Neutral Citation Number: [2021] EWHC 2395 (Ch)

Claim No: CR-2012-007914
Date: 25 August 2021

Before : Mr George Bompas QC sitting as a Deputy Judge of the High Court

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

IN THE MATTER OF CGL REALISATIONS LIMITED (FORMERLY COMET GROUP LIMITED) (IN LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN:

GEOFFREY CARTON-KELLY
AS LIQUIDATOR OF CGL REALISATIONS LIMITED
(IN LIQUIDATION)

Applicant

and

DARTY HOLDINGS SAS
(AS SUCCESSOR TO KESA INTERNATIONAL LIMITED)

Respondent

Tiran Nersessian (instructed by Jones Day) for the Applicant
Tom Smith QC and **Alex Barden** (instructed by Sidley Austin LLP) for the Respondent

Hearing date: 30 July 2021

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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

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the representatives of the parties by email and release to Bailii. The date and time for the hand-down is deemed to be 10.30 am on 25 August 2021

Mr George Bompas QC:

1 On Friday 30 July 2021 I heard the first Case Management Conference in these proceedings, an application by a liquidator (the Applicant) of a company once known as Comet Group Ltd (Comet) seeking relief against Darty Holdings SAS (the Respondent) under section 239 of the Insolvency Act 1986. In principle the relief sought is repayment of £115 million odd paid in early February 2012 by Comet to a company of which the Respondent is the successor by merger. In this judgment I refer to both that original company and the merged entity, Darty Holdings SAS, as "the Respondent" making no distinction between them.

2 Comet went into administration on 2 November 2012 and later went into liquidation. The Applicant came to appointed as a liquidator of Comet following a decision of Mr Justice Warren in a judgment of 7 June 2018 (Kahn v The Institute of Chartered Accountants in England and Wales [2018] EWHC 1378 (Ch)) to which I refer below.

3 The Applicant's claim is that the payment of the £115 million was a preference given at a "relevant time" for the purposes of section 239, and that (quoting from and summarising section 239(5)) Comet was "*influenced in deciding to give it by a desire to produce in relation to [the recipient] the effect*" of putting the Respondent in a position, in the event of Comet going into insolvent liquidation, which would be better than if the payment had not been made.

4 The proceedings were started in late 2018. They were the subject of a strike out application by the Respondent: this was rejected first in July 2020 by Deputy ICC Judge Agnello QC and then on appeal by Mr Justice Miles on 23 April 2021. The issue dealt with on that application was whether the Respondent was, for the purposes of section 239, "connected with" Comet at the time the £115 million was paid. Only if, as the Deputy ICC Judge and Miles J both held, the Respondent was so connected could the £115 million have been paid at a relevant time so as to be capable of founding a claim for relief under section 239.

5 However, a further effect of the Respondent being connected with Comet is that by section 239(6) Comet is presumed, "*unless the contrary is shown*", to have been influenced in its decision to pay the £115 million by the desire described in section 239(5) (above). It follows that the burden will lie with the Respondent to show that Comet was not so influenced.

6 A feature of the proceedings is that the putative preference was made in connection with, and about at the same time as, many other transactions involving Comet. This is because its making was part and parcel of steps to complete a sale of Comet by one group of companies of which the Respondent was then a member to a different group of companies. For convenience I shall call the first group "the Kesa Group" and the second group "the Hailey Group". The detail of this sale, and of the various steps to completion, is set out in the judgment given by Miles J (at [2021] EWHC 1018 (Ch)). I will not repeat that detail but will assume that the reader of this present judgement has also read Miles J's judgment: the sale was by no means a simple transaction.

7 I was told that on one analysis the various steps taken by the Kesa Group, the vendor, at the time of Comet's sale could be viewed as the Kesa Group paying the Hailey Group, the purchaser, to take Comet: a witness statement made by the Applicant in 2018 had indeed said that "*As part of the 'sale', [the purchaser] received a dowry payment for taking ownership of [Comet] …*". Warren J's judgment, to which I have already referred, also describes and discusses at length the transactions surrounding the sale of Comet, with particular attention to the involvement of the Hailey Group as purchasers; and, as appears from that judgment, there had already by the time of the hearing before Warren J been considerable investigation, including in respect of conduct of Comet's officers and of the Hailey Group, these investigations covering also the aftermath of the sale and then Comet's going into administration.

8 The Applicant's appointment as liquidator was made by Warren J, following the hearing before him. The Applicant was given power to investigate certain matters defined as the "Reserved Matters". The matters were (omitting detail), "*any causes of action which [Comet] or the Comet Liquidators may have arising out of or connected in any way to the circumstances of and surrounding the sale of the shares in [Comet] to [the Hailey Group], and the repayment on 3 February 2012 of the amount outstanding to [the Respondent] … and the advances by [the Hailey Group] of funds …*"

9 Returning to the chronology of these proceedings, various directions were made in 2020 for the trial. On 3 November 2020 an order was made staying the proceedings pending the determination of the appeal from the Deputy Judge. On 23 April 2021 Miles J made an order lifting the stay and revising the trial directions with a view to a 10-day trial now listed to be heard in October 2022. One of the orders made directed the Case Management Conference ("the CMC") before me; another directed that "*By 4 pm on the day falling 28 days after the … Case Management Conference, each party shall give extended disclosure in accordance with the Disclosure Pilot Scheme under CPR PD 51U which have been agreed or ordered*".

10 What was listed to be heard before me at the CMC on Friday 30 July 2021 were four applications, one by the Applicant and three by the Respondent. Before I explain these applications, I should say that two of the applications (that is, one of the Respondent's and one of the Applicant's) related to disclosure. These were the subject of detailed submissions before me at the hearing. The hearing ended at 4.15pm. Bearing in mind the tight time-table set for disclosure, I provided to the parties on the morning of Monday 2 August 2021 a note stating what my decisions are on those two disclosure applications. This judgment sets out my reasons for my decisions.

<u>The Respondent's security for costs and related discovery applications</u>

11 When the hearing of the CMC started, the other two of the four applications fell by the wayside. Both were applications brought by the Respondent.

11.1 The first was an application made on 8 March 2020 for security for costs. This had not been a promising application, at any rate so far as I could see as a matter of first impression, as the head within CPR 25.13(2) by reference to which the security was sought (namely sub-para (c)) depends on the Applicant being a company, which he is not, when (at any rate traditionally as I had understood the relevant principles) security for costs is not available against liquidators who

are individuals and are personally liable for costs of such applications as the present when made by them (see Re Wilson Lovatt & Sons Ltd [1977] 1 All ER 274, especially at 285e per Oliver J). This first application the Respondent withdrew at the hearing. All that remains is to consider costs.

11.2 The second application was made on 19 July 2021 but was supported by a witness statement made on 16 July 2021 referring to the application as being of that date. It was for the Applicant to give disclosure of his costs and anticipated costs, of the amount within Comet's estate for meeting costs, of the funding provided by a third-party funder, and of the terms on which that funder might withdraw. In the witness statement of 16 July 2021 Mr Matthew Shankland, a partner in the Respondent's solicitors (Sidley Austin), asked also for information about the Applicant's costs insurance arrangements. The justification for claiming this disclosure was said to be that under CPR 25.14 security for costs might be sought from someone other than the Applicant, at any rate where the conditions in paragraph (2) of CPR 25.14 are met and the court considers it just to make such an order "*having regard to all the circumstances*". A curious feature of the evidence supporting the application is that it does not address the reasons for thinking the Applicant personally to be unable to meet costs. Nevertheless, Mr Adam Brown, a partner in the Applicant's solicitors (Jones Day) made a witness statement on 20 July 2021 giving certain information about the Applicant's arrangements for financing the proceedings. Mr Tom Smith QC, Leading Counsel for the Respondent, told me that in the light of this the Respondent's second application was not being pursued, although his skeleton argument for the hearing explained that the Respondent is seeking costs and set out some detail concerning the application.

12 These two applications may require further consideration, if a ruling is needed from the Court concerning the costs of the CMC and of the four applications. I refer to this at the end of this judgment.

13 I turn now to the two discovery applications which remained live by the end of the hearing on 30 July 2021.

The Applicant's discovery application

14 Last year the parties must have been working together constructively to arrive at an agreed approach to discovery, as contemplated by the disclosure pilot scheme. By October 2020 a Joint Disclosure Review Document had been agreed. A feature of this document, and in particular of the descriptions of the several issues for disclosure listed out, is that the parties have been exercised about the material which will be relevant at the trial for any necessary findings to be made concerning the essential facts for the Applicant's section 239 claim. This is so in particular in relation to the ingredients specified in sub-section (5): specifically as to that, the parties are of the view that it may be necessary for the Court to take into account the desires, or motivations, of persons other than Comet and its officers which may have influenced Comet in deciding to pay the £115 million. It appears to be common ground that, whatever may be the correct legal analysis when it comes to the trial, the parties should be able to give consideration to and to deploy at the trial materials relevant to the desires of the Kesa Group and its companies (including the Respondent) in relation to the sale of Comet

and connected transactions. Thus, to give an example, Issue 3 in the JDRD is "*What were the reasons for deciding to proceed with [the Hailey Group] bid*".

15 The Applicant's disclosure application is directed, if viewed narrowly, at Issue 10 in the JDRD. This issue is described as being "*Whether the Company was influenced by a desire to put [the Respondent] in a better position than it would have been under a hypothetical liquidation at 3 February 2012*". According to the JDRD the parties have agreed that for both parties the extended disclosure on the issue should take the form of Model D described in Practice Direction 51U at para 8: that form and Model C extended disclosure are the two forms proposed in principle to be applied for all the JDRD issues. However, in the case of Issue 10 the JDRD has a footnote in relation to the indication that on that issue Model D extended disclosure is to be given by the Respondent: this footnote states that "*The Applicant reserves the right to extend the scope of disclosure by way of an application should he consider it necessary, particularly in the light of any response to Jones Day's letter to Sidley Austin dated 11 September 2020 regarding document deletion …*".

16 What gave rise to Jones Day's letter of 11 September 2020 referred to in the footnote was that Sidley Austin had shortly before explained, in a draft disclosure review document (referred to in the correspondence as "the DRD"), that potentially relevant documents had been destroyed; that is to say, electronic stored data had been deleted. To understand the various exchanges which followed, and the Applicant's disclosure application, the aftermath of the Comet sale for the Kesa Group needs a little further explanation. This explanation I take from the statement Mr Matthew Shankland made on 26 July 2021. He is, as he tells the Court, the partner in the Respondent's solicitors (Sidley Austin) with overall conduct of these proceedings for the Respondent.

17 What first happened was that Comet's pre-sale ultimate parent company changed its name to Darty plc. This was a listed company listed on the London Stock Exchange, and was also the parent of the Respondent. According to Mr Shankland, the UK business of the Kesa Group was significantly reduced following the Comet sale. "*Accordingly*", as he says, "*in July 2014, Darty plc management decided to transfer to Paris all finance roles in London except for Investor Relations and the Secretariat. This ultimately involved handing over the finance, reporting, tax and treasury processes to a newly formed team in France after the financial year-end in July 2015*". (I note here that Mr Shankland did not explain who told him what he reports, and how that individual or those individuals had their knowledge.) Finally, on 18 May 2016 Groupe FNAC S.A. made a recommended offer to acquire Darty plc, and this was completed on 19 July 2016. Then, at about the end of 2017 the merger of the Respondent took place.

18 According to Mr Shankland, the Respondent has no employees. It would also seem, from what Mr Shankland says, that the Respondent does not and never has had control over the servers of Darty plc on which electronic data was stored, and likewise no "*practical involvement in the implementation of FNAC Darty Group policies in relation to document retention or otherwise*". Nevertheless, he states that "*As part of this project, Darty plc transferred data stored on its servers in the UK to France*", but that nevertheless "*The Respondent has been unable to identify precisely what data was transferred or when the switchover occurred, but I understand that the migration project completed by December 2015.*" Mr Shankland says, quite candidly, that the

Respondent has not been able to determine whether Darty plc emails (that is, email accounts of individuals) were transferred.

19 Returning to the draft disclosure review document commented on in Jones Day's 11 September 2020 letter, there was there an explanation given by Sidley Austin to the effect that the deletion of potentially relevant documents came about shortly after July 2016, after the acquisition of Darty plc by Groupe FNAC. It was said that it was then that "*all of the employees of the UK entities of Darty plc left FNAC Darty*", and also that: "*The Respondent understands that in accordance with relevant document retention policies, all such employees' emails were deleted and no back up of those emails was made*". There was then an explanation of what material had been found to survive. It is apparent that either what was said in the draft disclosure review document was mistaken, or Mr Shankland's explanation must be mistaken.

20 Following Jones Day's letter of 11 September 2020 there were exchanges of correspondence concerning the loss or destruction of potentially relevant documents which might otherwise have been available to the Respondent. Thus:

20.1 On 6 October 2020, Sidley Austin now said "*Following the sale of [Comet] in February 2012, [the Hailey Group's] business in the UK was significantly reduced. Accordingly, as set out in the DRD, in July 2014 [the Hailey Group] transferred all finance roles based in its London office to France. As part of that exercise, [the Hailey Group] closed down its UK-based servers and transferred all data to servers in France … This project was completed in or around December 2015.*" It was then explained that in about July 2016 the former employees' emails were deleted from the transferred data, along with all other data with the exception of data stored on a single accounting tool. The impression from this letter is that there was a migration of data starting after July 2014 and completed by December 2015, followed by a deletion of emails in about July 2016.

20.2 On 29 October 2020, Sidley Austin said that they had provided a full explanation as to why their client no longer retained certain documents, this having been given in the 6 October 2020 letter and the DRD mentioned in the letter. They said that their client "*conducted extensive internal and external searches to confirm the same*". The letter continued, "*… we explained that following the sale of [Comet] in February 2012 Darty plc's business in the UK was significantly reduced. As a result, the UK business did not require or have the resources to retain historic data, and it was transferred to France accordingly. Following the acquisition of Darty plc by FNAC in 2016, all of Darty plc's UK employees left, and our client did not conduct any substantive business in the UK. There was no reason to retain the Legacy Darty Data in those circumstances*." The letter continued with an explanation of enquiries made concerning the loss of potentially relevant documents. It concluded by saying "*We fail to see what possible application your client could make for disclosure of documents which no longer exist*". It made no reference to deletion of emails or to document retention policies, unless by reference to the DRD; but nothing was said as to any decision, or the time of any decision, concerning the destiny of the "Legacy Darty Data".

21 I have already referred to the order made in November 2020 for a stay of proceedings, and to the order made on 23 April 2021 lifting the stay and directing the giving of extended disclosure by a date which will now be in late August 2021.

22 On 15 July 2021 the Applicant gave notice of its disclosure application. This seeks three things: first, that as to Issue 10 in the JDRD the Respondent should give Model E rather than Model D disclosure; second, that the Respondent should conduct searches for and give disclosure of documents that relate to or reference the decision to delete the Legacy Darty Data; third, that within a month or so the Respondent should provide both (a) witness evidence concerning the deletion from "*a relevant individual witness who was involved in the decision to delete … or alternatively has the requisite knowledge of the steps take to understand the same*", and (b) a report from an IT expert as to the possibility of recovery of any of the deleted material.

23 On 26 July 2021 Mr Shankland made his witness statement, to which I have already referred. This was to give through him the Respondent's answer to the criticisms of the Respondent's previous explanations for the loss of potentially relevant documents. He stated that his explanation was "*based on discussions which members of my team have had over an extended period with my client and employees of the wider FNAC Darty Group*". Although, in the course of his witness statement he mentions some individuals, both within his firm and within "the wider FNAC Darty Group", who have been involved in the investigations and explanations described, his statement is conspicuous in the lack of specific identification of the sources of information (that is, the individuals from within the wider FNAC Darty Group) or of the basis on which the informants have been able to assist. For example, in one section of the statement he starts off by saying "*I set out below to the best of my knowledge and belief what happened to the data stored sorted on the KEP/Darty plc server. I base this account on the extensive enquiries which my client and my firm have already made regarding this issue …* ". But in the account he gives he refers to only one individual, Mr Enoch (referred to below) who is said to have given "*my team*" information as a matter of impression which has not been able to be verified, and later in the statement to two individuals who were unable to help.

24 In his statement Mr Shankland emphasised that there is much pertinent data which has survived, that the Respondent had obtained access to that, and that "*it has already been subject to first level searches and review by my firm*". This information comprises 750 odd boxes of hard copy documents of the Kesa Group, and documents held by Slaughter & May who were the solicitors acting for the vendors on the Comet sale. The Slaughter & May material is said to include emails passing to and from Mr Enoch, who was Darty plc's company secretary at the time of the sale. Further, it appears that Mr Enoch had in about 2016 transferred data from his laptop to a Mr Pierre Koch, the head of legal affairs within Darty plc, and that that transferred data survives and is available. This is material which has been searched by the Respondent in the first level searches.

25 Mr Shankland has explained that "*by way of compromise, given that my firm has not yet conducted second level review of documents that have been marked as potentially relevant to Issue 10 following Model D searches … the Respondent is proposing to review the Model D output in order to assess whether it points to any other sources of documents*" touching discussions among Comet's board or within the Kesa Group relating to motives surrounding the Comet sale and payment of the £115 million. This compromise proposal was described in oral argument as involving the giving of Model

E disclosure applied to the documents already identified as not being altogether irrelevant but deserving, rather, of further consideration for disclosure.

26 In his written and oral submissions on behalf of the Applicant Mr Tiran Nersessian was critical of what was said by Mr Shankland in explanation for the loss of potentially relevant documents, and also of what was not said concerning what appear to have been inconsistent and possibly mistaken explanations offered on behalf of the Respondent in the second half of 2020. The skeleton argument on behalf of the Respondent asserts that "*The evident reality is that this data was deleted at group level and in the ordinary course of business*". Although I need not make any finding as to what is evident reality for the loss of data, I do not believe that there is at present any completely convincing explanation concerning what was lost or when or why.

27 Model D disclosure is summarised in PD U51 as "*Narrow search-based disclosure, with or without Narrative Documents*": the obligation is to disclose documents likely to support or adversely affect the claim or defence of the disclosing party or of another party in relation to one or more of the issues for disclosure. Model E, in contrast, is "*Wide search-based disclosure*" and covers not only the Model D disclosure but also train of enquiry documents which might result in the identification of other documents for disclosure. In other words the test of what is to be disclosed goes further and includes material which may be relevant to an issue without necessarily giving support for or adversely affecting a claim or defence.

28 In the course of his submissions Mr Smith explained that the first level review referred to by Mr Shankland was the first sift, that is a first review of the documents which searches, including electronic searches based on specific search terms, had identified as potentially relevant and disclosable for Issue 10. What has been pointed out by Mr Shankland in his witness statement is that, following the making by Miles J of the order of 23 April 2021, the Respondent had been getting on with preparations for the giving of the disclosure within the 28-day time limit in the order. It was also pointed out that between 23 April 2021 and 15 July 2021, and so not very long before the CMC, the Respondent had not made any further comment about the Issue 10 disclosure model or the loss of documents which might have been disclosable: Sidley Austin's letter of 29 October 2020 was the last word on the subject until 15 July 2021.

29 The Respondent's contention, as it was explained to me by Mr Smith, is that the Respondent cannot be criticised for having got on with the work needed for giving extended disclosure, and that it would be neither necessary or appropriate now to require the Respondent to start again, as it were, as to the Issue 10 disclosure. He submitted that to do so would be disproportionate in the circumstances, as the second sift yet to be carried out will be the final review of the universe of documents resulting from the first sift, and it would be at that time that a decision was to be taken that the document was within the narrow Model D disclosure parameters, while the universe of first sift documents could be taken now to be an appropriate starting point for what was effectively Model E disclosure. This, he submitted, is because the universe of documents meeting at the first sift the low threshold for a document's selection for consideration in the second sift would be likely to include documents which might be disclosable after all under Model E disclosure. Mr Shankland summarised by saying "*we have taken a generous approach in our first level review and will do so at the second*".

30 Model E extended disclosure is, according to PD 51U, "*only to be ordered in exceptional circumstances*". On behalf of the Applicant Mr Nersessian has submitted that the present circumstances are exceptional. First, he points out that the admitted loss of data is exceptional. Second, he points out that it is not at all clear what has been lost or when, how or why the loss or losses occurred, what efforts have been made and by what individuals to identify or recover the lost material, and what explanation is to be given for the confusing descriptions given of the reasons for and way in which the material was lost. In these circumstances he submits that the Respondent should be called upon to give disclosure of any documents which might lead to further inquiry concerning the issues within Issue 10.

31 I see force in Mr Nersessian's argument. Nevertheless I am satisfied that it would not be appropriate now simply to order that the Respondent should give Model E extended disclosure on Issue 10. There are three reasons.

31.1 First, in my judgment the Respondent should have been given some greater warning by the Applicant than it was that Model E extended disclosure would be applied for, if not agreed. It may have been appropriate for the Applicant not to have pursued the correspondence on the point after having had Sidley Austin's letter of 29 October 2020, as the proceedings had been stayed in early November 2020 so that there could not be any application made to the Court. But this was not the case after 23 April 2021 when the proceedings were to continue and with that extended disclosure given in short order.

31.2 Second, I accept that requiring the Respondent now to start over with Model E extended disclosure on Issue 10 does not seem to be a productive way to proceed, bearing in mind (a) that the time for disclosure to be given is now less than a month away, and (b) that what the Applicant seeks involves in practice a re-run of the first stage review of documents potentially to be disclosed in relation to Issue 10, and (as Mr Smith told me and I accept) the first stage review has already involved many hours of time inspecting the surviving documents (including the contents of the 750 odd boxes I have referred to). Meanwhile, there are reasonable grounds for believing that the re-run will not capture anything more than has already been identified as potentially relevant, and when Model E disclosure is offered in relation to what has already been identified.

31.3 Third, it is common ground that, as I have explained already, the burden lies with the Respondent to displace, at the trial, the presumption which is by section 239(6) of the 1986 Act, to be made concerning the question whether Comet was influenced by the relevant desire. If, then, material has been lost which might have borne on that question, the party more likely to be hampered by the loss will be the Respondent; and the submissions made by the Applicant before me as to what were said to be the Respondent's confused and inadequate explanations for the loss will no doubt be repeated at the trial. As matters stand the Court is unlikely to treat the loss of documents as involving a loss of material which, if preserved, could have supported the Respondent's case or adversely affected the Applicant's.

32 For similar reasons, I reject the application for discovery of documents relevant to the loss of data, as well as the application for the provision of a witness statement or affidavit concerning the loss. The application has been responded to by Mr Shankland

making his witness statement. I accept that the Respondent's legal team has worked hard to find information about events going back to 2016 and before, and that Mr Shankland's statement contains what he sees as his firm's and his client's best efforts as to the circumstances of the loss of the material.

33 I am sympathetic to the Applicant's submission that, when analysed, what is said in the statement is unimpressive, not only in failing to explain how it has happened that confusing and seemingly inconsistent explanations have been given concerning what might be thought to be a significant matter, but also in failing to detail precisely who has done what to investigate the matter or to give Mr Shankland the information he sets out. Nevertheless, I do not see that the way forward is for the Respondent to be required to give disclosure and to provide further witness evidence as asked. In this I accept the submissions made by Mr Smith. In my judgment acceding to the Applicant's application, in circumstances where Mr Shankland has responded to the application by doing what he and his client must consider to be their best, is unlikely to assist in the fair determination of the issues for trial, but is likely to involve the parties in further costs on collateral questions.

34 I also reject the application for an order requiring the Respondent to provide a report from an expert. This is because Mr Shankland has explained the fruitless searches and efforts already made with a view to recovering the lost data or copies. I accept that these have been diligent. There now seems little for a forensic expert to report on which is not already known.

The Respondent's disclosure application

35 The Respondent's live disclosure application was made by application notice dated 16 June 2021. It concerns Issues 13 to 17 in the JDRD. As issued, the application also sought production of a document, namely a settlement agreement dated 8 November 2019 between the Applicant and the Hailey Group compromising the proceedings which the Applicant had brought against the Hailey Group in respect of "Reserved Matters". Before the CMC came on for hearing that document was produced to the Respondent.

36 In the JDRD Issue 13 reads "*In what ways did the [Hailey] RCF impact on [Comet's] solvency*". This is agreed to be appropriate for extended disclosure in this form, and the documentation likely to be relevant has been explained in the JDRD. The issue between the parties is whether the formulation should be broader (as the Respondent contends and the Applicant denies).

37 The pilot scheme for disclosure is, according to the judgment of Vos C in UTB LLC v Sheffield United Ltd [2019] EWHC 914 (Ch) to operate "*along different lines [to previous practice] driven by reasonableness and proportionality … with disclosure being directed specifically to defined issues arising in the proceedings".* The aim is to reduce the amount of unnecessary document disclosure which is irrelevant or peripheral to the issues. Mr Smith submitted to me, and I accept, that there may be occasions when the "key Issues for Disclosure", what must have been intended by Vos C's reference to "defined issues", may include issues which are not to be identified exclusively from analysis of existing statements of case. Nevertheless, the starting point, if the aim is to identify the "key issues in dispute" (see para 7.3 of PD 51U), these being the "Issues for Disclosure", will be to see what, according to the parties'

statements of case are the issues to be decided at the trial. The purpose of statements of case is, after all, to set the stage as it were for the trial. In my judgment there is no reason in the present case (whatever may be appropriate in other cases), and Mr Smith has not sought to suggest one, why the approach in identifying the Issues for Disclosure to go into the JDRD should go any wider.

38 Issue 13 as set out in the JDRD, is described as being referable to two paragraphs of the Applicant's Points of Claim (2 and 12.3.4) and one of the Respondent's Defence (para 27(e)(xi)). The significance of this Issue, judging simply from the words used, might be that, when Comet was being sold and the £115 million was paid, a new revolving credit facility (a secured facility, however, in contrast with that paid off by the £115 million) was made available to Comet by the Hailey Group. The new facility is referred to as "the HAL RCF". Its terms have attracted considerable criticism in the aftermath of Comet's insolvency proceedings, being from Comet's point of view much less attractive than the facility it replaced.

39 That this is the thrust of the issue appears to be confirmed by the paragraphs of the statements of case noted in the JDRD.

39.1 Paragraph 2 of the Points of Claim is simply a pleading of Comet's administration and then liquidation; paragraph 12.3.4 is one sub-paragraph supporting an assertion that Comet was insolvent when the £115 million was repaid, the insolvency on the date being said to be corroborated by what the sub-paragraph describes as a report from Comet's administrators that on 28 April 2012 there was £53.25 million net asset deficiency "*rising to £84.2m as at 30 September 2012*".

39.2 Paragraph 27(e)(xi) of the Defence is a pleading of a fact said to support a conclusion that Comet's purpose in participating in arrangements for its sale, including the repayment of the £115 million, was to be sold, bought and refinanced in a way which allowed it and a fellow company "*to continue as going concerns under new management*". The alleged fact is that Comet "*continued to trade for 7 months, and ultimately failed because [the Hailey Group] extracted as cash payment of £25m from [Comet] 2 days before it went into administration, and decided to cease to advance funds … cutting off its cash flow*".

40 In summary, the scope of Issue 13, and the category of material for disclosure in respect of that Issue as set out in the JDRD, will cover post-sale financial statements and financial reports for Comet, as well as documents relating to the operation of the Hailey Group RCF and its impact on Comet's solvency and to the decision of the Hailey Group to extract £25 million from Comet just before its administration started.

41 The Respondent's application of 16 July 2021 seeks to have a much wider Issue 13, namely "*How did [the Hailey Group's] conduct in relation to, and relationship with, [Comet] impacted (sic) on [Comet's] solvency*". However, for reasons I explain, I cannot see this wider issue as one requiring extended disclosure, even if it genuinely arises at all in the proceedings. I return to this below. But the reformulation would indicate that there should be an investigation into much more than the HAL RCF and its terms and effect, the investigation being a wide-ranging exploration of Comet's relationship and involvement with the Hailey Group.

42 The remaining part of the Respondent's application seeks to add the following four issues into the JDRD as requiring Model C extended disclosure:

> *"14- What were the Liquidator's concerns and conclusions from his investigations? What were they based on?*
>
> *15 – Did the Company, the Deloitte Liquidators, or the Liquidator have viable claims against HAL and/or an entitlement to refuse to pay sums to HAL?*
>
> *16—Would HAL be an actual or potential beneficiary of an order against KIL in these proceedings?*
>
> *17 – The terms on and process by which the Liquidator agreed to discontinue his claim against HAL."*

43 What the Respondent appears to have considered to be appropriate for extended disclosure is the investigations made by office holders following Comet's administration and liquidation and their pursuit and later compromise of claims against the Hailey Group. These matters go further even than the proposed new Issue 13.

44 During the hearing on 30 July 2021 Mr Smith explained that there is no longer any need for Issue 16. This is because that matter has been resolved with the Applicant's production of the Settlement Agreement. Mr Smith also disclaimed (in my judgment quite correctly) any further pursuit of the application in respect of Issues 15 and 17. They simply do not arise as appropriate issues in the application, and certainly not as issues suitable for extended disclosure. What was said to fall within the scope of Issue 15 is "*Documents evidencing whether the Company, the [Liquidators or the Applicant] had viable claims against [the Hailey Group] and/or an entitlement to refuse to pay out sums to [the Hailey Group] …*"; and within Issue 17 is "*Documents evidencing the terms on which and process by which the Applicant agreed to discontinue his claim against [the Hailey Group]*".

45 Issue 14, however, was pressed. It is said, according to the Respondent's skeleton argument, to go (along with proposed Issue 13) to "*preference, solvency and remedy*". According to the JDRD the paragraphs of the statements of case in which it is anchored are paragraphs 12, 13 and 27(j) of the Defence and paragraph 5 of the Reply. Of these paragraphs:

45.1 Paragraphs 12 and 13 of the Defence assert that the Applicant's investigations on appointment had led him to conclusions concerning adverse impacts on Comet from transactions at the time of the sale, with his focus being on benefits provided to the Hailey Group.

45.2 Paragraph 27(j) of the Defence is a pleading that Comet was not influenced by a desire to put the Respondent in a better position in the event of an insolvent liquidation because the Applicant's conclusion as a result of his investigations was, as stated in a witness statement made by the Applicant in May 2019, that the repayment of the £115 million was "*constructed purely to allow a mechanism whereby unsecured shareholder debt could be exchanged for secured shareholder debt*".

45.3 Paragraph 5 of the Reply asserts that the Defence, in paragraphs 12 and 13, mischaracterises what has been presented by the Applicant in his claim as well as in his May 2019 witness statement, and is in any event irrelevant to the question whether the payment of the £115 million was a preference of the Respondent.

46 In his witness statement in support of the application concerning proposed Issues 13 and 14 Mr Shankland drew attention to witness statements made by the Applicant, first in October 2018 and then May 2019, in support of applications in Comet's liquidation for various directions concerning proposed proceedings, namely both this present section 239 application and an application making various claims against Hailey Group companies. The Applicant's May 2019 witness statement set out in detail various investigations the Applicant had made of the Reserved Matters: he told the court, in summary, that Comet's sale to the Hailey Group may have been effectively a deal designed to allow the Hailey Group to take on Comet and then allow it to go into an insolvency process, and he also explained that in his belief there were viable claims against the Hailey Group arising from the sale and subsequent transactions. The application notice by which the present proceedings were started also started Insolvency Act proceedings against the Hailey Group (for example, for relief under section 238 of the Insolvency Act).

47 While it may be interesting for the Court at the trial of the proceedings to hear the Applicant explain his concerns and conclusions from his investigations, those matters are irrelevant to the factual foundations of the Applicant's claim, just as the basis for the Applicant's concerns and conclusions is irrelevant as a separate matter for disclosure: what is relevant is the documentation to be disclosed in response to the disclosure required on other issues in the JDRD, that is documents relevant to the factual ingredients of the Applicant's claim against the Respondent that the repayment of the £115 million was a voidable preference within section 239 of the 1986 Act. For this reason I reject the contention that proposed Issue 14 is appropriate for extended disclosure.

48 I turn now to the submissions concerning proposed Issue 13. Mr Smith emphasised that the relevance is for the parties (no doubt with the Applicant bearing the burden to give disclosure for the Respondent to spend time considering) to explore the reasons for Comet's having gone into administration in the second half of 2012 because those reasons, and the position of Comet when it went into administration, would be relevant (he submitted) if the Court reached the position of being satisfied that the payment of the £115 million had been a voidable preference of the Respondent, but had to decide what remedy to order. The contention is that in those circumstances section 239(3) gives the Court a discretion, this being because the direction is that "*the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference*".

49 Making the assumption that the Court has reached the position described in the previous paragraph, I am not persuaded that based on the parties' present statements of case the Court's decision on remedy will be assisted by a detailed exploration of the conduct of the Hailey Group at the time of the repayment of the £115 million or, more widely, thereafter in the period down to the autumn of 2012. The discretion given by section 239(2) is not completely at large: as a matter of natural language it is directed at the way in which most appropriately, as the court sees it, the preferring company's position

is to be restored to what it would have been had the preference not been given. Most naturally this would involve the Respondent repaying the £115 million which Comet would have had if not paid to the Respondent.

50 That said, Mr Smith submitted, and I accept, that the discretion is, or at the least may very well be, wide enough to allow the court to decline to make any order at all. Indeed on 30 July 2021, on same day as the CMC, Mr Justice Trower handed down a judgment (Bucknall v Wilson [2021] EWHC 2149) considering just this point and affirming that the discretion does go as far as Mr Smith submits.

51 Nevertheless the starting point, making the assumption to which I have just referred, will be that relief is to be given and that it will be for the Respondent to say why it should not be and to satisfy the court of the facts relied upon. It would not normally be for the Applicant, having been successful in establishing all the elements of his voidable preference claim, to persuade the Court to make an order reversing the preference.

52 Consistently with this, the Respondent's Defence sets out, in paragraphs 36 and 37, various matters relied on by the Respondent to explain why a simple £115 million repayment order would not be appropriate. These include allegations that, when looked at in the circumstances of the sale and the transactions at that time, the beneficiary of the preference was the Hailey Group rather than the Respondent (eg paras 36(a) and (b) of the Defence), that reversing the preference would benefit the Hailey Group (paras 36(f) & (g)), that to reverse the preference would require Comet assuming a pensions liability (para 36(gg)), and that various income and expenditure items should be taken into account in quantifying the appropriate recovery (paras (36(h) and 37). So far as I can see, the extended disclosure proposed in the Respondent's Issue 13 is not appropriately required in relation to the issues raised by any of these paragraphs of the Defence.

53 A separate point is made in paragraphs 36(c), 36(d) and 36(h)(iii) of the Defence: this is that, if Comet's position was to be restored to what it would have been in the absence of the payment of £115 million to the Respondent, "*the relevant order would have been an order against [the Hailey Group], setting aside or reversing the effect of the matters complained of*". The "matters complained" in this plea are, as a matter of grammar, the statutory conditions entitling the Applicant prima facie to relief against the Respondent in respect of a preference by the payment of the £115 million. It is then pleaded that the Applicant does not seek such an order against the Hailey Group and has compromised "the claims" against the Hailey Group for no recovery. A case is also made that there were various amounts which could have been but were not recovered by the Applicant in Comet's liquidation, and should be brought into account as a deduction from any amount ordered to be repaid by the Respondent. The amounts, so far as particulars are given, are payments pursuant to certain arrangements made at the time of the sale of Comet, and the Applicant's statement of May 2019 identifies certain of these.

54 I do not accept that the Respondent's pleaded case makes it appropriate for there to be extended disclosure as to the Respondent's proposed Issue 13. First, there is already a great bulk of material available to the Respondent concerning the claims which the Applicant brought against the Hailey Group. Whatever point the Respondent is seeking to make concerning those claims or their pursuit does not need to start from what has in my judgment the character of a fishing expedition to see what can be turned up.

Second, the scope of Issue 13 and the category of material for disclosure in respect of that Issue as set out in the JDRD will already cover post-sale financial statements and financial reports for Comet, as well as documents relating to the operation of the Hailey Group RCF and its impact on Comet's solvency and to the decision of the Hailey Group to extract £25 million from Comet just before its administration started.

55 In my judgment, therefore, Issue 13 for extended disclosure should be as already set out in the JDRD.

56 In this judgment I have referred to possible questions as to the costs orders to be made on the CMC and the applications which were before me. I anticipate that once this judgment is handed down the parties will seek to agree what consequential orders are to be made. If they cannot agree, I will give directions as to those orders. I will do so on the basis of written submission or, if either party wishes, at a hearing.