Case Numbers: 3307668/2020-3307805/2020

EMPLOYMENT TRIBUNALS

Claimants		**Respondents**
Ms A Apter & Others	v	(1) DDD Limited (in Administration) (2) Dendron Brands Limited

Heard at: Watford **On**: In person with the parties present on 30 and 31 January 2023 and, in private, on 1 and 2 February 2023

Before: Employment Judge Hyams **Members:** Ms G Binks, MBE
Mr P Maclean

Representation:

For the claimants: Mr Martin Palmer, of counsel
For the first respondent: Not present or represented
For the second respondent: Mr Michael Salter, of counsel

UNANIMOUS RESERVED JUDGMENT

1. The claimants' dismissals were not unfair within the meaning of regulation 7(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246 as amended.

2. Accordingly, the second respondent is not liable to meet any of the claimants' claims, and those claims are dismissed as against the second respondent.

REASONS

Introduction; the claims made by the claimant in this case

1 By a claim form presented on 9 July 2020, a number of claimants (the second respondent counted them to be 138) made a number of claims arising from the ending of their contracts of employment with the first respondent. The first

respondent among other things manufactured and distributed a range of healthcare, beauty and pharmaceutical products both locally and internationally. It owned a number of brands, and it also provided development and manufacturing services to third parties. The first respondent went into administration on 28 February 2020 and did not respond to the claims. Employment Judge Hyams ("EJ Hyams") conducted a preliminary hearing by telephone on 17 March 2022 and at that hearing, with the agreement of (1) the claimants who were present or represented and (2) the second respondent, listed for hearing on 30 January to 3 February 2023 inclusive a hearing to determine some key preliminary issues. EJ Hyams stated those issues in his case management summary which he signed on 30 March 2022, and the parties accepted that those issues were apt for determination at that preliminary hearing.

Preliminary matters: the things that were agreed by the parties and the making by us on 30 January 2023 of an order under rule 36 of the Employment Tribunals Rules of Procedure 2013

2 At the hearing of 17 March 2022, Mr Salter on behalf of the second respondent accepted that there had been a transfer within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246, as amended ("TUPE"), to the second respondent on 5 March 2020 ("the TUPE transfer"), and that the claimants had not been employed by the second respondent. The second respondent also accepted that the claims were all made within the relevant time limits and after the completion of the early conciliation requirements of section 18A of the Employment Tribunals Act 1996. Also at the hearing of 17 March 2022, the parties who were present and EJ Hyams agreed that the claims of two claimants (Ms Apter and Mr Monk) would be treated as lead claims. On 30 January 2023, we realised that that had been done otherwise than under rule 36 of the Employment Tribunals Rules of Procedure 2013 ("the 2013 Rules"), and that such an order was apt. The parties agreed to the making of such an order, and we therefore made one. The claims of Ms Apter and Mr Monk are accordingly lead cases, and the claims of the other claimants are stayed.

The issues which we determined after the hearing of 30-31 January 2023

3 The issues which were agreed by the parties to be apt for determination at the hearing which we conducted were these.

3.1 When did the TUPE transfer take place? Was it on 5 March 2020 or (for example) over a period of time, in stages?

3.2 Were the lead claimants assigned to the organised grouping of resources or employees that was subject to the TUPE transfer?

3.3 Were they dismissed in the circumstances stated in regulation 7(1) of TUPE, namely the sole or principal reason for their dismissals was the TUPE transfer and there was not an economic, technical or organisational reason for the dismissal within the meaning of regulation 7(2) of TUPE for the dismissal?

3.4 If so, did regulation 8(7) of TUPE apply so that neither regulation 4 nor regulation 7 of TUPE applied to them?

3.5 If the reason for the lead claimants' dismissals was an economic, technical or organisational reason within the meaning of regulation 7(2) of TUPE, then was it (applying regulation 7(3) of TUPE) redundancy or some other substantial reason?

3.6 If so, then was the dismissal of Ms Apter fair within the meaning of section 98(4) of the Employment Rights Act 1996?

3.7 Were there special circumstances within the meaning of regulation 15(2)(a) of TUPE which rendered it not reasonably practicable to comply with the duties to (1) organise an employee representative election within the meaning of regulation 14 of TUPE and (2) consult in accordance with regulation 13 of TUPE?

3.8 If so, then did either respondent take "all such steps towards [the] performance [of the relevant duty] as were reasonably practicable in those circumstances"?

3.9 If the answer to either of the preceding questions is "no", what award should the tribunal make under regulation 15(7) of TUPE?

3.10 Were there special circumstances within the meaning of section 188(7) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRA") which rendered it not reasonably practicable for the first respondent to comply with the duties imposed by section 188(1A), (2) or (4) of that Act?

3.11 If so, then did the first respondent take "all such steps towards compliance with [the relevant duty] as [were] reasonably practicable in those circumstances"?

3.12 If the answer to either of the preceding questions is "no", what award should the tribunal make under section 189(2) of TULRA?

The treatment of the above issues by the parties and hence us

4 In fact, both parties (treating the claimants as one party and the second respondent as the other party) gave evidence in relation only to the question of

the reason for the claimants' dismissals and whether or not the reason or, if not the reason, the principal reason, for their dismissals, was the TUPE transfer. However, in the circumstances as they stood, the determination of that issue (issue number 3 in the above list) depended also on the determination of the first issue in the list, which was whether or not the transfer which did in fact take place took place in stages, one of which occurred before the claimants' dismissals.

The relevant case law

5 We were referred to a number of relevant authorities. We were reminded that most of them concerned the situation when a dismissal which was for a reason connected with a transfer under TUPE was automatically unfair within the meaning of regulation 7(1) of TUPE, and that now, with the regulations as they stand and stood in 2020, only if the reason or principal reason for a dismissal is a TUPE transfer itself will it be automatically unfair within the meaning of regulation 7(1).

6 We referred ourselves to one more authority: *Thompson v SCS Consulting Ltd* [2001] IRLR 801. The facts of that case were described in this way in the headnote.

> 'Mr Thompson was employed as a sales executive in the UK, originally by ... SCS Consulting, and subsequently by Lava Systems (Europe) Ltd. Both companies were wholly owned subsidiaries of a Canadian company, Lava Systems Inc.
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> On 21 December 1998, receivers were appointed to Lava in Canada. Another Canadian software company, Open Text, agreed to purchase Lava's assets in Canada and the UK. It was decided that its UK subsidiary, Open Text (UK) Ltd, would purchase the business of SCS and Lava.
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> On 23 December, the receivers designate in the UK for SCS and Lava informed Open Text UK that they proposed to dismiss all the employees immediately. However, Open Text UK did not want to lose vital employees, and it was agreed in writing that the appointment of receivers would be delayed until 29 December, by which date, Open Text UK would identify the employees it wished to retain for the future operation of the business. The agreement provided that before the sale and purchase agreement took effect, the receivers would dismiss the remaining employees "at the request of the purchaser as a precondition to the purchaser entering into this agreement on the grounds that they are not required for the operation of the business and that it would not be economically viable for the business to continue if the dismissed employees remained in the employ of the vendors."
>
> Mr Thompson was not included on the list of employees to remain and, together with 24 other employees, he was dismissed by the receivers with effect from 11.30 am on 29 December. The business was transferred

to Open Text UK at 10.30 pm on the same day. It was accepted that this was a transfer to which the Transfer of Undertakings Regulations applied.'

7 The nub of the ruling of the EAT (which was presided over by Mr Recorder Burke QC) was in paragraph 40 of its judgment, as follows:

> "[I]t was in our judgment open to the tribunal to conclude on the facts, as they did, that the business was overstaffed, inefficient in terms of sales and insolvent, and that the only way in which it could be made viable for the future and continued as a going concern was for the workforce to be reduced in size. The tribunal found as facts that this was not a case of collusion and that left to their own devices the receiver would have dismissed all of the employees. These findings were not challenged. On the basis of the primary facts it was for the tribunal to reach a factual conclusion as to whether the reason or principal reason for the dismissal of Mr Thompson was an ETO reason; it was open to the tribunal to decide that it was".

8 We found the judgment of Briggs LJ (as he then was) in *Kavanagh v Crystal Palace FC Ltd* [2013] EWCA Civ 1410, [2014] ICR 251, about the interplay between the law of insolvency and TUPE, to be of particular assistance. We quote all bar its final sentence, which was not material to our considerations. We have emphasised several particularly important passages.

> '**17** I agree that this appeal should be allowed, essentially for the reasons given by Maurice Kay LJ. I add some words of my own because I have throughout my consideration of this appeal been troubled by the wider implications thrown up by the outcome in the Employment Appeal Tribunal, and by the potential consequences of the application of Mummery LJ's judgment in *Spaceright Europe Ltd v Baillavoine* [2012] ICR 520, para 47 outside its factual context.
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> **18** This appeal raises, to my mind, some fundamental issues about the interaction between two statutory regimes, namely that which protects employment on the transfer of undertakings (TUPE) and that which seeks to preserve jobs from the consequences of corporate insolvency (administration). The sale of a business lies at the heart of both regimes. The reasons why it does in the TUPE regime are too obvious to call for description. The reason why it does in the administration regime is slightly more complicated.
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> **19** Paragraph 3 of Schedule B1 to the Insolvency Act 1986 (inserted by sections 248(2) and 279 of and Schedule 16 to the Enterprise Act 2002) sets out the purposes of administration, which include:
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>> "(a) rescuing the company as a going concern, or (b) achieving a better result for the company s creditors as a whole than would be likely if the company were wound up (without first being in administration) . . ."

Purpose (a) will not generally involve a transfer of the undertaking of the company, but purpose (b) very commonly will. Indeed, one of the main advantages of administration over liquidation is precisely that administrators have power to continue the insolvent company's business, protected (unlike the company's directors) by the moratorium on the pursuit of claims by creditors, so that it can be prepared and marketed for sale as a going concern, and the proceeds of sale distributed to the company's creditors, either by the administrators themselves, or (less commonly now) in a subsequent liquidation.

20 In administrations of type (b), continuation of the company's business is commonly a prerequisite of a beneficial sale. Once a business is closed down, its value rapidly declines to an amount no greater than the aggregate of the forced sale value of its constituent assets.

21 Sometimes, the business sale is arranged prior to the company going into administration and concluded almost immediately afterwards. This is commonly known as a "pre-pack". But there are many administrations, and the present case is an example, where the administrator continues the business in the hope or expectation of a sale, for as long as the resources necessary for that purpose are available to him, and while a beneficial sale (i e at a price greater than the break-up value) remains a realistic possibility.

22 An administrator's ability to continue the business pending sale is inevitably constrained by acute economic considerations. The company will not be in administration unless it is insolvent and, indeed, hopelessly insolvent, in the sense that the directors had reached the view that, without protection from its creditors, the company could not realistically expect to trade out of its difficulties. In most cases, that insolvency will have arisen because of the manner in which the company had been conducting its business. **Thus, leaving aside pre-packs, administrators will typically need urgently to reform and economise on the manner in which the business is being conducted immediately prior to their appointment, both to maximise the period before a lack of resources compels closure, and to make the business more attractive to purchasers. Dismissal of employees is, unfortunately for them, a principal method by which the administrators can achieve the economies necessary for those two purposes. Those who are kept on have to be paid their wages and salaries in full, as a prior claim on the limited funds available to the administrators.**

23 The insolvency legislation contains an elaborate code which prescribes the proportions in which a company's stakeholders (who include creditors, employees and shareholders) share in the misfortune constituted by the company's insolvency. The TUPE regime is not part of that legislation but, since it plainly applies to the transfer of a corporate undertaking by the administrators of an insolvent company, it has an undoubted effect on it, and one which is designed to be for the protection of the interests of employees. **It affects the operation of the insolvency**

code because, if the rights of employees who are dismissed before the transfer are enforceable against the transferee, then the purchaser of the business from the administrators will generally subtract from what might otherwise have been the purchase price an amount sufficient to discharge those liabilities, thereby reducing the amount which the sale will contribute by way of distribution to creditors generally. The result is that those dismissed employees' claims will achieve a priority in the insolvent distribution not contemplated by the insolvency code, under which for example unfair dismissal claims, even by employees initially kept on by the administrators, do not enjoy the priority afforded to payment of their wages and salaries. It is the propensity of the application of the TUPE regime in those circumstances to produce that favourable result that calls for an anxious consideration of the relationship between the two regimes.

24 Plainly, the tie-breaker which must be applied to resolve the potential conflict between the insolvency code and the TUPE regime for the protection of employees is, in the United Kingdom at least, regulation 7 of TUPE. It was designed to implement in the United Kingdom the spirit and intendment of article 4(1) of Directive 2001/23, which provides:

> "The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce."

In *Whitehouse v Charles A Blatchford & Sons Ltd* [2000] ICR 542, 555-556, Jonathan Parker J (sitting as an additional judge of the Court of Appeal) said, after a review of relevant European Court of Justice authority:

"the purpose of the Council Directive is to safeguard the rights of employees, vis-à-vis their employers, where an undertaking or business is transferred, but not to place employees in any better position vis-à-vis their employers by virtue of such a transfer."

25 The *Whitehouse* case was not about an insolvent transferor, but if that identification of the general purpose of the Directive is applied to an insolvency situation such as the present (and counsel did not suggest otherwise), a conclusion that regulation 7 should protect employees who have of necessity been dismissed by administrators because the money to pay them has run out would at first sight seem to conflict with it. It would place the dismissed employees in a much better position by reason of the transfer because, but for the transfer, their rights on dismissal would have been those less valuable rights afforded to dismissed employees under

the insolvency code. That does not of course mean that this purpose test can simply be applied wherever an issue arises as to whether regulation 7(1) is satisfied. But it does serve as a reality check, in cases where the resolution of the regulation 7 issue appears to produce a result apparently in conflict with the underlying purpose.

26 Regulation 7 unambiguously requires a subjective fact-intensive analysis of the "sole or principal reason" for the relevant dismissal, so that the employment tribunal needs to be astute to detect cases where office holders of insolvent companies have attempted to dress up a dismissal as being for an ETO reason, where in truth it has not been. In the present case the employment tribunal carefully assessed and rejected a case by the employees that this is indeed what had occurred, leading to their finding that Mr Guilfoyle's ostensible reason for the dismissals was the genuine reason.

27 The need to keep the operation of regulation 7 within the bounds contemplated by Directive 2001/23 is also a powerful reason why in my view the employment tribunal was correct to draw a careful distinction between Mr Guilfoyle's reason for these particular dismissals and his ultimate objective. **Office holders conducting a type (b) administration with a view to a sale of the business will almost always have a transfer of the undertaking as their ultimate objective. Everything they do will be tailored to its achievement. If that objective is applied without more as the sole or principal reason for the dismissal, then the ETO exception to the operation of regulation 7(1) will never, or hardly ever, apply in the context of this common type of insolvency process.**

28 For the same reason, it is important to understand Mummery LJ's judgment in *Spaceright* [2012] ICR 520, para 47 in the context of its facts. There the dismissal of the CEO was not because the money to pay him had run out, but solely or principally because it would make the business more attractive to a purchaser, who would naturally wish to put a person of his own choice into the top job.'

9 Mr Palmer relied on the following paragraph (numbered 18) of the judgment of the European Court of Justice ("ECJ") in *P Bork International A/s (In Liquidation) v. Foreningen Af Arbejdsledere I Danmark* [1989] IRLR 41:

"It follows that the workers employed by the undertaking whose contract of employment or employment relationship has been terminated with effect on a date before that of the transfer, in breach of Article 4(1) of the Directive, must be considered as still employed by the undertaking on the date of the transfer with the consequence, in particular, that the obligations of an employer towards them are fully transferred from the transferor to the transferee, in accordance with Article 3(1) of the Directive. In order to determine whether the only reason for dismissal was the transfer itself, account must be taken of the objective circumstances in which the dismissal occurred and, in particular, in a case like the present

one, the fact that it took place on a date close to that of the transfer and that the workers concerned were re-engaged by the transferee."

10 However, the issue in that case was whether or not there was in the circumstances of that case a transfer within the meaning of the Acquired Rights Directive which TUPE implements. The circumstances of that case were very different from those of an administration under the Insolvency Act 1986 (as amended) ("the IA 1986"), as can be seen from the ruling in paragraph 20 of the ECJ's judgment, which was this.

> "For these reasons, the answer to the question submitted must be that Article 1(1) of Council Directive 77/187 of 14.2. 77 must be interpreted as meaning that the Directive applies to a situation in which, after he has given notice terminating a lease or after forfeiture thereof, the owner of the undertaking retakes possession thereof and thereafter sells it to a third party who shortly afterwards resumes its operations which had ceased upon termination of the lease, with a little over one-half of the staff that was employed in the undertaking by the former lessee, provided that the undertaking in question retains its identity."

11 Mr Palmer also relied on paragraph 18 of the judgment of Bean LJ in *Hare Wines Ltd v Kaur* [2019] EWCA Civ 216, [2019] IRLR 555, which is in these terms.

> "The next difficulty is that Ms Kaur was dismissed on the day of the transfer. As the leading case in the CJEU of *P Bork International A/S v Foreningen af Arbejdsledere i Danmark* (101/87) EU:C:1988:308, [1989] IRLR 41 makes clear, proximity to the transfer is not conclusive, but it is often strong evidence in the employee's favour."

12 However, Bean LJ there did not consider how the decision of the ECJ in *Bork* needed to be applied where there was an administration within the meaning of the IA 1986, and the facts of *Kaur* did not involve such an administration. They were, in fact, somewhat unusual. The case was about a dismissal where there was a TUPE transfer to a company of which it was intended that a colleague of the claimant would be a director in the circumstance that the claimant "had a strained working relationship with" that colleague. The claimant was dismissed because (as recorded in paragraph 23 of Bean LJ's judgment) "the transferee did not want her on the books, the reason for that being that she got on badly with" the colleague in question.

13 Both parties relied on the decision of His Honour Judge ("HHJ") Jeffery Burke QC sitting in the Employment Appeal Tribunal ("EAT") in *Marshall v Game Retail Limited* UKEAT/0276/13/DA. That decision was a reserved one. In it, at paragraph 23, HHJ Burke QC said this about the burden of proof, having set out paragraphs 52-60 of the judgment of Mummery LJ in *Kuzel v Roche Products Limited* [2008] EWCA Civ 380, [2008] ICR 799:

> "It is accepted that the principles set out in those paragraphs were, although the Judgment in *Kuzel* itself may not have been, put before the Employment Judge and that Mr Sibbel [counsel for the claimant in the employment tribunal, who was the appellant to the EAT] did not put his case forward on the basis that the burden of proof lay throughout on the Claimant. It was not suggested that the fact that the inadmissible reason relied upon by the Claimant in this case was not that relied upon in *Kuzel* in any way reduces the applicability in the present case of the principles which Mummery LJ set out in the passage cited above. Accordingly, applying those principles, there was a burden on the Claimant in the present case to produce some evidence supporting his case that his dismissal was by reason of or connected with the transfer; once that stage had been reached, it was for the Respondent to prove that the reason or principal reason for the dismissal was the different reason on which they relied. If the Respondent failed to do so, then it would be open to the Employment Judge to find that the reason was the inadmissible reason on which the Claimant relied. That would often be the consequence of a failure of that type; but it was not in law a necessary consequence of such failure; see *Kuzel* at paragraph 59."

14 We saw that in paragraphs 57-61 of his judgment in *Kuzel*, Mummery LJ said this:

> '**57** I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.
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> **58** Having heard the evidence of both sides relating to the reason for dismissal it will then be for the tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.
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> **59** The tribunal must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the tribunal that the reason was what he asserted it was, it is open to the tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the tribunal must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted

by the employee. That may often be the outcome in practice, but it is not necessarily so.

60 As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.

61 I emphatically reject Roche's contention that the legal burden was on Dr Kuzel to prove that protected disclosure was the reason for her dismissal. The general language of section 98(1) is applicable to all of the kinds of unfair dismissal in the 1996 Act ("for the purposes of this Part"), including the subsequently inserted provisions. Section 98(1) is inconsistent with Mr Bowers's submission, as is the specific provision placing the burden of proof on the employer in case of detriment to the employee by reason of a protected disclosure. It is probable that no similar provision was made in the case of dismissal because it was considered, correctly in my view, that the situation in the case of dismissal was already covered by the general terms of section 98(1) and was blindingly obvious as a matter of general principle. An employer who dismisses an employee has a reason for doing so. He knows what it is. He must prove what it was.'

15 Both parties also referred us to the decision of the Court of Appeal in *Amicus v Dynamex Friction Limited* [2008] EWCA Civ 381, [2009] ICR 511. The facts of that case were described in this way in the headnote.

'On the petition of the sole director, S [Mr Craig Smith], administrators were appointed to manage the affairs of F Ltd. The following day all 93 employees of F Ltd were sent letters of summary dismissal by the administrator, informing them that they had been made compulsorily redundant but that, since there were no funds available to pay them, their claims fell to be paid by the Secretary of State. Within two weeks of the making of the administration order the respondent companies, with whom S also became involved, had each acquired a part of F Ltd's undertaking from the administrator. Two unions brought claims for protective awards on the ground that there had been a failure to consult, and a number of employees made claims for unfair dismissal or a redundancy payment. The employment tribunal found that, while there had been a relevant transfer under regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 1981 [the precurser to the 2006 TUPE regulations], the dismissals had been for an economic reason within the meaning of regulation 8(2) [now regulation 7(3) of TUPE], and not for a reason connected with the transfer, so that the employees were not

employed by F Ltd immediately before the transfer and there was no transfer of their contracts to the transferees pursuant to regulation 5; and that, accordingly, any liability for their claims rested with the Secretary of State. The employment tribunal expressly rejected any suggestion of collusion between the administrator and either S or the transferee companies. The Employment Appeal Tribunal allowed appeals by the claimants and the Secretary of State and remitted the matter to the tribunal on the ground that the tribunal had failed to find relevant facts that were in dispute, in particular in respect of the claimants allegation that the administration and subsequent transfer had been "stage managed" by S, using the administrator as an "unwitting tool" to circumvent the Regulations.'

16 In paragraphs 59-61 of his judgment, Ward LJ (with whom Rimer LJ agreed) said this.

> "**59** ... In deciding whether the reason for dismissal was an economic one or a transfer-related one, one has to identify whose thought process is the subject of this analysis. It has to be he who took the decision. It has to be Mr Rutherford's [i.e. the administrator's] decision that comes under the microscope. The employment tribunal found as a fact that he decided that he had no option but to dismiss the employees because he had no money with which to pay them. That is an economic reason. True it was that at the time when that decision was taken there was a need to sell the business and there was the possibility that a sale could be achieved. But no purchaser had been identified. No purchaser was identified until a week later. There is nothing to suggest that the administrator took the view that he had to dismiss the staff in order to have a better prospect of selling the business. There is no suggestion, taking up passages from Lord Oliver's speech in *Litster v Forth Dry Dock & Engineering Co Ltd* [1989] ICR 341, of the dismissal of the existing workforce being engineered specifically with a view to avoiding liabilities to the employees. There is no suggestion of a calculated disregard for the obligations imposed by the Regulations. This is not a device, transparent or otherwise, on Mr Rutherford's part to escape the legitimate claims of the workforce. He was not acting at the behest of or in collusion with either Craig Smith or Dynamex. As the tribunal found, the administrator dismissed the employees in spite of any transfer not with a view to effecting it. That finding destroys any argument that the transfer had anything to do with the dismissals.
>
> **60** I bear in mind the purpose of TUPE as explained in *Litster* [1989] ICR 341. The Regulations must be construed purposively. But the Acquired Rights Directive expressly permits the transferor to justify the dismissals if they take place for economic reasons. Regulation 8(2) of TUPE correctly encapsulates that purpose and the meaning is plain and needs no elaboration or adjustment as was required in *Litster* for the proper construction of regulation 5(3). The conclusion that the reason for

the change in the workforce was an economic one, seems to me to be an inevitable conclusion to be reached from the facts which were found.

61 As counsel have identified, the critical question is: whose decision was it? Once the answer is that it was the administrator's decision, then nothing done by Craig Smith before that decision was taken nor after it could have any bearing on the reasons why Mr Rutherford acted as he did. The facts may give rise to the inevitable conclusion that Craig Smith cynically manipulated the insolvency of Friction, saw the opportunity of the August holidays as the best time to place the company in administration and did so not simply with a hope but with every expectation that by reason of Realty's close association with Dynamex, Dynamex itself would soon fall into his palm. That is what happened. It is not an attractive story. It brings no credit to Craig Smith. But Craig Smith did not decide to dismiss the employees, even though he knew that would happen and wanted it to happen. Mr Rutherford dismissed them. He did so for economic reasons."

17 Before turning to the evidence before us, we record that in paragraph 12 of his judgment in *Marshall*, HHJ Burke QC said this.

"The Employment Judge then, at paragraph 68, pointed out that it was an unusual feature of this case that neither party had called the administrator who made the decision to dismiss the Claimant or had asked questions of the administrator which could be put before the Tribunal in writing, as had been done in the recent case of *Spaceright Europe Ltd v Baillavoine* [2012] ICR 520. He said, trenchantly but justifiably, that the parties had taken an evidential gamble; he referred, at paragraph 57 of his Reasons, to the emphasis put by Ward LJ in *Dynamex Friction Ltd v Amicus* [2008] IRLR 515 on the need, in deciding whether the reason for dismissal was a transfer-related reason, to put under the microscope the thought process of the person who had made the decision to dismiss. He then, at paragraphs 70 to 71, set out the Claimant's arguments on the facts in support of his case that he had been dismissed to make the sale of the business a more attractive proposition to purchasers. The Claimant relied on the facts that the administrator had said to HMRC on 26 March that they were intending to hive down the trade and assets as soon as possible and to sell to a third party or to existing lenders what remained (see the letter set out at paragraph 5 above), that OpCapita had been involved in a due diligence exercise from 21 March, that therefore a prospective purchaser was already on the scene and the sale of the UK business, reduced by the closure of a substantial proportion of the shops and the dismissal of a substantial proportion of the staff, took place within a very short period. He relied on other factual points set out in paragraph 71, in particular that there was no redundancy of his post and that his duties continued in the hands of the Respondent."

The evidence before us

18 We heard oral evidence from the lead claimants, Ms Apter and Mr Monk. We heard oral evidence on behalf of the respondents from the following witnesses.

18.1 Ms Olivia Regan, whose job title was at the time of the hearing before us and in February and March 2020, "Chief Financial Officer and Chief Operations Officer at Phoenix Labs Unlimited Company", which she described as "the parent company of Dendron Brands Limited", i.e. the second respondent. We refer below to Phoenix Labs Unlimited Company as "Phoenix".

18.2 Mr David Wilkinson, who was at the time of giving evidence to us Head of Risk at KPMG Ireland, but who was in February 2020 a partner in KPMG's Transaction Services business unit. KPMG is a well-known firm of accountants.

18.3 Mrs Suzanne Cox, who is a qualified accountant who was at the time of giving evidence to us and in February 2020 a Senior Manager in the Deals practice of PricewaterhouseCoopers ("PwC"). PwC is another well-known firm of accountants.

19 We had before us a bundle of documents consisting of 453 pages plus an index. Any reference below to a page is to a page of that bundle.

Our factual inquiry; a discussion about the evidence before us

20 Many factual aspects of the situation were undisputed, or indisputable. The claimants were not informed at any stage before 28 February 2020, when they were dismissed with immediate effect on the day when the first respondent entered into administration within the meaning of the IA 1986, of the reasons for the first respondent entering into administration.

21 As a result, Mr Palmer was unable to cross-examine the second respondent's witnesses about the key issue of the real, or real principal, reason for the claimants' dismissal by reference to anything other than what was in the hearing bundle and the witness statements of those witnesses.

22 However, there was a gap in the evidence before us, in that (as was the case in *Marshall*) we heard no evidence from the person who took the decision to dismiss the claimants on 28 February 2020. That person was Mr Michael Denny, who was one of the two administrators who were appointed on 28 February 2020. It was also noticeable that we did not hear evidence from the main shareholder of the parent company of the second respondent, Mr Larry McGowan, whose decision it was to buy the business of the first respondent as it stood after those dismissals. We return below to the significance of the absence of oral evidence from those persons. We now turn to the sequence of events which led to the claimants' dismissals.

The events which led to the claimants' dismissals

23 Although we did not hear oral evidence from Mr Denny, there was in the bundle before us a report which he had signed on 7 April 2020. It was at pages 314-359 and was stated to have been made for the purposes of Case No. CR-2020-BHM-000129 in the High Court of Justice Business and Property Courts in the Birmingham Insolvency and Companies List (ChD), "In accordance with paragraph 49 of Schedule B1 of the Insolvency Act 1986 and rule 3.35 of the Insolvency (England and Wales) Rules 2016". The background to the administration which commenced on 28 February 2020 was described in that report (to which we refer below as "Mr Denny's report"), at pages 320-321. Under the heading "The circumstances leading to our appointment", this was said.

> "On 3 October 2019, Leumi and the Company engaged us jointly to review the Company's position. The scope of work included reviewing the short term cash flow forecasts. [sic; that should it appears have been a comma] preparing an estimated outcome statement and reviewing the medium term forecasts of the business. This review identified a £4m funding need beyond existing debt facilities.
>
> The Company approached the existing shareholders, as well as considering other funding sources. However, there was very limited capacity to take on any additional debt given the business was already under-capitalised and with negative cash generation, and there was no ability from within the shareholder base to provide the level of funding required.
>
> Given the fragility of the cash position and the scale of the funding requirement, we were further engaged by the Company on 16 December 2019 to pursue a solvent sale of the Company and its subsidiaries on an accelerated basis. Under a separate engagement dated 17 December 2019, we provided short term cash flow support and undertook contingency planning for an insolvency process in the event that the Company was unsuccessful in achieving a solvent sale.
>
> The deadline for offers for parties interested in purchasing the Company and its subsidiaries was 31 January 2020.
>
> We approached 79 parties about their interest in the business and/or various brands and assets. Of these parties 23 returned NDAs and received an information memorandum. Many of these parties withdrew their interest quickly on review of the IM, which illustrated the scale of the turnaround and additional funding that was required.

10 parties remained in the process and received access to the data room and management presentations. All but one party ruled out a solvent sale very quickly. The one party remaining made an indicative offer but then went on to withdraw this offer on 28 January 2020.

From 1 February 2020, efforts were made to identify a buyer for the business through a pre-packaged administration sale. Five parties (who were part of the solvent sale process) made indicative offers. To preserve value in the business whilst a sale was explored further, a notice of intention to appoint administrators was filed in Court by the Company directors on 18 February 2020. However as the parties conducted their due diligence, the scale of the post-transaction funding requirement to meet payroll and vital restructuring costs meant that ultimately, all offers were withdrawn by 27 February 2020 and a pre-packaged sale was not achievable. During this time the board of directors obtained independent legal advice regarding their duties to creditors and the appropriateness of continuing to trade.

Given there was no longer the reasonable prospect of a better outcome for creditors through continuing to trade, and given the need to protect the goodwill and remaining value of the business, the Directors of the Company appointed Michael Thomas Denny and Robert Nicholas Lewis as Joint Administrators on 28 February 2020."

The circumstances described by Mr Denny after the start of the administration and leading up to 5 March 2020

24 At page 322 of Mr Denny's report, this was said.

"As part of our pre-appointment contingency planning work a number of post administration strategies were considered. As all offers to purchase the business had fallen away and a pre-pack sale was no longer achievable, the decision was made to continue trading the Company during administration. However, in light of the Company's insolvency and restricted financial position it was not possible to continue trading the business on the same scale as pre-administration operations. Consequently, and immediately following our appointment, it was necessary to make 186 redundancies, while 111 employees were retained to assist with the ongoing but significantly reduced trading footprint. Finished goods with clean title were identified with a view to selling these to existing customers, whilst seeking offers for the business.

To further help maintain the value in the business, the Administrators undertook focused production activity to convert existing WIP into finished goods. This continued in line with licensing and regulatory requirements, and the Company's head of quality provided the relevant notifications to the MHRA and other accrediting bodies.

Whilst the administrators continued trading the business on a much smaller scale, we adopted a strategy to try and achieve a sale of the Company's business and assets as it was considered that this would be a better outcome for the general body of creditors (see Appendix C for more detail).

Sale of the Company's business and assets

Following a short post-administration marketing exercise after our appointment, we were approached by 13 new interested parties and four parties who had shown an interest previously in the process. Most new buyers were interested in divisions or brands of the business and were also very small players in the market. Despite this, they had large synergies with the Company; for example, some were customers who were considering a purchase in order to ensure the continuity of the products they purchased from the Company.

All interested parties were sent an NDA and asked to move quickly in the process to preserve the value in the business and reduce trading costs as we needed to achieve a sale as quickly as possible. Further information regarding the sales process and dealing with initial interest from parties is included at Appendix C.

The Purchaser was the only party who was interested in purchasing the Company's business and assets as a whole (excluding book debts) and who was able to transact quickly. Given the risks of continued trading and the inevitable erosion of value and goodwill over time, achieving a sale quickly was a key priority for us.

Following successful negotiations, on 5 March 2020 a sale of substantially all of the business and assets of the Company was completed for consideration of £6m. All remaining 111 employees of the Company transferred to the new company under TUPE, which has led to a substantially lower level of creditor claims than would have been the case in a closure scenario.

Assets included in the sale comprised:

- Land and buildings - being a freehold property located at 94 Rickmansworth Road, Watford;
- Plant and Machinery;
- Stock - being raw materials (predominantly chemicals and packaging), work in progress and finished goods;
- IP Rights / Licences and trademarks (including IP over the Astral and other brands);
- Fixtures and fittings;

- Contracts and business information; and
- Goodwill.”

25 The reference in that passage to “the Purchaser” was to the second respondent.

26 Appendix C to Mr Denny’s report was entitled “Details about the sale of the business and assets”. The first part of the appendix under that heading was this passage (on page 336).

> “**<u>Introduction</u>**
>
> I led all engagements pre-appointment with the support of Robert Lewis and others. As explained earlier in the report, it was not possible to complete a sale of the Company’s business on a solvent basis.
>
> When considering the administration strategy prior to appointment, a pre-packaged sale of the Company’s business and assets was considered preferable to trading in administration due to the nature of the Company’s business as a manufacturer and distributor of pharmaceutical products. The Company was accredited by MHRA (UK) and FDA (USA) and health and safety requirements to trade and produce pharmaceutical products in administration would have been substantial and could have posed significant risks for any administrator. In addition, the trading costs for manufacturing and distributing the products over an extended period would have been significant and there may have been a requirement to source funding from key customers that the Company supplied, or other parties.
>
> However, it was not possible to secure a pre-packed sale as there were no offers for the business and assets. Following our appointment and after a short-marketing exercise, sales of substantially all of the Company’s business and assets were made to Phoenix Labs Unlimited Company, Dendron Brands Limited and Dendron Properties Limited on 5 March 2020.
>
> **<u>Options considered by the administrators in waiting</u>**
>
> A close down strategy was considered but this would have meant the redundancy of all the Company’s staff, increasing creditor claims in the administration. This would also have detrimentally impacted the value of the Company’s other assets, including the intellectual property and as a result of the closure, the resultant impact to customers would have seen reduced recoveries from the debtor ledger.
>
> The alternative strategy of trading on a reduced level at least in the short term would largely have avoided these issues and as detailed previously,

we believed there was a reasonable prospect that parties would renew their interest in the business following an insolvency. Our view was that this would maximise returns for creditors while preserving a number of jobs.

There were also key customers relying on the production of certain branded products who we understood may have been willing to fund a proportion of our trading cost post-appointment if that had been required, but this was not the case.”

27 At the top of the next page (337), this was said.

“**Marketing activities undertaken**

Pre-administration accelerated sales process - Proposed solvent sale

An information memorandum was drafted which was used to market the business. A no-names teaser document was also produced.

Interested parties known to the Company and to PwC, as well as potential interested parties obtained through market review were then contacted with the teaser document to ascertain interest. All parties that were approached were approved by the Company’s directors.

Following initial discussions with interested parties once they had signed an NDA, they were provided with the information memorandum to ensure confidentiality was maintained and therefore value in the business was preserved. Following the issuance of the information memorandum, parties were given the opportunity to meet with management. 10 parties met with management for a pre-prepared presentation and the opportunity to question management on areas of interest.

Parties which provided indicative offers or expressions of interest were then provided with data room access so they could undertake their due diligence.

Pre-administration accelerated sales process - Proposed pre-packaged sale in administration

We engaged with those parties who had previously expressed that they would be interested in purchasing the business in insolvency. As these parties already had access to all the marketing information discussed above and the financial position of the Company had not materially changed, no new marketing material was produced.

Post administration

As with our approach before appointment, all interested parties were sent an NDA and asked to move quickly in the process to preserve the value in the business and reduce trading costs as we needed to achieve a sale as quickly as possible. The same IM and data room that were available in earlier stages of the process were made available as these still accurately reflected the historical financial position of the Company and production of a new IM would have delayed interactions with interested parties and any subsequent sale. To speed up the process further, all interested parties that returned an NDA were asked to send a letter of intent explicitly stating what parts of the business or assets they were interested in. This helped us focus immediate attention on those parties interested in purchasing all or significantly all of the Company's business and assets as well as considering sales to two or more parties in the event that one sale might not be achieved."

28 All three witnesses for the second respondent gave evidence which was consistent with those passages. No part of those passages was challenged by the claimants. What was of most importance was to us, was, for the reasons stated in the case law to which we refer above, whether or not the claimants' dismissals were effected by Mr Denny on the basis which was in fact agreed by him (or on his behalf) with Mr McGowan that the latter was going to cause the second respondent to buy the business of the first respondent as it stood after those dismissals, or some part of that business.

29 In coming to a conclusion on that issue, we made the following findings of fact.

The oral evidence which we heard and our findings arising from it

30 Ms Regan's witness statement was commendably concise. Its second half was of particular importance. Phoenix is based in the Republic of Ireland. In the first half of the witness statement, Ms Regan described how Phoenix did not before 28 February 2020 have a subsidiary company in England. It was Ms Regan's evidence in her witness statement that the second respondent was incorporated so that Phoenix did have such a subsidiary and could, via that subsidiary, acquire part or all of the business of the first respondent if a purchase was agreed in that regard. In oral evidence, she said that although the second respondent had not yet been incorporated by 27 February 2020 (a date which was of particular importance given the evidence in paragraph 28 of her witness statement, which we set out in the following paragraph below), Mr McGowan and she decided that the incorporation should nevertheless be effected as Mr McGowan was interested in acquiring a suitable business in the United Kingdom so that if the business or a part of the business of the first respondent were not bought by the second respondent, the second respondent could be used to acquire some other business. The name of the newly-incorporated company was "Dendron Brands Limited", i.e. that of the second respondent, and the proposed registered office address of the company was

given as 94 Rickmansworth Road, Watford, which is a property which was at that time owned by the first respondent.

31 In the first part of her witness statement, Ms Regan said (as was reflected in the document at pages 104-105) that the first respondent on 11 February 2020 submitted an offer of £9.55m for the first respondent's brands and property. The final part of Ms Regan's witness statement was in these terms.

> "22. On 24 and 25 February Larry and I had meetings with David Wilkinson from KPMG who was leading the due diligence process for us. I can confirm that David's witness statement accurately summarises the information he gave to us in those meetings.
>
> 23. Larry arrived in Watford on 26 February 2020. He visited DDD [i.e. the first respondent] during that day.
>
> 24. Our work on the further due diligence information provided to us was indicating that losses for 2019/20 were going to be approximately £4m, which was higher than those originally forecast. The forecasts that had been produced by managers were all based on the premise that customers would stick with the business, but Larry's conversations with the customers had led us to believe that this was far from certain. It was obvious by this point that a large working capital injection would be required by us, at least initially, and we were therefore becoming nervous about our offer of £9.55m.
>
> 25. PwC were putting pressure on us to complete the deal by the end of the week, but we said that we were continuing to work though the numbers and various scenarios.
>
> 26. Although we were not convinced that we wanted to go ahead or that we would be in a position to complete within the timescales necessary, we instructed our solicitors gunnercooke to carry out a first review of the proposed Sale and Purchase Agreement (SPA), just in case.
>
> 27. PwC were chasing us for a response in the evening of 26 February but we communicated via David Wilkinson at KPMG that we were struggling to justify a deal on a pre-pack basis [page 142].
>
> 28. Matters came to a head on 27 February when Larry was informed in a call with Dermal (one of DDD's biggest customers) that they had decided to stop doing business with DDD. Other customers were also indicating that they planned to do the same. This, along with the underlying fragility of the business, led us to conclude that we should not go ahead with the purchase.

29. Although we did not plan to go ahead with the deal, by that point all of the work to set the Newco up had been done, so we had nothing to lose by continuing that process. The application for incorporation of the new company was submitted electronically by KPMG on 28 February 2020 [page 194] and we received confirmation from Companies House that the new company, Dendron Brands Limited, had been incorporated with effect from that date [page 193].

30. On Friday 28 February, PwC communicated to us that they had been appointed as administrators of DDD and they had implemented a redundancy plan.

31. Whilst the action in itself was not surprising, the speed at which this decision had been made and implemented did come as a surprise to us. There had been no indication from PwC in the days preceding 28 February that they planned to do this.

32. That evening, we asked KPMG to contact PwC to talk about the possibility of a new bid in the region of £6m, bearing in mind the new circumstances.

33. PwC's response was that the bid was below their expectations but as prolonging the administration was not in the interests of the company or its creditors, they would be prepared to consider our offer. They explained that they were not granting us any exclusivity so obviously other offers might come in.

34. Our offer was formally submitted on Saturday 29 February 2020 [pages 203 – 207] and covered the brands and the property (along with the remaining employees).

35. Later that day PwC agreed to proceed with our offer and we therefore contacted gunnercooke again to progress a redrafted SPA.

36. I then went to the UK with Larry to finalise the due diligence and complete the deal. We were in Watford from 4 – 6 March 2020. The deal was completed on 5 March 2020 [pages 210 – 313]."

32 We saw that the document at pages 210-313 was signed by Mr Denny on page 311 and by Mr McGowan on pages 312 and 313. It was dated by hand on page 210.

33 Ms Regan said something in oral evidence which was additional to what she said in her witness statement and was also material. She gave oral evidence to the effect that when the second respondent had taken over such of the operations of the first respondent as were covered by the transfer agreement of 5 March 2020, the second respondent found that there was a need to dismiss

more staff and recruit some new ones. Her actual words (as recorded by EJ Hyams and tidied up for present purposes) in that regard were these.

> "We had no hand in the discussions about who was to be made redundant. In fact, we were left after 5 March with staff in the wrong roles, and staff not in places where they were needed."

34 Ms Regan also said in oral evidence that she was not present at Watford during the week of 24-28 February 2020. She said that Mr McGowan had returned from Watford on 27 February 2020 and that he had telephoned her in the evening of that day "to say that he had pulled out as Dermal had pulled out of it", that is to say that Dermal had terminated its business relationship with the first respondent. She was then asked by Mr Palmer whether she had a sense of "finality" or whether it was as she saw it "just a hiatus in the negotiations". Her answer was this: "I thought that that was it." When asked why Mr McGowan had not been called as a witness, she said that it was because he had a heart condition and was "on a waiting list for surgery".

35 Almost all of Mr Wilkinson's witness statement was material. Again, it was admirably concise. In it, he said this.

> "3. I have worked with Phoenix Labs Unlimited Company ('Phoenix') and its CEO, Larry McGowan, a few times over the past 3 or 4 years, mostly doing due diligence assignments. One of my audit partner colleagues is the main point of contact with Larry, but I would tend to be brought in to assist with particular projects when needed.
>
> 4. On 12 February 2020 I was asked to assist Phoenix with due diligence enquiries into a possible acquisition of the business of DDD Limited. It was explained that DDD was heavily loss making, under significant financial pressure and due to its financial condition without a transaction it would likely become insolvent. PwC was running a sales process for the business and was to be the point of contact for diligence enquiries.
>
> 5. At this point Phoenix had already submitted an indicative offer for the business and its property of £9.55m, subject to contract [pages 104 - 105]. The Phoenix offer had been made, and Phoenix included in the process after the transaction deadlines PwC had set, which was indicative that the sales process was behind target.
>
> 6. Data room access was granted to me and my colleagues by the PwC team on 14 February 2020.
>
> 7. As part of the due diligence process, I travelled to Watford and spent time meeting DDD management from Monday 17 to Wednesday 19 February and from Tuesday 25 to Thursday 27 February. Mr Larry

McGowan, principal of Phoenix, was also in Watford for that duration and Ms Olivia Regan, Phoenix CFO, for much of that time, but not the entire duration.

8. On 18 February, gunnercooke, legal advisors appointed by Phoenix, initiated contact with DDD's solicitors.

9. Neither Phoenix Labs nor I knew if there were other bidders for the business, but we knew Phoenix Labs did not have exclusivity. Apart from unknown third parties, one could see why the business could have attracted the attention of two of its larger customers, so we never assumed Phoenix Labs was the sole interested party. At least at one point during the due diligence process, the PwC team let it be known to us that they and DDD management representatives were meeting another bidder party in London.

10. Phoenix had a very clear objective in assessing the acquisition. It saw value in DDD's own brands, but in order to preserve that value it also needed to secure production capability and continuity.

11. In the meetings with DDD management, it became very clear that the business, although not very large, was very complicated. It manufactured and distributed its own brands, it manufactured for third parties under licence, it manufactured and distributed for third parties under licence and it also distributed brands for others on an agency basis. One of its key activities was conducted through a joint venture arrangement with a US enterprise, Blistex.

12. It was losing money heavily, more than had been indicated in its budgets. It was also in difficult dialogue with two major production customers – Dermal and Blistex – who were threatening to remove their business. It had missed promised delivery targets and disappointed other customers, and it had manufacturing issues including contamination, high use of temps, as well as absenteeism.

13. The business was therefore profoundly challenged, making any acquisition decision equally challenging for Phoenix.

14. As part of responding to our diligence enquiries, on 19 February PwC provided Phoenix with a DDD management restructuring plan. DDD management had prepared plans to address its looming insolvency and to reshape the business in line with DDD's management's financial plan for the business. This was discussed with DDD management with a view to our assessing whether the overall plan was credible in terms of financial outcome and whether the planned reshaping of the work force had been carefully thought

through, was consistent with the business plan and its execution properly planned.

15. On 21 February, at the end of the first week of due diligence, I communicated with Mike Denny of PwC highlighting key areas of our focus for the following week [page 133].

16. While I was working at DDD's premises in Watford with Larry and Olivia, tax colleagues in KPMG Dublin were planning for the possible acquisition of the business and appropriate structuring in the event an acquisition was successfully negotiated. Knowing that a UK limited company was recommended as part of the likely acquisition structure, and knowing that the timeframe to execute a transaction was tight, Olivia Regan (Phoenix's CFO) requested that KPMG arrange to set up a company. This was a preparatory measure to demonstrate readiness to transact – without it, Phoenix Labs would not have been able to demonstrate its ability to complete within the timescales PwC were requiring. My colleague Ciara O'Donoghue discussed this with Olivia and emailed her a questionnaire on 21 February 2020 [page 139].

17. On Monday 24 February/ Tuesday 25 February, I discussed my due diligence findings with Larry McGowan. The purpose was to summarise the significant business issues emerging from the due diligence. At that point no decision had been taken by Phoenix to acquire the business.

18. Normally I would be retained to prepare a detailed due diligence report on the acquisition target, but this particular project was dynamic and I was retained to provide oral advice to Phoenix Labs, so a report was never required - I simply reported my findings to Larry as part of our ongoing discussions.

19. My findings included the following:

    a. that the operating loss for the DDD business was likely to be Stg£4m for the year to 31/12/19. Up to that point the indicated loss was circa £3.2m so business performance had deteriorated.

    b. That we considered the business had likely lost a further £800k in January / February 2020 and the short term trajectory saw that loss level continuing. We had not been provided with formal financial information for 2020 – these were purely our own estimations.

c. That management's current restructure plan would not restore the business to viability. Their plan was predicated on certain activities continuing which in our view likely would not continue due to customer relationships having been broken by DDD's bad performance.

d. Apart from any purchase price to be paid, up to a further £6m in funding would likely be required

e. There was a risk of further ongoing losses if whatever restructure was implemented failed.

20. During the second week we discussed further iterations of headcount plans prepared by DDD management while separately trying to form a view of what a viable business might look like and the headcount and roles it would require to support it. These were headcount plans prepared by DDD management for themselves, for their Board or perhaps for their PwC advisers. DDD management had its own view on reshaping the business to achieve viability and re cut plans to reflect their changing view. As per above, our view was that management's plans would not achieve viability.

21. On 26 February 2020 Olivia returned the incorporation questionnaire to my colleague Ciara O'Donoghue, and Ciara sent Olivia the incorporation documents for signature later that day [pages 136 - 137].

22. On Wednesday 26 February PwC chased us to confirm Phoenix interest in a prepack transaction for completion Friday 28 February [page 143]. We responded by e mail to PwC saying it was a struggle to finalise our offer to their timeframe but we continued to try [page 142]. [In fact, we saw, the words used there were these: "We are struggling to get there on the pre pack but have not given up. We'll be at DDD in the morning and are still working to put something to you."]

23. On Thursday 27 February – Dermal, DDD's largest production customer, communicated to DDD that it was terminating its business with DDD. Through that week there had also been unsatisfactory dialogue with Blistex, another key production customer, which was also unwilling to commit to a future trading relationship. Our internal assessment at that point was that the pre-pack transaction desired by PwC was not a transaction Phoenix should enter into.

24. The application for incorporation of the new company was submitted electronically on 28 February 2020 [page 194] and we received confirmation from Companies House that the new company,

Dendron Brands Limited, had been incorporated with effect from that date [page 193].

25. Later on Friday 28 February, we learned that PwC partners had been appointed administrators of the business and had let a significant number of staff go.

26. Whilst it was understood by us that the financial situation of the business was precarious, I had not been involved in any consultations or discussions with PwC, nor was I aware of any discussions between Phoenix and PwC around the placing of the business in administration nor any decisions made by the administrator to make employees redundant.

27. I was only told the business had been placed in administration after it had happened and only learned of the redundancies made after they had been implemented. I had no insight into the administrators' decision making on the downsizing.

28. We hypothesised that the administrators had ceased unprofitable activity, retaining only sufficient employees that appeared necessary to support profitable production of solid orders for certain customers – a very limited continuing activity but which would keep production open and would not be loss making while under administration.

29. The administrators did not share their rationale with us for the downsizing they implemented but from our review of the business it was apparent its losses were increasing, its outlook was deteriorating, it was losing cash, its lending bank's security was being eroded and it had imminent payroll and other obligations so we were not surprised that they needed to urgently implement redundancies.

30. We had brainstormed as to options available to DDD's board and its lending bank which PwC as advisors might be considering with them given the financial circumstances they faced. We considered that there would be some recovery to the secured lender through realisation of business assets by individual sale in administration, so it was a viable option, but it was an inferior option to achieving a sale of some or all of the business.

31. The placing of the business in administration, and the business risks that followed from it, accelerated the need for Phoenix to make a decision either to acquire or to step away. The impact of administration on suppliers, customers and employees was negative, so the matter was urgent, as each day in administration was likely to increase the challenge of rescuing any of the business.

32. Ultimately, Larry McGowan decided that he felt that he could persuade the customers to stay on board. Whilst the two most important manufacturing customers were flagging their intention to take their business away, he felt they had no good alternatives in the short term so needed manufacturing capacity for a short time, despite their unhappiness. That provided an opportunity to demonstrate to them that a business, run by Phoenix Labs could deliver for them and, even if they were not secured for the long term, it provided a window for a business run by Phoenix Labs to establish viability of its own operations. He made an entrepreneurial decision to take a risk and make an offer for certain of the business assets on this basis.

33. On Friday night 28 February, I spoke to the administrator, on behalf of Phoenix, making a revised offer of £6m for certain assets and property of the business. The administrator indicated the offer did not meet his expectations but was at a level where he would proceed, but not on an exclusive basis, reserving the right to deal with any other party who tabled a better offer.

34. On Saturday 29 February, a letter setting out this revised offer was sent to the administrator [pages 205 - 207] and over the course of the following week, asset purchase agreements were negotiated.

35. On Monday 2 March, I wrote to Phoenix's solicitors, gunnercooke, updating them on transaction developments [page 203].

36. Whilst neither Phoenix nor KPMG had knowledge of the decision for appointment of administrators, it was not a surprise to us at the time given the financial position of DDD Limited. It had exhausted its funding, continued to lose money and was unviable as then constituted."

36 Mrs Cox was employed by PwC to do work in relation to the first respondent's business before the first respondent went into administration. She described herself as a restructuring specialist, and she was junior in hierarchical terms to Mr Denny. As Mr Denny's report described, PwC was (see paragraph 23 above) engaged on 16 December 2019 to assist the first respondent "to pursue a solvent sale of the Company and its subsidiaries on an accelerated basis." Ms Cox started working on the affairs of the first respondent on 28 January 2020. She said this in paragraph 6 of her witness statement.

"I was not involved in dealing with the sale of the business. Instead, my role initially was to continue the contingency planning exercise that my colleague and other team members had already started, particularly looking at the case of insolvency. Such contingency planning is entirely

normal in these scenarios and is undertaken so that a number of stakeholders are aware of any potential issues or opportunities at an early stage in order to be ready to quickly implement a strategy if the business moves into insolvency."

37 Mrs Cox's witness statement contained the following further passage of particular relevance.

"16. Once Phoenix confirmed they would not be proceeding, there were no other interested parties remaining in negotiations, nor was there any indication that others would come along. As a result, the business could not avoid an insolvency process as there did not seem to be any realistic prospect of a sale.

17. During 26 and 27 February 2020 I had been liaising with Simon [Morris, the first respondent's HR Director] to further refine his reduced head count plans for various contingency planning scenarios. The various strategies being considered included one in which we would be producing stock, a second assuming we were unable to produce stock and a third of implementing a full closure strategy. We also discussed the logistics regarding how we would address the employees following an appointment of administrators. To assist this process, Simon sent an email to all employees on 27 February 2020 to invite them to meetings [page 145].

18. At the point that all sale of business options and other discussions had been exhausted, the business was placed into administration on 28 February 2020. Mike and Rob Lewis of PwC were appointed as Joint Administrators.

19. Obviously the timings involved were very quick once we knew there was no alternative but to proceed with an insolvency process, but accelerated timescales are normal with this type of work where businesses are in significant difficulty and urgent action is required to try to preserve as much value as possible for the benefit of the company's creditors. This is why we undertake contingency planning as early as possible, in order to prepare for an appointment.

20. Once the business was put into administration, we had to action an immediate headcount reduction plan. As a result of the administration, operations of the business had altered from normal trading and the strategy of the administration was to realise assets and provide the best outcome to all creditors (i.e. a winddown of the entire operation). To do this we used a modified version of the various plans that Simon had put together previously for the non-production staff. The administrators have a requirement to retain individuals in certain roles to assist with their processes, including in

functions such as HR, IT, finance, sales etc. In this scenario, we took the view that it was key to retain the HR team at that time (albeit we did not require the HR Director) as experience has shown that it is important to retain sufficient assistance to support and help those people who are being made redundant. The HR team knew the staff, they knew what work those staff were doing, and retaining them helped to keep the overall costs down rather than bringing in a team of external consultants to manage the redundancy related processes, final payrolls, assisting with employees' claims etc.

21. We also had to decide who at director level would need to be made redundant. It was decided that Simon and Carl Atkinson (Managing Director) were not required, but Roger Harrison (Managing Director) and Charlie Wadsworth (Finance Director) should be retained. Roger was required to assist with exploring opportunities to convert product and seek sales to customers and Charlie was required to assist with finalising the financial position of the company.

22. Prior to the company being put into administration, my colleagues at PwC and I had been fairly limited on who we could speak to within the business in order to obtain information to assist our contingency planning, as only a small number of senior employees were aware of the work we were undertaking. This is often the case as discussions are often commercially sensitive. The aim is to preserve employment and ensure business continuity whilst a range of options are explored. To discuss openly with employees could destabilise the business operations. Mostly we had only really spoken to the directors and two of the finance team members. However, once the administration began, we needed to quickly determine which operational roles were necessary in order to produce material or to get the existing stock ready to be sold. For that, we needed to speak to those who knew the operational side of the business really well and we could not have those conversations until we were appointed as administrators. We had no funding and our forecasts identified that we wouldn't be able to maintain the existing shift pattern, but we wanted to be clear on which staff would be required in order to operate at least one shift. Hemal Patel (who was Group Quality Director, albeit a consultant rather than an employee) was identified as being best placed to determine which individuals in production related roles would be required to support this strategy and Hemal advised that he would also require input from John Yorke. Hemal had initially been identified by one of the directors. Myself and a colleague met with Hemal and John on the morning of 28 February 2020 and they went through the schedule of operational staff to identify the individuals to be retained.

23. To provide some context to the selection criteria considered, as an example of some of the considerations, we were aware that for one of the company's products, which was a heavily regulated hormone drug, certain named individuals needed to be retained for regulatory purposes with the MHRA (Medicines and Healthcare Products Regulation Agency). It was therefore essential to retain those people in order to be able to produce/sell that particular product. If the MHRA registrations were lost for any products, this would be very damaging for the business and would significantly affect its value.

24. The redundancies were required because, given the financial circumstances of the company, DDD had an urgent need to cut costs, implement the strategy of the administrators to realise assets and to protect the overall position of creditors. For the avoidance of doubt and to the best of my knowledge, I do not believe that the redundancies were in any way influenced by any future sale of the business.

25. Our team has many years of experience at handling these sorts of situations so we followed our normal process."

38 We accepted all of the evidence of all three of the witnesses for the respondent which we have set out above. We found all three witnesses to be honest witnesses, doing their best to tell us the truth. We concluded that there was nothing which indicated to any of them that there had been collusion between Mr McGowan and Mr Denny in regard to the dismissals of the claimants with a view to Mr McGowan, via a company which he controlled, such as the second respondent, buying the business of the first respondent, or any part of it, shorn of the claimants' contracts of employment.

39 Before stating our conclusions on the factual issues before us, we record that in Ms Apter's witness statement, she said that she was present at the meeting of 28 February 2020 at which redundancies (including her own) were announced by Mr Denny. In paragraph 9 of her witness statement, she said this.

> "At the meeting, Mike Denny from PWC introduced himself. He outlined that that morning (28/2/2020) he and his colleague, Rob Lewis, had been appointed as joint administrators for DOD. He explained that administration was a type of insolvency and that in practical terms it meant that they had been appointed by the directors to run the company to maximise the outcome for the creditors. He explained that the refinancing for DDD had not been successful, and a buyer had not been found for the business. He announced that with immediate effect everyone in the meeting was redundant. Another representative from PWC, Mandy Hart, was also present. She explained how we would be supported, how we could claim redundancy through the Redundancy

Payment Service and how to claim payment in lieu of notice (transcripts 1-3 of meeting of 28/2/2020, p148-174)."

40 We accepted that evidence of Ms Apter.

Our conclusions on the key question of whether or not the sole or principal reason for the claimants' dismissals was the TUPE transfer which was evidenced by the document signed by the second respondent on 5 March 2020 (at pages 210-313)

41 We could not understand why the second respondent had not called Mr Denny to give evidence here. The explanation given by the second respondent for not doing so was that Mr Denny no longer worked for PwC. That was plainly an insufficient explanation, as he could have been called as a witness whether or not he continued to work for PwC. Accordingly, like the Employment Judge in *Marshall*, as recorded in paragraph 17 above, that was "an evidential gamble". However, unlike the first instance judge in *Marshall*, we regarded it as rather more of an evidential gamble for the second respondent than the claimants. That was because if there was in fact collusion between Mr Denny and Mr McGowan, then Mr Denny was unlikely to admit it, and if the claimants had called Mr Denny to give evidence, then they could not have cross-examined him. Similarly, it was not for the claimants to call Mr McGowan to give evidence.

42 However, proving (i.e. satisfying the tribunal on the balance of probabilities) what was in the mind of the person who made the decision to dismiss a claimant is akin to proving direct discrimination within the meaning of section 13 of the Equality Act 2010. In *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] ICR 1263, the Supreme Court considered the manner in which the burden of proof provision in that Act applied. The headnote helpfully summarised the effect of that court's decision. Holding (2) was this.

> "That, so far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense; that whether any positive significance should be attached to the fact that a person had not given evidence depended entirely on the context and particular circumstances; that relevant considerations would include such matters as whether the witness was available to give evidence, what relevant evidence it was reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence and the significance of those points in the context of the case as a whole; that all those matters were interrelated and how those and any other relevant considerations should be assessed could not be encapsulated in a set of legal rules; that, where it was said that an adverse inference ought to have been drawn from a particular matter, the first step had to be to identify the precise inference(s) which allegedly should have been drawn; that, in all the circumstances of the present

case, the employment tribunal could not be faulted for not drawing the adverse inferences contended for by the claimant from the fact that no evidence was adduced from the relevant decision-makers; that, furthermore, even if those inferences had been drawn, they would not, without more, have enabled the tribunal properly to conclude that the burden of proof had shifted to the employer; and that the tribunal had been manifestly entitled to dismiss the claim on the basis that there was no prima facie case of discrimination (post, paras 41-48)."

43 Here, as clarified by *Marshall*, the following words of the judgment of Mummery LJ in *Kuzel* showed what the claimants needed to do:

> "It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason."

44 Mr Palmer here relied on the proximity of the administration (starting during the morning of 28 February 2020) to the dismissals (effected by the administrator in the afternoon of that day) and the subsequent TUPE transfer (which was completed on 5 March 2020) as "some evidence of" a reason other than (in the circumstances) redundancy because of an urgent need to reduce costs with immediate effect and to avoid the incurring of ongoing costs for which there was no funding. In that regard, as we say above, Mr Palmer relied on paragraph 18 of the judgment of the ECJ in *Bork*, which we have set out in paragraph 9 above. However, for the reasons stated in paragraphs 10-12 above, *Bork* concerned a rather different situation, and the judgment of Briggs LJ in *Kavanagh* which we have set out in paragraph 8 above shows (especially in the parts that we have highlighted there) just how different from the situation in issue in *Bork* is the situation where there is a TUPE transfer following an administration because a company is insolvent.

45 We could see nothing in the evidence before us which indicated to any extent that the reason for the claimants' dismissals was anything other than the reason given by Mrs Cox in paragraph 24 of her witness statement, which we have set out in paragraph 37 above. That is to say, the reason was that the administrators knew (not least because PwC, of which the administrators were partners, had been closely involved in the activities described by Mrs Cox in paragraph 6 of her witness statement, which we have set out in paragraph 36 above) the financial position of the first respondent and were aware that there was enough money available to pay the salaries of only some of the staff of the first respondent as from 1 March 2020 onwards.

46 That conclusion was fortified by our acceptance of paragraphs 12, 13 and 25-31 of the witness statement of Mr Wilkinson which we have set out in paragraph 35 above. It was also fortified by what Ms Regan said in paragraph 24 of her witness statement, which we have set out in paragraph 31 above.

47 The report of Mr Denny to which we refer in paragraphs 23-27 above was also completely consistent with the proposition that the claimants' dismissals were purely because of the urgent need to reduce costs, in the circumstance that the only way open to the first respondent's administrators to do that was to dismiss staff with immediate effect.

48 It was entirely possible that Mr McGowan knew on 27 February 2020 that it was a certainty that the first respondent would be placed into administration shortly, and that he planned once that had occurred to make a new offer at a reduced price (reduced, that is, from £9.55m) for the business of the first respondent shorn of any parts that he did not want to acquire and shorn (assuming that this tribunal did not find that reason for the claimants' dismissals was the TUPE transfer that followed the making of that offer) of liability to meet the claimants' claims of unfair dismissal and for a protective award. If that occurred, then it was no more than what a previously-identified potential purchaser of the business (or part of it) of the first respondent who was hovering around, waiting for the administration which it was obvious to such a potential purchaser was going to happen, might have done. That conclusion is fully borne out by what Briggs LJ said in paragraph 22 of his judgment in *Kavanagh*, which we have set out in paragraph 8 above. The rest of that judgment is entirely in accordance with that paragraph. The conclusion that Mr McGowan's stance was no different from that of any other potential purchaser is also borne out by the analysis of Ward LJ in paragraph 61 of his judgment in *Amicus*, which we have set out in paragraph 16 above. Even if Mr McGowan (using words used by Ward LJ in that paragraph) "cynically manipulated the insolvency of" the first respondent, that would not mean in itself that the real reason for the claimants' dismissals was the TUPE transfer which did in fact occur on or before 5 March 2020.

49 If that transfer occurred in stages, however, then it did so because of collusion between Mr McGowan and Mr Denny. Thus, in the circumstances, the issues stated in paragraphs 3.1 and 3.3 above were one and the same.

50 If Mr Denny had been called to give evidence, then it was unlikely that he would have done more than state that the description in his report to the High Court, to which we refer in paragraphs 23-27 above, was accurate. If Mr McGowan had given oral evidence and he had agreed covertly with Mr Denny that after Mr Denny had been made the administrator of the first respondent, Mr Denny would dismiss staff and then accept a lower offer from the second respondent than had previously been made by Mr McGowan, then he would have been unlikely to admit that. However, it was not Mr Denny who placed the first respondent in administration: it was the directors of the first respondent who did that. Mr Denny had nothing ostensible to gain by colluding with Mr McGowan in that way. The directors of the first respondent would also have had nothing to gain by such collusion. Only if the offer for the business of the first respondent which it was intended would be made by Mr McGowan was going to be higher

than £9.55m, or at least more than £6m, would the directors have had anything to gain by such collusion.

51 In addition, Mr McGowan could have made a lower offer than £9.55m for the business of the first respondent, but still on a pre-pack basis. If he had done so then he would have been sure on the acceptance of the offer that he would acquire that business. By not making such an offer and waiting until the inevitable administration occurred, he was taking a chance that he would not after all acquire the business, or any part of it, of the first respondent.

52 While it might be thought that the incorporation of the second respondent with (1) the name that it now had and (2) premises owned by the first respondent as the new company's proposed registered office address, indicated an intention before the administration started to acquire some or all of the first respondent's business after the administration commenced, that incorporation was caused by Mr McGowan and Ms Regan (1) initially with a view to the pre-pack offer being converted into a deal, and then, when that deal did not occur, (2) simply to happen as originally planned. It is straightforward to change a company's name and its business address, and as we say in paragraph 38 above, we accepted Ms Regan's evidence in all respects, so we accepted her evidence to which we refer in paragraph 30 above about the rationale for pressing on with the incorporation of the second respondent.

53 Thus, in the circumstances, all of the evidence before us pointed towards the conclusion that the real reason for the claimants' dismissals was the urgent need to dismiss them for economic reasons which entailed changes in the workforce, i.e. a reason falling within regulation 7(3) of TUPE. The only thing from which we could have drawn the inference that the reason or principal reason for the claimants' dismissals was the TUPE transfer which was evidenced by the document at pages 210-313, was the fact that neither Mr Denny nor Mr McGowan gave evidence to us. Ms Regan's explanation for Mr McGowan's absence (which we have recorded in paragraph 34 above and which as we say in paragraph 38 above we accepted) was that he had a heart condition and was on a waiting list for surgery. There was no explanation for the absence of Mr Denny, but he had prepared and signed a detailed report for the High Court, and in that report he had stated what we were prepared to assume would have been in his witness statement if he had made one for these proceedings.

54 In all of the above circumstances, we concluded that while we could not be sure that there had been no collusion between Mr McGowan and the first respondent or Mr Denny, on the balance of probabilities the reason (or if not the reason, then the principal reason) for the claimants' dismissals was that which we have stated in the first sentence of the preceding paragraph above.

55 For those reasons, the second respondent is not liable to meet any of the claims made by the claimants in these proceedings. We accordingly do not

state a conclusion on any of the issues set out in paragraph 3 above other than those stated in paragraphs 3.1 and 3.3, namely

55.1 the TUPE transfer took place on 5 March 2020;

55.2 the claimants were not dismissed in the circumstances stated in regulation 7(1) of TUPE; so, it was not the case that the sole or principal reason for their dismissals was the TUPE transfer; there was an economic, technical or organisational reason for their dismissals within the meaning of regulation 7(2) of TUPE. That reason was in fact redundancy.

56 For all of those reasons, the lead claimants' claims against the second respondent are dismissed.

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Employment Judge Hyams

Date: 3 February 2023

Sent to the parties on:

16 February 2023

For Secretary of the Tribunals