

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

The Rolls Building  
Royal Courts of Justice  
7 Rolls Buildings  
London EC4A 1NL

Date: 25/08/2020

Before :

**INSOLVENCY AND COMPANIES COURT JUDGE MULLEN**

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**IN THE MATTER OF LONDON OIL & GAS LIMITED (IN ADMINISTRATION)**

**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

**Between :**

**(1) MR FINBARR O'CONNELL  
(2) MR ADAM STEPHENS  
(3) MR COLIN HARDMAN  
(4) MR LANE BEDNASH  
(as joint administrators of London Oil & Gas Limited)**

**Applicants**

**- and -**

**(1) LONDON GROUP LLP  
(2) LPE ENTERPRISES LIMITED  
(3) LONDON POWER & TECHNOLOGY LIMITED**

**Respondents**

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**Mr Andrew Shaw** (instructed by **Mishcon de Reya LLP**) for the Applicants  
The Respondents did not appear and were not represented

Hearing date: 25th June 2020

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**APPROVED JUDGMENT**

This judgment was handed down remotely by circulation to the parties' representatives by email. The time and date of the hand-down are deemed to be 10.30am on 25th August 2020.

## **ICC JUDGE MULLEN :**

### **Introduction**

1. On 2nd August 2019 the Applicants, as joint administrators of London Oil & Gas Limited (“the Company” or “LOG”), issued an application notice seeking:

1.1. a declaration that –

1.1.1. a novation agreement entered into between the Company, London Group LLP (“LG LLP”) and LPE Enterprises Limited (“LPE”); and

1.1.2. a novation agreement entered into between the Company, LG LLP and London Power & Technology Limited (“LP&T”),

both dated 15th February 2019 and signed by Mr Simon Hume-Kendall on behalf of each party (“the Novation Agreements”), were transactions at an undervalue for the purposes of section 238 of the Insolvency Act 1986 (“the 1986 Act”);

1.2. further or alternatively, declarations that the Novation Agreements are void on the basis that they were executed without the authority of the Company in that they were entered into by Mr Hume-Kendall in breach of the fiduciary duties that he owed to the Company as director and that LG LLP, LPE and LP&T were aware of this breach of duty; and

1.3. further or alternatively, a declaration that the Novation Agreements are shams and therefore void, together with associated relief.

2. The application is supported by the statement of Mr Lane Bednash, one of the joint administrators of the Company, dated 2nd August 2019. He sets out the Company’s circumstances and the background to its administration as follows. LOG is the single largest debtor of London Capital & Finance Plc (“LCF”). LCF issued “mini-bonds” to investors until it was required to cease trading by the Financial Conduct Authority in December 2018. LCF went into administration on 20th January 2019, owing its investors some £237 million. LCF was the Company’s principal source of funds, which the Company used to make onward loans and investments. The cessation of LCF’s business meant that the Company’s own business ceased and it followed LCF into administration on 18th March 2019.

3. The Applicants’ investigations led them to conclude that, between March 2016 and December 2018, the gross sum borrowed from LCF by LOG was some £122,049,137.58, although the net figure, after deduction of agent’s commission, amounted to £91,344,566.41. Almost all this borrowing was lent onwards to other entities, including LG LLP, or invested in other entities. Putting the operation of the Novation Agreements aside, the Applicants concluded that LG LLP was a debtor of the Company in the sum of about £32.6 million. This sum was shown as having been lent to LG LLP in the Company’s draft trial balance sheets. The Applicants’ case is that most of this sum was, in fact, paid to LG LLP’s beneficial owners. Mr Bednash’s statement contains an analysis of the payments made that were recorded as loans to LG LLP. £13 million was transferred directly from the Company to LG LLP, £27,000 was transferred directly from LCF to LG LLP and £20 million transferred by LCF’s payment agent to four individuals: Mr Barker, Mr Andrew Thomson (the chairman of LCF), Mr Hume-Kendall and a Mr Spencer Golding.

4. The Novation Agreements purported to novate LG LLP’s borrowing to LPE and to LP&T with effect from 1st January 2019. The novation agreement to which LPE was a party

(“the LPE Novation Agreement”) defines LOG as “the Lender”, LG LLP as “the Transferor” and LPE as “the Transferee”. It records that the Transferor “is the borrower under an inter company loan arrangement (Intercompany Facility)” and that the Lender:

“has advanced monies to the Transferor under the Intercompany Facility which, together with certain other amounts, including any accrued interest and fees, are outstanding as at the date of this deed.”

It goes on:

“The Transferor lent the monies advanced from the Lender under the Intercompany Facility to the Transferee and the Lender has agreed in consideration of the Transferee agreeing to repay to the Lender the money so advanced in accordance with the Facility Agreement to release the Transferor from its obligation under the Intercompany Facility.”

The “Facility Agreement” to which the Novation Agreement refers is set out in the schedule. This provided that the Company would provide a term loan facility of up to £20 million for the purpose set out in clause 4 of the scheduled Facility Agreement as follows:

“The Borrower shall use all money borrowed under this agreement for acquisition of Intelligent Technology Investments Limited and its subsidiaries and London Artificial Intelligence Limited.”

5. The operative provisions of the LPE Novation Agreement provide, at clause 3:

“3.1 The parties agree that on and from the Novation Date:

- (a) the Lender irrevocably and unconditionally releases the Transferor from all the Transferor’s obligations under the Intercompany Facility, whether present or future, actual or contingent, and the Lender’s rights against the Transferor shall be cancelled;
- (b) the Transferee shall assume the obligation to repay the Intercompany Facility upon the terms of the Facility Agreement

3.2 The Transferee agrees that on and from the Novation Date (and in consideration of the release in clause 3.1) it shall:

- (a) repay the Debt; and
- (b) pay all interest, fees and other amounts owing in respect of the Intercompany Facility; and
- (c) comply in full with the Facility Agreement.”

The “Debt” is defined as the sums due under or in connection with the Intercompany Facility.

6. The LPE Novation Agreement is signed on its last page, after the scheduled facility agreement, by Mr Simon Hume-Kendall on behalf of the Company as one of its directors, on behalf of LG LLP in his capacity as a designated member and on behalf of LPE as its director. Each instance of Mr Hume-Kendall’s signature was witnessed by Mr Robert Sedgwick, who had been the company secretary of the Company until 12th March 2018. He ceased to be the company secretary following his suspension by the Solicitors’ Regulation Authority from practice as a solicitor for a period of 12 months. The facility agreement is not itself executed.

7. The novation agreement to which LP&T is a party (“the LP&T Novation Agreement”) is in similar terms, although the scheduled “Facility Agreement” refers to a loan of up to

£30,000,000 being provided by the Company to LP&T for the purpose of purchasing 25,000,000 redeemable preference shares in London Power Corporation Limited (“LPC”). The LP&T Novation Agreement is again signed by Mr Hume-Kendall on behalf of the Company, LG LLP and LP&T after the scheduled facility agreement, which again is not itself signed. Mr Sedgwick was the witness to each instance of Mr Hume-Kendall’s signature.

8. Mr Bednash’s statement explains that former directors of the Company, Mr Robin Hudson, Mr Francis Starkie and Mr Martin Ruscoe, and Mr David Elliot, the former company secretary, confirmed at interviews following the administration of the Company that they had not seen the Novation Agreements prior to those interviews. No mention of these agreements is made in the minutes of board meetings of the Company or in those of any of its related entities in the evidence that I have seen.

9. The application came before Chief ICC Judge Briggs on 30th September 2019. He gave directions for specific disclosure of certain classes of documents to the Respondents and the filing and service of responsive evidence. He directed the listing of a trial of three and a half days, with half a day of judicial pre-reading. The time for filing and service of evidence in answer and reply were subsequently varied by consent.

10. The Respondents filed evidence in answer from Mr Hume-Kendall, Mr Sedgwick, Mr Starkie and Mr Michael Peacock, a chartered accountant who provided advice to the Company. Those statements are dated 31st January 2020. The Respondents’ case, which is principally set out in Mr Hume-Kendall’s statement, is that there was no loan to LG LLP at all. The loans made by the Company were to:

- 10.1. Independent Oil and Gas Limited plc (“IOG”);
- 10.2. P/F Atlantic Petroleum, an entity registered in the Faroe Islands (“AP”);
- 10.3. LP&T, for the purpose of purchasing redeemable preference shares in LPC;
- 10.4. LPE, for the purchase of shares in two technology companies London Artificial Intelligence Limited (“LAI”) and Intelligent Technology Investments Limited (“ITI”);
- 10.5. Intelligent Technology Limited, for its investment in companies called Asset Mapping Limited and Reserec Limited.

11. The Respondents’ position is that the Novation Agreements were simply devices to correct an erroneous position shown in the Company’s nominal ledgers, which error came about, as Mr Hume-Kendall states in his witness statement, as a result of “poor communication between those making the payments and the recording them by the accounts staff.” The true position was that the shareholders of LPC wished to acquire for the group certain technology assets, in the form of shares in LAI and ITI, and redeem certain preference shares. A restructuring of the group companies was contemplated, on which Mazars LLP, a firm of accountants, advised in June 2018. At a board meeting of LPC on 14th June 2018 the restructuring plan was approved, and it was agreed that the technology assets were to be brought in at a “fair valuation”, estimated to be £20 million. The funding for the acquisition of the technology interests and the redemption of the LPC preference shares was to be provided by LOG and the precise mechanism was left to Mr Hume-Kendall and LPC’s advisors to achieve.

12. Mr Hume-Kendall states that he asked Mr Sedgwick to assist with implementing the board’s decision and they decided to use LPE to acquire the technology assets and to use LP&T, which was a new company incorporated for the purpose, to purchase the preference shares. Mr

Sedgwick produced a share purchase agreement for LPE's purchase of the technology assets, being the shares in LAI and ITI, which were then owned by Mr Hume-Kendall and Mr Elten Barker, the other legal member of LG LLP and also a director of LPC and LOG. The purchase price was £20 million. The share purchase agreement was executed and bears the date 21st July 2018, although it records that that some £12.9 million had been paid to Mr Hume-Kendall and Mr Barker prior to this point. As to the purchase of the preference shares by LP&T, this is said to have been conducted in accordance with Mazars LLP's report. The members of LG LLP voted to distribute the preference shares to themselves in specie and the preference shares owned by Mr Hume-Kendall and Mr Barker were sold to LP&T on 27th July 2018 for the stated sum of £32,225,096. A share purchase agreement bearing that date was prepared by Mr Sedgwick. Mr Hume-Kendall explains that, although the agreement refers to £32,225,096, this was subsequently revised to just over £16.7 million. Though these purchase agreements were executed, the completion of the transfers did not take place immediately. Instead, according to the Respondents, the transfers of the shares was to happen when all the payments had taken place and the restructuring of LPC had been put into effect.

13. At board meetings in early 2019 Mr Elliot, then the company secretary of LOG, expressed concern that the "paperwork was not complete" and that the loans to LPE and LP&T were not properly documented. Executed facility agreements setting out loans to LPE and LP&T were put before the board for ratification on 12th February 2019. Although the executed version in respect of LPE bears the date 21st June 2018 and that in respect of LP&T bears the date of 27th July 2018 the uncontested evidence is that these were prepared by Mr Sedgwick and executed by Mr Hume-Kendall and Mr Barker in January 2019 as part of this "ratification" process. While there was no mention of the Novation Agreements at this meeting, Mr Sedgwick produced them on 12th February 2019 and asked Mr Hume-Kendall to sign them. Mr Hume-Kendall contends that this was a day-to-day matter of the correction of the error that he has described and was exactly the sort of transaction that he had authority to enter into on behalf of the Company.

14. In reply, the Applicants filed a statement from Mr David Hudson, an insolvency practitioner assisting the administrators, dated 16th April 2020, together with a further statement from Mr Bednash and a statement from Ms Sarah Spurling, a solicitor at Mishcon de Reya LLP, the Applicants' solicitors, both dated 17th April 2020. I need not address the contents of those statements at this stage, save to say that the Applicants do not accept the Respondents' contentions as to the arrangements between the Company, LG LLP, LPE and LP&T. In particular, Mr Bednash further queries the "legitimacy" of the facility agreements prepared in January 2019. As I shall explain, Mr Shaw, who appeared for the Applicants, invited me to set aside those agreements as well. Developments shortly before trial

15. A pre-trial review was listed before me on 18th May 2020. Shortly in advance of that, the Respondents filed an application, dated 14th May 2020, seeking adjournment of the trial, permission to adduce further evidence and an order for specific disclosure of certain documents. I was only asked to deal with the adjournment application at the PTR, which I refused. I directed that the remaining parts of the application be heard in the ICC Interim Applications List in the following week. In fact, the Respondents abandoned the remainder the application prior to that hearing.

16. At the trial, Mr Shaw took me through the developments thereafter. In the week after the PTR, Mishcon de Reya wrote to Nobles Solicitors, the solicitors for the Respondents, to confirm arrangements for the trial to be conducted remotely. There was a prolonged period of silence from the Respondents, punctuated by a reply from Nobles on 29th May 2020 to say that the proposed remote platform was too expensive. On 11th June 2020 Mishcon de Reya asked for details of the Respondents' counsel for the trial. Nobles replied to say that LPE and LP&T

had entered administration and that notice of intention to appoint had been filed in respect of LG LLP.

17. Mr Andrew Fender, one of the administrators of LPE, emailed Mishcon de Reya shortly thereafter, enclosing various documents, and seeking consent to the adjournment of the trial. The attached documents show that LPE had entered administration on 29th May 2020 and the administrators, Mr Fender and Mrs Sandra Fender, were appointed by Mr Hume-Kendall as floating charge holder. The administrators' consents to act were dated 4th May 2020. It is therefore clear that administration was contemplated long before the PTR. Indeed, it seems that there was a video call between Mr and Mrs Fender and Mr Hume-Kendall on 27th April 2020.

18. A further email from Mr and Mrs Fender, this time as administrators of LP&T, was received shortly thereafter. This informed the Applicants that LP&T had also gone into administration on 29th May 2020, on this occasion by an appointment by its sole director, Mr Hume-Kendall. Again, their consents to act are dated 5th May 2020. It is likely that the insolvency and administration of this company was considered in the video call on 27th April 2020 too. There is no evidence of any other contact prior to 5th May 2020.

19. Finally, again on 11th June 2020, an email was received attaching LG LLP notice of intention to appoint an administrator. The notice was signed on 5th June and filed on 8th June 2020. The resolution in favour of the appointment was passed by the vote of Mr Hume-Kendall, the other member, Mr Barker, having abstained. The notice of intention to appoint refers to advice having been received from Mr and Mrs Fender in the video call on 27th April 2020. Mr Shaw noted in submissions that the accounts for LG LLP for the period ended March 2020, approved by Mr Hume-Kendall and Mr Barker, showed a net asset surplus of £29 million. The accounts for the period ending May 2020 however, signed by Mr Hume-Kendall alone, show a very substantial asset write down allowing the firm to be certified to be insolvent. Mr and Mrs Fender were not appointed on this occasion. Mr Bednash and Mr Asher Miller were appointed by LCF as qualifying floating charge holder on 17th June 2020.

20. Mr Shaw invited me to note that the administration of all three of Respondents was plainly in contemplation long before the PTR. Moreover, the Respondents did not see fit to alert the Applicants to any of the administrations until two weeks before the trial. He asks me to regard this, together, with the application made at the PTR as indicative of the Respondents' reluctance to have these matters determined.

21. On 17th June 2020 Mr and Mrs Fender gave consent to the continuation of the proceedings in relation to LPE and LP&T and, on 23rd June 2020, confirmed that they would take a neutral stance on the proceedings and rely upon the witness statements filed for the respondents. The administrators of LG LLP similarly took a neutral stance but no longer rely upon the witness statements filed.

22. For the sake of completeness, I should also say that my attention was drawn to emails from a Ms Jane Sanders, who is apparently "in house counsel" for Mr and Mrs Fender. The email made various proposals as to the resolution of the issues between the parties. I also received a document from Mr Fender at the start of trial, making various observations as to the conduct of the case by the Applicants.

### **Approach to the evidence**

23. Mr Shaw submitted that the trial should proceed, taking into account the evidence filed by the Respondents. The directions order listing the trial contained an order for cross-examination in the usual form, that is to say that the makers of witness statements were required to attend to be cross-examined, in default of which their statements would not be read without

the permission of the court. None of the witnesses for the Respondents attended but Mr Shaw proposed that witness statements should nonetheless be read, first because LPE and LP&T wish to rely upon them and, secondly, because the Applicants' case has been prepared on the basis that they are part of the evidence before the court and evidence in reply has been filed. I adopted Mr Shaw's suggested course. There was no basis on which to adjourn the trial. The Respondents were well aware of the trial and their officers appear to have entered administration as a tactic to avoid engaging with it. They had filed evidence and the proportionate approach appeared to me to be that I should take that evidence into account. That evidence has not been tested by cross-examination and the Respondents were not represented before me to offer submissions on it. I have, however, read that evidence and Mr Shaw drew my attention to those parts of it that he considered to be of significance.

24. Mr Bednash, Mr Hudson and Ms Spurling all attended the trial by Skype and were each called to give evidence on behalf of the Applicants. In the absence of a representative of the Respondents they were not cross-examined and did no more than confirm the truth of the contents of their witness statements. I have no reason to doubt their evidence, which is of course predominantly based on contemporaneous documents of which they have no direct knowledge. I accept the evidence set out in their witness statements.

### **Relevant background**

25. It is necessary to give an account of the relevant background as it appears from the evidence produced by the parties in order to give proper context to their cases as to the context in which the Novation Agreements came to be created. It will already be apparent from what I have said above that LG LLP, LPC and LOG were related entities and had common officers.

26. LG LLP was the entity that owned the voting shares in LPC. LG LLP was incorporated on 17 March 2017 and Mr Hume-Kendall and Mr Barker are the only legal members of the partnership. Mr Hume-Kendall's evidence is that the beneficial owners of the partnership are:

- 26.1. Mr Barker (as to 5%);
- 26.2. Mr Hume-Kendall (as to 23.75%);
- 26.3. the Simon Hume-Kendall Trust (as to 23.75%); and
- 26.4. the Golding Trust (as to 47.5%).

The Applicants contend, on the basis of their analysis of the distribution of monies via LG LLP, that the beneficial owners are Mr Barker (as to 7.5%), Mr Thomson (as to 7.5%), Mr Hume-Kendall and/or the Simon Hume-Kendall Trust (as to 42.5%) and Mr Spencer Golding and/or the Golding Trust (as to 42.5%). It is not necessary for me to express any view on the Applicants' contention on this and I make no finding as to it.

27. LPC has been LOG's sole shareholder since 4th May 2017. Its directors on 4th April 2019, when it entered administration, were:

- 27.1. Mr Hume-Kendall and Mr Barker, both appointed on 2 December 2016; and
- 27.2. Mr Ruscoe and Mr Starkie, both appointed on 31st October 2017.

Between 2 December 2016 and 12 March 2018, Mr Sedgwick was the company secretary. He was replaced as company secretary by Mr Elliot and Mr Elliot himself resigned in February 2019.

28. LOG was incorporated on 15th August 2015 and at the date of its administration its directors were:

- 28.1. Mr Hume-Kendall;
- 28.2. Mr Barker;
- 28.3. Mr Ruscoe;
- 28.4. Mr Starkie;
- 28.5. Mr Robin Hudson;
- 28.6. Mr Charles Hendry; and
- 28.7. Mr Martin Orrell.

The company secretary between 24 October 2017 and 12 March 2018 was Mr Sedgwick. He was replaced as company secretary by Mr Elliot, who again resigned in February 2019.

29. LPE was incorporated on 23rd June 2016. Its directors were Mr Hume-Kendall and Mr Barker. Since 5th February 2018, the sole shareholder of LPE has been TW Private LLP, the members of which are LG LLP, Mr Hume-Kendall and Mr Barker. A share sale agreement bearing the date 21st July 2018 states that LPE purchased from Mr Hume-Kendall and Mr Barker the following:

- 29.1. 90% of the shares in ITI (which owned a subsidiary called Asset Mapping Limited (“AM”)); and
- 29.2. 80% of the shares in LAI for the sum of £20 million, of which £12.9 million had already been received (“the Technology Assets Sale Agreement”).

There is, however, a share sale agreement dated 27th July 2018 by which TW Private LLP purported to sell its shares in LPE to LP&T for £1 (“the LPE Shares Sale Agreement”). I will return to this agreement later.

30. LP&T was incorporated on 20 July 2018, apparently as a vehicle to receive the redeemable preference shares in LPC. According to a share sale agreement dated 27th July 2018, it purchased Mr Hume-Kendall and Mr Barker’s redeemable preference shares in LPC for £32.2 million, subsequently reduced to £16.9 million (“the Redeemable Shares Sale Agreement”). Mr Hume-Kendall has been the sole director of LP&T since its incorporation. He was also its sole shareholder from incorporation although, as I shall explain, there is a declaration of trust apparently made by him on 13th November 2018 that provides that he holds the sole share in LP&T on trust for LG LLP (“the LP&T Declaration of Trust”).

31. In the above introduction to the parties and the principal transactions I have attempted to avoid giving the impression that I accept that any of the documents to which I refer were in fact executed or, indeed, created on the date they bear, because this application is characterised by the number of documents which are backdated, exist in multiple and slightly differing forms or which are inconsistent with other documents and contemporaneous events. By way of example, the Applicants have identified three versions of a facility agreement from March 2016 between LCF and the Company. All of these are signed by Mr Hume-Kendall for the Company and Mr Thomson for LCF. It is not clear which of them was to govern the borrowing between the Company and LCF from that time. Depending on the version, the facility offered to the Company in March 2016 was a loan of up to £20 million or £25 million. The Applicants have



also identified a further facility agreement, dated 18th October 2018, under which some £150 million was offered.

32. Two further facility agreements have been discovered, the authenticity of which has been questioned by the Applicants. The first is dated 1st December 2017, which on its face extends the limit of the facility of March 2016 to £50 million. The second is dated 4th December 2017 and grants a facility with a limit of £120 million. Both are apparently signed by Mr Hume-Kendall and Mr Barker for the Company on the one part and Thomson for LCF on the other. The authenticity of these documents is not accepted by the Applicants, predominantly because no mention is made of them in contemporaneous documents in which one might expect them to be addressed. There might or might not be an explanation, but one has not been offered in the evidence that I have seen.

33. The Applicants' starting point is that the Company's trial balance as at 6th March 2019 shows LG LLP to have borrowed some £32.6 million from LOG. The Applicants' evidence sets out their contentions as to the ultimate beneficiaries of the sums referable to LG LLP. As I have said, according to Mr Bednash's evidence about £20m was paid directly to Mr Thomson, Mr Hume-Kendall, Mr Spencer Golding and Mr Barker on behalf of LCF (as lender to LOG) by its agent Global Currency Exchange Network Limited ("GCEN"). The vast majority of the remainder was paid to LG LLP, and appears to have been paid on to individuals, including Mr Hume-Kendall and Mr Barker. The Company's bank account statements between 5th February 2018 and 29th May 2018 confirm the payments made out of the account. Various descriptions are given for the payments. For example, some are described as 'Pref Share Adv', although LOG itself did not itself have any preference shares.

34. Discussions began as to the matters on which the Respondents rely in 2018. On 14th April 2018 there was a meeting of the board of LPC. The minutes record that LG LLP and LPC were proposing to "consolidate into one TopCo" which would enable some shareholders to sell and to simplify the share structure. It was noted that Mr Elliot had approached Mazars LLP to provide advice in this regard. The minutes record that the

"Board approves the restructuring of the company. SHK, JM and DE will continue to explore this process."

Mr Barker and Mr Elliot were said to be looking into new banking arrangements and begin the transition to those new arrangements at the time of the proposed restructure. It is notable that the restructuring proposals were then at a very early stage. While the restructuring had been approved, the process was still to be explored and Mazars LLP were yet to report on the process.

35. Mazars LLP in fact produced draft proposals for the restructuring on 11th June 2018. They proposed that LG LLP should distribute its shares in LPC to its members in specie and that those members who wished to retain an interest in LPC should form a new TopCo, to which they would transfer their shares and which would then acquire the shares from the members of LG LLP who did not wish to retain their interest.

36. The LPC Board met again on 14th June 2018. According to the minutes of that meeting it was reported that Mazars had produced a "Step Plan" for the restructuring. They record that a system was being considered to buy shares from those directors who were looking to sell them. The minutes state:

"The proposed indicative buyout structure was approved. The final structure will also need to be approved by the board."

They go on:

“The board approves DE/SHK to continue forward on the restructuring process. Once the final process is determined an EGM will be arranged and the board will vote to approve the final structure”

As Mr Shaw emphasised, this shows the grant of express authority to Mr Elliot and Mr Hume-Kendall to take the restructuring proposals forward but it was clear that the final structure would be subject to the final approval of the board. In relation to restructuring, the following action point is noted:

“The board approves LPC to form the required new shell companies and for preference shares to begin to be transferred as the first step in the restructure.”

The minutes continued with an account of a discussion of further investment opportunities in LAI and Asset Mapping Limited. The minutes state as follows:

“Update on new investment opportunities:

1. Technology

(a) London Artificial Intelligence Limited; and (b) Asset Mapping Limited

a) London Artificial Intelligence Limited (“LAI”):

- i. LAI is an investor into Reserec Limited and in partnership on our on-going commodity project;
- ii. Presentation from Dr Jagadeesh Gorla and HHK (see attached presentation);
- iii. LAI is looking for new opportunities to apply Artificial Intelligence (“AI”) to the energy sector.

**ACTION:** The board approved to bring Technology into the core activities of the new Topco at fair valuation estimated currently @>£20M.

**ACTION:** The board approves Robin Hudson to consult with LAI regarding the technical aspects of trading.

...

b) Asset Mapping Limited (‘AM’):

- i. The company is now making profits;
- ii. See supplementary document.

2. London Power and Technology Limited

a) SHK/Elten proposed that both LAI and AM be brought formally into the LPC group; this was noted to be the original intention for both assets. The present estimated value is £20M but will be professionally valued as they develop;

b) SHK advised a new subsidiary has been formed and to act as a subsidiary of TOPCO for LAI, AM and Future Energy Projects

**ACTION:** The board approves the formation of a new technology company and to bring in LAI, 20% of Reserec Limited, and 50% of AM in to the LPC group.

Note: As of 15th June 2018, the name London Power and Technology Limited had been reserved as a name for TOPCO for LOG & the Technology Companies. c) SHK/Andrew Thomson: LPC has agreed in principle to a facility with LCAF to acquire and develop the technology side of TOPCO. Security for such a facility will be decided on in due course.”

In summary therefore, LP&T had been identified as the new TopCo that would be used to receive the preference shares that Mazars LLP had envisaged would first be distributed to the members of LG LLP, though this was still subject to confirmation by LPC’s board. A further new company is also contemplated that would be the subsidiary of the new TopCo into which the technology assets would be brought at a value of around £20 million, though that was to be subject to a professional valuation. This would be funded by a facility from LCF and the arrangements for that would be decided in due course.

37. That then takes us to the Technology Assets Sale Agreement to which I have referred. LPE was owned TW Private LLP, of which Mr Barker and Mr Hume-Kendall were the members. That is entirely at odds with what was contemplated at the LPC board meeting. The meeting had considered the purchase of the technology assets by the new TopCo or a subsidiary of it. LPE was neither. Mr Hudson had estimated a value of £20 million, but this was to be subject to confirmation by a proper valuation process. That had not been undertaken. The Technology Assets Sale Agreement notes that £12.9 million of the purchase price had already been paid. Mr Shaw invites me to accept that this was part of the £13 million shown to be transferred to LG LLP and distributed onwards to its members between February and May 2018, as shown by LOG’s Metro bank statements. Indeed, this accords with Mr Sedgwick’s evidence at paragraph 39 of his statement that he was told by either Mr Hume-Kendall or Mr Barker that this sum had been paid by LOG to LG LLP and was paid on to those gentlemen or their beneficiaries. I accept Mr Shaw’s submission. I also note that the assets the board contemplated to be purchased by LPE do not accord with those purchased under the Technology Assets Sale Agreement.

38. The next document to note is the Redeemable Shares Sale Agreement, apparently entered into in the following month, on 27th July 2018. Again, this was done in advance of approval of the restructuring on the part of the board of LPC or of LOG. There was a meeting of the latter on 7th August 2019. Once again the proposal to restructure was approved and they authorised Mr Hume-Kendall, Mr Elliot, Mr Marshall and Lewis Silkin to continue to progress it, but it is made quite clear that there would need to be final board approval of documents giving effect to the reorganisation. The minutes provide as follows:

“8 Group Reorganisation

8.1 SHK and DE reminded the meeting that the Company’s ultimate parent, LPC, was proposing the Reorganisation, which would involve the consolidation of the Company and LPC into a new Topco structure.

8.2 THERE WAS PRODUCED to the meeting the steps plan drafted by Mazars LLP (Mazars) detailing the proposed Reorganisation of the Company’s group (Mazars Steps Plan) for the meeting’s review and consideration.

8.3 IT WAS NOTED that the intention of the Reorganisation is to:

- (a) allow some of LPC’s shareholders to sell out over time;
- (b) allow for the consolidation of share classes; and

(c) simplify the process for shareholders to divest.

8.4 SHK reminded the meeting that as part of the Reorganisation, certain of LPC's shareholders, some of whom are also directors, are proposing to dispose of their respective shareholdings in the Company (Sale Shares). LPC is continuing its consideration of various mechanisms by which the Sale Shares can be efficiently divested.

8.5 DE then turned the attention of the meeting to the details of the Reorganisation and in particular to the Mazars Steps Plan.

8.6 IT WAS NOTED that DE has engaged Mazars to develop a restructuring and share consolidation strategy in respect of the Reorganisation. Following a discussion with the meeting on the Mazars Steps Plan, DE indicated that he is satisfied with the document and does not expect the structure of the Reorganisation to change further.

8.7 IT WAS NOTED that a new company called London Power and Technology Limited (Topco) had been formed and that, as a result of the Reorganisation, Topco would become the Company's ultimate holding company.

8.8 IT WAS FURTHER NOTED that the Company's external counsel, Lewis Silkin LLP (Lewis Silkin) had been engaged by the Company to manage the legal aspects of the Reorganisation, including the drafting of the documentation necessary to effect the Reorganisation.

8.9 IT WAS RESOLVED that the Reorganisation be and is hereby approved and that the steps as outlined in the Mazars Steps Plan be and are hereby approved.

8.10 IT WAS RESOLVED that SHK, DE, JM and Lewis Silkin be and are hereby authorised to continue to progress the Reorganisation, provided that a meeting of the board (or a committee thereof) (and, if appropriate, a meeting of the Company's member) will be called to vote on and approve the documents effecting the Reorganisation.

8.11 IT WAS FURTHER RESOLVED that the formation of Topco be and is hereby ratified and approved and that DE, in his capacity as Company Secretary (or his delegates) be authorised to form any number of new companies as may be necessary to effect Reorganisation and to file all the appropriate documents and fees at Companies House as may be required."

The minutes go on to consider LOG's exposure to LCF and its need to build a cash reserve. There is no discussion of sums being paid to either an entity outside the LPC group to purchase technology assets or of the agreement of a newly formed company to pay seven figure sums to acquire Mr Hume-Kendall or Mr Barker's preference shares in LPC.

39. On the same day there was a meeting of the board of LPC. These record:

"4.1 The chairman reported that the purpose of the meeting was to:

...

(c) discuss and approve an indicative proposal to restructure the Company's group (the Reorganisation);

(d) discuss and approve the Company's financing and investment strategy, particularly in relation to the group's existing and future borrowings from London Capital and Finance Plc (LC&F);

...

(f) receive an update, discuss and approve the proposal for the Company to invest in the artificial intelligence industry by acquiring interests in London Artificial Intelligence Limited (LAI) and Asset Mapping Limited (AML)...”

In relation to the reorganisation of the group the minutes record:

“SHK reminded the meeting that the Company was proposing the Reorganisation, which would involve the consolidation of the Company into a new Topco structure.

8.2 The steps plan drafted by Mazars LLP (Mazars) detailing the proposed Reorganisation of the Company (Mazars Steps Plan) as presented at the previous board meeting was referred to the board for their review and consideration.

...

8.4 SHK reminded the meeting that as part of the Reorganisation, certain of the Company’s shareholders, some of whom are also directors, are proposing to dispose of their respective shareholdings in the Company (Sale Shares). The Company discussed the mechanism by which the Sale Shares would be efficiently divested and a discussion thereon followed. Details of the discussion would be recorded in SM’s notes in the Appendix.

8.5 IT WAS NOTED that London Group LLP, which currently holds 25,000,000 1 pence preference shares in the Company (and thereby all the voting rights in the Company) is considering selling 100% of those shares as part of the Reorganisation.”

Pausing there, the Redeemable Shares Sale Agreement that purported to sell those shares is dated 27th July 2018. The only persons who could have informed the board of LPC about activities of LG LLP were Mr Barker and Mr Hume-Kendall, both of whom were present at the meeting. The board were not informed of this development and the minutes proceed on the basis that the restructuring plan is still in the course of finalisation. Similarly, the minutes continue to discuss the proposal to acquire the technology assets at section 12 –

“12 London Artificial Intelligence (LAI) and Asset Mapping Limited (AML)

12.1 The meeting then discussed the Company’s potential investments in the technology sector by way of an acquisition of LAI and AML.

12.2 The chairman invited JG and HHK to attend this part of the meeting. JG and HHK provided the meeting with a presentation in respect of LAI and copies of the presentation were produced to the meeting.

...

12.6 IT WAS NOTED that the Company, after the Reorganisation, proposed that TOPCO may, subject to due diligence, acquire, either by share purchase or otherwise, LAI and AML (the Proposed Transaction).

...

12.9 IT WAS NOTED that the Company intends to finance the Proposed Transaction through a loan from LC&F (the New Loan). Although Topco may be the borrower under the New Loan, the Company may be required to provide a guarantee and a debenture to LC&F in support thereof. It was explained that the board will be provided with details of the New Loan and any such guarantee and debenture once available.”

40. While Mr Hume-Kendall and Mr Barker disclosed their interest in the technology companies, there is no mention of sale by them to LPE on the basis of monies advanced by

LOG to LPE for the purposes of the purchase. The minutes here do not accord with the case now advanced by the Respondents. Moreover, as at 7th August 2018, when this meeting took place, the proposal was that the transaction would be financed by a loan from LCF to the proposed new TopCo. There is no mention of any agreement that LOG had or will make a loan to LPE.

41. The meeting was reconvened on 9th August 2018 at which point the board of LPC authorised Mr Hume-Kendall, Mr Elliot and others to continue with the reorganisation. The formation of the TopCo was ratified, and Mr Elliot was authorised to form any further companies necessary to effect the reorganisation. The proposed acquisition of the technology assets was expressed to be subject to both “legal due diligence” and “final board approval”.

42. The next significant documents are the communications between Mr Peacock and the auditors of LPC and LOG. By an email dated 26th October 2018, Mr Peacock wrote to Mr Irfaan Limalia of BDO, attaching LOG’s draft trial balance for 30th September 2018. This records a debt due from LG LLP in the sum of £37.8 million. That email, with that attachment, was forwarded to Mr Hume-Kendall and Mr Elliot on the following day. BDO raised particular queries, including in relation to the loan to LG LLP, during the course of the following month as follows:

“Please provide an assessment over whether the £38.8m balance owed from London Group is recoverable.

Please include details and evidence of this assessment. For example, evidence of a sales price higher than £38.8m that London Group LLP would receive for the sale of its assets.

Bear in mind that London Group owes £3m to LOG within your assessment”

43. On 15th November 2018 Mr Limalia chased Mr Elliot and said:

“Would it be possible for me to give you a call regarding the loan balances in LOG? We are particularly keen on looking at the loans to London Group LLP, Asset Mapping and Intelligent Technology Investments.

If possible, we need to understand among others:

- The repayment and interest terms;
- The commercial viability of the loans;
- The mechanics behind the London Group LLP loan;
- The flow of funds between LOG and the recipient and any tax/ company’s act issues identified.”

Up to this point the financial team appear to have been proceeding on the basis that LG LLP had a substantial liability to the Company.

44. Mr Elliot email BDO on 5th December 2018 to which was attached a document that begins to set out the alternative account now relied upon by the Respondents.

“LPE Enterprises Limited (“LPE”) holds a 95% interest in Intelligent Technology Investments Limited (“ITI”), with the other 5% being held by a former consultant, Mark Ingham. ITI holds the investment in Asset Mapping Limited and also in Reserec Limited. LPE also holds an 80% investment in the third entity, London Artificial Intelligence.

LPE was currently owned by TW Private LLP, whose members are London Group LLP, Simon Hume-Kendall and Elten Barker and it has contracted to sell LPE to LP&T for £20,000,000 subject to valuation.

There is just one share in LP&T which is held by Simon Hume-Kendall subject to a deed of trust in favour of London Group LLP

The inter-company balance between LOG and LG LLP LLP includes sums that will be allocated against the purchase price of the shares.

These amounts total £19.162m of the LOG balance.”

He also attached the LPE Shares Sale Agreement. This would of course have had the effect of bringing the shares in ITI and LAI back into the group, consistently, to some extent, with what had been contemplated by the LPC and LOG boards. As Mr Shaw notes, there are problems with this document. Although the LPE Shares Sale Agreement is dated 27th July 2018 there is no contemporaneous evidence to support its execution on this date. In this regard it is notable that this document is inconsistent with an option apparently granted to LOG to purchase these shares only a month earlier on 21st June 2018. Nor is it consistent with the Register of Persons with Significant Control maintained by the Registrar of Companies. TW Private LLP continues to be shown in 2020 as the person with significant control in relation to LPE.

45. Mr Elliot also sent the LP&T Declaration of Trust to the auditors. It is dated 30th November 2018 and describes Mr Hume-Kendall as the owner of the sole share in LP&T, which, it states, he held on trust for LG LLP. This would mean that LG LLP had purportedly distributed its preference shares in LPC in specie to Mr Hume-Kendall and Mr Barker, who then sold their shares for £16.7 million to LP&T using, on their case, a loan from LOG. The beneficial owner of LP&T is LG LLP. The beneficial owners of LG LLP thus have the benefit of £16.7 million and remain the owners of the shares in LPC.

46. On 9th January 2019 it appears that Mr Hume-Kendall granting a facility of up to £10 million to LPE, secured by fixed and floating charges. It would seem that is linked to the cessation of LCF’s business, or the cessation of LCF’s ability to provide funds, as a result of the intervention of the FCA. On the same day there was a meeting of the LOG board. The minutes include a discussion the Company’s borrowing from LCF as follows:

“6.3 DE highlighted the following to the directors in respect of the Accounts:

(a) the valuations shown in the September accounts for both IOG and Atlantic and DE confirmed that these valuations had been prepared on the same basis as the previous year;

(b) the balance outstanding to LCAF of £108m, and explained that the balance had grown to such a level as follows:

(i) allowing for estimated interest and funding costs, the amount borrowed for lending to IOG and AP was £45.3m and £4.85m respectively;

(ii) amounts borrowed for lending to LPE Enterprises Limited (for the purchase of the technology business) and Intelligent Technology Investments Limited (for cashflow and the purchase of Resurec Limited) totalled £28.2m and £5.3m respectively; and

(iii) the amount borrowed for the purchase of the preference shares in LPC was £18.3m, which together totalled £101.95m. DE further explained that the directors would need to approve, authorise and ratify this lending undertaken by the Company, including both the payment of funds, the corresponding loan agreements and debentures and other security documents in respect thereof. RH confirmed that the structure of the lending and the

companies involved had been discussed previously but requested DE to send a paper to the directors outlining the various loans made by the Company so that they may consider such approval, authorisation and ratification.”

47. Mr Elliot’s email to BDO and his account of the position the Company’s board appears to have been based on his discussions with Mr Sedgwick. Mr Sedgwick’s witness statement explains that, at some point in January 2019, two facility agreements were created and backdated as follows:

“40. On 29 November 2018, I received an email from David Elliot requesting me to comment on a note that he had prepared as to the inter- company balances between LPC/LOG and LG LLP. I did so by way of response which I sent to him on 4th December 2018. In my note, I explained the transactions that had taken place in the summer. Subsequently, David Elliot and I discussed the need to document the loans that had been made by LOG to LPE and LP&T respectively.

41. I therefore agreed with David Elliot to prepare Facility Agreements for each loan. I believe these agreements were executed by the relevant companies in January 2019, although they were dated on the dates when the agreements were signed which was the effective date for those transactions. On reflection, it would have been better to date the facility agreements when they were signed and to have included a provision that the effective date was the date of each of the transactions, but this did not occur to me at the time.”

That appears to be a reference to the note that Mr Elliot prepared for the auditors and sent under cover of an email on 5th December 2019, to which I have referred above. Mr Elliot therefore appears to have requested an explanation of the position from Mr Sedgwick, who at that time had no formal role within the group, and noted that there was no documentation of the transactions which were said to have taken place. As a result of this, Mr Sedgwick produced two facility agreements.

48. These are the facility agreements that Mr Shaw invites me to find are void. The first is dated 21st June 2018. It does not state that it is effective from that date, though executed later. It simply gives the impression that it was executed on the date that it bears. It states that it is made between LPE and LOG and that a facility of £20 million is offered to LPE, which sums were borrowed by LOG from LFC. Clause 4 of the agreement provides that the purpose of the facility is as follows:

“4.1 The Borrower shall use all money borrowed under this agreement for acquisition of Intelligent Technology Investments Limited and its subsidiaries.”

In fact, the monies from LOG had also been used to acquire LAI, so this document does not reflect the transaction that it is purportedly intended to evidence (although this is corrected in the facility agreement scheduled to the LPE Novation Agreement). The agreement provided that LPE would indemnify LOG in respect of its borrowing of the facility sum from LCAF. In other words, it did not confer any commercial benefit on LOG. LOG was merely a conduit for the monies. The agreement is signed by Mr Barker on behalf of LPE and Mr Hume-Kendall on behalf of LOG. They were of course both directors of these companies.

49. The second facility agreement is dated 27th July 2018 and is purportedly made between LOG and LP&T. It too gives the impression that it was executed on the date given, rather than in January 2019. It provides that a facility of up to £30 million is to be provided for the purchase of the redeemable preference shares in LPC. It similarly requires LP&T to indemnify LOG in respect of its borrowing of the facility sum from LCAF, without conferring any additional



benefit on LOG. It is executed by Mr Barker on behalf of LOG and Mr Hume-Kendall on behalf of LP&T.

50. This takes place against backdrop of the failure of LCF and the appointment of administrators of that Company on 30th January 2019. On 6th February 2019, Mr Colin Hardman, one of the administrators of LCF, wrote to Mr Elliot and Mr Hume-Kendall. It is evident from that email that one of Mr Hardman's principal concerns was the financial position of IOG, which was a substantial debtor of LOG. According to Mr Bednash's first statement, LOG had made loans totalling around £34.6 to IOG. Mr Hume-Kendall's evidence explains that the loan was convertible into equity in IOG and LOG's value thus fluctuated with the value of IOG. Mr Hardman also asked about loans to LPE and LP&T. Understandably, Mr Hardman is concerned to establish the overall financial health of LOG as a major debtor of LCF.

51. This concern is reflected in Mr Elliot's email to the board of LOG on the same day. He contemplated that meetings would be held of the boards of LPC and LOG and he said:

“One of the matters to be discussed will be the ongoing viability of both LOG and LPC and as a consequence the responsibilities of the directors in this situation”

He referred to the instruction of Stephenson Harwood LLP, a firm of solicitors, to advise the Company and the need to consider, among other things:

“Summary of existing undocumented and unapproved loans by LOG to other London Group related entities and consideration of security package to support these and to be documented in due course. Ratification to be considered and risk of being set aside”

52. On 7th February 2019 Mr Finbarr O'Connell, in his capacity as an administrator of LCF, wrote to Mr Hume-Kendall and Mr Elliot. The principal concern raised in his email was again the risk that IOG would be unable to repay the sums it had borrowed from LOG:

“On top of that there is clearly a risk (and it is clearly a very substantial % risk) that IOG will never be able to repay LOG the £38m it owes it. IOG has admitted to having £5m of outstanding creditors, which it cannot repay, going back to 2016. This is very concerning as is the fact that LOG has been loaning money to IOG whilst aware of IOG's insolvent position. (As you, David, well know, IOG is insolvent under the terms of s.123 the Insolvency Act 1986)”

He raised the concerns that bondholders should have about LOG's “speculative and risky” lending to IOG and raised various queries about LOG's financial position.

53. On that same day, Mr Elliot emailed the Susan Moore, a solicitor at Stephenson Harwood, sending LOG's draft trial balance as at 30 September 2018, which had been forwarded to him by Mr Peacock. This again showed lending to LG LLP of £33.49 million

54. On 11th February 2019 Mr Elliot emailed Mr Hume-Kendall, Mr Barker and the other LOG board members. The email was headed “Summary of undocumented/unapproved loans by LOG to other London Group related entities”. He said:

“Dear Board members

At the board meeting held on 9 January 2019, the loans made by LOG to other London Group entities were discussed and I was asked to prepare a paper setting these out. I circulated my analysis to board members on 17 January 2019 and re-attach a copy of the paper here.

The board will be asked to consider the following resolutions at the LOG board meeting

- Ratification of the loan arrangements with LPE Enterprises Limited, Intelligent Technology Investments Limited and London Power & Technology Limited. The lending to date will depend upon the terms of the loan agreements entered into but based on current information the cash amounts loaned to each of the entities is approximately £19.1m (LPE), £3.6m (ITI) and £16.6m (being LOG £12.5m and LPC £4.1m). Further funding is likely to be required for ITI in order to provide funding for Asset Mapping but the exact quantum is unknown at present. However, as LOG is unable to draw down any further funding from LCF, any such support will be need to be made available from third party sources. The board will need to consider whether it was beneficial for LOG to enter into these loans in each case and the corporate benefit arising from each such loan. The board should consider taking legal advice before reaching such a decision, given the appointment of administrators over LCF. If the board conclude that the loans should be ratified, then the key terms of the loans will need to be agreed, such as maximum facility available, repayment terms, interest rates and fees, purpose of loan, type of commitment etc. and the security/guarantee package to be entered into by LOG in relation to the loan payments and ranking as against any existing security in the entity”

He went on:

“In the attached paper, I have referenced various sums loaned by LOG and also documents supporting these amounts. I would like to bring to the attention of the board the following:

- The initial loans made in February/March 2018 are annotated ‘pref shares’ in the LOG nominal ledger. These were included in the draft March 2018 management accounts provided to the board and were treated as relating as an advance payment in relation to the payment for preference shares as set out in the Mazars restructuring paper, which was in draft form at that stage. These payments were allocated to the London Group LLP nominal ledger code as there was no further information in relation to their treatment.

...

- As part of the audit for the period ended 30 September 2018, BDO required an analysis of the balance with London Group LLP and an explanation of how this balance would be recovered. Neither the accounts team nor Jo Marshall were aware nor had they been advised of the agreements detailed in my paper at the time they were entered into. I was first provided with a copy of the agreements on 4 December 2018 after asking Robert to review my proposed note to BDO on the recoverability of the debts. These were provided by me to the legal team during December and were then brought to the attention of the board at the meeting on 9 January 2019.”

55. I have quoted extensively there to illustrate that Mr Elliot was highlighting that the payments were allocated to LG LLP as there was no other information as to the purpose of the payments and that the accounts team were entirely unaware of any other basis on which those payments were made. He stresses that they will need to be ratified, taking into account any benefit to LOG in doing so. It is evident that this had been set in motion by the auditors’ query as to whether LG LLP could repay the loan and the enquiries made of Mr Sedgwick by Mr Elliot.

56. A meeting of the LOG board took place on 12th February 2019. The first piece of business recorded in the draft minutes in evidence is “Review the position of LOG in light of the appointment of administrators”. It was noted that the board had received standard advice for companies in financial difficulties from Stephenson Harwood and that, while the balance sheet was positive, the availability of funding needed to be considered. Funding was being provided from LPE with funds provided by Mr Hume- Kendall. The draft minutes state:

“DE then advised the board that the solvency of LOG needed to be kept under close review. It is a critical decision that needs to be made by the board in relation to LOG/LPC, who need funding to be able to continue trading. The funding that has been made available since mid December 2018 has been provided via LPE Enterprises Limited and has been made available to that company from SHK. The Board will need to be sure that LOG and LPC have a source of funding available to them and that they can continue as going concerns. DE suggested that the Board should look for a reasonable period of funding and that they look for comfort that funding will be available to 31/12/19. The current estimate is that £200k per month on average is required to run LOG and LPC to 31/12/19 that this will need to be front loaded over the next few months, particularly due to professional advisor costs, such as SH and EY.”

57. The minutes also record that Mr Elliot makes it clear that he did not consider that the LOG board had approved lending to LP&T and LPE. He said:

“I have very carefully stated that I don’t disagree that the board agreed to purchase the tech side of the business and also that the Mazars plan would be followed. What I am stating is that I do not believe the board of LOG ratified lending to LP&T and LPE.”

He consistently repeats that he did not see loan agreement in relation to LPE or LP&T.

58. The board purported to ratify the loans and there is one final exchange which I should note. Mr Elliot resigned as company secretary at the meeting. He was asked if he would consider changing his mind. The minutes record Mr Elliot then saying the following.

“sorry, no, but I do believe that LOG will have a successful future in time. I think if [Smith and Williamson] let IOG go into the market then hopefully they will achieve full funding - I believe they have a good model and future. However, I need a solid base from which to operate and I feel like I am on ‘shifting sand’. I do not agree that those documents were produced by [Mr Sedgwick] back in June and I believe that Mr Sedgwick] produced the Loan Agreements recently.”

To which Mr Hume-Kendall is recorded as responding:

“I think that’s unfair about RS, why would he back date them?”

I stress that these are draft minutes but, if they accurately record what was said that it a quite extraordinary statement from Mr Hume-Kendall. He had within the last month, executed the two backdated loan agreements.

59. As I said at the outset of this judgment the Novation Agreements were executed on the 15th February 2019. I need only say a few further words about them and the circumstances in which they were created. The first and obvious point is that they are entirely at odds with the account given by the Respondents that the backdated loan agreements to which I have referred are designed to support. They both record that LG LLP, as transferor, is the borrower under an intercompany loan arrangement and that it is to be released from the lending on basis of the assumption of an obligation under the scheduled facility agreement (a facility agreement that was apparently entirely unnecessary if one is to believe that such a facility was entered into in June 2018). That is entirely at odds with suggestion that the Novation Agreements were intended to correct an administrative error. On the contrary, they affirm that there was lending to LG LPP, from which the parties seek to release it. There is no doubt that the Novation Agreements were not approved by the board and it is accepted that were not even mentioned to it. In this regard I need do no more than quote from paragraph 72 of Mr Hume-Kendall’s statement in which he accepts that “At no point in the meeting of 12 February... was there any mention of any novation agreements.”

60. The parlous state of the Company's finances was confirmed on 18th March 2019 when notice of appointment of administrators was filed at court, which appointment took effect on 19th March 2019.

### **Authority to enter into the Novation Agreements**

61. Having set out the background I now turn to the arguments. Mr Shaw principally focused on the argument that the Novation Agreements were entered into without authority and that any purported ratification of them was of no effect. I shall therefore address this argument first.

62. The Applicants' case proceeds from the proposition that an agent cannot bind his principal without the actual or apparent authority of that principal. In *Criterion Properties plc v Stratford UK Properties LLC* [2004] 1 WLR 1846, Lord Nicholls said as follows at paragraph 4:

“If a company (A) enters into an agreement with B under which B acquires benefits from A, A's ability to recover these benefits from B depends essentially on whether the agreement is binding on A. If the directors of A were acting for an improper purpose when they entered into the agreement, A's ability to have the agreement set aside depends upon the application of familiar principles of agency and company law.”

If B is aware that a director of A is acting in breach of duty, B cannot rely on the director's apparent authority to enter into the transaction. In the same case, Lord Scott of Foscote said at paragraph 31:

“Apparent authority can only be relied on by someone who does not know that the agent has no actual authority. And if a person dealing with an agent knows or has reason to believe that the contract or transaction is contrary to the commercial interests of the agent's principal, it is likely to be very difficult for the person to assert with any credibility that he believed the agent did have actual authority. Lack of such a belief would be fatal to a claim that the agent had apparent authority.”

63. Again, Mr Shaw took me to *GHLM Trading Ltd v Maroo* [2012] 2 BCLC 369 in which Newey J (as he then was) held that a contract entered into in breach of duty to the knowledge of the parties was void:

“[170] As for whether the transaction is binding, ordinary agency principles indicate that a company can disavow a contract which a director has caused it to enter into if: (a) the director was acting in his own interests rather than those of the company, its members or (where appropriate) its creditors as a class, and (b) the other party to the contract had notice of the director's breach of duty. Thus, ‘Unless otherwise agreed, authority to act as agent includes only authority to act for the benefit of the principal’ (*Bowstead & Reynolds on Agency* (19th edn, 2010) para 3–007), and ‘No act done by an agent in excess of his actual authority is binding on the principal with respect to persons having notice that in doing the act the agent is exceeding his authority’ (*Bowstead & Reynolds*, para 8–049). The transaction may also be open to challenge on equitable principles: ‘A contract made or act done by an agent which is, to the knowledge of the other party involved, in violation of the agent's equitable duties to his principal entitles the principal to equitable relief against the third party’ (*Bowstead & Reynolds*, para 8–217).

[171] The better view appears to be that, where a director has caused his company to enter into a contract in pursuit of his own interests, and not in the interests of the company, its members or (where appropriate) its creditors as a class, and the other contracting party had notice of that fact, [2012] 2 BCLC 369 at 409 the contract is void rather than voidable: see eg *Bowstead & Reynolds*, paras 8–067 and 8–220, Richard Nolan, *Controlling*

*Fiduciary Power* [2009] CLJ 293 esp at 317–319, *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] 1 Lloyd’s Rep (Banking) 511, and *Hopkins v T L Dallas Group Ltd* [2005] 1 BCLC 543.”

64. “Notice” in such cases includes constructive notice. In *Wrexham Association Football Club Ltd v Crucialmove Ltd* [2007] BCC 130, Sir Peter Gibson said:

“44. ... This is not the usual case of a third party dealing with a company and having no knowledge of what was done inside the company other than knowing the names and capacity of the officers acting on behalf of the company. Mr Hamilton, through his personal involvement in the JVA and its variations, knew of the personal interest of Mr Guterman in the Wrexham project. He had, pursuant to that project, caused Mr Guterman to be put into his fiduciary position in relation to the Club by the purchase of the outgoing chairman’s controlling shares. He knew of the importance attached to the freehold’s purchase, funded by him, being made in the name of the tenant of the ground, the Club. He knew that the declaration of trust was a significant step to be taken by the Club to enable Mr Guterman and him to redevelop the ground as part of the Wrexham project. He can have seen no documents to show that any members of the board of the Club, other than Mr Guterman and Mr Rhodes, authorised or approved the declaration of trust, as there were no board minutes or other documents to that effect. In these circumstances any person acting in good faith, and particularly an experienced solicitor like Mr Hamilton, would be bound to enquire whether the transaction had been authorised or approved by the Club or its board and, if so, whether full disclosure had been made by Mr Guterman. The statement of belief by CL, which it pleads in para.26 of its defence, that there was a board resolution confirming authority, rings hollow in the absence of any evidence to substantiate the reality of that belief.”

65. A void act can of course be ratified. This might be done by the directors if it is within their powers and, if not, by the members. A helpful summary is provided in the judgment of Waller J in *Suncorp Insurance and Finance v Milano Assicurazioni SpA* [1993] 2 Lloyd’s Rep 225, at 234-235.

“The law on this aspect so far as material seems to me to be as follows:

(i) Where an act is done (as it was here) by a person in the name of another and that person does not have authority, then the person in whose name it was done may ratify by adopting the transaction (see *Bowstead* 15th ed. pp. 51 and 52).

(ii) In order that a person may be held to have ratified an act done without his authority, it is necessary that at the time of the ratification, he should have full knowledge of all the material circumstances in which the act was done, unless he intended to ratify and take the risk whatever the circumstances may have been. (See *Bowstead* art. 16, p. 64.) The commentary makes clear however that this principle, designed to protect the principal from being held too readily to have ratified acts of his agent, is less strict in the contractual context than it is in a tort context.

(iii) Ratification may be express or implied, and will be implied whenever the conduct of the person in whose name a transaction has been entered into is such as to show that he adopts the transaction in whole or in part; mere acquiescence or inactivity may be sufficient; (see *Bowstead* art. 17, p. 66.) The commentary has the following sentence:

‘Where the silence or inactivity is known to the third party, an estoppel may in appropriate cases arise against the principal, regardless of his actual intention (which alone is relevant to the ratification).’”

66. In order to form a view on the authority to enter into the Novation Agreements is necessary to form a view on the preceding transactions. This is not least because Mr Hume-Kendall characterises the entry into the Novation Agreements as the sort of administrative

matter that he had authority to enter into. Whether that is a sustainable characterisation requires consideration of what the position was apart from the Novation Agreements.

67. I am satisfied that Mr Hume-Kendall had neither actual or ostensible authority on LOG's behalf to enter into any arrangement whereby LOG was to make loans to LPE or to LP&T for the purpose of acquiring the technology assets or the purchasing LPC's redeemable shares. The Company had adopted the model articles provided for at Schedule 1 to The Companies (Model Articles) Regulations 2008 as its articles of association. Article 7 of requires that any decision of directors must be taken at a meeting or in accordance with Article 8, which provides for a written resolution. The evidence is quite clear that both of those matters required the approval of the boards of LPC and LOG. The arrangements as documented the Technology Assets Sale Agreement and the Redeemable Shares Sale Agreement, and the loan arrangements as reduced to writing in 2019, are at odds with the proposals being considered by the board. Mr Hume-Kendall had no authority to approve such loans. That absence of authority was known to LG LLP, LPE and LP&T because, in each instance, those entities were acting by Mr Hume-Kendall and his knowledge is to be imputed to each of them. In my judgment the loans and the loan agreements entered into and executed in 2019 are void.

68. Similarly, I am entirely satisfied that there was no actual authority for Mr Hume-Kendall to enter into the Novation Agreements. It is abundantly clear that the board were ignorant of these documents. It is particularly striking that these documents were not considered at a meeting called in part to purport to ratify the facility arrangements said to have been entered into in 2018 with LPE and LP&T, which were reduced to writing in 2019. Nothing further than the ratification of those arrangements was considered, which I shall address below. There is no basis on which it could be said that the meeting impliedly authorised the entry into the Novation Agreements.

69. Moreover, I am satisfied that Mr Hume-Kendall was acting in breach of duty in executing the Novation Agreements. Pursuant to section 171 of the Companies Act 2006 a director owes the following duty:

“A director of a company must—

- (a) act in accordance with the company's constitution, and
- (b) only exercise powers for the purposes for which they are conferred.”

70. Pursuant to section 172 a director also has the following duty:

“(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole...

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.”

Subsection (3) refers to the rule that, where the directors know or ought to know that a company is insolvent or is likely to become insolvent, they have a duty to take into account the interests of creditors (see *BTI (2014) Limited and others v Sequana SA* [2019] EWCA Civ 112 per David Richards LJ).

71. Mr Sedgwick says in his witness statement that the Novation Agreements were executed to provide a “belt and braces approach” to ensure that LG LLP had no debt liability to LOG. In other words, they were designed to close off any claim that the Company otherwise

had to pursue LG LLP for the debt. In my judgment, it was not a proper exercise of any power that Mr Hume-Kendall had to enter into the Novation Agreements to do so as to insulate LG LLP from a claim by LOG, in circumstances where, as I shall explain below, it was unlikely that any debt due from LPE or LP&T would be recoverable. Nor was it consistent with his duty to promote the success of the Company or to consider the interests of creditors to have done so at a time when the Company was likely to become insolvent, if it was not actually insolvent. As to this, there was significant doubt as to the recoverability of the debt from its principal debtor, IOG; the principal source of funds to LOG had ceased lending; and, as recorded in the draft minutes for the meeting on 12th February 2020 the running costs of the Company ran to £200,000 a month. The minutes show that the Company was relying on funding ultimately derived from Mr Hume-Kendall, who would himself be subject to a restraint order in March 2019.

72. There is no basis to contend that the execution of the Novation Agreement was simply an administrative consequence of the ratification of the facility arrangements with LPE and LP&T. On the Respondents' case, the Novation Agreements were unnecessary and did not reflect the true position because the sums recorded as owed by LG LLP had in fact been lent to LPE and LP&T and this lending, which had not been authorised, had been ratified by LOG's board on 12th February 2020. There was no ratification of those arrangements to which the Novation Agreements could be said to be ancillary. I am satisfied that the board were not in possession of the material facts to enable them to make a proper judgment as to whether to ratify such lending or not. To the contrary the board were misled. They were not told that the facility agreements recording those arrangements were not in fact executed in June and July 2018 but in January 2019, shortly before they were asked to ratify the transactions. They were not told that they were to approve lending that had the effect of allowing an LLP owned by Mr Barker and Mr Hume-Kendall to buy the technology assets from those gentlemen for £20 million. Nor do the board appear to have understood that the net effect of the loan for £16.7 million to LP&T was to enable LG LLP to buy the LPC preference shares from itself under the circuitous arrangement I have described. Finally, they do not appear to have been aware that around £20 million of the monies purportedly lent by LOG to LPE and/or LP&T had actually been advanced directly by LCF to either LG LLP or its beneficial owners and a significant proportion of the lending had been paid to LG LLP's beneficial owners before the transactions that were to be financed by the purported loans took place. All of those matters would have been material to the approval of the facility agreements put before them. In the absence of that information, in my judgment the purported ratification of the loans purportedly made pursuant to those agreements was similarly void.

73. Again, ratification by the board of these loan agreements would have been a breach of the board's duties to LOG under 172 of the Companies Act 2006 in the financial circumstances in which the Company found itself. It should have been apparent to the directors that the Company was on the cusp of insolvency and there was no benefit to LOG in making loans to LPE and LP&T. LOG did not stand to make any return on the loans at all. It appears to me that it would have been a breach of the board's duty to consider the interest of creditors to ratify lending arrangements that would serve only to limit the ability to recover the monies immediately.

### **Transactions at an undervalue**

74. The second limb of the Applicants' case is that, if the Novation Agreements are otherwise valid and genuine, they nonetheless are challengeable as transactions at an undervalue. Section 238 of the 1986 Act provides as follows:

“(1) This section applies in the case of a company where—

(a) the company enters administration, or

(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.”

The “relevant time” for these purposes is the period of two years ending with the onset of insolvency, which in the case of a company in administration where the administrators were appointed out of court is defined as the date on which the notice of intention to appoint is filed at court (section 240 of the 1986 Act).

75. It is also a requirement that the company must either be unable to pay its debts at the time of the impugned transaction or must have become unable to pay its debts by reason of the impugned transaction; although this requirement is presumed to be satisfied where the transaction was entered into with a person connected with the company (section 240(2) IA 1986). In determining whether the defence at section 238(5) IA 1986 applies, it is the company which must act in good faith and have reasonable grounds for believing that the transaction would benefit it, rather than the person entering into the transaction with the company (*Sinai Securities v Rosshill Properties Ltd* [2004] BCC 986, *per* Hart J at paragraph 21).

76. I reject the Respondents’ contention that no monies were owed by LG LLP. I am unable to accept the Mr Hume-Kendall and Mr Sedgwick’s account in the absence of independent corroborating evidence, given their willingness to produce misleading documents. In my judgment the best guide to LG LLP’s indebtedness is given in LOG’s trial balances, drafted prior to the insolvency of LCF and the possibility of action by LCF’s administrators. By the Novation Agreements, Mr Hume-Kendall sought to transfer LG LLP’s borrowing to LP&T and LPE. There was however, no consideration given by LG LLP for its release and the



payment covenants given by LPE and LP&T did not have any value. LPE was dormant and its only assets were LAI and ITI, the value of which was entirely uncertain, given that the contemplated valuation did not take place. Even if the sale of the preference shares by LPC to LP&T had completed, about which there is doubt, LP&T's only assets were the preference shares in LPC, the value of which was entirely dependent on the value of LOG, which was insolvent, or likely to become insolvent, as at 15th February 2019. The preference shares therefore had no value. Neither LPE nor LP&T seem to have had any cash from which to repay loans to them.

77. These transactions took place shortly before the entry into administration of the Company, within the relevant period and at a time when it was plainly insolvent. Their effect was to substitute as debtor companies that were unable to meet the debts in place of LG LLP, which might have valuable claims against the recipients of the monies received from LOG. There is no basis on which they can properly be regarded as being for the Company's benefit. If I am wrong that the Novation Agreements are void, the order that I should make pursuant to section 238 of the 1986 Act would be to set aside those agreements.

### **Sham**

78. The final ground on which the Applicants challenge the Novation Agreements is that of sham. Lord Diplock's speech in *Snook v London and West Riding Investments* [1967] 2 QB 786 at 802 provides the classic definition as follows:

"...it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co. v. Maclure and Stoneleigh Finance Ltd. v. Phillips*), that for acts or documents to be a "sham," with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

79. There is a strong presumption that parties intend to be bound by the terms of the agreements entered into by them and, consequently, a strong and natural presumption against holding that a provision or a document is a sham (*National Westminster Bank v Jones* [2001] 1 BCLC 98, *per* Neuberger J at [98]). In *Hitch v Stone* [2001] EWCA Civ 63, Arden LJ (as she then) was noted at paragraph 64 that a determination that a document is a sham requires a careful analysis of the facts. She summarised the following points that she had derived from earlier authorities:

"65. First, in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties.

66. Second, as the passage from *Snook* makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.

67. Third, the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement which unfavourable to one of them, or artificial, and a situation where

they intend some other arrangement to bind them. In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship.

68. Fourth, the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding. The proper conclusion to draw may be that they agreed to vary their agreement and that they have become bound by the agreement as varied: see for example *Garnac Grain Co. Inc v H.M.F. Faure and Fairclough Ltd.* [1966] 1 QB 650, 683-4 per Diplock LJ, which was cited by Mr Price.

69. Fifth, the intention must be a common intention: see Snook's case"

80. Here it is said that monies were advanced by LCF and LOG to LG LLP or its beneficial owners and were recorded as debts due from LG LLP to LOG. Subsequently, following an enquiry from LOG's auditors as to the collectability of the monies lent to LG LLP, transaction documents were produced that purported to show that the monies lent to LG LLP had in fact been lent to LPE and LP&T or that LOG's loans to LG LLP had been novated to LPE and LP&T. The net effect of the transactions was that the beneficial owners of LG LLP, and in particular Mr Barker and Mr Hume-Kendall, received the monies loaned to LG LLP, while retaining beneficial ownership of the assets purportedly transferred by those transactions. The Applicants contend that the Novation Agreements are a sham designed to conceal from them the fact that LG LLP is a substantial debtor of LOG and to shield its members from recovery action by any office-holders appointed over LOG. Alternatively, if, contrary to the position set out above, LG LLP did not owe LOG any money, then the purported effect of the Novation Agreements differed from the actual contractual position between the parties. Accordingly, they are also a sham and of no effect and should be set aside.

81. In view of my conclusions above it is not necessary to consider this element of the Applicant's case. I was not addressed on it in detail, but it is certainly the case that the Novation Agreements are at odds with the case advanced by the Respondents now. They contend that there was no loan to LG LLP but the Novation Agreements say that there was. Mr Sedgwick's characterisation of the Novation Agreements as being part of a "belt and braces" approach suggests that the intention behind the agreements was that if, contrary to the Respondents' primary position that there was no loan to LG LLP at all, it was found there was such a loan, then LG LLP would be released from it. The Applicants' case is that LG LLP was indeed a substantial debtor of LOG and for the purposes of this application I accept that. The intention on the part of the signatories to the Novation Agreements – to free LG LLP from its debt to the Company, thus accords with the position on the face of the documents. Given the Applicants' contentions as to the debt due from LG LLP and my findings as to the existence of that debt, it is difficult to characterise the Novation Agreements as shams.

## **Conclusion**

82. I am satisfied that the Novation Agreements are void on the basis that they were entered into without authority. Alternatively, I would set them aside on the basis that they constitute transactions at an undervalue.