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CITATION CODES
[2017] EWHC 211 (Ch)

ATTORNEY(S)

ANDREW THOMPSON QC and CIARAN KELLER (instructed by Debevoise & Plimpton LLP) for the Claimants

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JUDGES

MRS JUSTICE ROSE

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CITES 10

HARLEQUIN PROPERTY (SVG) LTD & ANOR V WILKINS KENNEDY (A FIRM)
England and Wales High Court (Technology & Construction Court), 21 Dec 2016

FIONA TRUST & HOLDING CORPORATION & ORS V PRIVALOV & ORS (COSTS)
England and Wales High Court (Commercial Court), 27 Oct 2016

BTI 2014 LLC V SEQUANA SA & ORS
England and Wales High Court (Chancery Division), 11 Jul 2016

FOX V FOUNDATION PILING LTD
England and Wales Court of Appeal (Civil Division), 07 Jul 2011

4ENG LTD V HARPER & ORS
England and Wales High Court (Chancery Division), 26 Oct 2009

HILL V SPREAD TRUSTEE COMPANY LTD & ANOR
England and Wales Court of Appeal (Civil Division), 12 May 2006

LEICESTER CIRCUITS LTD V COATES BROTHERS PLC
England and Wales Court of Appeal (Civil Division), 20 Mar 2002

HAMMOND SUDDARD SOLICITORS V AGRICHEM INTERNATIONAL HOLDINGS LTD.
England and Wales Court of Appeal (Civil Division), 18 Dec 2001

SUMMIT PROPERTY LTD. V PITMANS (A FIRM)
England and Wales Court of Appeal (Civil Division), 19 Nov 2001

MARS UK LTD V TEKNOWLEDGE LTD
England and Wales High Court (Patents Court), 11 Jun 1999

BTI 2014 LLC v Sequana SA & Ors
England and Wales High Court (Chancery
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Subsequent References | CaseIQ™ (AI Recommendations)
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BTI 2014 LLC V SEQUANA SA & ORS

(1) Introduction

1. I handed down judgment in these two claims on 11 July 2016, [2016] EWHC 1686 (Ch) ('the Main Judgment'). In this judgment I use the same abbreviations as I used in the Main Judgment indeed this judgment is only comprehensible if read together with that judgment. The Main Judgment disposed of two sets of proceedings heard jointly at the trial last year ('the Trial'). The claim brought by BTI against Sequana and the four directors personally (the 'Dividend Claim') failed in its entirety and will be dismissed. The claim brought by BAT against Sequana and AWA (the 's 423 Claim') was partially successful because although I held that the December Dividend had not been made with the s 423 purpose, I held that the May Dividend had been made with that purpose and fell within section 423.

2. As regards the May Dividend I held that as a matter of law, a dividend is a transaction entered into at an undervalue within the meaning of section 423(1) and that AWA had the intention when paying that Dividend of putting the dividend monies beyond the reach of BAT or of otherwise prejudicing BAT's interests. It was common ground that BAT was a victim of the transaction within the meaning of section 423(5). The May Dividend was 135,181,358.55 or $182,494,834.04 at 18 May 2009 exchange rates.

3. I did not deal with the appropriate relief to be granted to BAT in the Main Judgment. In paragraph 525 I said:

> "The parties were agreed that, in the event that I found that the claim under section 423 succeeded, I should not attempt to fashion a remedy at this stage. This was in part because in order to do so it is important to understand what has in fact happened in respect of the Lower Fox River and Future Sites liabilities since May 2009. During the course of these proceedings, we have all carefully shielded our eyes from what has happened since then in order to ensure that the assessment of what the directors knew and thought at the relevant times was not coloured by hindsight. However it may be helpful for me to give the following indication. I do not currently have in mind a remedy whereby the May Dividend is simply repaid by Sequana to AWA. In 4Eng Sales J contemplated such a payment in a situation where the transferor has become insolvent so that the transferred money is repaid to the transferor's liquidator or trustee in order to be distributed to the class of creditors. That is not the position here."

4. The consideration of what relief is appropriate and what other orders should be made to bring the proceedings to a close was the subject of a further two day hearing before me ('the Consequentials Hearing'). A number of issues were raised:

> a. the relief that should be granted to BAT pursuant to section 423 in respect of the May Dividend payment;

> b. the appropriate order as to the costs of the Dividend Claim and the s 423 Claim up to the Main Judgment, including the size of any interim payment;

> c. whether permission to appeal should be granted to both parties. Sequana asked for permission to appeal on the legal issues arising from the s 423 Claim in respect of the May Dividend and BTI sought permission on a range of issues determined against them in the Dividend Claim;

> d. Sequana sought a stay of execution in relation to any relief granted under section 423 and to any costs order made against it;

> e. BAT sought an order that if Sequana were allowed to pursue its appeal, it should be required to provide security for BAT's costs of opposing that appeal.

5. After handing down the Main Judgment, I gave directions for the parties to serve evidence in support of any application they wanted to make. A number of witness statements were served by both parties, describing amongst other things the events which have occurred since 18 May 2009 until the present as regards the clean up of the Lower Fox River. There was also evidence from BAT/BTI as to how its legal costs were incurred (in support of its application for costs) and evidence from both parties about Sequana's current financial position (relevant to Sequana's application for a stay of execution and to BAT's application for security for the costs of opposing Sequana's appeal). Sequana did not provide any evidence in relation to its costs.

6. At the start of the Consequentials Hearing I told the parties that I was minded to grant both sides permission to appeal on the matters that they wanted to challenge. Both sides then withdrew their opposition to the other's application for permission to appeal.

(2) Relief under section 423(a) Developments since May 2009

7. The remediation of OU1 of the Lower Fox River was completed in 2009, mostly by dredging. The total cost was $82 million. The remediation of OUs 2 -5 started in May 2009 and is expected to be completed by the end of 2018. This has been accomplished by a combination of capping and dredging. It is expected that there will be ongoing monitoring costs until 2050.

8. Between November 2007 and April 2012, NCR and AWA funded the majority of the costs for the remediation of the Lower Fox River. From April 2009, this was done through a special purpose vehicle called Lower Fox River Remediation LLC. Between 18 May 2009 and 30 April 2012 AWA spent $131.4 million on the clean up and a further $25 million in defence costs. NCR paid $91.6 million towards remediation. According to BAT's evidence, the total cost of the clean up of the Lower Fox River is likely to be more than was anticipated in May 2009. According to a recent press release by the US Department of Justice it is expected to exceed $1 billion.

9. At the end of April 2012, AWA told NCR and API that it was not going to pay for any further clean up costs for the Lower Fox River. This sparked a complicated series of claims and counterclaims in several sets of court and arbitration proceedings between NCR, API, BAT and AWA. Many of these proceedings were ultimately settled by the terms of a Funding Agreement entered into between NCR, API, BAT and AWA dated 30 September 2014. Mr Lloyd's evidence on behalf of BAT was that this was the most complicated and difficult negotiation he had ever taken part in and the terms finally arrived at were the culmination of seven weeks of intensive negotiation.

10. The terms of the Funding Agreement are very important to the parties' submissions on the proper form of relief under s 423 and I will need to go into some aspects of them in more detail later. The recitals at the front of the agreement refer to the large number of different legal proceedings between these parties and against third parties including, in the 6th preamble, the s 423 Claim issued in the High Court on 9 December 2013 and in the 8th preamble, the Dividend Claim issued by AWA ultimately assigned to BTI. The final recital refers to the parties' common interest in maximising recoveries from certain third parties to aid the funding of the clean up costs of the Lower Fox River and Future Sites and in minimising their own transaction costs, leading to a wish to resolve disputes between them.

11. In broad terms, the Funding Agreement means that:

> a. BAT (through BTI), API and AWA agree to pay a contribution to NCR's past costs incurred in the clean up. The sums agreed to be paid are $77 million for BAT, $6 million for API and $10 million for AWA. Those payments were made on 30 September 2014 and relate to the period 10 April 2012 to 1 October 2014.

b. As to ongoing funding:

> i. BAT agrees that as from 30 September 2014, it will pay 50 per cent of NCR's Fox River costs after API had paid an additional $19 million. NCR will pay the other 50 per cent. This was a change from the 60:40 split that was described as applying in the Main Judgment. The payments by BAT are made via BTI on a monthly basis.

> ii. API agrees to pay 50 per cent of what BAT has paid to BTI but capped at a total of $25 million. Clause 13.3 of the Funding Agreement provides that API does not have a right to an indemnity against AWA for this $25 million.

> iii. AWA has three payment obligations which I will describe in more detail later. These include a small up-front payment, an annual interest payment and a staged contribution towards monies that BAT has to pay out and for which BAT is not reimbursed by other PRPs.

> iv. However, AWA is protected from insolvency by the Funding Agreement because section 12.3(a) provides that AWA's liability to BAT under the agreement is such that AWA's assets cannot fall below $25 million. That figure of $25 million can increase over the years in accordance with a formula set out in the agreement but for ease of exposition I shall refer to it as "the $25 million AWA Floor".

c. Most of the litigation among the parties is stayed or discontinued.

d. Provision is made as to what is to happen to the proceeds of the Dividend Claim and the s 423 Claim if any. Broadly, whoever recovers any money from the s 423 Claim is obliged to pay it to BTI and, subject to a small deduction of commission for AWA, that money will then be used by BTI to help cover the costs of the Fox River clean up.

e. Provision is also made for 60 per cent of any recoveries by NCR in the US litigation and 100 per cent of the recoveries of API from other PRPs, Government bodies or third parties to be paid to BTI.

f. NCR and BAT reserve their rights against each other in relation to some costs and Future Sites Costs. API's exposure to Future Sites costs is also capped at $25 million.

g. There is a waterfall arrangement as to what happens if there is a surplus at the end of the whole process including the Whiting Litigation and other ongoing litigation in the US.

12. So far as the Whiting Litigation in the US is concerned, I referred in the Main Judgment to Judge Griesbach's decision to hold a preliminary hearing to determine the issue of what the PRPs knew about the toxicity of PCBs being discharged into the River and when they knew it. That trial led to a finding by Judge Griesbach that on the basis of the knowledge factor, NCR/API was liable for 100 per cent of the clean up costs of OUs 2 5 and could not recover any contribution from the other PRPs. This judgment was vacated on appeal to the Seventh Circuit and the case was remitted to be reconsidered by Judge Griesbach on the basis that all the equitable Gore factors should be taken into account. That retrial was due to take place starting at the end of March 2017. The other PRPs maintained their position that NCR should be 100 per cent liable and therefore sought the recovery of about $208 million which they said they have spent. In turn NCR claimed a contribution from them on the basis that it has already paid more than its fair share.

13. A large number of the PRPs settled with the Government after 2009 and so could no longer be pursued for a contribution in the Whiting Litigation (see paragraph 58 of the Main Judgment). A few days after the conclusion of the Consequentials Hearing, BAT's solicitors, Debevoise & Plimpton LLP wrote to tell me that NCR, API and the relevant US Government departments have entered into a settlement agreement in order to resolve both NCR's and API's Fox River liability and claims ('the Whiting Consent Decree'). The Whiting Consent Decree is subject to Court approval being obtained from Judge Griesbach. Although that is not a mere formality, as they understand it, Judge Griesbach has approved all previous Fox River settlements with the Government. The effect of the settlement is therefore to crystallise the extent of BAT's exposure in relation to Fox River. Nothing in the settlement affects the position in relation to the Kalamazoo River clean-up. Both parties sent me short written submissions about the effect of the Whiting Consent Decree on the expectations as to future liability for the Fox River clean up.

14. The principal consequences of the Whiting Consent Decree in relation to the matters which have been dealt with in the evidence for the Consequentials Hearing appear to be as follows:

> a. NCR is obliged to perform and fund all of the remaining Lower Fox River remediation work by itself without any contribution from any other PRPs. NCR has committed to complete the final phase of remediation by the end of 2018 and will take on those commitments immediately, prior to Judge Griesbach's approval of the settlement.

b. Glatfelter and Georgia-Pacific will bear primary responsibility for long-term monitoring and maintenance of the site but NCR commits to providing a "backup" commitment for that work.

c. Neither NCR nor API will be liable for the US Government past response costs claim (such as planning and oversight), as the Government will seek such costs from Glatfelter (Georgia-Pacific having previously settled this issue with the US Government).

d. NCR will be given contribution protection against claims from Georgia Pacific and Glatfelter and all other PRPs.

e. NCR and API will have no further liability to the Government for NRDs.

f. NCR will not pursue any appeal of the divisibility ruling against NCR in the Government enforcement action and the Government will not appeal the finding that API is not liable under CERCLA. This element refers to a separate action brought against NCR by the US Government in respect of its joint and several liability for OUs 2 5 (not OU1). NCR raised a defence that the damage was divisible in respect of OU4 but did not contend this for OUs 2, 3 and 5. This defence was rejected by the court.

g. NCR and API will abandon all of their claims against the remaining PRPs i.e. Georgia Pacific and Glatfelter, meaning that NCR and API will not be able to make any recovery from other PRPs.

15. The US court has granted a stay in both the Whiting Litigation and the Government enforcement action, pending the outcome of the court approval process for the Whiting Consent Decree.

16. BAT describe the overall effect of the Whiting Consent Decree, as regards the Fox River, as providing considerably greater certainty than there was. NCR's minimum further exposure in respect of the Fox River is crystallised at the sum required to fund the remaining remediation work, estimated by the US Government at more than $200 million. BTI will be liable for 50 per cent of that sum under the Funding Agreement, (API having capped its liability in respect of the Fox River at $25 million which it has already paid). It remains possible that NCR, and therefore BAT, could be exposed to further sums in respect of long-term monitoring and maintenance costs and US Government future response costs, but only if Georgia-Pacific and Glatfelter fail to pay. The maximum exposure of NCR, and therefore BAT, has reduced, not least because NCR and API have contribution protection against claims from other PRPs and are no longer liable for NRDs.

17. The other side of that coin is that since NCR and API have dropped their claims against Georgia-Pacific and Glatfelter and the other PRPs, the prospect that BAT and API (through BTI) could benefit from the claims that NCR and API had been running has been eliminated. BAT say that there is now no possibility of any surplus in BTI under the Funding Agreement as a result of such recoveries. Sequana submit that there is still considerable uncertainty as to the ultimate quantum of NCR's Fox River liabilities, when they will be incurred and to what extent BAT's exposure might be offset by recoveries from other sources. Those sources include claims against the auditors PwC (which claims have been stayed) and the director Defendants in the event that BTI's appeal in the Dividend Claim succeeds and in any arbitration against NCR as contemplated in the Funding Agreement.

18. The Kalamazoo River clean up has also become more of an issue than was anticipated in May 2009. Although I found that the possibility of AWA being liable for the Kalamazoo clean up was remote at the time of the events recounted in the Main Judgment, that remote risk has in fact eventuated. So far Georgia Pacific has paid for the remediation of the Kalamazoo River but it is claiming a contribution from NCR and others in proceedings lodged in the District Court of the Western District of Michigan in December 2010. There was a trial on liability before Judge Jonker in February 2013. At the end of September 2013, judgment was handed down holding that NCR was liable in principle as an arranger under CERCLA for the clean up. Thus NCR has been found liable as one of four PRPs in respect of the Kalamazoo River pollution. The second phase of that trial took place in Autumn 2015 and judgment is, I am told, awaited. The full costs of that clean-up have been estimated at between $670 million and $2.4 billion.

19. So far as AWA is concerned, the funds in the Maris Policy were exhausted by the end of July 2011. All the Historic Insurance Policies were cashed out in settlement by February 2011 and generated a further $122 million of which AWA received $110.8 million. Mr Gower and Mr Tauscher remain directors of AWA and were joined in September 2013 by Gerard Barron whose task was to assist Mr Gower and Mr Tauscher in choosing new investments for AWA to make.

(b) The law

20. Section 423 provides as follows:

> "423 Transactions defrauding creditors

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

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

> (b)

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

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

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

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

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

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

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

> (4)

> (5) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; "

21. Section 424(2) provides that any application for relief is to be treated as made on behalf of every victim of the transaction. Apart from BAT and API, it is common ground however that there are no other victims in this case whose interests need to be taken into account when deciding what remedy to give.

22. Section 425 deals in more detail with the kinds of orders that can be made.

> "425 Provision which may be made by order under s 423

> (1) Without prejudice to the generality of section 423, an order made under that section with respect to a transaction may (subject as follows)

> (a) require any property transferred as part of the transaction to be vested in any person, either absolutely or for the benefit of all the persons on whose behalf the application for the order is treated as made;

> (b) require any property to be so vested if it represents, in any person's hands, the application either of the proceeds of sale of property so transferred or of money so transferred;

> (c) release or discharge (in whole or in part) any security given by the debtor;

> (d) require any person to pay to any other person in respect of benefits received from the debtor such sums as the court may direct;

> (e) provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction to be under such new or revived obligations as the court thinks appropriate;

> (f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for such security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction.

> (2) An order under section 423 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the debtor entered into the transaction; but such an order

> (a) shall not prejudice any interest in property which was acquired from a person other than the debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or prejudice any interest deriving from such an interest, and

> (b) shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.

> (3) For the purposes of this section the relevant circumstances in relation to a transaction are the circumstances by virtue of which an order under section 423 may be made in respect of the transaction.

> (4) In this section "security" means any mortgage, charge, lien or other security."

23. It was common ground that the court has a broad discretion as to the remedy to impose when a transaction falls within section 423. As Sales J said in 4Eng Ltd v Harper [2009] EWHC 2633 (Ch) ('4Eng'):

> "9. A claim under's. 423 is a claim for some appropriate form of restorative remedy, to restore property to the transferor for the benefit of creditors, who may then seek to execute against that property in respect of obligations owed by the transferor to them. In an appropriate case, an order might be made to require the transferee to pay sums or transfer property direct to the creditors, if the position in relation to execution is clear and any further costs associated with execution ought to be avoided. But often the appropriate order will be for the transferee to pay sums or transfer property back to the transferor, leaving the distribution of those sums or property as between the creditors of the transferor to be governed by the general law. This may be particularly important if the transferor is bankrupt or in liquidation (or about to become bankrupt or go into liquidation) and has a range of creditors not all of whom are before the court on the application made under's. 423.

> [...]

> 16. In choosing what relief is appropriate in a given case, a great deal will depend upon the particular facts. One of the reasons the court is given such a wide jurisdiction as to remedy under this regime is to allow it flexibility in fashioning relief which is carefully tailored to the justice of the particular case. Helpful analogies may be drawn with other areas of the law to guide the court in reaching its conclusion, but given the wide range of situations which the statutory regime is intended to deal with it would be wrong to be unduly prescriptive in trying to lay down hard and fast rules for the application of these provisions."

24. There are some circumstances in which the court can decide that it is not appropriate for there to be any remedy imposed, but this would only be in an exceptional case: see per Mr Evans-Lombe QC in Chohan v Saggar **[1992] BCC 750** where he said that the court should make an order unless it is satisfied that any possible order will be otiose in the sense that it is incapable of conferring any benefit of the victims. In the Chohan case on appeal, the Court of Appeal discussed the objective of section 423. Nourse LJ said:

> "The object of's. 423 425 being to remedy the avoidance of debts, the 'and' between para. (a) and (b) of s. 423(2) must be read conjunctively and not disjunctively. Any order made under [s.423(2)] must seek, so far as practicable, to restore the position to what it would have been if the transaction had not been entered into and to protect the interests of the victims of it. It is not a power to restore the position generally, but in such a way as to protect the victims' interests; in other words, by restoring assets to the debtor to make them available for execution by the victims. So the first question the judge must ask himself is what assets have been lost to the debtor. His order should, so far as practicable, restore that loss."

25. I agree with the submission made by Mr Thompson QC on behalf of BAT that the principle to be derived from this case law is that the overriding purpose of section 423 is to recover assets for the victims so as to protect their interests. That statutory objective will generally override the interests of the transferee, though the court is entitled to take into account all the circumstances of the different parties involved in fashioning a just and appropriate remedy. I also agree with BAT that one of the factors to take into account at the stage of fashioning the remedy, as discussed by Sales J in 4Eng at paragraph 11 of his judgment, is the state of mind of the transferee or other action on the part of the transferee. In this case there was no suggestion that the AWA directors had been dishonest in their decision-making as regards the May Dividend. Mr Foxton QC appearing on behalf of Sequana reminded me that I found that there had been no breach of fiduciary duty by the directors in declaring the May Dividend. However, I found that the whole transaction comprising the payment of the May Dividend, the reduction of the inter-company debt and the sale of AWA to TMW was deliberately devised and implemented primarily for the benefit of Sequana and against the interests of AWA's actual and potential creditors.

(c) Sequana's proposed section 423 remedy

26. Sequana's primary submission is that because of the very substantial changes that have occurred to the position of the parties in the years following the impugned May Dividend payment, it is impossible to restore the position of the parties to what it had been and therefore no remedy ought to be granted. Mr Foxton recognised that the court can never expect to achieve a perfect restoration of the pre-transaction position and that is not automatically a bar to relief. But he highlighted a number of changes here that make it impossible to wind back the clock to such an extent that it would be unfair to give BAT any relief. First, the payment of the May Dividend had been immediately followed by the sale of AWA to TMW. I found in the Main Judgment that if the May Dividend had not been paid, the inter-company debt could not have been extinguished and the sale of AWA would not have taken place. If Sequana had not sold AWA, Sequana would have retained the management and control of AWA on behalf of API (which AWA was liable to indemnify) over the various complicated disputes and sets of proceedings being pursued or defended in relation to the Lower Fox River liability. This submission is, Sequana say, reinforced by the emergence of the Whiting Consent Decree, another development which they say has moved the world further away from where it was in May 2009 and which Sequana has been unable to influence. Further, Sequana, if it had still owned AWA and been subject to a liability for the clean up, would have exercised some control over the remediation process at the River. By losing control of AWA, Sequana lost control over the progress of the determination of the ultimate value of the clean up cost and it would be unfair, therefore, to fix it with liability now for any part of those costs.

27. Secondly, the Funding Agreement was entered into by AWA and the other parties without Sequana being involved in its negotiation or knowing of its terms before the agreement was concluded. Mr Foxton stressed that Sequana was not seeking in some way to set aside the Funding Agreement, indeed, as will become apparent, they rely on its terms to limit the scope of the remedy which should be granted if their primary contention of no remedy is rejected. They agree therefore that it is an important part of the factual background to the court's decision at this stage. The Funding Agreement has had a very significant impact on the extent of the liabilities of AWA, the assets available to meet those liabilities and the timing of any payments that need to be made. For example, to the extent that there is any surplus at the conclusion of all the US litigation, BAT and NCR will be reimbursed for all the monies that they have paid out and only then will any monies in excess of those payments make their way to AWA. The preservation of the $25 million AWA Floor together with the fact that any benefit Sequana derives from an eventual surplus now depends on the operation of the Golden Share are two points that work to the disadvantage of Sequana and in favour of the management and owners of AWA.

28. Thirdly, Sequana submit that the evidence shows that following the sale, the management of AWA took the company into new business areas and engaged in investment activity that depleted the assets of AWA in a way which would not have happened if Sequana had still been in charge. Fourthly, Sequana would also have retained ultimate control over the negotiations with the other PRPs over contributions towards remediation costs and also the negotiations with the insurers for the settlement of the Historic Insurance Policies. It is entirely possible, Sequana submit, that a better settlement could have been achieved if Sequana had remained in control, thereby reducing the point at which Sequana would have been called upon to repay the inter-company debt.

29. In my judgment it would be contrary to the statutory objective of section 423 to decline to make an order in these circumstances. Certainly it is impossible to unravel everything that has happened since 18 May 2009. But it would be most unjust to BAT if that were treated as a reason to avoid attempting to provide a remedy to restore to them some of the benefit that has been lost as a result of the impugned transaction. This is certainly not a case in which any order would be otiose or where the interests of Sequana as transferee should outweigh the interests of the victims of the May Dividend.

30. The desire on the part of Sequana to sell AWA to TMW was what prompted the payment of the May Dividend. The loss of control over AWA's business on which Sequana now relies as an irreversible change of position was part and parcel of Sequana's desire to remove the liability for the Fox River remediation from the group. The Sequana witnesses explained why they thought that it was important for the group, not only in financial but also in presentational terms, to cast AWA adrift and ensure that there was no recourse to Sequana by the AWA owners and management in any circumstances. It would be unfair to BAT to treat the attainment of that goal as being a justification for depriving them of relief.

31. There is no basis for supposing that the progress of the Whiting Litigation or the negotiation of the settlement of the Historic Insurance Policies liabilities would have been more favourable to AWA than has in fact occurred. On the contrary, Mr Gower and Mr Tauscher's eagerness to acquire AWA through TMW was because their ownership would give them an even greater incentive to bargain hard for the best deal for AWA than they had when they were simply acting as advisers to the company. I do not see any reason for saying that any of the events that have played out in the US litigation or negotiations would have been different or more favourable to AWA if Sequana had not sold AWA. The same individuals would have been involved and Sequana would have continued to rely on the advice and skills of Mr Gower and Mr Tauscher. Mr Gower's and Mr Tauscher's interests were to reduce AWA's liability to the other PRPs as much as possible and to squeeze as much out of the Historic Insurance Policies as they could. I therefore reject the submission that I should take these matters into account as a change of circumstance that means that Sequana should not now have to provide some relief under section 423.

32. As regards the conclusion of the Funding Agreement, it was not clear from the evidence why AWA decided at the end of April 2012 to stop funding the clean up. Mr Thompson suggested that it was simply because it had run out of money; a circumstance that was, of course, a result of the payment of the May Dividend and the release of the inter-company debt. However, Sequana point out that Mr Lloyd's evidence is that AWA still had a substantial sum in its accounts at the time it made the decision to stop paying. If there had been no May Dividend there would have been no sale of AWA; if there had been no sale of AWA then it is not clear whether AWA would have decided to stop payments in April 2012 and if AWA had not made that decision, there would probably have been no Funding Agreement.

33. Again, in my judgment it would be wrong to treat the Funding Agreement as a change of circumstance which militates against the grant of any relief. Even if the immediate trigger for the Funding Agreement was not lack of funds, the negotiations leading up to the conclusion of that agreement took place against the background that AWA was no longer part of the Sequana group and was threatened with insolvency if pursued to meet liabilities which turned out to be greater than the sums left in the Maris Policy and generated by the Historic Insurance Policies. The terms hammered out are the terms that the parties to the Funding Agreement thought were fair, given the situation in which they were placed as a result, in part, of the payment of the May Dividend. I agree with BAT's submission that the Funding Agreement should be regarded as a reasonable mitigation by the victims of their loss; avoiding at least some of the hugely costly litigation that might otherwise have dragged on following AWA's refusal to pay anything more in April 2012. The fact that it might not have been entered into if the May Dividend had not been paid is no reason to refuse to give the victims of the May Dividend a remedy.

34. Sequana's alternative submission is that any remedy should take the form of a restoration of the inter-company debt between Sequana and AWA rather than any payment out of funds to BTI or BAT. The effect of this would be that, given the operation of the terms of the Funding Agreement, Sequana's potential liability to contribute to the Lower Fox River clean up would be restricted to those sums which AWA is liable to pay under the Funding Agreement.

35. AWA's liability under the Funding Agreement arises in three ways:

> a. Section 4.2(a) AWA was required to pay $10 million to NCR towards the funding of the Lower Fox River remediation. This has been paid by AWA so there is no need to restore any funds to BAT to cover that.

b. Section 6 AWA undertakes an obligation annually to pay interest on 50 per cent of the amount by which BTI are out of pocket, an amount referred to as the Unreturned Funding Amount. Broadly, BAT pays money to BTI to put it in funds to meet the calls made by NCR pursuant to the Agreement in relation to either Lower Fox River or Future Sites costs. If BAT is not reimbursed by BTI either at all, or in respect of all its expenditure, then AWA has to pay interest at a rate specified in the section on 50 per cent of the difference between what BAT has paid in and what it has received back.

c. Section 12.3 Potentially the most substantial future liability of AWA under the Funding Agreement is to pay what is called in the agreement the BAT Shortfall, namely the difference between the amounts paid by BAT (in respect of the Lower Fox River and any Future Sites) and the amounts received by BTI from other PRPs and reimbursed to BAT by BTI. If there is a BAT Shortfall then BAT can recover that amount from AWA subject to the $25 million AWA Floor. AWA's liability to make a payment under section 12.3 crystallises on three occasions; the Initial Measuring Date (being the later of the conclusion of the Fox River remediation or the payment of the Sequana Recoveries), the Second Measuring Date (no sooner than two years after the Initial Measuring Date) and the Final Measuring Date (the termination of the Funding Agreement which is after all litigation in relation to the Fox River, the Kalamazoo River or any other Future Site has concluded and all liabilities have finally been determined, except Long Term Monitoring Costs).

36. Other provisions in the Funding Agreement expressly preclude AWA's liability to reimburse API for the $25 million that it has to pay for the Lower Fox River clean up and the further $25 million it has to pay for Future Sites: see section 13.3 of the Funding Agreement.

37. Sequana's proposal therefore is that the court order should restore the inter-company debt payable from Sequana to AWA on the same terms as existed just before 18 May 2009 and on terms that it can only be called upon by AWA's management to meet AWA's obligations under the Funding Agreement. Further, they argue that as regards the section 12.3 liability, any ability to call on the debt to meet this should be postponed until the Final Measuring Date rather than taking place in the three stages agreed by the parties.

38. In support of this proposal Mr Foxton emphasises what Sales J said in 4Eng where the judge referred to the aim of the remedy under section 423 being to restore property to the transferor for the benefit of creditors, who may then seek to execute against that property in respect of obligations owed by the transferor to them. The transferor in this case is AWA and the only obligations that AWA now owes to the victims of the payment of the May Dividend are the obligations set out in the Funding Agreement. Those obligations represent the best estimation by the parties to the Funding Agreement of the relative value of the claims as amongst them. That is, therefore, the correct measure of what it is fair to restore to BAT.

39. I do not read Sales J's judgment in 4Eng as indicating that the remedy under section 423 cannot go further than the value of any obligations of the transferor to the victims at the time when the court comes to consider the imposition of the remedy. Such a principle would risk creating an unfairness to the victims where, as here, a substantial period of time has elapsed between the date of the impugned transaction and the date when the remedy is devised and where the relationship between the various parties has changed in ways which have, at the least, been influenced by the fact that the impugned transaction took place. The 4Eng judgment was not intended to limit the exercise of the court's discretion in the way suggested. Such a conclusion would be inconsistent with the passages in that judgment and in the other case law referring to the need for the relief to be carefully tailored to the justice of the particular case and to the absence of any 'hard and fast rules' that might impede a just result. A focus on the specific debt owed at any particular time by the transferor to the victim is also inconsistent with the comment of Arden LJ in Hill v Spread Trustee [2006] EWCA Civ 542 ('Hill v Spread Trustee'). Arden LJ noted in paragraph 101 that the definition of 'victim' in section 423(5):

> " is not restricted to creditors with present or actual debts: whether a person is a victim turns on actual or potential prejudice suffered. The definition of "victim" is employed in relation to the criteria for relief in subs (2). It is not used in subs (3), which defines the necessary purpose."

40. Here it would be contrary to the justice of the case to limit the victims' remedy to the liabilities of AWA under the Funding Agreement because it was specifically contemplated by the parties to the Funding Agreement that any recoveries resulting from the s 423 Claim would be paid into BTI in addition to the amounts for which AWA is liable in the three ways I have explained.

41. Section 8 of the Funding Agreement deals with the assignment of the Sequana Dividend Claims (together with any claims AWA believes it has against its professional advisers) to BTI. Section 8 then provides:

> a. in section 8.2 that BAT should assume full control of the conduct of that litigation;

b. in section 8.2(e) that in the event that BAT obtains Sequana Recoveries it must pay them to BTI;

c. in section 8.3 that as to the s 423 Claim, AWA remains a party to that claim and that AWA and BAT will cooperate to ensure that they maximise any recoveries from those claims. Section 8.3(c) then provides (the LLC being BTI):

> "BAT shall take all reasonable steps to ensure that any Sequana Recoveries that result from the section 423 Claims are paid directly to the LLC, failing which to [AWA] (who shall hold them on behalf of the LLC, and pay them to the LLC in accordance with section 10.3). To the extent that the Recoveries from the Section 423 Claim are paid to BAT instead of [AWA], BAT agrees that it holds such Recoveries for the LLC and shall pay such Recoveries to the LLC"

42. The term "Sequana Recoveries" is defined as the amount of monies paid and actually received by the recovering party as a result of a judgment, award or settlement of the Sequana Dividend Claims and/or the s 423 Claim but excludes payments received in respect of legal costs. By section 8.5 AWA agrees to provide all necessary and reasonable assistance to BTI and to BAT to progress the Sequana Dividend Claims and the s 423 Claim.

43. Section 10.3 deals with the distribution of the Sequana Recoveries that have been paid to BTI under the provisions of section 8. It provides that BTI shall receive any and all Sequana Recoveries obtained and that it shall pay a small percentage commission to AWA. The rest of the Sequana Recoveries are intended to remain in BTI and to be used to pay for the remediation of the Lower Fox River in accordance with section 11 of the Funding Agreement, broadly speaking splitting the monies between BAT and NCR by way of dividend or distribution.

44. It seems to me therefore that the mechanism proposed by Sequana would thwart the intentions of the parties to the Funding Agreement. That intention was that anything recovered from Sequana as a result of these proceedings would go straight into the pot held by BTI in order to pay for the clean up and that that would be in addition to the other liabilities of the parties to the Agreement. A remedy under which no monies are in fact paid, but rather a debt is reconstituted and the call down of the debt is limited to AWA's three liabilities, undermines the bargain that the parties struck as a pragmatic solution to the predicament they found themselves in. It would bypass the possibility of there being any 'Sequana Recoveries' for the purposes of the agreement, despite the success of BAT in its claim in respect of the May Dividend. Such a result would not help restore the victims to their pre-transaction position nor protect their interests. If the May Dividend had not been paid then the inter-company debt owed by Sequana to AWA would not have been extinguished. Regardless of whether AWA would then have been sold, it would have had immediately available to it those monies to meet any demands that came in for reimbursement of the ongoing costs. There is no doubt that the Funding Agreement was negotiated in the context where AWA was outside the Sequana group and had few prospects of obtaining any more funds over future years. It is difficult to imagine that AWA's liability would have been limited to $10 million in relation to refunding the sums that had been paid out for the remediation between the date when AWA stopped making payments in April 2012 to the date of the Agreement in September 2014 if the context had been different. I find it hard to believe that the scope of AWA's responsibility for payment in respect of BAT's or API's liabilities would have been as limited as it is in fact under the Funding Agreement.

45. Mr Foxton argues that Sequana was not party to the Funding Agreement and if the parties arrived at a deal which turns out to frustrate their intentions by effectively depriving them of any Sequana Recoveries then that is just how things have turned out; they have, as Mr Thompson put it, shot themselves in the foot by failing to foresee that the court might structure a remedy in the way that Sequana proposes. There may be circumstances in which the court is compelled to adopt such an unpalatable course but this case is not one of them.

46. I therefore reject Sequana's alternative submission that the remedy should take the form of the reconstituted debt and be limited to reimbursing AWA for its liabilities under the Funding Agreement.

(d) BAT's proposed s 423 remedy

47. BAT's proposed remedy comes much closer to achieving a result that is just and that meets the statutory objective of restoring BAT to the position it would have been in had the May Dividend not been paid. Their proposal is that Sequana be ordered to pay to BTI within 14 days the sum of $138.4 million, that being the amount paid by BAT and API to date towards the remediation of the Lower Fox River under the Funding Agreement ('the Lump Sum'). The Lump Sum paid to BTI will then be handled in accordance with the terms of the Funding Agreement as they apply to Sequana Recoveries. Sequana will then remain liable to pay to BTI further sums up to a cap representing the amount of the May Dividend, grossed up by the addition of interest. That sum amounts on BAT's calculation to $74,335,351, that being the May Dividend plus interest then minus the Lump Sum ('the Ongoing Liability'). The order would then provide that Sequana's Ongoing Liability crystallises as and when BAT pays money to BTI under the terms of the Funding Agreement in response to payment demands for the remediation of either the Lower Fox River or Future Sites.

48. As to the calculation of the Lump Sum, BAT arrives at this by adding together:

> a. $77.03 million for past costs already paid by BAT towards the remediation of the Lower Fox River between April 2012 and 1 October 2014;

b. $36.3 million for past costs paid by BAT towards the remediation of the Lower Fox River from October 2014 to date;

c. $25 million for past costs paid by API towards the Lower Fox River to date;

49. As to the likely scale of the Ongoing Liability, BAT has set out in the witness statements of Mr Lloyd made for the Consequentials Hearing what future costs are expected. Some of this has been overtaken by the Whiting Consent Decree. The accuracy of the estimates or the way they might be affected by future events does not matter for the purpose of fashioning the remedy since Sequana will only be called upon to reimburse expenses as and when they are incurred and then only up to the value of the grossed up May Dividend.

(e) Sequana's arguments against the BAT proposal

50. As well as putting forward its own proposal for the section 423 remedy, Sequana makes a number of points challenging BAT's proposal.

(i) The notional asset cushion

51. The Main Judgment held that the May Dividend did not infringe Part 23 of the Companies Act 2006 and was not declared in breach of fiduciary duty by the AWA directors. I also held, in paragraph 517, that where a company is left with plenty of assets after a dividend is paid, the payment cannot have the section 423 purpose because there can have been no intention to prejudice creditors by making the payment. Sequana argue that when framing the relief to be given under s 423, the court should consider whether there is a lower amount of dividend which the directors could have paid out which would still have left plenty of assets in the company thereby negating any cause for complaint under section 423. It is only the value of the assets that needed to be left in the company the notional asset cushion that Sequana should have to restore, not the whole of the May Dividend, if it could legitimately have paid a smaller dividend without contravening section 423.

52. As to how much that notional asset cushion should be, Sequana recognises that this is more a question of judgement than science. It submits that the cushion would not have exceeded 50 million. They arrive at this sum by referring to the value of AWA's assets at the time of the December Dividend, noting that this would have been enough for AWA to meet its liabilities even had the NCR/API share been 55 per cent rather than the 38 per cent found to have been a best estimate at the time. Sequana therefore submits that it should be a term of any order that the amount payable by Sequana should in no circumstances exceed an amount to be determined by the court as representing this notional asset cushion plus interest.

53. In my judgment there is no basis in principle or authority for carrying out any such computation. The cases considering section 423 remedies contain no hint that this is an exercise on which it is appropriate for the court to embark. There is no justification for the court stepping in to rescue the transferor and transferee from the consequences of their illegitimate transaction by investigating the amount that they could legitimately have paid away when they in fact chose to pay away a larger amount. Even if there were a situation in which some such computation was needed in order to achieve the fair result, the evidence does not support it in this case. Mr Lebard and Mr Courteault were very clear that it was essential for presentational purposes to remove all the risk of the Fox River liability exceeding the Maris Policy and the Historical Insurance Policies proceeds. The 'very hairy situation' or 'significant underlying risk' to which Mr Martinet referred (see paragraph 507 of the Main Judgment) does not seem to me to be limited to 50 million.

(ii) Interest rate for grossing up the May Dividend to present value

54. The interest rate that BAT propose to use to gross up the value of the May Dividend to arrive at a present day value is as follows:

> a. from the date of the payment of the May Dividend until the date on which the s 423 claim was commenced (9 December 2013) the interest rate should be the contractual interest rate payable on the inter-company debt, that is the EURIBOR overnight rate plus 0.25%;

b. as from 9 December 2013, [the principal plus accrued interest should be converted into dollars and] interest should accrue at the US dollar LIBOR 12-month rate plus 2%.

55. Sequana object to this and argue that the rate should be the inter-company debt contractual rate for the whole period. That is in line with their overall submission, which I have rejected, that the remedy should take the form of the reconstituted debt repayable only in respect of AWA's future liabilities under the Funding Agreement. Alternatively, Sequana argue that the loan should only attract the higher rate of interest from September 2014 which is the first date on which BAT was required to make payments itself towards the Lower Fox River remediation costs.

56. In my judgment there is a logic to BAT's submission on this point and I accept that interest should run at the rates for which they contend. They are right to hold back from contending that the higher commercial rate should start to run from April 2012. We do not know why it was that AWA stopped making payments at that time and so we do not know whether AWA would have called on the inter-company debt to fund the reimbursement of NCR/API expenses as from that date in the counterfactual world. But in light of the findings in the Main Judgment, Sequana should have conceded when the s 423 claim was lodged that the May Dividend was caught by section 423. Given that I have now found that an immediate payment should in principle be made in respect of past costs, Sequana ought to have offered to make a payment at that point. It follows that interest should run at the higher commercial rate from that time and I will so order.

(iii) Conversion of the euro amount of the May Dividend into a dollar amount

57. After I circulated a draft of this judgment to the parties on Monday 30 January 2017 under the usual embargo terms, a further dispute arose about the terms of the judgment and of the proposed order. This relates to the words that I have put in square brackets in paragraph 54(b) above as regards BAT's submissions about the interest rates to be used to gross up the May Dividend. The inclusion of those words in square brackets would result in the principal amount of the May Dividend plus accrued interest being converted from euros into dollars at the exchange rate applicable on 9 December 2013 and the higher commercial dollar rate of interest thereafter applying to that dollar amount. That wording had been in the draft order that BAT had proposed from an early stage after the Main Judgment but the effect of it had not been brought home to me, or as I understand it, to Sequana before the draft of this judgment was circulated.

58. The significance of the wording is that a remedy in those terms goes much further than simply arriving at a present day value of the May Dividend to take account of the effect of inflation on the value of money the usual purpose of adding interest to the principal awarded to a successful litigant. Because of the depreciation of the euro against the dollar over the period, the conversion at the December 2013 rate would result in the amount of the Ongoing Liability being very much larger today than if the euro amount of the May Dividend plus a modest amount of interest is converted into dollars today. Sequana described the effect of this as very dramatic and BAT has calculated that the difference between the cap figure converted from euros into dollars at today's exchange rate and the cap figure converted from euros into dollars at the exchange rate on 9 December 2013 is about $50 million in BAT's favour.

59. BAT wished to contend that the wording they had proposed should stand and that as a matter of principle the euro amount of the May Dividend should be converted into dollars as at 9 December 2013. In any event, both sides agreed that the court's order needs to include some mechanism whereby they can calculate by how much the capped sum which Sequana is ordered to make available to BTI as a remedy for the s 423 Claim should be depleted by the payments out to meet the Fox River or Future Sites liability. The problem is that the May Dividend and the intercompany debt were a euro amount but the calls for funds to pay remediation costs are in dollars. If BAT are right that the principal amount as at 9 December 2013 should be converted into dollars at the exchange rate prevailing on that date then this solves the problem, the Lump Sum and any Ongoing Liabilities are denominated in dollars and can just be deducted from the now dollar fund. If no conversion into dollars takes place, the order has to enable the parties to work out how much money is left in the euro denominated fund once $138.4 million dollars, and any future dollar amount, has been deducted.

60. A short further hearing was held on 3 February 2017 ('the 3 February hearing') to hear submissions on this point. These submissions were not a re-opening of submissions that had been made at any earlier point in the proceedings but raised a new and important point.

61. Sequana argue that the conversion of the May Dividend into dollars at an early date is not justified as a matter of principle. The May Dividend and the inter-company receivable discharged by the May Dividend were both denominated in euros and the entitlement which AWA had was to call on a euro debt. From the start of the events described in the Main Judgment, AWA was being called on to honour dollar indemnity obligations and the ability of the debt to meet those obligations waxed and waned with the fluctuation of the currencies. The prejudice to the victims from the impugned May Dividend was prejudice by reference to a Euro denominated asset.

62. Sequana also point out that neither BAT nor API made any payments in respect of which relief is sought until 30 September 2014 and so no dollar liabilities fell to be converted into euros to be deducted from the May Dividend amount until that date. Sequana accept that some way must be found to deduct the Lump Sum of $138.4 million dollars from the Euro denominated May Dividend. They propose that that amount is converted using the exchange rate prevailing on 29 September 2014, namely 1 = $1.27. That is the date on which BAT paid the first tranche of the past costs pursuant to the terms of the Funding Agreement. They are prepared to use that exchange rate for converting the whole $138.4 million even though in fact BAT only paid $77 million on that date and the later sums were paid at dates when the euro had already started to depreciate. This favours BAT. As regards payments in the future, they propose that dollar payments be converted into Euros at the closing mid-market rate on the date that they are paid.

63. BAT argue that converting the May Dividend into dollars on the basis of the exchange rate in December 2013 is part and parcel of the court's task under s 423(2) of restoring the position to what it would have been if the transaction impugned under section 423 had not been entered into and of protecting the victims' interests. The source of the harm from the victims' point of view is the inability to call on funds to pay the indemnity liabilities they owe for the costs of the remediation. All those costs have been incurred and will be incurred in dollars and will be paid in dollars. The effect of the Main Judgment is that Sequana should have conceded liability in respect of the May Dividend when the s 423 Claim was commenced. If they had done so, and reconstituted the debt, AWA would have called in that debt and converted it into dollars to be in a better position to pay off its future liabilities. BAT point out that AWA converted its operating currency to US dollars after the sale by Sequana to TMW with effect from 1 January 2009. It would not fulfil the statutory purpose, BAT argue, for the victims to be exposed to the currency risk that arose because Sequana defended the case to judgment.

64. In my judgment there is no justification for converting the May Dividend into dollars at the date for which BAT contends. There are many cases in which an amount of damages paid in euros after judgment in contested litigation is worth much less in dollars than the same amount of euros would have been worth in dollars if it had been paid when the proceedings were started. The usual award of interest does not compensate the winning litigant for that disadvantage of having had to fight the case to the end. The question here is whether it makes a difference that the award in this case is made under section 423 and that the underlying obligations which AWA would have used the intercompany debt to meet were dollar liabilities. I have concluded that it does make some difference but that the fair outcome is that proposed by Sequana, namely to convert the past costs to dollars as at the date of the first major payment by BAT and then convert future costs at the rate prevailing on the date when the demand is made to BTI under the Funding Agreement.

65. Anything more than that would provide what is in effect a windfall for BAT. I do not consider that there is a sufficient factual basis for the counterfactual position that Mr Thompson put forward for that to justify such a windfall. It is not at all clear that if the intercompany debt had remained in existence, AWA would have called the whole amount in as soon as it could. Such an action might have been regarded as inconsistent with its stance as from April 2012 that it was not liable to make any further contribution to the Fox River remediation costs. Even after Mr Gower and Mr Tauscher had acquired AWA and so were free from the direct influence of the Sequana board members, the relationship between AWA and Sequana continued through the presence of the golden share. It seems unlikely that AWA would have taken the aggressive step of calling in the whole of the debt even though it was refusing to make any payments out. It seems even less likely that Sequana would simply have paid up the intercompany debt without a fight. I describe below some sabre rattling that had occurred before December 2013 with Sequana threatening to challenge various payments made by AWA allegedly in breach of the TMW sale agreement: see paragraph 77 below. Those kinds of points are likely to have resurfaced if AWA had asked for the intercompany debt to be paid. The choice of 9 December 2013, though it has a logic in relation to the change in interest rate does not have the same logic in this context given that BAT did not make any payments until the later date. Sequana's proposal gives BAT the benefit of the higher exchange rate in September 2014 in respect of all the Lump Sum costs. That strikes the right balance.

(iv) Liability for the Kalamazoo River

66. BAT argue that the Ongoing Liability should include liability for the victims' costs incurred for the clean up of the Kalamazoo River as well as the Lower Fox River. BAT's liability under the Funding Agreement to reimburse NCR for remediation costs for the Kalamazoo is uncapped but API's liability under the Funding Agreement is limited to $25 million (in addition to the $25 million for the Lower Fox River). Sequana point out that in the Main Judgment I rejected BAT's contention that the risk of AWA being pursued in respect of the Kalamazoo River clean up was anything more than remote. They argue that it would not therefore reflect the justice of the case for Sequana now to meet liabilities that did not form any part of the statutory purpose which the Court has found.

67. This submission is effectively answered by a further point that Arden LJ made in her judgment in Hill v Spread Trustee: (emphasis added)

> "The person or persons who fulfil the conditions in section 423(3) may thus be a narrower class of persons than those who at the date of the transaction are victims for the purpose of section 423(5). For a person to be a "victim" there is no need to show that the person who effected the transaction intended to put assets beyond his reach or prejudice his interests. Put another way, a person may be a victim, and thus a person whose interests the court thinks fit to protect by making an order under section 423, but he may not have been the person within the purpose of the person entering into the transaction. That person may indeed have been unaware of the victim's existence. That answers the question: what connection must there be between the purpose and the prejudice? Section 423(2) in conjunction with the definition of victim in 423(5) makes prejudice or potential prejudice a condition for obtaining relief. That prejudice does not have to be achieved by the purpose with which the transaction was entered into. Nor in my judgment does the purpose have to be one which by itself is capable of achieving prejudice."

68. If the remedy can be fashioned to protect a victim who was not in the contemplation of the transferor, it must follow that it can be fashioned to protect a victim who was clearly within the contemplation of the transferor but in respect of a potential additional liability towards that same victim even if that additional liability was not within the contemplation.

69. Further I consider it is right to exercise my discretion to include the Kalamazoo River clean up costs in the remedy. The intention of Sequana in paying the May Dividend to facilitate the move of AWA out of the group was to remove all potential liability for US environmental damages claims from Sequana. I will therefore include Kalamazoo River clean up costs in the order although I recognise that it is likely that the Lump Sum and the Ongoing Liability in respect of the Lower Fox River will swallow up the whole of the grossed up May Dividend amount in any event.

(v) AWA asset depletion

70. The TMW sale agreement negotiated between Mr Lebard and Mr Gower provided that the price to be paid by TMW for AWA was 2.8 million payable in December 2011. In fact the purchase price was paid to Sequana only in July 2012 after AWA paid a dividend of that amount to TMW in May 2010.

71. I described in the Main Judgment the Golden Share held by Sequana in AWA after the sale. The sale agreement provided that any dividends declared by AWA after the sale were split between TMW and Sequana after an initial $10.3 million had been paid out to Mr Gower and Mr Tauscher. For the next tranche of dividend, Sequana would receive 80 per cent and TMW only 20 per cent until Sequana had received $70 million. After that, Sequana received 50 per cent of any dividend declared.

72. Further on 18 May 2009 AWA's articles of association were amended to give Sequana certain rights including (a) a right to veto any transaction entered into by AWA otherwise than in the normal course of business; (b) a right to restrain AWA from entering into transactions with Mr Gower or Mr Tauscher or TMW save on terms approved by Sequana; and (c) certain rights to receive financial information, albeit of a limited scope, from AWA.

73. Mr Nicholas giving evidence in support of these applications for Sequana has gone in detail through documents disclosed by AWA describing the income and expenditure of AWA in the period following the sale to TMW. AWA over the years added to the $4.2 million in cash left in the company when it was sold to TMW and the $119.4 million left in the Maris Policy by cashing out the Historic Insurance Policies and retaining about $110 million of what it received for these. Over the years it spent some of this on the Lower Fox River clean up (about $131.4 million), defence costs in legal fees (about $25 million), the dividend to enable TMW to pay Sequana for the purchase of AWA and other dividends. As at 30 April 2012 when AWA stopped paying for the clean up, it was left with about $63.8 million.

74. Mr Nicholas then describes how AWA has used some of this money if not improperly then at least unwisely. He identifies $39,643,113 as money that would not have been spent if Sequana had not sold AWA. That sum of $39.6 million is made up, Mr Nicholas says, broadly of:

> a. Dividends and other emoluments paid to Mr Gower, Mr Tauscher and Mr Barron over the years.

b. Unwise investments that have depreciated in value. Mr Nicholas identifies a number of investments such as the purchase of shares in, or the making of loans to, start-up companies of different kinds.

c. Other expenses such as a substantial budget for advertising, investment management fees, AWA consultancy fees and subsidiary impairment.

75. Sequana submits that this amount should, in effect, be deemed still to be available within AWA to meet its liabilities so that AWA should only be able to call on Sequana's money once that amount has been overtopped by the demands of the Lower Fox River remediation. As regards the directors' emoluments and dividends, Sequana point out that some of these payments appear to exceed the maximum sums that Mr Gower and Mr Tauscher are entitled to pay themselves under the terms of the TMW sale agreement. But Sequana also seek to treat legitimate dividends and emoluments in the same way, including Mr Barron's salary and the dividend that was declared to enable TMW to pay Sequana the purchase price. This is on the basis that these amounts would not have left AWA's accounts if the May Dividend and the sale of AWA had not taken place and so would be available to meet the Fox River clean up costs.

76. I do not consider it would be fair to treat these assets as if they remained within the company to the benefit of Sequana and the detriment of BAT as the victim. The exercise on which the court is embarked is not an attempt to reconstruct a complete counterfactual pathway, trying to guess what would have happened from the point on 18 May 2009 when the real and counterfactual paths diverge. In any event, it is impossible to be sure whether the same or more or less expenditure would have been incurred by AWA than was in fact incurred, once it started to become clear that the liabilities for the Fox River and Future Sites were going to be greater than previously thought.

77. Further, I agree with the point that BAT make that in the negotiation of the sale and the period thereafter, Sequana had much greater control over what would happen within AWA than BAT or the other victims had. Sequana had important rights as a shareholder in AWA whereas BAT was not a shareholder either directly or indirectly in AWA and had no involvement in the management of AWA after AWA was demerged in 1990. Mr Lloyd in his evidence for BAT points out that Sequana has exercised its rights or threatened to do so on occasion since 2009. For example, in August 2012 Sequana's solicitors wrote to AWA's then solicitors reminding them of AWA's obligations to provide financial information in a timely manner. In that letter, Freshfields also challenged various payments shown in AWA's accounts as having been made to Mr Gower and Mr Tauscher, raising the question whether these were in breach of the articles of association and reserving Sequana's right to bring a derivative action. Mr Tauscher responded with an explanation of the payments and it appears that Sequana did not take the matter further. This shows that Sequana was monitoring the financial position of AWA and was able and willing to exercise its rights as a shareholder if it thought fit.

78. In the light of the respective positions of Sequana and BAT vis a vis the conduct of AWA over the period post sale to TMW, it would not be fair to adjust the remedy granted under section 423 to give Sequana the benefit of payments out of AWA since May 2009 when these payments were not within BAT's control in any way.

79. In an allied point, Sequana argue that they should have the benefit of the $25 million AWA Floor in the sense that that money should be exhausted notionally before any call can be made on Sequana to reimburse remediation costs. I do not accept that that would be fair. Sequana is a beneficiary of the provisions of the Funding Agreement that are designed to prevent AWA becoming insolvent. The insolvency of AWA would destroy the golden share and hence any chance Sequana had of benefiting from ultimate victories in the US litigation. The intercompany debt was payable on demand and it is not clear to me that, even if Sequana had remained in charge, they would have run the company down to its last dollar before putting in some funds, particularly if they had also decided to try to diversify AWA's operations a little to generate more money. The $25 million is not available to the victims of the May Dividend under the Funding Agreement so there is no justification for reducing their protection by that amount.

(f) Provision in the order for any ultimate surplus

80. During the course of the Consequentials Hearing, I raised the question whether the order should reflect the possibility envisaged in the Funding Agreement that BTI is ultimately in funds to reimburse the parties to the Funding Agreement. This possibility has greatly reduced in the light of the Whiting Consent Decree which removes the opportunity to recover reimbursement from the other PRPs. Sequana complain that AWA is at the bottom of the waterfall for distribution of monies received and that its own ability to be reimbursed is dependent on the exercise of its rights under the golden share and hence is limited to 80 per cent of any dividends.

81. In the light of the submission made by the parties at the hearing, I have concluded that it would be unwise to try at this point to anticipate in the order what is going to happen in this case. The sudden emergence of the highly significant settlement between NCR/API and the Government illustrates how the fortunes of the parties in the US litigation wax and wane so that it is difficult to predict not only where they will be at the end of the day, but also how close "the end of the day" actually is. The safest course is therefore to give the parties liberty to apply to

come back to court to revisit how the remedy is operating to ensure that it continues to achieve a just outcome.

(g) Provision of information to Sequana on the progress of the US litigation

82. Mr Foxton submitted, and I agree, that now that Sequana has an interest in the progress of the different sets of proceedings in the US, it should be kept informed about what is happening. I will therefore include in the order a provision to the effect that Sequana is to have the same entitlement to information as the Settling Parties in accordance with section 9.4 of the Funding Agreement, provided that it accepts the same obligations to keep that information confidential as the Settling Parties are under.

(3) Costs of the proceedings to the Main Judgment

83. Some interlocutory costs orders were made in Sequana's favour during the course of the proceedings. These were listed in paragraph 87 of Sequana's written submissions for the Consequentials Hearing and I will make the orders that are needed to give effect to those. Other than that, the parties are very far apart as to who should pay for the costs of these proceedings.

84. The only common ground is that I should not simply make an order that the costs of the Dividend Claim should follow the event namely that Sequana won and that the costs of the s 423 Claim should follow the event namely that BAT won in part. It would not be practical to leave it to a costs judge to work out what such an order meant in financial terms. The parties accept that as the trial judge I am best placed to assess what adjustments should be made to reflect the successes and failures of the parties in the two sets of proceedings.

85. CPR Rule 44.2 provides that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party but that the court can make a different order. In deciding liability for costs, the court must have regard to all the circumstances including whether a party has succeeded on part of its case even if that party has not been wholly successful. The court can make any manner of order as to costs including awarding costs of particular issues or a proportion of the costs otherwise due.

86. Sequana's submission is that I should deal with costs in two stages. First I should apportion a percentage of the total costs of the Trial between the Dividend Claim and the s 423 Claim. They argue that the fair split would be to regard 75 per cent of the total costs as incurred in relation to the former and 25 per cent in relation to the latter. This is because if the s 423 Claim had been pursued by itself, the issues in dispute would have been much narrower in scope. Although they accept that the lawfulness of the two dividends under section 423 depended on the directors' appreciation of the inherent uncertainties in the Lower Fox River costs, the fact that there was great uncertainty about every aspect of the Fox River liability was not really in contention. All the more extensive detail about CERCLA, the US litigation and the expert accounting evidence was really directed at the computation of the provision in the various annual and interim accounts and the validity of the solvency statements; issues only relevant to the Dividend Claim. The application of section 423 to the May Dividend also depended on the effect of the sale of AWA and, again, that was not really in contention.

87. Sequana argue that since the Dividend Claim was wholly unsuccessful, BAT should be ordered to pay Sequana the whole of that 75 per cent of Sequana's total costs. As regard the remaining 25 per cent referable to the s 423 Claim, Sequana accepts that the court will ordinarily take as its starting point that a party which has made some financial recovery in litigation is to be regarded as the successful party. However, that party may be disallowed a proportion of its costs and even ordered to make a payment to the other party's costs in appropriate circumstances. It is not necessary to show that a party has acted unreasonably before making such an order: see Summit Property v Pitmans (a firm) [2001] EWCA Civ 2020 per Longmore LJ. Given that Sequana won on the December Dividend but lost on the May Dividend, Sequana submits that an order requiring BAT to pay Sequana 50 per cent of its costs of the s 423 Claim reflects the justice of the case overall.

88. BAT see the matter rather differently. Mr Thompson referred me to a number of recent authorities where the Court of Appeal has urged courts to give full weight to the overall success of the winning party. Fox v Foundation Piling Limited [2011] EWCA Civ 790 was a personal injury case in which the claimant had exaggerated his claim but won more damages than the defendant had offered to settle the case. Jackson LJ deprecated what he described as a "growing and unwelcome tendency" by first instance courts to depart too far and too often from the general rule in CPR 44.2 (2)(a) that the unsuccessful party will be ordered to pay the costs of the successful party. He went on to say that such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates.

89. This case is different from the cases to which Jackson LJ was referring where the main issue in the case turned out to generate a lower sum of damages than claimed. Here the quantum of the s 423 Claim in relation to the May Dividend was not really in doubt; what happened was that there were other discrete claims for other sums on which the claimant wholly failed. More relevant therefore are two recent costs decisions which I have found helpful. In Fiona Trust & **Holding Corporation v Privalov** and others [2016] EWHC 2657 (Comm), Males J was considering the appropriate order for costs where he had made a substantial award in favour of the defendants but where (a) that award was only a modest proportion of the total claim and (b) where large parts of the defendants' case had been wholly rejected. The issues on which the defendants had failed were entirely discrete areas of the case and had caused very significant costs to be incurred. He noted that no Part 36 offer had been made and that the defendants could have protected their position in costs. He rejected the claimants' submission that there should be no order as to costs since that would fail to recognise the overall success which the defendants achieved. He ordered that the claimants pay 50 per cent of the defendants' costs. In Harlequin Property (SVG) Limited and another v Wilkins Kennedy (a firm) [2016] EWHC 3233 (TCC) Coulson J had dismissed the second claimant's claim and also dismissed most of the first claimant's claim against the defendant. But he allowed one sizeable claim. That meant that the claimant was to be regarded as the successful party. Coulson J said:

> "39. But, notwithstanding the clear warning in Fox, justice would manifestly not be done if I made no allowance for the raft of issues on which the claimant was unsuccessful. My main Judgment runs to 897 paragraphs. A large part of that is spent explaining, doubtless in too much detail, how and why most of the claims against the defendant failed, either because liability had not been made out, or causation could not be established, or both. On the three main issues, the claimant was successful on part of one of them, and comprehensively lost the rest. I consider that it would be a rank injustice if, notwithstanding all of the work, time and cost generated by these failed claims, the costs order ignored that overall result.

> 40. Thus, this is a case in which it is appropriate to depart from the general rule because of the scale and nature of the claimant's lack of success. Both parties agreed that this should be done by a percentage reduction of the claimant's costs, rather than making issues-based costs orders."

90. He ordered that the defendant must pay 60 per cent of the claimant's costs.

91. Here overall BAT has been the successful party because they have achieved a substantial award in their favour. But a reduction needs to be made to reflect the failure of the Dividend Claim and the failure of the s 423 Claim in relation to the December Dividend. BAT argue that Sequana should pay BAT 55 per cent of BAT's total costs of the proceedings. That leaves costs to be paid of just under 10 million including costs in relation to an application heard by Snowden J in which an order for costs in the case was made. The way in which the legal costs were charged to the claimants is described in the 9th witness statement of Mr Lloyd. He described how Debevoise & Plimpton were initially instructed just on the s 423 Claim when that was issued on 9 December 2013. The order that the two claims be tried together was made in November 2014. From that date, the firm did not distinguish between the costs for the claims for BAT or BTI and did not issue separate invoices. However, the firm did set up a billing system which distinguished between different aspects of the case the trial, disclosure, reviewing documents/strategy, and so forth. Mr Lloyd goes through each of these nine categories applying a different percentage to represent how much of it is referable to the s 423 Claim.

92. Although I have no doubt that Mr Lloyd has carried out this task with fairness and in good faith, there are clearly risks for the future in the court being seen to approve a particular method of cost apportionment to resolve these difficult questions which often arise at the end of a case. That risk is that parties, with a good idea of the relative merits of the different limbs of their claim, will seek to weight the legal costs as they go along onto those limbs on which they regard as more likely to succeed. Similarly, I deprecate the tendency of parties to count up the paragraphs in opening or closing submissions dealing with winning and losing arguments as a proportion of the whole or, even worse, dividing up the pages in the daily transcripts of proceedings. I would not want to say anything that might condemn future generations of junior lawyers to the tedious task of performing such a counting exercise. If this method gained currency as a way of apportioning costs, it would be open to manipulation whether conscious or unconscious. There is no substitute for the trial judge carrying out a realistic, albeit non-scientific, appraisal of the fair proportion of the costs of the successful party that should be disallowed to reflect costs incurred on parts of the case on which that party failed.

93. Further, the methods proposed by the parties here do not reflect the principle that has been emphasised in the case law that it is open to a party in the position of Sequana to protect its position as to costs by making a payment into court or making a Calderbank offer to resolve the case by a means other than an immediate payment of money. That is highly relevant in the present case. All the evidence on which I based my conclusions on the May Dividend came from the evidence of Sequana's witnesses and from documents that they had disclosed: see paragraphs 506 onwards of the Main Judgment. They were in a good position to assess the merits of that part of the case as soon as the claim was brought and to protect themselves from the very situation in which they now find themselves as to costs.

94. Sequana argue that this situation is different because there are two claims here with different parties. BAT is not the same as BTI and the individual defendants were only party to the BTI claim. However, there is no evidence from the Defendants' side suggesting that the individual defendants have personally paid any costs which they are entitled to recover. I also cannot see that there are any costs that could be regarded as having been incurred solely for the benefit of the individual directors rather than for Sequana as well. Although formally the claimant in the unsuccessful Dividend Claim was BTI and the partially successful claimant in the s 423 Claim was BAT, no distinction was drawn between them during the Trial or at the earlier stages of the proceedings, once both actions were underway. The events which gave rise to both proceedings are the same and everyone recognised that it made sense for the two actions to be dealt with and heard together.

95. Turning to what the fair deduction would be, I agree with Sequana's submission that much of the evidence that was explored at Trial as well as many of the legal submissions made would not have been needed if the Trial had been limited to the section 423 challenge to the May Dividend. The detail of the CERCLA evidence, as well as the accounting evidence and much of the factual evidence about the development of the provision over the years would not have been needed. As I stated in paragraph 494 of the Main Judgment, the issue of the actual or imminent insolvency of AWA was irrelevant to the s 423 Claim. It would still have been necessary to understand the evidence about the Maris Policy, the likely receipts from the Historical Insurance Policies and the progress of the clean up operation. But the case would have had a very different shape and scale, even though 135 million is still a substantial amount of money meriting substantial legal effort.

96. Having regard to all these points, the fair order to make is that Sequana pay BAT/BTI 50 per cent of their total costs of the proceedings leading up to and including the Trial to be assessed on the standard basis if not agreed.

97. Interest on costs will accrue at 1% above Bank of England base rate from the date when the costs were paid until the sums become subject to the judgment interest rate.

98. BAT have also applied for an interim payment in respect of these costs. Subject to Sequana's application for a stay discussed below, there is no reason not to order a reasonable sum on account of costs, in accordance with CPR r44.2(8). In accordance with the principles discussed in Mars (UK) Ltd v TeKnowledge Ltd [1999] EWHC 226 (Pat), the figure for the interim payment should be one which I am confident will not be higher than any amount following a final assessment. I will order a payment of 60 per cent of the proposed costs liability. Mr Lloyd's evidence is that the total costs bill is about 18 million. I have decided that BAT is entitled to have half of its costs paid. 60 per cent of that half is 5.4 million and I will order that to be paid as an interim payment.

(4) Stay of Execution

99. Sequana have applied for stays of execution in relation both to the section 423 remedy and in relation to any immediate order as to costs, pending the determination of its appeal. This is on the basis that there is a very real risk that Sequana will be precluded from pursuing any appeal if ordered to make a significant payment to BAT prior to the appeal.

100. The granting of permission to appeal is not normally a sufficient reason to grant a stay of any remedy: the successful litigant should not generally be deprived of the fruits of litigation pending appeal: see **Leicester Circuits Ltd v Coates Brothers plc** [2002] EWCA Civ 474 where Potter LJ said that the normal rule is for no stay, but where the justice of that approach is in doubt, the answer may well depend on the perceived strength of the appeal. Both parties agreed that the relevant test is that set out in Hammond Suddards Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 2065, where Clarke LJ described the correct approach as follows:

> "Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of an appeal being stifled? If a stay is granted, and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"

101. Sequana say that there is a risk of their appeal being stifled and of irreparable prejudice to Sequana, its employees and other creditors because of its precarious financial position. The evidence on this point was set out in Mr Nicholas' 6th witness statement. The position is that Sequana's total cash at present is about 4 million. The company is owned 20 per cent by the Impala group which is a diversified French company, 15.42 per cent by the investment arm of the French State and the remainder by individual and institutional investors, Sequana being a quoted company on the Paris stock exchange. It has two wholly owned subsidiaries, Antalis International and Arjowiggins, both of which are operating paper manufacturers and distributors. Sequana is dependent on receipts of money from Antalis in the form of dividend payments and management fees.

102. In 2014 the Sequana group underwent a significant, court-sanctioned financial restructuring following a long period of negotiation with its lenders and main shareholders. A very large amount of debt was written off with some of the remaining debt converted into bonds. Antalis' credit facility was extended to the end of 2018 and in return Antalis was required to enter into various factoring arrangements so that the proceeds could be paid to senior lenders. Sequana's shareholders participated in a rights issue to raise additional capital and suffered a significant dilution of their shareholdings. The restructuring left Antalis with a large syndicated credit facility with eight banks. A large proportion of this has already been drawn down. The terms of the credit facilities restrict the amounts that Antalis is permitted to distribute to Sequana as dividend. The caps are, Mr Nicholas says, calibrated to reflect the banks' assessment of Sequana's actual operating expenses requirements at the holding company level. If Antalis exceeds those levels without the banks' agreement that would be an event of default entitling the lenders to terminate the facilities.

103. Arjowiggins is not subject to covenants restricting the payment of dividends. But it does not have enough money to make any such payments and is currently cash constrained. Mr Nicholas concludes that should Sequana be ordered to pay to BAT or into court a significant amount and that amount is perceived by the credit insurance market to be unaffordable, this could create a liquidity squeeze through a cash run from suppliers, a reduction in payment periods and/or a downgrade by credit insurers.

104. Despite this detailed evidence, BAT describe Sequana as having been 'remarkably coy' about its finances. They submit that although Mr Nicholas' evidence 'is suggestive of doom and gloom' it is entirely generic and uninformative. BAT point to the fact that Sequana has been able to finance the very considerable costs of defending these proceedings during the course of 2016, including the costs of the Consequentials Hearing itself. Sequana also contemplates funding its appeal over the coming year. BAT focuses on Sequana's failure to adduce evidence as to efforts to raise money from its directors, shareholders, other backers or interested parties. The Sequana evidence goes no further than to say that in the opinion of the Sequana management there is no possibility of a renegotiation with lenders or of a rights issue. Mr Lloyd also gives evidence that in early November 2016, in response to the evidence of Sequana on this point, Debevoise & Plimpton wrote to Freshfields asking whether Sequana was capable of making any payment ordered by the court and if so how much. The reply was simply to refer back to Mr Nicholas' evidence and refrain from naming a sum. BAT correctly point out that if Sequana pays over the sums due under the section 423 Claim but are successful in their appeal, there is no doubt that BAT would be in a position to refund the money to Sequana since BAT is a very substantial company.

105. In my judgment this is a case where the justice of the case demands a stay of execution of the section 423 remedy pending the resolution of Sequana's appeal against the finding of liability in respect of the May Dividend. I have reached that conclusion for the following reasons.

106. First, Sequana's appeal largely turns on two legal points which may well turn out to be right. These are:

> a. my decision explained in paragraphs 497 onwards of the Main Judgment that a dividend is capable of being a transaction falling within section 423(1)(a) or (c); and

b. more generally, the relationship between the protection conferred on creditors by section 423 and the protection conferred on creditors by the provisions in Part 23 of the CA 2006 and by the triggering of the creditors' interests duty contemplated by section 172(3) of that Act: see paragraph 501 of the Main Judgment.

107. These are not easy points and there is no authority discussing how these complicated sets of provisions are meant to work together. If Sequana succeeds on either of these points, its liability under section 423 may be overturned.

108. Secondly, I have no doubt on the basis of Mr Nicholas' evidence that Sequana is in a difficult financial position and that it may well not survive the requirement of a substantial lump sum payment of the size that would result from the immediate enforcement of the section 423 remedy that I have held should be made. There is a real risk therefore that any appeal will be stifled. I do not accept BAT's criticisms of the evidence put forward by Sequana. As Mr Foxton pointed out, there has recently been a court approved restructuring in which the lenders and shareholders agreed to very significant erosions of their rights. There must be a very real risk that nothing more can be squeezed out of them now.

109. Finally, I realise that Sequana's financial difficulties are also relevant to the second stage of the test propounded by Clarke LJ in Hammond Suddards. If Sequana's and its subsidiaries' fortunes continue to decline, this may make it less likely that BAT would be able to recover anything from Sequana if Sequana's appeal ultimately fails but it has slid further into difficulty. Sequana might be in a stronger position to pay something now if BAT is allowed to enforce the order than in a year or so. However, BAT is a substantial company which can bear the expenses it has agreed to incur for the Lower Fox River clean up. The terms of the Funding Agreement show that BAT has recognised that it may have to wait a long time before the final reckoning of what it is entitled to recover from whom can be made and that it will have to suffer being out of funds until that point.

110. I therefore grant a stay of execution in respect of the section 423 order. The stay should not apply to the part of the order that requires the provision of information to Sequana about the progress of the US litigation: see paragraph 82 above.

(5) Orders consequential on the Consequentials Hearing

111. At the Consequentials Hearing and at the 3 February hearing more issues were raised arising from the draft judgment that I had circulated to the parties.

(a) The costs of the Consequentials Hearing and the 3 February hearing

112. The Consequentials Hearing was a substantial hearing lasting two intensive days. The hearing followed the parties' compliance with my directions order which required evidence to be filed to bring the court up to date on the issues that were important in arriving at the decisions contained in this judgment. BAT has been successful on the principal issue dealt with namely the nature of the relief to be granted in respect of the s 423 Claim. I have also accepted most of BAT's arguments in relation to the costs of the Trial. On the other hand, some of the evidence lodged by Mr Nicholas related to the application for a stay of execution of the section 423 order and Sequana has been successful on that issue. The Consequentials Hearing and the 3 February hearing should be treated as one so far as costs are concerned.

113. Having regard to what I have decided, the fair order to make is for Sequana to pay BAT 70 per cent of BAT's costs of the Consequentials Hearing (including the 3 February hearing) to be assessed on the standard basis if not agreed. I will order a payment on account of those costs of 60 per cent. Mr Lloyd's evidence is that BAT's costs of the Consequentials Hearing are about 900,000 so the interim order will be for 378,000.

(b) A stay of the interim costs order

114. The reasons given above for granting a stay of the section 423 remedy do not justify staying the order for costs, including the interim payment order. The sums involved are much smaller and appear to be well within the scale of funds described by Mr Nicholas as expended on general operating costs for the group. Sequana and its backers have funded Sequana's own costs of defending the litigation and plan to pursue their appeal and oppose BTI's appeals. They should be able to make the interim payment I am ordering without that threatening the continued viability of the group. I therefore dismiss the application for a stay of the costs order.

115. However, in light of the submissions made by Mr Mumford QC on behalf of Sequana at the 3 February hearing, I have extended the time

given to Sequana to make this payment so that it falls after the next date on which a dividend payment from Antalis to Sequana is due to be made.

(c) Permission to appeal the decisions in this judgment

116. The 3 February hearing also afforded the opportunity for the parties to make submissions on which aspects of the proposed order they would want to appeal. My decision is as follows:

> a. I grant permission to appeal to Sequana in relation to the decision regarding the remedy to be granted for the s 423 Claim;

b. I also grant permission to appeal to BAT in relation to my decision on the dollar conversion point described in paragraphs 57 to 65 above.

c. I refuse permission to appeal to Sequana in relation to the decision as to the costs of the Trial (paragraphs 83 to 98 above). At the 3 February hearing, Sequana argued that there was a point of principle here as to the proper approach to costs when two actions with different claimants and defendants are tried together and lead to very different results. The order I propose making prevents, they argue, the individual defendants and their subrogated Directors & Officers liability insurers from recovering their own costs from BTI as they would ordinarily have done if the BTI action had been heard separately. There may well be an interesting point of principle as Sequana say but that point does not properly arise in this case. There is no meaningful distinction between BAT and BTI for these purposes on the claimants' side. As regards the individual directors, the order for directions I made following the Main Judgment required the parties to lodge any evidence in support of their consequential relief applications well in advance of the hearing. Sequana could have provided evidence of what payments the individual directors had made or what claims had been made on their insurance. They did not serve any evidence in relation to costs. Mr Mumford relied at the 3 February hearing on a reference in Mr Nicholas' sixth witness statement in the context of Sequana's financial position to 'a 4.5 million reimbursement from insurance companies in respect of legal costs'. I do not know if that is referring to the directors' insurance and it is very far from firm evidence that the individual directors or their insurers will be out of pocket by 4.5 million if the order I propose to make stands. I can think of no reason why the directors or their insurers should have been required to pay such a large sum to Sequana towards the costs. In the light of the lack of evidence to show that anyone other than Sequana has paid any costs of this action, this is not a suitable case in my judgment in which the point of principle raised by Mr Mumford to be examined.

d. Similarly, I refuse permission to appeal to Sequana in respect of the decision to refuse to stay the interim costs order (paragraph 114 above) for the reasons set out there.

(d) Interest on the Lump Sum payment

117. Given that I have stayed the obligation of Sequana to pay the $138.4 million straight away, the question arises as to what interest rate should apply to that figure assuming that Sequana do not pay it and assuming further that their appeal is unsuccessful. Mr Mumford submitted that the court should substitute a different interest rate from the judgment rate that would normally apply because this is a dollar amount. I do not accept that submission. Any alternative dollar rate is likely to be substantially below the current judgment rate which has never been adjusted to reflect the very low rates that have prevailed for many years now. I do not see that the mere fact that the sum due is expressed in dollars should entitle Sequana to what is likely to be a much more favourable interest rate.

(6) Security for costs

118. Although BAT contended that Sequana's evidence of impecuniosity was inadequate to support Sequana's application for a stay, BAT rely on that evidence in support of their own application for security for costs. They submit that Sequana may be unable to pay BAT's costs of Sequana's appeal if that appeal fails and Sequana is ordered to pay those costs. BAT puts its likely costs bill for Sequana's appeal at 950,000 whereas Sequana says that its appeal is a narrow one which should take only a day or two to argue so that a much smaller amount is likely to be incurred.

119. I have granted permission to appeal to BTI which intends to challenge many of the points decided against them in the Dividend Claim. Sequana is, of course intending to oppose BTI's appeal. It is likely that the points that Sequana wants to make in its appeal will take up a small proportion of the time taken by the larger BTI appeal. In those circumstances I do not consider it is appropriate to order Sequana to provide security for costs in relation to its appeal. I therefore dismiss BAT's application.

CONCLUSIONS

120. In summary the consequential relief I will order to give effect to the Main Judgment is as follows:

> a. Permission to appeal is granted to BTI and to Sequana in respect of the Main Judgment;

b. The order to give effect to BAT's successful claim in respect of the May Dividend under section 423 should be in the form proposed by BAT rather than the form proposed by Sequana, namely a payment of $138.4 million being the amount paid so far by BAT and API for remediation of the Lower Fox River and an additional Ongoing Liability up to the cap represented by the grossed up amount of the May Dividend.

c. Further:

> i. I reject the argument that there should be a notional asset cushion because Sequana could have declared a smaller May Dividend without having the section 423 purpose.

> ii. Liability for the clean up of the Kalamazoo River should be included in the Order.

> iii. No allowance should be made in respect of alleged asset depletion by AWA since May 2009.

> iv. The interest rate used to gross up the May Dividend since May 2009 should be the contractual interest rate payable on the inter-company debt (EURIBOR overnight rate plus 0.25%) for the period 18 May 2009 until 9 December 2013 and thereafter interest should accrue at the US dollar LIBOR 12 month rate plus 2%.

> v. The amount of $138.4 million shall be converted into Euros at the rate of 1.27 and thereafter payments made pursuant to the Ongoing Liability shall be converted into Euros at the closing mid-market rate on the date when the demand for payment is made under the Funding Agreement.

> vi. The order should grant both parties liberty to apply so that they can come back to the court to ask for the order to be revised if circumstances over the coming years change in a material respect.

> vii. The order will also provide that Sequana should have the same entitlement to information about the progress of the US litigation as the Settling Parties have under section 9.4 of the Funding Agreement.

> viii. Permission to appeal is granted to Sequana in respect of the s 423 remedy ordered.

> ix. Permission to appeal is granted to BAT in respect of the decision not to direct the conversion of the May Dividend from euros into dollars otherwise than as set out in sub-paragraph (v) above.

d. The parts of the order giving effect to the section 423 remedy (but not the part giving effect to sub-paragraph c(vii) above) are stayed pending the determination of Sequana's appeal.

e. As regards the costs of the Trial,

> i. Sequana must pay BAT 50 per cent of the total costs of proceedings leading up to and including the Trial, to be assessed on the standard basis if not agreed.

> ii. Interest on those costs will accrue at 1% above Bank of England base rate from the date when the costs were paid until the sums become subject to the judgment interest rate.

> iii. Sequana will make an interim payment of 5.4 million to BAT on account of those costs by 4 pm on Friday 5 May 2017.

> iv. Sequana's application for a stay of this costs order is refused.

> v. Sequana's application for permission to appeal against this costs order is refused.

f. As regards the costs of the Consequentials Hearing,

> i. Sequana shall pay BAT, 70 per cent of their costs of the hearing to be assessed on the standard basis if not agreed.

> ii. Interest on those costs will accrue at 1% above Bank of England Base rate from the date when the costs were paid until the sums become subject to the judgment interest rate.

> iii. Sequana will make an interim payment of 378,000 to BAT on account of those costs by 4 pm on Friday 5 May 2017.

> iv. Sequana's application for a stay of this costs order is refused.

g. BAT's application for security for costs in relation to Sequana's appeal against the decision on the May Dividend in the section 423 Claim is refused.

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