Neutral Citation Number: [2023] EWHC 2998 (Ch)

Case No: CH-2023-000122

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES COURT

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

Date: 27/11/2023

Before:

CHIEF INSOLVENCY AND COMPANEIS COURT JUDGE BRIGGS
(Sitting as a Deputy High Court Judge of the Chancery Division)

- -

Between:

(1) MRS RUTH MUNN **(2) MR KENNETH MacGREGOR MUNN**	**Appellants**
- and -	
ETL HOLDINGS (UK) LIMITED	**Respondent**

- -
- -

KATHERINE HALLETT (instructed by **Direct Access**) for the **First Appellant**
PHILIP CURRIE (instructed by **Glaisyers Solicitors LLP**) for the **Respondent**

Hearing dates: 2 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 27 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE
(Sitting as a Deputy High Court Judge)

Chief ICC Judge Briggs:

1. This is an appeal from an order of Deputy Master Arkush made on 24 April 2023.

2. In April 2021 Deputy Master Smith granted summary judgment in favour of ETL Holdings (UK) Limited ("ETL") against Mr and Mrs Munn on its claims for breaches of warranty arising out of a share purchase agreement under which ETL acquired 40% of the shares in a company called Carston Holdings Limited (the "Company"). Deputy Master Smith gave directions for a hearing to assess the damages consequent on the breaches of warranty found by him.

3. The hearing before Deputy Master Arkush stretched over 4 days spanning the end of September 2022 to the end of January 2023. He gave judgment in March 2023 and made an order that Mr and Mrs Munn pay £1,403,666.79 for breach of warranty. The breach related to a failure to disclose a debt owed by the Company to Dormco Candco Ltd ("Dormco"). He also ordered that Mr and Mrs Munn pay £66,608 for breach of warranty in relation to a failure to disclose a claim for dilapidations made against the Company and consequential losses of £94,595.55 including £30,000 legal fees for costs incurred in defending a winding up petition. The total sum Mr and Mrs Munn were ordered to pay was £2,008,531.74 to include interest and costs.

4. The Deputy gave permission to appeal. He was concerned that the award he made had over-compensated ETL.

5. Mr Munn is an undischarged bankrupt and has not taken part in this appeal. ETL have petitioned for the bankruptcy of Mrs Munn.

The judgment of Deputy Master Smith

6. The Deputy started his judgment by reference to the judgment of Deputy Master Smith which set out the background to the claims made (where relevant):

> 4. On 6 February 2015, the claimant entered into the SPA [32], by which it agreed to purchase 40% of the shareholding in a company called Carston Holdings Ltd ("Carston Holdings"). The vendors of the shares were the defendants (in respect of 280 shares, which they held jointly) and a Mr Rees (in respect of 120 shares). Carston Holdings operated as a holding company. Its subsidiaries included Sinclairs Carston Ltd ("SICA"), SBL Carston Ltd ("SBL") and Dormco Candco Ltd ("Dormco"). Dormco has operated under a number of different names, including (from 2010 to 2013) Carston & Co. Ltd, but I shall refer to it throughout as Dormco. The subsidiaries were involved in providing accountancy services. The first defendant was a director of Carston Holdings, SICA, Dormco and SBL.
>
> 5. The SPA contained various warranties given by the defendants. The warranties were subject to matters disclosed by the defendants in a disclosure letter [83], also dated 6 February 2015 ("the Disclosure Letter").

6. In the years prior to the SPA, there was a curious series of inter-company transactions by which goodwill was supposedly transferred from one group company to another. The following is a summary:

a. In 2004, Dormco purported to transfer the goodwill of its accountancy business to Carston Holdings at a price of £1,000,000.

b. A further purported transfer of goodwill from Dormco to Carston Holdings took place in 2009 at a price of £469,586.

c. Although the goodwill was purportedly transferred to Carston Holdings, Carston Holdings did not trade. Unsurprisingly, HMRC later contended that goodwill of a business could not be transferred separately from the business.

d. It appears that Carston Holdings did not pay £1,000,000 or £469,586 at the time of the purported transfers of goodwill: those sums remained unpaid and were treated as debts due from Carston Holdings to Dormco.

e. In 2013, Carston Holdings purported to transfer goodwill to Dormco at a price of £975,670. Again, no moneys were actually paid.

f. On 31 October 2013, Dormco purported to transfer the goodwill to SICA at a price of £1,800,000. At that point, Dormco ceased trading. Its only unpaid creditors were HMRC.

g. Again, SICA did not pay the sum of £1,800,000 to Dormco. This resulted in a debt from SICA to Dormco. The debt of £1,800,000 was treated as an asset of Dormco and meant that Dormco was able to pay a dividend to Carston Holdings which, in turn, meant that Carston Holdings was able to pay a dividend to the directors of Carston Holdings, including the first defendant. The debt also meant that Dormco was, or appeared to be, solvent when it ceased to trade.

7. From about 2011, HMRC was investigating the transfers of the goodwill giving rise to distributable reserves in the transferor companies. It was investigating whether the dividends declared following the transfers of goodwill were unlawful.

8. On 6 February 2015, as part of the broader transaction which included the claimant entering into the SPA to buy the 40% in Carston Holdings, SICA purported to transfer to SBL, for £1, the goodwill acquired from Dormco. SICA then ceased trading. It subsequently went into insolvent liquidation. The liquidator

of SICA has brought proceedings against SBL alleging that the transfer of goodwill was a transaction defrauding creditors.

9. Dormco was placed into Members Voluntary Liquidation on 4 June 2016. The first defendant, as director of Dormco, executed a declaration of solvency on 31 May 2016 ("the Declaration of Solvency") by which he declared that, after full enquiry into the company's affairs, he considered Dormco would be able to pay its debts in full with interest within a period of 12 months from the commencement of the winding up. The statement attached to the Declaration of Solvency showed that Dormco had assets of £3,694,204, consisting of trade debts owed to Dormco, and unsecured creditors of £1,056,489. The reference to Dormco's assets of £3,694,204 was consistent with Dormco's accounts and financial statements to 31 October 2014 (approved by the first defendant on 27 July 2015, after the SPA), which showed assets of £3,712,238 of which £3,694,204 consisted of amounts owed to Dormco by other members of the group (note 5 to Dormco's financial statements [266]).

10. In fact, Dormco proved not to be solvent. On 21 April 2017, Dormco entered Creditors' Voluntary Liquidation.

11. On 28 July 2017, the liquidator of Dormco, Mr Kevin Brown, presented a petition for the winding-up of Carston Holdings [168]. The petition stated that Dormco's debt ledger revealed that Dormco was owed £3,694,203.73, of which £3,106,156.11 was owed to Dormco by Carston Holdings (I refer to this as "the Dormco Debt"). In other words, the first defendant was able to make the declaration of solvency on 31 May 2016 only because of the existence of the Dormco Debt. Without the Dormco Debt, the declaration of solvency would have showed Dormco's assets were some £588,000, against unsecured liabilities of £1,056,489. The Dormco Debt was not referred to in any of the accounting information provided to the claimant at the time of the SPA or the Disclosure Letter.

12. The first defendant made a witness statement dated 31 August 2017 [171] in response to the Carston Holdings winding-up petition. Among matters referred to in that witness statement, the first defendant explained that Dormco had been under investigation by HMRC since December 2011. On April 2016, HMRC had presented a winding up petition against Dormco alleging that Dormco owed £856,488.51 in respect of PAYE, NIC and corporation tax. HMRC was Dormco's only creditor. The first defendant had concluded that the sum properly due to HMRC was about £500,000, which he had considered could be cleared within 12 months, and so he had made the decision to place Dormco into a Members' Voluntary Liquidation and made the Declaration of Solvency. The

> Declaration of Solvency had been prepared by an insolvency practitioner, a Mr Doyle, who was appointed liquidator under the MVL on 1 June 2016. By April 2017, HMRC was claiming that Dormco owed about £2,500,000, which resulted in Dormco being placed into a Creditors' Voluntary Liquidation.
>
> 13. The first defendant's witness statement of 31 August 2017 then addressed the Dormco Debt. The first defendant referred to the Dormco Debt as based on a nominal account ledger which corresponded with the statement of affairs in the declaration of solvency. That seems to be a reference to the debt ledger referred to in the winding up petition presented against Carston Holdings by the Dormco liquidator, Mr Brown. That ledger does not form part of the hearing bundle, but the first defendant did not dispute that it was part of the accounting papers received by the Dormco liquidator, and at paragraph 16 of the witness statement of 31 August 2017 he explained his understanding of how the figure of £3,106,158.11 was arrived at. The first defendant then explained that inter-company balances were written off in about November 2013, and so Carston Holdings' accounts do not refer to the Dormco Debt or, indeed, any debt to Dormco. He said that, with the benefit of hindsight, he should not have approved Dormco's 2014 accounts and should not have signed the declaration of solvency in respect of Dormco. Plainly that is right. If the inter-company balances had been written off in November 2013, Dormco was owed nothing by Carston Holdings and was insolvent."

7. Deputy Master Arkush observed [5] that it was common ground before him that the appropriate measure of damages is the difference between the value of the shares as warranted and the true value of the shares. The experts had moved toward agreement on the issue of values.

8. The Deputy reasoned [6]:

> "In a claim for damages for breach of warranty in a share purchase agreement, the general measure damages will therefore reflect the value of the company as seen at the date of acquisition. If the company had an undisclosed debt such as the Dormco Debt, the value of the company was to be taken as reflecting the impact caused by the debt on the value of its shares. The debt deprived the claimant of the contractual benefit for which it bargained. <u>If the company subsequently succeeded to pay off the debt for a lesser sum, the general rule is that this hindsight cannot be taken into account</u>. <u>The qualifications to the general rule are restricted to two situations. The first is when it is necessary to give effect to the compensatory principle. The second depends on any allocation of risk inherent on the contract.</u> If the benefit or detriment of the contingency is a risk which has been allocated to the buyer,

> it is not appropriate to deprive it of any benefit which is fact ensues (such as being able to pay off the debt for a lesser amount), since that was inherent in the bargain." (my emphasis)

9. On the approach adopted to damages he said [15]:

> "It is not appropriate to use hindsight to take into account that the Dormco Debt and dilapidations claims were ultimately settled for lesser amounts than those provided for, or which should have been provided for, in the accounts of the Company or any group company… the compensatory principle is that it should be compensated for being deprived of those contractual benefits. The compensation is to be measured by the difference between what ETL paid for the shares, and their actual value given the existence of the undisclosed claims. The qualifications to the compensatory principle do not apply. It cannot be said that it is necessary to use hindsight to give effect to the principle. On the contrary, to use hindsight would represent a breach of the principle as it would deprive ETL of part of its bargain. Further, the SPA has not allocated the risk or reward of the contingency to the sellers. The benefit or detriment of the contingency occurring is therefore that of ETL as the buyer. It was inherent in the contractual bargain. It is therefore impermissible to deprive ETL of any benefit that has in fact ensued by having succeeded in paying off the claims for lesser amounts." (My emphasis).

10. And the Deputy's conclusions followed [17]:

> "In paragraph 38 of his judgment, Deputy Master Smith found that the Company paid an unlawful dividend to Mr Munn in 2014. The amount was £169,999.99. It was unlawful as the Company did not have the reserves available from which such a dividend could be paid. On 9 October 2017 the Company exercised its rights to enforce a lien over Mr and Mrs Munn's shares in order to recoup the dividend amount and/or to recover damages for breach of director's duty owed by Mr Munn. Mr and Mrs Munn claim that the resulting increase in the net assets of the Company is something for which they should be given credit against the Company's claim for damages. This is not only an improbable assertion on a number of levels, but is wholly misplaced. The enforcement of the lien arose out of the Company's claim against Mr Munn for breach of director's duty. It was entirely independent of ETL's claim for damages for breach of warranty. The Company's rights existed irrespective of any claim that might be and in the event was put forward by ETL. The enforcement of the Company's rights resulted in it receiving compensation for the damage it suffered as a result of Mr Munn's breach of duty as a director. This does not compensate ETL in any way for the damage it suffered as a result of the breaches of warranty at the time of

> the SPA more than two years earlier. The effect of the compensatory principle is that such damage is to be assessed as at the date of the SPA, since that was when it entered into the bargain to buy the shares. The remedy of damages is to compensate ETL for being deprived of benefits it bargained for. The fact that more than two years later the Company was able to enforce its own, separate rights against Mr and Mrs Munn for breach of director's duty has nothing to do with, and cannot affect, ETL's right to damages for the difference between the price paid for the shares and the shares' actual value as at the date of the bargain given the undisclosed claims to which the Company was subject." (My emphasis)

11. The enforcement of the lien on 9 October 2017 is an important feature of this case. The lien was imposed on the shares that Mr and Mrs Munn did not sell under the share purchase agreement. I shall refer to the unsold shares as the "Retained Shares".

12. I shall explain a little more about the lien.

13. By a letter dated 22 September 2017 the company served a lien enforcement notice pursuant to article 22 of the Company's articles of association. The articles provide that the Company has a lien over every share, which is registered in the name of any person indebted or under any liability to the company.

14. An enforcement notice may only be given in respect of a share which is subject to a company's lien and in respect of a sum payable to a company for which the due date for payment has passed.

15. Mr and Mrs Munn failed to comply with the enforcement notice which entitled the Company to sell the shares subject to a lien.

16. When a company sells shares using the enforcement notice procedure the company must apply the net proceeds of any such sale in a particular way. It must first satisfy the lien and if there are any sums left over, distribute the proceeds to the person entitled to the shares at the date of the sale.

17. It is not disputed that the shares were sold by the Company, and the net proceeds were used to satisfy the lien. The shares were purchased by (i) the company owned and controlled by the husband of ETL's managing director, EKWilliams Accountants Limited, and (ii) ETL.

18. I turn to the grounds of appeal.

Grounds of appeal

19. The essence of the argument made by Mrs Munn is that ETL has been awarded more than it ought. Although the grounds are various the parties agree that the operable grounds for the purpose of the appeal are as follows:

    a. The Judge wrongly found that the Claimant had not been compensated for the Dormco debt and associated legal costs by way of the action it took to forfeit the shares.

b. The Judgment makes no reference to the evidence which demonstrates the claim for breach of warranty was a repeat of the first claim against the first defendant for breach of fiduciary duty as both claims arise from the same facts and circumstances relating to the Dormco debt.

c. The learned Judge should have adopted the evidence of the ETL's expert Mr Stringfellow who found that it had been overcompensated by £311,000 from the share forfeiture, which ETL should pay to the Defendants.

20. Mrs Munn rightly accepts that although there are new or better arguments that could be raised on this appeal, she is constrained by the grounds of appeal and how the matter proceeded before Deputy Master Arkush.

Argument

Mrs Munn

21. Mrs Munn argues that the award given by the Deputy Master is contrary to the compensatory damages principle, to place the party in the same position as if the contract had been performed. The rationale for the argument can be taken in stages: i) ETL became a shareholder in the Company through the share purchase agreement; ii) the consideration given for the shares was inflated due to the Dormco debt which was not disclosed; (iii) ETL had the benefit of a contractual claim against Mr and Mrs Munn for the failure to disclose; (iv) the measure of the damages for the failure was equal to the difference between the purchase price under the agreement and the value having regard to the Dormco debt; (v) the managing director of ETL was appointed director of the Company; vi) She caused the Company to impose a lien, that was subsequently enforced, on the Retained Shares; (vii) the security against the Retained Shares was in respect of a debt said to be owed by Mr Munn for breach of Mr Munn's duty to the Company for causing the Company to pay an unlawful dividend (as found by Deputy Master Smith); and (viii) the shares were forfeited and the Company received full satisfaction for the claim relating the unlawful dividend. In addition, ETL received satisfaction for the Dormco debt.

ETL

22. ETL argues that the Deputy Master was right to distinguish between the sums claimed for the diminution in the value of the shares, as a result of a breach of warranty. The claim made by the Company was a different event. The loss suffered by ETL arose at the latest on the payment of £2,880,000 provided by ETL on 6 February 2015 for the shares it acquired under the share purchase agreement. The Retained Shares were forfeited and sold on 9 October 2017. The Deputy Master was right to award ETL £1,242,463.24 in respect of the DOrmco debt.

23. ETL argue that the issue on appeal is whether it is permissible to use hindsight when assessing the true value of the shares as at the date of the SPA, and whether, with the use of hindsight, ETL was overcompensated by the Deputy Master's order. The mere fact that the value of the Company's shares increased (because the Dormco debt was settled) since the date of assessment is not a windfall.

Evidence

24. The Deputy Master had the benefit of witness statements of fact, heard oral evidence, expert evidence reports and oral evidence from each expert. He also saw correspondence passing between the parties at the time the lien was imposed over the Retained Shares. The experts were recalled after they had finished their evidence and following final submissions. The Deputy Master was concerned that ETL's expert had not adequately dealt with the losses it had suffered by reason of a failure to disclose (i) the Dormco debt and (ii) a claim for dilapidations made by Howard de Walden Estates Ltd against the Company in the sum of £277,237.84.

25. The appeal bundle does not contain all the documentary evidence that was before the Deputy Master, however some of the correspondence has been provided.

26. Kuits solicitors wrote to Mr Munn on 21 September 2017 on behalf of the Company demanding payment of £1,249,999. The letter states:

> "We are instructed that at all material times you were a director and/or shareholder of the Company. As per the schedule enclosed with this letter, we are instructed to give you notice that all monies outstanding as per the schedule are immediately due and payable by you to the Company."

27. The schedule broke down the debt that was said to be owing to the Company. The sums stated were £169,999 due under a loan, £30,000 for legal fees in respect of a winding up petition presented by the liquidator of Dormco and £1,050,000. This last sum is described as:

> "In breach of your fiduciary duties as director of the Company as set out in ss 177-176 of the Companies Act 2006, you caused and/or permitted and/or allowed accounts for [Dormco] for the period 31 October 2014 to be signed and filed at Companies House confirming the Company owed a debt to [Dormco]. In breach of your fiduciary duties…you caused/or permitted…a statutory declaration and statement of affairs for [Dormco] as at 31 May 2016 signed by you and filed at Companies House confirming the Company owed a debt to [Dormco]. In reliance on the aforementioned documents signed by you, the liquidator of [Dormco] presented a winding up petition against the company for the sum of £3,106,158.11. The Company has agreed to pay [Dormco] the sum of £1,050,000 in compromise of the petition debt. Your breach of fiduciary duties has caused the loss to the Company of £1,050,000."

28. The details of the debt disclose that the Company had reduced its loss by negotiating a settlement figure. The negotiations are not disclosed in the appeal bundle nor, as I understand it, were they in the hearing bundle before the Deputy Master. The court does not know if the liquidator of Dormco had overstated the claim which may have helped with negotiations.

29. ETL needed funds to make payment to the liquidator. It asked for assistance from an associated company in Germany. The request for funds was made in writing by a letter dated 25 September 2017:

> "According [sic] our compromise ETL UK Holdings request funds before As soon as possible [sic]. These must be paid within one week to comply with the legal requirements of the deal.
>
> Purchase of shares in Carston £1,050,000 GBP"

30. The reference to the purchase of shares is to the purchase of the Retained Shares subject to the lien.

31. A letter from Kuits solicitors (acting the Company) dated 9 October 2017 refers to e-mails sent between Mr Munn and the managing director of ETL and from Mr Munn to solicitors Charles Russell Speechly. I have not seen the e-mails. They may have some relevance. I also understand that not all the correspondence is before the court on appeal. The 9 October 2017 letter from Kuits refers to the value of the Retained Shares:

> "Our client has commissioned a value of the whole shareholding of [the Company] which equates to £2,281,455. Such valuation means that your client and Mrs Munn's 42% shareholding has a value of £958,211… the valuation has no minority shareholding discount… our client shall therefore give your client and Mrs Munn the benefits of the valuation sum against the debts and claims owed to [the Company] buy them as consideration for their shares. In effect your client and Mrs Munn are realising the true…value of the minority shareholding…"

32. Kuits sought assurance that settlement would include an agreement that Mr and Mrs Munn would not petition for unfair prejudice.

33. Mrs Munn says that breach of fiduciary duty claim asked for £1,249,999.90 compensation which expressly included the Dormco debt in the agreed sum of £1.05m. This is the same sum mentioned in correspondence between ETL and its associated German company: "Purchase of shares in Carston £1,050,000 GBP".

Lien over the Retained Shares

34. By a letter dated 22 September 2017 the company served a lien enforcement notice pursuant to article 22 of the Company's articles of association. The articles provide that the Company has a lien over every share, which is registered in the name of any person indebted or under any liability to the company.

35. An enforcement notice may only be given in respect of a share which is subject to the company's lien and in respect of a sum payable to the relevant company for which the due date for payment has passed. The sum said to be due was the loss caused to the Company by Mr Munn as director, not loss caused by the shareholders.

36. Mr and Mrs Munn failed to comply with the notice which entitled the Company to sell the shares subject to a lien.

37. When a company sells shares using the enforcement notice procedure the company must apply the net proceeds of any such sale in a particular way. It must first satisfy the lien and if there are any sums left over, distribute the proceeds to the person entitled to the shares at the date of the sale.

38. It is not disputed that the shares were sold by the Company at value, and the net proceeds were used to satisfy the lien.

39. The shares were forfeited on 9 October 2017 which is said to have settled the claim for loss arising in respect of the Dormco debt, said to be due by reason of Mr Munn's breach of duty to the Company.

Single transaction

40. It is said that the intention of the parties to determine all issues between the Company and Mr and Mrs Munn by the forfeiture of the shares is evident from the correspondence. Kuits acted for both ETL and the Company. The managing director of ETL provided instructions to Kuits.

41. The letter from Kuits dated 9 November 2017 explains:

> "The company did not have sufficient cash reserves or resources to fund the payment of the sum of £1,050,000 and so it was forced to obtain a loan from ETL Group in that sum in order to avoid a winding up order being made against it. The sum of £1,050,000 was paid in or around 4 October 2017. In addition the Company incurred legal fees …"

42. Taking the correspondence of 9 October and 9 November 2017 it is evident that the sums claimed were in respect of losses to the Company not to ETL.

43. Instructions were given to experts, Mr Mesher (on behalf of Mr and Mrs Munn) and Mr Stringfellow (on behalf of ETL) to have regard to the Dormco debt and the lien secured over the shares of Mr and Mrs Munn.

44. Mr Stringfellow, set out his instructions from ETL:

> "I understand that on 22 September 2017 [the Company] exercised its lien over the shares held by Mr KM and Mrs R Munn…in respect of an unpaid liability owed to the Company by Mr KM Munn in the sum of £1,249,999.90. Consequently on 9 October 2017 [ETL] acquired a further 49 ordinary shares of £1 each in [the Company] from Mr K M Munn and Mrs R Munn (increasing their holding in the Company to 44.9% of the issued share capital) whilst at the same time EK Williams Accounts acquired 371 ordinary shares of £1 each from Mr and Mrs Munn (being 37.1%). A review of the financial statements of EK Williams…for the year-ended 31st December 2019 indicates that the investment in the 371 ordinary shares in [the Company] was the only "investment in associated companies" held as at 31st December 2018 and so is included at cost of

> £952,272. A review of the financial statements of [the Company] for year-ended 31st December 2017 indicates that there were two "investment in associated companies"…being (i) 40 ordinary B shares in EK Williams Limited which were issued…; and (ii) 449 ordinary shares in [the Company]…"

45. He concludes that the Retained Shares had a value of £1,561,460.

46. Mr Mesher says [6.1] that the enforcement of the lien increased the shareholding acquired by ETL from 40% to 82%.

47. Taking the limited evidence, but looking at it holistically, the correspondence, the filed accounts and expert evidence, there is a reasonable factual argument that ETL and the Company treated the forfeiture of the Retained Shares as benefiting ETL not the Company. Mr Mesher notes:

> "EKWilliams Accountants Limited is a company incorporated on 24 March 2017 where Peter Brassington is the sole director and is owned by ETL and Peter Brassington. Peter Brassington is Sara Brassington's husband."

48. He notes [6.4]:

> "On the Claimants own valuation at that time, [ETL] appears to have been more than adequately compensated for the Dormco Debt and dilapidations issues, as ETL received shares valued at £958, 211, against its 40% share of the issues being £358,857; i.e it would appear to have fully mitigated its loss."

49. A link is formed by reason of ETL borrowing the money for the purpose of paying the sum owed by the Company to the liquidator in respect of the Dormco debt, the Dormco debt having been satisfied so that the Company is no longer liable to the liquidator, the Company forfeiting the Retained Shares for the purpose of compensating ETL for money it borrowed and any loss ETL suffered by reason of the Dormco debt not having been disclosed.

50. Unfortunately, the Deputy Master did not consider the link or explain why he thought the experts were wrong save that he concluded that as ETL was claiming for breach of warranty and the Company for breach of duty both entities were entitled to recover the same loss.

51. The Deputy Master reasoned that the even though the calculated value extracted from the enforcement of the lien included the Dormco debt, it [17]: "had nothing to do with and cannot affect ETL's right to damages".

52. The conclusion of the Deputy Master that it was not "necessary to use hindsight to give effect to the [compensatory] principle" did not make reference to the correspondence, financial statements or expert evidence on the subject of the: (i) hostile lien made over the Retained Shares; (ii) position of Mrs Munn who was not a director of the Company; (iii) addition of the Dormco debt to the sum extracted from the Company by way of the unlawful dividend; (iv) the payment made by ETL to the

liquidators to settle the Dormco debt; (v) the simultaneous forfeiture of the Retained Shares and acquisition by ETL and its associated company EKWilliams of the same shares; and (vi) reasons for the apparent submission by Mr and Mrs Munn to the enforcement process.

53. In my view the Deputy Master was right to start from the position that the claim vested in the Company and the claim vested in ETL were different. The Company claim was against Mr Munn only breach of duty, and ETL had a contractual claim against Mr and Mrs Munn.

54. As I read the judgment, the conflation of the separate causes of action and separate parties, and the timing issue persuaded the Deputy Master to find that the losses caused by the existence of the Dormco debt could be recovered by the Company and ETL. It appears from his reasoning that the two-year time difference between the completion of the share purchase agreement and the settling of the claim by the Company was of great importance.

55. On the separate party issue, he made no finding on the argument advanced about the link or single transaction whereby, it is said, that the parties intended to settle all claims.

56. The use of the term "single transaction" may not adequately describe the argument advanced. It is more likely that the argument (I have not been provided with the skeleton arguments from the first instance hearings nor do I have the benefit of a transcript) involves a common intention to compromise, which may have comprised an express agreement or possibly an agreement by conduct or an estoppel. The factual basis of the argument, as advanced to me, is grounded in the settlement made by ETL by way of a payment to the liquidators for the Dormco debt, the connected seizure of the Retained Shares and the transfer of those shares to ETL.

57. Finally, the Deputy Master failed to address the valuation of the Retained Shares but made a finding that was contrary to what the experts agreed.

Legal submissions

58. The single transaction argument was explained in *Phillips v Brewin Dolphin Bell Lawrie* [2001] UKHL 2. The House of Lords considered whether a transaction, as defined by the Insolvency Act 1986, was entered into at an undervalue for the purposes of the Act. Lord Scott opined that a series of closely related and complex transaction should be viewed as one single transaction. Lord Scott opined [26]:

> "Where the events, or some of them, on which the uncertainties depend have actually happened, it seems to me unsatisfactory and unnecessary for the court to wear blinkers and pretend that it does not know what has happened. Problems of a comparable sort may arise for judicial determination in many different areas of the law. <u>The answers may not be uniform but may depend upon the particular context in which the problem arises. For the purposes of section 238(4) however</u>, and the valuation of the consideration for which a company has entered into a

> transaction, reality should, in my opinion, be given precedence over speculation." (my emphasis)

59. *Phillips v Brewin Dolphin Bell Lawrie* was cited by Popplewell J in *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd* [2014] Bus LR 1338 [33] and at [34]:

> "There is no conceptual difficulty in using subsequent events to inform an assessment of value at an earlier date in an appropriate case."

60. The subject matter of the *Ageas* dispute was a share purchase agreement. Under the agreement, the claimant acquired from the first defendant the entire issued share capital in Kwik-Fit Insurance Services for £214.75m. The first defendant breached warranties contained in the agreement, and the claimant brought a claim. The claim settled and the issue of quantum remained.

61. Although Popplewell J. found that the general rule, from which departure had to be justified, was that damages were to be assessed at the date of breach. However, the rule is not strict. Subsequent events may inform an assessment of value where the compensatory principle is not undermined. In an appropriate case, the ascertainment of the value may take account of events after the relevant date. The court does not have to disregard reality by wearing "blinkers". Secondly, the court should have regard to any contractual allocation of risk provided in an agreement. The parties are entitled to allocate the risk under the agreement and an award of damages should not undermine their objective intentions. The task of the court is to examine whether the contingency represents a risk which has been allocated.

62. More recently, the Court of Appeal explained in *MDW Holdings Limited v Norvill* [2022] EWCA Civ 883 that [49]:

> "There is a strong case for saying that, in general at least, the position should be similar in relation to warranties given on a share sale. Supposing the position to be that the true value of some shares is depressed by a contingency, someone buying them at a higher figure will have paid more than they were worth even if the contingency never happens. Events subsequent to the purchase cannot affect the value at the time of the transaction. The price of a share could typically be said to be a product of a number of contingencies. If a particular risk does, or does not, occur, the price may rise or fall, but that will not retrospectively change the value of the share at an earlier date."

63. The Court of Appeal did not shut out the prospect that knowledge of events after the date of a share purchase may be taken into account when assessing loss. Newey LJ said [49v]:

> "…there can be cases in which account can be taken of what happened subsequently as regards a contingency which existed on the date of assessment when determining what, if any, damages are payable for breach of a warranty on a share sale,

> they must be rare. They would doubtless involve situations in which the buyer might otherwise be said to have gained a 'windfall'…"

64. My understanding of the reasoning in *MDW* is that hindsight cannot be used unless to ignore it would be contrary to the overriding compensatory principle. The usual rule is that steps taken or not taken by a purchaser to mitigate its loss after the purchase are irrelevant. The loss crystallises at the point of purchase.

65. The court may have regard to a subsequent event where that event results in overcompensation. Although these cases may be "rare" they are not impossible. What qualifies as a "windfall" is likely to be fact specific but a change in the value of shares after the date of the agreement will not qualify as a windfall.

The date of assessment of damages

66. The sale purchase agreement dated 6 February 2015 concerned only 40% of the paid-up share capital of the Company. By clause 3.1 of the agreement the consideration was subject to adjustment:

> "Subject to adjustment as provided by clause 8 the consideration payable for the Shares ("the Purchase Price") shall be in the sum of £2,880,000… to be paid in cash, in the manner stated in clause 3.3 below."

67. Clause 8 allocated the risk of failure to meet a turnover of £4,000,000 prior to the final payment to the Mr and Mrs Munn as sellers. It is not suggested by either party before me that this allocation of risk assists in determining this case. I regard it as irrelevant. No other express allocation of risk has been drawn to my attention although it was submitted that any risk not prescribed in the share purchase agreement is inherent. That, in my view, says nothing of the contractual position. Invariably every transaction will have an element or risk. In this case, it has been found by the High Court that ETL knew of the Dormco debt at the time of the transaction. I shall deal this below.

68. It has been said that the risk that Mr Munn breached his duties to the Company fell on the purchaser. That is true as a statement, but it is not the whole picture. At the time of the share purchase agreement, there was a pre-existing claim vested in the Company for loss in respect of the Dormco debt.

69. It is settled law that a shareholder has an interest in a company that confers certain rights such as voting. The investment is rewarded, subject to the articles of association, by a declaration and payment of a dividend. These rights are attached to the shares for which consideration was provided by the original holders. Dividends are both commercially and legally a return on the investment. Any depression of the value in the shares, which may or may not mean that a return on the investment is less likely, by reason of a breach of directors' duties is reflected in the loss to a company. Where any loss suffered by a company due to a breach of duty is made good, restoration of its value and the value of the shares in the company will follow.

70. In this case the restoration of share value occurred after the usual date of assessment of damages for breach of warranty.

71. In *Ageas*, Poppelwell J. provided a useful example of when the court may have regard to events at the time of assessment and give effect to the overriding compensatory principle [36]:

> "I posited an example of the sale of a racehorse, which the seller warranted to be free from disease; its value at the date of sale was to be measured by reference to an assessment of the races it might win and its consequent stud value; at the date of sale it had a latent disease which increased the risk of it suffering a career ending lameness at some stage; if the parties had known the true position at the date of sale the horse would have been valued at half the price because of this increased risk of lameness; by the time damages came to be assessed, however, the horse's racing days were over and it was known that there had been no incidence of career ending lameness despite the increased risk. Would the buyer still be able to claim half the price of the horse on the basis that its value without the benefit of hindsight was half what he paid? I am inclined to think not. By the time damages come to be assessed, it is known that the buyer received a horse which was every bit as valuable at the date of sale as the horse as warranted; with the benefit of hindsight it is known that the horse was as capable of winning the same number of races over its racing career as a horse without the latent disease. To award the buyer half the price of the horse would offend the compensatory principle and provide the buyer with a windfall."

72. The Deputy Master made no mention of the racehorse example in his judgment or considered the realities of the situation. If a windfall arises in circumstances where, at the time damages come to be assessed, it is known that a buyer with the right to enforce a warranty and obtain damages has, with the benefit of hindsight, suffered no loss and the consequence of any award would be a windfall, then reasons must be given as to why the racehorse example does not work in favour of the Munns. This is particularly so given the evidence of the experts.

Disposal

73. The Deputy Master erred by not addressing the "single transaction" argument and the valuation of the Retained Shares.

74. The Deputy Master made a finding that was contrary to what the experts agreed without providing adequate or any reasons. He did not address adequately the association of those who received the benefit of the Retained Shares, the Company and ETL nor the consequences of a compromise or a common intention to settle the Dormco debt when Mr and Mrs Munn submitted to the enforcement of the Retained Shares. The need to address the "single transaction" and its consequences is sufficient to allow the appeal.

75. In addition, the Deputy Master did not take account of all the arguments when addressing the "windfall" issue.

76. The experts, who gave evidence at trial, agreed that the breach of warranty reduced the value of the shares sold by approximately 40% of the purchase price. Mr. Mesher stated:

> "On the Claimant's own valuation at the time, [ETL] appears to have been more than adequately compensated for the Dormco Debt and dilapidations issues."

77. Mr Stringfellow was one of the experts who appeared in *Dormco Sica (In Liquidation), Richard Howarth Toone, Robert Neil Starkins, Adrian Paul Dante (In Their Capacity as Joint Liquidators of Dormco Sica Limited (In Liquidation)) v S B L Carston Limited, Kenneth Munn, Ruth Munn* [2022] BCC 360. The Deputy Master made no reference to the finding by Court other than to comment that the parties were agreed that proceedings in the ICC List were not relevant. However, it is not explained why findings made in the *Dormco Sica v SBL* should be ignored. Mrs Brassington's case was that ETL knew nothing of the Dormco debt at the time the share purchase agreement. That was found to be false. The Judge found that Mrs Brassington was not just a mere conduit as she claimed, and that the debt was obvious from the accounts [51-58]. The court appears to have known of these findings and in my judgment fell into error by not having regard to them. Returning to the example of the racehorse posited by Popplewell J, the parties did know the true position at the date of sale.

78. There was no finding that the opinion of this expert was incorrect. In giving his opinion Mr Mesher had regard to the breach of warranties and the claims made by the Company. He had in mind that any loss suffered by the Company caused by the failure to disclose was the same loss said to have been suffered by ETL on its claim for breach of warranty.

79. Applying the rationale of Popplewell J. in *Ageas* the relevant question to ask in respect of a post-completion event subject to a warranty is: "with the benefit of hindsight" is it "known that there was no loss"?

80. This is a question of fact that requires determining. The material fact about the horse with the latent defect is that the latency never materialised. By the time damages come to be assessed, it was known that the buyer received a horse which was every bit as valuable at the date of sale as the horse as warranted. In that example applying a "blinkered" approach to the date of assessment would offend the compensatory principle because the purchaser would receive a "windfall".

81. In this case it has been found that ETL had actual knowledge of the ETL debt and proceeded with the purchase notwithstanding its knowledge. This finding may have some bearing on the outcome of the claim now made by ETL.

82. The value of the unlawful dividend claim to the Company was £169,999. If the evidence of the experts is accepted, and as I have mentioned no reasons were given for not accepting it, the Retained Shares had a value of £1,561,460. The correspondence in September 2017 valued the breach of warranty claim at

£1,050,000. By the forfeiture process, driven by the common management of the Company and ETL and using the same legal advisers, the Company received £1,391,461 in excess of the unlawful dividend claim. ETL (and its associated companies) acquired the Retained Shares and started proceedings to recover the loss to ETL as at the date of the breach.

83. The circumstances are unusual. The court must answer why this is not a "rare" case on the facts, and why the racehorse example does not apply.

84. I would therefore allow the appeal and, despite the advantages of making a final decision by substituting my own, I am conscious that the appeal bundle was deliberately condensed so that I do not have all the material and questions of fact need to be re-argued and decided.

85. I therefore remit the matter to the Master of the Chancery Division who has conduct of the case, with a recommendation that a full-time Master rehear the matter.