Neutral Citation Number: [2025] EWCA Civ 1669

Case No: CA-2025-000055

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
MRS JUSTICE DIAS
[2024] EWHC 3146 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2025

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE NEWEY
and
LADY JUSTICE FALK

- -

Between:

(1) TAQA BRATANI LIMITED **(2) TAQA BRATANI LNS LIMITED** **(3) SPIRIT ENERGY RESOURCES LIMITED**	**Claimants/ Appellants**
- and -	
(1) FUJAIRAH OIL AND GAS UK LLC **(formerly known as ROCKROSE UKCS8 LLC)** **(2) ROCKROSE ENERGY LIMITED** **(formerly known as ROCKROSE ENERGY PLC)** **(3) VIARO ENERGY LIMITED** **(4) VIARO INVESTMENT LIMITED** **(5) FRANCESCO MAZZAGATTI** **(6) FRANCESCO DIXIT DOMINUS**	**Defendants/ Respondents**

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- -

David Allison KC and Niranjan Venkatesan KC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Appellants**
Jonathan Nash KC and Daniel Hubbard (instructed by **DAC Beachcroft LLP**) for the **Second to Sixth Respondents**

Hearing dates: 2 and 3 December 2025

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Approved Judgment

This judgment was handed down remotely at 2.00pm on Friday 19 December 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Falk:

Introduction

1. This is an appeal against a decision of Dias J ("the judge") dismissing a claim under s.238 of the Insolvency Act 1986 ("IA 1986"). In her judgment, [2024] EWHC 3146 (Comm) (the "judgment"), the judge concluded that, although there was a transaction at an undervalue within the prescribed period of a winding up petition being presented for the purposes of s.238, it fell within the defence in s.238(5).

2. The appeal raises issues as to the correct approach to the identification of the "transaction" for s.238 purposes, what may be treated as consideration for a transaction when determining the existence and extent of any undervalue, and the scope of s.238(5).

3. I have concluded that the appeal should be allowed, that the defence in s.238(5) is not available and that it is therefore necessary to remit the case to the Commercial Court in order to determine the appropriate remedy.

The relevant facts

4. The company in question, and the first defendant in these proceedings, is a Delaware incorporated limited liability company ("LLC"). It is now known as Fujairah Oil and Gas UK LLC. At the relevant time it was known as RockRose UKCS8 LLC. I will refer to it as "UKCS8". References in what follows to the defendants are to the defendants excluding UKCS8. (For ease of reference, I have also used the terms "claimants" and "defendants" throughout, rather than referring to them as appellants and respondents respectively.)

5. UKCS8 was originally part of the Marathon Oil group. It was the holder of Marathon's interest in the Brae area in the North Sea, and was also the operator of the Brae complex. The claimants (and appellants in this appeal), who are two members of the TAQA group (together, "TAQA") and a third entity called Spirit Energy Resources Limited, also held interests in the Brae area, along with a further entity which is not a party to these proceedings.

6. In February 2019 UKCS8, and therefore Marathon's interest in the Brae field, was acquired from Marathon by the second defendant, RockRose Energy Limited ("RockRose"). UKCS8 continued as the operator. Then, in July 2020, it was announced that RockRose was itself to be acquired by the Viaro group, a group owned and controlled by the fifth defendant, a Mr Francesco Mazzagatti. The acquisition was implemented by a court approved scheme of arrangement under which the third defendant, Viaro Energy Limited, acquired the shares in RockRose for US$248m. The purchase was completed in early September 2020, largely funded by cash on RockRose's own balance sheet. TAQA had initially opposed that method of funding, expressing a concern that it would leave UKCS8 unable to meet its obligations under the Brae joint venture arrangements, particularly in relation to security for decommissioning costs, but ultimately withdrew its objection.

7. Decommissioning obligations were covered by two Amended and Restated Decommissioning Security Agreements (the "DSAs") to which the claimants and UKCS8 were each a party. The DSAs contained a formula for determining the amount

of security required each year, which was then reflected in an invoice issued by the operator known as a "Provision Invoice". Joint venture participants were required to pay the amount invoiced to them in cash by 15 December, or alternatively to provide contractually compliant security, known as "Alternative Provision", by 1 December. Unremedied defaults resulted in an obligation on the other participants not only to make good the shortfall in security but also to meet the defaulter's share of operational expenses (subject to an indemnity), and in some circumstances entitled them to lift the defaulter's share of petroleum. A prolonged default would also result in those other participants becoming entitled to forfeit and acquire the defaulter's interest in the Brae field.

8. On 30 September 2020 a Provision Invoice was issued to UKCS8 in an amount of around US$110m. No Alternative Provision was made by 1 December and no payment in cash was made on 15 December 2020. However, on that date RockRose entered into a share purchase agreement (the "SPA") with a company called Fujairah International Oil & Gas Corporation ("FIOGC"), a state-owned company incorporated in the Fujairah Municipality of the UAE, under which RockRose agreed to sell its membership interest in UKCS8 to FIOGC. FIOGC also provided TAQA with a draft parent company guarantee as proposed "Alternative Provision".

9. The defendants' case, which the judge accepted, was that they believed that the sale was in the best interests of UKCS8 since the Brae joint venture was deadlocked as to its future direction. FIOGC had undertaken to stand behind UKCS8 and it was believed that it would be able to improve the relationship that UKCS8 had with TAQA, and potentially even allow an onward sale of UKCS8 to TAQA.

10. FIOGC did not undertake due diligence on UKCS8 and the SPA was very short. Clause 1 contained definitions. The material provisions are clauses 2 and 3, which read as follows:

> "**2. SALE AND PURCHASE**
>
> On the terms of this Agreement at Completion, the Seller shall sell and the Buyer shall buy, the Membership Interest legally and beneficially owned by the Seller, with full title guarantee free from all Encumbrances and together with all rights that attach (or may in the future attach) to the Membership Interest.
>
> **3. PURCHASE PRICE AND COMPLETION**
>
> 3.1 The amount payable for the sale of the Membership Interest shall be USD $1.00.
>
> 3.2. Completion shall take place immediately after:
>
> 3.2.1 the Seller has removed Rockrose UKCS 9 Limited (company number: 01293052) from being a Subsidiary of the Company so that it stays with the Seller's Group following completion;
>
> 3.2.2 the Buyer providing all such sureties, indemnities, assurances and commitments in [sic] currently in place by or for the benefit of the

> Company or its Subsidiaries such commitments as are to meet the decommissioning obligations of the Company and it [sic] Subsidiaries in relation to the Licences, in all cases to the Seller's reasonable satisfaction.
>
> 3.3 The Buyer will use its best endeavours to fulfil the condition in Clause 3.2.2. If conditions in clause 3.2 are not fulfilled within 28 days hereof, this Agreement may be terminated by the Seller, without prejudice to any rights that may have accrued prior to such termination.
>
> 3.4 On Completion, the Seller and Buyer agree that the Company and its Subsidiaries shall waive the right to receive any amounts (whether provided through loans, subscriptions, intra group payments or otherwise) due to them from the Seller's Group.
>
> 3.5 At Completion, the Buyer shall
>
> > 3.5.1 pay the Purchase Price to the Seller in cash to the Seller's nominated bank account;
> >
> > 3.5.2 deliver to the Seller a copy of the resolution adopted by the board of the Buyer approving the execution and delivery of this Agreement.
>
> 3.6 Save in relation to the matters contemplated in this Agreement (such as the waiver of intragroup loans) the economic effective date of the sale of the Company shall be 00:01 on 1 December 2020."

11. Clause 4 provided for deferred consideration in certain circumstances in the event of an onward sale. Clause 5 contained limited warranties as to capacity and ownership of the subject matter of the sale. Clause 6 contained a commitment that FIOGC would provide "appropriate security" that it was able to meet decommissioning obligations, and an indemnity against liabilities incurred due to a failure to provide it. Clause 14 provided for English governing law and a waiver of sovereign immunity.

12. After the draft SPA was prepared but before it was signed, Mr Mazzagatti was informed by the CFO of RockRose, a Mr Richard Slape, that there was an intercompany balance of over US$60m owed to UKCS8. In fact the correct number for the receivable was around US$84.7m, owed to UKCS8 by RockRose. Mr Mazzagatti gave instructions to extinguish the balance, leaving it to his team to determine the details of how that should be done. As the judge recorded at [110] of the judgment, Mr Mazzagatti's view was that he was "selling a valuable asset from which FIOGC could hope to make good profits and he saw no reason why he should effectively gift it an additional US$84 million".

13. In the event, it was determined that the amount owed to UKCS8 should be dealt with by a dividend. On 24 December 2020, on the same date as the SPA was completed, RockRose signed a written consent as UKCS8's sole member which approved a distribution in an amount equal to the US$84.7m receivable, so extinguishing it.

14. As contemplated by the SPA, RockRose UKCS9 Limited ("UKCS9") was also transferred from UKCS8 prior to completion. UKCS9 was the statutory employer of RockRose group personnel and another company, RockRose UKCS11 Limited ("UKCS11"), was the group service company. An agreement was in place under which

UKCS9 provided the services of its employees to UKCS11, which in turn provided those and other services to other members of the group, in particular, UKCS8.

15. Marathon had historically operated a defined benefit pension scheme, in respect of which UKCS9 was liable as the statutory employer. The scheme had been bought out by an insurer in July 2020 for a premium of £39m, equivalent to US$53.7m. RockRose had settled the amount due and recorded it as a receivable from UKCS9. On 24 December 2020, RockRose wrote this amount off. I will refer to this as the "pension write-off". The defendants' position is that the full amount of the pension write-off was a benefit to UKCS8 because it would otherwise have been recharged that amount under the service arrangements. The claimants' position is and remains that the defendants cannot prove that more than approximately 54% of the pension write-off benefited UKCS8.

16. Following completion of the sale, the proposed Alternative Provision was not accepted by TAQA as avoiding a default in respect of the Provision Invoice. The dispute led to UKCS8's share of production being lifted by TAQA and the other joint venture partners. Further notices of default were served in respect of failures to pay operating expenses, and ultimately the claimants invoked the forfeiture provisions to take over UKCS8's interest in the Brae field. They also obtained a default judgment against UKCS8. The present claim was issued on 29 June 2022 as a claim under s.423 IA 1986 and a claim for damages for unlawful means conspiracy.

17. The claimants presented a winding-up petition in the High Court on 16 December 2022, relying on the default judgment. UKCS8 was ordered to be wound up by ICC Judge Jones on 8 February 2023. The liquidators subsequently assigned any rights of action under s.238 to the claimants, and the pleadings in the present claim were then amended to add a claim for relief under that provision.

18. The claim was tried by the judge over a four-week period in October 2024. She concluded that each of the pleaded causes of action failed. Recognising the difficulty of challenging findings of fact on appeal, the claimants do not seek to appeal the judge's decisions on the application of s.423 and unlawful means conspiracy, but they say that the judge's approach to s.238 involved errors of law.

The legislation and the judge's conclusions in outline

19. Section 238 IA 1986 provides as follows:

> "**238 Transactions at an undervalue (England and Wales)**
> (1) This section applies in the case of a company where—
> (a) the company enters administration,
> (b) the company goes into liquidation;
> and "the office-holder" means the administrator or the liquidator, as the case may be.
> (2) Where the company has at a relevant time (defined in section 240) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section.
> (3) Subject as follows, 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 entered into that transaction.

(4) For the purposes of this section and section 241, a company enters into a transaction with a person at an undervalue if—

(a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or

(b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.

(5) The court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied—

(a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and

(b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company."

20. Although the application of s.423 IA 1986 is no longer in issue it is of some relevance and is conveniently set out here:

"**423 Transactions defrauding creditors**

(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—

(a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;

(b) he enters into a transaction with the other in consideration of marriage or the formation of a civil partnership; or

(c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.

(2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—

(a) restoring the position to what it would have been if the transaction had not been entered into, and

(b) protecting the interests of persons who are victims of the transaction.

(3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—

(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or

(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make…"

21. Returning to s.238, it was common ground that the dividend paid by UKCS8 was paid to a connected company within the period of 2 years before the commencement of the winding up, being the presentation of the petition (s.129(2) and s.240(1)(a) and (3)(e) IA 1986). It was therefore paid at a "relevant time" within s.238(2) unless it was excluded by s.240(2), which provides that a time is not a relevant time unless the company was unable to pay its debts within s.123 or became unable to do so as a result of the transaction. That issue was disputed at trial. The judge proceeded on the assumption that

UKCS8 was not cash flow insolvent but concluded that it was balance sheet insolvent at the date the dividend was declared.

22. It was also common ground that there was a transaction at an undervalue within s.238(4), although there are disputes as to its nature and amount. These disputes are relevant to the key battleground in this appeal, which is s.238(5). In summary, the claimants' case was that the dividend was the transaction for s.238 purposes and that the amount of the undervalue was the full amount of the dividend, because there was no consideration for it. The judge preferred the defendants' case that the relevant transaction was the "overall arrangement by which UKCS8 was sold to FIOGC" (judgment at [230]-[231]).

23. The judge also accepted the defendants' case that the full amount of the pension write-off should be treated as consideration for s.238 purposes, such that the amount of the undervalue would be US$31m rather than US$84.7m. As the judge recognised at [235], the transaction remained at an undervalue on either basis, but the correct treatment of the pension write-off was relevant both to the defence in s.238(5) and, if that failed, to the question of remedy.

24. Section 238(5) prevents an order being made if its conditions are met. There are three limbs, namely that the court must be satisfied that the company entered into the transaction in good faith and for the purpose of carrying on its business (limbs 1 and 2) and that there were reasonable grounds for believing that the transaction would benefit the company (limb 3). The judge concluded that the conditions in s.238(5) were satisfied and dismissed the claim on that basis.

25. Where there is a transaction at an undervalue at a relevant time which is not excluded by s.238(5), the court is required to make "such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction" (s.238(3)). Section 241 makes further provision as to the order that may be made. Given that the judge dismissed the claim she did not need to, and did not, consider the question of remedy.

The Grounds of Appeal and Respondent's Notice

26. There are three grounds of appeal, which may be summarised as follows:

Ground 1: The judge should have held that the dividend alone was the "transaction" for the purposes of s.238.

Ground 2: Irrespective of the correctness of Ground 1, the judge erred in concluding that s.238(5) applied. The judge failed to consider whether, even if a sale was in the interests of UKCS8 in general terms, the payment of the dividend was for its benefit. The judge also made errors in determining whether the transaction was in good faith and for the purpose of its business, and further erred in relation to the Delaware law evidence.

Ground 3: The judge wrongly treated the pension write-off as consideration. In doing so she made errors of law and made factual findings that were not properly open to her.

27. There is a Respondent's Notice which maintains that, even if the judge was wrong to regard the relevant transaction as the wider arrangement, nevertheless the question whether s.238(5) applies must be determined by reference to that wider arrangement.

28. Shortly before the hearing of the appeal the claimants made an application to adduce further evidence in respect of the pension write-off issue. That application was opposed by the defendants, but they also made their own application to file responsive evidence in the event that the claimants' application succeeded.

Section 238: preliminary observations

29. What is now s.238 IA 1986 was introduced following a review of insolvency law and practice by a committee chaired by Sir Kenneth Cork, which led to the publication of *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558) (1982) ("the Cork Committee Report"). Chapter 28 of the Cork Committee Report addressed the existing provisions covering recovery of assets disposed of by a debtor and made proposals for change. It explained that there were two categories of provision, the first capable of being invoked without insolvency, and the second only where there was an insolvency process (at the time, largely bankruptcy).

30. In the first category was the predecessor to s.423 IA 1986, then in the form of s.172 of the Law of Property Act 1925 ("LPA") but originating in legislation first introduced in 1571 (the so-called "Statute of Elizabeth 1"). As the Cork Committee said at para. 1202, the principle behind that legislation was that "persons must be just before they are generous and that debts must be paid before gifts can be made". As remains the case with s.423 there was no limitation to cases where there was a formal insolvency process, but the remedy required an element of intent. In s.172 this was expressed as an "intent to defraud creditors". Section 423(3) now refers to a purpose of putting assets beyond the reach of, or otherwise prejudicing, a claimant or potential claimant. (See also the discussion of the background to s.423 in the judgment of Lady Rose and Lord Richards in *Invest Bank PSC v El-Husseiny* [2025] UKSC 4, [2025] 2 WLR 320 ("*El-Husseiny*") at [21]-[24].)

31. The second category referred to in the Cork Committee Report included cases where a debtor disposed of assets for less than full consideration but without fraudulent intent, or preferred one creditor over another, where a formal insolvency process followed. In relation to provisions in that category, the Cork Committee Report pointed out at para. 1209 that:

> "…the bankruptcy code…is directed towards achieving a *pari passu* distribution of the bankrupt's estate among his creditors. The justification for setting aside a disposition of the bankrupt's assets made shortly before his bankruptcy is that, by depleting his estate, it unfairly prejudices his creditors; and even where the disposition is in satisfaction of a debt lawfully owing by the bankrupt, by altering the distribution of his estate it makes a *pari passu* distribution among all the creditors impossible."

32. The Cork Committee considered what was then s.42 of the Bankruptcy Act 1914, which made certain settlements void against the settlor's trustee in bankruptcy, and recommended various reforms, including its extension to corporate debtors. This is reflected in what is now s.238 IA 1986.

33. It is clear from the Cork Committee Report, and indeed common ground as the judge recorded at [138] of the judgment, that the underlying objective of what is now s.238 is to uphold the principle of *pari passu* distribution of the assets of an insolvent company

between its creditors, in an order of priorities in which holders of interests in the equity of the company rank last.

34. While there are notable similarities between s.423 and s.238, in particular in relation to a requirement for a transaction at an undervalue and in relation to the court's powers if the provision applies, there are important differences. Section 423 does not require either proof of insolvency or a formal insolvency process, so there are no specified time periods within which the transaction must occur. Relatedly, it may also be invoked by a "victim" of a transaction (essentially anyone capable of being prejudiced) rather than only by an insolvency office holder. But what s.423(3) does require is proof of a purpose of putting assets beyond the reach of a claimant or potential claimant, or otherwise prejudicing their interests.

35. The judge suggested at [144] that, because the same evidence may be relevant both to the application of s.238(5) and s.423(3), claims under the two sections are likely to stand or fall together, such that cases where a claim under s.238 succeeds but a claim under s.423 fails are likely to be rare. With respect, I do not agree. Section 423(3) requires proof of a purpose of prejudicing the interests of a creditor or potential claimant. That is a subjective test: *El-Husseiny* at [28]. The defence in s.238(5) raises different issues. In particular (and leaving to one side differences as to the burden of proof), s.238(5)(b) contains an objective test which s.423(3) does not. That test has real substance. Section 238(5)(a) is also in different terms to s.423(3), requiring demonstration not only of good faith but of business purpose. While a successful invocation of the defence in s.238(5) may very well mean that there is no claim under s.423, the converse does not follow. Section 238 may well apply where s.423 does not.

36. The differences between s.423(3) and s.238(5) reflect the more targeted focus of s.238. It can apply only where the company a) is or becomes insolvent as a result of the transaction; and b) enters into an insolvency process within a specified period. The right to apply under s.238 is also confined to the office-holder (in this case the claimants acquired the right by assignment: see [17] above).

37. The fact that s.238(5) contains different and more challenging tests from the perspective of a defendant than s.423(3) reflects the fact that insolvent companies should not, as a general rule, enter into transactions that deplete assets available for creditors, undermining the *pari passu* principle by instead preferring the interests of their shareholders. It is unsurprising in those circumstances that the defence available under s.238(5) is relatively narrowly targeted. In contrast, section 423 is not restricted to cases of insolvency.

38. The judgment of Lady Rose and Lord Richards in *El-Husseiny* also commented on the relationship between s.423 and s.238 at [61]-[74], but I can see nothing there that is inconsistent with what I have said. Among other things, this passage confirms that the concept of a transaction at an undervalue should be construed consistently, reflecting the common purpose to provide redress where transactions at an undervalue have prejudiced creditors. That is uncontroversial but of course says nothing about s.238(5).

Ground 1: the "transaction"

The judge's analysis

39. The judge's analysis of whether the dividend or "wider arrangement" was the relevant "transaction" is at [225]-[232]. While correctly recognising, based on the Court of Appeal decision in *BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112, [2019] 2 All ER 784 ("*Sequana CA*"), that a dividend is capable of being a transaction, the judge relied on the decision in *Feakins v Department for Environment Food and Rural Affairs* [2005] EWCA Civ 1513, [2007] BCC 54 ("*Feakins*") to conclude at [229] that:

> "…if a dividend is genuinely an inextricable part of a wider arrangement which is not otherwise objectionable, then the purpose of the statute is not subverted by regarding the wider arrangement as the relevant transaction and judging the company's motives and purpose accordingly. It is all a question of fact in the particular case."

40. At [230] the judge set out the submission of Mr Nash KC, for the defendants, that in this case the transaction was:

> "…the overall arrangement by which UKCS8 was sold to FIOGC, including all the linked steps taken to facilitate the sale and ensure that the company was sold free of cash and debt, including the declaration of the dividend and the release of the inter-company balances between RockRose, UKCS8, UKCS9 and UKCS11."

Mr Nash submitted that it was sufficient that UKCS8 performed "one of the linked steps". It did not have to be a party to every step.

41. The judge accepted these submissions in the following terms at [231]:

> "In the light of my factual findings above, this seems to me an entirely legitimate way of analysing the situation. As I have found, the dividend was never regarded as an end in itself but was merely an afterthought adopted almost at the last minute in order to give effect to the prior agreement that the sale be cash and debt-free. In those circumstances, I agree with Mr Nash that it would be wholly artificial to regard the dividend as the only relevant transaction in isolation from the wider arrangement to which it owed its very existence and with which it was inextricably entwined."

42. Thus, while the dividend was itself a transaction, *Sequana CA* did not mean that it was the only transaction that could be considered ([232]). Further, and relying on *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] UKHL 2, [2001] 1 WLR 143 ("*Brewin Dolphin HL*"), the judge concluded that it followed that benefits received as part of the wider arrangement could amount to consideration ([233]-[235]).

Discussion

43. The word "transaction" is broadly defined by s.436 IA 1985 as including "a gift, agreement or arrangement". However, when determining how a provision using that concept should be applied, it is important to bear in mind that it must be interpreted in its statutory context, in accordance with conventional principles of statutory interpretation.

44. Section 238(2) applies where a company has at a relevant time "entered into a transaction with any person at an undervalue". There must therefore not only be a transaction, but it must be entered into with a person, and at an undervalue. The requirement for each of these conditions to be met is reinforced by s.238(4). In particular, both s.238(4)(a) and (b) repeat the requirement for the transaction to be "entered into" by the company. In other words, the company must be a party to the transaction. As Kitchin LJ said in *Re Ovenden Colbert Printers* [2013] EWCA Civ 1408, [2014] 1 BCLC 291:

> "31. The requirement that the company has itself entered into a transaction is an essential part of any claim under s 238 and comprises two interrelated elements: first, that there is a transaction; and second, that the transaction is something which the company has itself entered into.
>
> 32. As I have explained, the term 'transaction' is widely defined in s 436 as including a gift or arrangement…But to focus unduly on the term 'transaction' risks obscuring the need for the second and vital element, namely the requirement that the transaction be something that the company has 'entered into'. This expression connotes the taking of some step or act of participation by the company. Thus the composite requirement requires the company to make the gift or make the arrangement or in some other way be party to or involved in the transaction in issue so that it can properly be said to have entered into it..."

45. *Sequana CA* established that, for the purposes of s.423 IA 1986, a dividend was not a gift but was both a "transaction", and one "on terms that provide for [the company] to receive no consideration". It is common ground that there is no relevant distinction between s.423 and s.238 for these purposes, as *El-Husseiny* confirms. In summary, *Sequana CA* held that a dividend was not a gift because dividends are a return on the investment originally provided for the shares and are paid pursuant to the rights attaching to them (judgment of David Richards LJ, with whom Henderson and Longmore LJJ agreed, at [41]). While that original investment was insufficient to amount to consideration, there was a "transaction" for the purposes of s.423 for the reasons that David Richards LJ gave at [58]-[64], including that the concept is not limited to bilateral transactions but is intended to cover a dividend as well as a gift, and in any event it is too narrow to describe a dividend as a unilateral act.

46. In *Sequana CA* David Richards LJ described the dividend in that case as forming part of an arrangement between the company, AWA, and its parent Sequana, under which the dividend was set off against a debt owed by Sequana: see at [64].

47. Similarly, in this case there was an arrangement entered into by UKCS8 under which it declared the dividend with the effect of extinguishing the US$84.7m receivable. That was an arrangement that UKCS8 entered into with its parent, RockRose, on 24 December 2020. However, that was the only transaction which UKCS8 entered into. UKCS8 was not a party to the SPA. The SPA was an agreement between RockRose and FIOGC which had been entered into 9 days earlier and which had UKCS8 (or strictly, the membership interest in it) as its subject matter. The dividend was an "afterthought" which was decided upon only after the SPA was agreed, when it was determined that it should be used as the means of removing the receivable as contemplated by clause 3.4 of the SPA.

48. I respectfully disagree with the judge that *Feakins* assists the defendants. In that case Mr Feakins was the owner of a farm which was mortgaged to NatWest and was also subject to an equitable charge in favour of DEFRA to secure a judgment debt. In addition there was an agricultural tenancy in favour of Mr Feakins' company, to which the mortgage was subject. The value of the farm subject to the tenancy was in the region of £450,000, whereas its unencumbered value was around £1m. Mr Feakins was in significant financial trouble, such that a sale of the farm was very likely. Mr Feakins entered into an arrangement with a Miss Hawkins which comprised a) persuading NatWest to sell the farm to her at a price that reflected the subsisting tenancy (and overreaching DEFRA's charge) and b) Mr Feakins surrendering the tenancy following the sale, such that Miss Hawkins was left with a farm worth £1m. The plan was implemented with the result that NatWest was paid in full but DEFRA's judgment remained unsatisfied. DEFRA brought a successful claim under s.423 IA 1986.

49. Jonathan Parker LJ, with whom Moses and Waller LJJ agreed, observed at [76] that the broad definition of "transaction" in s.436 was consistent with the statutory objective of s.423 of remedying the avoidance of debts. "Arrangement" was "apt to include an agreement or understanding between parties, whether formal or informal, oral or in writing". However, the critical point was the identification of what the arrangement – the "transaction" in that case – actually was. As the judge in that case had correctly identified, it was the arrangement between Mr Feakins and Miss Hawkins, under which they would bring about a sale by NatWest as the means of achieving the result that they sought ([77] and [78]). In other words, the relevant arrangement was one entered into by the debtor. As Jonathan Parker LJ also observed at [78], every case turns on its own facts.

50. *Feakins* is therefore not authority for the proposition that mere linkage of some sort between transactions is sufficient to enable them to be treated as a single transaction for the purposes of either s.423 or s.238. Rather, the statutory question asks whether the company (itself) "entered into" a transaction at an undervalue.

51. *Feakins* does provide an illustration of the need to adopt a purposive approach to the legislation to achieve its purpose. Another recent example of that can be seen in *El-Husseiny*, where the question was whether s.423 could apply to action taken by a debtor to procure that a company he owned transfer a valuable asset for no consideration. As in *Feakins*, the point was that it was the debtor, Mr El-Husseiny, who on the assumed facts arranged the transfer (in that case, with his son) and caused it to occur.

52. Mr Allison KC, for the claimants, relied on the recent decision of Miles LJ in *Credit Suisse Virtuoso SICAV-SIF v Softbank Group Corp* [2025] EWHC 2631 (Ch) ("*Credit Suisse*") to support the claimants' case that the "transaction" in this case was confined to the dividend, and in particular Miles LJ's reliance on the judgment of Morritt LJ in the Court of Appeal decision in *Phillips v Brewin Dolphin Lawrie Ltd* [1999] 1 WLR 2052 ("*Brewin Dolphin CA*"), where he concluded that the "transaction" in that case was the share sale agreement.

53. As discussed further below at [84]-[89], the House of Lords took a different approach to the Court of Appeal in *Brewin Dolphin HL*, but in *Credit Suisse* Miles LJ concluded at [588]-[589] that in doing so it did not cast doubt on Morritt LJ's guidance about the identification of the "transaction". However, as Miles LJ also pointed out at [590]-[592] that guidance is no substitute for the terms of the statute, the identification of the

transaction is a fact-specific exercise and the court should have regard to the statutory objective of the provision.

54. Morritt LJ's observations in *Brewin Dolphin CA* obviously need to be read in the light of *Brewin Dolphin HL*, but it is correct that despite the different approach taken by the House of Lords its decision also proceeded on the basis that the "transaction" entered into by the company was the share sale agreement (*Brewin Dolphin HL* at [20] and [32]; see the discussion of the facts of that case below). That, in my view, simply reinforces the conclusion that I have reached. Section 238 applies to a transaction which is a) entered into by the company, and b) at an undervalue. The test is a composite one, and in the *Brewin Dolphin* case it was the share sale by which the company divested itself of a valuable asset that was the transaction. In this case that transaction was the dividend.

Ground 2: s.238(5)

55. To recap, s.238(5) provides a defence in the following terms:

> "(5) The court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied—
> (a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and
> (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company."

56. The tests in s.238(5) are obviously cumulative, so the court must be satisfied that the conditions in both paragraphs (a) and (b) are met. Mr Allison concentrated his oral submissions on the objective test in s.238(5)(b). I will adopt a similar approach.

57. I agree with the claimants that the judge's error of approach on the scope of the "transaction" undermines her analysis of s.238(5)(b). However, it does not automatically follow that the judge was wrong to conclude that the defence is available to the defendants. Rather, the question posed by s.238(5)(b) needs to be considered afresh in the light of the judge's unchallenged findings of fact. In doing so, it would be wrong to adopt a blinkered approach that would require the surrounding circumstances to be ignored. Indeed, it is very difficult to see how, taken in isolation, a transaction at an undervalue could ever reasonably be believed to benefit an insolvent company. What s.238(5)(b) must require is a consideration of all the relevant circumstances in order to determine whether there were in fact reasonable grounds for the belief. To that extent I agree with the argument raised in the Respondent's Notice.

58. The point is well illustrated by an example Mr Allison suggested in argument of a company being driven to sell a valuable asset at speed in order to stay afloat. In such a case the defence might be available if the sale was at less than full value, but that could only be determined by reference to a consideration of the wider circumstances in which that sale was made.

59. The correct question to ask under s.238(5)(b) is whether there were, in the circumstances which prevailed at the time, reasonable grounds for believing that the dividend (being the relevant transaction) would benefit UKCS8. Further, that question must be answered from the perspective of UKCS8, and not anyone else. That is the correct, and only, lens through which the transaction must be viewed. This reflects the fundamental principle

that, as a separate legal entity with its own creditors, the company's interests must be considered separately from that of other members of the group: see the discussion of *Walker v Wimborne* [1976] HCA 7, (1976) 137 CLR 1 in *Sequana CA* at [129]-[132]. (*Walker v Wimborne* is also considered in the Supreme Court decision in *Sequana*, [2022] UKSC 25, [2024] AC 211 at [29] and [389].)

60. Having concluded that the relevant transaction was the wider arrangement, the judge did not critically assess whether, even if a sale to FIOGC was in general terms in the interests of UKCS8, the payment of a US$84.7m dividend as part of that broader arrangement could reasonably be believed to be for its benefit.

61. The judge's key finding in relation to the purpose of the sale and the role of the dividend in it was at [198], in the following terms:

> "On my assessment of the witness and documentary evidence, I find and hold that the sale to FIOGC was agreed for a legitimate commercial purpose, namely, to break the deadlock with TAQA and to enable the provision of the required DSA security. The transaction was not conceived or executed with the intention or purpose of prejudicing UKCS8 or its creditors and the dividend was declared for no other reason than that it was a necessary adjunct to that sale."

62. As I have already indicated the question is not whether, in general terms, a sale of UKCS8 to FIOGC was in the interests of UKCS8 or was otherwise for a legitimate commercial purpose. The fact that the judge found that it was, and that the sale was not conceived with the purpose of prejudicing creditors, is not determinative. Further, for the reasons I will explain, the judge's assessment that the dividend was a "necessary adjunct" to the sale reflects an error of approach.

63. The judge appears to have been influenced by the defendants' case that the company was being sold on a "cash free debt free basis", and that this meant that the dividend was essential to achieve a sale on that basis. As I understand Mr Nash's submissions, the context for the judge's focus on this point is that it formed part of the defence to attacks on the defendants' motives to support the s.423 and conspiracy claims, but unfortunately it appears to have led the judge into error in relation to s.238. The judge said this at [186]-[187]:

> "186. The contemporaneous evidence amply demonstrates that the declaration of the dividend was very much an afterthought which would not have happened if Mr Slape had not drawn attention to the fact – after the draft SPA had already been circulated – that there was an inter-company balance which needed to be removed in order to achieve a cash and debt-free sale. The question of a dividend was therefore not in anyone's mind until after the sale to FIOGC had been agreed and after instructions had been given to RockRose's solicitors to draft an SPA on cash and debt-free terms. In those circumstances, it is clear that the dividend was never regarded as an end in itself or as a means of damaging creditors but was simply the administrative method adopted in order to give effect to the SPA which was conceived specifically to allow UKCS8 to continue operating more effectively rather than the reverse.

> 187. While the Claimants did not put it this way, their case effectively amounts to a complaint that the sale was in fact agreed on cash and debt-free terms at all. However, Mr Jenkins gave evidence that this was a usual practice and it cannot be suggested that there is anything inherently improper in such a sale. Mr Mazzagatti's evidence that, having agreed a sale on these terms, there was no reason for him to gift FIOGC some US$84 million is not only commercially understandable but entirely reasonable."

(Mr Jenkins was the chairman of Viaro Energy Limited and one of the defendants' factual witnesses.)

64. The judge returned to the significance of the sale being on "cash free debt free" terms later in her judgment, in particular at [230]-[231] (see [40] and [41] above) and again at [257] where she referred to the fact that "inter-company debt…had to be extinguished, whatever its value, in order to achieve a cash and debt-free sale". This was obviously the basis of her conclusion that the dividend was a "necessary adjunct" to the sale.

65. Mr Jenkins was not an expert witness, but even taking at face value what he said about a cash free debt free sale being "usual practice", it does not follow that a sale had to be concluded on that basis, or even that the so-called usual practice necessarily involves there actually being no cash or debt in the company – something that for many companies would in practice be impossible to achieve – rather than having some other agreed mechanism to reflect the actual cash and debt position at completion. Further and in any event, the existence of a practice of the kind Mr Jenkins described cannot be used to justify the payment of a dividend by an insolvent company.

66. Moreover, the sale was not actually agreed on terms that could be described as "cash and debt-free". While clause 3.4 of the SPA, set out at [10] above, contained an agreement between RockRose and FIOGC that intra-group receivables owed to UKCS8 would be waived at completion, there was no equivalent provision in respect of debt owed by UKCS8. In fact, there was no provision at all that either required UKCS8 to be cleared of debt or provided for any form of adjustment if debt was found to exist. Apart from appearing to indicate a rather remarkable indifference to UKCS8's financial position on the part of FIOGC, this further undermines the judge's reliance on the sale being on "cash free debt free" terms. Clause 3.4 might have been intended to render UKCS8 "cash free", but nothing required it to be "debt free".

67. Clause 3.4 was clearly agreed for the benefit of RockRose and no other person. Clause 3.4 was not expressed as a condition to completion and it is unrealistic to suggest that FIOGC would have insisted upon its being complied with. FIOGC would hardly have complained if it had acquired UKCS8 with the benefit of additional assets, and of course UKCS8 could only have benefited from not being required to forego a valuable receivable. In contrast, it was RockRose that had everything to gain by not being obliged to meet its obligation to UKCS8. What was "not only commercially understandable but entirely reasonable" was RockRose's perspective, not that of UKCS8. But the defence in s.238(5) necessarily requires the position to be looked at from the point of view of UKCS8.

68. In truth, the dividend was something that RockRose determined was required because a) Mr Mazzagatti decided that he did not want to "gift FIOGC some US$84 million" and b) no other mechanism was included in the SPA to deal with the existence of the receivable

(for which there would have been a number of candidates, including an agreement to pay additional consideration should the receivable be satisfied, or the novation of RockRose's liability to FIOGC).

69. Mr Nash fairly pointed out that the question is not whether a sale could have been negotiated on different terms. However, in deciding whether there were reasonable grounds for believing that the dividend would benefit the company it is relevant to decide whether, even if the sale was in UKCS8's interests, a dividend was in fact a "necessary adjunct" to that as the judge held. In my judgment it was not, for the reasons I have given. Rather, as Mr Allison submitted, clause 3.4 and the dividend that resulted from it were not only unnecessary to achieving a sale, but were included for the sole benefit of RockRose.

70. The lack of focus on the position of UKCS8 is further emphasised by the fact that Mr Mazzagatti had decided that the receivable had to removed whatever its value, giving instructions that this should be done without ascertaining the correct figure (see [12] and [64] above). Although the written consent pursuant to which the dividend was paid recorded that RockRose "deemed" it to be in the best interests of the company, there is no indication that real consideration was given to whether a dividend, or a dividend in that amount, was in fact in the interests of UKCS8 rather than its parent company.

71. The conclusion I have reached on s.238(5)(b) makes it unnecessary to address a further argument raised by the claimants, namely that the defendants were in any event precluded from relying on that provision because the dividend was unlawful under Delaware law, and it could not reasonably be believed that an unlawful dividend would benefit the company. This argument relied on a provision of Delaware law that, in broad terms, prohibits a distribution by an LLC to the extent that (after the distribution) its liabilities would exceed the fair value of its assets. The judge found it unnecessary to decide whether the evidence of the claimants' Delaware law expert on this point should be preferred to that of the defendants' expert on the basis that there was no indication that the Delaware lawyers who had been involved in preparing the SPA had flagged it as an issue. The claimants criticise that conclusion on a number of grounds, but I do not need to decide whether the judge was entitled to take the approach that she did on that point.

72. It is also unnecessary to consider the claimants' challenges to the conclusions reached by the judge on s.238(5)(a), other than to clarify that, as with s.238(5)(b), that provision must be considered from the perspective of the company in question. I will just briefly comment on one submission for the claimants, which was that on its proper construction the second limb of s.238(5)(a) ("for the purpose of carrying on [the company's] business") is satisfied only if entering into the transaction was "necessary" for carrying on the insolvent company's business.

73. The judge correctly rejected that argument, which involves reading in words to the legislation. It is not supported by the case on which the claimants relied, *Lord v Sinai Securities* [2004] EWHC 1764 (Ch), [2005] 1 BCLC 295. As the judge said at [260], that was a summary application to defeat a claim under s.238 on the basis that it had no real prospect of success. Hart J's judgment must be read in that context. He simply decided that the claim under s.238 met the threshold test that it was properly arguable. This can be seen from the way he expressed himself at [22], namely that unless and until it was shown that there was no other or cheaper means of freeing the company from the

corporate paralysis it was suffering from, "the liquidator has some prospect in my judgment of being able to show that the requirements of s 238(5) are not satisfied".

Ground 3: whether the pension write-off was consideration

74. As already explained, on the same day as the SPA completed, RockRose wrote off US$53.7m owed to it by UKCS9, reflecting an amount that RockRose had paid to discharge a pension buy-out liability (the pension write-off).

75. The challenge under Ground 3 is relevant not to the existence of an undervalue – a point which was common ground – but to its amount. As Mr Hubbard, who made submissions on this issue for the defendants, put it, it affects the starting point for the remedy under s.238(3). Is the scale of the challenge they face under s.238(3) an undervalue of US$31m rather than US$84.7m? The defendants' position is that it is the former, as the judge found. They maintain that the full amount of the pension write-off should be treated as consideration received by UKCS8 because it would otherwise have been recharged that amount under the service arrangements referred to at [14] above, so reducing the US$84.7m receivable by that amount.

76. Ground 3 involves challenges both to the judge's approach as a matter of law and to factual matters relating to the proportion of the pension write-off that was properly the liability of UKCS8. What follows is confined to the former.

77. The judge's approach to this issue was inevitably affected by her conclusion that the relevant transaction for s.238 purposes was the wider arrangement. The correct question to ask is whether the pension write-off fell to be treated as consideration for the dividend under s.238(4).

78. Mr Venkatesan KC, who made submissions on this issue for the claimants, relied on the conclusion in *Sequana CA* that the dividend in that case was a transaction entered into "on terms that provide for the company to receive no consideration". Mr Venkatesan submitted that David Richards LJ's analysis relied on the consideration being confined to amounts provided for by the "terms" of the transaction. It was only on that basis that the otherwise inconsistent conclusions that the dividend was not a gift but was a transaction for no consideration could be justified.

79. *Sequana CA* concerned s.423(1)(a), the equivalent to s.238(4)(a). David Richards LJ explained his conclusion on this issue in the following terms at [50]:

> "In my judgment, it cannot be said that the company receives consideration for the payment of a dividend. It is not enough to say that the dividend is paid in accordance with the rights attached to the shares, where those rights are quite different from, for example, the right to receive interest payments on loan notes or the right to be considered for bonus declarations on a with-profits fund. If and when a company pays a dividend to shareholders, the terms of the dividend do not provide for the company to receive any consideration nor will it receive any consideration. It might be said that to come within the second limb of s 423(1)(a) the terms must expressly provide for no consideration but in my view that would be too literal a reading of the provision. Parliament can hardly have intended the operation of the section to depend on the vagaries of drafting styles."

80. Mr Venkatesan submitted that the dividend in this case contained no terms requiring, or even envisaging, the pension write-off. He further submitted that s.238(4)(b) should be interpreted consistently with s.238(4)(a), such that the reference to "for" a consideration significantly less than the value provided by the company in s.238(4)(b) is treated as a shorthand reference to the requirement in s.238(4)(a) that any consideration must be provided for by the terms of the transaction.

81. I do not need to decide whether the concept of the "terms" of the transaction is incorporated in s.238(4)(b) because I am satisfied that the pension write-off was in any event not consideration "for" the dividend on a straightforward interpretation of that provision and its application to the facts.

82. The only transaction into which UKCS8 entered was the dividend: see above. There is no reference in the documentation for that transaction to the pension write-off. Furthermore, and significantly, there is nothing either in the judge's findings or drawn to our attention from the evidence that indicates that UKCS8 paid the dividend in any sense in return, or as a quid pro quo, for the pension write-off. What the judge found at [230]-[231] was simply that both elements were part of the wider arrangement, that UKCS8 did not have to be a party to every step, and that it was enough if it performed one of the "linked steps". And at [234] *Sequana CA* was distinguished on the basis that it did not consider what the correct analysis was where a dividend was part of a wider arrangement. It was this reasoning that led to the judge's conclusion on the point at [250]. Clearly RockRose regarded both the dividend and the pension write-off as part of the arrangement for sale (albeit that, in fact, the SPA did not require debts owed by UKCS8 to be removed: see above), but the dividend and the pension write-off were not in exchange for each other.

83. Mr Hubbard relied on the decision in *Brewin Dolphin HL* to support the argument that the pension write-off should be treated as consideration for the dividend, but it does not assist the defendants.

84. In that case the company in question, AJB, had reached a commercial deal to sell its stockbroking business to Brewin Dolphin for £1.25m. Rather than a making a straightforward sale of the business AJB transferred it to a subsidiary, BSL, and sold that company to Brewin Dolphin for £1 together with the assumption of certain liabilities. But it also sublet the computer equipment used in the business to Brewin Dolphin's parent company PCG for four years at an annual rent of £312,500, a total of £1.25m.

85. The judge, Evans-Lombe J, found that the sale and sublease were linked in the sense that one would not have been entered into without the other, but held that the sublease rent was not consideration for the share sale, such that the sale was at an undervalue for the purposes of s.238. The Court of Appeal dismissed an appeal by Brewin Dolphin and PCG on the basis that there were two separate (albeit linked) transactions with different parties.

86. On a further appeal to the House of Lords, Lord Scott, with whom Lord Steyn, Lord Hutton, Lord Hobhouse and Lord Millett agreed, held at [20] that it was necessary to start with the share sale agreement, which was the agreement under which the company divested itself of a valuable asset. However, s.238(4)(b) required the identification of the "consideration" and it did not specify by whom the consideration was to be provided. The identification of the consideration was a question of fact. Lord Scott added:

> "…if a company agrees to sell an asset to A on terms that B agrees to enter into some collateral agreement with the company, the consideration for the asset will, in my opinion, be the combination of the consideration, if any, expressed in the agreement with A and the value of the agreement with B. In short, the issue in the present case is not, in my opinion, to identify the section 238(4) 'transaction'; the issue is to identify the section 238(4) 'consideration.'"

87. On the facts, the consideration for the shares included the benefit of the sublease agreement. As Lord Scott said at [21], it was "plain that the consideration for the BSL shares was, apart from obligations assumed by Brewin Dolphin under the share sale agreement itself, the entry by PCG into the sublease agreement under which it covenanted to pay £312,500 per annum for four years". Lord Scott supported this by setting out part of a memorandum which described the commercial agreement between the parties in the following terms:

> "The basic concept is that Brewin Dolphin purchases the trade of [AJB] for a consideration of £1.25m payable over four years… The detailed scheme is as follows: (1) [AJB] forms [BSL] as a subsidiary. [AJB] sells its business excluding its computer and other fixed assets to [BSL]… [AJB] sells [BSL] to Brewin Dolphin… The purchase consideration would be £1… (2) [AJB] enters into a finance lease for the computer and other assets with PCG. PCG enters into an operating lease with Brewin Dolphin for the computer, the lease payments to be yearly in arrears for four years at a rate of £312,500. This means that the purchase price will be tax allowable and there will be no goodwill."

(A payment for goodwill could have prompted a regulatory requirement for additional capital: see at [6].)

88. On the facts, PCG's covenant turned out to be worthless because the sublease was entered into in breach of the head lease, AJB defaulted on the head lease rent and there was a termination and repossession of the equipment. Lord Scott concluded that, for that reason, the value of the consideration should be treated as confined to that provided for under the share sale agreement. Nevertheless, it was appropriate to exercise the court's discretion under s.238(3) to allow credit to be provided for a loan of £312,500 that had been made from PCG to AJB and which had been intended to be set off against the first rental payment, a loan which was likely to have a negligible value in AJB's liquidation.

89. Returning to s.238(4), the critical point is that while the transaction was the sale of the shares (which effected the sale of the business), the consideration for the shares was what AJB bargained for in exchange, as recorded in the memorandum. Put another way, the transaction (or "arrangement") which AJB entered into was the sale of the shares in exchange for both the price paid under the share sale agreement and the rent payable under the sublease, reflecting the commercial deal it had agreed to sell the business for £1.25m.

90. In contrast, in this case there is nothing to indicate that the pension write-off was in exchange for the dividend. It was in no sense part of a bargain that UKCS8 entered into under which the dividend was paid.

91. It follows that the pension write-off cannot be regarded as consideration for the dividend, with the result that the amount of the undervalue was the full amount of the dividend, US$84.7m.

92. However, it does not follow that the pension write-off is irrelevant to the application of s.238. Under s.238(3) the court has a broad discretion to make "such order as it thinks fit for restoring the position to what it would have been if the company had not entered into [the] transaction".

93. Mr Venkatesan submitted that the same principles should apply to restoration under s.238(3) as apply in determining the consideration under s.238(4), so that the pension write-off was not relevant. I disagree.

94. Section 238(3) is in the nature of a "but for" test. The court must seek to restore the position to what it would have been but for the transaction at an undervalue. It is well-established that this provision confers a discretion. In exercising its discretion, the court will have regard to a wide variety of considerations with a view to achieving justice between the parties (see for example *Reid v Ramlort* [2004] EWCA Civ 800, [2005] 1 BCLC 331 at [125]-[126] in relation to the bankruptcy equivalent of s.238). *Brewin Dolphin HL* provides an example of this in requiring account to be taken of the loan to meet the first rental payment, although it was not suggested that the loan was itself part of the consideration.

Disposition

95. For the reasons I have given, I would allow the appeal. It follows that the question of remedy under s.238(3) must be determined, and I would remit that issue for determination by a judge of the Commercial Court. The determination should proceed on the basis that the judge's findings of fact are not to be revisited, except only to the extent to which those findings were the subject of challenge under Ground 3 of the appeal, for which permission was obtained but which it has not been necessary for this court to decide.

96. It has also not been necessary to address the applications to admit new evidence in deciding this appeal. The extent to which that or other evidence should be taken into account in determining the question of remedy will be a matter for the Commercial Court on remittal, but in principle the court should not be inhibited in its task of achieving a just result by disputes over evidence which is in fact relevant to the issue.

Lord Justice Newey:

97. I agree.

Sir Geoffrey Vos, Master of the Rolls:

98. I also agree.