Neutral Citation Number: [2010] EWHC 7 (Ch)

Case No: 7MA30500

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MANCHESTER DISTRICT REGISTRY

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

Date: 7th January 2010

Before:
HIS HONOUR JUDGE HODGE QC
sitting as a Judge of the High Court

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Between:

	Murray Vernon Holdings Limited	**Claimant**
	- and -	
	Norman Hassall	**Defendant**
	- and –	
	(1) Paul Murray Vernon	
	(2) Jeremy John Vernon	**Third Parties**

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Mr Edward Bartley Jones QC and **Mr Neil Cadwallader** (instructed by **Bowcock Cuerden LLP**, Nantwich) for the **Claimant**
Mr Lance Ashworth QC and **Mr David Warner** (instructed by **Heatons LLP**, Manchester) for the **Defendant**
Mr Neil Berragan (instructed by **SAS Daniels LLP**, Stockport**)** for the **Third Parties**

Hearing dates: 11th - 14th May, 18th - 22nd May, 9th & 10th June, 21st & 22nd September, and 14th - 16th December 2009

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JUDGMENT**His Honour Judge Hodge QC:**

Overview

1.The claimant, Murray Vernon Holdings Ltd ("**Holdings**"), was established by the late

Mr Tony Vernon, a well-known figure in the cheese trade, as the holding company for the Murray Vernon group of companies, based in Cheshire. By the time of his death (on 29 March 2004) from a brain tumour diagnosed some 9 months earlier, the group had an annual turnover of many millions of pounds. Its success was largely due to the entrepreneurial skills of Tony Vernon; but for some 30 years he had been assisted by two trusted lieutenants, Mr Bob Corfield (now aged 69), another trader, and the defendant, Mr Norman Hassall (now aged 66), a qualified accountant and the group's financial director. Tony had two sons, Mr Paul Murray Vernon (now aged 45) and Mr Jeremy John Vernon (now aged 42), who is usually referred to as JJ. Neither had any real interest in the group's business activities: Paul, who lives in Hampshire, had been a non-executive director of Holdings since about 1992 and attended board meetings, but his real business interests are in the field of organising team-building and sporting competitions and events. JJ lives in Dublin where he works as a teacher and freelance composer and deals with sound design for theatre. He only became a director of Holdings in August 2003, after the diagnosis of his father's terminal condition.

2. At all material times, Holdings had an issued ordinary share capital of 191,000 shares of £1 each. After Tony's death, these were held as follows: 77,000 by the executors of Tony's estate (Mr Hassall and Mr Howle); 41,850 by Paul; 41,850 by JJ; 20,001 by Mr Corfield; 10,000 by Mr Hassall beneficially; and 299 by Tony's widow (the mother of Paul and JJ), Mrs Jane Vernon. On 30 September 2005 the estate's shares were transferred to Paul (38,500) and to Mr Hassall and

Mr Howle (38,500) as the trustees of a discretionary trust, one of the beneficiaries being JJ. There were also 3 'A' shares which were held by the executors of Tony's estate, Mr Corfield and Mr Hassall until the end of March 2005 when they were transferred to Paul, to JJ, and to Norman Hassall Ltd (a company owned and controlled by Mr Hassall). After 31 March 2005 (when Mr Paul Shaw, a chartered accountant and a partner in Beever & Struthers, resigned from the board) the directors of Holdings were Mr Hassall (as chairman), Paul, JJ, Mr Corfield and Lord Wade of Chorlton. At the end of September 2005, Mr Corfield transferred his 20,001 shares in Holdings to a recently incorporated company, Murray Vernon Group Ltd ("**Group**"), for £1,050,000; and he resigned from the board of Holdings. At the same time, Mr Hassall transferred his 10,000 ordinary shares in Holdings to Group for £525,000. £2,070,000 was transferred to Group's bank account from Holdings on 11 October 2005; and cheques for £525,000 and £1,050,000, drawn on Group's bank account by Paul and JJ in favour of Mr Hassall and Mr Corfield respectively, were debited to Group's bank account on 13 and 14 October 2005 (4/149 & 152).

3. Mr Hassall remained a director of Holdings until Thursday 20 October 2005, when he unexpectedly resigned (by an email timed at 5.56am: 8/1428-9). Until early December 2005, when Mr Hassall resigned from the board (9/1671 and 1676), the three directors of Group were Mr Hassall, Paul and JJ. At the same time, Mr Hassall submitted to Paul a signed stock transfer form transferring the one ordinary issued share in Group (which he had been holding as nominee) to an unnamed transferee (9/1676 and 7/1039-40). (Mr Hassall overlooked (as I find)

the fact that the A share in Holdings had been retained by his company until he was in the course of being cross-examined in this case, when he procured a blank stock transfer form to be executed in relation to it, which was then delivered to Holdings.)

4. At some time between 15 June 2006 (see the email of that date from Chris King, a solicitor with Bowcock Cuerden LLP, Holdings' solicitors in the current litigation, to Mike Parton, then the company secretary, at 9/1869-1872) and 19 July 2006 (the date it was stamped), Paul's name was inserted as the transferee of Mr Hassall's share in Group, and the transfer was back-dated (by an unidentified hand) to 17 June 2005. At or about the same time, minutes were prepared of a purported (but non-existent) meeting of the board of Group on 17 June 2005 at which it was recorded that it had been resolved that a second ordinary share in Group should be allotted to JJ (11/79-80); and letters were signed by Paul and JJ (13/512 and 7/1038), and back-dated to 17 June 2005, requiring Group's secretary to note the nature and extent of their interest in the shares to be recorded in Group's register of directors' interests. Under cross-examination, both Paul and JJ were forced to retract earlier evidence that they had never back-dated documents (Paul having to be recalled for that purpose). By the conclusion of the evidence of Paul and JJ, I believe that it was common ground that these documents of 17 June 2005 were not created on that date but were produced by Holdings' solicitors in June 2006 and deliberately back-dated by Paul and JJ; but, in any event, I find as a fact that this was the case.

5.It is not in dispute that Paul and JJ together effectively own and control both Holdings and Group. Nor is there any suggestion that either Holdings or Group is, or ever has been, insolvent.

The litigation

6.By a claim form issued in the Manchester District Registry on 13 July 2007, Holdings claims relief from Mr Hassall in connection with the transfers of the minority shareholdings in Holdings by Mr Hassall and Mr Corfield to Group, the subsequent transfer of moneys from Holdings to Group, and Group's use of part of those moneys as the consideration for the purchase of the shareholdings of Mr Hassall and Mr Corfield. To paraphrase paragraph 2 of the principal witness statements of each of Paul and JJ, it is said that despite owing fiduciary duties to Holdings as a director (and its chairman), Mr Hassall "orchestrated and put into effect a scheme under which [Holdings] paid a total of £1.575 million (plus £10,000 - in fact only £7,875 – in stamp duty) to fund the purchase of shares in itself by [Group] from [Mr Hassall and Mr Corfield]." It is said that this was in clear breach of the prohibition against the giving by a company of financial assistance for the acquisition of its own shares then contained in section 151 of the *Companies Act 1985*; and that Mr Hassall thereby acted in breach of his duties as a director of Holdings. It is further said that the arrangement was such that the shares were purchased at a gross over-valuation. This action is brought to enable Holdings to recover its alleged losses from Mr Hassall. It should be noted that there is no claim by Group; there is no claim against Mr Corfield; and there

is no claim to set aside the purchases of the shares. Nor has any such claim ever been advanced. It should also be borne in mind that, as Paul and JJ both accepted in the course of cross-examination, if Holdings succeeds in its claim, any recovery will enure for the benefit of Paul and JJ. Effectively, they seek (through Holdings) to recover the price for the minority shareholdings paid to Mr Corfield and to Mr Hassall and (through Group) to retain the shares. Holdings is represented in this litigation by Mr Edward Bartley Jones QC leading Mr Neil Cadwallader of counsel.

7. Mr Hassall is represented by Mr Lance Ashworth QC leading Mr David Warner of counsel. Mr Hassall defends the claim. He denies the breach of any fiduciary duty owed to Holdings; and he also disputes that any such breach as may be proved against him has been causative of any loss to Holdings. He says that Holdings was contractually obliged to purchase Mr Corfield's shares; that Paul and JJ approved the price negotiated for those shares by Mr Hassall, which was a proper price; that Paul and JJ freely agreed to purchase Mr Hassall's own shares at a corresponding price per share; and that it was Paul and JJ's admitted, and unilateral, insistence that Mr Hassall should be paid for his shares all at once, rather than by instalments, that necessitated the transfer of funds from Holdings to Group in circumstances which (subject to a legal argument founded on the "larger purpose" exception in section 153 (1)) gave rise to the breach of the section 151 prohibition against unlawful financial assistance because it meant that it preceded the lawful declaration of a dividend in favour of Group in a sum sufficient to defray the cost of acquiring the shares. If necessary, Mr Hassall

claims relief under section 727 of the *Companies Act 1985* on the basis that he acted honestly and reasonably throughout, and ought fairly to be excused from all liability. He has joined Paul and JJ as third parties, claiming contribution on the ground that, if he was in breach of fiduciary duty towards Holdings, so too were they; and, because of their central role in initiating the transfer of funds to Group, they should bear the entire (or at least the greater) responsibility for any resulting loss. Although Paul and JJ are the natural persons directing this claim on behalf of Holdings, they are separately represented in this litigation by Mr Neil Berragan of counsel.

8. The trial was listed before me for 9 court days from 11 to 22 May 2009. Unfortunately, and in part because Mr Hassall (who was the last witness of fact) was unwell on the last of those days, the trial had to be adjourned part heard with his cross-examination incomplete; and, due to the non-availability of counsel, Mr Hassall's evidence was only concluded on 9 and 10 June. By then, the court had heard evidence from 8 live witnesses of fact; and a witness statement from Mr Finan (tendered on behalf of Paul and JJ) was received without challenge. (Although Paul and JJ had served a witness statement from Lord Wade, this was not tendered in evidence; and, whilst it was not suggested that there was any reason why Lord Wade could not be called as a witness, he was not made available for cross-examination on behalf of Mr Hassall.) After the conclusion of the factual evidence, there was a further adjournment until 21 and 22 September when I heard evidence from the two expert forensic accountants. I then adjourned for written submissions, which were served sequentially and (because of the existing

commitments of counsel) over a protracted period: Holdings' written submissions (a little over 60 pages) are dated 28 October 2009; Mr Hassall's written submissions (191 pages) are dated 24 November 2009; and Paul and JJ's written submissions (a modest 13 pages) are dated 10 December 2009. I was able to pre-read the written submissions before hearing 3 days of oral submissions on 14 to 16 December 2009. Since reserving judgment, I have re-read my notes of the evidence - there was no verbatim transcript - and of the oral submissions; and I have also re-read (more than once) the written submissions and also the bundle of core documents helpfully assembled by Mr Hassall's counsel after the court had adjourned for written submissions, together with other documents adduced in evidence. Since I am already heavily listed from Monday 4 January 2010, this judgment had effectively to be completed in draft before that date (necessitating considerable work over the Christmas and New Year period); and it will therefore be less detailed than I would have liked. Inevitably, I cannot address all of the issues in the detail that they have been argued before me (although none of them has been overlooked). Rather, I shall briefly seek to set out the reasons why, in my judgment, this claim fails.

The witnesses

9. Before setting out my detailed findings of fact, it is first necessary for me to say something about the quality of the oral evidence and my assessment of the witnesses who gave evidence before me since these are crucial to my resolution of the disputed issues of fact in this case.

10. Paul initially gave evidence for about 8 1/2 hours, spread over the first two days of trial (Monday 11 and Tuesday 12 May 2009). He was then recalled, after JJ had concluded his evidence, on the afternoon of day 5 (Monday 18 May) and cross-examined for a further 30 minutes. I find Paul to be an intelligent man but a wholly unsatisfactory witness, who was both careless and unreliable in his evidence and his recollection. He was clearly the driving force behind this litigation; and I accept Mr Ashworth's submission that, whilst he did his best to try to hide it, Paul is plainly an angry and bitter man who feels a particular animosity towards Mr Hassall. I find that Paul's hostility and partiality has coloured his recollection and evidence, and has led him to embellish and distort his account of events. I reject the underlying thesis of Paul's evidence that he and JJ were naive in the ways of business and wholly reliant upon Mr Hassall in relation to the management of Holdings and its associated companies. This does not accord with either my assessment of Paul or the contemporaneous documents. I accept the evidence of Mr Corfield that, since the diagnosis of Tony Vernon's terminal illness in or about July 2003, Paul had been becoming "more and more hands on", and "more and more in charge" of the group companies. He was increasingly making decisions for the group companies independently of Mr Hassall. Mr Corfield spoke of his own wish to strengthen the management of Murray Vernon Ltd ("**MVL"**), then the principal trading arm of the group; but he said that Paul would have nothing of this, on the grounds that he considered it to be "too disruptive". It was Paul (with the support of JJ) who insisted that Mr Hassall should be paid out in full for his shares on 10 October 2005. Paul's attempt to explain away the clear effect of his handwritten note (at 11/371) to

"pay out RFC today" and to "pay out NH today" was woefully unconvincing. Paul had no hesitation in forcefully speaking down to Mr Hassall over his proposed redundancy package for Louise Hewson. I am entirely satisfied that Paul has deliberately minimised his active participation and role, and that of the board, in the restructuring of the group companies. This may be illustrated by Paul's denial at paragraph 50 of his witness statement (acknowledged in cross-examination as "misleading") of any knowledge of discussions between Mr Hassall and Mr Shaw regarding the corporate re-organisation; by his e-mail to Mr Shaw of 24 February 2005 (at 5/625); and by Paul's evidence (at paragraph 62 of his witness statement) that it was Mr Hassall who instructed Mr Parton to incorporate Group when the instruction was in fact given at a meeting of the board of Holdings, attended by both Paul and JJ, on 31 May 2005 (11/39).

11. I have already referred (at paragraph 4 above) to the backdating of documents to 17 June 2005. In cross-examination, Paul asserted that he would never have put his name to backdated documents. JJ initially made a similar denial; but during the course of his cross-examination, it was demonstrated that the documents in question had been drafted by Bowcock Cuerden almost a year after the date which they bear, and they had then been adopted and backdated by Paul and JJ (although this backdating of documents had been applied selectively, and only to those documents which worked for the benefit of Paul and JJ, and not to those which might have operated to assist Mr Hassall). The act of backdating these documents, and the circumstances in which (according to Paul's further evidence, when confronted with the irrefutable falsity of his earlier evidence) this

must have been done, causes me seriously to question the honesty of Paul's initial assertion that he had never backdated documents, and his later evidence that he could not recall having done so (although Mr Ashworth did not suggest to Paul that he had deliberately lied in his earlier evidence to the court). However, even on the footing that Paul did not deliberately lie to the court on this topic, the inaccuracy of his evidence in this area clearly demonstrates that he is an entirely unreliable, and discredited, witness. Had I not previously concluded (as I had) that Paul's memory and evidence could not be relied upon, I would have viewed his evidence about the 17 June 2005 documents very much as the 13th stroke of the clock that casts doubt on all that has gone before.

12. I also bear in mind that Paul, together with JJ, was guilty of a serious failure to disclose documents that were material to Mr Hassall's defence, in particular the budget spreadsheets attached to Mr Hassall's e-mail of 17 August 2005 at 7/1225, and added to the bundle as 1225A-C. Since these were produced by JJ (from his laptop) during the course of the trial, I acquit both brothers of any deliberate decision to suppress documents adverse to Holdings' case (whilst noting that Paul accepted that the corresponding documents should still have been available on his own laptop). However, both Paul and JJ had signed a disclosure statement dated 8 September 2008 (1/221a-c) stating that they had carried out a search for electronic documents contained on their personal computers during the material time. In the light of this, I cannot accept Paul's evidence (when he was recalled) that the brothers were never specifically asked to look at their laptops. I do not consider that Paul was thereby guilty of what Mr Ashworth termed "a blatant

lie". Rather, I regard Paul's answer as a further indication of the unreliability of his evidence generally, and of his deplorably slapdash attitude to this litigation.

13. JJ gave evidence for about 6 1/2 hours in total, spread over the morning of day 3 and (after the interposition of Mr Shaw) most of day 5 (Wednesday 13 and Monday 18 May). Like his brother, JJ is an intelligent man; but he too was clearly angry and bitter towards Mr Hassall. Indeed, early in his evidence, JJ was overtly hostile towards him, making serious allegations of dishonesty and incompetence against Mr Hassall (particularly in relation to his role as the chairman of Total Marketing Ltd). Acting on instructions from his clients, these wholly unsubstantiated allegations of dishonesty were later withdrawn by Mr Berragan at the end of Mr Corfield's evidence on the afternoon of day 7 (Wednesday 20 May), whilst, at the same time, he affirmed JJ's honest belief in what he had said at the time. As with Paul, I reject, as inconsistent with the contemporary documents, JJ's evidence that he was ignorant of the proposals for re-structuring the companies within the Murray Vernon group put forward by Mr Shaw in or about January 2005 and developed over the following months. Like Paul, I find that JJ was kept fully informed about them. Unlike Paul, I find that JJ probably had no real interest in these proposals at the time.

14. At the beginning of his evidence, JJ corrected paragraph 28 of his witness statement to admit to having been present at a meeting between Mr Hassall, Mr Corfield, Paul and himself in his late father's old office at which Mr Corfield had expressed the wish to sell his shares, and Mr Hassall had agreed to look after the

matter. JJ explained that his change of recollection had been prompted by seeing the witness statements of Mr Hassall and Mr Corfield. I suspect that it was also prompted by Paul's admission (in cross-examination, and contrary to paragraph 56 of his witness statement) to having a "slight" recollection both of a meeting between Mr Hassall and Mr Corfield in or about October 2004, and of a conversation from which he understood that Mr Corfield wanted to sell his shares. Nevertheless, JJ's recollection of this meeting remained vague. JJ is subject to the same criticisms that I have already made in relation to Paul concerning the unreliability of his evidence as regards the backdating of the 17 June 2005 documents and the late disclosure of documents from his laptop. Since JJ did produce the missing budget spreadsheets, and was prepared to make some concessions in evidence (for example, as regards the meeting at which the sale of Mr Corfield's shares was discussed, and as regards his willingness for the purchase of the minority shareholdings to be effected in any lawful manner), I do not consider that he was deliberately seeking to mislead the court by his evidence. However, I find that JJ's evidence is coloured by his deep-seated hostility towards Mr Hassall; and that he is an unsatisfactory, and unreliable, witness whose evidence cannot stand against conflicting evidence from witnesses whose evidence I consider to be reliable.

15. Mr Hassall was cross-examined before me for a little over 11 ½ hours, and he was then re-examined for a further 2 hours. Ignoring the day he was unwell, his evidence was spread over 3 court days (Thursday 21 May, Tuesday 9 June and Wednesday 10 June). He was described by Paul as a reliable, trustworthy and

honest man, who would never shirk his responsibilities. That assessment was consistent with the evidence of all the other witnesses apart from JJ, who had developed (as I find) an irrational antipathy towards Mr Hassall. It also accords with my own assessment of the man. I reject Mr Bartley Jones's description of Mr Hassall as a man who obfuscates, or one who bullies, threatens or seeks to manipulate people. I find him to be an honourable and upright person, and a credible, truthful and reliable witness. I reject the submission that parts of Mr Hassall's evidence were devalued by his resort to reconstruction rather than honest recollection. I accept Mr Ashworth's submission that, contrasting the quality of Mr Hassall's evidence (tested by reference to its consistency with the contemporaneous documents, its consistency with his witness statement (prepared, due to his restricted financial resources, with limited legal assistance), and his performance in the witness box) with that of Paul and JJ (tested by the same criteria) merely serves to highlight the disparity in the quality of their evidence.

16. Mr Hassall is not immune from all criticism; but he was alive to his own failings. He indicated that on 10 October 2005 he was pressured into falling into line with Paul's insistence (supported by JJ) that he and Mr Corfield should be paid out for their shares in full, and at once. He accepted that, with hindsight, he should have told the brothers that this could not be done immediately; but he had been saddened by their conduct, thinking that they were overriding his own wishes, and he was "not thinking straight". Mr Hassall also acknowledged (and I accept) that the emails and letters that he wrote following Bowcock Cuerden's letter

before action of 18 December 2006 (10/1920-1922) were wholly out of character, and were driven by his frustration and sorrow at the whole unwelcome and sorry state of affairs to which matters had descended. Given Mr Hassall's many years of devoted and loyal service to the Murray Vernon group and its founder, I can understand, and sympathise with, Mr Hassall's deeply felt perception of disappointment and betrayal at the actions of Paul and JJ. I do not regard these messages as indicative of a manipulative or bullying personality.

17. In addition to Paul and JJ, Holdings (and the two brothers) relied upon the oral testimony of four further witnesses. The first was Mr Paul Shaw, a partner in the accountancy firm of Beever & Struthers and the group's tax adviser, who acted as a non-executive director of Holdings from February 2004 until he left of his own volition at the end of March 2005 because he felt that he could no longer usefully contribute to its affairs. He gave evidence for about 4 ½ hours on day 4 (Thursday 14 May). I find him to be a likeable and genial man, and a thoughtful, considered, reliable and honest witness, whose evidence was supported by the contemporaneous documents. His evidence (which I consider to be fairly summarised at paragraph 44 (a) of the defendant's written closing submission) is broadly supportive of Mr Hassall's evidence and case. In particular, Mr Shaw said that his view was that Paul understood what was going on with regard to the corporate restructuring, although he was less sure about JJ; and he confirmed (by reference to his note at 7/1058) that it was he who, on 20 June 2005, had suggested to Mr Hassall that he should sell his shares in Holdings in order to "lock in" his capital gains.

18. The second witness, Mr Michael Parton, is a certified accountant. He was the company secretary of Holdings, as well as being an employee and a director of another group company, until he was made redundant on 31 October 2006. He gave evidence for a little under 3 ½ hours on day 6 (Tuesday 19 May). By the time he came to do so, it had already been established that (contrary to paragraph 7 of his witness statement) no meeting of the board of Group had taken place on 17 June 2005. Despite this, Mr Parton gave no satisfactory explanation for his mistake in referring to this (non-existent) meeting in his witness statement; nor did he provide a full or satisfactory explanation for his role in completing blank sections of the form transferring Mr Hassall's share in Group to Paul (7/1039-1040). I accept Mr Ashworth's submission (at paragraph 44 (b) of his written closing) that Mr Parton gave little appearance of genuinely trying his best to assist the court; and I am left with the impression that (for whatever reason) he was simply seeking to follow the line set by Paul and JJ in this litigation. Where his evidence conflicts with that of Mr Hassall, I reject Mr Parton's evidence and prefer Mr Hassall's. But where Mr Parton's evidence is consistent with that evidence, I accept it as corroborative of Mr Hassall's evidence and case. In particular, and significantly, Mr Parton accepted that he had had a discussion with Mr Hassall about the need for a dividend to be declared by Holdings; and that he would not disagree with Mr Hassall if he said (as he did) that this had taken place on 10 October 2005.

19. The third witness, Mr Alan Brookes, a partner in Brookes O'Hara, who took over from Ernst & Young as the group's auditors in 2005, gave evidence for about 50

minutes on the afternoon of day 6. He was an honest and reliable witness, but I find him to be of limited assistance. The final witness, Mr Alan Sturrock, a private client solicitor and a partner in Addleshaw Goddard, who acted for Mr Hassall and Mr Howles (in their capacity as the executors of Tony Vernon's estate) gave evidence for about 50 minutes on day 7 (Wednesday 20 May). Again, he was an honest and reliable witness but of limited value. In cross-examination, he effectively resiled from the impression conveyed by his witness statement (prepared for Paul and JJ personally, rather than for Holdings) when he confirmed that, in all their dealings, Mr Hassall had been acting in the best interests of the estate.

20. Mr Hassall's only independent witness was Mr Bob Corfield. He gave evidence for the remainder of day 7 (for just under 3 ½ hours in cross-examination and about ½ an hour in re-examination). He was an honest, down-to-earth, and credible witness, with no agenda of his own, who had clearly liked Tony's two sons, and who had felt great disappointment in them when (without any prior warning and, in Mr Corfield's view, without justification) they had placed MVL into administration on 5 December 2005. Mr Corfield would clearly have preferred not to have been giving evidence in these proceedings; and at one point in his re-examination he became extremely emotional when recalling Tony Vernon's death. Mr Corfield was not entirely reliable in his recollection, asserting that he had assumed that he would be paid for his shares in one lump sum, rather than by instalments, when the documents indicate (as I find) that payment in one lump sum was a modification to the original arrangement that only came about on or

around 17 August 2005. However, the fact that Mr Corfield persisted in his evidence to this effect demonstrates that he is not a man who is prepared to trim his evidence to suit the party calling him, and thus serves only to enhance his credibility. Save in this one respect, I find Mr Corfield to be an entirely honest and reliable witness whose evidence is entirely supportive of Mr Hassall's evidence and case.

21. In summary, I find that (1) apart from Mr Parton (whose evidence I cannot accept where it is at variance with the evidence of Mr Hassall), all of the independent witnesses were either broadly supportive of, or do not detract from, Mr Hassall's evidence and case; (2) neither Paul nor JJ is a reliable or credible witness; and (3) Mr Hassall is an entirely credible, reliable and truthful witness. Even Mr Bartley Jones was constrained to acknowledge, in the course of his closing submissions, that Paul and JJ did not "get everything right". I would go much further. Wherever the evidence of Paul and JJ conflicts with that of Mr Hassall, I prefer the evidence of the latter and reject the evidence of Paul and JJ.

The expert witnesses

22. On days 12 and 13 I heard the evidence of two expert forensic accountants. Their reports, and their joint statement (which was not signed off until July 2009), may be found in bundle 3. In the event, I find their evidence to be of little real assistance in resolving the issues I have to decide. Mr John Green (a director of Pierce Forensic Ltd) was called by Holdings and gave evidence for some 6 ½

hours. Ms Sally Longworth (a partner at Grant Thornton UK LLP) was called by Mr Hassall and gave evidence for a little under 3 hours. To the extent that there is are material differences of opinion between the two experts, I have no hesitation in preferring the expert opinions of Ms Longworth to the views of Mr Green on all issues.

23. After the conclusion of the factual evidence in the case, Mr Green's signed report of 6 March 2009 (referred to in the joint statement) was substituted for the version of his earlier unsigned report (dated 27 January 2009) which had originally appeared in bundle 3 (and now appears in bundle X). Bowcock Cuerden's explanatory letter of 7 August 2009 (at the front of bundle X) asserted that "…a few typos or similar may have been corrected, but there are no substantive changes of any kind". Part of Mr Ashworth's cross-examination of Mr Green exposed the falsity of this assertion. The later report incorporated many substantive changes. I am satisfied that Mr Green's reports were drafted entirely from the perspective of his client and its pursuit of this litigation. Mr Green has ventured opinions on matters (such as pensions, tax and company law) on which he was not suitably qualified to opine. His reports are partisan and partial, and demonstrate a lack of objectivity and independence. By way of illustration, reference should be made to paragraphs 205, 206, 429, 454, 462, 463, 639 and 640 of the report. At times, Mr Green entered into the arena on behalf of his client and addressed matters which were inappropriate for an expert accountant (see, e.g., paragraph 532), a criticism which he accepted in cross-examination, both at the end of day 12 and early on day 13. Paragraph 543 is misleading by

suggesting that Mr Green had relevant experience. Paragraphs 549-551 were written without reference to the full facts. Mr Green's bottom line figures for the value of the shareholdings of Mr Corfield and Mr Hassall, at paragraph 337 of his addendum report (3/313), of £40,000 and £20,000 respectively simply fly in the face of common sense (and not just because of the size of the assumed excess pension deficit). I endorse the criticisms of Mr Green contained in paragraph 49 of the defendant's written closing submission. By contrast, Ms Longworth was an excellent expert witness, considered and measured in her evidence, and ready to make appropriate concessions. I accept the submissions made in relation to her evidence at paragraph 50 of the defendant's written closing.

Findings of fact

24. I turn now to record my findings of fact. Mr Hassall provided over 30 years' loyal and faithful service to the Vernon family and their companies. Tony Vernon, Bob Corfield and Norman Hassall all viewed the companies within the Murray Vernon group as operating effectively as a quasi-partnership between the staff who operated the vital support systems. In evidence, Mr Corfield confirmed the statement attributed to him in the book "*The Right Price and the Right Time - The Murray Vernon Story*" (published in 1992) that the business was "about trust" (4/82). He added that that was the whole essence of the type of business they were in and the people with whom they worked. There was a reasonable expectation on the part of Mr Hassall that on his retirement from the Murray Vernon group, his shares in Holdings would be purchased from him for an

amount referable to his percentage share of the net asset value shown by the latest audited balance sheet, and without any discount for a minority shareholding. Although article 16 (d) (iii) (11/75E-F) of Holdings' articles provided for a 25% discount to be applied to Holdings' net asset value, this discount had not been incorporated into the option agreement dated 30 August 2001 (4/203-5) under which Mr Corfield was entitled to dispose of his shares to Holdings (or to buyers nominated by that company). This option agreement had been drafted by Bowcock Cuerden, and had been signed by all of the shareholders (including Paul and JJ). After his many years of loyal and devoted service to the Murray Vernon group, and on the basis of the trust and confidence that existed between the key senior staff, there was every reason why Mr Hassall should understand and believe (as he did) that this 25% discount would not be applied to him as and when he chose to dispose of his own shares, just as it had not been applied to Mr Corfield's shareholding when the option agreement was drafted and approved.

25. I should record that in his written closing submissions, Mr Bartley Jones had sought to argue that Mr Corfield's option agreement was invalid as a "contingent purchase contract" within section 165 of the *Companies Act 1985*. This submission was abandoned at the end of Mr Bartley Jones's oral closing, on the basis that Mr Hassall could have had no knowledge of any possible invalidity given that the option agreement had been drafted by solicitors. In my judgment, Mr Bartley Jones was right to abandon his challenge to the validity of the option agreement. He was right to do so because any technical objection to its validity

had been cured by its express endorsement by all of Holdings' shareholders. Had it been necessary for me to do so, I would have held that the principle of unanimous shareholders' consent, as established in *Re Duomatic Ltd* [1969] 2 Ch 365, was sufficient to overcome any non-compliance with the requirements of section 165. In this connection, I would have considered myself bound by the reasoning (with which, in any event, I agree) of Judge McCahill QC (sitting as a judge of the High Court in the Bristol District Registry) in *Dashfield v Davidson* [2008] BCC 222; and I would have held that where a contract is executed by all of the company's shareholders, the failure to obtain any requisite special resolution approving the contract before it is entered into is cured by the unanimous consent of the shareholders.

26. After his heart attack in January 2003, Mr Hassall had ceased to work full-time for the Murray Vernon group; and he reduced his working hours and role still further in about April 2005, as evidenced by the reduction in his annual salary from £40,000 to £6,000. However, he could still fairly be described as the executive chairman of Holdings (as he described himself in an email to the group's bankers dated 26 October 2005, announcing his resignation from the board of Holdings: 10/1917), although Paul was increasingly assuming the effective role (albeit not the title) of chief executive (assisted by JJ and Mr Parton). Following the diagnosis of Tony Vernon's terminal illness, and continuing after his death, there was a deliberate change in the strategic direction of the Murray Vernon group away from trading operations, with a view to it becoming more of an investment vehicle. This resulted in the sale of a number of important subsidiaries and the

down-sizing of the group's business. Nevertheless, at no time was there ever any reason for concern about the solvency of Holdings, nor was any such concern ever entertained.

27. Early in October 2004, Mr Corfield told Mr Hassall of his wish to retire from the Murray Vernon group of companies and to exercise his option for Holdings to acquire his minority shareholding. At a meeting at the group's offices at Haslington Hall on or about Monday 11 October 2004, and attended by Mr Corfield, Mr Hassall, Paul and JJ, Mr Corfield formally announced his intention to retire from the group and exercised his option to sell his shares. Believing that it was necessary for him to do so by written notice, he asked whether he needed to exercise his option in writing. Paul told him that this was unnecessary, and both Mr Hassall and JJ agreed. Relying on these assurances, Mr Corfield never gave written notice of the exercise of his option; but all concerned proceeded thereafter on the footing that Mr Corfield had validly exercised his option. Because the Murray Vernon group of companies operated on a basis of trust and confidence, and all of the leading players (Mr Corfield, Mr Hassall, Paul and JJ) had been present at the meeting at which the option had been exercised (and they had all been signatories to the option agreement itself), there was never perceived to be any need to refer to the exercise of Mr Corfield's put option in any of the subsequent documents. Mr Hassall was left to deal with the mechanics of the share sale (including negotiating the sale price). Unsurprisingly, in view of the nature of their relationship and the length of Mr Corfield's association with the Vernon family, all of those involved were pretty relaxed about the

implementation of the sale of Mr Corfield's shares. They all wanted his departure to be effected in the most tax-efficient manner; and Mr Corfield was content to wait to agree a price for his shares until the 2004 accounts were available so long as he continued to receive (as he did in October 2004 and January 2005) quarterly dividends of £25,000 on his A share.

28. It was Mr Corfield's impending departure from the group, and the need to ensure that his shares (together with Tony Vernon's entire estate, and other assets of the Vernon family) were dealt with in the most tax-efficient way for all concerned, that triggered the whole idea of restructuring the group. The implementation of the restructuring proposal, including the creation of Group as the new holding company, evolved over time through discussions involving Mr Hassall, Mr Corfield, Mr Shaw, Paul, JJ and other professional advisers (including Addleshaw Goddard for the Vernon family and Cedric Christie for JJ). Mr Hassall was not the sole progenitor of the idea, which owed rather more to Mr Shaw; and Paul and JJ were fully and actively involved as willing participants in the development of the restructuring proposal (although JJ probably had real little interest in this). I reject Holdings' case that the proposal to restructure the Murray Vernon group was the "brainchild" of Mr Hassall, conceived and implemented to the exclusion of Paul and JJ. Everyone understood that the new holding company, the name of which was identified (by Paul and JJ) by as early as February 2005 as Group, should be the purchaser of Mr Corfield's shares. At a meeting of the board of Holdings on 31 May 2005, attended by both Paul and JJ, Mr Parton was duly instructed to form Group, as recorded in the board minutes

(11/39), which were approved as a true record at the next board meeting on 27 June 2005, attended by Paul but not JJ (11/40)

29. Everyone understood that Mr Corfield's shares were to be valued by reference to Holdings' most up-to-date audited accounts, which were the accounts for the period to 1 October 2004 ("**the 2004 accounts**"). Unfortunately, Ernst & Young only supplied the draft audited group accounts to Mr Hassall on 13 April 2005 (6/829), and they were not formally signed off until 20 June 2005 (13/295); but the unaudited draft accounts supplied to Ernst & Young for audit purposes had been available to Mr Hassall before the end of March, and he used these to negotiate the price for Mr Corfield's shares. I accept the evidence of Mr Hassall and Mr Corfield as to the course of their negotiations, which resulted in a provisional agreement as to a price of £1,050,000. This assumed a pension deficit of £910,000, as noted in the 2004 accounts (13/329); although this deficit (calculated on the funding, rather than the "buy-out" basis) was later reduced to £580,000 by the transfer of the employees of the two Fastnet companies to the purchasing company's pension scheme (7/1112-1117). It is accepted by Holdings that this figure of £1,050,000 represented a fair price for Mr Corfield's shares, provided they fell to be valued pursuant to the terms of his option agreement, and by reference to the 2004 accounts (compare paragraph 2.11 of the experts' joint statement at 3/327).

30. I find that the price of £1,050,000 was agreed in principle between Mr Hassall and Mr Corfield by about the end of March 2005; and it was reported to, and

approved by, Paul and JJ. Not only does this accord with the evidence of both Mr Hassall and Mr Corfield, but it is also consistent with, and explains, the transfer of Mr Corfield's A share to JJ at about this time, and Mr Corfield's consequent inability to participate in the interim dividends of £100,000 declared on those shares in favour of each of Mr Hassall and Paul (with JJ waiving his entitlement) on 5 April 2005, and a further £100,000 declared in favour of each of Paul, JJ and Mr Hassall on 6 April 2005. (The £200,000 received by Mr Hassall represented about £185,000 to which he was entitled by way of a bonus for its past performance, calculated by reference to 9% of the group's available profits, with the balance of about £15,000 reflecting his 5% ordinary shareholding.) Notwithstanding Mr Corfield's present recollection and belief, until about 17 August 2005, when Mr Hassall prepared revised budget forecasts on the basis of Mr Corfield being paid off in full (7/1225A-C), it was Mr Hassall's intention (and the intention of Holdings, as expressed in the applications for tax clearance) that the price for Mr Corfield's shares should be paid by instalments over 5 years, as permitted by the option agreement. Mr Corfield's contrary belief was founded upon his assumption that, because he could not recall anything having been said to him expressly about Holdings implementing the provision in the option agreement as to payment by instalments, he would be paid out in one lump sum.

31. I am satisfied that at the time when he negotiated and agreed the price for Mr Corfield's shares, Mr Hassall had no intention of selling his own shares in Holdings. The two shareholdings were not both in play at the same time. Mr Hassall's intention to sell his minority shareholding was only formed as a result

of his conversation with Mr Shaw on or about 20 June 2005 (7/1058). This is in accordance with the evidence of Mr Corfield and Mr Shaw, as well as the evidence of Mr Hassall himself. It is also consistent with the bulk of the documents. Other documents, which might suggest that Mr Hassall had formed an intention to sell his shares before 20 June 2005, are of insufficient probative value to lead me to that conclusion when they are weighed against the totality of the evidence in the case. Mr Shaw accepted that the statement in his email of 2 March 2005 (5/649BB and 6/650) that "all the minority shareholders may exit for cash" involved a "loose" use of language, and was not accurate. It is to be contrasted with Mr Shaw's email of 30 March 2005 (6/741) which refers to "a desire for one of the minority shareholders to exit sooner rather than later", which was a reference to Mr Corfield rather than Mr Hassall. Mr Brooks's note of a telephone call of 2 March 2005 (5/649D) stating that "minority shareholders disappearing for cash" is also an inaccurate record of what was envisaged at that time. Mr Hassall's initial draft of a letter to HM Inspector of Taxes dated 5 April 2005 (6/762-3) refers only to Mr Corfield wishing to sell his shares. The version, also dated 5 April 2005, at 6/763A-B, which refers also to Mr Hassall's wish to sell his shares, is a much later redraft (in or about late June 2005), on which the original date has not been altered. I accept Mr Hassall's explanation that he was just playing around, speculating about a possible price for his own shares, when he inserted £2.00 million as the approximate value of the consideration for a 15% minority shareholding in the course of annotating the draft clearance letter which appears at 9/1768. I do not accept the inference which Mr Bartley Jones seeks to draw from this document, which is that it shows that the price for Mr Corfield's

shares had not been agreed at £1.05 million by the time Mr Hassall first conceived the idea of selling his own minority shareholding. I consider that, when weighed against all the other evidence (including my assessment of Mr Hassall's reliability, credibility and veracity), this document provides far too flimsy a foundation for the case which Mr Bartley Jones seeks to build upon it.

32. The fact that Mr Hassall had not formed any idea of selling his own shares in Holdings until about 20 June 2005 seems to me to be supported by the fact that, on or about 16 June 2005, he requested and obtained cheques for £4,750 from each of Paul and JJ to assist in setting up Group: see paragraph 64 of Paul's witness statement and the cheque stub at 7/1032A. As explained by Mr Hassall at paragraph 45 of his witness statement, and as shown on his post-it sticker at 4/11, this is consistent with Paul and JJ each acquiring 47.5% of Group, with Mr Hassall holding the remaining 5%. Mr Hassall could not sensibly have contemplated acquiring 5% of Group if he had already decided to sell his 5% stake in Holdings. The reason why their cheques were subsequently returned, uncashed, to Paul and JJ may be related to the fact that, shortly thereafter, Mr Hassall decided to sell his shares in Holdings, and so would no longer be investing in Group (leaving Paul and JJ as the sole original investors).

33. At some time between 20 June (7/1058) and 26 June 2005 (7/1074 and 9/1751-1754) Paul and JJ agreed that Group would acquire Mr Hassall's shares in Holdings on the same terms (pro rata) as had already been agreed for the acquisition of Mr Corfield's shares. I accept Mr Hassall's evidence that there was no actual

negotiation about the price. Although Mr Hassall had hoped for more, when he indicated that he wanted to sell his shares, Paul and JJ offered to purchase them for the same amount (pro rata) as had previously been agreed for Mr Corfield's shares; and Mr Hassall simply agreed to this. I reject any assertion that the price for his shares was "set" by Mr Hassall. At that time, the understanding was that the price would be paid by instalments over 5 years; and there was no suggestion that Mr Hassall would be retiring from his directorship of Holdings. No-one gave any thought to the term in Holdings' articles providing for a 25% discount from net asset value on any transfer of shares. So far as Mr Hassall was concerned, this was because he had never considered that this provision would be applied to his own shareholding when he came to dispose of it. No one consciously gave any thought to the fact that the price for Mr Corfield's shares had been negotiated against the background of his option agreement whilst Mr Hassall did not have the benefit of a similar agreement; but all three of them knew of this fact. All three appreciated that it was by reference to the most recent, and thus the 2004, accounts that the price for Mr Corfield's shares had been negotiated and agreed.

34. The requests for clearance of the proposed corporate re-structuring had been despatched to the Revenue on 20 and 29 July 2005 (7/1168-9 and 11/ 1182-9). Thereafter, on or about 17 August 2005, Paul and JJ decided that they wanted Mr Corfield off the board of Holdings by the year end (30 September) and fully paid off by around his 65th birthday (29 October) rather than by paying him off by instalments. This decision was probably prompted by the increase in Holdings' cash reserves that was anticipated from the realisation of its investment in a

subsidiary company, UMML, which took place at about this time. Mr Hassall therefore prepared and produced budget forecasts (7/1225A-C) which showed the impact on cash flow of paying Mr Corfield off in full. Mr Hassall was not asked to undertake a similar exercise in respect of his own shares; and the forecasts show this remaining constant as a loan to "associates" of £525,000.

35. Paul was in the United States from 17 to 23 September 2005. On 19 September 2009 Mr Corfield tendered his resignation as a director of Holdings and of MVL. On the same day, the agreements for Group to purchase his shares, and the shares of Mr Hassall, were reduced to writing and signed (in Paul's absence) by JJ on behalf of Group (8/1271- 1273B), subject to a variation, in a letter dated 20 September (8/1275) from Mr Corfield, by which he required payment in full for his shares no later than 31 October 2005, with interest running from 15 September 2005. I reject all suggestions that this was "sneaked through" by Mr Hassall in Paul's absence. This was the fruition of agreements reached by both Paul and JJ with Mr Corfield at the end of March, and with Mr Hassall between 20 and 26 June 2005. I reject the evidence of Paul and JJ that this was the first that they had heard of payment by instalments for Mr Hassall's shares. Since they had asked for revised budget forecasts showing only Mr Corfield being paid off in full, they must have appreciated that Mr Hassall was not to be paid off in the same way. However, I am prepared to accept that they (or at least JJ) may not have appreciated that the instalments were to bear interest at the rate of 3% above bank base rate. I find that it was this, and this alone, that concerned JJ, and led to his telephoning Paul in the United States. In view of the cash reserves then

available to Holdings, neither brother could see any point in deferring payment for Mr Hassall's shares if this was to involve Holdings in paying interest at 3% over base. It was this which led Paul and JJ to decide that Mr Hassall (like Mr Corfield) should be paid off in full. According to JJ, the brothers agreed that they would put this to Mr Hassall as soon as Paul had returned to the United Kingdom. They had every opportunity to do so immediately before, at, or after the board meeting on 26 September 2005, especially once Mr Corfield's resignation had been accepted and he had left the meeting, leaving Mr Hassall, Paul and JJ as the only board members present (11/45-6). Instead, they chose to leave it until Monday 10 October 2005, after Mr Hassall had returned from Spain (where he had been staying on holiday from Thursday 29 September to Saturday 8 October 2005). At some time, and probably after his return from the United States on 23 September, Paul signed the waiver of pre-emption rights dated 19 September 2005 (8/1274).

36. Lord Wade sent his apologies for not attending the board meeting of Holdings on 26 September 2005, which was attended by Mr Hassall, Paul, JJ, Mr Corfield (until he left the meeting following his resignation) and Mr Parton (as company secretary) (11/45-46). The minutes of an earlier meeting on 22 July 2005 (11/42-3) were read and approved. Neither Mr Hassall nor Mr Corfield had attended that meeting, which had been chaired by Paul with JJ and Lord Wade the other board members present. At that July meeting, Mr Parton had updated the board on the meeting between the pension scheme advisers and its trustees, and he had reported that the new deficit, to be funded over 10 years, was

approximately £580,000. The trading position of MVL, and its continuing losses, had also been discussed. (The "disappointing" and "poor" performance of MVL had been a constant theme of recent board meetings, attended by both Paul and JJ; see, e.g., the minutes for the 29 March at 11/34, 31 May at 11/38 and 27 June (not attended by JJ) at 11/41).

37. At the September board meeting, stock transfers for the shares held by Mr Corfield and Mr Hassall were presented to the meeting, and the transfers were duly authorised. The company secretary was instructed to send the forms for stamping. It was recorded that the shares were being acquired by Group; and Mr Hassall advised that the shares in Holdings held by the Vernon family would be exchanged for shares in Group "at a later date". It was (and always had been) an integral part of the proposed corporate restructuring (appreciated by both Paul and JJ) that the remaining shares in Holdings held by and on behalf of Paul and JJ (and their mother) would be exchanged for shares in Group. Although the original intention, shared by both Paul and JJ (to the extent that the latter had any interest in matters of detail), had been to pay Mr Corfield (and later Mr Hassall) for their shares in instalments (funding them by loan notes, to be financed by way of dividends declared by Holdings in favour of Group, as its parent company), by 26 September 2005 Paul and JJ had determined to pay Mr Corfield for his shares in full by no later than 31 October 2005. Like Mr Hassall, they knew that the only source of payment was Holdings, which was perceived to be "cash-rich". Their common intention (despite Paul and JJ's denials) was that the exchange of shares should take place, and that Holdings should then declare a

dividend (in a sufficient sum to enable Mr Corfield to be paid in full) in favour of Group. As at 26 September 2005, there was still sufficient time to enable this to be done by 31 October 2005, even allowing for Mr Hassall's Spanish holiday. As Mr Berragan pointed out (at paragraph 23 of his written closing submissions) a board meeting could have been arranged at short notice, even by telephone, for this purpose; and a board meeting was already scheduled for 31 October. There would have been no problem in obtaining, at short notice, the approval of all the members of Holdings. All of this would have been perfectly lawful. What caused matters to descend into the realm of the unlawful was the bombshell announcement by Paul and JJ, following upon Mr Hassall's return from holiday on Monday 10 October, that they wanted not only Mr Corfield, but also Mr Hassall, to be paid out, as Paul recorded in his notebook (11/371), "today".

38. In the meantime, and on or about 3 October 2005, Mr Parton had transferred £10,000 from the bank account of Holdings to Group's account, and had sent the stock transfer forms for stamping, drawing two cheques (for £5,250 and £2,625) for the purpose (4/149). I reject the claim that he did so upon the authority and instructions of Mr Hassall, who was on holiday in Spain at this time. Rather, Mr Parton, who had been present at the relevant board meeting of Holdings, did so acting under the authority of the 26 September board minute instructing him to send the forms for stamping. He clearly regarded this as impliedly authorising him to pay the necessary stamp duty out of Holdings' funds (which were, after all, the only funds immediately available for the purpose).

39. I accept Mr Hassall's account of the events of Monday 10 October. The decision to pay Mr Hassall in full for his shares was taken unilaterally by Paul and JJ, and was announced to Mr Hassall, without prior notice, on Monday 10 October. It was unwelcome to Mr Hassall, who protested against it, regarding it as unfair to Mrs Vernon (who would receive only slightly less than half of what she had been expecting for her interest in Sandfield Securities Ltd, a property investment vehicle which was to be acquired by Group) and also to himself (since he would lose the benefit of a welcome income stream by way of interest), and viewing it (not without justification in view of the reference in Paul's notebook to Mr Parton becoming the chairman of Holdings at 11/384) as the prelude to being asked to retire from the board of Holdings. But thinking that he could not win any argument with Paul and JJ about the matter, reluctantly he went along with their decision. With the benefit of hindsight, and had he been thinking clearly (which he was not), Mr Hassall should have objected that he (and Mr Corfield) could not properly be paid out for their shares until Holdings had validly declared dividends (in a sufficient sum) in favour of Group. Instead, Mr Hassall conveyed to Mr Parton the express instructions of Paul and JJ to transfer £2.07 million from Holdings to Group, and to draw 3 cheques (4/152) on Group's account for £525,000 in favour of Mr Hassall, £1,050,000 in favour of Mr Corfield, and £495,000 in favour of Mrs Vernon (in part settlement of her interest in Sandfield Securities Ltd). In the course of doing so, Mr Hassall discussed with Mr Parton (as the latter effectively accepted in cross-examination) the need for the share exchange to take place and for a dividend to be declared. Mr Parton caused £2,070,000 to be transferred from Holdings to Group, the transfer of

funds being effected on 11 October 2005 (4/169 and 4/149); and he drew the three cheques which Mr Hassall then passed on to Paul and JJ for their signature. When handing the unsigned cheques to Paul, and consistently with what he had already told Mr Parton, Mr Hassall reminded Paul (in JJ's presence) of the need for a dividend to cover the transfer of funds from Holdings to Group. (Mr Hassall may well have used the phrase a "targeted" dividend.) At the same time, he mentioned that Mr Parton had expressed some concern that clearance for the transaction might have to be sought from the Pensions Regulator. Notwithstanding this, both Paul and JJ signed the cheques (4/195A), albeit with less enthusiasm on the part of JJ. It was therefore Paul and JJ who caused Holdings to lend money to Group to enable it to fund the purchase of the shares of Mr Corfield and Mr Hassall. I reject Mr Bartley Jones's submissions that Mr Hassall's "carelessness over unlawful financial assistance cannot be divorced from his wish to obtain full value for his shares"; and that "to seek to blame everyone else (in particular Paul) for what actually occurred is to warp the realities". It is Holdings' case that seeks to distort the true state of affairs. I also reject Mr Bartley Jones's submission that Mr Hassall had been "derailed from the proper course of a loyal fiduciary".

40. The cheques in favour of Mr Hassall and Mrs Vernon cleared on 13 October; and Mr Corfield's cheque cleared the following day. At around this time, I am satisfied (both from his evidence, and from his contemporaneous emails to Richard Davis of Browne Jacobson dated 11 October (8/1353-4 and 8/1358) and Sandra Kemish of SBJ Benefit Consultants (the scheme administrators) dated 12

October 2005 (8/1369)) that Mr Hassall genuinely, and reasonably, thought that there would be no difficulty in obtaining any necessary pensions clearance for the proposed share exchange, and the declaration and payment of any dividend by Holdings to Group, because of the size of Holdings' distributable reserves, and its "Net Worth". I am also satisfied that Mr Hassall did not have in mind the contents of Sandra Kemish's email of 6 October (8/1344), sent when he was on holiday in Spain, during the course of his discussions with Paul and JJ on 10 October. It was in this email that Ms Kemish had advised Mr Hassall that he should draw her opinion (that the employer should treat the sale of the minority shareholdings in Holdings as a notifiable event) to the attention of the remaining shareholders. The probability is that Mr Hassall had simply not read this email before 10 October 2005. This would be consistent with the fact that, on 11 October, Mr Hassall sent an email to Mr Davis (8/1353-4), with copies to Ms Kemish and Mr Parton, commenting upon Mr Davis's email to Sandra Kemish of 29 September (8/1354-5), but making no reference to her email of 6 October (or her chasing email of 11 October 2005 at 8/1352). Mr Hassall's email (which, from its terms and measured language was probably drafted in advance of the traumatic events of 10 October) provoked a response from Ms Kemish on 11 October (also at 8/1353), which may have interrupted Mr Hassall's perusal of the previous run of emails. If (contrary to the probabilities) Mr Hassall had previously read Ms Kemish's email of 6 October 2005, I am satisfied that it was driven from his mind by Paul and JJ's unheralded announcement on 10 October that they wanted Mr Corfield and Mr Hassall paid off in full that day. Had this email been in his mind, Mr Hassall would have been likely to have mentioned it

in the context of Mr Parton's views about the need for clearance from the Pensions Regulator.

41. In an email sent at 5.56am on Thursday 20 October 2005 (4/128-9) Mr Hassall resigned from the board of Holdings, having formed the view that he was no longer valued by Paul and JJ and that they did not want him to stay on. He was also concerned that Paul had spoken down to him, forbidding him to agree a severance package with Louise Hewson. He considered Paul's management style was inconsistent with his own; and he was concerned that all the worry he was feeling might provoke another heart attack. According to his wife's diary (11/410), Mr Hassall's decision to retire from Murray Vernon "after all these years" had been taken on Tuesday 18 October. She wrote how she felt "so sorry for him"; and she expressed the hope that "all will be OK". Mr Hassall had informed Ron Brookes (of MVL) and Mr Parton of his decision on the following day (Wednesday 19 October).

42. In a message to JJ shortly after Mr Hassall's resignation (8/1440-1) Paul expressed his view that, by retiring without any prior notice, Mr Hassall had let the family (and especially their mother) down "in a huge way"; but he went on to express the belief that "in the long run it may be a blessing in disguise", although "only time will tell". In an email sent on the afternoon of 20 October (8/1428), Mr Hassall invited Paul to "rest assured" that he was "continuing to work on outstanding legal etc matters re the Group Recon". DLA contacted Mr Hassall by email on 20 October regarding the need for clearance from the Pensions

Regulator. Mr Hassall sought the necessary authority to act from Mr Parton on Wednesday 26 October (8/1513) only to receive the response that Mr Parton had already briefed DLA Piper (solicitors) on the situation and had received some preliminary advice (8/1510). (Mr Parton appears to have assumed responsibility for this particular matter on 21 October, obviously feeling unsure about the extent of Mr Hassall's continuing involvement: 8/1439.) Also on 26 October (and following an earlier telephone conversation), Mr Hassall sent an email to Bowcock Cuerden regarding the corporate restructuring (8/1516) in which he referred to Group's purchase of the 15% minority shareholdings in Holdings as having been "on deferred terms". In an email to Paul (copied to JJ, Mr Parton and Lord Wade) on the morning of Friday 28 October (8/1548), Mr Hassall provided updates on Group for the forthcoming board meeting of Holdings. These included reference to the solicitors preparing a "simple agreement" for the exchange of the family's shares in Holdings for shares in Group.

43. Mr Hassall appears to have taken no steps towards the declaration by Holdings of any dividend in favour of Group. I find that he took the view that this was a matter for Mr Parton and the board of Holdings to attend to, having taken any appropriate professional advice (which he knew they were in the course of receiving). Having alerted both Mr Parton and Paul (in the presence of JJ) to the need for such a dividend on 10 October 2005, and since this was primarily a matter for Holdings (of which he was no longer a director) rather than Group, I do not consider that this was an unreasonable position for Mr Hassall to adopt, at least in the absence of any express request for assistance in this regard on behalf

of Holdings. Mr Hassall did refer to the intention, once Holdings became a wholly owned subsidiary of Group, to pay dividends from Holdings to Group "up to a level acceptable to all parties" in his email to Mr Parton of 1 November 2005 (9/1559), which was copied to Paul, JJ and Lord Wade. Mr Parton's response (9/1556a) was to note Mr Hassall's comments, and to agree that DLA needed to "walk" Paul and JJ through the events. This must have fortified Mr Hassall in his understanding. Once a sufficient dividend had been declared in favour of Group, it would be in a position to repay the "loan" which Group had effectively received from Holdings in order to enable it to make the payments to Mr Corfield and Mr Hassall (and Mrs Vernon) which had been effected on 10 October 2005. It is clear that there were (and always had been) ample distributable reserves within Holdings to enable such a dividend to be declared lawfully.

44. At the next board meeting of Holdings on 31 October 2005 (which was chaired by Lord Wade and attended by Paul, JJ, Mr Parton and Mrs Vernon), the board discussed the share exchange, and considered information from DLA and the scheme administrator regarding pension clearance procedures in advance of the share swap. The information contained in the report was to be considered at the next board meeting (11/47-9). That meeting (scheduled for 7 November) did not take place. On 7 November 2005, DLA advised that it was "highly doubtful" that the proposed restructuring could remove the risk to group assets from adverse changes in the funding position of the pension scheme (9/1587). This was the first occasion on which it had been suggested that the "ring-fencing of risks" in

the context of "pensions exposure" by means of the corporate restructuring (which had been one of Mr Shaw's points for consideration at the seminal meeting of 24 January 2005 at 5/507-8) might not be capable of achievement. At the next board meeting, on 5 December 2005, Paul was appointed chairman of the board; and he advised that the proposed share swap was "now in abeyance" (11/51-2). By this time, Mr Hassall had attended a meeting with Chris King of Bowcock Cuerden on 24 November 2005 (9/1656-8) at which the declaration of a dividend by Holdings in favour of Group of up to about £5 million had been discussed, and the issue of unlawful financial assistance in breach of section 151 of the *Companies Act 1985* had been raised. Mr Hassall had pointed out that Group had borrowed to pay off "the loans" (presumably to Mr Corfield and himself) so that they needed to "clear off the borrowing as soon as possible". At about the time of the 5 December board meeting, Mr Hassall resigned from Group's board (9/1671 and 1676); and he also proffered to Paul the blank share transfer form relating to his share in Group which was later to be filled out in favour of Paul in or about June 2006.

45. On 5 December 2005 MVL was placed into administration. At no time prior to this was it contemplated by Mr Hassall that MVL would cease to trade or become subject to any form of insolvency procedure. By as late as mid-November 2005, all of those involved with MVL were still engaged in attempting to turn the company round. Mr Hassall could not have anticipated the write-downs in the 2005 accounts of Holdings that resulted from the decision to put MVL into administration.

46.I accept Mr Ashworth's submissions that the dispute over the funding of the pension scheme is largely an "irrelevant side show", and that Mr Bartley Jones has not established any breach of duty on the part of Mr Hassall in relation thereto. Holdings has not demonstrated that in or up to October 2005 buyers of company shares had any established practice of making a deduction for any pension scheme deficit on a "buy out" basis when calculating the value of a company's shares on a net asset basis. In any event, such a deduction would have been inconsistent with the basis of valuation expressly adopted in Mr Corfield's option agreement. When fixing the price to be paid for Mr Corfield's shares, Mr Hassall acted entirely properly in reducing the net asset value of Holdings by the amount (£910,000) of the pension deficit as noted in the 2004 accounts. Indeed, because of the impact on the pension deficit of the Fastnet company sales, this in fact resulted in an under-statement of Holdings' true net asset value by some £330,000 (and a corresponding saving on the price paid for Mr Corfield's shares). In any event, Mr Parton had updated the board of Holdings on the true position regarding the pension deficit at the board meeting attended by Paul, JJ and Lord Wade (but not by Mr Hassall or Mr Corfield) on 22 July 2005 (11/42-3). The board of Holdings had in no way been left in ignorance in this respect.

47.I also accept Mr Ashworth's analysis and submission (at paragraphs 199 and 208-245 of his written closing submissions) that there is no substance in the claim that Mr Hassall acted unreasonably in ignoring warnings from the pension scheme administrators. Even if clearance was needed from the Pensions Regulator, it has

not been established that this could not have been obtained. The reason for not pursuing the application for clearance was the decision (to which Mr Hassall was not a party) not to proceed with the proposed exchange of shares and corporate restructuring. That was a decision that Paul communicated to the board of Holdings on 5 December 2005 (11/51). There is no evidence that the Pensions Regulator has ever objected to Group's purchase of the minority shareholdings in Holdings. Nor is there any evidence that he would have sought to challenge or impugn the proposed restructuring, or that any loss would have been sustained by Holdings had it proceeded without clearance from the Pensions Regulator.

Conclusions from the facts

48. Having made my findings of fact, I arrive at the following conclusions. I have already indicated that the option agreement dated 30 August 2001 was valid and legally enforceable by Mr Corfield. I hold that, on or about 11 October 2004, Mr Corfield validly exercised his put option under that agreement. Holdings waived any requirement for written notice of exercise. The agreement provided for no minority discount to be applied to Mr Corfield's shares. On the true construction of the option agreement, the relevant accounts for the purpose of determining the price to be paid for those shares were the 2004 accounts, rather than the 2005 accounts. The 2004 accounts are the accounts for the period most recently ended before the exercise of the option, and thus reflect the company's performance during the last full period before the date of exercise. They are also the accounts for the calendar year during which the option was exercised. I hold that these

were the accounts for "the year in question". Once they had been prepared and audited, the 2004 accounts constituted the most recent and up-to-date audited accounts for Holdings; and the use of any later accounts would fly in the face of the commercial realities of the situation. One of the circumstances in which the option might be exercised was by the giving of written notice between certain dates during the months of October and November in any year; and it therefore made sense for the parties to provide that the price should be assessed by reference to the accounts for the period ending 1 October in that year, otherwise it would be likely to take some 18 months or more before a price could be established for the shares (with consequential difficulties in implementing the provisions for interim payments based upon the previous year's audited accounts). The fact that (in certain circumstances) the option might be exercised at another time cannot detract from the fact that the only commercially sensible construction of the option agreement is to assess the price by reference to the audited accounts for Holdings' most recent accounting year, which, in the events that happened, means the 2004 accounts. Even JJ accepted (in cross-examination) that the 2004 accounts were the appropriate accounts to use for the purpose of determining the price payable for Mr Corfield's shares.

49. It follows from my conclusion that Mr Corfield's shares were acquired pursuant to the valid exercise of his put option, and from paragraph 2.11 of the experts' joint statement, that the price of £1,050,000 at which Group agreed to purchase his shares was a fair price. Accordingly, Mr Hassall could not have been in breach of any fiduciary duty in negotiating that price, which was in any event freely agreed

by Paul and JJ, who (together with Mr Hassall) constituted the board of Group, the purchasing company, and comprised its legal and beneficial owners. Even if Group had not in fact been acquiring Mr Corfield's shares pursuant to the valid exercise of his put option, Mr Hassall had honestly and reasonably believed this to be the case.

50. I therefore turn to consider whether Mr Hassall was in breach of fiduciary duty in relation to the price of £525,000 agreed for his own shares. I have already found that this price was not dictated by Mr Hassall, but was freely offered by Paul and JJ by reference to the price which had previously been agreed for Mr Corfield's shares (before Mr Hassall had formulated any idea of selling his own shares). There is no dispute as to the content of the core fiduciary duties owed by Mr Hassall as a director of Holdings. These are set out at paragraph 17 of the particulars of claim, and are admitted in the defence. Corresponding duties were also owed by Paul and JJ. As explained by Lewison J in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at paragraphs 1305-6, the fundamental rule that obliges a fiduciary to account for any personal benefit or gain has two separate strands, which have been conveniently labelled the "no conflict rule" and the "no profit rule". On a true analysis, it seems to me that it is the former, rather than the latter, rule which is potentially engaged in the present case. Mr Hassall already owned his 10,000 shares in Holdings. He did not use his position as a director of Holdings to acquire them; and Holdings was in no position to sell them or to profit from their sale. There was no question of Mr Hassall obtaining or receiving any benefit or gain by reason, or by the use, of his fiduciary position

as a director and the chairman of Holdings, or by his misappropriation or misuse of any opportunity or knowledge resulting from that position. This is not a case where a director has made a secret profit or diverted a corporate opportunity to himself at the expense of his company. I reject Mr Bartley Jones's submission that the profit realised on the sale of Mr Hassall's existing minority shareholding is sufficient to attract the application of the "no-profit" rule, even if the deteriorating financial position of the Murray Vernon group as a whole means that the value of his shares would have been less if they had been valued by reference to figures later than those recorded in the 2004 accounts. In my judgment, the relevant rule is that which appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty, or a significant possibility of such conflict.

51. Founding himself upon the developing equitable jurisprudence of a proscriptive fiduciary duty to disclose information or misconduct to be derived from the Court of Appeal's decision in *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244; [2005] 2 BCLC 91, Mr Bartley Jones argues that Mr Hassall was under a fiduciary duty to alert Holdings to the fact that the price which had been agreed for his shares represented a gross over-valuation. Although it is not alleged that he consciously suppressed the differences between his own position and that of Mr Corfield, it is said that, blinded by the situation of conflict which he had allowed himself to enter into, Mr Hassall allowed his own personal interests to prevail over his fiduciary duties as a director by failing to draw the

attention of the other directors of Holdings to those differences, and also to other matters relevant to the true value of his shares (including the fact that his shareholding should attract a substantial minority discount from his percentage share of the company's net asset value). I am not certain that the decision in *Item Software* actually goes this far; but I am content to proceed on the basis (without necessarily deciding) that it supports Mr Bartley Jones's position.

52. Since this claim is brought by Holdings (and not by Group), it must establish that Mr Hassall was in breach of fiduciary duties owed to itself, and not merely to Group. Mr Ashworth contends that Mr Hassall owed no fiduciary duties to Holdings in relation to the sale of his shares in that company since it was Group (and not Holdings) that was, and was always intended to be, the purchaser of those shares. Neither at the date (about 26 June 2005) when the price for Mr Hassall's shares was agreed, nor on 19 September (when the agreement to purchase those shares was reduced to writing), nor at the board meeting of 26 September 2005 was Holdings bound to make any payment to Group to enable it to purchase those shares. Mr Ashworth submits that the duties asserted on the part of Mr Hassall towards Holdings in relation to a transaction to be entered into between himself and Group (a separate legal entity) "are entirely novel and wholly unsupportable". He argues that it was never intended that Holdings should have any interest in the shares to be acquired by Group, and Holdings never assumed any obligation to pay for those shares. Since Holdings' only involvement in the transaction was to be the declaration of a dividend to be paid out of its distributable profits, which would then be used by the recipient to finance the

acquisition of the shares, Holdings had no interest in the value to be ascribed to Mr Hassall's shares by the parties to the transaction. The money which was to be used to purchase the shares was Group's money and not Holdings' money. Still less did Mr Hassall, as a director of Holdings, come under any fiduciary duty to inform that company that the price which Group had agreed to pay for his shares represented an overvaluation (if, which is denied, that was the case). Nor could the arrangements between Mr Hassall and Group give rise to any relevant conflict between Mr Hassall's personal interests and those of Holdings since, as the company whose shares were being acquired by Group, Holdings had no interest in the transaction. Because Holdings was not going to benefit from any form of security over the shares, the price to be paid by Group to Holdings was, for these purposes, irrelevant.

53. In response to these submissions, Mr Bartley Jones argues that at the time that Holdings provided the finance for the purchase of the shares, no dividend had been declared by Holdings in favour of Group, so that it was Holdings' money (and not Group's) that was used for the share purchase. Factually, this is correct; but I do not consider that it assists Mr Bartley Jones. On Holdings' case, the latest point in time at which Mr Hassall should have made disclosure to Holdings must have been at the board meeting on 26 September 2005. At that time, as I have found, the intention was that the share purchase was to be financed by way of the declaration of dividends by Holdings in favour of Group. The fact that this part of the transaction subsequently underwent a fundamental change (at the behest of Paul and JJ) on 10 October 2005 cannot, in my judgment,

retrospectively give rise to a fiduciary duty of disclosure on the part of Mr Hassall if none previously existed. But Mr Bartley Jones has a second limb to his response to Mr Ashworth's submission. If (as I have found) the intention of Holdings (shared by Mr Hassall) was, and always had been, that the share purchase should be financed out of dividends declared by Holdings in favour of Group, then clearly the capital reserves of Holdings would be correspondingly reduced. Mr Bartley Jones submits that this is sufficient to give rise to fiduciary obligations on the part of Mr Hassall (in the respects asserted by Holdings) which were owed towards Holdings. In response to (possibly ill-considered) prompting from the bench, Mr Bartley Jones emphasised that equity looks to the substance of the transaction rather than its form. He also pointed out that Mr Hassall himself had recognised that he would have been in a situation of conflict had he been negotiating the price for Mr Corfield's shares at a time when he had already envisaged selling his own shares in Holdings. Mr Bartley Jones emphasises the harsh, inflexible and inexorable nature of the no conflict and the no profit rules, which are not founded upon any dishonesty or conscious impropriety.

54. With some hesitation, and despite the persuasive terms in which it was expressed, I also reject this second limb of Mr Bartley Jones's submission. Holdings was, and was perceived to be, both solvent and in possession of substantial distributable reserves, which it was always envisaged should ultimately enure for the benefit of the members of the Vernon family who were its shareholders. Against that background, it does not seem to me to be sufficient, in order to give rise to a

fiduciary duty on the part of Mr Hassall in his capacity as a director of **Holdings,** when fixing the price to be paid for the purchase of his shares in that company by **Group**, that (as he appreciated) the price that would be paid by Group would in fact be derived from the distributable reserves of Holdings. By the time the purchase price was paid, the purchase moneys would have ceased to be Holdings' own moneys, and would belong to Group. Mr Hassall's personal interest, in achieving the fullest possible price for his shares in Holdings, did not conflict with any fiduciary duty he owed to Holdings since it was not Holdings which was to purchase the shares, nor was it Holdings' own money that was to be used to fund the purchase. As for Mr Hassall's own perception, whilst this may be relevant, it cannot be determinative of the court's decision on a point of law. In any event, he may well have been right in thinking that, in the hypothetical situation postulated, the no conflict rule would have been engaged, as between himself and Group (as distinct from Holdings), obliging him to account to Group for any personal benefit or gain obtained or received by him in breach of the no conflict rule. Lest I am wrong on this point, however, I shall consider the position on the footing that Mr Hassall did indeed owe fiduciary duties to Holdings in relation to the fixing of the price for his own shares.

55. On this hypothesis, it seems to me that any fiduciary duty of disclosure fell to be discharged at the meeting of the board of Holdings on 26 September, when the stock transfers were presented to the board and the transfers were duly authorised, if no sufficient disclosure had previously been made. It does not seem to me that Holdings can rely upon the lack of any disclosure to Lord Wade since

he had sent his apologies for absence from the relevant board meeting. (Although Lord Wade was apparently available to give evidence as a witness for Paul and JJ, they failed to call him; and I therefore decline to draw any inference in their favour that Lord Wade would have given evidence which would have tended to support their case.) Mr Corfield had previously tendered his resignation from the board; and he withdrew from the meeting after this was duly accepted. For present purposes, therefore, the board of Holdings comprised Mr Hassall (as chairman), Paul and JJ. (They were, of course, also the only directors of Group.)

56. The matters which Holdings asserts that Mr Hassall should have disclosed to the board are addressed at paragraph 138 of its closing written submission, to which Mr Ashworth responds at paragraph 360 of his written closing. I accept Mr Ashworth's submission that there was nothing which Mr Hassall failed to draw to the attention of the board about which he knew but the other relevant board members (Paul and JJ) did not. They all knew that Mr Hassall was selling his own shares in Holdings to Group. It hardly lies in the mouths of Paul and JJ to complain that they did not know that Mr Corfield's shares were being acquired pursuant to the exercise of his put option, whereas Mr Hassall did not have the benefit of any corresponding put option, in circumstances where it is their case that Mr Corfield had never validly exercised his put option. But, in any event, I have already found that Paul and JJ were present at the meeting at which Mr Corfield validly exercised his put option. They therefore knew the basis upon which Mr Corfield's shares were being purchased. If Paul and JJ chose not to reacquaint themselves with the terms of that option agreement (which they had

both signed), that was entirely a matter for them, as competent, intelligent and responsible adults. Mr Hassall never suggested that he had the benefit of a similar option agreement; and neither Paul nor JJ ever suggested that they had thought that he did.

57. It is accepted by Holdings, Paul and JJ that Mr Hassall did not consciously or deliberately withhold any information from the board with a view to increasing the price he would obtain for his shares. Despite new articles of association having been approved by the shareholders and the board of Holdings as recently as 28 February 2005, everyone – Mr Hassall, Paul and JJ – had forgotten about the provision in the articles for a 25% discount from net asset value. In this regard, Mr Hassall, Paul and JJ were all in the same boat; and no criticism can properly attach to Mr Hassall in this regard. Although Mr Hassall had accepted in evidence that he knew that, in general, a minority shareholding attracted a discount from the corresponding percentage share of net asset value, he had also made it clear that he did not consider that this was appropriate to the circumstances of a company such as Holdings, which had been regarded effectively as akin to a quasi-partnership. Again, I cannot understand how any criticism can properly attach to Mr Hassall in failing to mention that a minority shareholding should attract a discount when (as I have found) he honestly and reasonably believed that this was inappropriate in all the circumstances.

58. Everyone knew that the price agreed for Mr Corfield's shares had been prepared on the basis of the figures contained in the 2004 accounts; and Paul and JJ chose to

adopt the same basis when they agreed the price to be paid for Mr Hassall's own shares. Everyone knew about the continuing trading losses being experienced at MVL and its consistently disappointing performance since this had been a constant source of concern and discussion at board meetings throughout the course of 2005. Further, the information packs prepared for each board meeting had included all relevant and up-to-date management accounts. Indeed, Paul had already rejected, as "too disruptive", proposals from Mr Corfield for strengthening the management of MVL made with a view to turning that company around. The board knew all about the pension deficit since this had been reported by Mr Parton at the meeting chaired by Paul (in the absence of Mr Hassall), and attended by JJ, on 22 July 2005. In any event, the price for Mr Corfield's (and thus of Mr Hassall's) shares had been agreed upon the basis of the pension deficit of £910,000 noted in the 2004 accounts whereas, by July 2005, this had been reduced to £580,000 (as a result of the departure from the scheme of the Fastnet Fish members). Had Paul or JJ wished to bring any of these matters into account when calculating the price to be paid for Mr Hassall's shares, they could have done so.

59. It follows from the foregoing that, even if Holdings had established the existence of any relevant fiduciary duty owed to it by Mr Hassall in connection with the agreement of the price to be paid for his shares, I am satisfied that Mr Hassall did not act in breach of that duty. There was nothing which he withheld from the board of Holdings. In the context of the board's pre-existing perceived and actual state of knowledge, and in the particular circumstances of this case, I am satisfied

that Mr Hassall discharged any duty to make full disclosure of all facts material to the transaction. I am also satisfied that the terms that were agreed for the purchase of his shares were fair terms.

60. Had I reached a different conclusion, it would have been necessary for me to consider whether Mr Hassall should be relieved from liability under section 727 of the *Companies Act 1985*, on the footing that he had acted "honestly and reasonably" and "ought fairly to be excused" in all the circumstances of the case. Those circumstances include (but are not limited to) the facts that he was a qualified accountant, who had served as a director of the relevant company for some 30 years, and was in receipt of remuneration for his services. It is not in dispute that Mr Hassall acted honestly at all times. In my judgment, Mr Hasall also acted reasonably in negotiating and agreeing the price both for Mr Corfield's shares, and for his own shares, in Holdings. Clearly, Mr Hassall ought fairly to be excused in relation to the price paid for Mr Corfield's shares, since this was a sum properly due to, and received by, Mr Corfield, from which Mr Hassall derived no personal benefit. So far as the price paid for his own shares is concerned, in my judgment Mr Hassall ought fairly to be excused to the extent that the price he received for those shares represented their fair value. Since I am not satisfied that Mr Hassall received more than the fair value for his shares, relief would have been granted to the full extent of the £525,000 sale proceeds. On the evidence (including that of Ms Longworth), and in all the circumstances of the case, I do not consider that Mr Hassall's shareholding should have attracted any minority discount on a sale to Group, which was effectively

regarded as being in the same position as the holder of the remaining shares in Holdings. Had it been appropriate to apply any minority discount, the appropriate discount to have adopted would have been the 25% provided for in Holdings' articles. In my judgment, it would have been inappropriate to have applied the "buy out" basis for the purpose of calculating Holdings' potential liability for the deficit in the pension scheme since everyone envisaged that Holdings would continue as a going concern. It follows that an appropriate sum had already been factored into the price agreed for Mr Hassall's shares on account of the pension scheme deficit.

61. I turn next to consider the allegation that the payments of £7,875 (in stamp duty) and £1,575,000 (for the shares of Mr Corfield and Mr Hassall) constituted unlawful financial assistance by Holdings in the purchase of its own shares, contrary to section 151 of the *Companies Act 1985*. In the circumstances that prevailed following the instructions from Paul and JJ on 10 October 2005 to transfer funds from Holdings to Group to enable Mr Corfield and Mr Hassall to be paid for their shares that very day, it is not in dispute that "financial assistance" was given within the meaning of the 1985 Act. The question is whether that financial assistance was "unlawful".

62. Mr Ashworth relies upon the "incidental purpose" exception to the section 151 prohibition contained in section 153 (1) of the 1985 Act, which permits a company to give financial assistance for the purchase of its shares if the giving of such assistance "is but an incidental part of some larger purpose of the

company". Distinguishing *Brady v Brady* [1989] AC 755, he argues that that was the position here, on the basis that the funding provided by Holdings to Group went considerably further than the mere purchase of the minority shareholdings of Mr Corfield and Mr Hassall, and was but one part of a much wider restructuring of the Murray Vernon group's affairs which had been in the planning since early in 2005.

63. I reject this submission. In my judgment, the funding provided by Holdings to enable Group to purchase the shares of Mr Corfield and Mr Hassall cannot properly be characterised or described as "but an incidental part of some larger purpose of" Holdings. Both historically, and in reality, the purchase of Mr Corfield's shares (and later Mr Hassall's) and the corporate restructuring were separate, although the former "spawned" the latter (as Mr Halsall accepted in cross-examination). The purchase of the minority shareholdings, and the finance provided to achieve this, were not an "incidental" part of the wider company reorganisation. They were an independent objective, which preceded, and existed independently of, the corporate restructuring. Indeed, if anything, the company reorganisation would seem to me to have been an "incidental part" of the purchase of Mr Corfield's (and later Mr Hassall's) shares.

64. I therefore find that Holdings was in breach of section 151. Although this breach was initiated by Paul and JJ (rather than Mr Hassall), and they must bear the primary responsibility for it, I cannot absolve Mr Hassall of all legal responsibility for having caused Holdings to provide unlawful financial assistance for the purchase

of the two minority shareholdings. Mr Hassall said and did nothing which might have served to deter Paul and JJ from acting in advance of the declaration of a lawful dividend in favour of Group; and he cashed his own cheque knowing that this had not been done. In this one respect, therefore, I find that Mr Hassall acted in breach of the fiduciary duties he owed to Holdings. I am not persuaded by Mr Ashworth's submission that he cannot be held to be in breach of fiduciary duty because, by going along with Paul and JJ's wishes, as those of the majority shareholders, Mr Hassall honestly believed that he was acting in the best interests of Holdings. Mr Hassall had a duty to observe the provisions of the *Companies Act 1985*, including the prohibition against the giving of unlawful financial assistance. Moreover, although Paul and JJ controlled the membership of Holdings (and so could, in time, have reconstituted the board), they did not necessarily control the board as it was then constituted (since they had only 2 votes out of 4). Paul and JJ had Lord Wade, as well as Mr Hassall, to contend with. No matter how stubborn and determined Paul and JJ may have been, had Mr Hassall alerted them to the unlawfulness of their proposed actions, I consider that they would have paused before proceeding. Thus, I find that Mr Hassall's conduct did contribute to the breach of section 151. I emphasise that this holding owes nothing to Holdings' claim (which I have already rejected) that Mr Hassall's involvement in the breach of section 151 was in some way motivated or influenced by the fact that he had allowed himself to be placed in a situation of conflict concerning the purchase of his own shares.

65. However, I am entirely satisfied that Holdings has suffered no loss as a result of this

breach of section 151, as both Paul and JJ were constrained to admit during the course of their cross-examination. It was always the intention that Holdings should be the source of the funds for the purchase of the minority shareholdings of Mr Corfield and Mr Hassall. Had the board of Holdings been alerted to the possibility of any breach of section 151, the financial assistance provided by Holdings to Group would have been restructured so as to fall outside the scope of the section 151 prohibition, with the share purchase being financed and completed in an entirely lawful manner. This would have been achieved by paying the money as a lawful dividend, which is expressly permitted by section 153 (3) (a) of the 1985 Act. There were sufficient distributable reserves within Group to enable this to be done. Once the members of the Vernon family had exchanged their shares in Holdings for shares in Group, a dividend could have been declared by Holdings on all its shares in a sufficient sum to fund the payment for the minority shareholdings. Had there been any problem or delay in completing the share exchange (because, e.g. of any perceived need to obtain clearance from the Pensions Regulator), Paul, JJ and Mr Hassall's company could have transferred their A shares to Group; and Holdings could then have declared a dividend on those shares. I have no doubt that Mr Hassall would have been prepared to co-operate to this end, either by procuring the transfer of the A share by his company (as he did during the course of the trial) or by waiving any interim dividend declared on his A shares. There were other ways (identified by Mr Ashworth at paragraph 341 of his written closing submissions) in which the payments could have been financed by way of a lawful dividend.

66. Similarly, the declaration of a dividend after the event (as envisaged by Mr Hassall at his meeting with Bowcock Cuerden on 24 November 2005, and as Bowcock Cuerden themselves proposed the following June) would have resolved the problem presented by the breach of section 151. The financial assistance in fact provided (by way of loan on 10 October 2005) could have been remedied by Holdings declaring a dividend in favour of Group, to be applied by it in repayment (or cancellation) of that loan. Paul and JJ controlled the boards of both Holdings and Group, and so could have caused the necessary documents to be prepared and book entries to be made. In this connection, it is relevant to note that, in my judgment, Holdings had a restitutionary claim against Group to recover the unlawful financial assistance it had provided in breach of section 151. I reject Mr Bartley Jones's submission that a company which has provided unlawful financial assistance in breach of section 151 is precluded from bringing a claim in restitution to recover it back by the rule that money paid under an illegal contract is irrecoverable. In my judgment, such a case clearly falls within the exception to the rule (described in *Goff & Jones: The Law of Restitution*, 7th ed (2007) at paragraphs 24-005 and following) which permits recovery where the transaction was rendered illegal under a law made for the protection of the party seeking to effect recovery. In my judgment, in the context of the present case, section 151 was enacted for Holdings's protection. By pursuing a restitutionary claim against Group for the recovery of the unlawful financial assistance, Holdings would merely have been seeking to undo the consequences of an illegal transaction, and not seeking to take advantage of it. Holdings could equally have taken steps to rectify the illegality and mitigate its loss by declaring a dividend in

favour of Group; and, had it done so, it would have avoided all the consequences of the financial assistance it had provided.

67. In the light of my conclusion on the issue of loss, it is unnecessary for me to consider the grant of relief under section 727 in respect of the breach of duty constituted by the provision of unlawful financial assistance under section 151. Had it been necessary to do so, I would have granted Mr Hassall such relief. It is not in dispute that he acted honestly. Notwithstanding my observations at paragraph 64 above, I consider that Mr Hassall acted reasonably in the difficult circumstances in which he found himself on 10 October. Matters went awry, and the financial assistance occurred, because of Paul and JJ's unilateral decision to pay Mr Hassall off all in one go, and to bring forward the payment for his shares to the very day that this decision was communicated to him. Mr Hassall accepted the situation, but he drew the need to declare the necessary dividend to the attention of both Mr Parton and Paul. Mr Hassall genuinely, and reasonably, believed that the position could, and would, be regularised, and that Holdings would therefore suffer no loss. It was Paul and JJ who failed to take the necessary steps to correct the position. In the context in which the breach of the section 151 prohibition occurred, any knowledge which Mr Hassall had acquired, in connection with the realisation of Holdings' interest in UMML, about the requisite formalities attending the purchase by a company of its own shares, is of no relevance. As for the third element of the claim for section 727 relief, Mr Hassall had served the Vernon family, and their group companies, loyally and selflessly for some 30 years. He derived no personal benefit, and Holdings has suffered no actual loss,

from the breach of section 151 because (as I have previously indicated) the transaction could (and would) have been restructured in such a way as to have enabled the share purchase to be financed and completed in an entirely lawful manner. Indeed, although in the event I find it unnecessary to make any specific finding on the point, for the reasons indicated in paragraph 383 (d) of Mr Ashworth's written closing submission, the likelihood is that, even without the declaration of a dividend, the "whitewash" procedure could have been used, thereby avoiding any question of unlawful financial assistance. In these circumstances, I consider that Mr Hassall ought fairly to be excused.

68. Had the point arisen, I would not have been prepared to grant similar relief to either Paul or JJ. It was they who created the situation that led to the events of 10 October, which gave rise to the unlawful financial assistance in the purchase of Mr Corfield's and Mr Hassall's shares. Although they acted honestly at the time, I do not consider that they acted reasonably. Nor ought Paul and JJ fairly to be excused for their own beaches of duty. On their own evidence, they had formed the intention of paying Mr Hassall off in full on or about 19 September 2005; yet they said nothing to Mr Hassall (or to the boards of Holdings or Group) until 10 October. JJ's evidence was that they decided to raise the matter with Mr Hassall as soon as Paul returned to the country from the United States. However, they said nothing about it when they next met Mr Hassall on 26 September. Had it been raised at the board meeting on that day, Mr Hassall would have had sufficient opportunity to consider the position, rather than having the matter sprung upon him unawares on 10 October. He would have been able to think

clearly about both the content and timing of the steps which needed be taken to declare the necessary dividend, and he could have set these in train before his departure for Spain on 29 September. Mr Parton, too, would have had ample opportunity to consider the implications of this new proposal, particularly in the context of the pension scheme deficit. Matters might well have taken a very different course. Paul and JJ were unable to provide any satisfactory explanation as to why they had not raised the matter until the very day that they intended to make the payment for the shares. It was Paul and JJ who controlled the board of Holdings after Mr Hassall's resignation on 20 October. Both they, and Mr Parton, had been told by Mr Hassall on 10 October of the need for a dividend to be declared by Holdings; yet they did nothing to implement this. Even after the breach of section 151 had been identified, and Bowcock Cuerden had suggested (in June 2006) how the position might be rectified, Paul and JJ took no steps to declare a lawful dividend in favour of Group and repay the unlawful financial assistance (whilst taking steps, including the backdating of documents, to ensure that they rectified any problems over their own ownership of Group). Further, it is Paul and JJ who effectively stand to obtain a "double benefit" if they were to be granted relief, retaining both the shares and the purchase price, without being under any liability to contribute to the claim against Mr Hassall.

69. It does not seem to me that the allegations of breach of trust on the part of Mr Hassall add anything to Holding's claims of breach of fiduciary duty. In my judgment, they fall with those claims.

70. On the view I have taken of this case, no question arises of Paul and JJ's liability to contribute pursuant to the *Civil Liability (Contribution) Act 1978* in respect of Mr Hassall's liability to Holdings, on the footing that they are also liable to Holdings in respect of the same damage. For reasons corresponding to those I have already outlined at paragraph 68 above, had it been necessary for me to adjudicate upon this issue, I would have found that Mr Hassall was entitled to a contribution from Paul and JJ; and I would have quantified the extent of the contribution which it would be just and equitable for them to bear, having regard to their responsibility for the damage in question, at 100% (divided equally between them).

71. On my findings of fact, there can be no question of any conspiracy between Mr Hassall and Group to injure Holdings by the use of unlawful means. Mr Hassall did not control Group. In any event, it was Paul and JJ (and not Mr Hassall) who made the decision to restructure the share purchase in such a way that it amounted to the provision of unlawful financial assistance. If anyone was party to a "conspiracy" with Group, it was Paul and JJ and not Mr Hassall. In any event, since I am satisfied that the share purchase could have been financed by way of the declaration of a lawful dividend, any claim under this head would have failed for want of the necessary proof of loss and damage. Although, in the circumstances, my decision on this point is entirely obiter, I accept Mr Bartley Jones's submission, founded upon the Court of Appeal's decision in *Customs & Excise Commissioners v Hedon Alpha Ltd* [1981] QB 818, that relief under section 727 of the *Companies Act 1985* is not available in a claimed founded upon the tort of conspiracy to injure by the use of unlawful means since such a

claim is not brought against Mr Hassall in his capacity as a director or officer of Holdings, but rather in his personal capacity for his own allegedly tortious wrongdoing as a party to an alleged conspiracy. I reject Mr Ashworth's submission that the *Hedon Alpha* case is authority only for the proposition that relief under section 727 is not available where the claim is by a third party, rather than the company of which the applicant for relief is a director. That case also establishes that the "default" in respect of which a director is entitled to apply for relief must be some default in his capacity as a director: see particularly at 832B-D and 824D per Stephenson LJ, at 825H-826A per Ackner LJ, and at 827G-828A per Griffiths LJ.

Postscript

72. This claim therefore falls to be dismissed. I am entirely satisfied that it is Paul and JJ who have initiated and pursued this litigation, and that they have done so out of ill-will towards Mr Hassall, and with a view to their own ultimate benefit and gain. They have sought to hide behind the separate corporate existences of Holdings and Group, hoping to recover the price paid for the minority shareholdings by Holdings whilst at the same time retaining the benefit of those shareholdings for Group. In the result, I have held that their attempts to do so fail. This was a claim that should never have been brought, and, having been brought, should never have been persisted in, particularly once Paul and JJ's evidence was complete, and still more so once Mr Hassall's evidence had been concluded. I have not heard any submissions on costs. But it seems clear to me

that, however any costs order is to be structured, no part of the burden of the (no doubt) considerable costs of this case should fall upon Mr Hassall.

73. I invite the parties' submissions as to the appropriate form of order for disposing of this litigation. Subject to further order in the meantime, I shall extend the time for appealing for a further 21 days after the formal handing down of this judgment (making 42 days in all from formal hand down). Finally, I must pay tribute to the assistance which I have received from all counsel in this difficult and troubling case. Mr Hassall, in particular, has every reason to be grateful to Mr Ashworth and to Mr Warner, who came into the case at short notice, and who have clearly expended considerable time and effort on his behalf. It was time and effort well-spent.