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THE ULVA STORY- PART 1

By Sally Ramage

This case study illustrates financial misfeasance, taxation avoidance, arguable voidable contracts, reckless litigation, opulence, and high living leading to murder, arson and suicide. Four dogs, three horses and three people were killed, the stables were burnt down, the house was completely burnt out and four expensive cars were completely burnt out, a total destruction and annihilation of Christopher Foster, his immediate family and all his tangible property within the United Kingdom.

The Scenario- Family, friends and colleagues

Surviving family are Anne Giddings, Christopher Foster's sister-in-law and Jill Foster's brother. Among neighbours is a car dealership businessman named John Hughes. Former colleagues are Giuseppina Beardsmore and US citizen Dan Sherrill. The Fosters' former accountant is Terrence Baines, from Tamworth, Staffordshire. Deceased persons in the Foster arson are presumed to be Christopher Foster, Jill Eileen Foster and Kirsty Foster. The domestic property concerned is Osbaston House in Maesbrook, near Oswestry, Shropshire,

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United Kingdom.

The Administrator of Ulva Ltd is the legal firm *Butcher Woods* of West Midlands, UK. Former colleagues Mark Bassett and Peter Grkinic are now employed by SWP Construction Group as directors in the new Ulva business operations.

ULVA Ltd. in Administration

The website of the business claims its operations as *"Investigating corrosion under-insulation. The world's leading provider of non-metallic thermal and acoustic cladding, ULVA are the preferred choice for the oil and petrochemical industry"*. Mr. Foster's business developed from home cladding to developing insulation technology for oil rigs, a quantum leap. The director of ULVA Ltd of Unit H, Horton Enterprise Park, Telford TF1 7GZ, is recorded as Mr. Christopher Foster and UK Companies House records show that Mrs. Jill Eileen Foster was the company secretary. However, the debts at Ulva were so large as to make it no longer a "going concern" business. In 2005 the company owed nearly £2.8m to creditors, including tax avoidance estimates by the HMRC. Ulva Ltd. had loaned about £160,000 to one of the company directors, in breach of company law. Ulva Ltd had a main supplier, namely DRC *Polymers Ltd.* a Cambridgeshire company, now owned by the *SWP Construction Group*. Litigation ensued in September 2006 after it was discovered that Ulva Ltd. was using another supplier, in breach of a contract between Ulva Ltd and DRC Construction Ltd. The contract in question was actually between the two Special Purpose Vehicles of Ulva Ltd and DRC Polymers Ltd., respectively. However the courts recognized these two Special Purpose Vehicles as legitimate even though at the time of the court case, Her Majesty's Revenue and Customs of the United Kingdom has already calculated these two Special Purpose Vehicles as instruments for the purpose of

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taxation evasion, an English criminal offence.

Four important transactions were taking place in 2006, apart from the business operations of cladding oil rigs.

Christopher Foster began to buy property overseas, even though he was in debt.

He became entangled with two security businesses and when they quarrelled, he complained to the local police of threats to his life by these former colleagues, was believed and the two former colleagues were charged with blackmail offences.

He contracted with another supplier contrary to the agreement he made with his colleague, director of DRC and as a consequence, he became party to an expensive civil litigation.

He caused to be formed another limited company, Ulva International Ltd. With the sole purpose of transferring business and assets from the failing Ulva Ltd.

The criminal offence of blackmail is a very serious charge to be brought against businessmen and carries a maximum prison sentence of fourteen years. It would ruin the reputation of the person so charged and any harm the businesses which were being operated by suspected blackmailers. It is not clear whether the Fosters had bought security systems for their properties in the UK and abroad from these two accused businessmen. This criminal prosecution was unsuccessful in Shrewsbury Crown Court (*Foster v Leo Dennis and another* [2006] unreported), although it had ruined the business lives of the suspects, who, before which prosecution, were operating a multimillion pound security/management consultancy business, according to company records.

Ulva International Ltd, Ulva Ltd, Patent ownership and other intangible assets

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Mr. Foster transferred assets from Ulva Ltd to another company he had set up, Ulva International Ltd, at Unit D Hortonwood, 31 Telford, TF1 7G T, so that he could carry on trading despite the failure of Ulva Ltd. In particular, he transferred the Intellectual Property, the Patent of the cladding technology.

25 million ocean freight shipment records

Ulva International has, according to its website, online access to over 25 million ocean freight shipment records searchable by supplier name, importer name, and product description. Ulva International's clients include importers, exporters, investment banks, stock traders, freight forwarders, attorneys, and more.

See <http://www.ulva.co.uk/> and

<http://www.importgenius.com/shipments/ulva-international-limited.htm>. Its database, it claims, gives online access to

ocean freight shipment records, for a fee, searchable by supplier name, importer name, product description, etc. The

database is called "ImportGenius", a searchable database covering all ocean container imports entering the United

States. This database includes detailed information about the shipper (exporter), consignee (importer), product description, and dozens of other data points; it is claimed on the website.

"ImportGenius" is useful for researching the shipment activity of competitors and suppliers; sourcing products of any nature from anywhere in the world; monitoring overseas suppliers activity; ensuring exclusive agent compliance tracking the activity of publicly traded companies; and intellectual property investigation and enforcement, it is claimed. It is not clear

whether such a database of information available to any buyer causes the commission of the English offence of obtaining and communicating information useful to an enemy contrary to s1 Official Secrets Act 1911, an offence carrying a sentence of 14 years imprisonment on indictment and conviction. It is not

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clear as to how many criminal offences this database and its operation would cause in the United States, nor is it clear whether this company has US or UK licence to operate this database or to collect such records.

Takeover of Ulva Ltd and DRC Construction Ltd by SWP

SWP bought Ulva Ltd. in November 2007 for a nominal sum as Ulva Ltd. was by then a dissolved company whose business operation now trades under the newly formed company *Ulva Insulation Systems Ltd*, listing BP, British Gas, Total and Amerada Hess as clients. With regard to personal taxation debts to Her Majesty's Customs and Excise owed by Christopher Foster and Jill Foster, a legal restriction was placed at the Land Registry on their mansion, in May 2008, stopping them from selling it without authorization from the corporate liquidators.

The case about an illegal contract-legal citation

[2007]EWHC 1716 QB

This move was directly as a result of was the protracted breach of contract court case *DRC Distribution Ltd v Ulva Ltd* [2007] EWHC 1716, QB. The claim for breach of contract arose from a deliberate decision to flout the terms of the contract.

Both companies had formed subsidiaries or Special Purpose Vehicles through which they transacted with each other for the purpose of the avoidance of taxation, it transpired.

The claimant company had contracted with the defendant company through a nominee company and so could not recover damages for any breach of contract it had suffered.

DRC Distribution Ltd (DRC) and Ulva Ltd (Ulva) entered into a long-term supply agreement under which DRC was to supply a fire-resistant cladding system. Under the contract, Ulva was to source all of its needs for the product from DRC and was given a 60-day credit facility to pay invoices rendered to it. The cladding was manufactured by DRC's subsidiary/SPV, DRC

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Polymer Products Ltd. In breach of the agreement, and unknown to DRC, Ulva began to source a significant volume of cladding from another supplier because the price was lower. Ulva also began to settle DRC's invoices increasingly late. DRC's credit insurers then reduced the permitted credit line for transactions with Ulva to nil on the ground that its financial statements indicated a deteriorating financial position. DRC informed Ulva that it had reasonable grounds to believe that if credit terms continued to be offered, Ulva might not pay invoices. As a result, DRC indicated that in future it required payment in full and in advance. Ulva then served notice of termination of contract. The contractual notice period was six months. DRC responded that until the termination, it expected that all of Ulva's supplies would continue to be exclusively ordered from DRC and would be paid for in advance. Ulva replied indicating that the requirement for payment in advance was a breach of contract, and gave notice that unless the requirement was withdrawn and the credit facility restored the agreement would terminate after 30 days due to a material breach by DRC. However, during that 30-day period, DRC conducted a site visit of Ulva and discovered that Ulva was sourcing products from a third party. Whether such a visit was a covert investigation; whether investigators breached information privacy; whether copy records of Ulva's business were made illegally, is not known. DRC decided to terminate the agreement with immediate effect for irremediable breach, as per English contract law.

Ulva accepted that it was in breach of contract and liable for damages by sourcing product from a third party. This admission was made at a late stage. Breach of contract was denied in the initial defence and the position changed only after a successful application for specific disclosure. The issues were whether DRC could recover damages for the full six-month

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contractual notice period, or whether it was confined to the 30-day period following service of Ulva's notice requiring restoration of the credit facility; i.e. whether DRC had suffered any loss and whether the withdrawal by DRC of the credit facility to ULVA was a breach of contract. The drafting of the contract was flawed in that the contract granted Ulva a 60-day credit period, but did not remove or limit this in the event of a breach of contract by Ulva. However, it was argued that it was a condition precedent to DRC's obligation to provide credit terms that Ulva should source 100% of the product from DRC; i.e. that it was an implied term of the agreement.

Since the contract contained nothing to suggest that the credit facility was contingent on Ulva complying with its obligation to source product only from DRC and since the test for the implication of a term is high (it must either be obvious or necessary), it was not an implied term. Indeed DRC had granted the credit facility without requiring a guarantee.

DRC could only claim damages for the 30-day period in which it was required to remedy its breach, not for the normal six-month notice period prior to termination. Ulva had served a valid notice that would have brought the contract to an end within 30 days, and damages were payable only until the end of that period. It is not clear whether the HMRC treated the two Special Purpose Vehicles as void in order to determine the amount of avoided taxation. It is not clear why the courts did not declare the contracts illegal and therefore voidable.

Contract enforced in [2007]EWHC 1716 QB

A Special Purpose Vehicle which agrees with another Special Purpose Vehicle to avoid taxation is an unenforceable and illegal contract. Contract law rules declare that certain agreements, or clauses within agreements, are to be unenforceable on the basis of the kind of activity or action that

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is required by, or closely linked to, those agreements. Examples include agreements to sell human organs; prostitution agreements; US online gambling agreements; unduly restrictive covenants; agreements that require or result in criminal or tortious conduct as in this case study. Such illegal agreements are subject to rules that preclude courts from enforcing them, yet in this English case [2007]EWHC 1716 QB, the courts dealt with this unenforceable and fraudulent contract as being legal, illustrating the business culture of English courts.

These rules of contract law focus on the nature of the activity associated with a contract. These rules therefore can be distinguished from rules which focus on procedural defects such as duress or capacity. These rules differ from rules which focus on substantive fairness, i.e. unconscionable fraud, besides which, it is questionable whether this was in fact a contract, the elements of a contract being offer, acceptance, intention to create legal relations and consideration.

Special Purpose Vehicles formed with avoidance of liabilities as purpose

Christopher Foster was also director of Ulva Management Ltd. of 7 Upper Brook Street, Ulverston LA12 7BH. He was a director of ten companies registered in the UK Companies House Register. Companies House records show the following: The businesses involved in this Foster murder, arson and liquidation case study are as follows:

[1]Ulva Ltd, Company No. 03541086, formed 6th April 1998, (previous name in [2]).

[2]Ulva Distribution Ltd of Butchers Wood, 79 Caroline Street, Birmingham, B3 1UP.

[3] Ulva BMS Ltd, Company No. 04660285, formed 10th March

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2003, (previous name

[4] Double Mark Services Ltd) of Glenwood House, 5 Arundel Way, Cawston, Rugby, CV22 7TU.

[5] Ulva Management Ltd, Company No. 01686029, formed 10th December 1982, of Sky Cottage, 7 Upper Brook Street, Ulverston, Cumbria, LA12 7BH.

[6] Ulva International Ltd, Company 04517789, formed 23rd August 2002, (previous name in [7]).

[7] Ulva Holdings Ltd) of Unit D Hortonwood 31, Hortonwood Enterprise Estate, Telford, TF1 7GS.

[8] Ulva Insulation Systems Ltd, Company No. 04023701, formed 2th June 2000, (previous name in [9]).

[9] DRC Distribution Limited of 1 Regal Lane, Soham, Ely, Cambridgeshire, CB7 5BA, (previous name in [10]).

[10] Casperdraft Limited).

English tax law- Income Tax (Earnings and Pensions) Act 2003 ('ITEPA')

As regards taxation avoidance, HM Revenue and Customs (HMRC) have a detailed guidance on the application of Chapter 4 of Part 7 of Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003), known commonly as "the new tax on dividends". The chapter 90000 of the Employment Related Securities Manual (ERSM) includes anti-avoidance clauses and is legislation which creates a tax charge on what are termed "post acquisition benefits" deriving from employment-related securities (which includes shares). It applies to UK resident and ordinarily resident employees, and is a 'mopping up' clause, to tax any benefits which have not been caught elsewhere in Chapters 2 to 3d of ITEPA, or otherwise taxed as employment income for the employee or another associated person. The tax charge may apply to any benefit received after 16th

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April 2003, regardless of when the securities were received, but only applies to securities which are employment-related, so those which have been acquired through a personal relationship, such as gifted to friends and family are unaffected. Dividends, if paid as employment reward is targeted by the legislation. A benefit may come into charge if it not taxed elsewhere or where something has been done which affects the employment-related securities as part of a scheme of arrangement, the main purpose (or one of the main purposes) of which is the avoidance of tax or National Insurance contributions. It states:

'Where an owner-managed company, run as a genuine business, pays dividends out of company profits and there is no contrived scheme to avoid income tax or NIC on remuneration or to avoid the IR35 rules, HMRC will not seek to argue that a Chapter 4 benefit has been received...'

Special Purpose Vehicles used to hide gains withdrawn as dividends and pensions

UK tax law states that dividends paid to contracted workers in place of income subject to PAYE and NICs, is an attempt to circumvent IR35 and may be charged to tax under s 447. The retrospective position and the actual tax charge seem to have been applied in this case. ERSM90210 states that if dividends are paid on the shares of special purpose vehicle (SPV) companies (where the "special" purpose is that they are set up to pay employees' bonuses) then they may be caught by the extra tax charge. There are the transitional and retrospective rules to consider and also the NIC position, which is complicated by the National Insurance Contributions Act 2006.

Similarities to Enron's Special Purpose Vehicles and Foster's SPV

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Like Enron, the conception, creation and decision to fund Special Purpose Entity or Special Purpose Vehicle partnerships with company stock as Christopher Foster's decision, caused HMRC to judge it as a creative effort to circumvent accounting principles through the complex structuring of transactions that lacked fundamental economic substance. The accountancy and legal firms which created these SPV's for Christopher Foster and his former friend, director of DRC, may be chargeable to the criminal offence of aiding and abetting tax avoidance. The United Kingdom does not admit to using SPV's but no survey has been conducted to ascertain exactly how many SPVs are operating in the United Kingdom and offshore. The UK has no swift profession-wide disciplinary processes and increased accountability for parties in the capital market system.

(to be continued..._