should have prevented the payment being made to Mr Morgan, and (d) subject to (c) did the Defendant breach his duties to NL by entering into the agreement and then not preventing Mr Morgan from taking the payment.

Limitation

79. I turn first to the limitation issue. The phrase "*constructive trustee*" is conventionally used in the two distinct senses, being (a) those cases where the Defendant though not expressly appointed as a trustee, has assumed the duties of trustee by a lawful transaction which was independent of and preceded the breach of trust; and (b) those cases – sometimes referred to as remedial constructive trust cases – where the trust

obligation arises as a direct consequence of the unlawful transaction which is the basis of the claim against that defendant - see Paragon Finance Plc v. DB Thakerar & Co [1999] 1 All E.R. 400 per Millett LJ (as he then was) at 408.

80. Where a company director wrongfully transfers to him or herself or a third party assets of the company of which he or she is a director, he or she will be liable to the company as a constructive trustee in the first sense because by becoming a director of the company the director had assumed in effect the duties of trustee in relation to the company's assets. On the other hand, where, for example, a company director makes a secret profit at the expense of the company of which he is a director, he is constructive trustee for the company of the secret profit only in the second sense.

81. S.21(1) of the Limitation Act 1980 provides:

> "(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action:
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee or previously received by the trustee and converted to his use
>
> …
>
> (3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued."

The effect of s.38 of the Limitation Act 1980 and s.68(17) of the Trustee Act 1925 is that the words "trust" and "trustee" include constructive trusts and trustees. The exception set out in s.21(1) of the Limitation Act 1980 to the general rule contained in s.21(3) applies however only to the first and not to the second kind of constructive trustee identified by Millett LJ – see Halton International Inc v. Guernoy Limited [2006] EWCA Civ 801 [2006] WTLR 1241. The *rationale* for this distinction is that identified by Lord Sumption JSC at [13] of his judgment in Williams v. Central Bank of Nigeria [2014] UKSC 10 [2014] 2 WLR 355. The exception does not apply to claims based on knowing receipt or knowing assistance – see Williams v. Central Bank of Nigeria (ante).

82. I accept that if NL proves that the Defendant had caused assets belonging to NL to be transferred to Mr Morgan in breach of his fiduciary duty owed to NL, then such claim will not be statute barred applying the principles set out in Paragraphs 69-70 above. I turn therefore to whether NL has established that claim.

Defendant as De Facto Director of NL

83. I turn first to the *de facto* directorship issue. NL's pleaded case lacks particularity. In Paragraph 3 of the amended Particulars of Claim it is alleged that the Defendant was a *de facto* director of NL from "*… around the time of its incorporation until 9 October 2009 …"*. No facts or matters are pleaded in support of that allegation. The rest of the pleading is uninformative as to NL's case on the issue I am now considering. It is pleaded that the Defendant was a NL shareholder in Paragraph 6.1 of the amended Particulars of Claim and it is alleged that he owed a large number of duties to NL in Paragraph 6B of the amended Particulars of Claim, where it is alleged that he owed the duties pleaded by reason "*… of his position as a director or de facto director …"* of NL. In Paragraph 31 of the amended Particulars of Claim the fact of the agreement between Mr Morgan and the Defendant concerning the payment of the £250,000 is pleaded as I have described and it is alleged in Paragraph 31.10, that Mr Morgan and/or the Defendant "*… procured that the payments by OEL … be made to [Mr Morgan] instead of [NL]*".

84. The principal cause of action pleaded in relation to these events as against the Defendant is a claim in knowing assistance or conspiracy. The knowing assistance and conspiracy claim is pleaded by reference to the agreement (Paragraph 41.2) and that thereafter the Defendant knew the money was being paid to Mr Morgan but took no steps to prevent it (Paragraph 41.3). However, each of these claims is statute barred as I have explained.

85. In Paragraphs 44 and 45 of the amended Particulars of Claim NL pleads its claim for breach of duty against the Defendant. Paragraph 44 sets out a rolled up plea that by procuring the payments pleaded earlier (including the £250,000) the Defendant was in breach of each of and all of the duties it was earlier pleaded he owed to NL on the basis that he either knew or ought to have known all of the facts and matters pleaded in Paragraph 41. It is then alleged in Paragraph 45 of the amended Particulars of Claim that by reason of the alleged breaches of duty the Defendant "*… is liable to account to [NL] as constructive trustee in respect of all such sums as have been paid as a result of those breaches and/or is liable to pay equitable compensation in respect of loss and damage suffered by [NL]*".

86. In relation to the question whether the Defendant was a *de facto* director during the period alleged down to 22 September 2005, the only authority that was cited to me was HMRC v. Holland [2010] UKSC 51 [2010] 1 WLR 2793. The issue that arose in that case concerned the circumstances in which a director of a corporate director of another company could be treated as a *de facto* director of that other company. Much of the guidance to be found in that case is applicable only to that specialised question. However one point that emerges from the judgments concerns what must be pleaded and proved where an allegation that a person is a *de facto* director is made. Lord Hope at [29] cited from the judgment of Millett J (as he then was) in Re Hydrodam (Corby) Limited [1994] 2 BCLC 180 with apparent approval. There, Millett J had observed:

> "To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company that could properly be discharged only by a director."

Lord Collins cited the same passage at [86]. Lord Clarke (giving one of the two dissenting judgments)observed:

> "As I read the judgments in the present case, it is accepted in them all that in order to establish that a person was a de facto director it is necessary to plead and prove that he undertook functions in relation to the a company which could only properly be carried out by a director … "

87. As is apparent from my summary of NL's pleaded case no attempt has been made to plead out the facts and matters relied on as establishing that the Defendant was a *de facto* director of NL. My only reason for not deciding this allegation against NL on the basis of that omission is that Mr McCormick did not take that point. However in my judgment it is at least potentially seriously unfair for a defendant in the position of the Defendant to face the bald allegation that he is a *de facto* director without any attempt having been made to plead the facts and matters relied on as establishing that assertion. It is not good enough to plead the allegation in the bald way adopted in this case and then leave it to a defendant to serve a CPR Part 18 Request for Information. It is noteworthy that this omission was not put right even in NL's written opening submissions. In Paragraph 18 of those submissions the penultimate sentence contains merely an assertion that it was NL's case that the Defendant was a *de facto* director of NL.

88. The substantive guidance contained in <u>Holland</u> is that in deciding whether a person is a *de facto* director the court takes into account all the relevant factors in deciding whether the person concerned at the relevant time in substance assumed to act as a director or exercised the powers and discharged the functions of a director. This will include considering:

    i) Whether the person concerned was concerned with the management of the company's affairs;

    ii) Whether the tasks that he undertook were tasks that could properly be performed by a manager below board level;

    iii) Whether the person concerned was at least equally with others directing the affairs of the company;

    iv) Whether the company held the person out as being in substance a director;

    v) Whether the individual concerned held him or herself out as being in substance a director;

    vi) Whether the individual had access to proper information on which to base decisions – access to accounts is likely to be particularly relevant where it is alleged that the person concerned is authorising the use of company funds;

    vii) Whether the individual took major decisions in the name of the company;

    viii) Whether the individual was part of the corporate governing structure or exercised real influence on the corporate governance of the structure; and

ix) Whether the individual assumed a role sufficient to justify imposing on him a fiduciary duty and make him responsible for the misuse of assets.

89. In my judgment NL has failed to prove that the Defendant was a *de facto* director during the relevant period - that is between the date when NL was formed and 22 September 2005. My reasons for reaching that conclusion are as follows.

90. In his closing submissions, Mr Boeddinghaus identified the evidence that he relied on in support of his contention that the Defendant was a *de facto* director. He referred first to the statement of Mr Nayan Jagjivan. This refers to a conversation said to have taken place in September 2005 in which the Defendant is alleged to have told Mr Jagjivan that "*... he would remain as a shareholder and director of ...*" NL. This coincides with the letter of 22 September 2005 referred to earlier in this judgment, in which Mr Morgan had acknowledged he had been paid the £250,000 inferentially some time earlier (because he had to pay tax on it). On any view the agreement on which NL relies had been made years earlier than September 2005 and the payments had been made probably at least some months prior to 22 September 2005.

91. Mr Boeddinghaus suggested that this evidence had not been challenged by Mr McCormick or had not been challenged effectively. I reject that submission. Mr Nayan Jagjivan's evidence was challenged by Mr McCormick as is apparent from T1/100/33-101/9. The answer given by Mr Nayan Jagjivan was instructive. The proposition that the Defendant had told Mr Jagjivan that he was a director was what was challenged. The response was not to point to what was said in the statement or to assert that he could recall being told by the Defendant that he was a director of NL but to make generalised assertions about what the Defendant is alleged to have told other people. This was not a satisfactory response on what was clearly an important issue in this case. I do not accept therefore that the Defendant told Mr Nayan Jagjivan that he was a director of NL in 2005 or at any other time.

92. Even if this is wrong, other than inferentially, what the Defendant allegedly said in late 2005 does not help establish that he was a *de facto* director either at the time when the agreement that the £250,000 be paid to Mr Morgan was reached or whenever thereafter it is suggested that the Defendant should have but failed to prevent Mr Morgan receiving that sum. In any event, merely holding oneself out as being a director is not the, or even a, test for whether a person is a *de facto* director because as the case law I have summarised above demonstrates, the question is one of substance rather than form. It is not the title adopted that provides the answer – see by way of example <u>In Re Mea Corporation Limited</u> [2007] 1 BCLC 618 *per* Lewison J (as he then was) at [83] cited with approval by Lord Hope in <u>Holland</u> (ante) at [32].

93. Some reliance was placed on the conclusion of Mr Prescott in [23] of his judgment in the Oxonica proceedings that both Mr Morgan and the Defendant were directors. That finding does not assist on the issue I am presently considering. What if any evidence was led before Mr Prescott on this issue is not identified. In any event the finding reached is not binding on the Defendant (who was not a party to the Oxonica proceedings) and I have to reach a conclusion as to the facts on the basis of the evidence available to me.

94. The Defendant's evidence concerning how the affairs of NL were managed is evidence that I accept because it was not contradicted by any evidence called on behalf of NL and because it is consistent with the documents that are most centrally important for these purposes.

95. For the whole of the period that I am now concerned with, NL had nominal directors in NL's country of incorporation. Mr Morgan styled himself NL's "*Attorney in Fact*" on all correspondence and other documentation concerning NL. None of the parties could help me with the provenance of this concept. In England it is sometimes used as meaning someone appointed under a power of attorney to conduct the appointer's business. Given that NL is an offshore company with nominee directors in its place of incorporation, it is possible (but there is no evidence) that the nominee directors executed a power of attorney that enabled Mr Morgan to act on behalf of NL. It is worth noting however that whereas Mr Morgan styled himself in the manner I have described, and acted on behalf of the company on that basis, there is no evidence that the Defendant operated in the same manner or otherwise held himself out as acting in the name of the company.

96. There were discussions between him and Mr Morgan, which were discussions between majority and minority shareholders, but it was Mr Morgan who managed the company's money and carried out all the other managerial and administrative functions that concerned NL. That this was so is not entirely surprising. Throughout many of the early years NL was kept afloat by finance provided by Mr Morgan, which he then appears to have accounted for using a loan account. I say "appears" because the only NL financial statements available are those that have been produced by Mr. Morgan. There is some doubt as to when he prepared those accounts and the corporate statements that go with them. None of this accounting material was shown to the Defendant by Mr Morgan, much less shared with him. It was material that the Defendant says he saw for the first time only following disclosure in these proceedings. The Defendant's evidence that he was not shown and did not see any accounts invoices or receipts by Mr Morgan was not challenged and I accept it.

97. For most of the relevant period the Defendant lived and worked first in Hong Kong and then Singapore attempting to build a market for products manufactured by Oxonica using the IPR vested in NL. During most of this period the Defendant was employed by OEL and was statutory director of another Oxonica company to which he had given an undertaking not to be involved in the management of NL. That the Defendant gave such an undertaking is relevant to the issue I am now considering because it makes it inherently more unlikely that he would have acted as a *de facto* director of NL in breach of such an undertaking. The Defendant's promotional activity during this period was carried out for that company. It is true that he would benefit from this activity as a 40% shareholder in NL through the royalty income generated under the Licence. However, there is no evidence that what he was doing in the Asia and Pacific region during this period was being done in the name of NL as opposed to that of his employer. When this issue was put to the Defendant he denied that he held himself out as a director of NL during any of the period prior to his appointment as a *de jure* director – see T3/107/1-14.

98. Although it was submitted on behalf of NL that the letter of 22 September 2005 demonstrates that Mr Morgan treated the Defendant as a fellow director I cannot

accept that submission. The letter is as consistent with a report to a 40% shareholder in a closely held company of what Mr Morgan had done and proposed to do as with anything else. In particular the second paragraph is consistent with that being the position. As will be apparent from what I say hereafter, although the letter is in some places couched in terms that suggest agreement was being sought from the Defendant for Mr Morgan to withdraw some of the sums that he refers to, there is some evidence in relation to some sums that (unknown to the Defendant) this had already been done by the date of the letter. I refer to this in detail in relation to some of the other NL claims I consider later in this judgment.

99. I accept because it was common ground that the Defendant was heavily involved in managing the Oxonica litigation from Singapore and that he was also heavily involved in the settlement negotiations that led to the 2009 Settlement Deed. This was a major point relied on by Mr Boeddinghaus but in my judgment it does not assist. First this was years after the events with which I am now concerned. OEL did not inform NL of its intention not to pay royalties in respect of sales of E2 until 5 October 2006 and the litigation did not commence until the following year. Secondly the fact that the Defendant was conducting litigation on behalf of NL on an everyday basis does not support the conclusion that the Defendant had assumed a role sufficient to justify imposing on him a fiduciary duty and make him responsible for the misuse of assets over which he exercised no control or that even then he was acting as a director or exercising the powers and discharging the functions of a director. Conducting litigation is not something that can only be conducted by a director. In any event by October 2006 the Defendant was employed by EHPL and the litigation was being funded by that company. In those circumstances, that the Defendant gave instructions in relation to the litigation and represented the company in the settlement negotiations in 2009, does not of itself show that he exercised real influence on the corporate governance of NL between 2001 and 2005. I conclude therefore that NL has not discharged the burden that rests on it to prove that the Defendant was a *de facto* director during any part of the time relevant to the issue I am now considering.

The Assets Deed

100. I now turn to the issue of when the agreement between the NL shareholders concerning the payment of the £250,000 to Mr Morgan was made. NL's case is that the Assets Deed contains the relevant agreement. It is a document that bears what purports to be the signature of the Defendant. Although he now maintains that it is not his signature, he did not at any stage make that allegation in his Defence or in his witness statement, nor did he give notice under CPR r. 32.19 that he wished any documents disclosed by the Claimant under CPR Part 31 to be proved at trial within the time specified in CPR r. 32.19(2). He made the allegation in correspondence for the first time only at the end of the week before the start of the trial and no application had been made to amend the Defence.

101. Aside from disputing the Defendant's assertion that his signature on the Assets Deed had been forged, it was submitted on behalf of NL that I should infer that if the signature had been placed on the document by someone other than the Defendant that was with the authority of the Defendant. The Defendant accepted during his cross examination that he had in the past authorised others to sign documents for him including his secretary who was authorised to affix electronic facsimiles of his

signature to formal documentation. In those circumstances, Mr Boeddinghaus submits that I should reject the Defendant's evidence and conclude that the Assets Deed had been signed by the Defendant or by someone else on his behalf and with his authority. In consequence it was submitted that I should conclude that the agreement concerning the £250,000 is contained in the Assets Deed.

102. The Defendant's case on this issue in essence is that he only noticed that the signature on the Assets Deed was not his at a very late stage and that his failure to plead that the signature was not his in his Defence or to explain that point in his witness statement was the result of him acting for most of this litigation without the assistance of lawyers. Whilst it is true that on some occasions he authorised others to attach his signature to documents, this was usually only his secretary and was to facilitate the signature of important documents while he was away from his base usually on business.

103. This would be a difficult issue for me to resolve given that Mr and Mrs Morgan have not given any evidence before me on this issue and no handwriting expert evidence has been adduced. Mrs Morgan's evidence would have been relevant because she purports to have witnessed the signature of the Assets Deed by the Defendant. In the end I have concluded that it is unnecessary, and indeed might be erroneous, for me to attempt to resolve this issue because it is not one that has been pleaded or otherwise put in issue by the Defendant in time, and it is one that Mr McCormick made clear would not be the subject of an application for permission to amend. If the Defendant is to allege that his signature has been forged that allegation would have to be pleaded if it was to be resolved in the context of these proceedings. This is not an unrealistic expectation given that NL has pleaded reliance on the Assets Deed in the amended Particulars of Claim.

104. Furthermore I consider it unfair to NL for the Defendant to be permitted to rely on a point of this sort raised for the first time a couple of days before the commencement of the trial in circumstances where no application for permission to amend had been made and NL's advisers had not anywhere near the time reasonably necessary to investigate the allegation or obtain evidence from Mr and Mrs Morgan about it. In those circumstances, to the extent that it is necessary for the resolution of this or any of the other NL claims, I proceed on the basis that the Assets Deed is an authentic document that contains the only relevant agreement between the shareholders concerning NL that was reached at or about the time when it was incorporated. If and to the extent there was an oral agreement reached between the shareholders prior to the incorporation I conclude that it was superseded by the Assets Deed.

Breach of Fiduciary Duty

105. In any event, it is unnecessary for me to grapple with this issue further in relation to the £250,000 Claim because I am satisfied that even if the agreement concerning the payment of the £250,000 to Mr Morgan was made before not after the incorporation of NL it simply does not matter.

106. First as I have found already, the Defendant was not a *de facto* director of NL at the relevant time. Thus whether the relevant agreement was made before or after NL's incorporation is immaterial. Secondly I do not consider that entering into the

agreement constituted a breach of fiduciary duty even if, contrary to my finding, the Defendant was a *de facto* director of NL at the time when the agreement was reached between him and the Morgans, because I am satisfied applying the dishonesty test that it is common ground I should apply, the Defendant entered into the agreement honestly believing that it was in the best interests of NL at the time. Thirdly, if and to the extent that the Assets Deed contained the relevant agreement I am entirely satisfied that this was an agreement made unanimously by all the NL shareholders in circumstances where the shareholders were entitled to reach that decision at the time. My reasons for reaching these conclusions are as follows.

107. As to the Defendant's honest belief that to enter into the agreement was in the best interests of NL, the evidence given by the Defendant satisfies me that he considered the payment was an appropriate one for NL to agree to make. I accept as entirely convincing the Defendant's evidence that had he not agreed to what Mr Morgan was demanding, what he called "the project" – that is the commercial exploitation of the IPR - would have failed at the outset. The sum reflected personal expenditure that Mr Morgan said he had incurred by the time the payment was received in supporting the project and I accept that he regarded his ability to recover that outlay as critical to his continued involvement. I accept also the Defendant's evidence that Mr Morgan was a difficult man whose primary concern was to recover sums expended and make money where he could. Indeed the impression given by the Defendant (which I accept reflected the reality as he saw it at the time) was that he had no choice but to agree what was being demanded by Mr Morgan because he was a minority shareholder and Mr Morgan considered the recovery of what he had spent ahead of any division of the profits made by NL as a deal breaking issue and that in any event he considered it fair recompense for the expense that Mr Morgan had incurred in relation to the earlier development stages of the business.

108. Notwithstanding the terms of the amended Particulars of Claim, I did not understand Mr Boeddinghaus to argue that the Assets Deed was anything other than a genuine agreement between the shareholders. In those circumstances, it was submitted by Mr McCormick that if and to the extent that both Mr Morgan and the Defendant were *de facto* directors of the company at the time the agreement was entered into, NL has no cause of action because the acts of the shareholders are the acts of the company – see Multinational Gas v. Multinational Services [1983] Ch 258 *per* Lawton LJ at 269.

109. Mr Boeddinghaus disputed this submission by reference to Bowthorpe Holdings v. Hills [2003] 1 BCLC 226 where it was held by Sir Andrew Morritt V-C at [50]-[51] that before the general principle could apply:

i) The transaction had to be honest; and

ii) The transaction must not be likely to jeopardise the company's solvency or cause loss to creditors.

These conclusions are ones that I am bound to follow for the reasons identified by Flaux J at [112] of his judgment in Madoff Securities International Limited and others v. Raven and others [2011] EWHC 3102 (Comm). However, I am not able to accept Mr Boeddinghaus's submissions for the reasons that follow. As I have said already, I am satisfied on the basis of the evidence that I heard from the Defendant that he and the other shareholders considered what was agreed to be honest applying the dishonesty test identified earlier in this judgment as being the proper means by which Mr Morgan could recover the personal expenditure that he had incurred in supporting the project and without which the project could not have succeeded. There is no evidence available from which I can infer that the parties to the agreement ought reasonably to have thought that the agreement would jeopardise the company's solvency or cause loss to creditors at the time it was entered into or in the future. As I said earlier in this judgment, at the time when NL was formed there was no reason for supposing that it was anything other than a vehicle to receive money or would have any expenses other than minor incidental expenses in connection with its administration and any tax that it might have to pay on its receipts. There is no evidence that suggests any creditors went unpaid in fact as a result of this arrangement. The financial statements prepared by Mr Morgan suggest that he financed NL until royalties started to be paid in significant sums. The litigation that resulted in very substantial long term liabilities being incurred by NL was not in and could not reasonably have been in contemplation at the time the agreement was entered into or when the money was paid over to Mr Morgan. The only person foreseeably likely to be harmed was the Defendant for the payment of the sum to Mr Morgan meant that it was not available for distribution as a dividend.

£250,000 Claim - Disposition

110. All this leads me to conclude that NL's claim to recover the £250,000 paid to Mr Morgan is not recoverable from the Defendant. The Defendant was not a *de facto* director at the time, he honestly believed that the agreement was one that it was in the best interest of NL to enter into in the circumstances and it was in any event an agreement that was entered into by all the shareholders and was one that it was proper for them to enter into at the time it was entered into. The assertion that the Defendant should have prevented effect being given to the agreement is without merit because (even if the Defendant was a *de* facto director at that time) there is no evidence that anything changed down to the date when payment was made that would have caused him to take any different view to that which he had at the date when agreement was reached between the shareholders.

The Loan Claim

111. The Defendant accepts that payments totalling £39,000 were made to him by Mr Morgan personally between the end of October 2000 and 7 December 2001 at the rate of £500 per week. The loan was the subject of a loan agreement in writing dated 31 October 2000 signed by both Mr Morgan and the Defendant. The loan agreement provided that the whole of the sum lent would be repayable by the Defendant on or before 31 March 2003. The terms of the agreement suggest that the loan was interest free. There is a written record of the payments on which the Defendant has signed for each payment received by him. The end of the period covered by the last payment drawn down coincided with the date when the Defendant signed his service contract with OEL. This timing supports the point made by the Defendant that the purpose of the loan was to provide him with money during the development phase of the project that preceded the signing of the Licence.

112. The Defendant's evidence was that in effect this was an arrangement created at the insistence of Mr Morgan and that it was agreed between them at the time the loan agreement was signed that the loan was never going to be recoverable from the Defendant – see T3/34/37-35/19. It is unexplained why Mr Morgan would have perceived it to be in his best interest for these payments to be treated as if they were a loan to the Defendant if in fact the loan was to be irrecoverable. However, it makes no sense from the Defendant's perspective that the payments should be treated as being a loan to him. I say that because the payments were only being made for the purpose of enabling the Defendant to move to Poole in order to carry forward the project. If the payments were treated as a loan that would be recoverable from the Defendant it would mean that this expense would be borne as to 100% by him even though it was to enable him to work on the project for the potential joint benefit Mr Morgan and the Defendant. The Defendant's case is that the understanding was that the £39,000 was part of the sum that would be recouped by Mr Morgan on receipt of the £250,000.

113. What contemporaneous material there is provides some inferential support for what the Defendant says. It suggests that Mr Morgan had taken the steps necessary to enable him to recover these sums from NL in due course in or around March 2002 and that he did so after agreement had been reached concerning the payment to him of the £250,000 and without discussing the issue further with the Defendant. This material includes that pleaded by NL in Paragraph 32.4 of the amended Particulars of Claim. The document there referred to is in evidence (3/471). It is an invoice on the letterhead of Mr Morgan. The date of the document had been altered from 5 October 2005 (which, if correct, would have provided inferential support for NL's case that Mr Morgan and the Defendant had agreed to the course proposed by Mr Morgan in the 22 September letter) to 9 March 2002. Although it is difficult to be certain, the handwriting in which the change has been made looks to me to be that of Mr Morgan – see also T3/39/24-35. This alteration is consistent with a Corporate statement for the period ending 29 November 2002 produced by Mr Morgan for NL. The next document that is material is a statement for Mr Morgan's loan account. This document purports to show that on 9 March 2002, the sum of £39,000 was added to that account as being a sum due from NL to Mr Morgan. I was entirely convinced by the Defendant's oral evidence that he did not see any of these documents at the time. I accept they were not seen by the Defendant until they were disclosed in these proceedings.

114. Mr Boeddinghaus drew these documents to the attention of the Defendant in cross examination – see T3/38-42 – and then Mr McCormick enquired as to whether it was NL's case that these documents were created in or around 2002 or at some later date. Mr Boeddinghaus's response was that "*The Claimant's case is that it does not know when the amount was transferred to the loan account*".

115. The case that Mr Boeddinghaus advanced concerning the payment of the sums ostensibly due to Mr Morgan in respect of his loan account was that it was paid off by a series of personal payments being made by Mr Morgan using NL funds which were then set off against the loan account – see T3/43/36-45/16. There is no evidence that supports the proposition that the Defendant was aware of any of these transactions. I accept the Defendant's evidence given at T3/45/20-23 that "*I knew nothing about these payments until your client brought this case. I was pretty amazed and surprised that he had made those payments and yes I have no idea what he was doing*".

116. The Defendant's evidence was that no approach was made to him concerning repayment until the Defendant received the letter of 22 September 2005. His evidence was that he considered that the sum lent had been recovered by Mr Morgan when he received the £250,000 and that when he received the letter he contacted Mr Morgan and told him that he considered it "off" as he put it that Mr Morgan should attempt to recover this sum in addition to the £250,000. The Defendant said that Mr Morgan agreed that they would discuss the matter further in the future and there he says matters rested. NL challenges this version of events, pointing out that it has not been pleaded by the Defendant in his Defence or trailed in his witness statement.

117. The case as pleaded against the Defendant in relation to this issue is that he was in breach of fiduciary duty or knowingly assisted Mr Morgan to breach his fiduciary duty by turning a blind eye to the fact that his debt to Mr Morgan was being discharged by payments taken from NL by Mr Morgan that the Defendant knew "*... were being made or would be made …*".

118. In my judgment, NL has not proved this allegation. I accept the Defendant's evidence that he assumed that repayment of the loan was included in the £250,000 payment given that its purpose was to discharge the liabilities that had been incurred by Mr Morgan prior to the signing of the Licence and the commencement of his employment by OEL.

119. It is possible that the typed date on invoice relating to this payment - 5 October 2005 – was accurate and the date in the loan account ledger and the entry in the financial statement for the period ending 29 November 2002 were dishonestly backdated, following an agreement between the Defendant and Mr Morgan following receipt by the Defendant of the letter of 22 September. However I think that this is unlikely to be so in the circumstances. If there had been such an agreement, it is not obvious why Mr Morgan would have backdated the material in the manner suggested. If agreement had been reached on or shortly after 22 September 2005, there was no reason at that time for backdating anything. If agreement had been reached then that this sum could be recovered by Mr Morgan, it would have been easy enough to record that such an agreement had been reached either in correspondence or the records of NL.

120. If, as I conclude was probable, the Defendant believed that the £250,000 included reimbursement of the sums that Mr Morgan had loaned to the Defendant, that makes it more likely than not that the Defendant would have objected to what on the face of the 22 September letter appeared to be an attempt to recover the £39,000 as an additional payment. In those circumstances, and having heard the evidence of the Defendant on this issue, I accept his evidence that when the letter of 22 September 2005 was received by him, he contacted Mr Morgan by phone and made clear that he considered Mr Morgan's suggestion that he recover the £39,000 to be "off" and that it was left between them that it would be the subject of further discussion.

121. If and to the extent that these documents were created by Mr Morgan in 2011 (as Mr Boeddinghaus invited the Defendant to assume at T3/47/42 but in respect of which there is no evidence at all) then that would tend to support the Defendant's case that he had objected to the recovery of the £39,000 after receiving the letter of 22 September 2005 rather than agreeing to it at that time because if he had agreed the

more natural outcome would have been for Mr Morgan to have recorded it then without any need to backdate any such record.

122. In those circumstances, I do not accept that NL has established that it is entitled to recover £39,000 from the Defendant on the basis of an alleged breach of fiduciary duty or dishonest assistance of Mr Morgan to breach his fiduciary duty. The loan was one that it had been agreed between Mr Morgan and the Defendant would not be recoverable from the Defendant, the Defendant considered that it had been recovered through the payment of the £250,000 and the steps taken by Mr Morgan (whenever in fact he took them) to recover the £39,000 via his loan account were steps taken by Mr Morgan without the consent or knowledge of the Defendant.

123. The alternative way this claim is put is that the sum is recoverable on the basis of a knowing receipt by the Defendant by the discharge of the loan due from him to Mr Morgan. This claim must fail too essentially for the reasons already given. The loan was not one that was repayable by the Defendant to Mr Morgan. Thus recovery of a sum equivalent to the loan by Mr Morgan did not result in a discharge of a liability that the Defendant was otherwise under. In any event as far as the Defendant was concerned repayment of the sums advanced to him by Mr Morgan had been recovered by Mr Morgan on the receipt by him of the £250,000. The Defendant did not authorise Mr Morgan to withdraw the sum of £39,000 in addition at any stage.

The Celox Legal Expenses Claim

124. Again there is not any dispute that matters in relation to the primary facts surrounding this claim. Celox was sued by Nanophase, a US corporation, in relation to an order to supply Cerium Oxide. Various lawyers were instructed on behalf of Celox and Mr Morgan incurred personal liability for £15,864.13 in respect of those costs. It is also clear that in the letter of 22 September 2005, Mr Morgan said that he had to pay the fees personally (even though they had been incurred in protecting Celox's position) "*... and so I feel justified to claim these through ...*" NL. The case pleaded against the Defendant is that he dishonestly assisted or conspired with Mr Morgan or breached his fiduciary duty by failing after 22 September 2005 to prevent Mr Morgan from recovering this sum from NL or require Mr Morgan to account for the payments taken.

125. In my judgment there is a high level of artificiality about this claim. First, the 22 September 2005 letter is entirely non-specific on whether the sum had been taken or would be taken by Mr Morgan from NL. Secondly, it is to be remembered that the Defendant was a 40% shareholder in NL. The rest of the shares were held as to 40% by Mr Morgan and as to 20% by Mrs Morgan. It is difficult to see what practically the Defendant was expected to do about this payment even if he considered the payment to be inappropriate (which in fact he did not). As I have said more than once, in September 2005 the Defendant was living and working in Singapore. Mr Morgan was living in Poole. He had complete control over the management of the affairs of NL at this stage and certainly all the financial affairs of the company.

126. In fact the Defendant maintained that the shareholders had all agreed that Mr Morgan could recover these costs from NL. As I have said before there is some doubt as to when Mr Morgan prepared the Corporate Statements for NL. However, that for the

year ending 29 November 2002 refers to such an agreement having been made and inferentially it appears to be suggested that it was made in the period covered by the statement. Mr Morgan recorded the sums in question as an expense in the accounts he drew up for the period ending 29 November 2003. Mr Morgan then added this sum to his loan account. It would appear from the statement for the loan account that the whole of the sum outstanding on that account was cleared off by payments made by NL acting by Mr Morgan between December 2006 and 8 August 2007. There is no evidence that any of this material was sent to or seen by the Defendant either at this time or at any time prior to disclosure in these proceedings. The contrary is not suggested.

127. The only basis on which this claim could be advanced against the Defendant is by reference to him not objecting to the discharge of the legal expenses on or after 22 September 2005. As I have said there is nothing in the evidence that persuades me that such an objection would have had any effect at all. The Defendant's case is that he objected to the suggestion that Mr Morgan should recoup the £39,000 because he considered that to have been recovered as part of the £250,000. Notwithstanding that objection and an indication from Mr Morgan that suggested they would discuss the issue further in the future, he proceeded (having apparently some years earlier added that sum to his loan account) to pay off what he described as his loan account and thus recovered the £39,000 without informing the Defendant. I think it likely that precisely the same result would have followed in relation to the sum I am now considering. Mr Morgan had exclusive control of the accounting and administration of NL. The Defendant was a minority shareholder living and working in Singapore. He was simply not in a position to do anything effective at that time.

128. The Defendant's evidence was that in any event it had been agreed between the shareholders that Mr Morgan should be able to recover these expenses because Mr Morgan incurred them in aid of the project. Various justifications for this agreement were floated including the fact that it had been necessary to form NL rather than to use Celox to receive the royalties payable in respect of the IPR in order to protect against the risk that litigation brought by Nanophase might result in loss of those rights. NL did not dispute that this was the purpose for setting up the structure in fact adopted, as Mr Boeddinghaus made clear to me in the course of his final submissions. The Defendant said that it had been agreed between the shareholders at or about the time when NL was formed that the costs incurred in relation to the project concerning Celox would be recoverable. The Defendant considered that fair and reasonable in the circumstances – see T3/16/30 – 36; 17/1-22; 19/21-20/14; and 21/1-22.

129. There was no reason why an agreement to this effect could not have been made as alleged by the Defendant and his co-shareholders at the time it is alleged it was made. Such an arrangement was not dishonest and certainly was not thought by the Defendant to be dishonest at that stage and an agreement to the effect alleged could not reasonably have been thought likely to harm creditors for the reasons I have given earlier. There is no reasonable basis for concluding that Mr Morgan would or should have been willing to adopt the structure that was in the end adopted for carrying what the Defendant calls "the project" forward if the consequence was that he would be left without recourse for personal liabilities incurred in furtherance of the project.

130. Even if I am wrong to conclude on the balance of probabilities that an agreement to the effect alleged by the Defendant was made, it would in any event be necessary for NL to show that the Defendant acted dishonestly in September 2005 by not taking any steps to prevent Mr Morgan from recovering these sums. Aside from the fact that NL has failed to establish that there was anything effective that the Defendant could reasonably have been expected to do at that time other than express dissent, NL has not demonstrated that by not objecting the Defendant was acting dishonestly applying the test I identified earlier in this judgment. As I have said, the Defendant considered reimbursement fair and reasonable. There was no reason in September 2005 to suppose that creditors of NL would be adversely affected by such reimbursement. The sale of shares in NL to third parties was not at that stage in contemplation. There is no evidence that the Defendant became aware of the steps that Mr Morgan took to recover this sum until after the commencement of these proceedings. In September 2005, the Defendant had no reason to think that anyone other than himself would be adversely affected by this reimbursement. If the sum was not recovered by Mr Morgan from NL's assets, that sum would have remained part of NL's assets and thus available to form part of the profits available for distribution amongst the shareholders. Things changed thereafter but as I say there is no evidence that the Defendant was aware of the steps that Mr Morgan took to recover this sum or, importantly, when he actually took them. In my judgment this claim fails in those circumstances.

The £3,000 and £6,000 Claims

131. The short point about each of these payments is that by his letter of 22 September 2005, Mr Morgan informed the Defendant either that he had obtained recoupment from NL for each of these items or that he intended to do so. There was no reason why the Defendant should consider that recoupment of these sums by Mr Morgan in September 2005 could adversely affect creditors for the reasons that I have given. There is nothing in the circumstances that surround either of these payments that support the suggestion that these transactions were dishonest or that the Defendant acted dishonestly by not objecting to Mr Morgan procuring payment of these sums from NL. There was no reason in September 2005 to suppose that creditors of NL would be adversely affected by such reimbursement. The sale of shares in NL to third parties was not at that stage in contemplation. As a 40% shareholder the person most likely to be adversely affected by these arrangements in September 2005 was the Defendant. There is no evidence that the Defendant was aware of how or when Mr Morgan obtained payment of these sums from NL until after the commencement of these proceedings. That being so, there is no basis for suggesting that the Defendant breached any duty owed to NL or dishonestly assisted Mr Morgan to breach his duty to NL by not objecting when Mr Morgan procured NL to make payments that had the effect of discharging his loan account.

132. NL alleges that these payments to Mr Morgan were dishonest because he knew that there was no justification for either of these payments being made to him by NL. Aside from the fact that it is not alleged that the Defendant could have done anything other than object to Mr Morgan taking these sums at the time when he first became aware of them (September 2005), what matters most is whether the Defendant honestly believed that NL was justified in making these payments to Mr Morgan. His evidence in relation to each satisfies me that he honestly considered that Mr Morgan

was justified in seeking reimbursement for these payments applying the dishonesty test referred to earlier in this judgment: – see T367/21 – 70/43 (in relation to the £3,000 payment), T3/71/5 – 72/27 (in relation to the £6,000) and T3/76/36 – 78/33 (in relation to both sums).

The 2006 Royalty Claim

133. The pleaded allegation made by NL is that in the 12 month period ending 29 November 2006, NL received royalties of £58,115 and Mr Morgan distributed a total of £24,230 as to 60% to himself and 40% (£9,692) to the Defendant. It is not alleged that this sum was paid to or received by the Defendant after the 2006 SAA had been entered into. In Paragraph 21(f) of his Defence, the Defendant admits receipt of this sum. The claims made are formulated in breach of fiduciary duty, knowing assistance, conspiracy and knowing receipt. In my judgment each of those claims fails for the following reasons.

134. First, as I have held already, NL has not proved that the Defendant was a *de* facto director of NL. That being so, he did not owe NL any fiduciary duties. I turn now to the knowing assistance and knowing receipt claims. At trial, the Defendant asserted that in fact he had not received this sum and his admission was made in error. A letter to this effect had been sent to the Claimants solicitors shortly before trial. Mr Boeddinghaus enquired in the course of his cross-examination of the Defendant whether any application was being made to withdraw the admission. Mr McCormick told me that no such application was being made but that the letter had been written in order to forestall any suggestion of late invention on the part of the Defendant – see T3/55/33-36. In those circumstances, I must proceed on the basis that the Defendant in fact received the sum.

135. The only allegation that NL is entitled to advance in these proceedings is that which has been pleaded. The allegations made concerning this payment are those pleaded in Paragraphs 41.7 and 41.8, 44 and 46 of the amended Particulars of Claim.

136. It is first alleged by NL in Paragraph 41.7 that the Defendant and Mr Morgan did not have an entitlement to any part of the royalties. Only NL was entitled to receive the royalties. That is so and is not disputed. However, Clause 4 of the Assets Deed does not provide that the royalties will be distributed as such. It provides for distribution net of all liabilities and thus in truth is not an agreement to distribute royalties but an agreement to distribute NL’s net profits to the shareholders. It is noteworthy that neither the 2006 or 2007 distributions were of the whole of the royalties received by NL in the relevant year as is apparent on the face of the amended Particulars of Claim.

137. As I have explained already, at the time this agreement was entered into it was not and could not reasonably have been in the contemplation of the shareholders that NL would do anything other than hold the IPR and receive the royalty payments from OEL. It was not contemplated that any substantial liabilities would be incurred by NL much less any long term or contingent liabilities. For these reasons, I reject the assertion made in Paragraph 41.7 of the amended Particulars of Claim that the Assets Deed conferred on Mr Morgan and the Defendant the right to share between them the royalty payments received by NL. It purported to be an agreement between all the shareholders to distribute net income after all liabilities had been met. It was not to

provide "*... ostensible documentary justification ...*" for the payment made 4 and 5 years later. It represents the agreement reached between all the shareholders at the time.

138. In Paragraph 41.8 it is alleged that the Defendant was in breach of fiduciary duty or dishonestly assisted Mr Morgan to breach his fiduciary duty by failing "*... to take any steps to prevent such payments being made ...*". Paragraphs 41.7 and 41.8 have to be read together. So read the essence of the allegation being made (and the only allegation being made) is that the Defendant acted in breach of duty or dishonestly assisted Mr Morgan to breach his duty by failing to prevent the payments because he knew that the royalties belonged to NL, not its shareholders. It is not alleged that he knew that the company could not afford to make a distribution at the time it was made or that he knew that it could not afford the distribution that in fact was made because of its exposure to the contingent costs of the Oxonica litigation. That litigation had not commenced but it was in contemplation as is apparent from the reasons for making the 2006 SAA. In fact the litigation was commenced by OEL and then only in February 2007, following the termination of the Licence by NL. Given that no allegation of this sort has been pleaded and the point I am now considering was not developed in cross examination or in the closing submissions, it is not appropriate I consider it further.

139. Likewise, it might have been, but was not alleged that the distribution was not one that ought to have been made following the signature of the 2006 SAA on 28 October 2006. In those circumstances it is not appropriate I consider that issue further either.

The 2007 Royalty Claim

140. The same factual allegations are pleaded in relation to the 2007 distribution. The only difference is that in the year ending 29 November 2007 NL had received royalties of £78,780 – see Paragraph 37.2 of the amended Particulars of Claim – and £50,000 was distributed by Mr Morgan, split as to 60% to Mr Morgan and as to 40% to the Defendant.

141. In addition, by the time the 2007 distribution came to be made, on any view the 2006 SAA had been entered into. The Defendant admitted receipt of the payment and pleaded in Paragraph 21(g) of his amended Defence that Mr Nayan Jagjivan had agreed orally that Mr Morgan could distribute the net income received by NL to the existing shareholders notwithstanding the sale by the existing shareholders of some of their shares to EHPL by the 2006 SAA. This was the subject of a Part 18 Request for Further Information that was provided in full by the Defendant in August 2013.

142. In my judgment the outcome on the factual question whether the Defendant has proved the oral agreement he alleges is finely balanced. First, there is no reference to this concession in the 2006 SAA. This omission is surprising because on the Defendant's case it was of utmost importance to Mr Morgan. Even if it could be said to have been in EHPL's interest to leave this out of the 2006 SSA it is more difficult to see why Mr Morgan would not have insisted on its inclusion. By the same token however, it is common ground that the only reason for the sale of the shares under the 2006 SSA was a promise from the Jagjivans that they would provide funds through EHPL sufficient to fund the litigation. That did not appear in the 2006 SAA either. A

provision to this effect was of as much importance to the existing shareholders as the alleged promise about the royalty income that had fallen due prior to the sale. One possible conclusion is simply that the 2006 SAA did not reflect all that had been agreed between the parties. Another possible conclusion is that whilst the absence of a provision concerning the financing of the litigation was an omission that was rectified by the provision concerning the finance of the OEL litigation in the 2007 SAA, the omission of the reference to the royalty income was because no such agreement had been reached.

143. In the end I have come to the conclusion that the evidential burden of establishing such an oral agreement rested on the Defendant and that he has failed to discharge it. I say that because (a) its omission from the 2006 SAA is not explained and this is so notwithstanding that it was the Defendant who provided the instructions for the preparation of that document; (b) given the alleged importance to Mr Morgan of this concession it is highly likely that he would have insisted on a provision that confirmed this arrangement before he signed the document; and (c) the omission was not corrected in the 2007 SAA. This is all the more the case given the presence within the 2006 SSA of the entire contract clause. In relation to (b), it is to be remembered that it is the Defendant's own evidence that Mr Morgan would do all in his power to preserve and enhance his wealth and was all the more likely to do so if as the Defendant maintained, Mr Morgan had been shocked and disappointed to be told by the Defendant at the end of the negotiations that what had been negotiated was denominated in US$ not Sterling and that this was the basis on which he sought and obtained the concession the Defendant alleges was made.

144. In my judgment the point is immaterial however. It is not alleged by NL that Mr Morgan and/or the Defendant had acted dishonestly in relation to the 2007 distribution by reason of the effect of the 2006 SAA. If, as I have concluded (a) the evidential burden rested on the Defendant to prove this allegation because he was the party making the allegation; but (b) he has failed to prove it, that still leaves NL unable to succeed on the allegations that it has pleaded for the reasons that I have given. For these reasons the breach of fiduciary duty, knowing assistance and conspiracy claims relating to the 2007 distribution fail.

145. The alternative way that it is put is that the sums received by the Defendant were dishonestly received by him. I reject that claim as well. The essence of a knowing receipt claim is that the recipient becomes accountable because he has received trust assets knowing that they have been transferred to him when he has no right to receive them. The knowledge test is slightly different to that which applies to knowing assistance claims – it is whether in the given context the receipt can be said to be unconscionable – see Snell's Equity, 32nd Ed., 30-071.

146. Whilst in principle a distribution of profits received in the knowledge that the distribution would or might reasonably be expected to defeat the interests of creditors or the interest of other shareholders who had purchased but had not yet received the shares that they had purchased might be capable of founding a knowing receipt claim, that is not the basis on which this claim has been pleaded. No application was made to further amend the amended Particulars of Claim so as to allege that the Defendant had wrongfully received the distribution knowing that NL could not afford to make such a distribution by reason of the liabilities that it had and would be incurring in

conducting the OEL Litigation and/or that following signature of the 2006 SAA it was not open to the Defendant to rely on the terms of the Assets Deed as entitling him to receive the distribution. Had the knowing receipt claim in relation to the 2007 distribution been pleaded by reference to these facts, and had the question of unconscionability been explored by reference to this issue in cross examination, then it is possible that I might have been able to conclude that the Defendant's receipt of the distribution was wrongful. However it was not pleaded, nor was the Defendant cross-examined, on that basis. Unconscionability was pleaded exclusively by reference to the allegations that I have considered already and rejected. In those circumstances, the receipt claim must fail.

Conclusion

147. The claim is dismissed.