



**HHJ Brian Rawlings:**

## **INTRODUCTION**

1. This is an appeal, under Rule 14.8(1) of the Insolvency Rules 1986 (as amended) by Claims Direct Plc, acting by its liquidators (“the Applicant”). The Applicant appeals against the decision, dated 1 July 2020 of Lloyd Hinton (“the Respondent”) the Trustee in Bankruptcy of Colin Poole (“Mr Poole”) to reject the proof of debt dated 7 January 2020 submitted by the Applicant to the Respondent. (“the Proof of Debt”).
2. Mr Poole is a former director of the Applicant. Two claims are advanced in the Proof of Debt, both relate to the conduct of Mr Poole while he was a director of the Applicant in 2000. The first claim is that Mr Poole fraudulently breached the duties he owed as a director of the Applicant in relation to the acquisition, by the Applicant of a part of the business of Poole & Co, a solicitors practice of which Mr Poole was sole proprietor (“the Breach of Duty Claim”). The second claim is a claim against Mr Poole in the tort of deceit, again related to the acquisition of part of Poole & Co’s business by the Applicant (“the Deceit Claim”).
3. The Breach of Duty Claim and the Deceit Claim both seek damages equivalent to the whole of the purchase price paid to Poole & Co by the Applicant (and therefore to Mr Poole as its sole proprietor) of £9,750,000 (“£9.75m”).
4. In this judgement I will (in separate headed sections):
  - (a) set out the relevant background to the Breach of Duty Claim and the Deceit Claim;
  - (b) refer to previous relevant proceedings, namely:
    - (i) Company Director Disqualification proceedings taken by the Secretary of State, against Mr Poole and Anthony Sullman (“Mr Sullman”) another director of the Applicant in connection with their conduct as directors of the Applicant (“the CDDA Proceedings”);
    - (ii) Proceedings commenced against Mr Poole in 2008 before the Solicitors Disciplinary Tribunal (“SDT”) in connection with matters relevant to this appeal (“the SDT Proceedings”); and
    - (iii) a claim brought by Peter Edward Carroll (“Mr Carroll”) against Mr Poole in which Mr Carroll claimed that the Applicant had assigned to him the benefit of (in substance) the Breach of Duty Claim and Mr Carroll pursued that claim against Mr Poole (“the Carroll Claim”).
  - (c) describe briefly the Breach of Duty Claim and the Deceit Claim;
  - (d) confirm who represented the Applicant and the Respondent on the hearing of this appeal and the stance that they took on hearing of the appeal. I will also explain that other parties (including Mr Poole) were invited to participate in this appeal, but have not done so;
  - (e) describe the evidence that I have available to me to determine the appeal;
  - (f) set out:
    - (i) the basis upon which the Applicant advanced the Breach of Duty Claim and the Deceit Claim in the Particulars of Debt dated 7 January 2020 which the Applicant sent to the Respondent with the Proof of

- Debt also dated 1 July 2020 (“the Particulars of Debt” and “the Proof of Debt);
- (ii) Mr Poole’s response to the Particulars of Debt set out in a document dated 4 March 2020 (“the Response”);
  - (iii) the Applicant’s reply to the Response, dated 29 May 2020 (“the Reply”);
  - (iv) the reasons given by the Respondent, in the “Trustee’s Statement of Reasons” dated 1 July 2020 for rejecting the Proof of Debt (“the Trustee’s Reasons”); and
  - (v) the grounds on which the Applicant appeals against the Respondent’s rejection of the Proof of Debt
- (g) explain my approach to the evidence that is available to me to determine this appeal;
- (h) set out my decision on the Deceit Claim and my reasons for that decision;
- (i) set out my decision on the Breach of Duty Claim and my reasons for that decision; and
- (j) determine the value of the Applicant’s claim.

## **BACKGROUND**

5. In the mid 1990’s the government took steps to restrict the availability of legal aid to fund civil proceedings.
6. In December 1995, Mr Sullman incorporated Claims Incorporated Plc (“Claims Inc”). Claims Inc, from 1996, started to offer a service to prospective personal injury claimants, by which, in return for 30% of the proceeds of a successful claim, Claims Inc would locate a solicitor to pursue the claim on behalf of the claimant and, if the claim was unsuccessful, would provide an indemnity to the claimant, both for the costs of the solicitor that pursued the claim on the claimant’s behalf and for any costs of the defendant which the claimant was ordered to pay.
7. On 1 June 1996 Claims Inc entered into an agreement with Poole & Co, a firm of solicitors of which the sole proprietor was Mr Poole (“Referral Agreement”). Under the Referral Agreement prospective personal injury claimants who accepted the service offered by Claims Inc were exclusively referred, by Claims Inc to Poole & Co. The Referral Agreement provided that:
  - (a) Poole & Co could decide, either to pursue the claim on behalf of the potential claimant themselves or to refer the potential claimant to a solicitor which was a member of an approved panel (“Panel Solicitor”);
  - (b) Poole & Co would be entitled to charge a fee to any Panel Solicitor to whom it referred a potential claimant, the fee was stated to be for Poole & Co’s costs for vetting the claim before it was referred to the Panel Solicitor. The fees paid to Poole & Co by Panel Solicitors, became over time, because of the large number of referrals made to Panel Solicitors very substantial (“the Vetting Business”); and
  - (c) the agreement lasted for the period of three years from 1 June 1996 and thereafter was terminable by either party, giving three months written notice to the other.

8. Mr Poole became a director of Claims Inc on 8 July 1997.
9. From August 1999, Claims Inc offered to provide to prospective claimants, at no cost to the prospective claimant, insurance against the risk of the prospective claimant having to pay the defendant's costs, if their claim was unsuccessful. The insurance was only provided if the prospective claim was assessed as having a better than 50% chance of succeeding. A premium was payable which Claims Inc indicated would not be payable if the claimant lost and would be recovered from the defendant if the claimant won.
10. In early 2000, the board of Claims Inc decided to float its claims business on the London Stock Exchange and the Applicant (Claims Direct Plc) was incorporated on 27 March 2000 to acquire the business of Claims Inc and to offer the Applicant's shares to the public ("the Floatation").
11. In May 2000, as the Applicant was being prepared for its shares to be offered to the public, the board of Claims Inc (which still owned and operated the claims business at that point) discussed the possibility of ending the arrangement by which Poole & Co carried on the Vetting Business with a view to the Vetting Business being conducted by the Applicant after the Floatation. The reason presented to the board of Claims Inc for ending the running of the Vetting Business by Poole & Co was that Investec, who were underwriting the Floatation considered that Mr Poole's role as a director of the Applicant and as sole proprietor of Poole & Co would give rise to a conflict of interest which would not be viewed favourably by potential buyers of the Applicant's shares.
12. PwC were instructed to advise upon a fair value for the Vetting Business and on 12 June 2000 PwC produced what they referred to as a "indicative valuation" of £27 million for the Vetting Business ("the PwC Valuation").
13. On 20 June 2000, the board of the Applicant met (Mr Poole not attending) and considered a draft of an agreement between the Applicant and Poole & Co for the acquisition of the Vetting Business by the Applicant. The board were told, in a memo dated 17 June 2000, prepared by Paul Doona, a director of the Applicant ("Mr Doona's Memo") that a price of £9.75m had been agreed in principle, between Mr Sullman and Mr Poole for the acquisition of the Vetting Business by the Applicant from Poole & Co. A copy of the PwC Valuation was provided with Mr Doona's Memo and comments on the PwC Valuation, and the price agreed between Mr Sullman and Mr Poole were made in that memo. The board of the Applicant approved the purchase price of £9.75m and the draft agreement, which it was told was subject to amendment.
14. On 5 July 2000 there was a further board meeting of the Applicant, by this time the original proposal that the Applicant would acquire the Vetting Business from Poole & Co had changed to one in which Poole & Co would retain the Vetting Business, but Poole & Co would sub-contract the vetting of claims to the Applicant and pay the vetting fee that it received from Panel Solicitors to the Applicant. The reasons for the change, in simple terms was that Law Society Regulations did not allow a solicitor to pay a referral fee to anyone who was not another solicitor and so the new structure provided for Panel Solicitors to continue paying vetting fees to Poole & Co, (a

solicitor practice). The final form of the agreement was approved by the board of the Applicant, with Mr Poole attending but not voting on the agreement and signed on 5 July 2000. Putting it neutrally, and in general terms, for the moment, the date of completion of the sale and purchase depended upon when Mr Poole disposed of Poole & Co (“the Vetting Business Agreement”).

15. On 6 July 2000 the Applicant issued its prospectus to the London Stock Exchange (“the Prospectus”). The Prospectus explained that historically the Vetting Business had been carried out by Poole & Co a firm of solicitors of which Mr Poole, the chief executive of the group, was the sole proprietor, that Mr Poole intended to dispose of his interest in Poole & Co, after the admission of the Applicant’s shares to the Stock Exchange and that once Mr Poole had disposed of his interest in Poole & Co, the Vetting Business would be sub-contracted by Poole & Co to the group.
16. On 18 August 2000 an agreement was entered into between Mr Poole and Mr Jake Bennett (“Mr Bennett”), by which Mr Poole agreed to sell, and Mr Bennett agreed to buy the goodwill and assets of Poole & Co, with completion to take place on 1 September 2000 (“the Poole & Co SPA”). However by clause 11 of the Poole & Co SPA, Mr Bennett could serve an Opt Out Notice opting out of purchasing Mr Poole’s interest in Poole & Co, or an Opt In Notice opting to continue with the purchase, in either case before the first anniversary of the date of the agreement, if he did neither by the first anniversary he would be taken to have opted out. If an Opt Out Notice or no notice was served by the first anniversary of the date of the agreement, Mr Bennett would transfer the business and assets of Poole & Co back to Mr Poole.
17. On 22 August 2000, Mr Poole told the Applicant that he had agreed a sale of Poole & Co to Mr Bennett with effect from 1 September 2000.
18. The Applicant has produced a copy a memo written by Mr Rew, another director of the Applicant, on 31 August 2000 (“Mr Rew’s Memo”). Mr Rew’s Memo purports to record what Mr Poole told Mr Rew during a telephone call that day. Mr Rew’s Memo says “You told me that you would cease to be a partner (ie proprietor) of Poole & Co with effect from midnight tonight, on this basis and on the understanding that Claims Direct will be in a position to commence providing the Services tomorrow- Paul Doona and I propose to sign off on the payment to Poole & Co of £9.75 million plus vat, by close of banking hours tomorrow”. The Applicant says that Mr Rew’s Memo was sent by facsimile to Mr Poole and it produces a facsimile sheet as evidence of that. It is fair to say at this point that Mr Poole does not accept that Mr Rew’s Memo fairly reflects the content of any telephone call, that he had with Mr Rew and he does not accept that he saw Mr Rew’s Memo.
19. On 1 September 2000, the Applicant transferred £9.75m to Poole & Co.
20. Between September and November 2000 the media exposed complaints made by personal injury claimants that they had been misled by the Applicant as to the recoverability of insurance premiums that had been paid to protect claimants against the risk of having to pay the defendant’s costs if they lost. This media exposure led to a collapse in the share price of the Applicant.

21. Mr Poole resigned as director of the Applicant on 29th of August 2001 and in May 2002 Mr Bennett opted out of purchasing the business and assets of Poole & Co and that business and those assets were transferred back to Mr Poole.
22. In July 2002 Administrators were appointed to the Applicant and it has subsequently passed into creditors voluntary liquidation.

### **PROCEEDINGS TAKEN AGAINST MR POOLE**

23. In 2004 the Secretary of State commenced the CDDA Proceedings against Mr Poole and Mr Sullman, in connection with their conduct as directors of the Applicant. Shortly before the CDDA Proceedings were due to be heard, Mr Poole agreed to provide an undertaking for 10 years not to be a director of or involved in the management of a limited company (“the Disqualification Undertaking”). Mr Poole agreed to accept, (for the purposes of the CDDA Proceedings only) that there were 6 matters which he did not dispute made him unfit to be a director/manager of a limited company. One of the matters he did not dispute (“Fact 6”) was that-“ Instead of Claims Direct exercising its right to terminate its agreement with Poole & Co he was involved in payment being made by Claims Direct to him personally of £9.75 million to acquire the rights under the agreement”.
24. The CDDA Proceedings continued against Mr Sullman only, to trial before Mr Justice Norris who delivered his judgment in December 2008 (“the Norris Judgment”). By the Norris Judgment, Norris J made six findings of conduct on the part of Mr Sullman, which he considered made Mr Sullman unfit to be a director of, or concerned in the management, of a limited company. One of those six findings was, in summary, that Mr Sullman had not approached his negotiation with Mr Poole for the acquisition, by the Applicant of the Vetting Business of Poole & Co on a proper commercial basis, but instead as a device to overcompensate Mr Poole at the expense of the Applicant’s shareholders.
25. In October 2008, the SDT Proceedings were commenced against Mr Poole, by the SDT. The SDT Proceedings were heard in October and December 2010 and the SDT published its decision on 11 February 2011 (“the SDT Decision”).
26. By the SDT Decision, the SDT found that Mr Poole had acted dishonestly, including in its view misleading investors in and the underwriters of the floatation of the Applicant, by stating in the Prospectus that he was divesting himself of his interest in Poole & Co, whereas Mr Poole did not, by the Poole & Co SPA divest himself of that interest. As a consequence of the adverse findings that the SDT made, Mr Poole was struck off the roll of solicitors.
27. On 18 December 2014, Mr Carroll issued the Carroll Claim against Mr Poole, claiming to be equitable assignee of a claim which the Applicant had against Mr Poole for “compensation for fraudulent breach of trust and fiduciary duty in dishonestly applying or causing to be applied the sum of £9,750,000 being money belonging to [the Applicant] to his own use and in deliberately and dishonestly concealing that fact”.

28. Mr Poole served a defence to the Carroll Claim on 22 April 2015. He denied that the Applicant had a valid claim against him and that the claim had been validly assigned to Mr Carroll.
29. Mr Poole was made Bankrupt on a petition presented against him by HMRC, before the Carroll Claim was determined. The Respondent was appointed as Mr Poole's Trustee in Bankruptcy and Mr Carroll submitted a proof of debt to the Respondent. The Respondent admitted Mr Carroll's proof of debt, but Mr Poole appealed against that decision. The matter came before HHJ Worster on 21 May 2019, in a judgment handed down by HHJ Worster on 29 August 2019, HHJ Worster allowed Mr Poole's appeal, finding that the Applicant's claim had not been validly assigned to Mr Carroll.

### **THESE PROCEEDINGS**

30. On 7 January 2020, the Applicant submitted the Proof of Debt to the Respondent, with attached Particulars of Debt of the same date. The Particulars of Debt asserted that:
- (a) in receiving £9.75m from the Applicant, under the Vetting Business Agreement, Mr Poole acted in fraudulent breach of trust and in breach of the fiduciary duties that he owed to the Applicant because, in simple terms, he knew that, what Poole & Co had to sell was not worth 9.75m;
  - (b) Mr Poole: (i) had been a party to the representation in the Prospectus that he intended to dispose of his interest in Poole & Co after admission of the Applicant's shares to the Stock Exchange; (ii) entered into the Vetting Business Agreement which provided that the £9.75m would only be paid once Mr Poole disposed of his interest in Poole & Co"; (iii) told Mr Rew that he would dispose of his interest in Poole & Co from midnight on 31 August 2000, in consequence of which the Applicant paid £9.75m to Mr Poole; and (iv) Mr Poole did not in fact divest himself of his interest in Poole & Co with effect from midnight on 31 August 2000 or at all. This is said to amount to deceit; and
  - (c) reliance was placed by the Applicant, in support of the Proof of Debt, upon: (i) the findings in the Norris Judgment; (ii) Fact 6, not disputed by Mr Poole for the purposes of the Disqualification Undertaking, given by Mr Poole; and (iii) the findings of the SDT, in the SDT Determination.
31. Mr Poole submitted to the Respondent a detailed response to the Particulars of Debt dated 4 March 2020 seeking to refute the Applicant's claims ("the Response").
32. On 29 May 2020 the Applicant sent to the Respondent a reply to Response ("the Reply").
33. On the 1st of July 2020 the Respondent, as Mr Poole's trustee in bankruptcy rejected the Applicant's proof of debt for reasons that he set out in the "Trustee statement of reasons" dated 1 July 2020, in doing so he largely accepted the case put forward by Mr Poole in the Response ("the Trustee's Reasons").

34. On 21 July 2020 the Applicant appealed against the Respondent's rejection of its proof of debt, setting out the grounds of its appeal ("Grounds of Appeal").
35. On 20 November 2020 I gave directions to determine the appeal. In the recital to those directions, I recorded that the Respondent had indicated that he proposed to take a neutral stance in relation to the appeal and that if no application was made by any of the parties listed in paragraph 2 of my direction order, to be joined as additional respondents, the court would proceed to determine the appeal in the absence of oral evidence and with no oral argument in favour of refusing the appeal. At paragraph 2 of the order I directed the Applicant to serve the application and evidence in support and my order upon Mr Poole, the executor's of Michelle Poole (Mr Poole's late wife) ("the Estate") and HMRC and at paragraph 3 I directed that, if any of those parties wished to apply to be joined as additional respondent to the appeal, they must file and serve an application to be joined on the existing parties by 4:00 PM on: (i) 10 December 2020 in the case of Mr Poole and the Estate; and (ii) 31 December 2020 in the case of HMRC.
36. The reasons why I included in my order the matters set out by me in paragraph 35 above is that, I had before me evidence that the Respondent's solicitors had sought confirmation from Mr Poole and the solicitors representing the Estate of whether Mr Poole and/or the Estate wished to become parties to the appeal, but it appeared that neither wished to do so. I was surprised, given the possible financial interest of the Estate in the outcome of the appeal and that Mr Poole had previously submitted his detailed Response to the Particulars of Debt, that neither appeared to wish to be joined to the appeal. I wished to ensure therefore that both Mr Poole and the Estate were aware of the neutral stance that the Respondent intended to take on the hearing of the Appeal and that, absent their applying to be joined as respondents themselves to the appeal, the court would not have any oral evidence or oral argument before it in opposition to the appeal, when it heard the appeal. As for HMRC, the Respondent confirmed that, other than the Applicant's claim, HMRC was the single largest creditor of Mr Poole and, appeared therefore to have an interest in opposing the admission of the Applicant's claim for dividend. I wanted to be sure therefore that HMRC also had an opportunity to apply to be joined as respondent and understood how the appeal would be dealt with by the court, in the event that it elected not to be joined. I gave HMRC more time to apply to be joined, because, unlike Mr Poole and the Estate it had not been in correspondence with the Respondent regarding the Appellant's proof of debt and may need more time to decide whether it wished to be joined as a respondent.
37. In the event, no party has applied to be joined as an additional respondent to these proceedings and the Applicant's appeal against rejection of its proof of debt by the Respondent has therefore proceeded on the basis outlined in the recital to my order of 20 November 2020.

## **REPRESENTATION**

38. At the hearing before me, on 11 May 2021, the Applicant was represented by Mr. Robinson and the Respondent, by Ms Palser, although as already indicated the



Respondent has taken a neutral stance and Ms Palser has made no submissions in opposition to or support of the Applicant's appeal.

### **EVIDENCE**

39. The evidence I have before me consists of:
- (a) the Proof of Debt and Particulars of Debt dated 7 January 2020, endorsed with a statement of truth, signed by the Applicant's solicitors;
  - (b) the Response dated 4 March 2020 endorsed with a statement of truth signed by Mr Poole and copies of the documents attached to it;
  - (c) the Reply to the Response dated 29 May 2020 endorsed with a statement of truth signed by the Applicant's solicitors and attached documents;
  - (d) the Trustee's Reasons dated 1 July 2020, signed by the Respondent;
  - (e) the Grounds of Appeal dated 21 July 2020; and
  - (f) a bundle of documents produced by the Applicant.
40. No witness attended for cross examination.

### **SUBMISSIONS TO THE RESPONDENT AND THE RESPONDENT'S DECISION ON THE PROOF OF DEBT**

41. I have already provided a very brief summary of the content of the Particulars of Debt, but I will now set out the content of the Particulars of Debt in more detail and will then summarise the contents of: (i) the Response; (ii) the Reply; (iii) the Trustee's Reasons; and (v) the Grounds of Appeal.

#### **The Particulars of Debt**

42. Two heads of claim are set out in the Particulars of Debt, namely: fraudulent breach of trust/breach of the fiduciary duties that Mr Poole owed to the Applicant, as its director; and deceit. I will deal with each in turn.
43. As to fraudulent breach of trust/breach of fiduciary duty, the Applicant says:
- (a) The duties that Mr Poole owed to the Applicant included: (i) to act in what he considered, bona fide, to be in the best interests of the Applicant; (ii) to exercise the powers conferred upon him for the purpose for which they were conferred; (iii) not to make a personal profit from his position without the fully informed consent of the Applicant; (iv) not to place himself in a position in which his personal interests might conflict with the interest of the Applicant and/or his duties to the Applicant; and (v) to use the property of the Applicant for its benefit and not to convert such property to his own use;
  - (b) The findings in the Norris Judgment in the CDDA Proceedings and of the SDT, include findings of fact which the Applicant relies upon;
  - (c) the Referral Agreement entered into between Claims Inc and Poole & Co on 1 June 1996 expired 3 years later, in June 1999 and was thereafter terminable on 3 months-notice;

- (d) the PwC Valuation of the Vetting Business of £27m assumed a maintainable income of at least £4.5m for 3 years and so was based on a rolling 3 year contract, not a rolling 3 month contract;
- (e) Norris J, in the Norris Judgment found, against Mr Sullman that: (i) PwC had been told that the 3 year contract had been renewed for a further 3 years, which is why their valuation was based on 3 years turnover, but that was not true; (ii) Mr Sullman knew that a payment of £27m could not be justified, so he decided to see what he could get away with. Investec, the underwriters of the floatation, had said that they could not see a figure in excess of £10m being acceptable to shareholders, so Mr Sullman settled on £9.75m; (iii) during discussions between Mr Sullman and Mr Poole, about the floatation, in August 1999, Mr Sullman had talked of £20m going in Mr Poole's direction as a result of the floatation of the Applicant; and (iv) the acquisition of Poole & Co's interest in the Vetting Business, by the Applicant was not undertaken by Mr Sullman (as a director of the Applicant) on a commercial basis, from the Applicant's perspective, but as a means of overcompensating Mr Poole, in order to ensure that he received £20m from the floatation of the Applicant;
- (f) in receiving and retaining the £9.75m, Mr Poole acted in fraudulent breach of trust and breach of his fiduciary duties to the Applicant, in that he: (i) exercised his powers for his own benefit; (ii) failed to act in a way that he considered, bona fide, to be in the best interests of the Applicant; (iii) made a personal profit from his position, without the fully informed consent of the Applicant; (iv) placed himself in a position where his personal interests conflicted with the interests of the Applicant; and (v) converted the Applicant's property to his own use;
- (g) Mr Poole ought to have taken steps to terminate the Referral Agreement, rather than entering into the Vetting Business Agreement (pursuant to which he received £9.75m), which he accepted, for the purposes of the CDDA Undertaking was one of the matters that made him unfit to act as a director;
- (h) Mr Poole knew that: (i) the Vetting Business was worth no more than £7.5m, because Investec had told him that; (ii) PwC had valued the Vetting Business on the basis that a new 3 year deal had been agreed and he knew that it had not been; (iii) there was no justification for a price of £9.75m and, as Norris J found, it was an unjustified means of ensuring that he got £20m from the floatation; and (iv) he was furthering his own interests at the expense of the Applicant and thereby was acting dishonestly and in breach of the duties that he owed to the Applicant.

44. As to deceit:

- (a) Mr Poole represented at page 8 of the Prospectus that "Colin Poole intends to dispose of his interest in Poole & Co after admission. These arrangements are being entered into.... to remove the related party relationship that currently exists;
- (b) the Vetting Business Agreement, provided at clause 1.1 and 3 that the £9.75m was payable to Mr Poole one day after he ceased to be "proprietor of, or a partner of, and/or otherwise engaged by Poole & Co";
- (c) Mr Poole informed the board of the Applicant, through Mr Rew, that he would dispose of his interest in Poole & Co and cease to be a partner or

proprietor of it with effect from midnight on 31 August 2000, as a result of that representation, the Applicant paid the sum of £9.75 million to Mr Poole on 1 September 2000;

- (d) Mr Le Poidevin, of counsel, who drafted the Poole & Co SPA said, in an advice directed to Mr Poole and Mr Bennett: “No draftsman can disguise the fact that during the period [of 1 year during which Mr Bennett could choose whether or not to opt in] the practice is being carried on entirely for Mr Poole's benefit..... The assets will be formally vested in Mr Bennett but the benefit of them will not. In my view therefore Mr Poole will remain in law either a sole practitioner ...or else a partner with Mr Bennett.”;
- (e) the SDT concluded that Mr Poole, in the Poole & Co SPA had not entered into a bona fide disposal, of his interest in Poole & Co, and his conduct was dishonest; and
- (f) Mr Poole knew, in representing to the board of the Applicant, on 31 August 2000, that he would dispose his interest in Poole & Co with effect from midnight on 31 August 2000, that that representation was false or he was reckless as to its truth.

## **The Response**

45. In the Response, Mr Poole says, as to the Breach of Duty Claim:

- (a) he accepts that he owed the duties as director of the Applicant asserts in the Particulars of Debt;
- (b) he denies breaching any of those duties in receiving £9.75m under the Vetting Business Agreement:
  - (i) whilst the Referral Agreement expired on 31 May 1996, Mr Sullman had negotiated the terms of a new agreement with Mr Poole;
  - (ii) in preparing the PwC Valuation, PwC were aware of the contractual position and scrutinised the relevant documents;
  - (iii) on 20 June 2000 the Board of the Applicant (excluding Mr Poole) approved the Vetting Business Agreement, including the price of £9.75m, having considered the PwC Valuation and Mr Doona's Memo, in which, Mr Doona said that: the Referral Agreement had expired and was subject to 3 months-notice; in the fullness of time a new agreement would probably have been entered into, but events were overtaken by the floatation; and the PwC valuation had been prepared comparing the income streams of the Applicant's business and the Vetting Business, applied to the market valuation of the Applicant, which valuation methodology, certain members of the board questioned the validity of;
  - (iv) in approving the Vetting Business Agreement, the board of the Applicant considered: the value to the Applicant of the Vetting Business; the difficulties that the Applicant would encounter if the Referral Agreement were terminated; and the advantages to the Applicant of preserving the relationship with Poole & Co;

- (v) £20m was roughly what Mr and Mrs Poole stood to receive for their shares when added to what Cartmel Securities Ltd (“Cartmel”), a discretionary trust from which Mr Poole/his family expected to benefit if it sold its shares in the Applicant if the business of the Applicant were valued on floatation at £200m;
- (vi) Mr Poole did not owe a duty to act in the best interests of the Applicant when acting as counterparty to the Vetting Business Agreement;
- (vii) Mr Poole owed no duty to terminate the Referral Agreement using his own powers as sole practitioner of Poole & Co and he had no power to do so on behalf of the Applicant. The board of the Applicant could have terminated the Referral Agreement, but, Norris J in the Norris J Judgment had recognised that terminating the Referral Agreement would incur cost and difficulty that a competent disinterested director would seek to avoid;
- (viii) The Vetting Business Agreement had been entered into by the Applicant following a board resolution of the Board of directors of the Applicant, on 20 June 2000. The board had been fully informed of all relevant facts and matters of which Mr Poole was aware (in Mr Doona’s Memo) before it resolved to enter into the Vetting Business Agreement and pay the price of £9.75m and Mr Poole had abstained from voting on that resolution. There was therefore no breach of duty by Mr Poole.

46. As for the Deceit Claim, Mr Poole says:

- (a) the representation in the Prospectus is true, Mr Poole did intend to dispose of his interest in Poole & Co, on 6 July 2000;
- (b) the Vetting Business Agreement did not specify, as a pre-condition to completion of that agreement, and payment of the £9.75m, that Mr Poole must cease to be “proprietor of, or a partner of, and/or otherwise engaged by Poole & Co”. The date upon which Mr Poole ceased to be “proprietor of, or a partner of, and/or otherwise engaged by Poole & Co” merely effected the date on which completion took place. The latest date on which completion would take place was specified as 31 December 2000, and completion would take place on that date, regardless of whether Mr Poole had ceased to be “proprietor of, or a partner of, and/or otherwise engaged by Poole & Co” by that date;
- (c) neither the Prospectus nor the Vetting Business Agreement required Mr Poole to dispose of his interest in Poole & Co, they merely reflected his intention to do so;
- (d) Mr Poole did not tell Mr Rew that he would cease to be proprietor of, or a partner in Poole & Co from midnight on 31 August 2000 and he did not see Mr Rew’s Memo; and
- (e) Mr Poole was, in any event not “a proprietor of, or a partner of, and/or otherwise engaged by Poole & Co” after midnight on 31 August 2000. Mr Poole denies seeing Mr Le Poidevin’s advice

of 17 August 2000 and he says that, in any event, Mr Le Poidevin's advice about Mr Poole being a proprietor or partner after 1 September 2000, was most likely a reference to the Law Society Rules and Regulations (not an advice as to the position under the general law). Notwithstanding suggestions to the contrary in the SDT Determination and by the Applicant, Mr Le Poidevin has confirmed, in an e mail of 28 June 2010, that the Poole & Co SPA was not a sham.

47. Mr Poole also says, in the Response that the judgments of Norris J and the SDT are not binding on the Respondent, in considering the Proof of Debt; and both the Applicant's claims are statute barred.

## **The Reply**

48. The Reply responds to Mr Poole's Response.

49. As to the Breach of Duty Claim, the Applicant says:

- (a) Mr Poole has not responded to the assertion in the Particulars of Debt, that the PwC valuation was based upon a 3 year rolling contract applying to the Referral Agreement, merely asserting that PwC were aware of the contractual position and had scrutinised all the relevant documents;
- (b) if PwC believed that the Applicant had to give 3 years notice to Poole & Co to terminate the Referral Agreement, then that was wrong and PwC confirmed in the PwC Valuation that it had relied on management as to the financial position of the Applicant;
- (c) the failure of PwC to consider the effect of the Applicant being able to terminate the Referral Agreement, by 3 months-notice, in the PwC Valuation demonstrates that PwC were unaware of that fact;
- (d) the assertion of Mr Poole that the board of the Applicant had considered the three matters (set out by me in paragraph 45 (b) (iv) above) should be disregarded because none of those matters are recorded in the minutes of that board meeting that considered the Vetting Business Agreement and Mr Poole asserted in his defence to the Carroll Claim, that he did not attend the board meeting at which the Vetting Business Agreement was discussed and could not comment on what was discussed;
- (e) it is denied that the board of the Applicant gave its fully informed consent to the acquisition of the Vetting Business on the terms of the Vetting Business Agreement, because: (i) the board was not told that the PwC Valuation was based upon incorrect information as to notice required to terminate the Referral Agreement and the directors were told that the price negotiated of £9.75m had been negotiated "in light of the advice received from PwC"; (ii) Mr Doona's Memo, whilst confirming the basis on which the PwC valuation had been prepared and that certain members of the board questioned that approach, went on to justify the approach on the basis that "there was wide sympathy for the view that a longer term agreement...would have been entered into in the fullness of time." (iii) Mr Poole and Mr Sullman took the position that a new 3 year agreement had

been agreed (as found by Norris J, in the Norris Judgment). It was to be inferred that Mr Sullman, as chairman of the relevant board meeting informed the meeting that a new 3 year agreement had been agreed, leading the directors to approve the Vetting Business Agreement, based on inaccurate information; (iv) the directors were not told (consistent with Norris J's finding in the Norris Judgment) that the £9.75m agreed did not result from an arms-length negotiation between Mr Sullman and Mr Poole, but from Mr Sullman "seeing what he could get away with" so far as Investec was concerned and procuring that Mr Poole received £20m from the floatation; and (v) the board were told on 20 June 2000 that the Vetting Business Agreement would end the related party relationship between Mr Poole and the Group and Mr Poole and Poole & Co, but on Mr Poole's case it would not, because the Vetting Business Agreement did not, he says, impose any obligation upon him to dispose of his interest in Poole & Co;

- (f) Mr Poole ought to have exercised his powers as director of the Applicant to prevent it from paying £9.75m to him personally. Fact 6 of the grounds of unfitness, in Mr Poole's CDDA Undertaking acknowledged this in saying "Instead of Claims Direct exercising its rights to terminate its agreement with Poole & Co, I was involved in payment being made to me personally in the sum of 9.75m", so Mr Poole breached his duty to exercise his powers as to the application of the Applicant's money for a proper purpose, given his knowledge of the matters summarised by me in paragraph 49 (e) above;
- (g) it was accepted that Mr Poole did not owe a duty to act in what he considered to be the best interest of the Applicant, when negotiating or acting as the Applicant's counterparty, so long as he did so with the fully informed consent of the Applicant, that required the consent of the Applicant's shareholders, not its board of directors and no valid consent was obtained from the Applicant's shareholders;
- (h) Mr Poole was under an obligation to ensure that the Applicant and its directors were aware of the Applicant's right to terminate the Referral Agreement and of the significant financial advantage to it of doing as opposed to paying £9.75m for the Vetting Business and Norris J, whilst accepting that there could be difficulties if the Referral Agreement was terminated stated "it does not follow that such a director would then have paid the maximum amount he could, without complaint from the shareholders irrespective of the true value of what he was acquiring"; and
- (i) Mr Poole's assertion that it was unnecessary for £9.75m to be paid to him under the Vetting Business Agreement, in order for Mr and Mrs Poole to receive £20m from the floatation, because Mr and Mrs Poole stood to receive £10.7m from the sale of Cartmel's shares is false, because the Due Diligence report prepared by Maclay Murray & Spens, solicitors ("MMS" and "Due Diligence Report) for the purposes of the floatation, states that no disposal of Cartmel's shares in the Applicant would be paid to Mr Poole or his family.

50. As to the Deceit Claim, the Applicant says:

- (a) it is not correct that the Prospectus and Vetting Business Agreement, merely reflected a present intention on the part of Mr Poole to dispose of

- his interest in Poole & Co: (i) the Prospectus says that “Assets relating to the claims vetting business currently carried on by Poole & Co will be acquired by the company. These arrangements are being implemented to improve the structure of the group’s processes, to enhance the efficiency of the group's operations and to remove the related party relationship that currently exists”.; (ii) Mr Poole accepted in evidence, to the SDT, that these words amounted to an “unqualified public promise” to remove the related party relationship; and (iii) the Vetting Business Agreement imposed an obligation on Mr Poole to cease to be “a proprietor of, or a partner of, and/or otherwise engaged by Poole & Co” in order for the sum of £9.75m to fall due for payment to Poole & Co (of which he was sole proprietor);
- (b) the advice of Mr Le Poidevin of 17 August 2000, was on two issues; (i) whether, under the Poole & Co SPA Mr Poole is a partner in the practice; and (ii) whether the agreement complies with the Law Societys’ rules and regulations. The advice went on to say that “as to the first point ...in my view, therefore, Mr Poole will remain in law either a sole practitioner, though employing others to do work for him, or else a partner with Mr Bennett depending on those arrangements.” So Mr Le Poidevin’s advice on that point did not relate to Law Society Rules and Regulations;
  - (c) whilst the Poole & Co SPA was a bona fide agreement, and not a sham, as confirmed by Mr Le Poidevin, in his e mail of 28 June 2010, Mr Le Poidevin also confirmed that compliance with regulations and other requirements were considered “on the footing that you retain the benefit of the practice”; and
  - (d) Mr Poole’s assertion that he did not see Mr Le Poidevin’s advice of 17 August 2000 is incredible.

51. Finally, as to the claim of Mr Poole, that the Breach of Duty Claim and the Deceit claim are statute barred:

- (a) The Breach of Duty Claim is not statute barred, because Mr Poole, as its director, was a trustee of the assets of the Applicant, the payment of £9.75m came from the assets of the Applicant which Mr Poole owed fiduciary duties to protect and the claim therefore falls under Section 21 (1) (b) of the Limitation Act 1980, to which no limitation period applies; and
- (b) the Deceit Claim is a claim against a trustee in fraud and therefore falls within Section 21 (1) (a) of the Limitation Act 1980, to which no limitation period applies.

### **The Trustee’s Reasons**

52. On the 1st of July 2020 the Respondent rejected the Proof of Debt for reasons that he set out in the Trustee’s Reasons” dated 1 July 2020. In summary those reasons were:

- (a) he did not consider that the findings of Norris J, or the SDT were binding upon him;
- (b) Fact 6, agreed by Mr Poole, solely for the purpose of his disqualification undertaking did not amount to an admission that he breached any duty that he owed to the Applicant as its director;
- (c) as to the Breach of Duty Claim:

- (i) he accepted that Mr Poole did not owe duties to the Applicant when negotiating as its counterparty in connection with the Vetting Business Agreement, other than to ensure that the board of the Applicant was informed of all relevant facts and matters, pertinent to it deciding whether to approve the Applicant entering into the Vetting Business Agreement;
  - (ii) he accepted that, if the board of the Applicant acted to approve the Vetting Business Agreement, with full informed consent, then there could be no breach of duty by Mr Poole;
  - (iii) having regard to the content of: the PwC Valuation; Mr Doona's Memo; the Due Diligence Report, and to the number of lawyers and other professionals present at the board meeting on 20 June 2000, he was satisfied that the board of the Applicant had given fully informed consent to the Applicant entering into the Vetting Business Agreement; and
  - (iv) therefore there was no breach of duty by Mr Poole.
- (d) As to the Deceit Claim:
- (i) he accepted Mr Poole's evidence in the Reply that he did intend to dispose of his interest in Poole & Co, on 5/6 July 2000, so there was no deceit about his intention, in the Prospectus or the Vetting Business Agreement;
  - (ii) it was not a pre-condition of the Vetting Business Agreement that Mr Poole had to sell his interest in Poole & Co, if it had been, then it would not have been referred to purely in the "Commencement Date" definition, in the Vetting Business Agreement, he accepted Mr Poole's assertion that the date upon which Mr Poole disposed of his interest in Poole & Co only affected the date of completion of the Vetting Business Agreement, which had to take place on 31 December 2000, even if Mr Poole had not disposed of his interest in Pole & Co by that date;
  - (iii) the Poole & Co SPA was drafted by a respected counsel who acted for both Mr Poole and Mr Bennett and who had confirmed that he did not consider the agreement to be a sham;
  - (iv) it is not unusual for an agreement to have an opt in and opt out clause, where the buyer cannot afford to pay the consideration up front;
  - (v) the definition of "Commencement Date" in the Vetting Business Agreement was satisfied in any event on 1 September 2000, when title to the Poole & Co business and assets passed from Mr Poole, to Mr Bennett; and
  - (vi) Mr Poole's arguments about not being: "proprietor of, or a partner of, and/or otherwise engaged by Poole & Co" after 31 August 2000 were plausible.
- (e) Finally, the Respondent accepted that, if the Applicant was able to show (and he found that it was not) that Mr Poole had committed any fraud or fraudulent breach of trust, or deceit, then it was unlikely that any either claim would be statute barred.



## The Grounds of Appeal

53. The Grounds of Appeal can, I think, be fairly summarised in the paragraphs that follow.
54. The Respondent accepts that, neither the Breach of Duty Claim, nor the Deceit Claim were likely to be statute barred if the Respondent had accepted those claims so no points are made by the Applicant as to limitation.
55. Mr Poole was not interviewed by the Respondent and the Respondent accepted, in the Trustees Reasons, that he was disagreeing with the conclusions of the SDT which did see Mr Poole being cross-examined and found him to be dishonest.
56. Mr Poole has been inconsistent on the question of whether a new 3 year referral agreement had been concluded between Mr Poole and the Applicant: (a) Norris J's Judgment recorded that Mr Poole had asserted and Mr Sullman had agreed that a further 3 year agreement had been concluded, the same position was taken by Mr Poole in his defence to the Carroll's Claim; however (b) in the Response, Mr Poole says that the "main terms of a new agreement" had been negotiated and PwC were aware of the contractual position.
57. As to the Deceit Claim:
- (a) Mr Poole's representation to the board of the Applicant (via Mr Rew) on 31 August 2000 that he would cease to be a partner in or proprietor of Poole & Co with effect from midnight on 31 August 2000 was false and Mr Poole made it knowing it was false or being reckless as to its truth;
  - (b) the representation was made at a time when Mr Poole knew that: (i) Mr Le Poidevin had advised that he would remain proprietor or a partner in Poole & Co following completion of the transfer of legal title to the business and assets of Poole & Co to Mr Bennett on 31 August 2000; (ii) in order to be able to commence providing the Vetting Services, Mr Poole's relationship with Poole & Co had to cease, because Mr Le Poidevin had advised that Mr Poole could not lawfully continue his relationship with Poole & Co after Poole & Co started sub-contracting the Vetting Services to the Applicant; (iii) under the Poole & Co SPA, a related party relationship between Mr Poole and Poole & Co would continue to exist, unless and until Mr Bennett served an Opt In Notice; and
  - (c) the representations made by Mr Poole had induced the Applicant to pay £9.75m to Mr Poole, as Mr Rew's Memo makes clear;
58. As to the Breach Of Duty Claim:
- (a) Mr Poole knew that the Referral Agreement could be terminated on 3 months-notice but he made no attempt to terminate it himself or to ensure that the board of the Applicant considered that option;
  - (b) Fact 6 of the Grounds of Unfitness which Mr Poole agreed to as part of his CDDA Undertaking (and thereby accepted was a valid ground upon which he could be found to be unfit to act as a director) said "instead of the [Applicant] exercising its right to terminate its agreement with my then firm Poole & Co I was involved in

payment being made to me personally in the sum of £9.75m to acquire the rights under that agreement”;

- (c) that conduct amounts to a breach by Mr Poole of his duties: (i) to act in the way he considers, bona fide to be in the best interests of the Applicant; (ii) not to make a personal profit from his position as director; and (iii) not to place himself in a position where his personal interests conflicted with those of the Applicant;
- (d) it was the members of the Applicant and not its board which would have to give their fully informed consent to the making of a personal profit by Mr Poole and the members did not give their fully informed consent or any consent;
- (e) the board of the Applicant did not in any event give its fully informed consent because: (i) the board were not told that the PwC Valuation had been calculated on the basis of inaccurate information as to the length of the remaining term of the Referral Agreement; (ii) the directors were told that the price of £9.75m had been negotiated “in light of the advice received from PwC”; (iii) Mr Doona’s Memo records that the PwC Valuation had been prepared by comparing relative income streams of Poole & Co and the Applicant and that certain members of the board had questioned the validity of that approach, but it went on to justify the PwC approach on the basis that “there is however wide sympathy for the view that a longer term agreement, with appropriate safeguards, would have been entered into in the fullness of time”. As Mr Poole and Mr Sullman took the position that a new three year agreement had been reached it is to be inferred that Mr Sullman, as chairman of the meeting that approved the Vetting Agreement told the board that a new agreement was in place; (iii) the board of the Applicant was not told that the figure of 9.75m was not the result of an arms-length negotiation but rather an attempt by Mr Salman to “see what he could get away with,” informed by Investec’s statement that a figure in excess of £10m would not be acceptable to shareholders ; (iv) the figure of £9.75m was a result of negotiations between Mr Sullman and Mr Poole, both of whom took the position that a new three year agreement had been reached and presumably negotiated the price on that incorrect basis; (v) the board were told at the meeting on 20 June 2000, that the Vetting Business Agreement would end the related party relationship between Mr Poole and “the group”, but on Mr Poole’s case as set out in the Reply that was incorrect, because he claims that the Vetting Business Agreement did not impose an obligation on him to dispose of his interest in Poole & Co; and (vi) terminating the related party relationship was important to the Applicant, because Mr Poole’s defence to Mr Carroll’s Claim stated that, had the Applicant decided to terminate the Referral agreement rather than enter into the Vetting Business Agreement, then Mr Poole would have considered his continuing position as CEO of the Applicant to be untenable and the Applicant would have been faced with the resignation of its CEO immediately prior to the flotation;
- (f) Mr Poole knew that Mr Currie of Investec was of the view that £7.5m was the top of the value range for the Vetting Business and that PwC had valued the Vetting Business at £27m, he knew that PwC had been told, in April 2000 that a new 3 year deal was being agreed and from this, Mr Poole knew that PwC were valuing the Vetting Business on the basis that a new 3 year deal had been agreed;
- (g) Mr Poole knew that no such agreement had been reached and that there was no justification for the figure of £9.75m which was (as Norris J found) a “fig leaf” to ensure that he received £20m from the flotation of the Applicant; and
- (h) Mr Poole therefore acted to further his own interests at the expense of the Applicant, acting dishonestly and in breach of trust and in breach of his director’s

duties in (i) failing to act in the way in which he considered, bona fide, to be in the best interest of the Applicant; (ii) making a secret profit from his position without the fully informed consent of the Applicant ; and (iii) placed himself in a position in which his personal interests conflicted with those of the Applicant, without the fully informed consent of the Applicant.

### **MY APPROACH TO THE EVIDENCE AND BURDEN OF PROOF**

59. The Response is endorsed with a statement of truth signed by Mr Poole. Mr. Robinson submits that Mr Poole has been given every opportunity to join in the appeal and give oral evidence but has declined to do so, thereby avoiding being cross examined and the risk of disclosure orders being made against him. Mr Robinson invites me to draw adverse inferences from Mr Poole's failure to give evidence about matters that are or might reasonably be expected to be within his knowledge.
60. Mr. Robinson says that the available documents are of much more evidential value than the recollection of witnesses, such as Mr Poole. He refers me to the well-known comments of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Limited EWHC 3560 (Comm)* at paragraphs 15-23. In simple terms, what Leggatt J says, in those paragraphs is that, given the fallibility of human memory and the propensity of witnesses, even if giving evidence honestly, to miss-recall what happened (particularly if the events in question happened a number of years ago) he preferred, in commercial disputes, to place reliance on the contemporaneous documents and what might be inferred from those documents, rather than the recollections of witnesses.
61. I consider the proper approach here to be as follows:
- (a) I will treat the Response as hearsay evidence, as is normal where a witness makes a witness statement, endorsed with a statement of truth, but then does not attend for cross examination. I will consider carefully what weight should be attributed to the content of the Response;
  - (b) to the extent that Mr Poole has not dealt with a matter, in the Response, which I would expect him to have personal knowledge of, I will consider what, if any, inference can be drawn from his failure to deal with the particular point in the Response;
  - (c) I note that neither the liquidator of the Applicant, nor his solicitors who have signed the statements of truth appearing at the end of the Particulars of Debt, Reply, and Grounds of Appeal, have any personal knowledge of the facts which are referred to in them and therefore I will need to consider carefully what weight can be attributed to the statements made in those documents, particularly where they are not supported by contemporaneous documentary evidence; and
  - (d) I accept that the contemporaneous documents interpreted in the context of the background to this matter are likely to be the most reliable basis upon which I can make factual findings.
62. Reliance, in the Particulars of Debt, Reply and Grounds of Appeal is placed upon:
- (a) the findings in the Norris Judgment;

- (b) Fact 6 in the Disqualification Undertaking; and
  - (c) the findings in the SDT Decision.
63. The proper approach to the Norris Judgement and the SDT Decision, in my judgement, is that I am not bound by any findings of fact made in those proceedings and I may come to a different conclusion on those facts.
64. As to the Disqualification Undertaking, Mr Poole was taken to have admitted Fact 6 for the purpose only of the CDDA Proceedings. He is still able however, by the Response to assert that Fact 6 is not a true representation of the facts or that, properly read, it does not bear the meaning that the Applicant seeks to place on it.
65. I will say at this stage that, for reasons I will explain later, I have placed little reliance on facts which appear to have been determined in the Norris Judgment or the SDT Determination or upon Fact 6 of Disqualification Undertaking. Instead I have considered the evidence before me (in particular the contemporaneous documents) and made my factual findings, based on that evidence.
66. Finally counsel agree that this appeal against the decision of the Respondent, as Trustee in Bankruptcy of Mr Poole, to reject the Proof of Debt, requires me to consider afresh whether the Proof of Debt should be admitted for proof in the Bankruptcy of Mr Poole, on the evidence which is now before me (whether or not it was before the Respondent when he rejected the Proof of Debt on 1 July 2020). In other words I simply need to decide, on the evidence before me, whether the Applicant has proved, on the balance of probabilities, the Breach of Duty Claim and/or the Deceit Claim, I will adopt that approach.

### **THE DECEIT CLAIM**

67. In *Ludsin Overseas Limited v Eco3 Capital Limited* [2013] EWCA Civ 413, at paragraphs 70-82 Jackson LJ described the key elements of the tort of deceit that a claimant needs to prove as follows:
- (a) there must be a representation of fact, made by words or by conduct;
  - (b) the representation must be made with knowledge that it is false, i.e. it must be wilfully false or at least made in the absence of any genuine belief that it is true or reckless, i.e. without caring whether his representation is true or false;
  - (c) the representation must be made with the intention that it should be acted upon by the claimant, or by a class of persons which will include the claimant, in the manner which resulted in damage to him;
  - (d) it must be proved that the claimant acted upon the false statements; and
  - (e) it must be proved that the claimant has sustained damage by doing so.
68. I have already set out the basis on which the Deceit Claim is pursued by the Applicant (in the Particulars of Debt, Reply and Grounds of Appeal).
69. Mr Poole, in the Reply says that he is not liable in the tort of deceit because:

- (a) The representation in the Prospectus (dated 6 July 2000) that Mr Poole intended to dispose of his interest in Poole & Co was just that, a representation of his intention. The Vetting Business Agreement entered into on 5 July 2000 also reflected Mr Poole's intention to dispose of his interest in Poole & Co. It was Mr Poole's intention at that time to dispose of his interest in Poole & Co and therefore the representation was not untrue
- (b) there was no requirement, in the Vetting Business Agreement, that Mr Poole disposed of his interest in Poole & Co;
- (c) the Vetting Business Agreement, when properly interpreted, provided that the £9.75m would be paid and the Applicant would start providing the Vetting Services by no later than 31 December 2000, even if Mr Poole had not ceased to be "proprietor of, or a partner of, and/or otherwise engaged by Poole & Co", by that date;
- (d) Mr Poole did not tell Mr Rew, on 31 August 2000 that he would cease to be a proprietor of or partner in Poole & Co, with effect from midnight that day;
- (e) Mr Rew's Memo did not accurately reflect any conversation that Mr Poole had with Mr Rew and Mr Poole did not see Mr Rew's Memo;
- (f) Mr Poole, in any event ceased to be a "proprietor of, or a partner of, and/or otherwise engaged by Poole & Co" at midnight on 31 August 2000; and
- (g) Mr Poole denies seeing the advice of Mr Le Poidevin dated 17 August 2000, in which Mr Le Poidevin, who drafted the Poole & Co SPA said that Mr Poole would continue to be proprietor of or a partner in Poole & Co after execution of the Poole & Co SPA. Mr Poole also suggests that, insofar as Mr Le Poidevin's advice did refer to Mr Poole continuing to be a proprietor of or partner in Poole & Co, it was likely that Mr Le Poidevin was saying that Mr Poole may be regarded as such in accordance with the Law Society Rules/Regulations, not as a matter of general law.

70. In order to consider whether the Applicant has proved that Mr Poole is liable to it in the tort of deceit, I propose to make findings of fact, by reference to the 7 reasons advanced by Mr Poole (summarised in paragraph 69 (a)-(f) above) as to why he is not liable to the Applicant, in the tort of deceit. I will then consider whether those factual findings satisfy the five key elements of the tort of deceit identified by Jackson LJ in *Ludsin*.

**(a) Did the Prospectus contain a false representation? and (b) Did the Vetting Business Agreement Require Mr Poole to dispose of his interest in Poole & Co?**

71. The Prospectus contains the following statement: "Historically, vetting has been carried out by Poole & Co, a firm of solicitors whose sole partner is Colin Poole, the chief executive of the Group. Colin Poole intends to dispose of his interest in Poole & Co after Admission. Following such disposal, the claims vetting business carried out by Poole & Co will be sub contracted to the Group and certain assets relating to the claims vetting business currently carried on by Poole & Co will be acquired by the Company. These arrangements are being implemented to improve the structure of the Group processes, to enhance the efficiency of the Group's operations and to remove the related party relationship that currently exists."

72. The Prospectus is said to have been issued with the agreement of all the directors of the Applicant, Mr Poole is identified in the Prospectus as one of those directors and therefore I find that what I have set out in paragraph 71 above as an extract from the Prospectus, is a representation by Mr Poole.
73. Notwithstanding that the SDT Determination records that Mr Poole had conceded, when appearing as a witness before it, that the extract from the Prospectus that I have quoted in paragraph 71 above, was an “unqualified public promise” to remove the related party relationship, I find that the Prospectus only refers to an intention on the part of Mr Poole to dispose of his interest in Poole & Co and is not a promise that he will do so. A representation, as to intention is nonetheless a representation of fact and, if Mr Poole did not in fact have an intention, when the Prospectus was issued, on 5 July 2000, to dispose of his interest in Poole & Co, then the representation as to his intention was false.
74. In the Reply, Mr Poole says that he had the intention, when the Prospectus was issued on 6 July 2000, to dispose of his interest in Poole & Co. Mr Poole’s evidence on this point, is in the Reply, and it is the only witness evidence I have as to what Mr Poole’s intention was at the time.
75. The definition of the “Commencement Date” in the Vetting Business Agreement, which I have set out in full below, clearly refers to the Commencement Date as being one day after Mr Poole ceases to be “proprietor of, or a partner of, and/or otherwise engaged by Poole & Co”.
76. It is not part of the Applicant’s case that the Vetting Business Agreement placed a contractual obligation upon Mr Poole to dispose of his interest in Poole & Co. The Applicant’s case is that Mr Poole disposing of his interest in Poole & Co was a condition precedent to completion of the Vetting Business Agreement (a point I will deal with shortly). There is nothing in the Vetting Business Agreement that places a contractual obligation on Mr Poole to dispose of his interest in Poole and Co, but the provisions of the Vetting Business Agreement (executed a day before the Prospectus was sent out) are consistent with Mr Poole intending to dispose of his interest in Poole & Co on 5/6 July 2000.
77. The remaining reasons given by Mr Poole, in the Reply, as to why he is not liable in the tort of deceit, relate to the wording of the Vetting Business Agreement, or to events taking place after the Vetting Business Agreement was entered into (on 5 July 2000) and the Prospectus was sent out (on 6 July 2000). The conclusions that I have reached in relation to those issues (which I will set out shortly) support the view that, at some point after 6 July 2000, Mr Poole did not intend to dispose of his interest in Poole & Co. Those conclusions do not, however, lead me to conclude that Mr Poole did not intend to dispose of his interest in Poole & Co, when he entered into the Vetting Business Agreement and approved the Prospectus. This is because I am not satisfied that Mr Poole knew, when he entered into the Vetting Business Agreement and approved the Prospectus that he would be unable to dispose of all his interest in Poole & Co, on the terms he would be willing to agree (including the price).

78. For all of those reasons, I am not satisfied, on the balance of probabilities, that the Prospectus, in saying that Mr Poole intended to dispose of his interest in Poole & Co, misrepresented Mr Poole's intention, when the Prospectus was issued on 6 July 2000.

**(c) Was the disposal of Mr Poole's interest in Poole & Co only relevant to the date of completion date of the Vetting Business Agreement?**

80. The Applicant contends that, Mr Poole disposing of his interest in Poole & Co was a condition precedent to the Applicant having an obligation to pay £9.75m to Poole & Co and to Poole & Co sub-contracting the Vetting Business to the Applicant (I will refer to this as "Completion"). Mr Poole contends that Completion had to take place by no later than 31 December 2000 in any event, even if Mr Poole had not disposed of his interest in Poole & Co, by that date.

81. The approach which a court must take to the interpretation of the wording of a written agreement is as follows:

- (a) to focus on the meaning of the words in their context and in light of the natural meaning of the clause, any other relevant provisions, the overall purpose of the clause, facts and circumstances known by the parties at the time and commercial common sense to endeavour to determine what the ordinary and natural meaning of the words used is, viewed in the context of the other clauses of the agreement;
- (b) the less clear the words and the more ready the court will be to depart from the ordinary and natural meaning of the words;
- (c) commercial common sense is not to be invoked retrospectively because, for example, the contractual arrangement has worked out badly for one of the parties; and
- (d) the court can only take into account facts or circumstances known to both parties when the contract was made (see *Arnold v Britton* [2015] UKSC 36)

82. Disputes regarding the proper interpretation of an agreement normally take place between the parties to the agreement who each wish the court to enforce the agreement according to their interpretation of its meaning. In this case it is the original parties to the Vetting Business Agreement who dispute its meaning (the Applicant and Mr Poole, (the then sole proprietor of Poole & Co)) but neither party is seeking to enforce the agreement.

83. The Applicant relies on its interpretation of the Vetting Business Agreement to show that Mr Poole had to procure that he was no longer "proprietor of, or a partner of, and/or otherwise engaged by Poole & Co", in order to receive the sum of £9.75m, at all and so, it says, there was a strong incentive for Mr Poole to represent that he was no longer "proprietor of, or a partner of, and/or otherwise engaged by Poole & Co", even if this were not true.

84. Mr Poole relies on his interpretation of the Vetting Business Agreement, in order to show that he would have received the £9.75m on 31 December 2000, even if he remained "proprietor of, or a partner of and/or otherwise engaged by Poole & Co" on that date and so there was much less reason (perhaps no reason) for him to

represent that he had ceased to be “proprietor of, or a partner of, and/or otherwise engaged by Poole & Co” if this were not true, in order to secure an earlier Completion on 1 September 2000.

85. I now set out those provisions of the Vetting Business Agreement, which I consider are directly relevant to the question of whether Mr Poole or the Applicant are right in their respective interpretations:

- (a) the definition of “Commencement Date” (set out in full) is as follows “Subject to the satisfaction of the conditions precedent in Clause 3, the date on which Claims Direct shall commence provision of the Services being the day one day after the day on which Colin Poole ceases to be proprietor of, a partner of and/or otherwise engaged by Poole & Co, provided that such date shall be no later than 31 December 2000” (“the Commencement Date Definition”). The “Services” are the Vetting Services.
- (b) Clause 2, where relevant provides “ In consideration of the payment by Claims Direct to Poole & Co of the sum of £9,750,000.....in cash in one lump sum on the Commencement Date (to a bank account nominated by Poole & Co) Poole & Co subject to the satisfaction of the conditions contained in Clause 3.1 irrevocably appoints Claims Direct to provide, and Claims Direct agrees to provide, the Services from the Commencement Date ....”.
- (c) the Applicant is defined as Claims Direct.
- (d) Clause 3, where relevant states “3.1 In addition to any other matters which have to be dealt with on or before the Commencement Date under the terms of this agreement, the commencement of the arrangements contemplated in this agreement is conditional upon the following conditions being satisfied or waived by Claims Direct in its sole discretion (acting reasonably) on or before the Commencement Date:” (there then follows a list of conditions).

86. The Respondent, in rejecting the Proof of Debt, preferred Mr Poole’s interpretation, on the ground that, if the disposal of Mr Poole’s interest in Poole & Co were a precondition to Completion (payment of £9.75m and sub-contracting of the Vetting Business) then the reference to Mr Poole disposing of his interest in Poole & Co would not be referred to purely in the Commencement Date definition (paragraph 26 of the Trustees Reasons).

87. I accept that the definition of “Commencement Date” is not naturally where one would expect to find what is essentially, on the Applicant’s case, a precondition or condition precedent to Completion. Clause 3 would be the natural place to include such a precondition/condition precedent. Nonetheless, whether I accept Mr Poole’s interpretation, or that of the Applicant, the definition of Commencement Date provides for a variable and not a certain date upon which Completion is to take place. On either case, the date of Completion depends on when Mr Poole disposes of his interest in Poole & Co (if this takes place before 31 December 2000). The question I need to decide is whether, as Mr Poole contends, the definition of Commencement Date required that Completion of the Vetting Business Agreement take place on 31 December 2000, even if Mr Poole had not disposed of his interest in Poole & Co by that date, or, as the Applicant contends Completion would only take place if Mr Poole disposed of his interest in Poole & Co on or before 31 December 2000.



88. In my judgment, looking purely at the ordinary and natural meaning of the wording of definition of “Commencement Date, in the context of other relevant provisions of the Vetting Business Agreement, the interpretation of the Applicant is to be preferred to that of Mr Poole and I am satisfied that the meaning is clear. I come to this conclusion for the following reasons:

- (a) Clause 3.1 acknowledges that there are or may be other matters which have to be dealt with, on or before Completion. This is a neutral point neither supporting, nor undermining the Applicant’s interpretation (it merely acknowledges that there are or may be other conditions);
- (b) the definition of Commencement Date, where relevant to the date on which Completion is to take place, is in two parts, the Commencement Date will be: (i) “one day after the day on which Colin Poole ceases to be Proprietor of, a partner of and/or engaged by Poole & Co” and (ii) “provided that such date shall be not later than 31 December 2000”;
- (c) it seems to me that, considered in that way, the interpretation that Mr Poole contends for would only be correct if the definition said that the Commencement Date was (i) or (ii) whichever was the earlier, or words to that effect. Absent that additional wording, it seems clear to me that Completion would only occur if (i) was satisfied no later the (ii) 31 December 2000 and if that did not happen Completion would not occur at all (consistent with the Applicant’s case).

89. Having settled on what I consider to be the natural meaning of the words, I should not depart from that ordinary and natural meaning without good reason.

90. I also find that, viewed in context, by reference to the likely purpose of referring to Mr Poole disposing of his interest in Poole & Co, and to what was known to the parties, on 5 July 2000 (when the Vetting Business Agreement was signed) those considerations also support the Applicant’s case, because:

- (a) Mr Doona’s Memo of 17 June 2000 which was considered by the board of the Applicant, when it approved a draft of the Vetting Business Agreement on 20 June 2000, explains that the proposed renewal of the Referral Agreement was overtaken by the floatation and anticipated acquisition of the Vetting Business (by the Applicant), when it became clear that the Law Society had no difficulty with vetting income being earned by a non-legal practice. “This removed a very considerable potential conflict of interest issue and the board and advisers alike agreed that it would be expeditious to proceed with the acquisition”. The conflict of interest referred to in this memo, would only be removed if Mr Poole disposed of his interest in Poole & Co;
- (b) consistent with what is said in Mr Doona’s Memo, the Board Minutes of the board meeting of the Applicant on 20 June 2000, record that there was a risk of “a potentially negative impact on potential investors if the acquisition did not proceed (the acquisition being the sub-contracting of the Vetting Business by Poole & Co to the Applicant, by the Vetting Business Agreement) as the related party relationship between the Group and Colin Poole would still exist “. The “related party relationship” was that Mr Poole was CEO of the Group and proprietor of Poole & Co. Entering into the Vetting Business Agreement would only cause the “related party relationship” to cease to exist, if it required Mr Poole to dispose of his interest in Poole & Co, as part of the arrangement, by which Poole & Co sub-contracted the Applicant to provide the Vetting Services;

- (c) Mr Gordon-Saker of counsel, was instructed by the Applicant to advise upon whether the proposed scheme of the Applicant carrying out the Vetting Services, would breach any Law Society Rules or Regulation. In a written advice dated 28 June 2000, counsel advised that Mr Poole would breach the Separate Business Code 1994, if the Applicant undertook the Vetting Services. This was because the Separate Business Code prohibited a practicing solicitor from... “controlling, actively participating in or operating”.... a separate business that... gives legal advice or carries out conduct of a matter which could proceed before a court”. The Vetting Services appeared, counsel opined, to fall into that category and Mr Poole was both CEO of the Applicant and proprietor of Poole & Co, and so he would be carrying on a solicitor’s practice and have an interest in a separate business (the Applicant) which was carrying out the Vetting Services. A draft of the Vetting Business Agreement was provided to Mr Gordon-Saker, on 3 July 2000. A minute of a meeting of the board of the Applicant taking place on 6 July 2000, the day after the Vetting Business Agreement was executed and the day on which the Prospectus was issued recorded that Mr Rew, Mr Doona, Scott Campbell and Mr Poole spoke with counsel about the proposed structure of the transaction. “the question was directly put to counsel as to whether he had any concerns with the sub-contracting arrangement. Counsel confirmed that as long as Colin Poole was no longer involved in any capacity with Poole & Co he was happy with the sub-contracting arrangement”;
- (d) The Prospectus was issued on 6 July 2000 and it states (see paragraph 71 above) that it is the intention of Mr Poole to dispose of his interest in Poole & Co and that the Vetting Business would be sub-contracted to the Group after (my emphasis added) the disposal of Mr Poole’s interest in Poole & Co and this was being done to remove the related party relationship (Mr Poole being CEO of the Group and proprietor of Poole & Co); and
- (e) each of the documents ((a)-(d)) emphasise that it was important to the Applicant (and appeared to be important to Mr Poole) that Mr Poole should dispose of his interest in Poole & Co, before or at the same time as Poole & Co sub-contracted the Vetting Services to the Applicant. This supports the Applicant’s case that Completion of the Vetting Business Agreement would not take place unless and until Mr Poole had disposed of his interest in Poole & Co provided that that happened before 31 December 2000.

91. Whilst I may look at commercial common sense, in deciding on the proper interpretation of the Vetting Business Agreement, as the guidance in *Arnold v Britton* makes clear, commercial common sense only plays a role in interpreting a written document if the natural meaning of the words would produce a result which makes no commercial sense. It is not sufficient to show that the natural meaning of the words produces a result that is to the obvious disadvantage of one of the parties (the court does not save a party from a bad bargain).

92. If I test my interpretation of the definition of “Commencement Date” against commercial sense, then it makes perfectly good commercial sense for the Vetting Business Agreement to treat the disposal of Mr Poole’s interest in Poole & Co as a condition precedent to Completion viewed in the context of the matters I refer to in paragraph 90 above. Viewed, in light of those matters, it would make less commercial common sense for the Applicant to agree to Completion taking place

on 31 December 2000, regardless of whether Mr Poole had disposed of his interest in Poole & Co.

**(d) Did Mr Poole tell Mr Rew, on 31 August 2000, that he would cease to be proprietor of or a partner in Poole & Co from midnight that day?; and (e) Does Mr Rew's Memo accurately record any conversation that Mr Poole had with Mr Rew and did Mr Poole see Mr Rew's Memo, on 31 August 2000**

93. I have decided to deal with all three of these questions together, because Mr Rew's Memo is the document that the Applicant primarily relies upon, in asserting that Mr Poole represented to the Applicant that he had disposed of his interest in Poole & Co, so as to trigger Completion of the Vetting Business Agreement.
94. I am satisfied, on the balance of probabilities, and find as facts, notwithstanding the assertions made by Mr Poole in the Reply, that Mr Poole did tell Mr Poole that he would cease to be proprietor of or partner in Poole & Co, with effect from midnight on 31 August 2000, that Mr Rew's Memo does accurately record that conversation, and that Mr Poole saw Mr Rew's Memo on 31 August 2000. I make these factual findings for the following reasons:
- (a) although the Response is signed by Mr Poole and endorsed with a statement of truth, he has chosen not to attend for cross examination, although he was given the opportunity to do so. I treat the Response therefore as hearsay evidence and must decide what weight to attribute to it;
  - (b) if Mr Poole had attended for cross examination, then it seems to me that he would have had great difficulty in answering questions convincingly, that would be likely to have been asked of him, in relation to the points that I make at (c)-(h) below. In those circumstances I consider that I can attribute little weight to Mr Poole's assertions that he did not tell Mr Rew that he would cease to be proprietor of or a partner in Poole & Co, at midnight on 31 August 2000, that Mr Rew's Memo is not an accurate record of a conversation between Mr Poole and Mr Rew on 31 August 2000, and that Mr Poole did not receive Mr Rew's Memo, on 31 August 2000;
  - (c) in accordance with the guidance given by Leggatt J (as he then was) in *Gestmin*, I accept that contemporaneous documents are a more reliable means of deciding what was said (if anything) and when, between Mr Poole and Mr Rew about the effect of the Poole & Co SPA. Even if Mr Poole is telling the truth, in the Reply, about his recollection of events some 20 years ago, Mr Rew's Memo is just such a contemporaneous document, purporting to record the content of a conversation taking place between Mr Rew and Mr Poole, on the same day as the memo purports to have been written. The content of Mr Rew's Memo is more likely therefore to be an accurate record of what was said 20 years ago, than Mr Poole's memory;
  - (d) I have accepted the Applicant's interpretation of the meaning of the definition of "Commencement Date", in the Vetting Business Agreement, but whether I accepted the Applicant's interpretation, or that of Mr Poole, in August/September 2000, what would trigger Completion (including the obligation of the Applicant to pay £9.75m to Poole & Co) was Mr Poole ceasing to be "proprietor of, a partner of and/or otherwise engaged by Poole & Co";

- (e) in an e mail sent by Mr Poole to Mr Rew and Mr Doona on 22 August 2000, Mr Poole says “ I can confirm that I have now agreed the sale of Poole and Company to Jake Bennett with effect from 1 September 2000.... I understand that arrangements are in place for the Claims Direct legal department to transfer with effect from 1 September and accordingly I would ask that the £9.75 million consideration is transferred to the Poole and Company office account, by telegraphic transfer on that day. If for any reason this cannot be accommodated I will be grateful if Paul Doona will contact me prior to 1 September and advise me of any difficulties there may be”. The natural meaning of the first sentence of that memo, made without qualification is that the disposal of Poole & Co, by Mr Poole will be a disposal of all Mr Poole’s interest in Poole & Co;
- (f) Mr Rew’s Memo is very clear about what Mr Poole told Mr Rew and what consequences flowed from what Mr Poole had told him. Mr Rew’s Memo says “You have advised me that you will cease to be a “partner” (ie proprietor of Poole & Co with effect from midnight tonight.... On this basis and on the understanding that the Company will be put in a position to commence providing the Services tomorrow-Paul Doona and I propose to sign off on the payment to Poole & Co of £9,750,000 plus VAT by close of banking hours tomorrow;
- (g) Mr Poole does not dispute that £9.75m was paid to Poole & Co on 1 September 2000, or that Poole & Co commenced sub-contracting the Vetting Service to the Applicant with effect from that date. It makes every sense that the Applicant would seek some reassurance that Mr Poole had or would cease to be “proprietor of, a partner of and/or otherwise engaged by Poole & Co”, as required by the Vetting business Agreement before Completion could take place, (ie before it made the payment of £9.75m and took over the provision of the Vetting Service from Poole & Co) one day after that occurred. The only surprise perhaps is that the Applicant was prepared to accept Mr Poole’s verbal assurance (and his memo of 22 August 2000) that this would occur with effect from midnight on 31 August 2000, rather than seeking a rather more solid confirmation of the point;
- (h) there is a fax sheet endorsed to say that it was being sent by Mr Rew to Mr Poole dated 31 August 2000, directed to Mr Poole at “Room 6108”. Mr Rew’s Memo indicates at the top that it is being sent by fax and the transmission details show the fax as being set at 15.38 on 31 August 2000, to fax number 001 407 824 3186, a facsimile machine in the USA. I am satisfied that Mr Rew’s Memo was sent to Mr Poole in the USA, by Mr Rew, and that Mr Poole received it. Mr Rew’s Memo says “You have advised me that....” . It only makes sense for it to be written in that way, if Mr Rew intended to send his Memo to Mr Poole;
- (i) in the Response, Mr Poole says (paragraph 65) that he “may have told Mr Rew orally that he had completed his deal with Mr Bennett but he did not assert that he would cease to be a partner or proprietor of Poole & Co from midnight on 31 August 2000”. Given that the Response goes on to assert at paragraph 75 (1) and (2), that Mr Poole was not a partner in or proprietor of Poole & Co after completion of the Poole & Co SPA, it is not clear why Mr Poole would not have told Mr Rew that he would cease to be proprietor of or partner in Poole & Co at midnight on 31 August 2000, but instead possibly just told him that he had completed “his deal with Mr Bennett”; and
- (j) there is no suggestion by Mr Poole, that Mr Rew had seen the Poole & Co SPA. Mr Rew’s interest and that of the directors of the Applicant was in knowing whether the requirements of the definition of Commencement Date in the Vetting Business Agreement had been met, not whether Mr Poole had completed “a deal”.

The problem for Mr Poole's case, it seems to me is that, unless he lead the directors of the Applicant to believe (through Mr Rew or otherwise) that his deal with Mr Bennet meant that the requirements of the definition of Commencement Date would be met by completion of that deal, his agreement with Mr Bennett would be irrelevant to satisfying that definition, which triggered Completion of the Vetting Business Agreement (including the payment of £9.75m to Poole & Co). Mr Rew's Memo sets out a plausible way in which Mr Rew and the directors of the Applicant might have been satisfied that the definition of Commencement Date would be met, Mr Poole's suggestion that he simply told Mr Rew that he had completed "his deal" with Mr Bennett would not.

**(f) Did Mr Poole cease to be a partner in or proprietor of Poole & Co at midnight on 31 August 2000?**

95. The question of whether Mr Poole ceased to be proprietor of, or a partner in Poole & Co at midnight on 31 August 2000, depends upon the terms and effect of the Poole & Co SPA.
96. I am satisfied that the terms of the Poole & Co SPA did not result in Mr Poole ceasing to be proprietor of or a partner in Poole & Co at midnight on 31 August 2000 or at any point thereafter. I have come to this conclusion for the reasons that follow.
97. It is common ground that Mr Poole was sole proprietor of Poole & Co, immediately before the Poole & Co SPA was executed by Mr Poole and Mr Bennet on 18 August 2000. I must look therefore at the terms of the Poole & Co SPA to determine if his status changed as a result of that agreement.
98. The following provisions of the Poole & Co SPA are relevant:
  - (a) Mr Poole agreed, by clause 2 of the Poole & Co SPA to sell to Mr Bennett the goodwill and assets of the solicitors practice carried on by Poole & Co (defined as "the Practice") and completion of the sale was to take place on 1 September 2000 (clause 4);
  - (b) until 1 September 2000 all profits and losses of the Practice were to be treated as profits or losses made by Mr Poole, after 1 September 2000 the profits and losses of the Practice would be treated as profits and losses of Mr Bennett (clause 5 and the definition of "Transfer Date");
  - (c) clause 10 provided that Mr Poole would finance the continuation of the Practice by making loans to Mr Bennett;
  - (d) the Price for the purchase of the Practice was defined as £5m, but Mr Bennett was not obliged to pay any part of the Price to Mr Poole unless and until he served an opt in notice ("Opt In Notice") on Mr Poole and he could do that, at any point up until the first anniversary of the date of the agreement (ie by midnight on 31 August 2001). If Mr Bennett served an Opt In Notice, then he became obliged to pay the Price, and had to start paying it by agreed instalments (clause 11);
  - (e) if Mr Bennett served an opt out notice on Mr Bennett, before midnight on 31 August 2001 ("Opt Out Notice") or did not serve an Opt In Notice by that time, the goodwill and assets of the Practice would be transferred back to Mr Poole and Mr Poole would be treated as having continued as sole proprietor of Poole & Co,

so that he would have the benefit of any profits made and burden of any losses incurred by the Practice after midnight on 31 August 2000 and any loans made by Mr Poole to Mr Bennett to continue the Practice would be cancelled and would no longer be payable by Mr Bennett to Mr Poole;

- (f) Under clause 12 Mr Bennett agreed to pay to Mr Poole all the profits of the Practice and Mr Poole would indemnify Mr Bennett against all costs and liabilities he incurred in running the Practice, including any liability to income tax incurred either (i) to the date on which Mr Bennett served a valid Opt In Notice; or (ii) if no valid Opt In Notice was served, without limit in time; and
- (g) Under clause 13, Mr Bennett required the consent of Mr Poole, so long as he had not paid the entire Price, amongst other matters to incur expenditure and borrow money above certain limits, enter into partnership with anyone, charge assets of the Practice, change the auditors of the Practice or write off book debts above a certain limit.

99. The combination of 2,4 and 5 of the Poole & Co SPA would appear to be an absolute transfer of the Practice from Mr Poole to Mr Bennett, with effect from 1 September 2000, such that Mr Bennett became sole proprietor of the Practice in place of Mr Poole from that date. The provision of loans by Mr Poole, to Mr Bennett to fund continuation of the Practice under clause 10 would be consistent with that conclusion (save for clauses 10.5 and 10.6, to which I will turn shortly). If the Poole & Co SPA stopped there, so far as the terms of the transfer of the Practice was concerned, then Mr Poole would cease to be proprietor of the Practice, with effect from midnight on 31 August 2000, as he contends.

100. However, whilst clause 5 purported to provide that the benefit of the profits and burden of the losses of the Practice passed from Mr Poole to Mr Bennett, on 1 September 2000, in fact Mr Poole continued to fund the Practice and take the benefit of the Practice's profits and burden of its losses pursuant to clauses 10 and 12 and whilst clause 10 provided for Mr Poole to loan money, to Mr Bennett to continue the Practice from 1 September 2000, Mr Bennett only had to repay the loan if he served a valid Opt In Notice" (clauses 10.5 and 10.6).

101. Mr Bennett's ability to make any significant decisions for the Practice was severely restricted because he had to obtain Mr Poole's consent before making certain significant decisions regarding, the continuation of the business of the Practice and the form of its ownership (until he had paid the Price).

102. The effect of clause 12 is that, even if Mr Bennett did serve a valid Opt In Notice, Mr Poole would still receive the benefit of any profits and burden of any losses of Poole & Co unless and until such a valid Opt In Notice was served. In addition, the goodwill and assets of the Practice were liable to be transferred back to Mr Poole and would be if a valid Opt In Notice was not served on or before the first anniversary of the signing of the Poole & Co SPA.

103. I conclude that, in accordance with the terms of the Poole & Co SPA, Mr Poole remained the true proprietor of the Poole & Co practice unless and until Mr Bennett served a valid Opt In Notice. It is common ground that no valid Opt In Notice was ever served by Mr Bennett and in due course the goodwill and assets

of the Practice transferred back to Mr Poole. So, Mr Poole remained proprietor of Poole & Co on 1 September 2000 and thereafter.

**(g) Did Mr Poole see Mr Le Poidevin's Advice dated 17 August 2000 and did Mr Le Poidevin advise that Mr Poole would remain proprietor/partner in Poole & Co?**

104. I am satisfied, on the balance of probabilities, and find as facts that: (a) Mr Poole did see Mr Le Poidevin's advice dated 17 August 2000, before he signed the Poole & Co SPA; and (b) that advice did confirm that, in the view of Mr Le Poidevin, Mr Poole would continue to be proprietor of alternatively a partner in the Poole & Co Practice (unless and until Mr Bennett served a valid Opt In Notice) as a matter of general law, and not merely that he would be regarded as such for the purpose of Law Society Rules or Regulations. I will now explain why I have come to those conclusions.

105. Mr Le Poidevin was instructed by Mr Poole and Mr Bennett to draft the Poole & Co SPA. He produced and sent to Mr Poole and Mr Bennett several drafts of that agreement. The final version (subsequently signed on 18 August 2000) was sent by Mr Le Poidevin, to Mr Poole and Mr Bennett on 17 August 2000, with a written advice. The advice, at paragraph 2 says that it addresses two issues: (i) "whether under the agreement, Mr Poole is a partner in the practice; and (ii) "whether the agreement complies with the Law Society Rules and Regulations.

106. Paragraph 3 of the advice says "As to the first point, until Mr Bennett has opted in or out Mr Poole retains all the profits of the practice. Mr Bennett gets a fixed remuneration package whether or not there are profits. No draftsman can disguise the fact that during the Period ([that is 1 September 2000 to the date of service of an Opt in Notice, or 31 August 2001] the practice is being carried on entirely for Mr Poole's benefit, subject only to his arrangements with Mr Bennett; the assets will be formally vested in Mr Bennett but the benefit of them will not. In my view, therefore, Mr Poole will remain in law either a sole practitioner, though employing others to do the work for him, or else a partner with Mr Bennett, depending on those arrangements". Mr Poidevin's advice goes on to say that "As I mentioned in conference, the possible significance of that falls under the following headings.....(2) the Stock Exchange has apparently required Mr Poole to cease to be a partner in Poole & Company in connection with the flotation of Claims Direct plc. The precise terms of that requirement I do not know. As I mentioned in conference he will need to check with the appropriate authorities whether the terms agreed are sufficient. Mr Le Poidevin goes on in paragraph 4 to address "those rules and regulations".

107. Mr Le Poidevin was instructed by both Mr Poole and Mr Bennett, much of the advice and certainly the advice on Mr Poole's status in relation to Poole & Co and the question of whether (on counsel's understanding) the terms of the Poole & Co SPA would satisfy the Stock Exchange requirement that Mr Poole ceased to be a partner in Poole & Co, were matters of concern principally (if not exclusively) to Mr Poole and not Mr Bennett, I consider it highly unlikely that Poole and Mr Bennett did not both take part in the conference to which the written advice referred and receive the written advice. In addition because the advice was sent

with the final version of the Poole & Co SPA, that was subsequently signed by Mr Poole and Mr Bennett, it is unlikely that Mr Poole did not see the advice.

108. On 28 June 2010, Mr Le Poidevin sent an e mail to Mr Poole, which Mr Poole produced in the SDT Proceedings and which he exhibits to the Response. Mr Le Poidevin attaches to that e mail three advices that he sent (including that of 17 August 2000), four versions of the Poole & Co SPA and a salaried partner agreement that he drafted. Mr Le Poidevin says in the e mail that “You asked me whether I had had any reason to think that the transaction I was being asked to put into legal form was not the real agreement between you and Mr Bennett. If I had had any reason to think that, I am pretty confident that I would recall it. I have no such recollection. Re-reading my further advice of 17th August 2000, I see that I said (paragraph three) “No draughtsman can disguise the fact that during that period the practice is being carried on entirely for Mr Poole's benefit subject only to his arrangements with Mr Bennett; the assets will be formally vested in Mr Bennett but the benefit of them will not”. I am sure that I was not being asked to disguise the underlying transaction; I would not have accepted such instructions. The nature of the arrangement between you and Mr Bennett was a matter of analysing the sale agreement and I think I meant that compliance with any regulatory or other requirements had to be judged on the footing that you retain the benefit of the practice.”

109. Whilst, in his e mail of 28 June 2010, Mr Le Poidevin says that he thinks he meant, (in the part of paragraph 3 of his advice of 17 August 2000 which he quoted) that compliance with any regulatory or other requirements had to be judged on the basis that Mr Poole retained the benefit of the Practice, paragraph 3 of the advice is clear in saying that it is dealing with the first point raised in paragraph 2 and that is whether Mr Poole would continue to be a partner in Poole & Co, not whether he would be regarded as a partner, by Law Society rules and regulations. So I am satisfied that Mr Le Poidevin's advice of 17 August 2000 was that Mr Poole would remain proprietor of, or depending on his arrangements with Mr Bennett, a partner in Poole & Co unless and until Mr Bennett served an Opt In Notice (which never happened).

110. Mr Poole suggests that it is part of the Applicant's case that the Poole & Co SPA is a sham and he produces, as an exhibit to the Response, a copy of Mr Le Poidevin's email of 28 June 2010, to support his contention that the Poole & Co SPA was not a sham. That is not however the Applicant's case, the Applicant's case is that the Poole & Co SPA never resulted in Mr Poole ceasing to be proprietor of Poole & Co and that Mr Poole knew that, when he represented to Mr Rew, on 31 August 2000 that he would cease to be proprietor of or a partner in Poole & Co with effect from midnight on 31 August 2000. Mr Le Poidevin's advice of 27 August 2000 and email of 28 June 2010 support that contention.

### **Summary of Factual Findings**

111. In summary, the factual findings that I have made, in relation to the Deceit Claim, are as follows:



- (a) I am not satisfied that Mr Poole did not intend to dispose of his interest in Poole and Co, on 6 July 2000, when the Prospectus was issued (I have also found that the terms of the Vetting Business Agreement, entered into the previous day between Mr Poole and the Applicant are consistent with Mr Poole having that intention, on 6 July 2000);
- (b) under the Vetting Business Agreement, the date upon which Completion would take place (so that the Applicant was bound to pay £9.75m to Poole & Co and Poole & Co were bound to commence sub-contracting the Vetting Services to the Applicant) was one day after Mr Poole ceased to be “ proprietor of, or a partner of, and/or otherwise engaged by Poole & Co”. If that did not occur by 31 December 2000, then Completion of the Vetting Business Agreement would not take place;
- (c) Mr Poole did tell Mr Rew, on 31 August 2000, that he would cease to be a proprietor or partner in Poole & Co at midnight on 31 August 2000. I am satisfied that Mr Rew’s Memo accurately records the conversation that took place between Mr Poole and Mr Rew on that date, and I am satisfied that Mr Poole saw Mr Rew’s Memo on 31 August 2000;
- (d) Mr Poole remained the sole proprietor of Poole and Co after midnight on 31 August 2000; and
- (e) Mr Poole saw Mr Le Poidevin’s advice dated 17 August 2000, before he signed the Poole & Co SPA, on 18 August 2000 and that advice confirmed that Mr Poole would continue to be proprietor of, alternatively a partner in Poole & Co following completion of the Poole & Co SPA (as a matter of general law and not just that Law Society Rules or Regulations might regard him as such).

### **Applying My Factual Findings to the Key Elements of the Tort of Deceit**

112. The five key elements of the tort of deceit identified by Jackson LJ in *Ludwin* are:

- (a) there must be a representation of fact, made by words or by conduct;
- (b) the representation must be made with knowledge that it is false, i.e. it must be willfully false or at least made in the absence of any genuine belief that it is true or reckless i.e. without caring whether his representation is true or false;
- (c) the representation must be made with the intention that it should be acted upon by the claimant, or by a class of persons which will include the claimant, in the manner which resulted in damage to him;
- (d) it must be proved that the claimant acted upon the false statements; and
- (e) it must be proved that the claimant has sustained damage by doing so.

113. I will now consider each of those five essential elements in turn.

114. I have found that Mr Poole told Mr Rew, on 31 August 2000, that he would cease to be proprietor of or partner in Poole and Co at midnight that day. I have also found that Mr Poole received Mr Rew’s Memo, on 31 August 2000, which confirmed what had been said during their telephone conversation that day. Mr Rew was a director of the Applicant, and Mr Rew’s Memo confirmed that, on the basis of what Mr Poole had told him and on the understanding that the Applicant would be “in a position to commence providing the Vetting Services tomorrow,

Mr Doona (another director of the Applicant) and Mr Rew proposed to sign off on the payment of £9.7m plus VAT, the next day. I am satisfied that what Mr Poole said to Mr Rew about ceasing to be proprietor of or a partner in Poole & Co, with effect from midnight on 31 August 2000, was a representation of fact and because it was made to Mr Rew, who was a director of the Applicant and because Mr Rew confirmed that he and Mr Doona (another director of the Applicant) intended to act on that representation, by causing the Applicant to make a payment of £9.75m, to Poole & Co, that representation was made by Mr Poole to the Applicant.

115. I have found that Mr Poole did see Mr Le Poidevin's advice dated 17 August 2000, before he signed the Poole & Co SPA, the next day, and therefore 2 weeks before he made the representation that I have found he did make, to Mr Rew and therefore the Applicant, on 31 August 2000. I have also found that Mr Le Poidevin's advice clearly says that Mr Poole would continue to be proprietor of, alternatively a partner in Poole & Co unless and until Mr Bennett served a valid Opt In Notice, as a matter of general law and not merely that he would be regarded as such, for the purpose of Law Society Rules and Regulations. In light of those findings, I also find that Mr Poole knew that his representation to Mr Rew, that he would cease to be proprietor of or a partner in Poole & Co at midnight on 31 August 2000 was false, or Mr Poole was at least reckless as to whether or not it was true. I find this because:
- (a) it is unlikely that Mr Le Poidevin would have advised upon whether Mr Poole would cease to be a proprietor or partner in Poole & Co unless asked to do so or alternatively, it was at least obvious that he should do so. So I find that it was clear at the time that this was a key issue about which there was, at least, doubt, before Mr Le Poidevin gave his advice;
  - (b) Mr Le Poidevin's advice is clear on the point;
  - (c) I have found as a fact that Mr Poole did not cease to be proprietor of Poole & Co at midnight on 31 August 2000, in spite of Mr Poole's assertion in the Reply that he did;
  - (d) Mr Poole was, in August 2000, a qualified and experienced solicitor and it is highly unlikely that he did not understand Mr Le Poidevin's advice on the point. It is also highly unlikely that Mr Poole would himself have come to the conclusion that the underlying effect of the Poole & Co SPA, was that he would cease to be proprietor of Poole & Co at midnight on 31 August 2000 (in spite of what Mr Le Poidevin had advised). Whilst Mr Poole has asserted in the Response that he did not remain a partner in or proprietor of Poole & Co after 31 August 2000, and he has sought to explain away Mr Le Poidevin's advice on the basis that it was merely suggesting that Mr Poole might be regarded as proprietor/partner for Law Society Regulatory purposes only, rather than as a matter of general law, he has put forward no reason as to why he should not be regarded as having continued as proprietor of Poole & Co after 1 September 2000 as a matter of general law. Therefore, he has not advanced any reason why he may reasonably have thought that he ceased to be proprietor/partner in spite (on my findings) of his having seen Mr Le Poidevin's advice of 17 August 2000, the day before he signed the Poole & Co SPA and 2 weeks before he made the representations that I have found he made to Mr Rew, on 31 August 2000, that he would cease to be proprietor/partner in Poole & Co, with effect from midnight on 31 August 2000; and
  - (e) at the very least, in light of Mr Poidevin's advice and what I have found to be the underlying effect of the Poole & Co SPA (consistent with Mr Le Poidevin's

advice, Mr Poole was at least reckless as to whether what he told Mr Rew, on 31 August 2000 was true.

116. I am satisfied that Mr Poole intended that the Applicant would act on his representation to Mr Rew on 31 August 2000, that he would cease to be proprietor of or partner in Poole & Co, from midnight that day, by paying £9.75m to Poole & Co and the Applicant taking over provision of the Vetting Services, both on 1 September 2000. That much was obvious from the terms of the Vetting Business Agreement and I find that Mr Poole would be well aware of the significance of the representation that he made to Mr Rew because the payment of £9.75m was to go to Mr Poole (through his being sole proprietor of Poole & Co). The matter is put beyond any doubt by: (i) Mr Poole's e mail to Mr Rew and Mr Doona on 22 August 2000, in which Mr Poole says " I can confirm that I have now agreed the sale of Poole and Company to Jake Bennett with effect from 1 September 2000.... I understand that arrangements are in place for the Claims Direct legal department to transfer with effect from 1 September and accordingly I would ask that the £9.75 million consideration is transferred to the Poole and Company office account, by telegraphic transfer on that day"...; and (ii) Mr Rew's Memo of 31 August 2000, which I have found Mr Poole received, which explicitly says that the payment of £9.75m plus VAT is being made to Poole & Co because of the representation that Mr Poole made that he had ceased to be partner in or proprietor of Poole & Co (and on the understanding that the Applicant would be in a position to commence providing the [Vetting] Services tomorrow).

117. I am satisfied that the Applicant acted on Mr Poole's representation, because it is common ground that the Applicant paid £9.75m plus VAT to Poole & Co on 1 September 2000 and it is not disputed that the Applicant commenced providing the Vetting Services with effect from 1 September 2000.

118. I am satisfied that the Applicant suffered loss as a result of Mr Poole's representation. Under the Vetting Business Agreement, unless and until Mr Poole had ceased to be "proprietor of, or a partner of, and/or otherwise engaged by Poole & Co" before 31 December 2000 (and I have found he did not) the Applicant would not have been bound to make the payment of £9.75m to Poole & Co . I find that Mr Rew and Mr Doona (who it appears arranged the transfer of the £9.75m to Poole & Co) would not have made that payment unless they thought the Applicant was bound to make it under the Vetting Business Agreement and the reason that they believed that the Applicant was bound to make the payment was that Mr Poole represented that he would cease to be proprietor of or a partner in Poole & Co with effect from midnight on 31 August 2000. The Applicant has therefore suffered a loss as a result of Mr Poole's representation (the correct calculation of that loss I will consider later).

### **Is the Deceit Claim Statute Barred?**

119. The next point that I need to consider is whether the Deceit Claim is statute barred. In his skeleton argument, Mr Robinson says that the Respondent appeared

to accept that, if the Applicant had been able to make out either of its claims against Mr Poole, then the claims were unlikely to be statute barred.

120. As I am considering this appeal, de novo, it is still necessary for me to consider the question of whether the deceit claim is statute barred, whatever position the Respondent may have taken on this issue, when rejecting the Proof of Debt.
121. Section 21 (1) (a) of the Limitation Act 1980 provides that “No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action-(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy”.
122. In *Burnden Holdings (UK) Limited v Fielding and another* [2018] UKSC 14, Lord Briggs, with whom the other members of the Supreme Court agreed said, at paragraph 11 “It is common ground (and clear beyond argument), that as directors of an English company.....the defendants are to be regarded for all purposes connected with section 21 as trustees. This is because they are entrusted with the stewardship of the company's property and owe fiduciary duties to the company in respect of that stewardship” ....By the same token, the company is the beneficiary of the trust for all purposes connected with section 21”.
123. I am satisfied that the Deceit Claim brought against Mr Poole, by the Applicant is a claim brought for fraud or fraudulent breach of trust by Mr Poole and that, in accordance with Section 21 (1) (a) no period of limitation applies to that claim. The Deceit Claim is not therefore statute barred.

#### **FRAUDULENT BREACH OF DUTY/BREACH OF FIDUCIARY DUTY**

124. Mr Robinson accepts that the calculation of the value of the loss that the Applicant has incurred is the same, whether I find that the Applicant has made out its case in the tort of deceit (as I have) or whether I find that the Applicant has made out its case for fraudulent breach of duty/breach of fiduciary duty (which I have not yet considered).
125. In light of that, it is unnecessary for me to consider whether the Applicant has proved that Mr Poole acted in fraudulent breach of the duties that he owed the Applicant or in breach of his fiduciary duties in the manner alleged. For completeness I will however say briefly, why I am not satisfied that the Applicant has proved that Mr Poole acted in fraudulent breach of duty/in breach of his fiduciary duties to the Applicant. I will do so by reference to each point advanced by the Applicant in support of its case (that Mr Poole acted in fraudulent breach of duty/in breach of his fiduciary duties).

**The Members of the Applicant did not Approve the Vetting Business Agreement**

126. In the Grounds of Appeal, and in his skeleton argument, Mr. Robinson refers to Section 320 of the Companies Act 1985 (in force in June/July 2000). Mr. Robinson says that Section 320 provided that, where a director of a company enters into a substantial transaction with the company of which they are a director, by which the director acquires a non cash asset from the company or the company acquires a non cash asset from the director, the transaction is not valid, unless a resolution of the company in general meeting is first obtained. The board resolutions on which Mr Poole relies do not satisfy the requirements of Section 320 and in consequence the Vetting Business Agreement is not valid against the Applicant.

127. I accept that the Vetting Business Agreement would not be valid as against the Applicant, unless it was approved by a resolution of the Applicant's members. I am not however satisfied that such a resolution was passed, for the following reasons:

- (a) The Board Minutes of 20 June 2000 say: (i) at paragraph 6.1(f) "the chairman informed the meeting that, in order to prepare the company for admission it was intended that resolutions to the following effect be passed: (f) approval of the Poole & Co agreement.....for the purposes of Section 320 of the Act" and (ii) at paragraph 6.6 "it was also resolved that the secretary be authorised and instructed to dispatch to the shareholders a notice of extraordinary general meeting of the company containing resolutions in the form of the draft produced to the meeting .....";
- (b) amongst the documents produced to me I do not have a draft of the resolutions which were apparently attached to the board minutes of 20 June 2000, nor do I have any resolutions of the members of the Applicant;
- (c) the Applicant was represented by MMS solicitors, in connection with its floatation, the requirements of Section 320 of the Companies Act 1985 were well known in 2000, it is unlikely that those requirements were not addressed, by obtaining a members resolution approving entry into the Vetting Business Agreement (particularly when the board minutes highlight the need for approval under Section 320 and an extraordinary general meeting of the members was being convened to pass resolutions); and
- (d) the Section 320 point was not mentioned in the Particulars of Debt to which Mr Poole responded in the Response with copies of documents to support his case. If Mr Poole has copies of any members resolutions passed in June/July 2000 then he was not alerted by the Particulars of Debt to the need to produce them.

### **The Informed Consent of the Board of the Applicant was not Obtained**

128. Leaving aside the need for a members resolution, for the purposes of Section 320 of the Companies Act 1985, it appears to be common ground that the duty that Mr Poole owed to the Applicant, as counterparty to the Vetting Business Agreement was to obtain the Applicant's informed consent to its entry into the Vetting Business Agreement. Mr Robinson says that the board of the Applicant did not give its fully informed consent to the Applicant entering into the Vetting Business Agreement, because it was not informed of the following facts, by Mr Poole:

- (a) that PwC had been misled, when preparing the PwC valuation of the Vetting Business, in that PwC: (i) was told that a new 3 year referral agreement had been entered into, which was not true; and (ii) was not told that Richard Salter QC had advised, in April 2000 that the vetting fees were likely to be regarded as illegal referral fees;
- (b) that the price of £9.75m agreed between Mr Sullman and Mr Poole was not agreed as a result of an “arms-length” commercial negotiation, but was instead agreed: (i) as a result of Mr Sullman deciding to see “what he could get away with”, in light of Investec’s view that the maximum price that would be acceptable to potential investors was £10m; and (ii) as a means of overcompensating Mr Poole for losing the Vetting Business income stream, in order to ensure that he received a total of £20m from the floatation of the Applicant’s shares;
- (c) ending the Referral Agreement, by giving 3 months-notice to Poole & Co would be preferable to paying £9.75m to acquire the benefit of that agreement, because the Applicant would still acquire the Vetting Business in that way and it would only cost the Applicant £1.1m. Mr Poole should therefore have terminated the Referral Agreement, by giving 3 months-notice, or at least ensured that the board of the Applicant considered this option;
- (d) whilst Mr Doona’s Memo referred to the Referral Agreement being terminable on 3 months-notice, it went on to justify the £9.75m on the basis that a new 3 year agreement would have been agreed had the floatation not intervened, and it is to be inferred that Mr Sullman informed the board meeting on 20 June 2000, as its chairman, that a new 3 year referral agreement had been agreed; and
- (e) Mr Poole knew that Mr Currie of Investec considered £7.5m was the top of the range of the value of the Vetting Business, but failed to disclose this to the board.

129. In the Norris Judgment, at paragraph 113 (g) and (h) Norris J came to the conclusion that, either PwC had been misled into thinking that 3 years notice was necessary to terminate the Referral Agreement or they had been incompetent in preparing the valuation and he favoured the former view. It is apparent from paragraph 113 (g) that Norris J took the view that the PwC valuation had been prepared on the footing of there being a 3 year rolling contract with Poole & Co and not a 3 month rolling contract. It was in that context that he made the comment that PwC had either been incompetent in valuing the Vetting Business in that way, or they had been misled into thinking that the existing Referral Agreement still had 3 years to run. Norris J does not refer to anything else in support of his conclusion that the PwC valuation was based upon a three year rolling contract being in place and Mr. Robinson has not pointed to any evidence that the PwC valuation was based on an extant three year rolling contract

130. Whilst I share Norris J’s view that the PwC valuation was curious, to say the least, I am not sure that he is necessarily right that the PwC valuation was prepared on the basis that there was a 3 year rolling contract in existence. The valuation is in a one and a half page letter with two and a half pages of figures attached. The penultimate paragraph of the letter says that the fair value of the Vetting Business is 8.5% of the market value of Claims Direct. The letter does not explain how this percentage is arrived at, but the figure of 8.5% appears underneath tables which compare the revenue and profit of Claims Direct and Poole & Co (presumably in the latter case, only the Vetting Business) for financial years ending 1998, 1999 and 2000 actual and 2001 and 2002 forecast. This

appears to have led Norris J to conclude that the valuation was based on what would be earned by Poole & Co for the current year (2000) and 2 more years and was therefore based upon a rolling 3 year contract, however, the valuation is dated 12 June 2000, and therefore in order to produce actual figures for the financial year to 2000, that financial year must already have ended, therefore the tables included less than 2 years of future income/profits (not 3 years of future income/profits). It appears likely that the PwC Valuation was simply produced based on actual figures for 3 years and the only two future years for which projections were available.

131. The PwC valuation appears on any view to be a gross over valuation, given that Poole & Co did not have a right, unlimited in time to continue providing the Vetting Services, whether its contractual entitlement was 3 months or 3 years. In contrast, viewed at the time the Applicant was entitled to continue earning its income without anyone being able to serve a notice terminating that right.
132. For those reasons I am not satisfied that PwC were misled into believing that there was a 3 year rolling contract in place.
133. The advice of Mr Richard Salter QC is referred to in an e mail from Mr Stevens, of Investec to a recipient identified as “Tony @mybriefcase.net”. The email is copied, amongst others to Mr Poole and Mr Doona and appears to relate to advice given by Richard Salter QC, during the course of a conference which Mr Stevens had attended. The email says that Richard Salter QC had expressed considerable doubts about whether the proposed scheme (which I take, from what is said in the e mail to be the scheme by which Claims Direct proposed to provide adverse costs insurance to claimants and to recover the premium from unsuccessful defendants) would work. The e mail also says at paragraph (ii) that “RS expressed concern that the arrangements between panel solicitors and CD (whereby the panel solicitor pays CD an introductory fee) may be unlawful, if challenged, unless it can be demonstrated that this remuneration is reasonable for the work actually and reasonably done. If these arrangements were subsequently proved unlawful then the security under Investec's block discounting facility would be unenforceable.”
134. I have to consider this appeal de novo, on the evidence that is before me now. That means that I can take into account the content of Mr Stevens’ email, notwithstanding that it was not before the Respondent, when the Respondent rejected the Proof of Debt. I consider, nonetheless that the Applicant is limited by the grounds set out in its Grounds of Appeal. The Grounds of Appeal set out at paragraph 57 the allegation that the board of the Applicant did not give fully informed consent and set out in sub paragraphs 57.2.1-57.2.7 those matters that it is asserted that the board was not informed of. The advice of Mr Salter QC is not mentioned amongst those matters or anywhere else in the Grounds of Appeal, and nor is there any assertion that the board ought to have been informed that there was doubt as to the validity of the vetting fees paid by panel solicitors to the Applicant. The issue is raised for the first time in Mr Robinson’s skeleton argument.

135. Even if I did consider it proper to consider the point, there are a number of reasons why I would not have found Mr Stevens' e mail to be compelling evidence that Mr Poole breached his duty to the Applicant by failing to inform the board of the Applicant, in advance of it approving the Vetting Business Agreement on 20 June 2000, about the apparent content of Mr Salter QC's advice, namely: (a) Mr Salter QC says that Panel solicitors paying the vetting fee to Claims Direct may be regarded as an unlawful referral fee. The original suggestion was that Claims Direct would simply take the place of Poole & Co and receive the vetting fees. Thereafter however, the proposal changed to one, in which Poole & Co received the "vetting fee" from the panel solicitors and sub-contracted the vetting work to the Applicant, passing the vetting fee that it received from the Panel solicitors to the Applicant. Mr Gordon-Saker (see paragraph 90 (c)) above advised that he had no concerns regarding the sub-contracting arrangement, provided that Mr Poole ceased to be connected with Poole & Co. It appears therefore that the Applicant was advised that the sub-contracting arrangement between Poole & Co and the Applicant avoided the problem identified by Mr Salter QC; (ii) all of the directors of the Applicant may have known, by 20 June 2000 all that there was to know about the issue. Mr Doona clearly knew in addition to Mr Poole (because Mr Stevens' e mail went to both Mr Poole and Mr Doona) and if it remained an issue of any substance that the other directors or some of them did not know about, then it is surprising that Mr Doona's Memo did not deal with it; and (c) the issue was not raised in the Particulars of Debt, so it is not surprising that Mr Poole does not deal with it in the Response. I certainly cannot conclude that, because he does not deal with it in the Response, it is to be inferred that Mr Poole has no answer to the point.

**The figure of £9.75m was based on what Mr Sullman thought he could get away with/ delivering £20m to Mr Poole and not a commercial Price**

136. I am not satisfied, notwithstanding the content of the Norris Judgment, that the figure of £9.75m was agreed by Mr Sullman, on the basis that he thought it was what he could get away with (based on Mr Currie of Investec saying that the investors would not agree to pay more than £10m), or that Mr Sullman intended to make up the balance of the £20m that Mr Sullman talked about going in Mr Poole's direction (in August 1999) as a result of the floatation (by agreeing that the Applicant would pay more than a proper commercial value for the Vetting Business). I have come to these conclusions for the following reasons:

- (a) Mr Doona's Memo records that Mr Currie of Investec had told the executive directors (which would include Mr Poole and Mr Sullman) that he thought that a figure below £10m could be argued through with the shareholders, with some difficulty. If both Mr Poole and Mr Sullman knew what Mr Currie had said, then perhaps £10m represented the maximum that Mr Sullman thought he could agree to the Applicant paying and Mr Poole saw a figure close to £10m as something that Mr Sullman could agree to;
- (b) I accept that the Due Diligence Report says that the trustees of Cartmel Securities Limited have confirmed that neither Mr Sullman, nor Mr Poole, nor their families would receive any of the proceeds of sale of the disposal of ordinary shares by Cartmel under the placing agreement. This appears to suggest that the Response is



wrong to assert that £20m was very roughly the sum that Mr and Mrs Poole might realise if the business were valued at £200m and Mr and Mrs Poole and Cartmel (a discretionary trust from which Mr and Mrs Poole expected to benefit) sold their shares. However, the position in relation to Cartmel (Mr Poole and his family, on the face of it having no interest in it, according to the Due Diligence Report) may not have been the same, in March 2000, when the Due Diligence Report was prepared, as it was in August 1999;

- (c) it is entirely unclear from the Norris Judgment or otherwise, how Mr Sullman arrived at his estimate, in his e mail of August 1999, that Mr Poole would receive around £20m from the floatation of the Applicant. As there is no evidence before me that the Applicant acquiring the Vetting Business from Poole & Co was even being discussed in August 1999, it is difficult to conclude that that disposal was included in the calculation;
- (d) if Mr Sullman's figure of £20m did in fact include the price to be paid for the Vetting Business, then, assuming that it was included at around £10m that may have been based on him believing that that is what the Vetting Business was worth, when he wrote his e mail, in August 1999, and that view may have persisted;
- (e) if Mr Sullman thought that Mr Poole would receive £20m from the floatation and that £20m did not include the sale of the Vetting Business by Poole & Co, or included it at a much lower figure, then it is unclear how any over-estimate, by Mr Sullman, in August 1999 of what Mr Poole would receive from the floatation occurred; and
- (f) the mere fact that, in August 1999, Mr Sullman was estimating that he would receive around £100m and Mr Poole £20m seems a fragile basis for concluding that Mr Sullman decided to agree the purchase price at £9.75m in order illegitimately to make up the overall figure to around the £20m he had estimated in August 1999, that Mr Poole would receive as a result of the flotation. Finally, even if this is what Mr Sullman intended, that does not mean that Mr Poole was aware that that was his intention.

### **Mr Poole should have Terminated the Referral Agreement/ensured that the Directors of the Applicant considered that option**

137. Mr Robinson says that the cost to the Applicant of giving 3 months-notice to end the Referral Agreement, if Poole & Co had elected to earn a further 3 months of income would have been £1.1m and that this compares very favourably with the price of £9.75m paid by the Applicant under the Vetting Business Agreement, to obtain the benefit of the Vetting Service income stream, without giving that 3 months-notice. To Poole & Co Whilst it tends to enhance, rather than detract from the point that Mr Robinson makes, the £1.1m is based upon the gross income from the Vetting Business that the PwC valuation showed Poole & Co to have earned in its year ending 2000 of £4.5m. Based on the figures used for the purposes of the PwC valuation, the average profit (EBITDA) that Poole & Co earned in its financial year ending 2000 was £1.5m and therefore what Poole & Co would lose, by not operating the Vetting Business for 3 months, based on those figures, and what the Applicant might reasonably be expected to gain by not giving 3 months-notice to Poole & Co was £375,000, not £1.1m.

138. I am not however satisfied that the choice, for the Applicant was as straight forward as Mr Robinson suggests.
139. In the Response, Mr Poole points out that, in the Norris Judgment, the judge noted that terminating the Referral Agreement would involve cost and difficulty which a competent director would seek to avoid. In response, Mr Robinson points out that Norris J found that Mr Sullman had not approached the acquisition, by the Applicant of the Vetting Business of Poole & Co on a proper commercial basis, but as a device to overcompensate Mr Poole at the expense of the Applicant's shareholders.
140. If the Applicant served 3 months-notice on Poole & Co to terminate the Referral Agreement, then:
- (a) that was likely to be seen by Mr Poole, the group CEO as a hostile act. Mr Poole suggests that, if that had happened his position as CEO would have become untenable, perhaps he would have resigned;
  - (b) undoubtedly, the Applicant seeking to take the Vetting Service "in house" without the active co-operation of Poole & Co would have been highly challenging, the Panel solicitors had a relationship with Poole & Co, or its personnel;
  - (c) importantly, the advice that the Applicant had from Mr Gordon-Saker was that referral fees had to be paid to a solicitor and could not be paid direct to the Applicant, which is why the sub-contract arrangement with Poole & Co was set up. The paying of referral fees to the Applicant would therefore have been unlawful based upon counsel's advice at the time, whereas the arrangement with Poole & Co for the Applicant to act as sub-contractor to Poole & Co was lawful. Doubt has subsequently been expressed (the SDT Decision and the Norris Judgment) on whether the sub-contracting arrangement was lawful, but the advice at the time appeared to be that it was, on that basis, absent Poole & Co agreeing to the sub-contract arrangement, some other firm of solicitors would have to take on this role. I do not expect that would be easy to arrange and of course, any solicitor that did take on that role would expect to be paid for taking it on; and
  - (d) if the Applicant's shares were to be floated on the Stock Exchange, it could hardly afford to suffer consequences (a)-(c) and no doubt those issues would have had to be disclosed to the market. Instead, in the Prospectus, the directors of the Applicant were able to say that the Applicant was to acquire the benefit of the Vetting Business and Mr Poole intended to dispose of his interest in Poole & Co, thereby bringing an end to the CEO's conflict of interest.
141. In reality, in my judgment, both the Applicant and Mr Poole, as sole proprietor of Poole & Co needed to agree an arrangement for the smooth handing over of the benefit of the Vetting Business to the Applicant and Mr Poole needed to tell the market that he intended to end his involvement with Poole & Co, in order for the floatation of the Applicant's shares to be a success. I doubt that Investec would have underwritten the floatation in the scenario that I paint in paragraph 140 above.
142. I do not consider that Mr Poole was, in any event obliged to terminate the Referral Agreement, acting as sole proprietor of Poole & Co. In that capacity, Mr Poole was entitled to act in his own interests in deciding what position to take in

relation to the Referral Agreement generally and specifically whether it was in his interests, rather than those of the Applicant to terminate the agreement.

143. As to ensuring that the board of the Applicant considered the option of terminating the Referral Agreement, the board were aware, both from Mr Doona's Memo and the Due Diligence Report, that the Referral Agreement was terminable on 3 months-notice. Once the board were aware of that they were aware that the option of terminating the Referral Agreement existed. I do not consider that an obligation fell on Mr Poole to somehow advocate that the Applicant should terminate the Referral Agreement.

144. Mr Poole conceded, for the purposes of the CDDA Proceedings, that one of the grounds on which Mr Poole was unfit to act as a director was that—"Instead of Claims Direct exercising its right to terminate its agreement with Poole & Co he was involved in payment being made by Claims Direct to him personally of £9.75 million to acquire the rights under the agreement". However that ground is stated in very wide terms and does not identify what it is that Mr Poole did wrong and it does not therefore alter my view that the Applicant has not proved that Mr Poole breached his duties as director of the Applicant by not procuring that the Referral Agreement was terminated by himself as sole proprietor of Poole & Co, or by the Applicant, or that he breached his duty by failing to ensure that the board of the Applicant considered the option of terminating the Referral Agreement.

### **Mr Doona's Memo/what Mr Sullman may be Inferred to have told the board of the Applicant**

145. Mr Robinson accepts that Mr Doona's Memo did refer to the Referral Agreement being terminable on 3 months-notice, but complains that the memo went on to justify the price of £9.75m, on the basis that a new 3 year agreement would have been agreed, had the floatation not intervened and he suggests that it should be inferred that Mr Sullman, as chairman of the board informed the board at the board meeting on 20 June 2000 that a new 3 year referral agreement had been agreed. Mr Robinson makes these points in support of his contention that the board of the Applicant did not give fully informed consent to the Vetting Business Agreement, and in particular the price of £9.75m.

146. I am not persuaded by Mr Robinson's arguments for the following reasons:

- (a) Mr Doona's Memo accurately records that the Referral Agreement was entered into on 1 June 1996 and ran for initial 3 year period and since the end of that period was subject to 3 months-notice. The Memo says that a copy of the Referral Agreement is attached to the memo;
- (b) Mr Doona says that in his view, in the fullness of time a new referral agreement probably would have been agreed for a 3 year period, but events were overtaken by the floatation. I also note that Mr Doona says that members of the board had questioned the approach in the PwC Valuation of comparing the income streams of the two businesses to arrive at a value for the Vetting Business as a percentage

of the estimated value of the Applicant. He then goes on to say that there is wide sympathy for the view that a longer term agreement would have been entered into in the fullness of time. Finally he says that David Currie of Investec thought that £7.5m was at the top end of the valuation range but that Mr Currie considered that, if a 3 year contract had been in place, then valuations around £15m would not be unreasonable;

- (c) it seems clear to me that, whilst there may have been sympathy for the view that a new 3 year agreement might have been in place, had the floatation not intervened, the board were clearly told that such an agreement was not in place and that Mr Currie was of the view that this fact had significantly reduced the value of what Poole & Co had to sell. I do not consider that the board were misled by Mr Doona's Memo into thinking that Mr Doona's view that a new 3 year agreement would have been agreed, had the floatation not intervened, meant that the value of what Poole & Co had to sell was worth more than it would have been, had that not been the case; and
- (d) I cannot see any justification for my inferring that Mr Sullman would have told the board that a 3 year agreement had in fact been agreed. First any such assertion on Mr Sullman's part would have been contradicted by Mr Doona's Memo which made it clear that this was not the case, and the documents attached to his memo (the existing Referral Agreement that was subject to 3 months-notice and the draft new referral agreement). Second there really is no evidence at all to support Mr Robinson's contention that Mr Sullman would have made that assertion, in the face of the content of Mr Doona's Memo and the copy Referral Agreement and draft referral agreement attached to it.

### **Mr Poole Knew that Mr Currie considered £7.5m at the top of the range for the value of the Vetting Business but Failed to Disclose this to the Board**

147. Finally, as for Mr Robinson's submission that Mr Poole knew that Mr Currie considered £7.5m was at the top of the range for the value of the Vetting Business, but failed to disclose this to the board, Mr Doona's Memo informed the board meeting on 20 June 2000, which approved the draft Vetting Business Agreement, that Mr Currie considered £7.5m at the top of the range for the valuation of the Vetting Business. Mr Poole owed no duty to disclose to the board something that they were already aware of, because it was disclosed to it, in Mr Doona's Memo.

### **VALUING THE APPLICANT'S LOSS**

148. In *Target Holdings Limited v Redfern* [1996] A.C. 421 the Defendant firm of solicitors ("Solicitors") acted in a commercial conveyancing transaction for both the proposed mortgagee and the proposed mortgagor. The mortgagee transferred £1,525,000 to the Solicitors to be held for it on bare trust, pending completion of purchase of the property and a charge in favour of the mortgagee. The Solicitors paid £1,490,000 of the mortgagee's money away without a charge having been created in favour of the mortgagee and therefore in breach of trust. The mortgagee did however obtain a valid charge on the property a month later. The transaction was part of a mortgage fraud, pursuant to which the mortgagee had been provided

with an inflated valuation of the property and the mortgagee only recovered £500,000, on subsequent enforcement of its charge.

149. The mortgagee sued the Solicitors claiming £990,000 on the basis that the Solicitors had paid away £1,490,000 in breach of trust and were therefore bound to restore the trust fund (£1,490,000 less £500,000 realised from the sale of the property = £990,000). The Solicitors contended that the mortgagee had obtained the charge which it had expected to obtain (albeit not contemporaneously with the payment away of the £1,490,000 by the Solicitors) and its loss had been caused by the fact that the property was worth less than the amount of the advance (as a result of the mortgage fraud for which the Solicitors were not responsible). The mortgagee applied for summary judgment and on appeal, the Court of Appeal found that the Solicitors were bound to restore the moneys paid away in breach of trust.

150. The House of Lords allowed the Solicitors' appeal finding that, whilst in the context of a traditional trust, requiring a trustee who paid away trust moneys in breach of the trust, to restore to the trust fund the amount paid away was appropriate, this principle was not applicable where a bare trust arose in a commercial context. Here the beneficiary was entitled to be compensated for the loss they actually suffered as a result of the breach of the trust. The amount of the compensation to which the beneficiary was entitled was to be assessed at the date of judgment (not breach) as the amount required to put the beneficiary in the position that they would have been in, had there been no breach of trust. In the case of *Target Holdings*, that meant that the mortgagee was not entitled to any compensation, because it had received the security that it had expected to receive for the sum advanced and its loss was caused by the inadequacy of the security, not the Solicitor's breach of trust.

151. Mr Robinson accepts that the principles enunciated by the House of Lords in *Target Holdings* apply here and therefore there is to be deducted from the Applicant's claim the value of any benefit which the Applicant received as a result of it entering into the Vetting Business Agreement.

152. Mr Robinson refers to the case of *Parallel Imports Europe Limited v Radivan* [2007] EWCA Civ 1373 in support of his contention that the burden falls on Mr Poole to prove that the Applicant received a benefit and the value of the benefit received, if this is to be deducted from the Applicant's claim for £9.75m.

153. In *Parallel*, Mr Radisson represented to Parallel (referred to in the case as "Baglan") that Deprince, a car dealer had 36 specified Ford cars available for delivery to Baglan, at a price of 281,880 Euros. In fact, those 36 cars had already been sold by Deprince and could not be delivered to Baglan. Baglan paid 281,880 Euro's to Deprince to purchase the 36 cars, but Deprince supplied 10 different cars and kept the 281,880 Euros. Mr Radivan argued that Deprince had kept the 281,880 Euros and only supplied 10 cars because of a dispute between it and Baglan concerning a previous contract and that Baglan had therefore suffered no

loss, in that it had failed to prove that Deprince was not entitled to keep the money to meet its claim, under the previous contract against Baglan.

154. Baglan sued Mr Radivan for 281,880 Euros, less what it had received for the sale of the 10 cars. The trial judge found that Mr Radivan had fraudulently misrepresented that the 36 specified Ford cars were available for purchase by Baglan, but he found that Baglan had not proved that it had suffered a loss as a result of that fraudulent misrepresentation. At paragraph 56 of his judgement the judge stated “The burden is upon Baglan to prove its loss. It must show on a balance of probabilities that it suffered loss because Deprince was not entitled to keep the balance of the money after allowance for the 10 cars that were supplied. I am far from satisfied that that burden has been discharged.”
155. The relevant issue for the Court of Appeal, was whether (Baglan, having proved that Mr Radivan made a fraudulent misrepresentation, which resulted in Baglan making a payment to Deprince, that it would not otherwise have made) the burden fell on Baglan to prove that Deprince was not entitled to retain the 281,880 Euros as against Baglan, or on Mr Radivan to show that Baglan had, in reality suffered no loss. The Court of Appeal found that the burden lay on Mr Radivan.
156. In paragraph 29 of Wall LJ’s judgment (with which the other members of the Court of Appeal agreed) he said “Baglan had proved that a fraudulent misrepresentation was made by Mr Radivan, to Baglan, that Baglan was induced to make a payment to Deprince that it would not have otherwise made, that the cars paid for were not available and that Baglan was not repaid. In our judgement, it was for Mr Radivan to adduce evidence showing that Baglan had in reality suffered no loss by making the payment, because Deprince was entitled to keep it in respect of Baglan’s existing liability to it” . Neither side had produced evidence to show whether or not Deprince was entitled to keep the money and so Baglan was entitled to recover the difference between the 281,880 Euros it had paid and what it had received for the sale of the 10 cars delivered by Deprince.
157. I accept that, the Applicant, having proved that it was induced to pay £9.75m to Poole & Co, by the deceit of Mr Poole, the burden falls on Mr Poole to prove what, if anything should be deducted from that sum as a benefit actually received by the Applicant as a result of entering into the Vetting Business Agreement, assessed now, and not at the date of the Vetting Business Agreement.
158. I have already rejected Mr Poole’s argument that: (a) the Vetting Business Agreement would have to have been completed on 31 December 2000, even if Mr Poole had not ceased to be “a proprietor of, or a partner of, and/or otherwise engaged by Poole & Co” by that date, and (b) the Applicant therefore suffered no loss (see paragraphs 80-92 above).
159. Mr Poole’s alternate case is that the Applicant benefitted from the Vetting Service income stream after the Vetting Business Agreement was entered into, which it would not have received, if it had not entered into that agreement and the

value of that benefit should be deducted from the sum of £9.75m, if this is to be returned to the Applicant.

160. I accept that, to the extent that the Applicant did receive a benefit from receiving payments from Poole & Co, to carry out the Vetting Services after 1 September 2000, this should be deducted from the sum of £9.75m which the Applicant seeks to recover from Mr Poole.
161. Mr Robinson says that Mr Poole cannot discharge his burden of proving that the Applicant benefitted from the Vetting Services income stream that it received from Poole & Co, after the Vetting Business Agreement was entered into, in circumstances where: (a) the Applicant could have obtained the income stream by simply giving 3 months-notice to Poole & Co to terminate the Referral Agreement; and (b) the income stream was formed of unlawful referral fees and therefore was of no real value to the Applicant.
162. As to the first of those points, I have already determined (see paragraphs 140-144 above) that the Applicant has not proved, on the balance of probabilities that the Applicant could have chosen, in the summer of 2000, just before its floatation, to terminate the Referral Agreement, by giving 3 months-notice to Poole & Co. For the reasons that I have set out in those paragraphs, I also conclude that Mr Poole has proved, on the balance of probabilities that it would not realistically have been open to the Applicant, on the eve of its flotation to have given 3 months-notice to Poole & Co to terminate the Referral Agreement.
163. I am also satisfied, on the balance of probabilities, that if the vetting fees were in fact unlawful referral fees (about which I express no concluded view) the benefit of any vetting fees that the Applicant received, from Poole & Co, after the Vetting Business Agreement was entered into, should still be deducted from the monies that the Applicant is entitled to recover from Mr Poole. The reason for this is that unless: (a) the Applicant was required to repay any part of the monies that it received from Poole & Co; or (b) a claim has been lodged in the insolvency of the Applicant, to recover those monies and the Applicant does not suggest that either has happened, the Applicant has retained whatever benefit it received from the monies paid to it by Poole & Co in the form of Vetting fees, even if they were unlawful.
164. Mr Poole has however, in my judgment failed to prove, on the balance of probabilities, what (if any) benefit (judged now) the Applicant has received from entering into the Vetting Business Agreement. I have come to this conclusion for the following reasons:
- (a) I accept that there is good evidence that the amount paid, as at July 2000, by Panel Solicitors, for vetting fees was £72.50 per case, but there is no evidence before me of how many cases were referred to Panel Solicitors after 1 September 2000; the PwC Valuation suggests that Poole & Co's gross receipts for its financial year ending 2000 from vetting fees were £4.5m and it projects that fees would increase over the following 2 years. Even if the PwC Valuation were regarded as

containing reliable figures for projected gross vetting fee income for 2001 and 2002, and as providing some basis for assessing what vetting fees the Applicant was entitled to receive after 1 September 2000, PwC's figures assume continued rapid growth and success of the Applicant's business. The evidence before me is that between September and November 2000 the media exposed complaints made by personal injury claimants that they had been misled by the Applicant as to the recoverability of insurance premiums and this media exposure led to a collapse in the share price of the Applicant. It is a reasonable inference that the collapse in the Applicant's share price was accompanied by a significant reduction in the number of personal injury claimants being introduced to Panel Solicitors and a consequent reduction in vetting fees. Thereafter the evidence is that the Applicant's business did not recover, prior to it entering Administration in July 2002;

- (b) Mr Robinson says that, by February 2002, Poole & Co owed some £1.9m to the Applicant and so it appears that a substantial part of the vetting fees that Poole & Co received (or should have received) from Panel Solicitors and which should have passed on to the Applicant were not paid;
- (c) it appears that, as part of the process of taking over the provision of the Vetting Services, from 1 September 2000, employees employed in carrying out this task in Poole & Co will have transferred to the Applicant. The Applicant will therefore have borne any costs associated with the termination of those employments. There are no details of this;
- (d) the Applicant would have only benefitted to the extent that it would have realised a profit from providing the Vetting Services. The PwC Valuation showed EBITDA of £1.5m earned by Poole & Co, compared to turnover of £4.5m for the financial year to 2000. If that turnover and profit had been repeated every month, in the period up to the Applicant entering Administration, then total profit would have been £2.75m from 1 September 2000 to July 2002 (a period of 22 months). However, as I have already noted: (i) turnover can be expected to have declined substantially over that period due to the adverse media exposure and slide of the Applicant into Administration; (ii) expenditure is unlikely to have declined at a similar rate to turnover, further squeezing profits (if profits were still being made); (iii) it appears that Poole & Co did not pay a substantial part of the vetting fees over to the Applicant, after 1 September 2000, so even if the Vetting Business carried on by the Applicant after 1 September 2000 was profitable on paper, the Applicant may not have benefitted from carrying on the Vetting Business, taking into account money not paid to it by Poole & Co; and (iv) the Applicant may have incurred cost in terminating the employment of employees engaged in the Vetting Business; and
- (e) Mr Poole has not therefore proved on the balance of probabilities that the Applicant did benefit from the transfer of the Vetting Business to it on 1 September 2000 and if so in what amount.

165. For all those reasons the Applicant's proof of debt should be admitted in the Bankruptcy of Mr Poole at £9.75m.



