Case No: 8557 of 2012

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY
2014 EWHC 3003 (Ch)

Priory Courts
33 Bull Street
Birmingham
B4 6DS

Friday, 11 July 2014

IN THE MATTER OF HUSKY GROUP LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BEFORE:

HIS HONOUR JUDGE PURLE QC

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BETWEEN:

DAVID JOHN WATCHORN
(Liquidator of Husky Group Limited - in creditors' voluntary liquidation)
Claimant

- and -

JUPITER INDUSTRIES LIMITED
Defendant

- - - - - -

MR PAUL J DEAN (instructed by Freeths LLP, One Colton Square, Leicester LE1 1QH) appeared for the Claimant.

MR DAVID EATON TURNER (instructed by Ashteds Solicitors, Unit 1, Harcourt Way, Leicester, LE19 1WP) appeared for the Defendant.

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Judgment
(Approved)

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Friday, 11 July 2014

JUDGE PURLE:

1. Husky Group Limited is now in liquidation. Its liquidator seeks relief in respect of an assignment of trademarks effected by Husky Group Limited on 11 November 2008. The assignee was the parent company of Husky Group Limited, Jupiter Industries Limited. I shall call Husky Group Limited "Group" and the parent "Jupiter".

2. Relief is sought both under section 238 of the Insolvency Act 1986 because it is said that the transfer of the trademark was a transaction at an undervalue at a material time. As the parent is a connected party, the onus is upon the parent to demonstrate, as it is accepted that the transaction was at an undervalue, that Group was solvent at the material time.

3. The application is also made under section 423 of the same Act. That section is misleadingly headed "transactions defrauding creditors". I say "misleadingly" because the description suggests that dishonesty is required and it is clear from the authorities that it is not. The relevant requirement, as set out in section 423(3), is that the person entering into the transaction, in this case Group, did so for the purpose either (a) of putting assets beyond the reach of a person who is making or may at some time make a claim against him, or (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make. It is also a requirement of the section (which is not troublesome in this case) that the transaction should be entered into at an undervalue.

4. The trademarks with which I am concerned historically belonged to the controlling spirit behind the company, a Mr Thomasson. On 20 January 2002, he assigned those trademarks to Group "to hold the same unto the assignee absolutely". He did that, according to his evidence, which I accept, because Group, then known as Husky Products Limited, was about to indulge in litigation to protect the mark and it was more convenient that the mark should be in its name.

5. From January 2004, Group conducted its trade through a number of subsidiaries, but that only lasted until January 2007 when one of the subsidiaries transferred its business to Group and then later the other subsidiaries did likewise. So that, as from that time, the Group not only held the trademarks, but also carried on the businesses.

6. It appears to be relatively commonplace for the trademarks to be held by one person or entity, and the business activities to be carried on by another. The thinking goes that as business can only be carried on with risk, it is desirable to protect the trademarks themselves from the vicissitudes of the business in question.

7. It is said that in 2002, at the time of the assignment of the trademarks to Group, there was a collateral arrangement under which Mr Thomasson was entitled to call for a re-transfer or reassignment at any time, or to buy the trademarks back.

The original price under the 2002 assignment was £10. The problem with that argument, which was largely a construct of Mr Eaton Turner for the purposes of argument, was that it bore no relationship to Mr Thomasson's evidence. It was not his evidence that he reached an agreement effectively with himself in 2002; his evidence was that he, or other members of his family, or a family trust, entirely controlled and owned all the companies within the Husky group and that he was effectively the owner of the trademarks, wherever they happened to be within the particular corporate structure, because he controlled all the companies in question. That is not an unusual approach from the perspective of an entrepreneurial individual such as Mr Thomasson, but it is not, of course, the law, because it peers straight through the corporate structures, not recognising the separate existence of the entities within that structure.

8. Accordingly, the reason he did not reach an agreement with himself in 2002 is that he never saw the need to. As he wrongly saw matters, the trademarks were his to be taken as and when he wanted them.

9. Eventually, in about July 2007, when the separation of the trademarks from the operating companies came to be addressed, he had a discussion with his wife (a director) and a Mr David (an employee and fellow director) to the effect that the trademarks should be retransferred to him. However, no binding agreement was reached at that stage. There was no more than an instruction that Mr Thomasson, seeing himself, as I have said, as owner of the trademarks, gave to Mr David, and which Mr David eventually acted upon, though in a modified form.

10. Minutes were subsequently produced, but not until November 2008, recording a July 2007 decision to transfer the trademarks to Jupiter. Jupiter was not mentioned in the July 2007 discussions as an assignee. The minutes are not a reliable record, therefore. The thought at that stage was that Mr Thomasson should get the trademarks back. Various hurdles were properly advanced by the solicitors who came to consider the question of transfer, not the least of which was their querying whether a nominal consideration would meet the requirements of proper corporate governance. The consideration eventually inserted was £1, hence the ready concession that this was a transaction at an undervalue. The expert evidence is that on a going concern basis, the trademarks at the date of transfer had a value of £360,000. As it happens, not even the £1 was paid.

11. At the time of this transaction (November 2008) a number of business developments were anticipated and pending, the most important of which was an arrangement then emerging with a company called Chef King under which (effectively) Chef King would take over and run, for the benefit of Jupiter, the commercial side of the UK business. That side of the business had not been doing particularly well, but it was expected on 11 November, though not wholly certain, that there would eventually come into being, as did in fact occur, a distribution agreement securing very large sums for Jupiter and giving to Chef King an exclusive UK licence.

12. As I have said, although that was not certain to occur on 11 November, I find, having been taken through the evidence of several months of negotiations, that

this was by then very much a strong probability. Also in contemplation was the formation of two new subsidiaries of Jupiter, not of Group, to deal with the export and domestic businesses. The domestic business had until then been trading at a profit, but the export business like the commercial business had not.

13. The two new subsidiaries, Husky Refrigerators (Export) Limited and Husky Retail Limited, known as "Export" and "Retail" for short, were incorporated shortly after the assignment of the trademarks and were clearly in contemplation at the time.

14. Mr Thomasson's hopes and desires were to develop the Husky brand in foreign fields, because he thought that that was where a lot of money could be made, and also he wished to live abroad, close to his daughter in Florida. Accordingly, the assignment of the trademarks was very much part of the intended restructuring, the result of which would be that Group itself would no longer have any business, except the selling off of its existing stock to Chef King as and when required for the purposes of the distribution and licence agreement. Accordingly, the intention as of November 2008 was, in effect, that Group would be "wound down", adopting the expression which came to be used.

15. That, of course, was a perfectly legitimate objective so long as the creditors were not imperilled. However, the effect of transferring the trademarks out of Group into Jupiter was that they were no longer available for Group's creditors, and the effect of switching Group's various business into Jupiter, Export and retail was that the fruits of those businesses would likewise not be available for Group's creditors. That gives rise at least to an initial inference that one of the purposes of the transaction was to put the trademarks outside the reach of creditors, or someone who might claim as a creditor.

16. There is some further support for that inference. At the time a company called Syrtech was making a claim against Group, on what appeared at least to Mr Thomasson and Mr David to be an extravagant basis. Syrtech had been providing warranty repair services to the company since about April 2008 and had, in the views of Mr Thomasson and Mr David, done so unsatisfactorily. I have no doubt that their views were genuinely held. Nonetheless, there was a dispute which was certainly brewing up at the time of the assignment. Eventually a figure well in excess of £300,000 was claimed by Syrtech.

17. It is not, in my judgment, a coincidence that the transfer took place in such a way that the Syrtech claim, if ever made good, would be frustrated because neither the trademarks nor the ongoing business of Group (taken over informally by Jupiter, Export and Retail) would be available to meet that claim

18. Likewise, there appears to have been a claim, which Mr Thomasson and Mr David clearly regarded as spurious, by a company called ERA. That also was a claim against Group.

19. There were indications in some email exchanges, for example, one of 20 August 2008 from Mr Thomasson to the auditors, Thomas May, to the effect that Group had pending cash-flow problems and needed help urgently. This, it is said, is an indication of insolvency and a desire to protect the trademarks and businesses

from creditor claims. However, I consider that that aspect of the case has been overstated. The business of the company related to refrigerated units, a business which is necessarily seasonal, and I was told and accept that cash was always tight round about that time of the year.

20. The merger discussions with Chef King (which is what they had originally been) had gone on for some months. By August 2008, Mr Thomasson had reached the conclusion that the best deal for him would be a distribution agreement, which is what in fact came about. One can see that, for example, from his exchange of emails on 28 and 29 August 2008 with Chef King. However, the deal was done in the name of Jupiter and one of the new subsidiaries, mot Group, which was excluded.

21. There were no up-to-date audited accounts of Group available in November 2008. Management accounts were however produced on a regular basis. The hope of Mr Thomasson and Mr David, who was also closely involved in the business, was that over a period of time, enough money would be generated to pay off all the outside creditors, enabling Group to clean up its balance sheet by a series of write-offs of inter-company indebtedness. However, this did not occur. I do, however, accept that that was the genuine hope and that there was some optimism that this result might be achieved. However, it was also very much a possibility that it would not be achieved. Group did in fact have fairly decent cash reserves at that time, but they would not last for ever.

22. In December 2008, there was a meeting with an insolvency practitioner, a Mr Elwell, who is also of the liquidator's firm. This was an informal meeting to consider the proposed wind-down. Understandably, the parties to that meeting have different recollections and no notes were made. Mr David and Mr Thomasson have a stand out recollection that, when they revealed to Mr Elwell the amount of cash that was held, his immediate reaction was to query why he was there at all. Mr Elwell, however, also recalls that there was concern about possible insolvency and that he advised on the desirability of the new companies trading, and Group remaining out of liquidation, for at least a year, because otherwise there would be a problem over prohibited names.

23. I accept Mr Elwell's evidence but I also accept that that did not make a significant impact at that stage upon either Mr Thomasson or Mr David, as the planned course had never been to go into a liquidation in the near future, or at all, but simply to engineer an orderly wind down of the business. As I have said, there was existing stock which was to be sold to Chef King. The intention was to sell that at cost, so there was no prospect of Group making any profit in relation to its sole remaining activity and, at least as Mr Thomasson saw it, there was a significant advantage in removing from Group its existing commercial business, which he likened to the removal of a cancer, because that business was, as things then stood, loss-making.

24. That, however, somewhat overlooked the impact of the expected distribution and licence agreement which guaranteed healthy cash flow (but not for Group) had things gone to plan which, as it turns out for reasons which do not matter, they did not. I do consider, despite the protestations of Mr Thomasson and Mr David to the contrary, that the risk of insolvency, though not high on their

agendas, was certainly evident to them in December 2008 and must have been evident to them, in my judgment, in November 2008 as well when the transfer took place.

25. One might ask why Group was cut out of the equation. Group was deprived not just of its trademarks, but was deprived also of its business, including the domestic business which had, at least until recently, been making a profit according to Mr David's witness statement.

26. Mr Eaton Turner in his closing submissions submitted that the reason for setting up Export and Retail was to clean up the position, but the only cleaning up that was needed was to isolate unwelcome debts, such as the Syrtech and ERA claims, which rested within Group. In my judgment, that leads properly to the inference that a substantial purpose, and it need not be the only purpose, of the transaction was to put assets beyond the reach of creditors or people making claims.

27. That inference is made stronger by a letter of 14 August 2012 from Jupiter's solicitors, which in terms justified what happened in this case as follows:

> "The trademarks had in the main been kept separate from the trading business. This was done for sound commercial reasons to ensure that, if anything happened to the trading entities, then the trademarks would be protected. For many years, the trademarks were held personally by Mr Thomasson away from his businesses. On advice in 2002 they were assigned to Husky Group Ltd.
>
> In November 2008, when it was clear that the marks were now being held by the trading company, they were assigned to our client to maintain the position that existed for the majority of time since 1994.
>
> There is nothing sinister nor is there anything wrong in adopting this strategy which was for very clear business reasons."

28. The "very clear business reasons" must be a reference to the "sound commercial reasons" set out in the first paragraph, namely:

> "…to ensure that if anything happened to the trading entities, then the trademarks would be protected."

29. That may possibly be a proper observation if the trademarks are never owned by but are instead licensed to a trading entity, but in this case the trademarks were owned, beneficially, I have found, by Group, which was also a trading entity, and were transferred for £1 to Jupiter in order to give effect to the "sound commercial reasons" set out in that letter. In my judgment, that brings the case fairly and squarely within section 423 and the liquidator is entitled to succeed on that ground alone.

30. In those circumstances, it is strictly unnecessary for me to consider the question of insolvency, because that is only relevant to section 238. However, for the sake of completeness, and should the case go further, Jupiter has not satisfied me that Group was solvent at the relevant time.

31. I say that for a number of reasons, which I will shortly explain. The material date is 11 November 2008. Mr Eaton Turner tried to persuade me that the material date was July 2007 at the latest, when Mr Thomasson called for a transfer in accordance with the arrangements made in 2002, but I have already rejected that conclusion on the evidence, for reasons set out earlier. The significance of July 2007 is that this was outside the period of 2 years ending with the onset of insolvency, meaning that a transaction at that or any earlier date would not have occurred at a relevant time for the purposes of section 238: see section 240(1)(a).

32. As the assignment of trademarks was preliminary to the winding down of Group's business, Group was properly to be regarded as non-trading. I do not consider that the holding of stock for passing on to Chef King at cost can be held out as a serious business, whatever technically it might be for tax purposes. Accordingly, it is necessary to approach the valuation of assets on a break-up basis because that, in effect, is what was happening to Group.

33. Moreover, although in accounts subsequently prepared (though not audited) in September 2009, a surplus of shareholders' funds as at 31st December 2008 was revealed of £215,000-odd, that took into account, at its full face value, inter-company indebtedness owed to Group of over £1 million, when there was no chance of it ever being paid.

34. In answer to that I am told that I must look at the accounts on a consolidated basis and bear in mind that that inter-company indebtedness might have been eliminated or turned into a surplus by subscriptions for further share capital and then money going round in a circle and back eventually to the parent, or by a series of write-offs of inter-company debts. I am prepared to accept that as a possibility, though this did not in fact occur. Nevertheless, even if one takes, as I am prepared to do for the sake of argument, the resulting net assets figure on a consolidated basis of £261,000 in round figures, other adjustments are required.

35. Plant and machinery is shown in the December 2008 accounts at a figure of just under £81,000. In fact, between 11 November 2008 and the end of that year, there were additions to the plant and machinery coming out of available cash, which reduced the cash balance in the 2008 accounts but increased the plant and machinery. It is said that the plant and machinery ought to be written off to nil. If that is the case, and for reasons which I am about to come to in my judgment it is the case, then the figure that should be written off is not £81,000 but £60,000, because that was the book value of the plant and machinery on 11 November 2008.

36. I say that sum should be written off because, when the statement of affairs came to be sworn following the ultimate liquidation of Group on 8 January 2010, a realisable value of nil was given by Mr Thomasson on the grounds that all the plant and machinery was in China. It is somewhat ironic that Group's plant and

machinery, which has apparently been used to carry on manufacturing for the benefit of Jupiter, Export and Retail, is not available to Group's liquidator. Nor has Group been paid for that use. There is something counter-intuitive in this context of being asked to ascribe full book value to plant and machinery which was effectively spirited away.

37. It is said by Mr Thomasson and Mr David that they were advised by Mr Elwell to put a nil value on this and other assets so as not to raise expectations of creditors needlessly. Mr Elwell was not asked any questions about this in cross-examination. I am nevertheless prepared to assume that, as an experienced insolvency practitioner, he may well have advised the directors to err on the side of caution when ascribing values to Group's assets. That would be quite sensible advice to give. Experience shows that, in an insolvency, some assets may turn out to have no, or even a negative, value. It seems to me that that was a realistic approach and certainly applied to the plant and machinery in the circumstances of this case. It is accordingly appropriate to write the value of the plant and machinery as at November 2008 down by £60,000 to nil.

38. The same applies in principle to fixtures and fittings, which were again shown in the statement of affairs as having no realisable value. There had been realisations between November 2008 and the liquidation date of fixtures and fittings having a net book value of £6,213. Therefore, in round figures, the book value for fixtures and fittings as at November 11 2008 should be reduced to £27,200 and that figure ought to be written off.

39. There were included in assets intangible fixed assets which related to costs incurred in getting what are known as UL approvals in the United States of America. These, it is said, had a value of £87,122 at the time of the 2008 accounts. Of those, approximately £22,000 was expenditure after November 11, 2008 so that in round figures the intangible fixed assets figure at that date was £65,000. In my judgment, all this should be taken as having no realisable value. That is what the statement of affairs said in January 2010 and nothing was different, in my judgment, in November 2008 so far as Group was concerned. Group was not intending to carry out any meaningful business. It did not own any longer the trademarks. Whilst Mr Thomasson, who was genuinely optimistic -- which I think probably reflects his nature and goes some way to explaining why he has succeeded in business – and believed that those approvals could have been sold, there is no other evidence suggesting that that was so, notwithstanding that at one stage the directors were advised to seek professional advice from a well known firm of valuers. They did not do so. It seems to me that they have not demonstrated that these assets had any value and that they should therefore be written down to nil.

40. I do not, in reaching that conclusion, place any reliance upon the notes of a meeting held on 2 September 2010, which suggested that much of the expenditure related to the funding of an individual's lifestyle and not to the obtaining of approvals. It seems to me there may have been some misunderstanding at that meeting, but I reach the conclusion that the approvals have (and had) no value anyway.

41. Two debts need to be considered. The first is known as the Australian debt, which relates to a venture in Australia involving a Mr Carkeek. The second is a Venezuelan debt relating to goods which were shipped to that country in July 2008. They both have this feature in common. During 2008, Group reduced its overhead by disposing of its factory. This resulted in the need to shift stock, a great deal of which was shifted to Australia and Venezuela respectively on what was said to be a consignment basis, meaning that the recipient was to pay Group when the stock was realised.

42. So far as the Australian debt is concerned, the statement of affairs in January 2010 put no realisable value on it, and it seems to me that that was appropriate. This is partly because overseas debts can give rise to problems of their own in a liquidation, and also because there had been a rumbling dispute between Mr Carkeek and Mr Thomasson, who had fallen out. Complaint is made that the liquidator did not do enough to chase this debt down and that there was critical loss of momentum when Mr Elwell was absent at the beginning of the liquidation. As by that time the debt was already ancient, it seems to me that that is not a criticism upon which I can place any reliance. It is not at all clear to me what the liquidator should have done.

43. Mr Carkeek had raised some queries over quality issues and there was correspondence between Mr Carkeek and Group under which he claimed to have accepted an offer of settlement which, on the state of account between the parties would have reduced the balance owed to Group to nil. Mr Carkeek never resiled from this position.

44. These were all matters which occurred after November 2008, but I do not consider that I should ignore them. Where, as here, I am able to judge the situation with hindsight, it is appropriate in answering the question "Was this company solvent?", to look at what in fact happened and not at how hypothetically a set of directors might have viewed the matter on 11 November 2008, the date of the impugned transaction.

45. In the 2008 accounts a provision of £70,000 against the Australian debt was made. In my judgment, that provision should be increased to the full amount of the debt, which was £144,212.

46. Looking at matters with hindsight is consistent with the earlier authority of Ex parte Russell (1882) Ch 588, a decision of the Court of Appeal under section 91 of the then Bankruptcy Act 1869, which was another provision relating to what would nowadays be called transactions at an undervalue.

47. In considering the debtor's insolvency at the material date, the Court of Appeal rejected an earlier assessment by the debtor and applied actual realisation values occurring three years later. That is a clear indication that it is appropriate to use hindsight, though I do not suggest that it will in every case be conclusive. This approach is also supported by the Australian case referred to by Mr Dean in argument: Lewis v Doran (2004) 208 ALR 385. At paragraph 108, Palmer J said:

> "Where the question is retrospective insolvency, the Court has the inestimable benefit of the wisdom of hindsight... By reference to what actually happened, rather than to conflicting experts' opinions as to the implications of balance sheets, the Court's task in assessing insolvency as at the alleged date should not be very difficult."

48. I now know that the Australian debt has not been and is unlikely ever to be recovered. I consider that full provision should be made for the whole amount of the debt in considering the true financial position of Group as at 11 November 2008. The same is applies to the Venezuelan debt. Full provision should be made in that case also. That was originally over £100,000 (before the issue of a credit note) and was written down to £20,000 in the statement of affairs, though even that has not in fact been realised and I have no real explanation as to why £20,000 was thought to be appropriate.

49. As regards Venezuela, the goods had been shipped on the consignment basis (as earlier explained) in July 2008. They turned out to be a mixture of B grade goods, which were in a number of cases faulty. Through a process of cannibalisation, some but not all of the refrigeration units could have been sold. There also appeared to have been damage in transit and there was an on-going problem, soluble but nonetheless problematical, with a compressor. There was also some question mark over whether illegal material had been used in manufacture, but I think that fell away on the evidence and I place no reliance upon it. Nonetheless, nothing has been realised for these goods and it seems to me that the court must take into account what it now knows and can place no value on that debt as at November 2008.

50. The liabilities in the 2008 accounts and the proposed consolidated balance sheet do not include an alleged liability of £95,523 in relation to ERA, which is an acronym for Expense Reduction Analysis. This claim was considered, on what appeared to be solid grounds, as spurious by Mr David and Mr Thomasson. This may justify its not appearing in the 2008 accounts. I do not know enough about the subsequent fate of the claim to reach a different conclusion. I am merely told the proof has been admitted but have not been shown that proof. I think it appropriate to leave that claim out of account, and not to reduce the net assets figure on that score.

51. There is, however, the Syrtech claim which had been made at the time of the November assignment. Shortly thereafter, on 5 December 2008, the figure of £318,718 including VAT was advanced. I think I can leave aside the VAT, but more significantly, a provision was made in the December 2008 accounts of £168,446 inclusive of VAT. That is reflected in the net assets figure of £261,000 urged upon me and was in my judgment an appropriate provision. According to Mr David, that provision was arrived at after he had had time to consider the actual figures that came out of Syrtech and I do not consider that it was incumbent upon Group or is now incumbent upon me to put in a higher provision. Nor do I consider that it would be appropriate to ignore the work done by Mr David and make a smaller provision as at 11 November 2008. It is proper to use hindsight here also. As, therefore, the Syrtech claim was provided for in an appropriate amount, nothing more needs to be added in.

52. However, the sum total of the figures that I have mentioned for plant and mchinery, fixtures and fittings, intangibles and the balance of the Australian and Venezuelan debts exceed the £261,000 which Jupiter relies upon as the consolidated surplus as at 2008. Accordingly, Jupiter has not satisfied me that the company was solvent at the material time.

53. On that ground also, I would grant the liquidator relief.

54. The liquidator seeks £360,000 as the going concern value of the trademarks at 11 November 2008. He also seeks interest at the judgment rate from November 2008, at least since the company went into liquidation. Rule 4.93(6) of the Insolvency Rules 1986 is relied upon by analogy. However, interest stops at the liquidation date under that rule – see rule 4.92(1). Moreover, the rule relates to provable debts in a liquidation, which has no relevance to the present case. I shall instead award statutory interest from 11 November 2008 at 3% above base and shall leave it to the parties to agree the calculation.

55. I ought to explain why I consider it appropriate to award damages in the full amount of £360,000. Mr Eaton Turner argued that the power of the court under section 423 is to put the parties back in the position they would have been in if the impugned transaction had not been entered into. There is a similar provision in section 238. It may well be that, had there been no assignment of the trademarks for £1, no transfer of any kind would have occurred. In that case, Mr Eaton Turner says, the company would have still ended up going into liquidation, and the liquidator would have had the trademarks, to deal with on a break-up basis. I do not know that to be the case. So far as I am aware, both Jupiter and its two new subsidiaries (Export and Retail) carry on their businesses and the previous business of Group with the benefit of the trademarks. It is not clear that Group could not have done likewise and, with the benefit of its trademarks and businesses, averted liquidation, retaining the full going concern value of the trademarks.

56. The consequence, Mr Eaton Turner contends, is that I should either set aside the transaction and let the liquidator do what he will with the trademarks, in which case he will achieve a much smaller realisation on the break-up basis, or order compensation on the break-up basis, which is considerably less. In my judgment, that is not the correct approach. The court has a broad discretion under section 423 and is able, amongst other things, under section 425(1)(d):

> "To require any person to pay to any other person in respect of benefits received from the debtor, such sums as the court may direct."

57. That seems to me to justify the court in looking at the value of the assets in the hands of the recipient, which, in the circumstances of this case, was privy to the improper purpose in question. There is a similar provision, concerning transactions at an undervalue, in section 241(1)(d), to which the same observation applies.

58. Looking at the benefits, what Jupiter obtained were the trademarks, which enabled the existing and future businesses to be conducted on a going concern

basis. That also is what Group lost. There is no justification for allowing Jupiter to collect those assets on a break-up basis. I therefore reject Mr Eaton Turner's submissions in that respect and grant relief in the sum of £360,000. I do not consider that it would be appropriate simply to set the transaction aside and leave the liquidator with a different market in which to sell them from the market which prevailed in November 2008.

59. I will now hear from counsel as to the consequences of these rulings.

[After further argument)

60. I am going to order all of the costs of this application to be paid by Jupiter on the indemnity basis. I do so for this reason.

61. Jupiter has clearly lost and, although the claim was initially put by the liquidator at a substantially higher figure than it eventually came home for, which involved Mr David in particular doing some work and some input from the expert, nonetheless the sort of work that was done was, in my judgment, work that would have been required anyway because, as Mr Dean reminded me, the various accounting and administrative exercises that were needed to produce what might have become a solvent company, were never undertaken. They were however assumed for the purposes of the further exercise determining £261,000 as the suggested starting point. Much of the work related to that further exercise, but, despite success on some points, Jupiter still did not persuade me of the solvency of Group at the material time.

62. Moreover, the letter of 14 August 2012 is striking. It sets out the purpose of the transaction (though subsequently in the later without prejudice correspondence I have now seen, the point was taken, unconvincingly, that that was merely its effect and not its purpose). The purpose set out in that letter was the very purpose proscribed by section 423. It seems to me that this should have been recognised at the outset. That takes this case very much out of the norm and is a case which simply should not have been defended.

63. Jupiter was warned by responsible solicitors at the time of the transaction that a nominal consideration raised corporate governance issues, but chose not to heed that advice. That also takes this case very much out of the norm, irrespective of the Part 36 offer.

64. In addition, as from 9 January 2014, the 18 December 2013 Part 36 offer kicked in. By that offer the liquidator offered to accept £325,000 inclusive of interest. In my judgment, as the liquidator has clearly done better than that, the consequences set out in CPR 36.14(3) follow.

65. The first question is: should there be interest on the whole or part of any sum of money awarded at a rate not exceeding 10% above base for some or all of the period, starting with the date on which the relevant period expired? There will, of course, be interest at 3% above base, as I have already ordered, down to 9 January 2014. In my judgment, it is appropriate to award an enhanced rate of

interest in consequence of the Part 36 offer unless I am persuaded that it is, in the words of the rule, unjust to do so

66. I have, in considering whether it would be unjust, had regard to all the matters set out in sub-rule (4) of this rule. The first is the terms of any Part 36 offer, which the liquidator beat. I am particularly impressed also by the fact that subsequently the liquidator offered to accept an even smaller sum, £110,000 on 19 March 2014. I have also noted the offers coming from Jupiter, none of which came anywhere close to satisfying the proper requirements of the liquidator, as the result has shown.

67. The next matter is the stage in the proceedings when the Part 36 offer was made. This was well before trial and there was ample time to consider it. The information available at the time of the offer is also to be taken into account. The expert report came out at about the same time as the first offer, so everyone knew then what, on the only expert evidence that would be called at trial, the value of the trademarks was.

68. Mr Eaton Turner complains that the claim was exaggerated. Nonetheless the liquidator has got home in an amount greater than the offer. Mr Eaton Turner's complaint, in my judgment, takes nothing away from the Part 36 offer or from the liquidator's costs entitlement. The claim was overstated initially. That did not remain the case.

69. The conduct of the parties is referred to in (4)(d) in relation to giving or refusing to give information. Nothing turns upon that.

70. Having considered those matters, I do not consider it unjust to award interest at an enhanced rate. The rules also refer to my taking into account "all the circumstances of the case". Other circumstances are relied upon here. It is said by Mr Eaton Turner that I did not find dishonesty against any of the individuals within Jupiter, which I certainly did not, and I accepted that their hopes were genuine that they would manage to resolve the matter without an insolvency process. But I also found, and repeat, that they were aware of the risks of insolvency, and that was something which must have been evident to them in November 2008.

71. It seems to me that none of those matters makes it unjust to order the consequences that follow. The whole purpose of these consequences is to encourage claimants to make and the defendants to receive and consider very carefully Part 36 offers so as to avoid some of the horrendous costs that are on display in this case. That encouragement, to be effective, needs to be underpinned by an effective sanction.

72. 10% above base seems to me to be the appropriate rate because, as I take the view that this case should not have been defended, and as also the valuation was available for consideration at the time of the first Part 36 offer, the failure to accept the offer was inexcusable. The interest sanction should therefore be at

the highest end of the scale. For the same reason, interest should run through to judgment today.

73. Under CPR 36.14(3)(b), I am required to order indemnity costs from the date of expiry of the Part 36 offer unless I consider it unjust to do so. However, I have already ordered indemnity costs, so do not need to do so again. I shall however, as required under CPR 36.14(3)(c), order interest at the enhanced rate of 10% above base on the costs incurred since expiry of the offer down to judgment. For the same reasons as those mentioned in relation to interest on the £360,000 damages, I do not consider it unjust to do so.

74. I now consider the additional amount referred to in CPR 36.14(3)(d), which is not to exceed £75,000. This is calculated by applying the prescribed percentage (which varies between 5% and 10%) to, where the claim is or includes a money claim, the sum awarded to the claimant by the court. For the same reasons as before, I do not consider it unjust in principle to order payment of the additional amount.

75. Mr Eaton Turner contends that it is unjust because of the very large costs involved, the liquidator having the benefit of a CFA, extending to a large part of the costs, with a 60% uplift and an ATE insurance premium of £213,000. It seems to me that those matters are of no or very little weight. All those costs are in principle recoverable. It is not unjust for any of the other consequences to follow, just because the amounts involved are very high

76. I do have to consider, however, to precisely what part of my award the prescribed percentage applies in calculating the additional amount. The basic monetary award is £360,000, to which interest has been added, for part of the period at 10% above base. I have also awarded costs.

77. It is conceded by the liquidator that, in calculating the additional amount, I ignore the amount of any costs awarded, even though the costs will, eventually, be translated into a monetary award. There is no concession regarding interest, however. Mr Dean says I apply the prescribed percentage to all the interest I have awarded. Mr Eaton Turner says I do not apply the prescribed percentage to interest at all.

78. Part 36.14(3)(d) requires the court:

> "... unless it considers it unjust to do so, [to] order that the claimant is entitled to an additional amount which shall not exceed £75,000 calculated by applying the prescribed percentage set out below to an amount which is -
>
> (i) where the claim is or includes a money claim, the sum awarded to the claimant by the court; or

> (ii) where the claim is only a non-monetary claim, the sum awarded to the claimant by the court in respect of costs."

I should refer to sub-rule (5) as well, which states:

> "Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest may not exceed 10% above base rate."

79. As I have awarded 10% above base rate for part of the period in question, it might be thought that the effect of sub-rule (5) is to preclude me from applying an additional amount in respect of interest.

80. As a matter of strict construction, any amount payable under CPR 36.14(3)(d) does not fall within (5) because the court is not awarding interest under (d); it is simply awarding “an additional amount” calculated in a particular way. However, the commercial effect would be to turn what is a maximum interest rate of 10% above base (when ordered) into 11% above base, which is surprising.

81. In those circumstances it seems to me that what the court is looking at under (d)(i) is the basic monetary award not including interest. Accordingly, in my judgment, CPR 36.14(3)(d) does not require the court to apply the prescribed percentage to an award of interest, in just the same way as (except in the case of a non-monetary claim, where costs are expressly mentioned) the prescribed percentage does not, on the concession made before me, apply to costs.

[<u>After further submissions</u>]

82. Costs of an alarmingly high figure of approximately £500,000 are said to have been incurred, including uplift and ATE insurance premium, so I am told by Mr Dean. He is instructed by experienced and responsible solicitors and I can therefore take that figure as a reliable estimate of what the liquidator’s costs in fact are. .

83. He seeks a payment on account of 70% of those, reminding me that I have ordered indemnity costs. It seems to me that that is excessive for a payment on account. I will order a payment on account, paying due but not excessive regard to the uplift and the insurance premium, of £250,000.

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