Neutral Citation Number: [2018] EWHC 1378 (Ch)

Case No: CR-2012-007914

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF COMET GROUP LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986
[IN PRIVATE]

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

Date: 07/06/2018

Before :

SIR NICHOLAS WARREN

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Between :

(1) NEVILLE BARRY KAHN **(2) NICHOLAS EDWARDS** **(in their capacity as the joint liquidators of Comet Group Limited)**	**Applicants**
- and -	
THE INSITUTE OF CHARTED ACCOUNTANTS IN ENGLAND AND WALES	**Respondent**

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Mr Gabriel Moss QC and Mr Ryan Perkins (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Applicants**
Mr Terence Mowschenson QC and Ms Lexa Hilliard QC (instructed by **the Institute of Chartered Accountants**) for the **Respondent**

Hearing dates: 11th April, 12th April and 13th April 2018

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Approved Judgment

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

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SIR NICHOLAS WARREN

Sir Nicholas Warren :

Background

1. This unusual application arises in the course of the liquidation of Comet Group Limited ("**Comet**"). The applicants ("**Mr Kahn**" and "**Mr Edwards**", together "**the Liquidators**") are the joint liquidators of Comet. They are partners in Deloitte LLP ("**Deloitte**"). The respondent to the application is The Institute of Chartered Accountants in England and Wales ("**the ICAEW**"), which is Deloitte's regulator. The application is made by the Liquidators for directions pursuant to section 112 Insolvency Act 1986 (**"section 112**" and "**IA**") as to what (if any) further investigations they ought to undertake in relation to certain matters which have been raised by the ICAEW in letters and in an Opinion of Lexa Hilliard QC ("**the Hilliard Opinion**). Ms Hilliard has produced some further advice in her Note dated 26 March 2018. I have read the Hilliard Opinion and the Note, which have informed the debate although I have not found it necessary to refer to them in any detail. Comet has a secured creditor known as Hailey Acquisitions Limited ("**HAL**") under a £186 million revolving credit facility ("**the HAL RCF**"). The security was created pursuant to a debenture dated 3 February 2012 ("**the HAL Debenture**"). The central issues in this application concern the validity of the HAL Debenture and whether the directors were in breach of duty in various ways in respect of the overall transaction, and in particular agreeing to the HAL Debenture.

2. I had thought, at the end of the hearing, that I would be able to deal with the Liquidators' application in a relatively short judgment produced in short order. Instead, I have found it necessary to review a substantial amount of material and to record in some detail a considerable amount of it and the detailed arguments of Counsel

3. The Liquidators find themselves in what they describe as a difficult and unprecedented situation. They have received detailed advice on the validity of the HAL Debenture from David Allison QC in the form of a written opinion dated 20 December 2017 (the "**Allison Opinion**") and from Freshfields Bruckhaus Deringer LLP (in the form of two reports from Mr Baird, a partner in that firm). The advice obtained is that the HAL Debenture is valid subject to certain assumptions. The Liquidators wish to continue the liquidation on the basis of that advice. The view of the ICAEW, however, is that the Liquidators have failed to make the enquiries appropriate to discover whether there are any valid grounds for challenging the validity of the HAL Debenture. I will come later to its reasons for holding that view.

4. The ICAEW's concerns have been raised in correspondence with the Liquidators and their lawyers. I will also come to that to some extent later. Rightly or wrongly, the Liquidators perceive the ICAEW as interfering in the liquidation when they have no right to do so and are concerned that they will face regulatory consequences and perhaps disciplinary proceedings if they fail to comply with what they see as directions from the ICAEW. Pending this application, they have ceased making payments to HAL under the HAL Debenture. And, in the light of the imminent expiry of the relevant limitation period, they have issued proceedings ("**the Protective Claim**") against HAL and the relevant directors of Comet seeking an order setting aside the HAL Debenture and claiming relief for breach of directors' duties. The Liquidators consider the claims raised to be without merit and do not wish to serve the Claim Form on the named parties.

5. The application notice seeks directions as to what (if any) further investigations they ought to take in relation to the matters raised by the ICAEW. Although not mentioned in the application notice, the draft order produced on behalf of the Liquidators also seeks directions as to whether (i) they are permitted to continue making payments to which HAL is entitled on the basis that HAL Debenture is valid and (ii) they are permitted to allow the Protective Claim to lapse or whether it should be served on any of the defendants named in it.

6. The ICAEW is the only respondent to this application. It has no financial interest in the liquidation. As it says, it is not part of its function, and it has no desire, to carry out the further extensive factual enquiries which it considers are likely to be necessary to determine whether, and if so how, to challenge the HAL Debenture. The persons with financial interests include the unsecured creditors (the major creditor being HMRC) but none of them is joined. None of them has been informed of the ICAEW's concerns, nor has it been suggested to any of them that there may be grounds on which to challenge the validity of the HAL Debenture or that they have not even been provided with information concerning the circumstances leading to its execution. Having been joined, the ICAEW has made extensive submissions. Although it may be correct that the ICAEW itself would have no standing to seek directions under section 112 or otherwise, I am obviously entitled to take account of its submissions in determining the directions which I should make on the Liquidators' application.

7. There is one further point I should mention by way of general background. It no doubt accounts for the air of hostility which I have detected between the Liquidators and the ICAEW in the correspondence leading up to this application. It is that there is an extant disciplinary investigation commenced by the ICAEW in about March 2014 against Mr Kahn, Mr Edwards and another individual, Mr Farrington, who had been appointed administrators of Comet in 2012 (together **"the Administrators"**). The ICAEW's allegations are strenuously denied by the Administrators. As matters stand, no disciplinary finding has been made or sanction imposed against them, and the investigation remains pending. As a result of those proceedings, the ICAEW is unusually well informed when it comes to matters which it considers should have been investigated by the Liquidators but which have not been. They are in a far better position, indeed, than any creditor to have made relevant submissions to me.

8. The Liquidators acknowledge that I cannot reach any final or binding determination as to the merits of the Protective Claim or the validity of the HAL Debenture at this hearing, and do not ask me to do so. That must be right, just as it is right that I should not form any view as to the merits of the ICAEW's disciplinary investigation into the conduct of the Administrators. What Mr Moss asks me to do is to make directions that the Liquidators be permitted:
    a. to form their own view as to the merits of the Protective Claim and the validity of the HAL Debenture;
    b. to take their own decision as to whether the Protective Claim should be prosecuted, whether any further payments should be made to the holder of the HAL Debenture, and whether any further investigations should take place.

9. If that is really what is being asked for by the application, I do not see its purpose. It does not need a direction from the Court for the Liquidators to form their own views and make their own decisions: that is precisely what they would have to do if they had not launched this application in the first place. Indeed, as Neuberger J said in Re T&D Industries plc [2000] 1 WLR 646 at 657:

> "... a person appointed to act as an administrator may be called upon to make important and urgent decisions. He has a responsible and potentially demanding role. Commercial and administrative decisions are for him, and the court is not there to act as a sort of bomb shelter for him."

10. It is not, in any case, what the draft order seeks. I have set out at paragraph 5 above what the application notice and the draft order ask. The Court, it appears, is being asked (i) to decide whether the Liquidators are required to conduct further enquiries, (ii) to rule whether the Liquidators should be permitted to continue making payments to HAL and (iii) to rule whether the Liquidators should be permitted to allow the Protective Claim to lapse or whether it should be served.

11. As to (i), this appears to be casting the decision about the need for further enquiries onto the Court. As to (ii) and (iii), the order could be seen as ruling only that the continued making of payments and allowing the Protective Claim to lapse are decisions that the Liquidators could properly make, leaving the actual decision to them, although the alternative direction that the Protective Claim should be served again seems to be leaving the decision to the Court and not to be leaving the Liquidators to make their own decision. The distinction in the context of a private trust between, on the one hand, a trustee surrendering his discretion the Court (which surrender the Court may or may not be willing to accept) and, on the other hand, seeking the protection of Court by obtaining liberty to act in a particular way (that is to say, by satisfying the Court that a particular course of conduct is one which a reasonable trustee may take) is well-understood. The draft order appears to be a mixture of both.

12. Mr Moss tells me that the directions which the Liquidators seek are not intended to prevent any of Comet's unsecured creditors from arguing that the HAL Debenture is invalid, or seeking to bring any proceedings against the Liquidators in the future. Mr Moss submits that the directions are merely intended to reflect the inescapable fact that Comet's liquidation is to be run by the Liquidators, not the ICAEW: any actions taken by the Liquidators would be taken at the Liquidators' own risk in the same way that all actions taken by office-holders in any insolvency proceedings are taken at their own risk.

13. To reflect that approach, the draft order will need modification to make clear that the directions are given without prejudice to any rights which a creditor would have, absent the direction, to challenge the Liquidators' decisions. If I ignore, for the moment, the Liquidators' concerns about the ICAEW's position in relation to the HAL Debenture, this would be a very strange order to make. It would, at least in theory, achieve nothing so far as the creditors are concerned since it would afford the Liquidators no protection as against them. I say in theory because, in practice, a creditor seeking to challenge the Liquidators' conduct would be faced with one extra hurdle namely that the judge (that is to say me) should not have given the direction which, on this hypothesis, I did. It would be odd, for

instance, for me to make a direction that the Liquidators be permitted to allow the Protective Claim to lapse and at the same time provide that the creditors can nonetheless pursue a claim against the Liquidators for then allowing it to lapse.

14. Since the directions I am asked to make are to have no impact on the position of the creditors *vis a vis* the Liquidators, the purpose of the application can only be to protect the Liquidators in some way from actions which the ICAEW might take against the Liquidators or which it might otherwise take in relation to the liquidation.

15. So far as actions in relation to the liquidation are concerned, the ICAEW does not assert any right to intervene in any way. It does not itself make any application to the Court at all. It makes no application seeking to fetter the exercise by the Liquidators of their powers. It has taken certain views about what the Liquidators ought properly to do by way of the carrying out of investigations, but it does not assert any power to compel the Liquidators to carry out further investigations. Since it takes the view that further investigations are required, it also considers that payments to HAL should be suspended and that the Protective Claim should be preserved until proper investigations have been carried out (which may mean that the Protective Claim has to be served on HAL). But it does not assert any right to compel the Liquidators to carry out further investigations or to apply for the appointment of an independent liquidator to carry out investigations; nor does it assert any power to compel the Liquidators to s payment to HAL or to serve the Protective Claim.

16. The Liquidators, nonetheless regard the actions of the ICAEW as interference, or an attempt to interfere, in the exercise by them of their powers and duties as liquidators. This, it seems to me, can only be because they view the ICAEW's statements and actions as a veiled threat to invoke disciplinary proceedings against them, although it is clear that there is no immediate threat of disciplinary action. Absent such a perceived threat, the Liquidators, as the robust professionals which they are, should not feel constrained in acting as they see fit.

17. What, then, would be achieved by the directions sought? The Liquidators must think that it will afford them some sort of protection from the ICAEW; and since it is common ground that the ICAEW has no power to intervene in the liquidation but only has disciplinary powers, the Liquidators must consider that the directions which they seek would prevent exposure to the risk of the exercise by the ICAEW of its disciplinary powers. I think that is a realistic view. It must be right that the risk of disciplinary proceedings would be hugely reduced, if not altogether eliminated, were I to make directions and if the Liquidators were then to act in accordance with such directions.

18. Thus, looking at the paragraphs of the draft order, if I directed that the Liquidators are not required to undertake further investigations, it would be difficult to criticise them if they subsequently decided not to do so. If I directed that the Liquidators are to be permitted to make payments to HAL, it would be difficult to criticise them for doing so. And if I directed that the Liquidators are to be permitted to allow the Protective Claim to lapse, it would again be difficult to criticise them for doing so.

19. The key concern, it can be seen, is whether there should be further investigation of the validity of the HAL Debenture and, if so, whether it is necessary (and practicable) to appoint an independent liquidator or whether the Liquidators are themselves able to carry out the necessary investigations or whether there is some other way in which the merits of an action against HAL and the directors can be established. To determine whether further investigations are, in principle desirable, it is necessary to go into some detail about the facts and the legal advice obtained, matters to which I now turn. I gratefully acknowledge that I have drawn heavily on the skeleton arguments in some sections of this judgment, particularly when recording the parties' arguments.

The ICAEW investigation

20. I need to say something about the ICAEW investigation. The ICAEW does not contend that the HAL Debenture is invalid. Its main concern is that its validity has not, in its view, been properly investigated. Its concerns arise out of the conduct of the Administrators, which is the subject of the on-going disciplinary matters which I have mentioned.

21. The ICAEW's investigation into the conduct of the Administrators commenced with a complaint made by Mr Walters in March 2014 about various aspects of the conduct of the Administrators. Mr Walters is a chartered accountant and member and fellow of the ICAEW. Until 21 December 2012, he was Head of Finance at Comet. Mr Walters was also company secretary of Comet until 3 February 2012, his resignation being accepted at the board meeting on that date as the Minutes record. His complaints included that the Administrators had not been sufficiently objective to have accepted the appointment given their prior professional relationships with HAL. Mr Walters also complained about the Administrators' failure to disclose key information to unsecured creditors and their failure to investigate properly the validity of the HAL Debenture as explained in the witness statement of Mr Wiggetts, the Executive Director of the Professional Standards Department of the ICAEW.

22. On 24 July 2014, the Insolvency Service made a complaint to the ICAEW about the conduct of the Administrators in failing to properly consult employees in respect of redundancies.

23. Also, on 24 July 2014, the then Secretary of State, Sir Vince Cable MP, announced a referral through the Company Investigations unit of the Department of Business, Innovation and Skills ("BIS"). The complaint was that the Administrators had a potential conflict of interest when they accepted the appointment by reason of the professional engagement of their firm, Deloitte, by HAL during the 10 months prior to the commencement of the administration.

24. The ICAEW's investigation by its Professional Conduct Department has resulted in a number of complaints set out in a report to ICAEW's Investigation Committee. The report is, I understand, still in draft and has not been formally delivered. The report invites that Committee to find that there is a *prima facie* case for many of the complaints to be referred to the Disciplinary Tribunal for an oral hearing. Those complaints include:

a. Accepting the appointment as administrators without first identifying and evaluating potential threats to their objectivity arising from the prior professional relationship with HAL leading to a failure to consider whether there were any suitable safeguards to eliminate the threats or reduce the potential threats to an acceptable level.
b. A failure to act transparently and openly in removing all of the work carried out by Deloitte at Comet for OpCapita/HAL from the list of significant prior professional relationships immediately prior to the list being filed in Court.
c. Removing the reference to the (as to which see paragraph 37 below) transaction in the proposals to creditors.
d. Failing to investigate properly the circumstances surrounding the sale transaction including the enforceability of the HAL Debenture.
e. Failing to investigate properly the conduct of the Comet directors before submitting the CDDA returns.

25. For reasons which become apparent, complaint a. is not relevant to this application.

The BIS investigation

26. Perhaps taking this aspect out of turn, if only to dispose of it early on, I need to refer to the BIS investigation. Following the reference by the Secretary of State mentioned above, BIS carried out an investigation. This did not result in any proceedings either against the Comet directors. One result is that the Liquidators remain in office as liquidators. The Liquidators place considerable reliance on what they see as their vindication. They appear to think that, because the BIS Investigation did not result in any proceedings against the Comet directors, it supports the Liquidators' position that there is nothing to investigate. However, the position is explained by Mr Hill, Chief Investigator in the Company Investigation Team at the Insolvency Service (an executive agency of BIS). His evidence is that BIS were not provided with and did not see, and therefore did not rely on, some of the documents that have been brought to the attention of the Liquidators by the ICAEW. These include (i) correspondence between the Comet directors and SJ Berwin, solicitors advising them and Comet on certain aspects of the transaction (provided but not relied on because of a claim for legal professional privilege) (ii) advice provided by PwC to the Comet directors and/or SJ Berwin in respect of the Statement of Affairs (not provided) (iii) an email dated 1 November 2012 from Bingham McCutcheon to Mayer Brown a (redacted) version of the board Minutes of the 3 February 2012 meeting attached including to it (not provided) (iv) any documents relating to the Administrators in relation to their CDDA review work (v) in relation to disclosure of RF4, an exchange of emails between Mr Walters and a Ms Keat of the Administrators' team (not received and, I infer, not provided) (vi) any balance sheet or financial information for Comet alone on the basis of which the directors apparently reached the conclusions set out in paragraph 16.5 of the Minutes (not provided) and (vii) the E&Y analysis referred to at paragraph 21.2.5 of the Minutes (not provided).

27. In his 3rd witness statement, Mr Kahn addresses Mr Wiggetts' reliance on the lack of use made by BIS of those documents:
    a. As to (i), he is no doubt right that to the extent that legal privilege vests in the directors rather than Comet (in which context I understand that SJ Berwin were acting for the directors as well as, according to Mr Moss, for Comet), the directors could assert that privilege in any claim against them. It does not follow that the

correspondence, which I believe the Liquidators have, would not be relevant to investigations which the Liquidators could undertake.

b. As to (ii), (iv) and (v), Mr Kahn points out that they post-date the administration of Comet and it is not clear to him how these go to the validity of the HAL Debenture as at 3 February 2012. That does not quite meet the point which Mr Wiggetts is making: the point is not that these documents themselves go to the validity of the HAL Debenture but that if BIS had known of them, its enquiry might have pursued further avenues.

c. As to (iii), Mr Kahn is again unclear how an email between two law firms, neither of which was acting for the Comet directors or HAL in relation to the sale of Comet, sent immediately before the administration in November 2012 would be relevant to the conduct of the Comet directors or HAL at the time of completion in February 2012. To defuse Mr Wiggetts' point that this document could have changed the course of the inquiry, he notes that BIS has not reopened its investigation to request this document.

d. Mr Kahn therefore reduces Mr Wiggetts' argument to reliance on the failure to review items (vi) and (vii). Mr Kahn considers this to be "disproportionate, in the context of the size and scale of the investigation that was undertaken by BIS" and notes again that BIS does not appear to be reopening its investigation by reason of this factor.

28. I think that Mr Kahn is downplaying the potential relevance of these documents too much. As I have said, the point is not whether these documents themselves provide primary evidence of a claim against the directors or of grounds to substantiate an attack on the HAL Debenture, but whether they might have had an impact on the direction of the BIS inquiry. The fact that no action has been taken following the BIS investigation is, in these circumstances, scant support for the conclusion that the Liquidators have done everything which they should. Nor does the fact that BIS does not appear to be intending to reopen its enquiry assist. There could be all sorts of reasons why it would not wish to do so at this stage.

29. In any case, as Mr Mowschenson points out, the BIS report and its conclusions are confidential: what documents BIS relied on and its interpretation of them is largely unknown. Mr Kahn complains that it is unfair that the ICAEW has had access to the BIS report but neither the Court nor the Liquidators have access to it. Since I have not seen it, I cannot rely on it, either in or against the interests of the Liquidators. But what I can be confident about is that if the BIS report contained anything which demonstrated that there could be no case against the directors or which showed that a challenge to the HAL Debenture would be doomed to failure, the ICAEW would not be responding to the Liquidators application in the way it is. The Liquidators do not appear to have asked BIS for a copy of the BIS report or of any transcript of the evidence taken for the purpose of its preparation. In the light of the decision in *Soden v Burn*s [1996] 1 WLR 1512, it may be that BIS would be receptive to a request, at least for the transcripts.

30. Mr Mowschenson also makes the point, which has considerable merit in my view, that it has apparently never occurred to Mr Kahn that BIS's view that there was insufficient evidence might have rested heavily on the fact that the Administrators submitted "nil" D Form returns

in respect of all the Comet directors. He submits that Mr Kahn, as an experienced insolvency practitioner, will be aware that it is almost unheard of for disqualification proceedings to be commenced against directors in the absence of an adverse report from the appointed officeholders.

31. Finally, in relation to the BIS investigation, I point out that even if the conflicts which the Administrators were under were not sufficient to require them to refuse to accept office, that does not answer the question whether those conflicts should have been addressed with procedures being put in place to deal with situations where those conflicts might be perceived to have an influence on the Administrators' conduct of particular aspects of the administration. This is particularly so in relation to the HAL Debenture. Accordingly, although Mr Moss is right to point out that the ICAEW has now acknowledged that the Administrators were not precluded from accepting office, it is not the case that it has conceded that the Administrators were therefore absolved from considering further the problems which might arise from their previous relationship with HAL. It is to be remembered, here, that it is not simply that Deloitte had such a relationship: Mr Kahn himself was one of the individuals through whom that relationship was conducted.

The disposal of the shares in Comet

32. In 2012, there was a disposal of the shares in Comet by the beneficial owners to outside investors. This has been variously described as a restructuring and as a sale and purchase. To understand the concerns which the ICAEW has about the validity of the HAL Debenture, I need to say something about the corporate structures before and after the 2012 transactions and the way in which the transactions were structured and implemented, and something about the transactions themselves.

33. Prior to the 2012 transactions, Comet was wholly owned by Kesa Holdings Limited ("**KHL**") which in turn was wholly owned by Kesa Electricals plc ("**KEP**"). So far as I understand the structure, KEP had another wholly owned subsidiary Kesa International Limited ("**KIL**") and KHL had a wholly owned subsidiary Triptych Insurance NV ("**TI**"). I will refer to KEP and the companies under it as **the Kesa group**.

34. Two intra-group unsecured borrowings outstanding at the time are relevant:
    a. Comet owed KIL £115.4 million pursuant to a £300 million unsecured revolving credit facility ("**the KIL RCF**"); and
    b. KIL owed TI £73.1 million.

The Share Purchase Agreement

35. By a Share Purchase Agreement dated 9 November 2011 ("**the SPA**") made between KHL, KEP, Hailey Holdings Limited ("**HHL**" - HAL's holding company) and HAL, KHL sold to HAL all the issued share capital in Comet for £1 and sold to HHL all the issued shares in TI for £1. Comet itself was not a party. Although the SPA was, indeed, a sale and purchase agreement, its terms went far beyond a mere sale and purchase. In particular, it was subject to a number of conditions set out in clause 3.

36. Certain of those conditions related to pensions: they are to be found in Schedule 1 under the heading Pensions Conditions. In essence, the significant pensions liability of Comet under

the Comet Pension Scheme was to be removed from its balance sheet by the substitution of KEP as principal employer under that Scheme. The pension liability would thus remain with the Kesa group on the sale of Comet out of the group. The SPA was conditional on execution of the appropriate deed of substitution and other documents designed to ensure the intended result.

37. The SPA contains a definition of a facility namely the "ABL Facility Agreement" which, as actually agreed at the time of completion of the sale of Comet, has generally been referred to in this application as the **RF4 Transaction.**

38. I need to mention at this stage that its terms are extremely onerous for the borrower. Mr Mowschenson submits that Comet never needed this facility and that it was only the requirement of the ultimate investors above HAL which led to its execution. It was terminated only a short time after the transaction at a cost to Comet of about £1.9 million. Under clause 2.4 of the SPA, if completion of the SPA had not taken place by the Long Stop Date as defined (6 months from the date of the SPA or a later agreed date) and if HAL/HHL had failed to deliver to KHL a copy of the ABL Facility Agreement executed by all parties other than Comet itself, for the purposes of satisfying paragraph 11(C) of Schedule 2 on or before 5.00 pm on the day immediately prior to the Completion Date, then KHL was to be entitled to terminate its obligations under the SPA with HAL/HHL paying £30 million by way of liquidated damages. Paragraph 11 of Schedule 2 sets out the obligations of HAL/HHL on completion: paragraph 11(C) requires delivery of "a fully executed copy of the ABL Facility Agreement".

39. The SPA also contains a definition of another facility named the "**Revolving Credit Facility**", which as actually executed is the HAL RCF.

40. Clause 7 of the SPA deals with certain completion payments:
    a. Provision is made in Clauses 7.1 to 7.4 for establishing relevant indebtedness (in particular group indebtedness within the Kesa group).
    b. Clause 7.5 then provides at paragraphs (A) and (B) for HAL/HHL and KHL respectively to procure payment of relevant group debts as between companies retained within the Kesa group and those being acquired by HAL/HHL (that is to say Comet and its subsidiaries and TI). It also provides at paragraph (C) for KEP and HHL to procure (insofar as paragraphs (A) and (B) do not satisfy this) that payments are made to ensure the obligations of KIL, TI, Hailey 2 LP, HHL, HAL and Comet under sub-clause 8.6 to 8.21 are met.
    c. Clause 7.6 then deals with how those amounts are to be satisfied.

41. Clause 7.6 has to be read with certain parts of Clause 8 (headed Pre-Completion Steps):
    a. Clause 8.2: KEP is to procure that prior to completion a board meeting of Comet is to be held at which Messrs Falque-Perrotin, Platt, Enoch and Terrier resign as directors with the appointment of persons nominated by HAL/HHL.
    b. Clause 8.3: after that, the board of Comet (that is to say including the HAL/HHL nominated directors) is to review Comet's financial position in the light of (i) its

current business plan (ii) the availability of the ABL Facility and (iii) the availability of the Revolving Credit Facility.

c. Clauses 8.4 and 8.5: after that, KEP is to procure pursuant KIL to capitalise part of the debt owing to it by Comet with the shares being transferred to KHL so as to be comprised in the shares transferred at completion.

Then, under the heading ***Tranche A***

d. Under Clause 8.6, HAL/HHL are to procure so far as possible that the investment vehicle, Hailey 2 LP invests £35 million in HHL and under Clause 8.7 that sum is to be invested by HHL in HAL. Under Clause 8.8, Comet is then to enter into the Revolving Credit Facility (presumably having approved that course at the meeting envisaged by Clause 8.2). Then, under Clause 8.9. Comet draws down £35 million to find itself met with a demand for the same amount under Clause 8.10 in repayment of monies owed by it, which might well include part of the £115.4 million owed by Comet to KIL. All of these steps are to take place before completion. The SPA is silent as to what is to happen if Comet declines to enter into the Revolving Credit Facility or the Debenture.

Next, under the heading ***Tranche B***

e. Under Clause 8.11, KEP is to procure that companies in the retained Kesa group agree to pay all amounts owed to TI ("**the Triptych Amount**" - in particular, the £73.1 million owing by KIL). Next, under Clauses 8.12 and 8.13, TI agrees to lend to HHL and HHL agrees to borrow from TI the Triptych amount with onward lending to and borrowing by HAL. Then, under Clause 8.14, Comet draws down an amount equal to the Triptych Amount under the Revolving Credit Facility. Under Clause 8.15, KEP is to procure that the relevant members of the retained Kesa group issue a demand for payment of group debts equal to the Triptych amount and which is owed by Comet, so that Comet will in practice be liable to make immediate payment of the Triptych Amount to KIL which is in turn is liable to pay to TI the amount which it owes.

Finally, under the heading ***Tranche C***

f. Under Clauses 8.16 and 8.17, KEP is to procure that KIL makes to enter into the Kesa Subscription, that is to say a capital contribution by KIL to Hailey 2 LP the ultimate investment vehicle of £50 million, and a further contribution equal to the sum of £22,660,000 plus a pension adjustment. Then the flow is similar to that under Tranche B with those two amounts being invested (rather than lent) by Hailey 2 LP in HHL and by HHL in HAL. Comet is then to draw down under the revolving credit facility an amount equal to the balance of the Group Debts (if any) after deducting £35 million and the Triptych Amount. This amount is then to be demanded from Comet in payment of debts owed by it.

42. What this comes down to is this:

a. Under Tranche A:
    i. Hailey 2 LP invests £35 million in HHL: this, it is to be noted, is the only new money being introduced into the structure.
    ii. HHL invests £35 million in HAL.
    iii. Comet and HAL enter into the HAL RCF and the HAL Debenture.
    iv. Comet draws down £35 million secured by the HAL Debenture.

v. KEP procures KIL to make demand for £35 million from Comet, which Comet agrees to pay. The result of this is that there can be no doubt that the debt is immediately due.

b. Under Tranche B:
   i. KEP procures that KIL agrees to pay the £73.1 million which it owed to TI.
   ii. TI lends £73.1 million to HHL.
   iii. HHL lends £73.1 million to HAL.
   iv. Comet draws down £73.1 million secured by the HAL Debenture.
   v. KEP procures KIL to make a further demand for £73.1 million from Comet, which Comet again agrees to pay.
c. Under Tranche C:
   i. In the event the additional amount was, I understand, £28.5 million making a total for the Kesa subscription of £78.5 million.
   ii. Hailey 2 LP invests £78.5 million into HHL.
   iii. HHL invests £78.5 million in HAL.
   iv. £78.5 million is, it is said, made available to Comet.
   v. £7.3 million, the amount of the balance of Comet's debt to KIL is, in practice, to be drawn down and used to pay that balance.
d. It is to be noted that there is no actual drawdown of cash by Comet at step v. under Tranches B and C, but only the "set off" described in Clause 7.6(A) and (C).
e. It is said that the £71.2 million balance of the KIL subscription was paid in cash to a Macfarlanes client account but I cannot say for sure that that is correct. Macfarlanes, it is to be noted, acted for HAL and for HHL.

43. Returning to Clause 7.6, paragraph (A) provides that the payment obligations of KIL, TI, HHL, HAL and Comet referred to in Clause 8.11 to 8.15 (that is to say Tranche B) are to be satisfied "by way of set-off against one another". The usual use of the words "set off" is in the context of mutual debts: If A owes B £X and B owes A the smaller amount of £Y, A can set off against the £X he owes to B the sum of £Y owing to him by B. Sometimes there is as a matter of law a right to set off; in other circumstances set off can be effected only by contractual agreement. The transactions identified under Tranche B cannot give rise to a set off in that sense. At best, there can, so it seems to me, only be an agreement between each party in the chain that it will accept discharge of an obligation by it as satisfaction of an obligation to it. For example, HHL could by agreement with HAL and TI accept discharge of its obligation to TI as satisfaction of HAL's obligation to it. If each party in the chain were to act in a similar way in relation to its lender and borrower, the chain would be complete and all obligations would be discharged. That cannot be the effect of the SPA on its own, since none of KIL, TI or Comet is a party to it. There is nothing in the evidence before me to suggest that any of those companies expressly agreed to the "set off" which the SPA contemplates. What is clear is that Comet received no cash but only benefited from a partial discharge of its unsecured debt to KIL, which was replaced by a secured debt to HAL.

44. Clause 7.6(B) deals with satisfaction of the amount payable in accordance with Clause 8.9 and 8.10 (that is to say Tranche A - the drawdown of £35 million under the Revolving Credit Facility and the demand by KIL for payment and the agreement of Comet to pay the demand). Such payments are to be satisfied by the payment directly from HAL to the relevant members of the Kesa Group "under direction by [Comet]". This is slightly curious. Clause 8.9 envisages the actual drawdown by Comet of £35 million; it is only after that - "but after the step set out in clause 8.9" - that the relevant member of the KESA Group in practice KIL is to issue a demand for payment which Comet agrees to pay. I doubt that anything turns on this imperfection in drafting. The practical effect of Clause 7.6(B) and Clauses 8.9 and 8.10 is that HAL is to transfer £35 million direct to KIL but so as to discharge to that extent Comet's debt to KIL: what Clause 7.6(B) confirms is that these monies were never at the free disposition of Comet but had to be used in discharging (in part) the indebtedness to KIL other members of the Kesa Group.

45. Clause 7.6(C) is concerned with the obligations of KIL, Hailey 2 LP, HHL, HAL and Comet. It is a complex provision about which I have received no submissions and which I have found difficult to understand. I do not propose to provide an exegesis. But it should be noted that the opening words provide for a set-off "to the extent a common amount is owed by and to each such person", those persons being the companies to which I have just referred.

46. The final provision of the SPA to which I wish to refer is Clause 19, headed "Exit Bonus Payments". Under this Clause KHL and HAL acknowledge that Comet has entered into, or will enter into, prior to or on completion, an exit bonus letter with Bob Darke. He is to be entitled to a bonus payment (the amount of which is unspecified) in relation to the sale by KHL of Comet and Triptych.

47. It would appear that one reason for adopting the complicated series of steps was to make the arrangements as safe as possible from risks arising out of English insolvency law, in particular section 245 IA which invalidates certain floating charges. This is apparent from the advice given by Macfarlanes to their client OpCapita LLP ("**OpCapita**"), of one the ultimate investors in HHL and HAL ("**the Ultimate Owners**"), the investors at the top of the corporate structure. Macfarlanes described section 245 as the area of greatest risk and explained that they had incorporated into the funding structure a number of steps to reduce any residual risk of a successful challenge being made. It is convenient to set out here the provisions of section 245(2):

> "(2) Subject as follows, a floating charge on the company's undertaking or property created at a relevant time is invalid except to the extent of the aggregate of—
>
> (a) the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the company at the same time as, or after, the creation of the charge,
>
> (b) the value of so much of that consideration as consists of the discharge or reduction, at the same time as, or after, the creation of the charge, of any debt of the company, and
>
> (c) the amount of such interest (if any) as is payable on the amount falling within paragraph (a) or (b) in pursuance of any agreement under which the money was so

> paid, the goods or services were so supplied or the debt was so discharged or reduced."

The meeting of the Comet board on 3 February 2012

48. The Comet board met on 3 February 2012 to deal with a number of steps which needed to be taken by Comet if the SPA was to complete as intended. The minutes of that meeting ("**the Minutes**") were pre-prepared by Macfarlanes, who were not then Comet's lawyers, but were lawyers to HAL and OpCapita. Whilst it is not uncommon for board minutes of this sort to be pre-prepared, I have not myself previously come across an occasion where the control of the contents of the minutes have been so far out of the control of the company's own lawyers. Various documents, including what was described as an "agreed draft" of the Minutes, were supplied to SJ Berwin who had been retained by Comet and its directors to advise on the duties owed by directors and other matters. No such agreement had been obtained, of course, from Comet: these were documents and Minutes agreed by the commercial parties to the sale transaction. SJ Berwin were told by Macfarlanes that none of the funding documents (thus including the HAL Debenture and the HAL RCF) were subject to comment. SJ Berwin (Mr Goldring) had emailed the directors and Mr Walters on 1 February 2012 stating this:

> "I have had a look at the various docs provided only this morning – here is a draft marked up minute …. "Apart from saying yes or no, we might counter-propose that we'll sign up provided (a) we get sufficient commitment in writing for 3-4 months cash flow and (b) we grant security but only for new money actually introduced into the business – not "hypothetical" cash which appears to be coming in but used to repay unsecured debt and in any event isn't coming in at all because Kesa is simply writing it off."

49. No commitment was obtained and the security was not restricted in that way. I have no idea what the directors and Comet did with that suggestion or what account they took of it in agreeing to the proposals and adopting the Minutes. The Liquidators are, I imagine, equally in the dark but they, at least, have had the opportunity to ask.

50. I refer in some detail to the Minutes (*ie* the actual minutes) below. The draft of the Minutes which had been sent to SJ Berwin by Macfarlanes was subject to an exchange of emails. Some changes were made to that draft. Reference to Mr Darke's equity participation was added, but references (at paragraphs 8.1 and 17.3 of the draft) to Comet running out of cash were not included although there is a reference to its doing so if drawdown requests were not permitted: see paragraph 17.4 of the Minutes originally in paragraph 18.4 of the draft minutes. The possibility of John Clare and Carl Cowling participating in certain equity incentive arrangements was inserted in paragraph 11.1. The reference to the finance documents being non-negotiable (paragraph 18.3.1 of the draft minutes) was removed and a reference to RF4 being controlled by the Ultimate Owners was removed (para 18.3.5 of the draft minutes).

51. The Minutes contain 24 numbered paragraphs (referred to in the Minutes as "items" although not each item relates to an agenda item but rather to the events that took place). They record at the top the place, date and time of the meeting. In the bundle are copies of two sets of

signed Minutes. One records the meeting as starting at 2.00 pm; the other at 2.30 pm. The Minutes list those present: Robert Darke (the "Chairman"), Simon Enoch (for items 1 to 13), Carl Cowling (for items 10 to 25) and John Clare (also for items 10 to 25). Mr Cowling and Mr Clare are recorded as in attendance for items 1 to 9. The meeting, according to the Minutes, comprised two parts. One item of business in the first part of the meeting was the appointment of Mr Cowling and Mr Clare as directors, and the resignation of Mr Enoch (amongst others). Mr Cowling and Mr Clare were the nominees of HAL/HHL. They were not directors of Comet until the stage recorded in paragraph 9. Mr Darke, it will be remembered, was to receive the bonus mentioned at paragraph 46 above.

52. At paragraph 2, Mr Darke is recorded as explaining the purpose of the meeting namely to consider and if thought fit to approve certain matters in connection with HAL's acquisition of Comet. These matters included (i) the registration of the transfer of the entire share capital of Comet from KHL to HAL at completion (ii) the appointment of Mr Clare and Mr Cowling as directors (iii) the resignation of a number of directors including Mr Enoch (iv) the terms and execution by Comet prior to completion of a revolving credit agreement (this was what became the HAL RCF) (v) the terms and execution prior to completion of a debenture (this was what became the HAL Debenture) (vi) the terms and execution prior to completion of an asset-backed lending facility (this was the ABL Facility Agreement referred to in the SPA and was what became the facility known as RF4) (vi) the repayment by Comet immediately prior to completion of £35 million of the debt owed to KIL "using the funds advanced to [Comet] by HAL" pursuant to the drawdown under Tranche A and (vii) the repayment by Comet immediately prior to completion of something over £73 million of the debt owed to KIL remaining after the payment of £35 million just mentioned "using the funds advanced to [Comet] by HAL" pursuant to the Tranche B request.

53. Paragraph 3 is headed "Directors' interests". It is recorded that each director present (that is to say, Mr Darke and Mr Enoch since, by this stage of the meeting, Mr Cowling and Mr Clare had not been appointed) had declared to the other directors (that is to say to each other as directors present) the nature and extent of his interest, direct or indirect, in any of the matters tabled at the board meeting or any related matters. It was noted that it was intended that Mr Darke "will participate in certain equity incentive arrangements designed to align his rewards more closely with the ultimate beneficial owners". These equity participations would be "designed to reward Bob Darke for achieving a consensual exit in respect of the investment in [Comet's] group made by" those owners. The Minutes do not record what, if anything, more was said about this equity participation for instance as to its extent or timing or indeed whether anything had yet been agreed or become contractually binding. So far as I am aware, no investigation has been carried out in relation to this equity participation, other than the limited enquiries of Mr Darake's Solicitors set out in Mr Golding's second witness statement. Mr Mowschenson is, I think, correct when he says that this reference to equity participation does not include the exit bonus payment which I have mentioned in paragraph 46 above; and nor is there any evidence that this payment was disclosed by Mr Darke. It certainly ought to have been disclosed.

54. The board then resolved, as recorded in paragraphs 4.4 and 5.2, to approve the issue of shares to KIL under the arrangements which I have described and the transfer of those shares from

KIL to KHL. Various other documents relevant to the overall arrangements were then addressed, as recorded in paragraph 8. The opening words of paragraph 8.1 are as follows:

> "The Resigning Directors then considered the terms of each of the Primary Documents in detail."

The Primary Documents are defined in paragraph 7.1 - A Deed of Priorities and two Withdrawal Agreements. I do not propose to go into the detail of those documents. It is sufficient to note that they are complex and could not be considered "in detail" in a matter of a few minutes.

55. This is all slightly curious. At this stage of the meeting, the only directors present were Mr Darke and Mr Enoch. Mr Darke was not included in the definition of "Resigning Directors" which is found at paragraph 13.1. Mr Darke was not resigning but continued as a director and falls within the definition of "Continuing Director" in paragraph 10. He is not recorded as having participated in the detailed consideration referred to in paragraph 8.1. If he did not participate, it is hardly likely that he would have voted on the resolution recorded as having been passed in paragraph 8.2.

56. There may be a perfectly good explanation for this. It is clearly the case – and I do not understand Mr Moss to suggest otherwise – that the Minutes were drafted before the meeting and set out what it was intended would happen at the meeting. They appear to be drafted on the basis that all of the Resigning Directors would be present. Had they all been present, then it would have made perfectly good sense for Mr Darke, as a continuing director and perhaps having different, even conflicting, interests from those of the Resigning Directors, to have taken no part in the decision whether or not to pass the resolutions. The Minutes are clearly incorrect as a matter of fact in recording that the Resigning Directors considered (which must, in the context of the Minutes, mean discussed) in detail the terms of the Primary Documents since only one of them, Mr Enoch, was present. It is not known to the Liquidators or the ICAEW what actually happened at the meeting since the Administrators (in that capacity) did not ask any of those present what did actually happen; and the questions asked by the Liquidators (in their capacity as liquidators) has produced responses which do not provide clear answers.

57. It was then resolved that the transfer of Comet's shares from KHL to HAL be approved as recorded at paragraph 9.

58. The next thing which is recorded, which is to be found at paragraph 10, is the appointment of Mr Clare and Mr Cowling as directors. Under the heading "Directors' interests" it is recorded, in similar wording to that applying to Mr Darke and Mr Enoch, that interests have been disclosed with reference to Mr Darke in relation to equity participation being replaced by references to Mr Clare and Mr Cowling. I make the same observations in relation to that as I have made in paragraph 53 above in relation Mr Darke.

59. Paragraph 12 records that it was noted that, for the purposes of all the subsequent business (including paragraph 13 to which I will come), the Resigning Directors did not form part of the quorum, partake in any of the discussions or vote on any of the resolutions.

60. Paragraph 13 records a resolution accepting the resignation of the Retiring Directors. Paragraph 14 records a resolution accepting the resignation of Michael Walters as company secretary. He features significantly in relation to the ICAEW's subsequent actions in relation to the Administrators.

61. Paragraph 16 is headed "Assessment of the current financial position of [Comet]". It is recorded that the Continuing Directors reviewed Comet's financial position in the light of the "Business Plan" (I have been unable to find a definition of this in the Minutes but I believe it to be the business plan prepared by HAL for the conduct of Comet's business after the acquisition) and the availability and terms and conditions of what became the HAL RCF and RF4 Transection. The Continuing Directors noted (see paragraph 16.3) that

> "given the fact that, without additional funding, [Comet] would inevitably run out of cash in the foreseeable future, the Continuing Directors have been advised that they must consider the interests of creditors of [Comet] as a whole."

62. Paragraph 16.4 then records as follows:

> "16.4 On the basis of the Continuing Directors' knowledge of [Comet's] financial position, the Continuing Directors considered whether [Comet] was presently unable to pay its debts, or would be so unable immediately following completion of the Completion and Finance Documents and the Post-Completion Documents, for the purposes of section 123 of the Insolvency Act 1986. The Continuing Directors considered in particular whether:
>
> …...
>
> 16.4.3 [Comet] was presently unable to pay its debts as they fell due; and
>
> 16.4.4 the value of [Comet's] assets (valued for these purposes at their real, rather than simply their book values) is presently less than the amount of its liabilities, taking into account for these purposes [Comet's] contingent and prospective liabilities.
>
> 16.5 Having considered the above, and having concluded in particular that the answer to each of the questions set out in paragraphs 16.3.1 to 16.4.4 was in the negative, the meeting concluded that [Comet] was not unable to pay its debts for the purposes of section 123 of the Insolvency Act 1986 and immediately following the date on which the Completion and Finance Documents and the Post-Completion Documents are signed, there would no ground on which [Comet] could then be found to be unable to pay its debts for the purposes of section 123 of the Insolvency Act 1986."

63. At paragraph 17.5 it is noted that Comet has been informed that no written commitment will be provided in relation to any projected drawdown request. And at 17.7 it is again noted that without additional funding Comet would inevitably run out of cash in the foreseeable future. Paragraph 17.9 contains a (self-serving) statement that the Continuing Directors had the objective of establishing a means to ensure the survival of Comet and that there was no intention of putting assets out of the reach of creditors.

64. The Minutes record that the meeting went on to consider the approval of the repayments by Comet involved in the overall arrangements, which were duly approved. Paragraph 21 records the directors as noting a number of matters (none of which would have been entirely straightforward for them to understand) including freedom from the pension fund debt (although it was noted that KEP currently guaranteed the debt). No mention is made of the certain loss-relief which would be foregone as a result of the arrangements, a relief of more value to Comet than freedom from the pension liability.

65. At paragraph 21.2, it is recorded that taking all the matters previously considered into account, the Continuing Directors concluded that it was in the best interests of Comet to enter into the series of transactions, there being set out in paragraphs 21.21 to 21.25 the reasons for this conclusion. In brief:
    a. The transactions represent an opportunity for Comet to be divested of a substantial amount of unsecured debt. This is a rather curious reason. The substantial unsecured debt was owing to KIL; it was in effect replaced by a secured debt to HAL. The pension fund debt was, indeed, eliminated but this was at the cost of foregoing a significant amount of loss-relief.
    b. There was no other deal available which might be structured any differently and which would provide any better opportunity for Comet to survive. I will consider this reason later.
    c. The Ultimate Owners had indicated that they intended to support Comet's business. The Minutes record however that, although their supportive actions to date were also consistent with those of a party intending to have an interest as a secured creditor, the Continuing Directors had no reason to doubt the sincerity of the Ultimate Owners.
    d. The only alternative (absent a different deal with other investors) is an imminent administration the outcome of which would be unlikely to produce a meaningful dividend for unsecured creditors. The Continuing Directors had seen an analysis of projected outcome from E&Y prepared in October 2011 and had no reason to doubt the assumptions underlying the analysis. It indicated a range of dividend for unsecured creditors of between 3% and 13%. I will also consider this reason later.

66. Before moving away from those Minutes, there are some points to be made. I must say that I am very surprised to discover that no professional adviser was present at the meeting. These were complex and significant transactions at which I would have expected Comet's lawyers to be present, unless everyone involved in reality considered that the meeting was simply for the directors to wield a large rubber stamp.

67. There was, of course, a meeting of some sort but whether it took the ordered course which the Minutes purport to record must be open to doubt. To have dealt with all of the matters recorded in the Minutes would have taken a considerable time, especially given the detailed consideration recorded as having been given to some matters. And yet the business of the meeting appears to have gone at a cracking pace. The HAL RCF and the HAL Debenture were approved, according to paragraph 15 of the Minutes, after the Resigning Directors resignations had taken effect and after the appointments of Mr Cowling and Mr Clare. They

were, it seems, executed at 2.46 pm and 2.55 pm according to the front-sheet of the two documents. The ICAEW suggests that, given the significance of the Finance Documents (as defined in the Minutes) to Comet and the far more onerous terms of the Finance Documents in comparison to the arrangements that Comet enjoyed as part of the Kesa Group, a genuine and detailed consideration of the documents would have taken much longer than the time between the start of the meeting and the execution of the documents. This is especially so in the light of the other business which the Minutes record as having taken place before this item was reached. In the absence of some explanation (there is none) as to how Mr Darke, Mr Cowling and Mr Clare could have been sufficiently informed to approve these documents, I find it difficult to resist the inference that they could not have been sufficiently informed.

68. Mr Clare (in response to the Liquidators' recent inquiries) has described the meeting as "long and complex", a description that would, as Mr Mowschenson submits and I agree, seem to be entirely at odds with both of the recorded start times for the board meeting and the subsequent signing of the HAL RCF and HAL Debenture. I agree that it must, therefore, be highly questionable whether he has remembered the right meeting.

69. The only evidence apart from the Minutes about what happened at the meeting comes from Mr Enoch who, according to a Deloitte attendance note of a phone call on 12 February 2018, says that "I remember a complete room full of documents but don't recall sitting round the table in a formal meeting room, it was more like a Completion Room in MacFarlanes… it was a big room and a lot of paper around. Not a formal sitting, people kept coming in and out of the room. It was dealt with the normal way of a completion".

70. There are some matters which the Minutes show which cry out for an explanation. Perhaps the most important is the basis for the directors' view that without additional funding, Comet would inevitably run out of cash. That would be so only if KEP withdrew its support. KIL's demand for repayment of the £115.4 million is timed at 2.01 pm on 3 February according to the manuscript on the written notice. I have no idea how this notice was served: it is addressed to Comet's address in Hull. It may well be that the directors did not know at the time of the meeting that it had been served, but it is hard to think that Mr Cowling and Mr Clare were not fully cognisant with the intended chain of events.

71. There are good reasons for thinking that the risk of withdrawal of support from the KEP if the sale did not go through was not as serious as the Minutes might suggest. KEP is a quoted company and would have risked severe reputational damages if it had allowed Comet to fail. It is highly questionable whether it would have allowed this to happen when it would be KIL's own demand which would trigger an administration or insolvent liquidation. It would, I can reasonably infer – at least it is something an investigation would reveal - have put the Kesa group companies in breach of their financial covenants to their own bankers. Support for that view can be found in the response of Mr Enoch (KEP's company secretary) as long ago as July 2014 to a question from BIS. His belief was "that had Comet remained part of Kesa, it is unlikely that it would have fallen into insolvent liquidation". However, he went on to point out that if a turn-around plan which was being discussed had failed, it would have been very unlikely that Kesa would have continued to operate Kesa as a going concern; the

business would likely have been closed. He also pointed out that although it was not Kesa's obligation to ensure that Comet succeeded under new ownership, Comet's insolvency would have impacted on Kesa group's relationship with its credit insurers (many of whose were at that time also Comet's credit insurers), thereby having an adverse impact of Kesa's remaining business.

72. Mr Enoch's response is entirely consistent with his description of Kesa's conduct earlier. BIS asked whether Kesa held out any information to Comet's key suppliers and credit insurers regarding Comet's financial position around 2010 and 2011 prior to its sale to HAL. Mr Enoch's response was this:

> "As part of its normal practice and in response to various rumours relating to the sale of Comet, Kesa held a meeting with key suppliers and credit insurers prior to the sale of Comet. When rumours in the market began to circulate regarding the potential sale of Comet in May 2011, Kesa engaged in a number of conversations with credit insurers to explain the situation. This included a verbal commitment, subsequently formally recorded in writing, that Kesa would continue to support Comet for so long as it remained under Kesa's ownership. The commitment was that for so long as Comet remained as a subsidiary of Kesa, the latter would ensure that Comet would have sufficient funds to pays its debts as and when they fell due. Such commitments were given to", and then Mr Enoch sets out the people.

73. Moreover, KEP had given a letter of financial support to Comet on 26 July 2011 ("the Letter of Support"):

> " We are pleased to confirm that Kesa Electricals PLC ("Kesa") will provide financial support to Comet Group plc ("Comet") in order that Comet meets its commitments as they fall due for so long as it remains a part of the Kesa Group
>
> The Kesa Group is currently evaluating some strategic structure options which include the possible sale of Comet. Should Comet be sold, it is the current intention of Kesa that Comet be sold as a going concern. Therefore, at this point of time, Kesa expects Comet to remain a going concern for a period of not less than 12 months from the date of this letter.
>
> We also confirm that, whilst Comet is part of the Group, we will not demand repayment of any amount owed by Comet to any other companies in the Kesa Group within the next 12 months."

74. There is a dispute as to whether the Letter of Support gives rise to a binding obligation or not, a dispute which I do not propose to resolve. The Minutes do not mention the Letter of Support nor is there any material before me which would have justified the directors in thinking that support would be withdrawn so long as Comet remained within the Kesa group. There is nothing to suggest that they ever asked Kesa what would happen if the sale to HAL did not go through and Comet remained within the group. Had they asked, they might have got the answer which Mr Enoch has given, namely that the Comet business would be closed down but if that were to happen, creditors would not suffer because there would be a solvent exit from business.

75. The next topic is disclosure of interests. The ICAEW contend that Mr Darke failed to make adequate disclosure of the financial incentives he would receive. Assuming that the Minutes are accurate (and that a meeting did in fact take place), the exit bonus letter referred to at paragraph 46 above is not recorded as having been disclosed. The reference to his proposed equity participation does not cover this payment. There is no evidence to suggest that Mr Cowling and Mr Clare were aware of the exit bonus payment. Mr Enoch was not aware of the detail. It transpired that the exit bonus was determined at £30,000, although there is no evidence before me of what was actually paid. I do not accept the suggestion from Mr Golding of Freshfields, acting for the Liquidators, that £30,000 is such a small amount in the context of the relevant transactions and Mr Darke's other benefits as to be disregarded and could not reasonably be regarded as giving rise to any conflict of interest. I do not, on the other hand, reject the suggestion: this is an area where I think that different minds might reasonably take different views but if that is right, it cannot be said that the exit bonus payment "cannot reasonably be regarded as likely to give rise to a conflict of interest".

76. Mr Darke, Mr Cowling and Mr Clare did declare that they were intended to participate in certain equity incentive arrangements, but absolutely no detail was disclosed. The terms of the participation of Mr Darke and Mr Cowling are set out in a document titled "Project Encore – equity terms" dated 3 February. The copy in the bundle shows that it was signed by both Mr Darke and Mr Cowling (as well as by Mr Clare on behalf of Comet), although the date of their signatures is not apparent. It is quite possible, indeed one might think it highly likely, that Mr Darke and Mr Cowling knew of the terms of their participation when they attended the board meeting. If they did know, it is probably the case that they knew the details of each other's participation. So far as Mr Clare's knowledge of the participation of Mr Darke and Mr Cowling, solicitors, Osborne Clark LLP, acting for all three of them have stated in their letter dated 28 March 2018 that Mr Clare was not aware of "the specifics" of the incentives of the other two.

77. Mr Mowschenson submits that the disclosure was inadequate. He may be right: but absent any proper investigation into this, it is impossible to say with any certainty.

78. Mr Clare's position is different. On 16 November 2011, OpCapita offered Mr Clare a number of benefits in consideration of his involvement in Project Encore, an offer which he accepted on 2 November 2011. Mr Clare was to receive (i) a cash consideration of £150,000 pa for the duration of his involvement (anticipated to be for 9 – 12 months) (ii) 18% of the OpCapita carried interest and (iii) £200,000 co-investment in institutional securities on equivalent terms and *pari passu* ranking with the institutional investors and OpCapita principals. There is no evidence that Mr Darke or Mr Cowling were aware of Mr Clare's arrangements. This is confirmed in Osborne Clarke's letter in which they state that Mr Darke and Mr Cowling were aware that Mr Clare's arrangement would reward him if Comet was successfully turned around to the benefit of its buyers, but were not aware of the specific mechanics. Osborne Clarke state that Mr Clare's arrangements were not finalized until sometime after the board meeting. I do not understand how that can be said in the light of the offer and acceptance I have just recorded.

79. From that material, it is apparent that Mr Clare's disclosure was inadequate; or if it is putting it too high to state that as a conclusion, there is manifestly a case to be investigated.

80. Mr Mowschenson identifies other matters which cause concern to the ICAEW:
    a. The Minutes refer to the directors having considered the financial position of Comet and reaching a conclusion that the value of Comet's assets exceeded its liabilities. There is, however, no contemporaneous balance sheet which shows a positive net asset position after taking into account the deferred tax write down immediately after completion. I have already referred to balance sheets which are in evidence which demonstrate a deficit once that item is removed.
    b. Paragraph 21.2.5 of the Minutes refers to the only alternative to the deal with HAL (absent a different deal with other investors) being "an imminent administration". The ICAEW's position is that this statement is palpably wrong for the following reasons:
        i. As described above, KEP is a quoted company. If the directors had refused to commit Comet to the Finance Documents, it would have been commercial suicide for KEP to have precipitated an administration of Comet. That is to put the point in graphic hyperbole. The reality may well have been that, absent a sale, there would not have been an insolvency process, but rather a cessation of trade under which all creditors debts were met. Nobody can say what would actually have happened without further investigation but the reality which I have just described cannot be described as fanciful, particularly in the light of what Mr Enoch has said, as recorded above.
        ii. Comet also had the benefit of the Letter of Financial Support which I have already addressed. Irrespective of whether the Letter is binding it is strong evidence that if the HAL sale had not proceeded Kesa would not have abandoned its subsidiary. Given all of this, the basis on which the directors felt able to conclude that administration was imminent is entirely unclear.
        iii. An assumption that the directors could have been justified in concluding that an administration was imminent on the basis of the E&Y report referred to at para 21.2.5 of the Minutes would be erroneous. It is clear from Mr Walters' evidence that the E&Y report was commissioned by Comet Trustee Company Limited (the pension fund trustee) and not by Comet and its purpose was to provide the trustee with advice in relation to the possible change of pension scheme sponsor from Comet to Kesa. As Mr Walters says:

            > "As a central part of its advice, EY had to work out what dividend the scheme would be likely to receive if, in the worst case scenario, Comet went into insolvent administration."

    c. The Minutes refer to the directors considering whether the transactions would be caught by section 238, 239 and 423 IA. But no consideration is recorded as having been given to whether any transaction might be caught by section 245 IA.

81. Despite these matters, the Administrators carried out no investigation into them or tested any of the statements that gave the impression that Comet was being thrown a lifeline by the HAL acquisition, when, on the ICAEW's case, that was anything but the case. The Administrators also carried out no serious investigation into why the directors were prepared to commit Comet to transactions that carried a very serious risk of administration with no, or negligible returns, to unsecured creditors, a situation which materialised in fact less than a year later.

82. As well as the criticism levelled at the Liquidators for what it regards as their inadequate actions in the light of the matters I have mentioned above and arising out of the Minutes, the ICAEW is also critical of the Liquidators' approach to the conduct of the Comet directors. The ICAEW is not maintaining that the directors have been guilty of any breach of duty or that they were clearly wrong to have allowed Comet to enter in the HAL Debenture and the RF4 Transaction. The criticism is, again, a lack of investigation.

83. In this context, and taking matters almost verbatim from the skeleton argument on behalf of the ICAEW:
    a. it appears that it was not until February 2018 that the Administrators/Liquidators took any steps to interview or raise any questions with the Comet directors about anything despite having some five and a half years to do so. It appears that they, in fact, took a positive decision not to do so. In March 2013, the Administrators' staff, according to Mr Wiggetts' evidence, had drafted letters to the directors seeking details of their incentives. But these letters were never sent because the Administrators instructed their staff not to send them.
    b. According to Mr Wiggetts' evidence again, Mr Kahn also vetoed seeking advice from Mayer Brown on whether Mr Shinehouse and Mr Pike, the HAL directors, had acted as shadow directors of Comet and whether there should be further investigation into certain antecedent transactions involving HAL. It remains entirely unclear why Mr Kahn concluded that advice was unnecessary.
    c. Without even interviewing or questioning the Comet directors, and notwithstanding that Comet went into administration less than a year after a restructuring the effect of which materially prejudiced the interests of unsecured creditors, the Administrators submitted "nil" D2 returns on the conduct of the directors to the Insolvency Service thereby confirming that there was nothing to investigate as regards the conduct of the directors for the purpose of proceedings under the Company Directors Disqualification Act 1986.
    d. The Administrators never asked the Comet directors:
        i. The basis on which they were able to conclude that there was no alternative to the HAL acquisition and that without it administration was imminent.
        ii. The basis on which they were able to conclude that the onerous RF4 Transaction was in the interests of creditors as a whole when Comet had no need for it and when it was cancelled less than 2 months later at a total cost to Comet of £1.9 million.
        iii. The basis on which the Comet directors were able to conclude that the HAL RCF, with its much higher fees and charges than the KIL RCF and

the HAL Debenture were in the interests of creditors as a whole when set against the fact that Comet had the benefit of the unsecured KIL RCF, the Letter of Financial Support and no practical prospect of being placed into insolvent administration while Comet remained part of the Kesa Group.

iv. Why the Comet directors did not take SJ Berwin's advice to seek a commitment in writing for 3-4 months' cash flow and only grant security for new money actually introduced into the business – not "hypothetical cash".

v. Why the Comet directors ignored PwC's advice to make it clear in the statement of affairs which would accompany the Administrators' proposals that the debt was "acquired from the former owner at completion on 3rd February 2012". PWC advised clarity because: "the materiality of this balance and the impact on the outcome for unsecured creditors, it is important for the unsecured creditors to be able to easily understand how it arose … At the moment it is not clear".

vi. How much the Comet directors made from the incentives that were designed to align their interests with the Ultimate Owners. It is clear from Mr Hill's evidence that significant payments have been made to the Comet Directors in respect of the incentives.

84. I agree with Mr Mowschenson when he says that the questions are obvious ones. The answers might lead to the conclusion that, contrary to the impression given in the pre-prepared Minutes, the Comet directors did not act in the best interests of creditors as a whole.

85. It is further contended that, had the Administrators asked about the Comet directors' incentives in 2013, instead of 2018, it would have been apparent then that contrary to impression given by the Minutes neither Mr Darke nor Mr Clare disclosed the nature and extent of their incentives to Mr Cowling.

86. The duty to disclose his interest is found in section 177(1) Companies Act 2006 **("the 2006 Act):**

> "(1) If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors.
>
> (2) The declaration may (but need not) be made—
>
> (a) at a meeting of the directors, or…
>
> (6) A director need not declare an interest–
>
> (a) if it cannot reasonably be regarded as likely to give rise to a conflict of interest; [or]
>
> (b) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware) ..."

87. As to that, the "requirement is for a full and frank declaration by the director, not of "an" interest but of the precise nature of the interest he holds …": *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 at [1433] – [1435]. The same applies, in my view, to the matters of which a director is aware or ought to be aware for the purposes of subsection (6)(b). The duty only rests on a director: accordingly, Mr Cowling and Mr Clare only became subject to the duty of disclosure upon their appointment at the 3 February 2012 meeting. The duty is to make disclosure to the directors who, after the resignation of the Resigning Directors and the appointment of Mr Cowling and Mr Clare comprised only themselves and Mr Darke.

88. Article 11 of Comet's articles of association provide for a quorum of two directors at board meetings. Article 16 is concerned with disclosure:

> "Subject where applicable to disclosure in accordance with the Companies Acts or the articles and subject to any terms imposed by the directors in relation to any Conflict or Permitted Situation, a director shall be entitled to vote in respect of any matter in which he is interested directly or indirectly and if he shall do so his vote shall be counted and, whether or not he does, his presence at the meeting shall be taken into account in ascertaining whether a quorum is present."

89. I see no reason to think that Mr Cowling and Mr Clare were not validly appointed as directors. Even if it were shown that Mr Darke had failed to disclose his interest as required by section 177, that failure did not touch on this particular piece of business – the appointments of Mr Cowling and Mr Clare – at the meeting. By the time that the HAL RCF, the HAL Debenture or the RF4 Transaction came to be considered, those three persons were the only directors.

90. Mr Moss suggests that section 177 does not apply in respect of the HAL Debenture because the directors had no "interest" in it. That is, I consider, a bad point. The question is not whether any of them had an interest in HAL Debenture in the sense of having some prospect of financial benefit from it but is whether they are interested, in the sense of having a commercial interest, in the proposed transaction. The HAL Debenture cannot be viewed in isolation in this context. The real question is whether the directors had a commercial interest in the overall transactions of which the HAL Debenture formed part. In my view they clearly did.

91. The question then arises whether each of the directors had disclosed to the other the nature and extent of his interest. It is clear that each of the directors had disclosed that they had an interest of some sort. The Minutes record that that is so in relation to the equity interest; there is, however, nothing in the Minutes amounting to disclosure of Mr Darke's exit bonus to Mr Cowling or Mr Clare. Nor is there any evidence to show that Mr Cowling or Mr Clare knew of it.

92. Each of the directors signed the term sheet which set out the details (insofar as they had been agreed) of Mr Darke's and Mr Cowling's equity participation, Mr Clare signing as a director of Comet. Mr Darke and Mr Cowling must therefore have known (and certainly ought reasonably have been aware) of each other's equity participation. And Mr Clare, even if he

was not actually aware of the detail of those participations, ought to have been aware (having signed on behalf of Comet) so that section 177 does not present a problem insofar as disclosure of the equity participations of Mr Darke and Mr Cowling are concerned. There was, however, no adequate disclosure by Mr Clare of his arrangements (detailed at paragraph 78 above).

93. Mr Moss suggests that since Mr Clare signed on behalf of Comet but that he was not appointed until the second half of the board meeting, it follows that this document cannot have been in force to be disclosed at the outset. All that needed to be disclosed was the possibility of entering into such an agreement and this was the case: the specifics of those arrangements had not been finalised by 3 February 2012 and therefore could not have been fully known to the directors at that time. That cannot be right. The specifics of the arrangements were known before the board meeting commenced (whichever half of the meeting one is concerned with). The arrangement may not yet have come into force, to use Mr Moss's words, but the nature and extent of the proposed transaction was known and should have been disclosed.

94. Of course, section 177 is only infringed if all of the following conditions are satisfied:
    a. that it could not be said that the equity participation or, in the case of Mr Darke, his exit bonus, or in the case of Mr Clare the other elements of the arrangement referred to at paragraph 78 above, cannot reasonably be regarded as likely to give rise to a conflict of interest (see section 177(6)(a));
    b. that each of Mr Darke, Mr Cowling and Mr Clare was unaware (and should not reasonably have been aware) of the relevant interest, that is to say the nature and extent of the equity participation and the exit bonus in the case of Mr Darke and the other benefits to be enjoyed by Mr Clare (see section 177(6)(b)); and
    c. that the nature and extent of the equity participation and the exit bonus were not disclosed at the board meeting (see section 177(2)(a)).

95. It is clearly well-arguable, and in my view the argument is probably correct, that each of those conditions is satisfied:
    a. It clearly cannot be said of Mr Clare's arrangements that they cannot reasonably be regarded as likely to give rise to a conflict of interest. Even if reasonable persons may differ on that question, a person regarding the arrangements as likely to give rise to a conflict of interest cannot be said to be holding an unreasonable belief. Although the position is not so clear in relation to Mr Darke's exit bonus, I consider that it would be a reasonable view for a person to hold that the arrangements were likely to give rise to a conflict, even though reasonable persons might differ on that question.
    b. I consider that it is clear that Mr Clare's arrangements, and in particular his equity participation, were not actually disclosed to Mr Darke and Mr Cowling and there is no material before me to support a conclusion that they were aware, or ought to have been aware, that Mr Clare would enjoy these benefits.
    c. If the Minutes record all that was in fact disclosed at the board meeting, then the disclosure by each of the directors was inadequate for the purposes of section 177.

96. However, even assuming that there that was a breach of section 177, the Court would have power to waive the breach if it is satisfied the relevant directors "acted honestly and reasonably, and ... having regard to all the circumstances of the case ... [they] ought to be excused": see section 1157 of the 2006 Act. Mr Moss says that the classic reason for waiving a breach under section 1157 is that the director rationally acted on legal advice, without any ill intent, referring, as an example, to *Re Claridge's Patent Asphalte Company Ltd* [1921] 1 Ch 543 (where the headnote records the Court's conclusion "that the section extended to a transaction in fact wholly *ultra vires* the company, but which the director, acting on counsel's considered opinion, honestly and reasonably thought to be *intra vires*"). That, no doubt, is true. But the issue then would be whether the directors do satisfy this requirement. It is far from self-evident that they do and, in any case, I do not know what advice they received on the basis of which they considered that they had complied with the duties of disclosure. The Liquidators do not appear to have investigated this.

97. If HAL was dealing with Comet in good faith and without notice of any breach of duty by the directors, including a failure to disclose interests, then the HAL Debenture would no doubt be valid. But if HAL had notice of any breach, then the HAL Debenture might be subjected to a successful challenge, although the precise (equitable) relief appropriate to be granted may be open to debate. Thus if the Comet board was not quorate and/or the Comet directors breached their duty by failing to give sufficient consideration to the interests of creditors as a whole, there would be a strong argument that HAL was on notice of the deficiency so that the HAL Debenture and other associated transactions could therefore be set aside. This is because of the unusual involvement of HAL in the overall transaction. In reality, it was HAL which was driving the entire transaction, with its own solicitors, Macfarlanes, drafting (or being significantly involved in the drafting of) the Minutes; and with HAL being aware of the interests of Mr Darke, Mr Cowling and Mr Clare and aware also of what had been disclosed by them, at least so far as the Minutes are concerned. In addition, Mr Cowling and Mr Clare were HAL's nominees on the board of directors adding force to the suggestion that HAL knew whether disclosure had been given, whether Comet was solvent and whether any reasonable director could have thought that the RF4 Transaction was for the benefit of Comet. Quite clearly HAL would have known of the package which Mr Clare was to receive. The offer letter which I have referred to at paragraph 78 above was signed by a Mr Jackson who was a director of HAL.

98. However, even if the Court were persuaded that it would otherwise be appropriate to rescind the HAL Debenture in all the circumstances, the claim to rescind might be defeated, for instance if Comet has affirmed the transaction, or cannot make proper restitution (*restitutio in integrum*), or the rights of a third party would be adversely affected. As to ratification, this raises the question of solvency. If Comet was insolvent (or even arguably insolvent) there is a strong argument (in my view a correct one) that there could be no ratification by shareholders of a director's breach of duty since the interests of the creditors then intrude when one is considering in whose interests the duties must be exercised in the first place: see *Vivendi SA v Richards* [2013] BCC 771 at [148]-[150]; and see also *re Finch (UK) plc* [2015] EWHC 2430 at [28] and section 239 (7) of the 2006 Act.

Comet's solvency position as at 3 February 2012

99. Comet's solvency position as at 3 February 2012 is relevant in two respects. First, if it was not solvent, then serious questions will arise over the validity of the HAL Debenture which the Liquidators have not adequately addressed. I will come to these in due course. Secondly, it raises questions about how the Comet directors could have been satisfied that Comet was in fact solvent as the Minutes record them as believing: see at paragraphs 16.4 and 16.5. As an aside, I find it hard to reconcile those paragraphs with the apparent acceptance of the E&Y analysis as indicating the actual position: see at paragraph 21.2.5.

100. Mr Mowschenson has identified a number of factors which he suggests are evidence of balance sheet insolvency. Before turning to those, I remind myself of the tests for insolvency found in *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL Plc* [2013] UKSC 28; [2013] 1 W.L.R. 1408; [2013] B.C.C. 397 ("*Eurosail*") and which are conveniently summarised in the judgment of Lewison LJ in *Bucci v Carman* [2014] EWCA Civ 383, [2014] B.C.C. 269:

a. The tests of insolvency in s.123(1)(e) and 123(2) were not intended to make a significant change in the law as it existed before the Insolvency Act 1986.
b. The cash-flow test looks to the future as well as to the present. The future in question is the reasonably near future; and what is the reasonably near future will depend on all the circumstances, especially the nature of the company's business. The test is flexible and fact-sensitive.
c. The cash-flow test and the balance-sheet test stand side by side. The balance sheet test, especially when applied to contingent and prospective liabilities is not a mechanical test. The express reference to assets and liabilities is a practical recognition that once the court has to move beyond the reasonably near future any attempt to apply a cash-flow test will become completely speculative and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test.
d. But it is very far from an exact test. Whether the balance sheet test is satisfied depends on the available evidence as to the circumstances of the particular case. It requires the court to make a judgment whether it has been established that, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to meet those liabilities. If so, it will be deemed insolvent even though it is currently able to pay its debts as they fall due.
e. After that distillation of the *Eurosail* test, Lewison LJ noted at [38] that, on the assumption that a particular loan had no value, then the company was balance-sheet insolvent. He added this:

> "While that, in itself, may not be a conclusive answer to the question whether Casa UK was insolvent within the meaning of s.123(2), it is difficult to see how it could not lead to that conclusion in the case of a trading company unless there was credible evidence that the balance sheet would improve in the near future."

101. Lewison LJ also referred to the approval by Lord Walker in *Eurosail* of the judgment of Briggs J in *Re Cheyne Finance Plc* [2007] EWHC 2402 (Ch); [2008] B.C.C. 182, referring to these points made by Briggs J:

a. Cash-flow solvency or insolvency is not to be ascertained by a blinkered focus on debts due at the relevant date. Such an approach will in some cases fail to see that a momentary inability to pay is only the result of temporary illiquidity. In other cases it will fail to see that an endemic shortage of working capital means that a company is on any commercial view insolvent, even though it may continue to pay its debts for the next few days, weeks, or even months.
b. Even if a company is not cash-flow insolvent, the alternative balance-sheet test will afford a petitioner for winding up a convenient alternative means of proof of a deemed insolvency.

102. Mr Mowschenson submits that the available evidence demonstrates that as at 3 February 2012 Comet was insolvent, or at the very least, arguably so. Mr Wiggetts says that there is no contemporaneous documentation on the files of the Administrators evidencing any analysis having taken place. And although Mr Kahn claims that the Administrators did consider solvency and were satisfied that Comet was solvent, no contemporaneous evidence has ever been identified to show that Comet was balance-sheet solvent. The evidence of balance-sheet insolvency relied on includes the following:
    a. Deloitte's own Project Levy Report of 19 March 2012 showing that in January 2012 Comet had net liabilities of £10 million and was predicted to have net liabilities of £32.1 million by April 2012.
    b. An opening balance sheet as at 3 February 2012 shows a deficit of £15.08 million (after adjustments but excluding the value of goodwill at £15.08 million for shares purchased for £1).
    c. An opening balance sheet as at 31 January 2012 which shows a deficit of £15.8 million (after deducting a deferred tax credit of £43m which was worthless because Comet was making a loss, not profit).
    d. A balance sheet that shows a deficit of £9.991 million which was prepared for a board meeting on 10 February 2012. This does not show the pension fund liability which was being removed as a result of the transactions.
    e. A balance sheet as at 31 January 2012 prepared for a Key Supplier Update showing a deficiency of assets over liabilities of £10 million.
    f. The attempts by SJ Berwin LLP (solicitors acting for Comet and the directors) to remove the balance sheet solvency covenant from the HAL RCF and the RF4 Transaction. This was because they shared Mr Walters' concern that these clauses would have allowed HAL to call an event of default immediately on signing. The covenants were not in the end removed.The summary balance sheet which accompanied the Administrators' proposals which showed that as at April 2012 Comet had net liabilities of £53.247 million As to b and c above, the liquidation have made very late observations which I have not been able to consider in detail prior to the handing down of this judgment, the date for and as at September 2012 it had net liabilities of £84.2 million.
    g. As to b and c above, the liquidation made very late observations which I have not been able to consider in detail prior to the handing down of this judgment, the date which has been fixed for some weeks. "In any case, although their observations show that there may be an explanation as to why paragraphs b and c

do not suggest that Comet was insolvent, there is certainly a case for investigation which a conflict liquidator would be well placed to carry out."

103. Mr Mowschenson submits that there is also a serious question whether Comet was cash flow solvent on 3 February 2012 because at that date Comet and its directors could have had no confidence that Comet would be able to pay any of its debts as they fell due in the future. In his evidence, Mr Wiggetts identifies the following matters of concern in this context:

a. The HAL RCF was repayable on demand.
b. Comet was obliged to sweep any Excess Cash to HAL on a regular basis.
c. The effect of the Governance Agreement (see below) was that Comet could make no further drawdowns from the cash that had been swept without the written consent of Hailey 2 LP (owner of HHL). Comet could not seek any other form of financing without consent. Thus, the ability of Comet to pay its debts as they fell due, as recorded in the Minutes, depended entirely on the willingness of the Ultimate Owners to consent to further drawdowns. Comet had received no guarantee that such consent would be forthcoming as is recognised in paragraph 17.5 of the Minutes.
d. The Governance Agreement was one of the documents approved at the board meeting on 3 February 2012. It is dated on that date. Comet was a party. As its name suggests, it governs the distribution of powers between Comet and the other parties which, relevantly, were Hailey 2 LP, OpCapita, HHL, HAL.

104. Following their appointment in November 2012, the Administrators instructed Mayer Brown LLP to advise on the validity of the securities including the HAL Debenture. On 6 December, they produced their Security Review which raised no issues about the validity of the HAL Debenture.

The alleged conflicts of interest of the Administrators/Liquidators

105. The ICAEW has serious concerns that the prior relationship of the Administrators/Liquidators (and, in particular, the lead administrator, Mr Kahn) with HAL and the Ultimate Owners has compromised their objectivity. This, it is said, has resulted in a failure by the Administrators/Liquidators to investigate properly the lending and security arrangements entered into by Comet on 3 February 2012 or the conduct of the directors who committed Comet to those arrangements.

106. The position of the ICAEW is that the Administrators had a clear conflict of interest created by the extensive involvement of Deloitte and Mr Kahn with HAL and the Ultimate Owners from shortly before the HAL acquisition up until the commencement of the administration. I do not propose to go into the detail of that alleged involvement: it is summarised by Mr Mowschenson and Ms Hilliard in paragraph 25 of their skeleton argument, which is taken from Mr Wiggetts' evidence:

a. Deloitte's and Mr Kahn's involvement in advising OpCapita, HAL and the Ultimate Owners commenced in December 2011.
b. On 9 January 2012 (prior to the acquisition) Deloitte and Mr Kahn (as lead partner) started work on "Project Venice" which involved a diagnostic review and contingency planning and a report of estimated outcomes in the event of a trading

administration. Lengthy reports were delivered on 20 January and 30 January. Further extensive work was carried out from January down to 15 October 2012.

c. On 8 February 2012, Mr Kahn and Mr Farrington made an internal submission to Deloitte for a conflict check in relation to a "Potential administration of Comet Group Limited"
d. In February 2012 Deloitte, with lead partner Ms Young and second partner, Mr Kahn, started work on a project known as "Project Levy" which was a "company side business review" for HAL and Comet with a lengthy report being produced on 7 September 2012
e. On 17 September 2012 Deloitte, with lead partners Mr Shah and second partner, Mr Kahn, was engaged by Comet and HAL to provide sell-side advice on the accelerated disposal of the trade and assets or shares of Comet.

Deloitte generated £1.4 million across the above engagements.

Failure to disclose prior relationship with HAL and OpCapita

107. A consequential area of concern to the ICAEW is that, instead of identifying the threats to their objectivity presented by the conflicts listed above and considering what safeguards could be put in place to eliminate the threats, the Administrators failed to inform unsecured creditors that any such threats existed. This failure does not, of itself, demonstrate that the Administrators (and now the Liquidators) failed to undertake an adequate investigation, although it might explain why they might not have done so. It does, however, underline the need for particular care to be taken in reaching the conclusion that no further investigation is needed or, if it is needed, that the Liquidators can carry out the task themselves. That is particularly so where the failure arises in a context where it can be suggested that the Administrators were (i) anxious not to raise matters which might lead to criticism of their acceptance of office in the light of the alleged conflicts and (ii) reluctant to go against the wishes of the Ultimate Owners and HAL.

108. The following illustration is given:

a. The original draft of the Form 2.2B statement of prior professional relationships ("SPPR") included Deloitte's engagements by OpCapita and HAL. Counsel advised the Administrators that those engagements should remain in the Form 2.2B. Mr Kahn ignored counsel's advice. Mr Moss says that this advice was superseded by that from Ms Osborne, the Administrator's solicitor. Whether she reverted to Counsel I do not know. The Form 2.2B that was filed in court omitted all reference to HAL and OpCapita.
b. Mr Mowchenson says that Mr Kahn has sought to justify his action on the ground that Form 2.2B refers to prior relationships with Comet. However, given the materiality of the series of engagements with OpCapita and HAL to the Administrators' objectivity, he submits that it would have been prudent to make full disclosure of all the professional relationships with and involving Comet. Mr Mowschenson then says that Mr Kahn spoke to Ms Osborne of HAL's solicitors and then acted contrary to previously obtained Counsel's opinion.
c. Mr Moss rejects this line of attack. The point is disputed in the disciplinary proceedings. He says that it was appropriate to take advice from Ms Osborne of

Bingham McCutchen who were also acting for the prospective Administrators. She advised that the completion of Form 2.2B was correct: that may be correct but it is not a matter on which I have been addressed and make no further comment.

d. Correct or not, the effect of Mr Kahn's instruction to remove the reference to engagements with OpCapita and HAL was that unsecured creditors had no way of knowing that Mr Kahn and his firm had had extensive involvement over many months with HAL. The interests of HAL were necessarily adverse to those of the unsecured creditors because less than a year previously HAL had taken security over the entirety of Comet's assets without providing any money in excess of the £115.4m that had been previously been advanced by KIL on an unsecured basis. And so it is contended by the ICAEW that, if unsecured creditors had been fully informed of the prior engagements with OpCapita and HAL, they might have insisted that any examination of the validity of the HAL Debenture and other related transactions be investigated by an officeholder who was entirely independent of OpCapita and HAL.

Failure to disclose the RF4 Transaction

109. Another example of the Administrators' suggested preference for the interests of HAL and the Ultimate Owners can, according to the ICAEW, be seen from the way in which the RF4 Transaction was dealt with in the Administrators' Proposals. The RF4 transaction clearly gives rise to questions and controversy because (i) Comet had had no immediate need for it on 3 February 2012 (ii) it contained extremely onerous terms (iii) it was cancelled in March 2012 at a total cost to Comet of £1.9m for a facility that was never used and (iv) on 28 March 2012 it was replaced by a much more generous facility with PNC ("**the PNC Facility**").

110. SIP13, para 6.4 (in force at the relevant time) required an administrator to include within his proposals reference to "any connected party transaction undertaken in the period of two years" prior to the administration. The original draft of the proposals prepared on or about 5 December 2012 included a reference to the RF4 Transaction. Mr Walters, who had been asked by Ms Keat of Deloitte to assist, confirmed his belief that theirs was a the connection on the basis of his own knowledge and the Minutes, which contained a manuscript note showing that RF4 was connected. Mr Moss contents that my summary is inaccurate. The details can be ascertained by a conflict liquidator if they are relevant.

111. Thereafter, on 10 December 2012, the Administrators sent a draft of their proposals to the representatives of HAL, Mr Shinehouse (also a director) and Mr Pike. Mr Shinehouse responded on 12 December 2012 with detailed amendments to the Administrators' proposals. Mr Pike of HAL responded on the same day querying RF4 as a connected party transaction stating: "This should not be here". A series of email exchanges followed between the Administrators and the HAL directors which culminated in Mr Farrington confirming to the HAL directors that the Administrators would take the reference to RF4 as a connected party transaction out of the Administrators' Proposals. This is an aspect which a conflict liquidator will be well placed to investigate.

112. While it might have been acceptable for the Administrators to invite comments from the HAL directors on their proposals, Mr Mowschenson submits that it was utterly unacceptable for them to bend to HAL's demand that the reference to the RF4 transaction be removed when HAL was not willing to confirm or deny that RF4 was connected. As Ms Moriarty states: "By removing the RF4 Transactions from the schedule creditors did not get the opportunity to review and comment on this transaction". She also states that Mr Kahn's "decision to exclude the details of the RF4 Transaction may have been what the Secured Lender, his former client, had requested but, in my opinion, it was not in the best interests of the creditors as whole".

113. If unsecured creditors had been informed about the RF4 Transaction it might have prompted further inquiries that would have elicited the fact that Comet had paid £1.9 million for a facility that it never used. This in turn might have prompted inquiries about whether the directors had properly considered the interests of Comet when they signed the RF4 Transaction with its extremely high interest rate and charges. Inevitably, that might have prompted other questions. The Administrators' actions, at the behest of HAL (and the Ultimate Owners) closed down any possibility of inquiry.

114. In summary, the submission is that there is cogent evidence that the Administrators/Liquidators' relationship with the Ultimate Owners or companies that they control has resulted in the Administrators/Liquidators seeking to further the interests of HAL at the expense of unsecured creditors by closing down possible avenues of inquiry that might result in enhanced returns to them.

Potential issues concerning the 3 February 2012 transactions

115. The ICAEW has identified a number of issues which it contends need to be addressed. The Liquidators position is that there is nothing in any of those issues; and upon addressing them it can be safely said that the Liquidators are acting reasonably in concluding that none of the possible claims against the directors or in relation to the validity of the HAL Debenture should be pursued. The claims, if they exist at all, are very weak as Mr Allison has advised. The Liquidators should be permitted to continue with the conduct of the liquidation without having to pursue these claims. The potential issues (which I take verbatim from the skeleton argument on behalf of the ICAEW) are these:

    a. Whether the HAL Debenture is caught by section 245 IA.
    b. Whether the Comet directors disclosed the nature and full extent of their financial incentives at the board meeting of 3 February 2012.
    c. Whether the Comet directors breached their fiduciary duties when they committed Comet to the HAL Debenture and the RF4 Transaction:
        i. By failing to disclose the nature and full extent of their financial incentives at the board meeting of 3 February 2012.
        ii. By failing to sufficiently consider the interests of creditors as a whole in circumstances where Comet was insolvent.
    d. Whether the purported ratification by HAL of any breaches of duty by the Comet directors had any effect in circumstances where Comet was insolvent.

e. If yes, whether HAL was on notice of the breaches of fiduciary duty such that the HAL Debenture may be void or voidable.
f. Whether KIL was preferred when it was "repaid" the KIL RCF.

116. Those issues have been considered in the Hilliard Opinion as supplemented by a note dated of 26 March 2018. Mr Mowschenson submits that none of the issues or facts surrounding them has been properly investigated by the Administrators/Liquidators because of their conviction that there is nothing to investigate. The facts, he says, strongly suggest otherwise.

117. The Liquidators have obtained a considerable amount of legal advice about the potential issues which I have just mentioned. Unsurprisingly, armed with that advice, the Liquidators consider that it is self-evidently a reasonable course of conduct for them to act in accordance with that advice. Whatever other persons in the position of liquidators of Comet might have done, the Liquidators' position is that their proposed course of action is one of a number of possible reasonable courses of action and that they should be at liberty to pursue it without interference. The ICAEW's overarching point is the Liquidators' approach is flawed. They ignore their close relationship with HAL which has compromised their objectivity so that neither they nor their lawyers are competent to undertake the task of investigating whether the HAL Debenture is valid.

118. I interpose here to say something about my own powers. There is no application before me to appoint an additional independent conflict liquidator, still less any application to replace the Liquidators themselves. It may be, as the Liquidators suggest, that the ICAEW itself has no standing to make such an application although I think it is strongly arguable that they do. I do not need to decide that point because what is clear is that I have jurisdiction to direct the Liquidators to apply for the appointment of an additional liquidator, and to make other directions, since the Liquidators themselves have brought the matter to court. However, I cannot decide, on this application, whether the Liquidators are compromised in the way suggested. But what I can decide is whether there is a perception that that might be so. There is an analogy here with bias, the paradigm being judicial bias. It is, I hope, a rarity that a judge in our courts is actually biased. But sometimes judges are put in a position where, however objective they actually are, the circumstances give rise to a perception of bias, in which case the judge will normally recuse himself or herself. In the present case, if I were to be satisfied that a reasonable person could have serious concerns about the objectivity of the Liquidators, it would be open to me to take a number of different courses, including at one end of the spectrum of possible and reasonable courses of action, to achieve the appointment of an additional independent conflict liquidator. I do not need to decide that the Liquidators in fact lack objectivity or that an independent liquidator would be likely to reach a different decision on whether to proceed with the Protective Claim from the course which the Liquidators wish to adopt; and nor do I thereby need to reach decisions which might touch upon the disciplinary proceedings. What I have to bring about is a situation where the interests of unsecured creditors are most effectively vindicated. The ICAEW contend, in effect, that those interests can only be effectively vindicated by a proper investigation by officeholders who are independent of the Liquidators. If that is right then, in considering how that can best be achieved I will have to take into account, of course, the cost involved and how it is to be borne.

119. With that diversion, I return to the topic of the legal opinions which the Liquidators have obtained. These comprise:
    a. An opinion from Macfarlanes dated 3 February 2012 ("**the Macfarlanes Opinion**"). Macfarlanes were at that time HAL's lawyers; after completion, they became Comet's lawyers.
    b. The Mayer Brown Security Review delivered on 6 December 2012.
    c. Freshfields' First Review produced on 12 September 2017.
    d. Freshfields' Second Review produced on 10 December 2017.
    e. The Allison Opinion produced on 20 December 2017.

120. **The Macfarlanes Opinion** gave a clean bill of health to the HAL Debenture (among other matters). That was given on the basis of a number of assumptions set out in Schedule 2 to the opinion letter. These included assumptions about solvency and about the corporate authority of Comet found at paragraphs 3 and 5, in particular:
    a. Comet is not unable to pay its debts within the meaning of section 123 IA at the time of execution of the Finance Documents and will not as a consequence be unable to pay its debts within the meaning of that section.
    b. The resolutions set out in the Minutes were (i) duly passed at a valid duly held and quorate meeting of the directors and (ii) are in full force and effect.
    c. The documents were entered into on arm's length terms and, in the case of Comet, for *bona fide* commercial reasons.
    d. Each of the parties other than Comet was dealing with Comet in good faith and had no knowledge of any irregularity in the corporate procedures adopted.
    e. Comet has net assets which are not reduced by its entry into the Finance Documents (including the HAL Debenture) or, if reduced, Comet has distributable profits at least equal to the reduction.

121. The Macfarlanes opinion is also subject to the reservations set out in Schedule 3. These include:
    a. That the opinions expressed are subject to all laws relating to insolvency matters and similar laws affecting creditors' right and no view is expressed on such laws or their effect.
    b. That they expressed no opinion on a number of matters including whether Comet is solvent immediately following the creation of the HAL Debenture.

122. It is interesting to note that the Macfarlanes opinion, in expressly excluding consideration of insolvency law, and thus of section 245 IA, does not address the warnings that Macfarlanes gave to OpCapita in their advice dated 8 November 2011 as to which see paragraph 47 above.

123. The assumptions and reservations render the Macfarlanes opinion irrelevant to the concerns which the ICAEW has raised since those concerns relate precisely to the correctness of the assumptions and areas covered by the reservations. For my part, I do not understand how (or indeed why) the Liquidators now seek to rely on it.

124. As to **the Mayer Brown Security Review**, the skeleton argument of Mr Mowschenson and Ms Hilliard presents some powerful and to my mind compelling reasons for thinking that it is an entirely inadequate basis on which to rely for the purpose of making a very substantial distribution to HAL (to the detriment of creditors should the HAL Debenture prove to be invalid).

125. **Freshfields' First Review** was produced on 12 September 2017. The review, which Mr Moss says was already under way, was able to address a request from the ICAEW that it receive an assurance that the HAL Debenture was valid when it knew that the Liquidators were continuing to make distributions to HAL. The ICAEW see this Review as having been based on incomplete information and assumptions that were questionable:

a. The Liquidators did not provide Mr Baird with any of the contemporaneous documents showing that Comet was balance-sheet insolvent. It considers that Solvency was simply assumed, although this ignores Mr Baird's analysis in Schedule 3.
b. Mr Baird accepted that the directors had declared their financial interests at the board meeting on 3 February 2012.
c. Mr Baird did not consider the possibility that Comet not might (contrary to his expressed view) have been cash-flow solvent as at 3 February 2012 because of the strict terms of the transactions that Comet had committed itself to on that day and the absence of any assurance from the Ultimate Owners to fund Comet (something which had been refused).
d. Mr Baird accepted that the directors may have had a conflict of interest at the time that the HAL Debenture was approved and entered into and may have been in breach of their duties under the 2006 Act. However, he expressed the view that any such breach was ratified by HAL as Comet's sole shareholder after completion. But the ICAEW's case is that Mr Baird had no evidence that Comet was solvent on 3 February 2012: if Comet was not solvent, there could be no ratification.

126. **Freshfields' Second Review** is dated 10 December 2017 in response to the ICAEW's second letter dated 23 October 2017. It identified no more evidence to support the assumption that the Comet directors had disclosed their financial interests to each other before entering into the Finance Documents. It did consider cash-flow solvency, concluding that Comet was cash flow solvent.

127. Mr Baird had been provided with additional documents but his views remained the same. He did not however, explain why the management accounts and the schedule for HAL's opening balance both dated 3 February 2012 to which I have already referred were irrelevant. In addition, notwithstanding that Mr Baird had been provided with Deloitte's own documents showing that Comet was balance sheet insolvent on 31 January 2012 (taking into account the HAL RCF) and forecast to remain so, he was unable to conclude that Comet was insolvent. On the other hand, Mr Baird, was unable to point to any evidence showing that Comet was solvent. Mr Baird relies on *Eurosail* and whilst acknowledging that the "point of no return" has been rejected as a test, it remains, as Toulson LJ said and Lord Walker appears to

approve, illuminating. But I find it difficult to see quite how the principles in *Eurosail* provide any justification in the present case from departing from the balance sheet to the extent Mr Baird seems to favour. As Lewison LJ said in *Bucci v Carman* in the passage quoted at paragraph 100e. above, once the company is balance-sheet insolvent (by which in that context he meant showed an excess of liabilities over assets) it is difficult to see how it could not lead to the conclusion in the case of a trading company that the company was insolvent within the meaning of section 123(2) unless there was credible evidence that the balance sheet would improve in the near future. It follows that, in the present case, there is a powerful argument that Comet was insolvent within the meaning of section 123(2) on 3 February 2012 since the various balance sheets or other documents relied on by the ICAEW which I have mentioned show an excess of liabilities over assets and there is no evidence that the balance sheet would improve in the near future, at least not to the extent of producing surplus assets. Mr Baird may be right in his conclusions but, with respect of his second review, I do not consider that he does justice to the ICAEW's points and concerns. The review is an articulate defence of his clients' conduct and decisions but I find it hard to read it (or his earlier review) as the sort of objective advice which a liquidator would hope to receive in order to guide him in making a decision on which he had an open (and I dare say troubled) mind.

128. **The Allison Opinion**, produced on 20 December 2017, was written following a request to the Liquidators from the ICAEW to obtain further advice on the validity of the HAL Debenture. He was instructed to make some important, and so far as the ICAEW is concerned, controversial assumptions:
    a. that the directors knew about each other's incentives ("**the Awareness Assumption**"); and
    b. that Comet was solvent ("**the Solvency Assumption**").

129. If either of those assumptions is incorrect, then Mr Allison cannot be taken as expressing any view about the validity of the HAL Debenture. He did not, in any case, express a view about whether the notional circular flow of monies from KIL to HAL was in substance nothing more than an exchange of unsecured debt for secured debt with nothing becoming available for creditors. This is a matter of importance when considering section 245 IA as will become apparent later.

130. Mr Allison stated that the Awareness Assumption was supported by the following matters:
    a. It is assumed that Mr Clare entered into his incentive arrangements "on the same (or materially the same) terms" as those of Mr Darke and Mr Cowling. It will be apparent from what I have already said that that assumption is incorrect.
    b. It can be inferred that Mr Clare was aware of the material terms of Mr Darke's and Mr Cowling's inventive arrangements and that they were aware of the material terms of his. The former would appear to be correct, or at least he ought to have been aware, but the latter, so it appears to me, is unsupported by any evidence and there is nothing on which such an inference could fairly be based.
    c. The arrangements are referred to in the Minutes. That is incorrect in relation to Mr Darke whose exit bonus payment was not referred to. The disclosure actually

found in the Minutes is not the disclosure of the nature and extent sufficient to comply with the requirements of section 177.

d. The SPA specifically refers to the exit bonus payment. That may be so, but it is far from clear, and to my mind more likely not to be correct, that access to the SPA amounts to sufficient disclosure to fall within section 177(1) or to render Mr Cowling and Mr Clare aware of the nature and extent of the payment for the purposes of section 177(6)(b).

131. As to the Solvency Assumption, it is just that, an assumption. Mr Allison has nothing to say on these points: this is not a criticism of him since it was what he was instructed. He does not comment in any detail on the circular flow of monies and the impact that this might have had on the validity of the HAL Debenture. I have not seen Mr Allison's instructions so I do not know what, if anything, was said about the circular flow of monies. It may be that relevant documents were included in the Schedule of Documents which Mr Allison says he has considered; Mr Moss says they were. But given that one of the ICAEW's expressed concerns related to this aspect of the matters, one might have expected it to have been expressly raised in Mr Allison's instructions. The fact that nothing appears in the Allison Opinion suggests that he was not asked to advise specifically on this aspect. It is not an attractive position for the Liquidators to contend that Mr Allison, having had the documents and not having raised any concerns on this issue, is to be taken as having given a clean bill of health.

132. He makes no comments about the Minutes although he does mention them.

133. One of the matters which the ICAEW had asked the Liquidators to consider further was the Letter of Support. Mr Allison notes, at [97] of the Allison Opinion, that the ICAEW was concerned that there had been no reference to the Letter of Support or to the third option open of relying on Kesa's commitment, which I have already discussed. Mr Allison stated in [98] that he does not find this argument at all compelling as it relies on a number of assumptions and inferences, noting in particular:

a. The Letter of Support is described as a "letter of financial support". He says that it is drafted in the form of a comfort letter, and it is very doubtful (at best) that any of the commitments in the letter would be enforceable as a matter of law.
b. The letter expressly notes that Kesa was seeking to dispose of its interest in Comet. If the directors had refused to co-operate in Kesa's sale of Comet to HAL, it is far from clear (to put it at its lowest) that Kesa would have continued to support Comet for any material length of time or at all.
c. The letter only offers to provide financial support until July 2012.

134. I comment on each of those, adopting the same lettering:

a. The letter is couched in much stronger terms than the usual type of letter of comfort which I have come across whether as counsel or a judge. It is of course not clear that the letter does give rise to legally binding obligations, but to say that it is "very doubtful (at best)" is not a description with which I would agree.
b. For reasons already given by Mr Mowschenson, it is, in my view, strongly arguable that it is unreal to think that Kesa would have allowed Comet to leave its

trade creditors unpaid. Mr Allison may be right to say that it is far from clear that Kesa would have continued to support Comet for any material length of time. But whilst the withdrawal of support almost certainly would have resulted in Comet ceasing to trade, there is no reason to think that Comet's creditors would have been left unpaid. I agree with Mr Mowschenson that the Allison Opinion adopts much too pessimistic an attitude to the alternative option that was open to the Comet directors of rejecting the HAL deal and remaining within the Kesa group, dismissing too readily the proposition that Kesa would not have withdrawn support from Comet and the significance of the Letter of Support.

c. This is incorrect. The Letter of Comfort provides for Kesa to support Comet so long as Comet remains in the Kesa group. It would be perfectly possible for subsisting inter-company indebtedness to be called in provided that Kesa continued to provide the necessary support through new loans or in some other way.

135. It is emphasised on behalf of the Liquidators that the HAL RCF is a revolving facility. There have been drawings and repayments. The Liquidators suggest that gross drawing up to the date of administration were in the order of £253.4 million and gross repayments were in the order of £260 million. But as Mr Mowschenson points out, at any one time Comet never had access to any funds much in excess of the original £115.4 million which was the amount owing to KIL and which was replaced by the HAL RCF. At the date of the administration, the amount outstanding under the HAL RCF was in the order of £110.4 million.

136. This leads to an argument about the applicability to the facts of the present case of the principle in the well-known decision of the Court of Appeal in *Re Yeovil Glove Co* [1965] Ch 148. That case decided that where a company had an account with its bank which was in overdraft at the time when a charge was given securing the overdraft, and where the company continued to trade, there was no ground for not applying the rule in *Clayton's Case*; that each payment which had been made subsequent to the date of the charge had therefore been a provision of new money; and that therefore there was no reason to compel the bank to treat payments in after the date of the charge as devoted to post-charge indebtedness. The result is that the effect of section 245 IA is largely nullified: a new drawing constituted new value even if the resulting balance is the same as before. In *Yeovil Glove* it had been held by the judge at first instance that the arrangements, which involved a bank, were *bona fide* and in the ordinary course of business, a conclusion which was not challenged on appeal: see at p 179.

137. Mr Mowschenson contends that there is an issue whether this principle could apply to the HAL Debenture (i) at all or (ii) in circumstances where the HAL Debenture appears to have been entered into with the intention of transforming the KIL unsecured debt of £115.4m into a secured debt owed to HAL with HAL only adding some additional £35m of new money (which was in substance never drawn down). He has referred me to Goode "Principles of Insolvency Law" 4th ed, at 13-111 to 13-122.

138. Referring to 13-117, Mr Mowschenson draws attention to the need for new value. He submits that there is a real question which needs to be looked into as to whether or not there

was genuine value given to Comet because it is no coincidence that the amount at the end of the day, and the revolving credit facility was almost the same amount as that due to KIL originally.

139. The discussion of the example at 13-122 (showing the application of the rule in *Clayton's Case*) is also instructive. It shows why it is not unfair for the *Yeovil Glove* principle to apply in the case of a bank. Critical is the observation that: "By allowing a new drawing without obligation to do so, the bank is genuinely extending new value. It could have kept the benefit of the payment into the account without allowing any further drawing but chose not to do so". This is a long way from the present case which is not concerned with a banking transaction and where the arrangements under the Governance Agreement (in particular the cash sweep) meant that the money used to discharge the pre-existing indebtedness was never at the free disposition of Comet. As is recognised in *Goode*, at the end of 13-122, "The position would, of course, be otherwise if there were no genuine new value, for example, if the bank stipulated that it would not honour a new drawing unless this was covered by a contemporaneous payment into the account, so that there was a ritual exchange of cheques and the company never had recourse to the funds drawn since these had to be simultaneously repaid". And so it is said that in the present case, the HAL Debenture was not entered into in the ordinary course of business and that the principles in *Yeovil Glove* and *Clayton's Case* do not apply.

140. I have already considered in some detail the origin of the excess over the £35 million just referred to. No money in fact changed hands, the transactions being effected by book entries which, as it were, cancelled each other out. Although the £50 million "dowry" from Kesa was an equity investment said by the Liquidators to have been paid from Kesa's cash resources, there was from Comet's point of view no new money at all. From Comet's perspective, the principal result of the transactions was that it had replaced an unsecured debt with a secured one. The result was that Comet had total RCF facilities of £186 million of which £115.4 million was drawn (if that is the right word to use in relation to these unusual transactions) at completion to repay or refinance the entire unsecured intercompany debt due from Comet. Further, although the initial Tranche A was not a repayment of the KIL debt, the result of KIL's own capital contribution was that HAL's initial £35 million was never at risk. Moreover, Comet was never permitted to draw much in excess of £115 million notwithstanding the stated amount of the facility of £186 million.

141. Mr Mowschenson compares our case with what occurred in *Re GT Whyte & Co Ltd* [1983] BCLC 311 where Lloyds arranged for a credit line to be made available to Whyte. Lloyds arranged for the money (by cheque drawn by Whyte in favour of Labco) to be advanced by a wholly owned subsidiary, Labco. It was arranged for Labco to send a letter of demand to Whyte and that Lloyds should create a new facility in favour of Whyte to enable it to meet this demand, this facility being secured by a floating charge. It was held that if the creation of the floating charge was in substance no more than the substitution of a secured for an unsecured debt, moneys advanced on the security of the charge were not "cash paid to the company" within section 322(1) Companies Act 1948 (then the relevant provision). Although the provisions of section 245 IA go wider in terms of what now counts as good consideration for a charge, Mr Mowschenson submits that the court held that the payment by

Lloyds of the cheque drawn in favour of Labco was not in substance the provision of any new money by Lloyds to Whyte. There is a critical distinction, however, with the present case which results, in my view, in *Whyte* being of little assistance. It is that, on the facts of *Whyte*, Nourse J held that there was no material distinction between Lloyds and Labco: Lloyds procured Labco to make the loan on its behalf, Lloyds having itself agreed to make the facility available in the first place. Thus the payment by Lloyds to meet the cheque drawn in favour of Labco was not the provision of new money at all. In addition, the wording of section 245 IA is materially different from that of the old section 322 in that the new value required does not have to be cash although in *Whyte* just as there was no new cash there would be no new value if the facts were repeated today.

142. Ms Hilliard addressed section 245 in paragraphs 5 to 7 of the Hilliard Opinion. I do not set out or even summarise what she says. But, in response to any suggestion that the sentiment behind what Mummery J said in *Re Fairway Magazines Ltd* [1992] BCC 924 at 932 ("If the effect of a payment, which in form made to the company, is merely to substitute secured debt for unsecured debt, then the payment is not in substance a payment to the company") is not applicable where the relevant consideration falls within section 245(2)(b), she expressed the view that such a suggestion would be wrong. As to that, like her, I do not understand that section 245(2)(b) has altered the general purposes of section 245, which is to prevent a company that is on its last legs from creating a floating charge to secure past debts or to secure moneys which do not go to swell its assets and become available for creditors.

143. Ms Hilliard does not address the revolving nature of the facility and the normal rule in ordinary banking transactions which would result in a charge such as the HAL Debenture contains being valid for new money which I have discussed in paragraphs 135*ff* .

144. Mr Mowschenson quite candidly admits that he is not saying that section 245 necessarily applies. But in the light of the amount of money involved, he maintains that the circularity of these payments has never been properly considered by the Liquidators in the context of section 245; and that needs to be investigated properly.

145. In addressing the issue of directors' breach of fiduciary duty, the Allison Opinion does not deal with the RF4 Transaction. For reasons which I have already mentioned, the ICAEW's case is that the RF4 Transaction was not, on any view, in the best interests of Comet and there was no possible basis for the directors to conclude that it was. Without needing to express such certitude, it is clear that there is a very strong case for reaching that conclusion. It may be that the directors will be able to say that they considered carefully the onerous nature of the RF4 Transaction but considered that, in the context of the overall transactions, it was better to enter into the RF4 Transaction than to bring about a collapse of the whole deal. There is no evidence at all that they did so. And there is no evidence to suggest that the Liquidators have sought to obtain the evidence of the directors on this issue or indeed themselves adequately to address the serious concerns which the ICAEW has about the RF4 Transaction.

146. In relation to the RF4 Transaction, I do not, in this already hugely overlong judgment, deal with Mr Mowschenson's submissions about (or the Liquidators' responses to) the redacted

version of the Minutes originally given to the Administrators before their appointment, something which will need to feature in any future consideration of this matter whether by the Liquidators or anyone else.

The ICAEW's current position

147. The ICAEW's current position is to adopt the conclusions in the Hilliard Opinion which are that (i) there are a large number of questions surrounding the restructuring/sale transaction which, if fully investigated, might well lead to a conclusion that the HAL Debenture is invalid and that (ii) the Liquidators are insufficiently independent to carry out that investigation or to pursue any subsequent proceedings.

148. Although the ICAEW's position is also that it has investigated matters for the purpose of the disciplinary proceedings and discharging its statutory regulatory objectives in the context of this case, it is no part of its function, and it has no desire, to carry out the further extensive factual enquiries that are likely to be necessary to determine whether, and how, to challenge the HAL Debenture. There is also the question of whether KIL was preferred, a question which has not been considered at all by the Liquidators or their advisers even though it was expressly referred to as a possibility in Macfarlane's advice. The Liquidators have made it clear, repeatedly, that they see no need for any further enquiries. Given the strong views of the Liquidators against carrying out any further investigation the ICAEW considers that they are hardly suitable candidates to do so: they are clearly incapable of bringing to bear the degree of professional scepticism that would be required for such an investigation, quite apart from their lack of independence which is said to be self-evident.

The Liquidators' case

149. My focus thus far has been on the position of the ICAEW and its perception of the inadequacies of the Liquidators' investigations. Although I have reached some conclusions as I have gone along, I now turn to what the Liquidators have to say about all of this. Their focus is very different from that of the ICAEW. They say that there is no point in undertaking further investigations because there is no reasonable prospect of success (either against the Comet directors or in establishing that the HAL Debenture is invalid) in the Protective Claim. It is pointless, and would be a waste of a great deal of money, for the Protective Claim to proceed. Further, even if there were some prospect of success in such claims, there will be a serious issue about funding. The cost of any investigation would have to come out of the assets which are *prima facie* subject to the HAL Debenture. The Court would have to authorise such expenditure (no doubt in the face of opposition from HAL) but since the cases against the directors and to rescind the HAL Debenture are so weak – and be seen to be weak without further investigation – such authorization would be refused. I will return to the funding issue later since the logically prior issue is to see whether there is any realistic possibility of success for the Prospective Claim. The Liquidators' position is that is wrong to focus on what the Liquidators are alleged to have failed to do. Rather, they should be permitted to continue the conduct of the liquidation, exercising their judgment in the interests of creditors, in accordance with the statutory priority rules, which after payment of the prescribed part puts the priority in favour of HAL in relation to remaining monies. On the basis of the legal advice received by the Liquidators, this would mean not pursuing the Protective Claim and continuing to pay the debenture holder as required by the statutory

provisions. They seek my permission to do just that, including the payment, as I understand almost immediately, of a further £8 million to HAL.

150. In their skeleton argument, Mr Moss and Mr Perkins relied on five primary propositions of law:

a. the ICAEW does not have any power to direct the actions of the Liquidators;
b. the ICAEW does not have any standing to apply for the removal of the Liquidators (and/or the appointment of a new liquidator);
c. the ICAEW does not have standing to seek any directions from the Court in respect of the liquidation;
d. the Liquidators are not permitted to rely upon the ICAEW's legal advice, and can only rely upon their own legal advice; and
e. the decision whether to prosecute the Protective Claim is a matter for the Liquidators, and the Court will not interfere with the Liquidators' decision in the absence of bad faith or gross irrationality.

151. Propositions a. to c. may well be right but are not relevant. For reasons already given, I have wide powers to give directions, including power to direct the Liquidators to apply for the appointment of an additional liquidator, since the Liquidators themselves have brought the matter to Court for directions. Proposition d. would appear to be correct. Mr Moss cited a number of authorities. I do not propose to refer to them other than *Re T&D Industries plc* [2000] 1 WLR 646 which shows that the decision whether or not pursue litigation is a matter for the liquidator's own commercial judgment.

152. But that does not render irrelevant the advice which the ICAEW has received and has communicated to the Liquidators. They need to take such advice into account and take their own advice in relation to the concerns expressed in the ICAEW's advice. This is what they have done. They can rely on their own advice (unless it appears to be hopelessly wrong, which is not the present case I hasten to add) but that advice must be based on the actual facts so that if assumptions made are incorrect the advice may be of little value. Further, in the exercise of my discretion, I am entitled to take account of conflicts of interest on the part of the Liquidators, whether actual or perceived. Mr Moss has cited a number of cases concerning when it is appropriate for the Court to interfere with a commercial or administrative decision of liquidators. I mention some of them, but do not cite from them save in one instance: *Re T&D Industries plc* [2000] 1 WLR 646 to which I have already referred, *Re MF Global UK Ltd* [2014] Bus LR 1156 at [41] *Leon v York-O-Matic* [1966] 1 WLR 1450 at 1455 and *Re Longmeade Ltd* [2016] Bus LR 506. In that last case, Snowden J summarised the relevant legal principles in this way:

> "I consider that the established legal principles outlined above can and should be applied to the modified regime concerning the commencement of proceedings by a company in compulsory liquidation post-26 May 2015. I would therefore summarise the position as follows: (i) a decision by liquidators appointed by the court as to whether to commence proceedings in the name of the company is essentially a commercial decision which the liquidators are entrusted to take without obtaining sanction from the court or the liquidation committee; (ii) in taking that decision, the liquidators should act in what they believe to be the best interests of the insolvent company and all those who have an

interest in its estate; (iii) the liquidators may, but are not obliged to, consult the creditors (or contributories) who have an interest in the estate; (iv) the liquidators should normally give weight to the reasoned views of the majority of such creditors (or contributories), provided that they are uninfluenced by extraneous considerations; (v) if all those who are interested in the insolvent estate are fully informed and are unanimously of the same view, the liquidators should ordinarily give effect to their wishes; (vi) the court should not generally become involved in giving directions to liquidators as to how to make commercial or administrative decisions; and (vii) the court should not generally interfere with a commercial or administrative decision of liquidators after the event, unless it is a decision that was taken in bad faith or was a decision that no reasonable liquidator could have taken."

153. The same basic principles should apply in the case of a liquidator appointed out of court. The most important statement is found in (vii). But here it should be noted that it is not a hard and fast rule that the decision must be taken in bad faith or be one which no reasonable liquidator could have taken. For instance, if there was a clear and immediate conflict of interest between the liquidator and the company, that may well be a case where the court should interfere. Or if it is shown that a decision had been made without a proper investigation of the facts, that too might be an occasion for interference by the court.

154. The Liquidators of course contend that there is no evidence of bad faith or gross irrationality. They say that their case is clear:

a. They have obtained detailed advice from Mr Allison and Freshfields who have advised that the HAL Debenture is valid. That is correct as a statement of fact: the issue is the extent to which that advice can be relied on in the light of the concerns I have addressed in detail above.
b. The Liquidators have carefully weighed the advantages and disadvantages of conducting a comprehensive investigation into the conduct of the relevant directors. They have determined that such an investigation would be very costly, duplicative of work already carried out by BIS, and most unlikely to bear fruit. The Liquidators have also determined that, in all likelihood, there would be no viable way to finance the litigation. There is actually no evidence about how they have carefully weighed those advantages and disadvantages or how they have determined that there would no viable way to finance the ligation, no reference being made to possible ways in which that might be done or the reasons for rejecting such possibilities.
c. There is no creditor acting as such who has ever suggested that the Liquidators should challenge the HAL Debenture. This is hardly surprising given that the Liquidators have not given to the creditors information on which they would even suspect that there might be a claim to avoid the HAL Debenture let alone to decide on whether a challenge would be a sensible one to make.

155. I turn now to the Liquidators' submissions on the potential legal challenges which the ICAEW has raised.

156. In relation to section 177 of the 2006 Act, I have already identified the hurdles which would have to be surmounted and some views about whether they might be surmounted: see paragraph 94*ff* above. Although Mr Moss has made a number of submissions in relation to each of those hurdles, my conclusions are that it may well be correct that:
    a. It cannot be said in relation to the £30,000 exit bonus that it cannot reasonably be regarded as likely to give rise to a conflict of interest;
    b. Mr Cowling and Mr Clare were not aware of the exit bonus at all let alone of its amount if they did know;
    c. Mr Darke would not be relieved from liability under section 1157. But even if he were, this would not have any impact on whether the HAL Debenture is valid;
    d. HAL had notice of Mr Darke's failure to disclose his exit bonus;

157. I think that Mr Moss is probably correct in saying that the failure to disclose the exit bonus by Mr Darke would not, standing by itself, lead to rescission of the HAL Debenture. But it does not stand by itself; and if HAL did have notice of Mr Darke's failure and his breach of duty, it would be a factor in favour of rescission.

158. Mr Moss says that, if the Solvency Assumption was correct, any breach of duty was almost certainly ratified by HAL (as the sole shareholder). Again, that may well be correct, but for reasons already given, there is a large question mark over the Solvency Assumption. It has not been explained, at least to my satisfaction, why the Liquidators considered the Solvency Assumption to be justified.

159. So far as the equity participations of each of Mr Darke, Mr Cowling and Mr Clare are concerned, I have already examined the factual position, insofar as it appears from the evidence, in some detail at paragraphs 75 to 79 above. I consider it to be highly questionable whether the disclosure by Mr Clare was sufficient to comply with section 177; indeed, my own view – I do not decide the point – is currently that it was not sufficient. And there is a doubt that Mr Clare was aware of the extent of the equity of participation of Mr Darke and Mr Cowling.

160. Contrary to Mr Moss's submissions, my conclusions are that it may well be correct that:
    a. The nature and extent of Mr Clare's equity arrangements (described by Mr Moss as "proposed" but where, albeit not formally adopted, the terms had already been settled prior to the board meeting on 3 September 2012) were not adequately disclosed.
    b. It cannot be said to be clear that Mr Clare was or ought reasonably to have been aware of the extent of Mr Darke's and Mr Cowling's equity participation.
    c. It cannot be said that Mr Darke and Mr Cowling were aware or ought reasonably to have been aware of Mr Clare's benefits including his equity participation.
    d. It is not likely that the Court would conclude that the equity arrangements cannot reasonably be regarded as likely to give rise to a conflict of interest.
    e. It is far from clear that the directors would be relieved from liability under section 1157 of the 2006 Act.
    f. As with Mr Darke's exit bonus, HAL had notice of the failures by the directors to disclose their interests.

161. If HAL did have notice of those failures, it is far from clear that the Court would exercise its discretion so as to refuse to rescind the HAL Debenture. This, of course, is a matter which would require careful consideration if the Protective Claim is not to be allowed to lapse. I am not in a position to make any ruling on the question, nor would it be appropriate to do so unless the result would be clear one way or the other.
162. So far as the Solvency Assumption is concerned, I repeat paragraph 131 above.
163. Mr Moss relies on the reasoning of the Allison Opinion in concluding that the board was quorate at the meeting on 3 September 2012. I have addressed this aspect of the case in some detail at paragraphs 88 to 95 above. The second half of the meeting was, I think, quorate in the sense that it was attended by the three persons who were by then the directors of Comet. But if there was inadequate disclosure by each of the directors (a matter which I have already considered), they would not have been able to vote on the relevant resolutions, Article 16 effectively providing for an interested director to vote only if he has disclosed his interest in accordance with section 177 of the 2006 Act.

164. The next legal topic is the effect of section 245 of IA 86 in the circumstances of the present case. On the facts of the present case, which I have addressed already and which include the fact that Comet made total drawdowns of £253.4 million (see paragraph 135) under the HAL RCF between February 2012 and the date of administration, Mr Moss submits that it follows, by virtue of section 245(2)(a), that the HAL Debenture is valid to secure the entire amount of the HAL RCF. This was noted by Mr Baird in the Freshfields' Second Review and was also noted in the Allison Opinion. Mr Moss submits that there is quite simply no answer to this point.

165. Mr Mowschenson has provided some sort of an answer to this in his submissions relating to *Yeovil Glove* (see paragraphs 136*ff* above). As I have said, he not saying that section 245 necessarily applies but that the position needs to be investigated properly, which he says it has not been.

166. As an alternative route to validation, Mr Moss relies on section 245(2)(b). This is dealt with in the Allison Opinion at [40] to [52] and the Second Freshfields' Review at [9.15] to [9.24]. The reasoning is simple: the funds advanced under the RCF were used to repay Comet's existing unsecured indebtedness to KIL and it follows that the HAL Debenture is valid by section 245(2)(b). The HAL Debenture coupled with the HAL RCF effectively refinanced Comet's unsecured indebtedness. Section 245(2)(b) is expressly designed to deal with refinancing of this type and there is no indication that the refinanced debt must have been secured.

167. Mr Allison's view was that *Re Fairway Magazines Ltd* (cited at paragraph 142 above together with a quotation from Mummery J) does not affect this analysis. He is right, of course, that Mummery J's comments related to section 245(2)(a). His opinion is that they do not apply to section 245(2)(b), which was not cited in the case. He suggests that this is the view of leading commentators, referring to four textbooks. Interestingly, in Lightman & Moss, The Law of Administrators and Receivers of Companies (6th ed) in a passage quoted by Mr Allison, the learned authors say that the new wording "has clarified the fact that the

discharge or reduction of a debt is as good as cash". They do not suggest that it is better than cash. If the effect of the payment of cash which is in form made to the company is merely to substitute a secured debt for an unsecured debt, then the payment is not in substance a payment to the company, as Mummery J states. Similarly, it must be well-arguable that the discharge of a debt should not fall within section 245(2)(b) if it is not, as Ms Hilliard puts it, a genuine business transaction designed to benefit the company but part of a scheme to convert an unsecured creditor's debt into a secured debt with no corresponding benefit to the company. The concern of the ICAEW is that the HAL RCF and the HAL Debenture are not, in the context of the overall transactions such as to attract the protection of section 245(2)(b). The commentators referred to by Mr Allison do not say that the payment in discharge of a debt is to be treated any differently from a payment direct to the company in the sort of case described by Ms Hilliard.

168. Of course, that approach goes hand in hand with the concerns about the conduct of the Comet directors in agreeing to the HAL Debenture. I would accept that, if they could, acting properly, have approved the HAL RCF and the HAL Debenture, then it is very difficult to see how the case would fall outside section 245(2)(b). But if, on the contrary, they were acting in breach of duty in failing to make proper disclosure and/or in asserting that an insolvent liquidation was the only alternative to the HAL deal, there is much to be said for the view that section 245(2)(b) would not protect HAL.

169. The next topic is breach of duty by Mr Darke, Mr Cowling and Mr Clare in authorizing the creation of the HAL RCF and the HAL Debenture. Mr Moss submits that any argument that they were in breach of duty is without merit: Mr Allison's conclusion was that it would be "very difficult" to establish breach of fiduciary duty and he was right to do so. Mr Allison (correctly I consider) observed that it is a well-established principle that a director must act in the way that he believes (not the way the Court believes) would be most likely to promote the success of the company: see *Birdi v Specsavers Optical Group Ltd* [2015] EWHC 2870 (Ch) at [61]. The duty is a subjective one, the question being whether the director honestly believed that his act was in the interests of the company: see *Regentcrest plc v Cohen* [2001] 2 BCLC 80 at [120]. Even an unreasonable belief that a particular action was in the best interests of the company does not put a director in breach of duty if the belief is honestly held: see *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598 at [97].

170. I agree with Mr Allison (at least in an ordinary case) that the role of the Court is not to second-guess management decisions if reached *bona fide:* see *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 832D-F. But this principle proceeds on the basis that the directors are acting properly. It must surely be the case, to take an extreme example, that where the directors are operating under a clear conflict of interest, the court must have power to intervene – not necessarily to make the decision itself but to put in place procedures under which a decision can properly be made by someone other than the directors under attack.

171. Further, even though a director is not in breach of duty because acting *bona fide*, it does not follow that an unreasonable belief that a particular transaction is for the benefit of the company is to have no consequences. If a director makes a wholly irrational decision by

entering into a transaction with a third party which that third party knows to be irrational, it is not at all clear to me that the transaction would nonetheless be safe from attack.

172. Mr Moss submits that it would be difficult in the present case to argue that the directors acted in breach of duty. I have covered most of the points already, but in summary:

a. Mr Goldring of SJ Berwin has confirmed (in writing) that the directors took advice from SJ Berwin on the "duties owed by the directors in relation to the transaction". In a recent telephone conversation, Mr Goldring confirmed that "his role had been to advise [the directors] on their duties to Comet and how the directors should comply with those duties". That included consideration of the interests of the unsecured creditors. What neither the ICAEW nor I know is what Mr Goldring actually advised, and in particular, the extent to which his advice was followed. Advice to the effect that the directors must consider, and act in, the best interests of the creditors is not advice that it is a reasonable decision to adopt the HAL RCF and execute the HAL Debenture. Whether Mr Goldring knew of the Letter of Support and whether he ever discussed the consequences of not agreeing to those matters, I have no idea. Mr Goldring's confirmation does not go nearly far enough to support the conclusion that the directors were not acting in breach of duty although it does, of course, eliminate any criticism that they had failed to take advice and were, for that reason, in breach of duty.

b. The Minutes recorded the directors as having considered their duties and that they noted that Comet would inevitably have run out of cash without additional funding in the foreseeable future and that completion was for the commercial benefit of Comet. I have already considered this aspect of the matter in detail.

c. That aspect is closely connected to the Letter of Support, which again I have already considered in detail.

d. I have also dealt with Mr Allison's view that the argument that Kesa would have continued to support Comet is not compelling. It cannot be dismissed as easily as he suggests if at all.

e. Mr Wiggetts had criticised Mr Allison for failing to consider whether it would have been at all realistic for a publicly listed company to have allowed a trading subsidiary to enter an insolvent administration or liquidation given the significant financial and reputational damage that would occur. Mr Moss submits that this is precisely the sort of commercial judgment which would be most unlikely to persuade the Court that the directors acted in breach of duty. The Court would not be prepared to interfere with the commercial decision-making of the directors merely because Mr Wiggetts would have acted differently if he had been a director of the Company. I agree entirely with that last proposition. There might be something in the earlier proposition if there was any evidence at all that the directors had considered what Kesa would actually do if the HAL deal did not go ahead. Had they done so, their obvious first step would be to ask Kesa and whilst they may well have been told that Comet would cease to trade, there is no evidence to suggest that Comet would have been allowed to go into insolvent liquidation.

f. In relation to the RF4 Transaction, the Liquidators' contention is that this is irrelevant to the question of the validity of the HAL Debenture. I disagree. The

various components of the overall transaction were inter-locking. It seems to me to be highly likely that there would have been no HAL RCF or HAL Debenture without the RF4 Transaction (which HAL was insisting on) and *vice versa*. It would be entirely artificial to view the HAL RCF and the HAL Debenture in isolation, particularly given that HAL itself was a party to the RF4 Transaction. It is difficult to see how the RF4 Transaction standing by itself could be seen as being in the commercial interests of Comet. If it could be justified at all, it seems to me that reliance would have to be placed on the fact that it had to be entered into or the whole deal would be off, a feature which demonstrates the artificiality of viewing either of the HAL Debenture or the RF4 Transaction in isolation.

Conclusions thus far

173. I can state my conclusions thus far reasonably briefly in the light of my lengthy commentary and analysis above. In my judgment, the concerns of the ICAEW are justified. This is not a case of the Court being asked to substitute its own judgment for the commercial judgment of the Liquidators. This is a case where there is a real and justified concern that the decisions of the Liquidators concerning pursuit of the directors and challenging the HAL Debenture do not reflect a properly informed exercise of commercial judgment. The complaint is not that, on the basis of all the material available, the Liquidators have made decisions outside the range of reasonable decisions, but that they have (i) made their decisions without proper consideration of the material which is available and (ii) made their decisions without proper investigation of matters which should have been investigated. Further, in my view, there is a conflict of interest, or at least a perceived conflict of interest, which makes it all the more important that decisions are made after consideration of all of the relevant material and after all appropriate enquiries have been made so that it can be seen that decisions have been properly made and also that the decisions fall within the range of decisions which a reasonable liquidator could make.

174. It is also the case that the legal advice which the Liquidators have obtained does not provide the Liquidators with knock-out answers to the concerns of the ICAEW or, perhaps more importantly, demonstrate that the course of action which they favour (not to continue with proceedings against the directors for breach of duty or against HAL in relation to the HAL Debenture) is within the range of reasonable decisions. If there were to be an independent investigation, it may be that that course of action would be vindicated. The point is that until the investigation is carried out, one cannot know. I would add that, for the Liquidators to contend that there should not be any further investigation because their commercial decision is not to conduct any further investigations, would be to beg the entire issue: it would be a classic bootstraps argument. I add that I may be right or I may be wrong on some of my conclusions. But the fact that I have reached them after this lengthy examination shows that there is much which needs to be investigated if the unsecured creditors' rights are to be vindicated.

175. Were it not for the question of funding (to which I will come), I consider that there must be further investigation into the matters of concern which the ICAEW has raised, many, although perhaps not all, of which I have discussed in this judgment. Mr Moss urges me not to appoint a third party to conduct any further investigation. He contends that the Liquidators are perfectly capable of carrying out the task and that they will investigate whatever I direct

them to investigate. I do not, however, consider it is for me to direct what the Liquidators (or any third party) should do except to indicate in the most general terms (and in practice this judgment provides such general guidance) the areas which require further investigation. Nor do I consider that the Liquidators themselves should be the persons to carry out the further investigation and then make decisions. It will be enormously difficult for the Liquidators to assert the objectivity which must now be brought to the potential claims against the directors and HAL. The way in which the case has been presented to the Court has been to resist at every turn any suggestion that they have failed to do things which it would have been sensible to do and to put forward every conceivable point to demonstrate that every possible claim is in reality hopeless. Their position has the appearance of being entrenched. I am willing to accept that the Liquidators genuinely believe that they can bring objectivity; and it may be that, in reality, they would be able to do so. But they must not be blind to the perception that they lack objectivity and, given the need for further investigation of the claims, it is important that the investigation is carried out by someone who is both actually, and perceived to be, objective.

176. My view, therefore, ignoring the funding issue, is that an independent third party needs to be appointed to investigate the potential claims against the directors. I consider that that third party should be an additional liquidator (a conflict liquidator) whose powers and duties should be restricted to that task. Such a person may be able, in short measure, to decide that there is no worthwhile claim to bring against the directors or HAL, or that the risks are too great to risk the incurring of substantial costs. In that case, subject to a further direction of the Court if that is sought, the Liquidation can proceed in the way in which the Liquidators already wish it to proceed.

Funding

177. There is a problem of funding. I do not know what assets, if any, are still available to meet litigation costs. A considerable amount of money has no doubt been spent on this hearing so it is not immediately obvious that there are no funds available at least for an independent liquidator to embark upon the task. In any case, Mr Mowschenson suggests that if a conflict liquidator was appointed to look into the matter independently, and the Liquidators are right that there is nothing more that merits investigation, the conflict liquidator may be able to reach that conclusion quickly with modest expenditure. If, on the other hand, the conflict liquidator concludes that there are issues that merit investigation then it would be quite wrong of the Liquidators to complain about the cost of an investigation that they, themselves, should have carried out in the first place.

178. As for how an investigation (and any subsequent proceedings) is to be funded, Mr Mowschenson points out there are many litigation funders who will fund cases that have good prospects of success. In addition, in so far as a challenge pursuant to section 245 is concerned, those costs would have priority over the floating charge assets (such as are left) in any event and the approval of the court is not required: see s.176ZA IA 86, rule 6.44-48 Insolvency Rules 2016. Moreover, unless there were good prospects of success a conflict liquidator, as an experienced professional, would not pursue a claim which was likely to fail.

179. A conflict liquidator would also be unlikely to pursue any such claim if he did not have the support of unsecured creditors to do so. This leads to another point, which is that the creditors have no knowledge at all of the issues discussed in this judgment. In theory, the creditors could agree to fund any litigation, or indeed to fund any investigations. But unless and until they are given full information, they cannot be expected to make any decision. Although a liquidator is not obliged to provide this sort of information to the creditors, I would have thought that, given my disagreement with the Liquidators that there is nothing to investigate, providing the creditors with information would be a useful step.

180. That, however, leads in turn to issues of confidentiality. To date, this application hadsbeen heard in private and the court file is sealed (an inapposite word in relation to digital files, but in any event access to the public is being denied). For the reasons given by Mr Moss, my current view is that the proceedings should remain confidential, although I am open to contrary submissions if the ICAEW think that the matter should be made public. It would be undesirable from Comet's perspective for HAL to learn of the views of the Liquidators concerning the proposed litigation. It does, nonetheless, seem to me that at least some creditors should be informed of the position and of this hearing. It should be possible, at least for major creditors such as HMRC, to be given information on a confidential basis such that there would be a contempt of court if the confidence were breached.

181. Returning to funding, the Liquidators consider that there is no realistic way to fund the Protective Claim. Due to its lack of merit, there is almost no prospect that a litigation funder would be willing to provide funding, and there is almost no prospect that the Liquidators would be able to obtain adverse costs insurance. The Liquidators could theoretically attempt to fund the litigation using Comet's assets, but all of those assets are subject to the HAL Debenture.

182. Since HAL itself is the target of the Protective Claim, it would be necessary for the Liquidators to seek the Court's permission to fund the litigation out of HAL's floating charge assets pursuant to rule 6.48 of the Insolvency Rules 2016. HAL would have to be served. Mr Moss' submission is that, due to the lack of merit in the Protective Claim, the application for permission would be rejected. Since the Protective Claim has already been issued, the litigation falls within rule 6.45(1)(b) so that the costs of any further investigation would have to be approved by HAL (inconceivable one might think) or the Court. I think there is a strong case to be made against Mr Moss's conclusion that the Court would not authorise the investigation costs to come out of the assets subject to the HAL Debenture. First of all, the actual Liquidators have not decided that there is a good case to pursue, quite the reverse; secondly, the Protective Claim has been issued because of the impending expiry of a limitation period. If that had not been necessary, a conflict liquidator who, *ex hypothesi*, would not have decided to bring a claim until completion of the investigations, would have been entitled to his costs without any permission from the Court. The answer, surely, is to see if a conflict liquidator can be found who is willing to take office and if so what funding requirements he would insist on before accepting office. An application to the Court will almost certainly be necessary.

183. There would remain the problem of an adverse costs order. Mr Moss submits that the Court would be unlikely to allow assets to be taken outside the scope of the floating charge

and it is very difficult to see how a liquidator could take the risk of an adverse costs order without adverse costs insurance, which would be almost impossible to obtain. What is absolutely inconceivable, in Mr Moss' submission, is the idea of unsecured creditors providing the costs of a conflict liquidator or to act as a representative creditor in the name of Comet and to shelter any adverse costs especially after nearly 6 years.

184. There is force in that, but the problem in relation to adverse costs will only arise if the conflict liquidator considers that the Protective Claim should proceed. If it does proceed, following whatever further applications, if any, the Liquidators or the conflict liquidator consider appropriate, it would do so only if appropriate funding, including protection against adverse costs orders, was in place. The availability of creditor support or of insurance will depend on the outcome of the investigation: it is not possible to judge at this stage the likelihood of such funding support being available.

Disposition

185. The Liquidators' application is dismissed. I decline to make an order which would afford them any protection against whatever regulatory or disciplinary action the ICAEW might wish to bring. Although Mr Moss only seeks an order (different from the draft order presented) which does not preclude a creditor from bringing such claims against the Liquidators as they would otherwise have, it would be quite wrong of me to authorise the immediate payment of £8 million to HAL in circumstances where, if the HAL Debenture were held to be rescinded, there will be significant problems in obtaining its recovery. If the Liquidators make such payment, they must do so at their own risk. On the other hand, I do not propose of my own motion to make a direction prohibiting the Liquidators from making such a payment except perhaps in the short term to allow a creditor to seek injunctive relief if the ICAEW invite me to do so. Having said that, it is obvious, I think, that the Liquidators should hold off making further payment until it is known whether the Protective Claim will be pursued or abandoned.

186. Since the matter is before the Court on the Liquidators' application for directions, I direct that the Liquidators should apply to the Court for the appointment of a conflict liquidator. I understand that the Liquidators will want such an appointment to take place as soon as possible if it is to happen at all. I would ask the parties to consider the most efficient way to achieve this end.

187. I would like to thank Counsel for their excellent written and oral submissions, and again to thank those responsible for preparing such good bundles. I regret the length of (i) the period from the hearing to the delivery of this judgment and (ii) this judgment itself.