Neutral Citation Number: [2022] EWHC 991 (Admin)

Case No: QB-2019-001367

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 April 2022

Before :

MRS JUSTICE FOSTER DBE

- -

Between :

SEAN MCDONNELL	**Claimant**
- and -	
DASS LEGAL SOLUTIONS (MK) LAW LIMITED T/A DLS LAW	**Defendant**

- -
- -

Ben Hubble QC and **Rosa Zaffuto** (instructed by **Londonium Solicitors**) for the **Claimant**
Miles Harris (instructed by **Travelers Legal**) for the **Defendant**

Hearing dates: 15 - 18 June 2021 and 22 June 2021

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 11:00 on 29 April 2022.

MRS JUSTICE FOSTER DBE:

INTRODUCTION

1. In this action the Claimant Mr Sean McDonnell (referred to here as "Mr McD") seeks damages of £2.5 million against the Defendant solicitors' firm (referred to here as "DLS") for breaches of duties he alleged they owed him in respect of certain property transactions that took place in 2017.

2. Mr McD is a businessman of Irish descent in his early seventies and was at the material times a prominent member of the Irish business community in and around Buckinghamshire. His particular interests were waste disposal and land. His business fortunes have not always prospered but it is not disputed he has been involved with numerous enterprises and at one time is said to have had a net worth of between £20-£30 million.

3. The Defendants are a firm of solicitors with whom Mr McD had an existing relationship: there had been approximately three years of dealing at the time of the events in issue here, regarding corporate and some personal aspects of Mr McD's activities.

4. Mr McD claims damages against DLS for failing to protect him against the loss of the opportunity to benefit from a contract to buy certain land at Menmarsh Road, Worminghall, Aylesbury, HP18 9UP (registered under Title No ON12683) ("the Land") from a Mr Andrew McGee ("AMG").

5. The contract to purchase the Land from AMG, dated 3 March 2017, was entered into by a company called Arc Holdings & Investments Limited ("Arc"), an entity which had been specially formed for the purpose on 18 January 2017. Mr McD held no position or shares in the company, rather a Mr Charles Giblin ("CG"), an associate and one-time employee of Mr McD's, was its only Director, and the holder of its two shares. Although not visible, Mr McD asserted that he owned a 70% beneficial interest in the shares of Arc with CG and a Mr Michael Lynch ("ML"), another business associate. CG and ML each had minority interests as to 15% each.

6. The events which have led to this claim arose when the proposed contract of sale between AMG and Arc fell through between exchange and completion.

7. CG, the director, agreed, it appears, behind Mr McD's back, that the Land be transferred directly from AMG to a third party called Midwest Formwork UK Limited ("Midwest") who had recently bought the neighbouring piece of land. The price was £850,000 with a cut of £150,000 to Arc Investments – and Mr McD himself received none of that money.

8. The Land was a scrap and storage yard extending to about 3.65 acres and to its north was a small strip owned in early 2017 by a family called Hanson. It was this strip that was later, on 23 February 2017, bought by Midwest, meaning eventually they owned the whole site. The whole site has an acreage of about 4.07.

THE ISSUES

9. Mr McD's case is that not only did he lose out on the deal to purchase valuable land with which he had had an involvement for a number of years, but the Land was transferred at a significant undervalue; its true value in 2017 was he says £1,646,650.00. He claims he missed out on his share of the proceeds of later sale and claims those losses against the solicitors.

10. Mr McD pleaded a case that on 20 January 2017 and on 14 February 2017, he instructed DLS to draw up for him a "Deed of Trust" to protect his interest, that DLS did not do so, nor did they give him any other advice on how to protect his 70% interest, by recommending, for instance, that he should be a director and a legal shareholder, in Arc.

11. DLS deny that Mr McD was their client at the relevant time for this transaction. In any event, they say, at no time was any express instruction given, nor at the relevant time was it ever suggested that Mr McD's interests were other than entirely coterminous with those of Arc, which was the client of DLS, and that this position is reflected in the letter of engagement signed by CG on 20 January 2017 between Arc and the Defendant firm.

12. DLS deny any request or duty otherwise to protect his personal interests in Arc and the Land sale: no advice was asked for, and none rendered. Furthermore, on those occasions when DLS were required to act whether for Mr McD personally, or for him in his capacity as director of a company, or as a person interested in a company, he always made it plain what he required and when. That was not the case in respect of any protection of his personal interests as against Arc: Arc was DLS's client and, not Mr McD in respect of the Land purchase.

13. The Claimant's case is that an express instruction was given (at least) at a meeting with DLS on 20 January 2017 and in light of his arguments as to the content of the January 20 meeting, Mr McD places an interpretation upon subsequent documentation and events which he says shows he gave an express instruction to DLS to draft the Trust Deed. He also says that he generally asked for or was entitled to expect advice to protect his own interests in the transaction. He has also claimed that if not on 20 January 2017 then at a further meeting on 14 February 2017 he gave the relevant express instructions which DLS did not carry out. He has also put his case on the basis that the transmission to DLS of letters between himself and CG and ML constituted either instructions in themselves, or were a reminder of instructions to draw up a Trust Deed in respect of his interests in Arc. It has also been argued, latterly, that such Trust Deed should, to have been effective, have exhibited share transfer forms reflecting his interests.

14. Mr McD asserts an express instruction giving rise to a retainer as client, and also alternatively that a duty care to him arose of which DLS were in breach.

15. DLS say not only was there no express instruction, but Mr McD was not relying upon them to safeguard his interests. It would not have been reasonable for him to so rely in all the circumstances, and DLS would not reasonably have thought he was so relying. They say that having lost out on a business deal Mr McD has cast around to find a person from whom he may recover what he claims he has lost, and so has sought to involve them by this claim.

THE PEOPLE INVOLVED

16. The main protagonists are the following individuals and entities. The Court heard live evidence as indicated below:

    i) Mr Sean McDonnell ("Mr McD"), the Claimant who made a written statement and was cross-examined. He is a businessman with an Irish heritage and long-standing business interests in and around Aylesbury.

    ii) Mr Andrew McGee ("AMG"), a businessman and long-term acquaintance of Mr McD who had at this time title to the Land, the subject of the sale. AMG was apparently introduced to Mr McD by Charles Giblin. He did not take part in the trial.

    iii) Mr Charles Giblin ("CG"), a businessman and associate of Mr McD's who had also been his employee. He had a 15% interest in Arc and was its sole Director and shareholder. He did not take part in the trial.

    iv) Martin Lynch ("ML"), an associate of Mr McD and CG, and with a 15% interest in Arc. He did not take part in the trial.

    v) Mr David Pilgrim ("DP"), a solicitor and a Consultant at DLS. He made a written statement and was cross-examined.

    vi) Mr Maninder Rupal ("MR"), a solicitor and litigation specialist, (since 2018) Partner at DLS. He made a written statement and was cross-examined.

    vii) Mr James Connaughton, a business associate of Mr McD (referred to as "Seamus" by Mr McD) involved in some of his companies as nominee shareholder or director. He was director of MPD and owned 9 Field Road. He did not take part in the trial.

    viii) Ms Imelda Leonard, an administrator and assistant who worked from time to time for Mr McD. Her written evidence was agreed; she did not give live evidence.

    ix) Ms Carly O'Keefe, also an assistant to Mr McD. Her written evidence was agreed; she did not give live evidence.

    x) Mr Avari is a friend and professional tax and business advisor to Mr McD. He made a statement and was cross-examined.

    xi) Ace Waste Recycling Limited registered under Co No 04645021 ("Ace Recycling") was a company of which Mr McD was a director when in June 2008 it purchased the Land for £420,000 with a loan from AMG. On 27 April 2009 it changed its name to Ace Recycling and Composting Limited. On 22 December 2009 Mr McD was made bankrupt, and on 9 April 2010 the Land was transferred by Ace Composting to a Mr Vernon, acting for Mr McD, and thence to AMG on 29 June 2010. The company went into voluntary liquidation on 14 July 2010.

xii) Biffa (Co No 06623843) was a company of which James Connaughton was director and legal shareholder; Mr McD said he had the status of "consultant" to the company. Biffa sought to purchase the Land from AMG in October 2010 at a price of €780,000.00; but the sale did not proceed.

xiii) Arc Investment and Holdings Limited ("Arc") is a company incorporated on 18 January 2017 with CG as its sole director and share holder in which Mr McD says he held a 70% interest. It was formed for the purposes of the proposed purchase of the Land from AMG.

xiv) Midwest Formwork UK Limited ("Midwest"), the company which bought the Land on 23 July 2017.

xv) Penygroes Holdings Limited (Co No 07925113), a company of which Mr McD was a director. DLS were instructed by Mr McD in a proposed transfer of 500 shares to a Paul Cairns from James Connaughton in exchange for an investment in Penygroes; DLS were instructed that Cairns was to hold the shares as nominee for James Connaughton under a Nominee Agreement.

17. In the following section an overview of the main background is given. The sections on the evidence examine in more detail the relevant parts of the material before the court.

BACKGROUND

(i) Client relationships

18. It was a matter of agreement that Mr McD had had a long association with the Land. He had also had both disclosed and undisclosed involvement in a series of companies connected to it. The background, the essentials of which were not in dispute, is relevant both to his claims as to the nature of his dealings with DLS and their duties to him, and to the solicitors' case that he was well-used to the corporate world and adept at dealing with his business affairs, only some of which were the subject of any professional solicitor/client relationship between them. DLS point to the complexity of Mr McD's corporate dealings, long experience and sophisticated business knowledge as supporting their characterisation of Mr McD as an independent, experienced businessman, with a detailed awareness of corporate matters, with a preference for self-protection both from overt participation and a predilection for operating in the shadows rather than openly.

19. It was common ground that there was a relationship going back at least to 2014. In that year he had introduced his son Paul and daughter-in-law Tracey to DLS when they had a dispute with a bank over a guarantee given by Paul to Ace. Two years later MR was instructed in regard to a first and second charge held by another bank over Mr McD's home and office, the Willows. MR was also instructed by Mr McD as director of Ace Group of Companies Limited (Co No 07282969), regarding a demand for payment of about £134,000.00 by Suez Recycling and Recovery Limited (also known as "Sita").

20. Emphasis is laid by DLS on a number of matters with which DLS were dealing at the time of the proposed purchase of the Land in January 2017 which included a direct

instruction from Mr McD personally concerning setting up a possible family trust of certain land in Ireland. On 16 January 2017 Mr McD indicated to MR he was concerned that he had been told by Companies House that he could not use the words "Family Trust" as a company name for a company called KGP Ireland Limited and he indicated that he wanted advice.

21. Also, on 16 January 2017 MR was emailed by Mr McD in respect of another possible property transaction concerning land at 9 Field End Road Denham. DLS draws attention to the fact that Mr McD instructed MR that his name should not appear, rather, that James Connaughton should be the addressee and should be contacted at the company's email address.

22. A further contemporary involvement of Mr McD and DLS concerned the affairs of a company called Penygroes Holdings Limited (Co No 07925113). Mr McD had instructed DLS that he desired a Mr Cairns to make an investment in the company in exchange for receipt of shares from James Connaughton and a second charge over his home, the Willows, as security. DLS was instructed that Mr Cairns would hold the shares in Penygroes as nominee for James Connaughton subject to a Nominee Agreement. One of Mr McD's associates, (Ms Imelda Leonard) communicated on 9 January 2017 with DLS regarding a stock transfer form for 500 Penygroes shares between James Connaughton and Paul Cairns. The documentation also shows MR communicating with DP on the Penygroes matter on 16 January 2017.

23. The communications including meeting notes at the time, reflect, say DLS, discussions and instructions regarding these other matters, whereas Mr McD says they show that he gave instructions for a Trust Deed to protect his interests in the Land transaction.

(ii) Involvement with the Land

24. The undisputed history (although unknown to DLS until after the relevant events), shows considerable previous involvement of Mr McD concerning the Land and AMG. According to Mr Avari, he had at one time operated a tyre recycling business from the site. In June 2008, Ace had bought the Land for £420,000. At that time Mr McD was a director of Ace Recycling, as was his son Paul McDonnell. The sale was enabled by a loan from AMG for almost the whole sum, in the sum of £395,000 which he secured with a charge over the Land dated 11 June 2008. Paul McDonnell held all the shares of the company. They were described by Mr McD in correspondence in January 2009 as "*held to my order … which means I am and will remain the sole legal beneficiary of the company and hence the land*." The shareholding is described in a letter addressed "*to whom it may concern*" dated 2006, as "*in the name of Paul McDonnell held in trust for his father … The dividends shown in the accounts were paid to the ultimate beneficiary Sean McDonnell*".

25. Mr McD obtained an offer of finance from Clydesdale Bank on 13 March 2009 but a proposed financing of the AMG loan by means of an advance of £630,000 from the bank did not proceed because of the bank's fears of financial problems. The value of the Land at this date was said to be £900,000. Clydesdale withdrew its in principle offer of loan facilities in September 2009.

26. On 22 December 2009 Mr McD was made bankrupt on a creditors' petition dated 1 October 2009. He resigned as a director of Ace on 8 January 2010; Ace ceased trading

and went into voluntary liquidation on 9 July 2010 with a recorded deficit of about £1.8 million. Just before that date, on 29 June 2010, title in the Land was registered to AMG, whose charge was removed. The transfer was effected with a valuation of £500,00.00 which (DLS points out) was less than half the given value at which Clydesdale Bank had been invited to lend monies to Ace and less than half the value that Ace's agent had represented of £1.2m to £1.5m in March 2010. DLS characterises this transaction as putting value beyond the creditors of Ace at an undervalue, just before its liquidation. They also point to materials showing that an agent organised the transfer from Ace, took the Land and organised that monies would be transferred to Mr McD from AMG. Mr McD denies such inference is fair.

27. The valuation of the Land on 14 April 2010 was made on the basis of a site extending only 2.5 acres because of what were said to be to the claims to adverse possession of the rest. Accordingly, the valuation sum was only £375,000.00. DLS suggests adverse possession issues had been dealt with in June 2009, so the sum was a conscious undervaluation. The Land was registered in AMG's name on 29 June 2010 with a value stated at £500,000.00. DLS also point to a later accusation by Mr McD regarding the failed deal, that AMG had acquired the Land fraudulently in order to avoid the liquidator disposing of it.

28. Mr McD's involvement continued in 2010. A company called Biffa of which a James Connaughton, an associate of Mr McD, was director, contracted to buy the Land on 12 October 2010 for the sum of €780,000. A 1% deposit of €7,800 was paid but they did not complete on the transaction. Mr McD, still an undischarged bankrupt, did not appear on the documentation but described himself as a "consultant" to James Connaughton/Biffa. Mr McD described Mr Connaughton's role (in accounting correspondence in 2013) as being his nominee, and, to the Land Registry in 2017 Biffa was described as the nominee purchaser on behalf of Mr McD. Mr McD appears to have paid what he called "interest" to AMG – as if he, Mr McD, had legal title and AMG had loaned him money; he did not call it "rent" although it had the character of a payment for occupancy. Mr Hubble QC on behalf of Mr McD described it as "*Mr McD being treated as if he were the owner of the Land.*" The Claimant pointed to this history as demonstrating that with the latest transaction he had been able to negotiate the purchase back of the Land at undervalue, namely £860,000 excluding the further strip. The true value he argues was and is much higher – hence the value of the claim he makes against DLS.

29. Further materials show that in 2015 it was being suggested again by Mr McD and on behalf of Biffa, that Biffa purchase the Land for £600,000.00 from AMG. That deal also did not happen. It was thereafter in 2017, that purchase became a possibility once more when Mr McD wrote indicating he understood AMG was about to sell to someone else. AMG realised that he was willing to sell to Arc.

30. After the sale of the land behind his back direct to Midwest, with Arc participating through CG, Mr McD was incensed by what he saw as CG's fraud, and in the months following took several steps against CG, seeking to recoup what he regarded as his rightful share in the Land, including reporting him to the Police, taking a significant amount of advice from other advisors, some of which was before the court, as to what recourse he might have against CG and/or AMG for fraud and any other causes of action against others. That included in 2018, launching these proceedings against the current Defendant. There is evidence that in late May and/or June 2017 comments were made

by Mr McD, although later retracted, that he blamed DLS for not protecting his interests.

(iii) Events of 13-17 January 2017

31. Mr McD heard through the grapevine on about 13 January 2017 that the Land was being sold again. He wrote to AMG stating that he had an interest in it because of the failed 2010 contract and what he described as the "*substantial interest*" paid by him to AMG and by his companies. He said he was ready, willing and able to complete. The correspondence from Mr McD suggests that he believed he had rights in the property in any event, and other interests to settle with AMG. He states to AMG, of the offer to purchase, "*I am sure you will agree* [it] *is better than entering into litigation*".

32. MR from DLS, who is a litigation specialist, says the matter of the possible purchase was first intimated to him "*in passing*" on about 16 January 2017 by Mr McD who said that CG, his friend, was buying some land at a yard, and inquired if the firm could assist him. DP, a property and trusts specialist, telephoned Mr McD on 16 January and a meeting was arranged for 20 January 2017.

33. Mr McD says that on 17 January 2017 he met with CG and with AMG and an agreement was signed in respect of the proposed purchase of the Land by (the as yet unincorporated) Arc, which was formed for the purpose.

34. It was agreed that AMG would sell the Land to Arc for £900,000 which included what is described as a "*strip of land which is currently owned by Nicholas Hanson*". There was a 5% non-refundable deposit of £45,000 payable on signing contracts with the balance of £855,000 to be paid 12 months before signing. Five percent interest was expressed to be chargeable every quarter on the balance of £855,000 i.e., £10,687 per quarter. On incorporation of Arc the day after, on 18 January 2017, CG was named as the sole director and the legal owner of the two issued shares. CG emailed MR at DLS stating he was going to be at the meeting organised for 20 January with DP and SM in order to discuss the purchase of the Land by Arc. He described himself as the director of Arc and asked for a client care letter for him to sign. He enclosed a copy of a letter dated 17 January 2017 signed by himself and AMG concerning the purchase.

35. Mr McD says that it was at that stage it was agreed that he was to have a 70% interest in the property, through Arc, and that at a Willows' meeting CG executed blank share transfer forms in Arc in his favour. He says he placed them in a filing cabinet at the office at the Willows. At some later date, in May 2017, these blank share transfer forms were stolen from the filing cabinet by CG, and he was left without the paperwork to evidence conclusively his share in the Land. It was thus possible for him to be swindled by CG as sole director and shareholder effecting a later sale without his knowledge or involvement.

(iv) Meeting with DLS on 20 January 2017

36. Central to Mr McD's case are the events of Friday 20 January 2017. It is agreed that a meeting took place at DLS's offices at which CG and Mr McD were present, the latter introducing CG to DLS, together with DP and MR from that firm. On behalf of Mr McD in opening, this was described as Mr McD instructing DLS "*together with CG*". It is common ground that before the main meeting Mr McD and DP had a private word

and Mr McD told DP that he had a majority share in Arc and that CG and another person, not named, had a minority holding. DP denies that he was asked to take any action or to advise in relation to these interests or in relation to the Land.

37. Mr McD relies on notes of the meeting made by DP which he says refer to that instruction to draw up a Trust Deed, whereas DLS states they refer to something quite different, relating to the other work being carried out by DLS for Mr McD either commercially or personally. DLS say that CG was introduced to them by Mr McD as the sole director of Arc and the company was their client in respect of a proposed transaction involving the Land, further this is reflected in the written evidence in pre-meeting correspondence with CG and the client care letter drawn up between Arc and DLS.

38. The note made by DP was as follows. On the right-hand side the following appeared:

> "*SEAN MCDONNELL: FRIDAY 2:30 PM*
>
> *20/01/17*
>
> *1. YARD 850 K*
>
> *2. 9 ROAD DENHAM?*
>
> *3. SHARE TRANSFER*
>
> *4. TRUST*"

39. In a box hand-drawn with an arrow pointing down into the second half of the sheet, which was outlined as a larger box, the following appeared, next to the word "*TRUST*" but separated from it by the hand-drawn arrowed box:

> "- *ARC TO SEAN-> CHARLIE-> ANOTHER?*
>
> • *INST. TO FOLLOW – IF REQUIRED –? NO*"

40. An arrowed line joined the YARD 850 K note to the lower large box which contained CG's telephone number and various details are clearly referring to the land such as 4.6 acres, 850K 5 percent, £42,500; Clydesdale Bank – offer subject to VP. It also noted planning consent – use as waste disposal – will apply – currently a scrapyard.

41. On the right-hand side of the sheet on which the note was written, (a double spread of apparently hole punched paper), from item "*4. TRUST"* an arrow was drawn to the top left-hand side of the double sheet. At the end of the arrow was written again: "*TRUST*". It, and accompanying wording was in another hand-drawn, separate box on the top half of the left-hand page. The words in that box were:

> "*Land in Ireland: –*
>
> *KGP Ireland Ltd, with a phone number*
>
> *Holds the land in Ireland*

Trust for Grandchildren

21, 20, 14, – details to be provided.

Trustees – TBA

Bare Trust

email shopping list to be provided by SM"

42. A lower, hand-drawn box appeared on the page which was linked by an arrow from item "*3. SHARE TRANSFER*" on the opposite page. In that lower box was the following:

"*Shares*

500 to Paul Cairns already

500 now to PC – to be held as nominee for Sean – Done already

Nominee Agreement £2,175,000

Funds paid on A/C to be taken into account."

Below this entry was written: "*END 3:45 PM*".

43. In essence, the author of the note says that the references to "Trust" were to do with the land in Ireland, and the references to Sean, Charlie and another with instructions to follow were references to possibly needing to take further instructions from CG/Mr McD in respect of Arc which proved not to be necessary. The Claimant, however, says this shows that instructions were given to draw up a Trust Deed in respect of the sale transaction in respect of the land, and the interests held in Arc.

44. DLS rely on an email dated 25 January 2017 from DP to Mr McD. In it, DP after introductory matters, and two paragraphs concerning (i) the Land and (ii) the additional strip at Worminghall, says in a third paragraph:

> "*I am also starting work on the other matters discussed when we met (Trust Deed for land in Ireland, Nominee agreement for shareholdings etc) and will get back to you shortly.*"

They point to the absence of any reference to a Trust Deed in relation to the Land. The email deals with the other two matters, a family trust of Irish land, and the Penygroes matter.

(v) Meeting on 14 February 2017

45. A further central encounter took place on 14 February 2017 at the Willows, the house (and working place) of Mr McD. MR of the Defendant describes this meeting as having taken place after a piece of quite separate litigation finished in Slough County Court in which Mr McD was giving evidence. MR was asked that day by a phone call via the office, to attend Mr McD's house afterwards. He attended and CG, ML and Mr McD

were all present. ML, CG and Mr McD signed two letters while ML was there which MR had not seen before and which had been prepared by an unconnected lawyer working personally for the Claimant. The letters recorded interests in two companies in the ratio 70%/15%/15%. They were each expressed as "*subject to contract*".

46. One letter was regarding Aylesbury Recycling Composting (ARC) Ltd (Co No 09829179), a trading company, and one was regarding Arc Holdings & Investments (Co No 10570598). Each letter was in substantially the same form, and each was signed by the three participants. The letter concerning Arc Holdings and Investments (Co No 10570598) was as follows:

> "*14 February 2017*
>
> *SUBJECT TO CONTRACT*
>
> *Dear Michael & Charles,*
>
> *Reference: ARC Holdings and Investments Ltd*
>
> *Company Number: 10570598*
>
> *I refer to our discussion on Friday, 3 February 2017 and thought it best to outline what was agreed in relation to the property at Worminghall. An official agreement/structure will be prepared by DLS Law but for now I have authorised as follows:*
>
> *The value of the site at Worminghall, Aylesbury, Bucks HP18 9UP is approximately £1.2 million subject to Sean McDonnell Andrew Magee and others since 2008.*
>
> *Andrew Magee has to receive £850,000.*
>
> *The shareholding of ARC Holdings and Investments Ltd will be 70% to Sean McDonnell & the balance of 30% between Charles Giblin & Michael Lynch divided equally at 15% each.*
>
> *At a later date we will discuss the option for you to purchase my 70% or for me to purchase your 30% of the shares subject to an independent valuation.*
>
> *Michael Lynch has already invested into ARC €32,000 as a loan, but when Michael becomes a director it will be deemed as a directors' loan with interest payable at a rate of 5% per annum.*
>
> *Charles Giblin has also invested €32,000 as a directors' loan with interest payable at 5% per annum.*
>
> *Any purchases of any assets going forward is to go into ARC Holdings and Investments Limited.*"

Below it was signed by Mr McD, CG and ML.

47. The letters were later emailed to MR after he had left the Willows that evening under cover of an email from Mr McD, which read as follows: "*Hello Maninder As discussed at the Willows today attached are two letters from Sean McDonnell to Michael Lynch and Charles Giblin dated 14 February 2017. Kind regards, Sean.*" MR also says at no time was he instructed regarding any official agreement/structure, or otherwise, whether orally or in writing, nor was he asked to do anything with the letters.

48. Mr McD relies on the letters as either a further instruction or a "reminder" that he had instructed a Trust Deed to be prepared. MR says he asked at the time, on 14 February 2017, what if anything he was to do, and Mr McD told him not to worry. He had mentioned an official agreement/structure only to reassure the others, whom he trusted, and nothing was needed. MR relies upon his file note of 14 February 2017 which he says reflects that exchange. The material part of the file note says, "*Charlie incentive – meeting. 70/30. All my finances mine…. STC* [which is a reference to share transfer certificate] *SMD just wants to reassure Charlie and Michael – 30%*." The relevance of this note was denied by Mr McD; he also denied an exchange with MR to the effect that nothing was expected of DLS. DLS rely upon two entries at the end of the note saying, "*Family trust: – DSP Bare trust"* and on the next line "*Penygroes* [spelt Penygroes] *share: DSP chase David*". These entries say DLS, show that other matters were listed in respect of which action was to be taken, but there is no record there of the need to draw up a Deed of Trust or pass anything onwards to DP. They also point to another note made by MR warning that DLS might not be able act because of a risk of conflict between Mr McD, CG and ML.

(vi) Exchange of contracts and further negotiations

49. Arc exchanged contracts, facilitated by DP of DLS, for the sale of the Land, without the extra strip (which had been sold to Midwest on 23 February 2017 for £85,000) at an intended price of £850,000.00. Mr McD relies upon an email sent from DP to "*Charlie and Sean*" subject: "*Land at Menmarsh Road, Worminghall*" which expresses pleasure in confirming the exchange of contracts, that completion was 17 December 2017 or earlier by arrangement, reminding that insurance would be necessary and other practical matters. It again expresses pleasure at having got the deal through and states that a message had been left on CG's phone. The next paragraph then says, before sign off, "*Sean - I haven't forgotten the Trust work – I'll get that done for you next week*". This shows, says Mr McD, that an instruction for a Trust Deed was given and understood by DP on 3 March 2017 - but negligently, it was not carried out. No, says DP - the trust work referred to concerned the instructions Mr McD had given personally about the property in Ireland and the family trust. Other evidence supports this inference say DLS, as does the absence of any request, inquiry or mention of the alleged Trust Deed from Mr McD until much later on, in late May and in June 2017.

50. After exchange, CG and Mr McD began negotiations with Midwest with a view to selling on to them, and £900,000.00 was offered. On 18 May 2017 Mr McD apparently sought to boost the sale price by emailing to Martin Corcoran of Midwest at 15.47 on 18 May 2027 that he had received much higher offers from others for the Land. Midwest did not take the bait. By email of 21.43 on 18 May 2017, Corcoran stated their offer was very fair, as were other offers they themselves had previously made to AMG for the Land. Midwest withdrew from the proposed onward sale.

51. It appears that it was around this time that the CG/Mr McD relationship broke down.

52. At 4 minutes to 1.00 AM on 19 May 2017, by email to DP, CG stated out of the blue that instructions from Arc Holdings were to come only from him thus: "*If an email comes from ARC it may not mean I have written it and unless you speak to me you are not to issue any such paperwork.*" He stated he was not going to be in a situation that compromised his company Arc. He was building a website, he said, had investments in it and a deal offered to him by AMG in January 2017.

(vii) Events after the rupture between Mr McD and CG

53. Later that day, separately, Mr McD contacted DLS saying CG had "*done the dirty on him*", Mr McD stated that it was just after this that he discovered that a set of signed share transfer forms that CG and ML signed on 20 January 2017 which were kept in his office, had disappeared. Mr McD says it is likely CG stole them at about this time.

54. On 24 May 2017 Mr McD phoned DP, and Mr McD's assistant, Ms Imelda Leonard, sent him "*a copy of the email sent to Maninder on 14 February regarding the shareholding Agreement for ARC Holdings and Investments and Aylesbury Recycling Composting (ARC) Limited. Kind regards, Imelda*".

55. DP responded that the letters "*reflected the position outlined at the meeting on 20 January 2017*".

56. Mr McD relies on an internal email from DP to MR dated 24 May 2017 asking if he had received the letters attached (meaning those of 14 February 2017). DP explains that he had not known they had been received, and he says:

> "*It seems we were expected to do something about them … Sean and Charlie have now fallen out and Charlie is saying he is 100% owner of ARC and has (allegedly) removed documents from Sean's office (it is NOT helpful to have advised Sean to go to the police!)*
>
> *It seems Sean expected me to prepare a trust deed following his confirmation based on the attachment, but as I was unaware that those instructions had been received perhaps you can let me know if you prepared anything or acted on the instructions.*
>
> *It is, of course, too late to now do anything so we just have to wait and see but as, it seems, we now have a conflict of interest then we are unable to advise either party to the dispute, which is a pity as inevitably we'll lose both clients.*"

This, says Mr McD, shows that DP read the letters as, without more, constituting an instruction and correctly recognised they ought to have acted on them. MR responded to DP that the letters were sent following the 14 February meeting, and, although he needed to check his file note, as far as he recalled:

> "*… Sean told me that he trusted Charlie implicitly, having known him for x amount of time and done business with him previously etc and said that no such agreement would be required in reality. I asked him to confirm his specific instructions to you directly*

> *(which appears not to have happened – presumably based on the above).*
>
> *There has never been any mention of such agreement/deed to me since that time in the many conversations that I have had with Sean since (or even today when Sean called me) nor do I believe they are suggesting otherwise now.*"

57. This says DLS is consistent with what happened at the 14 February meeting and shows no instruction was given then or otherwise.

58. Mr McD was in touch with DLS at the end of May. There is a dispute as to the terms of the interaction between him and DLS at this time. They say that he indicated that he wanted to pursue CG and wanted advice regarding what he could do about the sale of the Land. He could not get hold of CG, and he contacted DP and MR about it. The records show many telephone calls from Mr McD to MR; he also spoke to DP. DLS say he was also contacting them on a number of the various other matters they were handling for him. An attendance note made by MR is relied on by DLS as showing that MR gave Mr McD no advice at this juncture, having warned him about a potential conflict of interest because his interests and those of CG were diverging; but MR said he would speak to DP.

59. MR's note of a telephone call of 29 May 2017 with Mr McD states materially as follows:

> "*Arc-*
>
> *[telephone call SMD]*
>
> - *Cant get hold of Charlie.*
> - *I'm 70% of his companies*
> - *70% share to me*
> - *-what can I do re sale?*
> - *Let me speak to DSP*
> - *Potential conflict*
> - *No advice given*
> - *DSP*"

At the bottom of the note is written: "*no mention of any deeds by DLS law*".

60. DLS say they also told Mr McD to get independent advice.

61. On 30 May 2017 DLS took advice from the SRA helpline regarding they say the Mr McD/CG/Arc situation and potential conflicts of interest given the division that had emerged between Mr McD and Arc. The telephone note of the 30 May conversation

relates the history told to the SRA. It describes Mr McD and the history of engagement both as a personal client, and business client and that he had introduced Arc as a client that year. The note records relevantly:

> "*If Arc say don't deal with Sean – that's right.*
>
> *Can't act for Sean against Arc.*
>
> *We already acted for Sean can't we [cease]act[ing] for Arc?*
>
> *Need to look into future re conflict*
>
> *Arc transaction might compromise Sean's*
>
> *Sean and Arc*
>
> *We can't Act for Arc and …*"

62. The advice given was they could not act for Mr McD against Arc, their client. Mr McD says the attendance note of the call supports his case that instructions were indeed given by Mr McD to DLS regarding a Trust Deed. The note suggests, he argues, that DLS said to the SRA they have acted for Mr McD previously - and that means on his Trust Deed. DLS say that on the contrary, they are describing how Mr McD was not their client on the transaction but if they wish to act for him, Arc must get new solicitors.

63. On 19 June DP emailed the Senior Partner, Mr Dass, recording that Mr McD was complaining, not about a Trust Deed, but rather that they should have "*acted on those letters by only accepting instructions from him, rather than Charlie*". In other words, that the letters were evidence of his controlling interest. DLS rely on this as showing the issue Mr McD had at that time was not some Trust Deed but rather that DLS should be taking instructions from *him* – not CG. In the email DP records it is difficult because they act for Arc, not the individual parties, and that he suggested to Mr McD that he call a shareholders meeting with ML so the company might recognise his share. Mr McD however relies on the end of the email which says:

> " *… I would prefer to instruct Counsel on "next steps" and have advised Sean accordingly – he says, get on with it, but baulked at picking up the costs as, he says, we ought to have appreciated the significance of the letters when they were received – I tend to agree with him but disagree that anything would have changed as, unless I am wrong, we were not instructed to do anything, were we? However, if not, then why were the letters sent to us?*"

64. That afternoon, Mr Dass replied to DP and explained that following his own review of the situation he is clear that Mr McD did <u>not</u> give instructions for the drafting of a Deed of Trust – which he pointed out would have gone against Mr McD's own assertions about the executed share transfers which he now said he no longer had.

65. On 19 June 2017 CG terminated the retainer with DLS. Thereafter on 13 July 2017 Mr McD signed a retainer with the firm on a personal basis in order to try and chase his share in the sale of the Land. That retainer recited a history containing a passage at odds with Mr McD's case in this:

> "*It was agreed between you and Charlie that Arc would be set up as a "Special Purpose Vehicle" in order to purchase the land. It was agreed that Charlie would initially be the sole director and Shareholder of Arc due to your longstanding relationship and trust in Charlie however the shares were always to be held on trust, 70/30 in your favour and as per your respective contributions to acquiring the land.*
>
> *Charlie signed a letter to this effect in the presence of a Solicitor from this Firm on 14 February 2017. A Trust Deed was not requested of this firm as Charlie subsequently signed a stock transfer form with you effecting the above arrangement in respect of the shares. The document was being stored in your office and awaiting to be filed in Companies House.*"

Mr McD says this was self-serving and completed in an awareness of the own client conflict that had arisen because of DLS's failure to complete the Trust Deed which Mr McD had requested. He invites the court to disregard it and to reject DLS's evidence, particularly that of MR which he says betrays a failure to recognise Mr McD was accusing them of negligence and there was an own client conflict.

66. Meanwhile, in July 2017 CG had applied to remove from the Register Arc's notice of an interest under the earlier estate contract of 3 March 2017 (when contracts were exchanged with AMG to complete in December 2017). A TR1 of 25 July 2017 shows that AMG transferred "*with the consent of Arc Holdings*" ownership of the Land for a consideration of £1,000,000.00. £850,000 was payable to AMG and £150,000.00 to Arc and thus, Midwest bought the Land.

67. Mr Hubble QC for Mr McD described the activities after this as DLS acting for Mr McD in various unsuccessful attempts to assert Mr McD's rights in Arc to bring claims against CG or AMG, and to prevent the registration of the transfer from AMG to Midwest.

68. Thereafter, acting for Mr McD, DLS instructed Counsel in a series of attempts to protect his interests. Contained in the instructions to Counsel were certain passages on which DLS rely.

69. In particular Mr McD points to statements made in October 2018 and on instructions given to Counsel in which certain statements are made regarding the purpose of the meeting including a Trust Deed in respect of Arc, and are not commented upon or corrected by DLS contradicting the case they now make. These documents were not drawn up by up them say DLS; they were merely the conduit for the transmission to Counsel, and they do not reflect either the true position or an acceptance that Mr McD is correct.

70. I turn now to consider the evidence given by the parties.

THE EVIDENCE

Mr McDonnell

71. Mr McD made a statement for these proceedings adopting his Particulars of Claim and placing emphasis on the contents of the October 2017 statements drafted by other advisors on behalf of Mr McD. He drew attention to the statement that the purpose of the January meeting included to draw up a Deed of Trust in accordance with the shareholding agreement. Mr McD noted in his written statement that MR did not respond to his email of 14 February 2017 attaching the two letters so as to dispute that DLS were required to prepare a formal agreement.

72. He claims he had expressly referred to the need for a formal document such as a Deed of Trust to protect his interests in the meeting of 20 January 2017 and at no point throughout the matter did he ever say it was not required or retract his instructions. He expresses his belief that references by DP to a trust were references to that Deed of Trust. In that he said that he had made a large number of phone calls as he became increasingly worried about that situation. He complained the calls between 24 May and 6 July were not the subject of attendance notes and asserted that for an entire month he had been chasing DLS Law to find out what had been done and what could be done to protect his interests. He says the only response he got was from DP, he was told not to worry because he had a binding contract and there was nothing they could do.

73. In giving his oral evidence, Mr McD was a quietly spoken man of some charm. He made much in his pleadings and in evidence of what he presented as his disabilities of dyslexia (relying on a diagnostic report of 1990), and emphasising he had left school young. He had he suggested little education or facility with reading and writing. It was stated on his behalf that he suffered from sight impairment and was about to be registered blind. In fact, at trial emphasis was laid rather on his being hard of hearing and he said he needed someone to assist in the witness box with documents. This was arranged.

74. The oral evidence given by Mr McD concerning his reading and writing abilities as they related to business made clear that he had a careful support system in place. This included an accountant/book-keeper, a freelance legal assistant, Pria (who drafted the 14 February letters), and an insolvency practitioner Nick Wright, whom he used through his bankruptcy and otherwise when necessary. He had the use of an assistant, Ms Imelda Leonard, who was employed by one of his sons' companies and also various others who could and did assist him in drafting and/or in reading materials if necessary. Mr McD had known Nigel Spears, an accountant, for around 35 years and he would consult him from time to time when necessary including during his bankruptcy where he was also accompanied by Mr Wright. Mr Avari, his friend and advisor was an ex HMRC tax inspector and gave him advice from time to time. He had attended a meeting with DLS and Mr McD in February 2018. He made a statement in these proceedings and gave oral evidence. Mr McD's wife also had "*always and all the time*" helped him with the paperwork. Mr McD accepted it was therefore never difficult for him to read or understand materials. He also told people he had a problem with paperwork and most of the time other people made notes at meetings, he did not do so himself - but he had a good memory.

75. In light of the stark conflict of evidence as to the central issue of instruction to DLS, it was very important to form a view of Mr McD as a businessman, and also, whether the Court could regard him as reliable and a witness of truth.

76. Having seen Mr McD give evidence over many hours, I formed the clear impression Mr McD was a man of considerable intelligence and business acumen. I have no doubt, particularly by reference to the number and complexity of his corporate arrangements over the years, both those involving DLS and those involving his other many advisors, (including other firms of solicitors), that he had an excellent working awareness of corporate structure, its scope and limitations, and his own potential vulnerability and liabilities. Not only was he, in my judgement, experienced and astute, but he was careful to avoid giving damaging answers where he could.

77. Particular areas of his evidence revealed his caution, when testifying. Mr McD was asked about his earlier involvement and his company called Ace Waste Recycling Ltd (Co No 4645021) when it had first purchased the Land, for which AMG provided £395,000 - almost all of the price, in exchange for a charge over it. His evidence was reluctantly given. He agreed that the company changed its name, and his son Paul was the director. The shares were all, he eventually conceded, held by his son and were put in his name. Nobody would know they were actually his, and held to his order. It was put to him that in truth he transferred the land to AMG although his witness statement describes it as "*the land reverted to Mr McGee*", indeed, he transferred it just before the liquidation of the company. He answered evasively: "*he would not have done the paperwork", or again "Mr McGee was dealing with his own solicitors*". He did not know why correspondence was addressed "*Dear Sean*" nor why the correspondence asked for his son's identification, suggesting it was perhaps that they "*did not have his son's email*" – not that he was in control. He insisted he was dealing only on a "*consultancy*" basis.

78. It was put to him that he knew that AMG would get any equity in the Land rather than the creditors of Ace. Mr McD said it was not clear to him that there was equity, he did not know, and he said he never met the valuer. He denied that he was making sure that the Land was transferred to AMG rather than to creditors.

79. Having seen Mr McD give evidence and in light of my conclusions about his business experience I am quite clear that his answers in cross-examination to Mr Miles Harris on behalf of DLS were evasive and intended to minimise evidence of his controlling roles, and the disposal of assets shortly before the corporate vehicle holding them was dissolved.

80. When questioned closely about his interaction with the valuer who came to place a value of £375,000 on the Land, he said he could not remember ever meeting her. When shown written material indicating she had in fact met him, and had made a valuation on the basis of information concerning alleged adverse possession communicated by him to her, he conceded "*if she's saying that, maybe I did*". When it was put to him she was "*excluding almost a third of the Land on the basis of adverse possession, on the basis of what you told her*?" His answer was "*If you say I did, I might have told her. I knew about the adverse possession issue, but if I did go there, all that discussion would have been under a consultancy agreement.*"

81. Mr McD appeared to be answering this question as if he were being tasked with acting as a director or PSC, whereas the issue concerned the fact that the valuation itself was significantly diminished by the valuer on the basis that Mr McD had asserted relevant adverse possession of part of the Land. That part was then omitted from the valuation. Correspondence put to him showed that he had in fact sorted out the issue of adverse possession with the relevant tenant much earlier. Although he denied dishonesty, Mr McD's answers were highly unsatisfactory. In light of the written evidence that the adverse possession had long been eradicated by the grant of a lease in June 2009 it was impossible to accept his protestation of having only told the valuer in 2010 "*what he understood*" to be the true position at the time. Again, his evidence was evasive and in my judgement, when he detected the truth might be to his disadvantage, he was prepared to obfuscate or to lie.

82. In similar fashion he denied any control of the company Biffa at a time when he was an undischarged bankrupt. Material was put to him including a letter signed by him personally for Biffa saying, "*they are only paying me £50k … to ease our cash flow*", but he denied that he was in control of the company. The materials showed clearly Mr McD was regarded as the beneficial owner of the company. James Connaughton was the director and shareholder, as his nominee, and Mr McD was asserting that the company was his. When asked in cross-examination he denied it was. In light of the correspondence before the court it is impossible to accept that he was sending emails, in his own name, on behalf of James Connaughton as he sought to say; his denial that he deliberately controlled Biffa through James Connaughton although bankrupt was wholly unconvincing. He explained himself as only "*trying to sort out whatever problems AMG had*" and he didn't think he was doing anything dishonest. I was not persuaded by Mr McD's attempts at explanation of these matters and of his behaviour in the course of his then bankruptcy. His response to penetrating cross-examination was unconvincing.

83. These matters are of course relevant to the assessment I must make of what Mr McD says happened at the crucial meetings between himself and members of DLS and as to what his understanding of the corporate situation might be, and of his sophistication or otherwise, when dealing with his affairs and those of his various corporate entities from time to time.

84. When faced with an awkward question concerning the fact that he was claiming that LBC (which used to be known as Ace Group) was his company, yet Companies House and the company accounts indicated that James Connaughton was the director, Mr McD answered it was "*possible*" he had signed off the accounts, "*but the girl in the office might put it in front and I signed it*". Alternatively, he said, the Companies House records could be inaccurate. Mr McD said he did not accept that he had lied but then, "*if he signed something he should not have, it was quite possible*".

85. Importantly, Ms Imelda Leonard, Mr McD's assistant, had made a statement in October 2017 for use by Mr McD when it was hoped to pursue CG in connection with the Land, and before Mr McD fully turned his fire on DLS. She recorded in the written statement that Mr McD had told her that he would protect his own interest in Arc by having CG sign stock transfer forms. Others in the office deposed that they had downloaded these on 20 January 2017. Mr McD accepted in evidence he knew that with the share transfer forms, if he needed to, he could step in, and, once they had been signed, it would allow him to take control of Arc. He would not accept directly however that it constituted

protection of his interests. CG did not want him to be a director because of an issue with the Traffic Commissioner, (whom CG believed would impede vehicle licensing if Mr McD were involved), but that he needed to be protected and that is why he got the transfers to be signed. Yes, the forms were blank and signed and it would have been possible to sign all of it over to himself – but he did not accept it was his intention to do that. He claimed he "*went along with Charlie*", and was relying on others to advise him: including Nick Wright, his accountants - and his lawyers.

86. On more than one occasion when confronted with evidence that appeared inconsistent with his case Mr McD retreated into stating that things were just put in front of him to sign, he did not read it, or could not read it and asserted only that he had wanted his interest protected.

87. This was his response when challenged that DP's note of the first meeting on 20 January did not record any instruction regarding protection of his 70% interest. He agreed that by the time of this meeting on 20 January the share transfer forms had been signed. It was put to him his interest had thus already been protected. He did not answer the question directly, but spoke about the time in May when he found out that "*CG had stolen the share transfer forms*". He both said that he wanted a Deed of Trust but also said "*It was up to him* [DP] *or DLS to say this is what we need. This is what I rely on professionals for*."

88. Concerning the email dated 25 January 2017 (see paragraph 75 above) from DP to him, which indicated DP was starting work on other matters, namely a Trust Deed for land in Ireland and a nominee agreement for a shareholding, Mr McD's answers were unconvincing. He said that the reference to "*nominee agreement*" was in fact a reference to the Deed of Trust he had instructed DP to draw up on 20 January. He then answered that he was not sure, all he remembered was that he had asked for a Deed of Trust. It was put that he would have understood this as a reference to Penygroes and the nominee agreement for Cairn's shareholding. He said he was not sure; he might have misunderstood. He just repeated his assertion that he was clear he had asked about protection in Arc. There were, in effect, no convincing answers to the disparity between the contemporaneous documentation and what Mr McD was claiming he had instructed in the meeting of 20 January 2017. Where significant discrepancies were pointed out Mr McD generally fell back on "*I might have misunderstood*" or "*these things get read to me, I might have picked it up wrong from someone*".

89. Mr McD accepted that the share transfer forms, signed and in his possession in blank were documents that allowed him control of the company. He also accepted that the 14 February letters were connected to "*giving an incentive*" to CG and to ML.

90. When asked about the fact that at no point between 14 February and 24 May did he contact DP to ask where the Deed of Trust might be, his explanation for this was, "*They knew what to do. I didn't want to keep on to them, that's what I employ lawyers for*." At one point he did say he had spoken to DP (who denied it - see below). He also said at one point however, that by 14 February 2017 so far as he was concerned, the Deed of Trust was already in place – it was pointed out that even on his own case, he could not have thought that when the 14 February letters themselves stated that "*DLS would draw up agreement*".

91. When the absence of an instruction to MR concerning the 14 February letters was put to Mr McD in terms that it was merely an email attaching the two letters without any instruction at all he answered "*as far as I was concerned my instruction was given on 20 January and I was hoping they would act on it*" and "*I don't want to annoy people with things*", or "*I was told by my legal team they had a duty of care to explain*". He said also he may not have put it down there - but he knew what had been asked on 20 January. He said eventually that maybe he did not ask MR on 14 February to draft a Deed, but "*the letter was clear as to what the split was*".

92. When challenged on his interpretation of the solicitor's reference to "*trust work*", he again answered vaguely: "*if I took it up wrong, all I do know is my most important thing I needed to secure was 70% in Arc, my understanding was he was taking care of that*".

93. On his claimed interpretation of the 3 March letter and "*I haven't forgotten the Trust work*" he asserted another misunderstanding: "*if it was taken up wrong, then that's a different matter*". He also accepted, contrary to his case on damages as pleaded, that had he had an acceptable offer he would have taken it at that point. He had made a decision to sell, if not before completion then shortly after. He also conceded that his assertion to Midwest about issuing contracts to others and offers from other purchasers was not accurate or was "*badly worded*" and he was trying to push the price up from Midwest.

94. He also admitted it was quite possible he had been told to take separate legal advice in a conversation at the end of May. Although he claimed he had made many, many calls to DLS and been ignored, he accepted that amongst the calls made between the parties there were other calls relating to other matters that DLS were working on for him, they were not all relating to the Land.

95. Mr McD agreed that he would have known that the simplest and safest way to protect his interest was to become a director, but he said CG did not want him to be one. He did not dispute that a lawyer did not need to point it out to him. He said again, "*I would go to whoever I could for the best advice that's what I rely on. I rely on professionals all the time*".

96. A letter had been drafted on his behalf in August 2017 and sent to CG at Arc. It stated a position at odds with his present stance that he had given instructions to DLS to draft a Trust Deed:

> "*Mr McDonnell relied on the execution of [the share transfer forms] as evidence of your intention to procure the shareholding of the company would shortly be updated and considered it was no longer necessary to instruct this firm to prepare a Trust Deed. The forms were not immediately sent to Companies House but instead they were placed in a locked drawer in Mr McDonnell's office to which you have subsequently had access …*"

97. Mr McD had no answer as to why he agreed that that was his instruction. In the previous paragraph of the letter, he stated that following the execution of the 14 February letters he had intended to instruct the firm to prepare a formal Trust Deed but in the event it was not prepared. He could not explain why that letter went out on his behalf. His

response was just: "*there is no way whatsoever I agreed with them not to act in my interest, there's just no interest …*"

98. The precarious condition of Mr McD's finances was explored. Mr McD accepted that at the relevant time his house was going to be repossessed. He had claimed he had access to funds, but admitted he would have had to have borrowed. His mortgage had run out in 2016 and there was the intended grant of a second charge to Mr Cairns. He accepted Ace had a creditor in the form of Suez Ltd [formerly Sita] for £134,000 which had not been paid. Mr McD spoke of a Mr Townend, a property developer, although there was no evidence from him. Mr Townend had said he would be interested in the yard, but he admitted that he would have considered a back to back sale. It was put to him that that would have been the only advantage he could have taken of Arc's contract at that point. His answer was that if CG had not done what he did there was a good possibility Ace would not have gone into liquidation and could have been successful, that was his dream and he had hoped it would be his legacy but he could not say that he would not have taken the money.

99. All in all I concluded that Mr McD's evidence was most unsatisfactory on the important matters in issue, including whom he spoke to, and what he said to them. His answers were often inconsistent and vague. He did not recall discussing the Irish property with DP and he "*didn't really go into too many details with DP, only Arc*". When asked why DP had recorded in his attendance notes Penygroes was discussed, he suggested that DP might have misunderstood him, "*maybe because of my accent*". When asked why DP had noted down that the Irish land was discussed, when it was not, he said he had discussed Penygroes and the Irish land with MR not DP, repeating again, only that he had asked DP to protect his interest in Arc.

100. It was my impression that Mr McD tailored his answers entirely to what he thought were the possible difficulties in convincing the Court that he had issued an instruction on 20 January 2017 in respect of protecting his interest by a Deed of Trust, which DP denied. His twists and turns in evidence were unconvincing. I gained the impression Mr McD would say whatever it took to get himself off the hook in respect of difficult questions which suggested he had not given the instruction he claimed.

101. With regard to his disabilities, he stated that DP ought to have known that he had dyslexia, although it was accepted there had been no reference to it. He said MR already knew, but also said at one point that he was not sure that he had told MR, but anyway he did not have to write or to read anything. Having heard his evidence I am not persuaded that it is likely he did mention his dyslexia either to DP or MR, whether at that meeting or at all.

102. Both DP and MR gave evidence they were unaware of any impediment, but in any event, I am entirely unpersuaded that any dyslexia or other relevant difficulty in fact materially impaired Mr McD's ability to understand issues, give instructions where he wished, or carry out the discussions he had conducted over a number of years efficiently, and with full understanding.

103. This evidence, which is a only a sample of Mr McD's testimony, is of a piece with the rest of the evidence that he gave. In my judgement it damaged him as a witness of truth, and I could not draw from it the conclusion that it was more likely than not that he was correct in his assertion about what was said to him on 20 January 2017, thereafter, nor

indeed on any matter of importance where it differed either from a reasonable interpretation of the contemporaneous documentation, or from the witness evidence of the solicitors at DLS.

104. I shall go on to deal with what was said by the other relevant witnesses, namely DP and MR. Mr Avari gave evidence of his long association with Mr McD and his record of a meeting at which Mr McD and DLS were present and Counsel that chimes with my assessment of the intricacies of Mr McD's business dealings and my view, later expressed, concerning his financial position at the relevant time. The note revealed the explanation in consultation that there had been a couple of bankruptcies "*so no names in front*"; also the potential difficulties around the insolvency of Ace and transfer of the Land at that time– consistent with the impression given by other documentation.

Mr David Pilgrim

105. DP qualified as a solicitor in 1972 and ran his own practice between 1981 and 2004. He had worked continuously since as a solicitor, and joined the defendant Firm, founded by a former colleague, as a consultant in property matters. He dealt directly with clients on property matters on behalf of the firm but is otherwise independent. His statement made clear he had considerable experience in significant property transactions over the years both in the United Kingdom and abroad. He explained that client care matters in respect of the transaction involving the Land together with paperwork were dealt with by MR; he had been asked to attend the meeting on 20 January 2017 having been informed that a company called Arc Holdings and Investments Limited was proposing to acquire the Land as a waste disposal site, and that Mr McD and CG would attend. He had no previous direct dealings with Mr McD but understood that he was an established client of the Firm which was familiar with his business history. He stated he had no knowledge of dyslexia or any other impairment of Mr McD.

106. DP gave oral evidence consistent with his statement that he had been called by Mr McD on the morning of 20 January with a list of points that he wished to discuss. He had been informed by MR that Penygroes was a matter for discussion, but he had no discussion in detail until he saw Mr McD on 20 January. He had been told by MR about Arc and the attendance of CG some time before the meeting. He had a clear recollection that Mr McD said, in front of CG, "*this is Charlie, he's my man you can trust him".* He said that DP should take his instructions from CG, that he, Mr McD, had a financial interest in the company and that CG was the director and sole shareholder. He gave no instructions that he, Mr McD, was controlling but DP was satisfied they were working together on it and they both confirmed that they were. Mr McD stated that he had a share of the profits in Arc as to 70% and that CG would share the rest with "*another*". DP explained that was not necessarily the same as a split of shareholdings. Mr McD did not mention what the shareholdings were, but he did tell him that he had a controlling interest: as of 20 January he was not aware precisely what the share ownership was but was told he had a 70% in the profits and made the assumption they were one and the same thing.

107. DP's statement made clear that he had the impression that Mr McD pulled the strings, but he was also quite clear that he did not seek any advice at all from him on how to protect his interest. DP had asked him no further questions – because in his view he did not need to. DP recalled in his statement that Mr McD had asked him for tax advice,

both company and individual, but had never suggested he was going to purchase the property personally - certainly, he answered, once Mr McD had learned of the differential in tax rates, he never raised it again.

108. DP's evidence was clear that Mr McD did not say he was going to provide instructions regarding the transaction, but he was obviously an interested party. He described it, consistently with his statement, that the instructions came down to the fact that Mr McD wanted DP to act on behalf of Arc in the acquisition of the Land, and when doing so DP should rely on instructions given by CG. DP noted that Mr McD had not mentioned his right to 70% of the profits in front of CG.

109. The manuscript note made by DP at the meeting of 20 January 2017 was explained by him in evidence. He had written numbered items as identified by Mr McD which were to be discussed ahead of time. It is set out above in paragraphs 38 and 39.

110. DP reiterated in oral evidence that the Field Road matter was not discussed (it was a reference to MPD). The item 3 share transfer referred to Paul Cairns and Penygroes. DP was taken to the entry that read:

> "*– ARC TO SEAN → CHARLIE AND ANOTHER?*
>
> *INST. TO FOLLOW – IF REQUIRED – <u>NO</u>*"

111. It was suggested to him that "*ARC TO SEAN*" related to the word "*TRUST*", which he denied. The word "*TRUST*" related to the Trust in Ireland and the words on the page were his background notes so that he appreciated the division regarding the parties of Arc. DP explained that he jotted down notes as people talk, he used the word "*TRUST*" in relation to a telephone conversation about the land in Ireland. They were not words that related to any Trust which Mr McD now said he had wanted. When questioned about the version given in evidence by Mr McD to the effect that he says he instructed DP he wanted his 70% stake in Arc to be protected DP said, with some generosity, that he understood that "*Mr McD had persuaded himself that was what he instructed me to do"*. He was firm that it was quite wrong to read "*INST TO FOLLOW – IF REQUIRED – NO*" as being connected with any instructions regarding the claimed Trust Deed. What they referred to be the fact that Mr McD was telling DP that, if CG was unable to give him full instructions, then Mr McD would be able to do so. It was not a particularly important statement. The reason for the insertion of the word "*NO*" was that once he had seen CG he realised that he did not need further instructions. "*NO*" had been added immediately after the meeting – the point was that CG had given him very full instructions at the meeting and he did not need to know more.

112. Mr McD's case is a direct challenge to the veracity of DP's evidence on this issue. He asserts by implication that DP is untruthful about his Note of the 20 January meeting, and that these words relate to instructions in respect of a Trust Deed concerning Arc. I have no hesitation in rejecting Mr McD's version and I reject any suggestion that DP was in any way misleading – or indeed wrong – about the meaning and content of his notes. The natural reading of the Note, and the explanation by DP of what it recorded are an ordinary reading of the words in the context of the other documents which show the history of dealings with Mr McD on his other business.

113. The reference in the 3 March 2017 email to "*Sean I haven't forgotten the Trust work*" was a reference to drafting the Trust he had referred to of the land in Ireland for Mr McD's grandchildren.

114. DP was quiet, and understated but perfectly clear in his evidence. He had not been instructed that Mr McD wanted a Deed of Trust and wanted his interest protected. I accept that evidence. He had made no reference to purchasing the property personally and in his own words he had wanted to remain "*off the face of the transaction*", so he could not have become a shareholder, he could not have become a named person on the contract. It was DP's view that the obvious advice would be to be a director, and register as a majority shareholder and that Mr McD obviously knew that already. DP said that Mr McD did not ask him for advice on that issue. (In fact, that much was conceded by Mr McD in cross-examination (see above)).

115. It was DP's view that a Deed of Trust would have been worthless. In order to enter a restriction on the register he would have required the consent of AMG as the registered proprietor which would have been most unlikely to have been forthcoming. Otherwise, only a unilateral notice could have been entered. DP said when he was asked for advice to try and protect Mr McD's interest in the sale he gave it, but that did not happen until around 24 May 2017 or thereabouts.

116. DP, (who himself, did think of Mr McD as a client), was quite clear Mr McD was an experienced businessman who did not need DP to teach him how to run his business; he was firm that he was not obliged to tell him that he himself had no control of Arc.

117. As to sending emails concerning Arc addressed also to SM, DP indicated that it was prudent of him to ask SM, he was entitled to know the transaction details and had told him he was the controlling mind. He fairly accepted when the question was put that he was treating SM as a client of the firm, and thought of him as a client in respect of the Arc transaction "*Yes, I'm not trying to split hairs*" was his answer.

118. Mr McD places particular reliance on these answers of DP, and states that it indicates the true position namely, that in respect of the Arc transaction, SM was at all times a client of DLS and was owed the duties of a solicitor to his client in the usual way. That would have included an obligation to offer advice and protect his interests as and when an issue arose, and they had also culpably failed by not proffering advice.

119. DP categorically denied that Mr McD had chased him in telephone calls asking for a Deed of Trust for the property. DP said, (again), "*How can I put it, he may have persuaded himself he did that, but he certainly didn't chase me*". DP explained, in respect of the email from CG in May, declaring instructions could come only from him, he said that he had told Mr McD about it. He felt bound to tell Mr McD, and was on the telephone for nearly 10 minutes on 19 May.

120. On 24 May, as explained in DP's witness statement, Mr McD had telephoned him, concerned that CG had removed the share transfer forms and he insisted that DP must have been aware of it, although he was not. Mr McD certainly did <u>not</u> say in the call that he had instructed DLS to put a Trust Deed in place. DP said Mr McD had, rather, been concerned as to the shareholdings. Mr McD caused the 14 February letters originally sent to MR, to be sent on to DP on 24 May.

121. This was the first occasion that DP had become aware of the existence of the letters of 14 February. DP was confirming that the shareholding was according to his understanding. As he explained in evidence, the letters reflected what he had understood (sc. the various shareholdings) from the meeting in January. That was why he had answered by email "*The contents of the letters reflect the position as outlined to me at our meeting with Sean on 20 January about which I made a note at the time."*

122. The email exchange of 24 May 2017, upon which Mr McD puts considerable reliance ("*Did you receive letter … seems expected to do something*" - see above) reflected DP's supposition following the call. He did not accept you could take those letters as instructions, nor did he regard them as instructions. He certainly had not received any such instructions from Mr McD to protect his interest in the company. As at 24 May it seemed to DP that Mr McD was expecting DLS to have done something - he certainly did not suggest that DLP had <u>in fact</u> received instructions that they had failed to act upon.

123. DP was perfectly clear that the letters concerned the shareholding proportions which were already known by DLS. His evidence was:

> "*The letter was not addressed to us and was not itself an instruction it might require clarification, but it was certainly not an instruction to do anything at all. … Mr McD was perfectly capable of instructing me himself if he wished, he had ready access to me had, my home number and my mobile and …he certainly didn't instruct me*".

He responded clearly and firmly to cross-examination, saying the Claimant's current interpretation just sought to read things in to his responses in May that were not there, and Counsel sought to put words into his mouth.

124. As to the suggestion that there were numerous calls in the course of May and June, DP could not speculate on his reasons for trying to get in touch, but numerous calls just did not reach him. He assumes they were about CG's activities – Mr McD was speculating on what could be done but DP had no particular advice he could give him on that. DP observed it is very difficult to protect someone's interest when they do not want to be seen to be involved in any of the transactions. He was quite clear that this was not (as put to him) dissatisfaction regarding the absence of a Deed of Trust: that was not the case. He accepted it would have been easier to resolve if Mr McD did in fact control the company. He did not accept however, that without a Declaration of Trust nothing could be done. Mr McD could, in his view, still have applied for an injunction.

125. The totality of DP's evidence (of which this is a short extract) was given in a calm, consistent and impressive manner. He did not baulk at questions that might illicit answers that were unhelpful to DLS's pleaded case. As noted, he was perfectly prepared to accept that he saw Mr McD as a client in respect of the Land transaction of Arc. The effect of his view I will deal with later.

126. Overall, his evidence was convincing and I accept it as the truth. The explanation of how his contemporaneous note of the meeting of 20 January 2017 came to be made and what its various parts signified was clear and coherent. The note itself was handwritten and somewhat idiosyncratic in layout but I have no hesitation in accepting DP's analysis

of what he had written, why he had written it and where the various parts joined up. The meaning sought by Mr McD to be put on the notes of the meeting in January, when it is alleged a direct instruction was given, is unnatural and strained.

127. It follows from these observations that I was content to accept his evidence of what he was doing, what had been discussed between him and Mr McD, and what the import of his various communications was.

128. I turn now to the other solicitor who looked after the Arc Land transaction for Mr McD.

Mr Maninder Rupal

129. MR who has, since 2018 been a Partner in DLS, started his career as a trainee in 2013 with Irwin Mitchell LLP then joined DLS and qualified as an Assistant Solicitor in 2015. His particular expertise is the full range of commercial litigation including family and trusts work. He explained in his full and detailed statement for these proceedings, that Mr McD was first introduced to DLS in 2014, by another prominent Irish businessman called Bobby Killoran, a client of theirs. The Firm carried out work relating to historic matters connected to an already liquidated company Ace, involving Mr McD and his son Paul. Counsel's Opinion was obtained and, in spite of positive advice, Mr McD did not proceed with some proposed litigation, given the risks and the potential costs, which would have involved seeking to restore the company to the register. MR went on to assist with his son and daughter-in-law's affairs in respect of a bank charge over their home in favour of Ace granted to Paul McDonnell, as Director of Ace.

130. MR explained how Mr McD had told DLS in respect of the Ace work that he was to be kept informed at all relevant stages and that he would provide instructions. MR raised this with Paul and his wife, who agreed and indicated that indeed, all decisions were to go through Mr McD. Accordingly the Firm's client care letter to the couple reflected this, and they signed an express authorisation for DLS to correspond directly with Mr McD.

131. MR related his frequent contact with Mr McD and that he got to know of his previous involvement with haulage, tipping, business consultancy, construction and other land - related businesses. MR described the Claimant as "*by his own admission… No stranger to legal matters, be it regulatory/compliance, transactional matters or contentious issues*". He describes how Mr McD described himself to MR as highly experienced in commercial disputes. MR judged him confident in his ability to handle any dispute, particularly having once won an important case against the Revenue. As a client MR described him as forthright and happy to handle matters himself. He told MR he had amassed a property portfolio of some £30 million at the height of his activities. MR described the business that had been put DLS's way over the years by Mr McD whom he regarded as an entrepreneur and a dealmaker.

132. He acted in 2016 for the Claimant personally concerning the mortgage of his home and office, the Willows. They established a relationship, where Mr McD could reach Mr Dass, the Managing Partner, directly by telephone on his mobile when required if he was unable to reach MR directly. The client care letter in respect of this piece of business was duly signed by Mr McD personally in late July 2016.

133. MR was asked about knowledge of Mr McD's writing and reading abilities. He said he had seen him read in his presence; in the Slough County Court he had been assisted by nobody. Mr McD's cross-examination was conducted on his own by reference to documents in the usual way. Right up until 2017 Mr McD had never told MR that he was dyslexic. MR was clear that he had not been told about any disability by Mr McD. MR recalled in evidence that there was a person called 'Blaine Killoran' who was impaired with dyslexia and arrangements were made for his witness statement to have the relevant statement of truth shown in particular form, whereas with Mr McD, when sending a statement to him, he invited him to read it, sign it and send it back which he had done without comment. MR said whatever disability he may have did not hold back Mr McD, who was very intelligent and able in any aspect of the dealings that MR had had with him.

134. Concerning the history, MR was also involved in the receipt of instructions on behalf of Ace Group Ltd and a dispute with Sita UK (which was the earlier name for Suez), in respect of an alleged debt of £134,000. That letter is signed by the three directors Mr McD, his son and James Connaughton. MR said that there was frequent contact between himself and Mr McD in relation to various legal matters not limited to his own personal cases. There were the formal matters, involving NatWest and his son and daughter-in-law, Penygroes, and the Willows but they were also in frequent contact. He observed that the letter of engagement between James Connaughton on behalf of MPD Investments stated in terms that James Connaughton authorised DLS to correspond directly and take instructions from Mr McD as necessary.

135. MR portrayed Mr McD as an astute and experienced businessman familiar with the many legal terms and concepts which cropped up. "*Most of it was not new to him at all. SM wasn't shy to ask for advice when he needed it*". With respect to the Penygroes matter, that was not within MR's expertise. He described it as having been a fluid situation and in the event the money was paid Mr Cairns wanted a second charge over the Willows in exchange for an investment and the eventual retainer that MR dealt with was simply execution and witnessing of the second charge documents. The questions in so far as they were raised about wanting a nominee agreement for Mr Cairns and Penygroes to regulate the position in which the shares were held was for Mr McD and the initial purpose of the meeting in January 2017 had been to get him involved. When it was suggested to MR that he was wrong to characterise Mr McD in his written statement as a person who inhabited the shadows he disagreed. He believed the evidence showed that even though he was a director of a number of companies he was capable of deciding which companies he wished to be a director and shareholder of, and said "*where he benefits from lurking, he chooses to take that route which is always going to be difficult to evidence with a Companies House sheet as his name would not appear*".

136. MR said he was first aware that CG was Mr McD's nominee director, and that Mr McD was taking a majority interest in the transaction on 14 February 2017. He was not part of any introductory conversation, he joined shortly after and was not in the room during any conversation about that on 20 January 2017.

Attendance notes of MR 20 January 2017

137. His attendance note recorded "*new – Charlie's*", which referred to the purchase of the Land, "*share transfer*", which referred to Penygroes and "*trust*", which referred to the

Trust in Ireland and "*second charge*", which referred to a charge over the Willows and "*MPD*", which referred to 9 Field Road. Mr McD had told MR that Charlie/Arc was to be the client and that CG would give the instructions and the client care letter would be prepared on behalf of Arc. If it had been suggested to MR that Mr McD was to give instructions, then that provision would have been included in the client care letter. He was copied into a letter that said, "*Dear Sean/Charlie*" but he was not aware that Mr McD was providing instructions. When put to him that DP said he was treated as a client, and indeed had been communicating with him directly, MR said it was not his understanding of the position. It was suggested to him there was confusion in DLS's handling of the case reflected in the reference to MR on the engagement letter (which he left the room to prepare). It was, as he understood it, not a confusion but something that had "*crept in*" from a client care letter of his own. MR pointed out that the letter in fact set out DP's hourly rate. He was not dealing with the matter; DP was dealing, that was why they were at the meeting. MR was very clear Mr McD had absolutely not said to him that CG was his nominee and that he himself would be giving instructions. MR had no knowledge of the share before 14 February.

138. DP had commented to him that the "*Trust*" referred to the Trust in Ireland and he had spoken about it with DP, although he was not present when Mr McD spoke with DP. He made a note of what Mr McD had told him. There was no specific conversation between himself and Mr McD about the purchase of the property or arrangements between CG and Mr McD.

Meeting of 14 February 2017

139. MR explained that the notes he made (headed "*1.30 14/2/16*" [*sic*] meaning 14 February 2017), when he had been summoned to the Willows, were a record of the conversation that was taking place as he entered between Mr McD, ML and CG. He did not attend with the intention of discussing the purchase of the Land by Arc nor did it become clear to him that that was what they wished to discuss.

140. MR assumed that the case they had just fought (and Mr McD felt had been badly lost) in Slough County Court was to be the subject matter. He knew Mr McD had felt that he had lost face in front of the Irish community. Bobby, who had been involved, was a close associate of Mr McD and had wanted to know if MR could have done anything to save the trial to help his close associates. However, the conversation was in fact as he had noted in his note about the payment of the deposit, which was non-returnable, in respect of the Arc transaction.

141. With respect to the letters dated 14 February 2017, he did not read them, nor was he asked to. Nor was he asked to witness them. They had been prepared by a person whom he knows to be "*effectively the in-house lawyer*". He was given a summary of the letters and Mr McD said that the firm could prepare something if required. MR had said he wanted to know what was to be done if something was required but although in front of CG and ML, Mr McD spoke of an official agreement to regulate the position, once they left: "*SM explicitly told me why that line is in there, to reassure C and M that their 30% was safe*".

142. He pointed to his note which said, "*Charlie incentive – meeting 70/30" and lower down "STC SMD just want to reassure Charlie and Michael*", "*30%*" is written below that note. He did not get into much detail with Mr McD who summarised only. Regarding

the 70/30 split, MR was not aware at that time that the 30 was to be split 15/15. He believes that this was after the two men had left. His note also says, "*All my finance is mine*".

143. MR did not know at that point that Mr McD was holding the share transfer forms but he was clear that Mr McD specifically told him there was nothing required of the firm in regard to the agreement. MR told him he had to go to DP that he, MR, did not know anything about this matter since 20 January which was his last involvement with CG and Mr McD generally. He gave this answer: "*I'd been dealing with SM for the best part of three years, he's intelligent, no issues with communication and there is no way either of us could have walked away thinking anything different.*"

144. MR said DLS were instructed by Arc, and he did not think that they could do anything for the individual shareholders, individually, but Mr McD had reassured him nothing was required. The sending of the letters he said was not uncommon. Material is often sent as background information. "*As discussed*" was a reference to the conversation not for anything to be done. After this issue, the conversation had moved forward to other matters. MR's evidence was quite clear that the letters were not sent to him to be acted upon. When put to MR that he should have replied to Mr McD to say he confirmed he would not be taking any action he disagreed. He had been dealing with this "*capable client with no issues between us, we got on very well and I had no reason to do that*".

145. When tasked that the letters of 14 February 2017 contained an instruction MR disagreed forcefully. He said, "*Mr McD is very experienced at instructing lawyers and there is in my mind no way that he could have reasonably believed that this amounted to an instruction and in particular a new instruction. The letters are not addressed to us, a meeting has taken place in the context of all that it's quite clear*".

146. It was suggested to him he should have taken steps to prepare a formal agreement. He disagreed. He emphasised that he spoke daily with Mr McD and if he had thought that this amounted to an instruction he was just a phone call away as indeed was DP. He accepted, realistically, in hindsight had they been sent on to DP it would have been more helpful for the purposes of this litigation and, since they related to the purchase of the Land, they should have been passed to DP by him. Had he been in any doubt about the purpose of the letter he would have clarified, but he was in no doubt because of the clear conversation he had with Mr McD. He pointed out, it would make no commercial sense for a solicitor to turn down a potential instruction or enquiry and to do nothing about it. That was not the nature of his relationship with Mr McD. He would have drafted a client care letter and would have asked for some money on account.

Events from the end of May 2017

147. Dealing with the time at which the fraud was said to have happened, and Mr McD's interaction with DLS, MR explained that they had become aware that there had been a fall out between CG and Mr McD "*on or around 19 May 2017*", which was the date on which CG had written the email to DP concerning taking instructions only from him. Mr McD contacted MR concerned to find out what was going on with the sale of the Land. He denied that at that stage Mr McD said anything about the preparation of a Deed of Trust but later he began to make assertions, so far as he was concerned he

thought in June or July, to the effect that the firm had been meant to prepare the Trust Deed. MR was cross-examined to the effect that in truth Mr McD had contended that he had given the instructions earlier on 24 May or thereabouts and suggested that email traffic between MR and DP concerning the 14 February letters was "*just covering your tracks because you dropped the ball*" which MR strongly denied. He was indicating his recollection that Mr McD did not give him instructions, and that was what was being recorded in his email of 24 May 2017 when he said that there had never been any mention of such an agreement/deed to him since that time, in the many conversations he had had with Mr McD, nor indeed was it being suggested at that time by Mr McD.

148. It was suggested DLS were on the back foot, because they understood Mr McD to be alleging fault against them from the end of May. They were aware that they were in the territory of own interest conflict. MR explained that the concerns about conflict were mentioned on 14 February, namely acting on behalf of individual shareholders in respect of a consensual agreement that had become acrimonious. To the extent that Mr McD wanted to instruct DLS on his behalf as against CG/Arc (for whom they acted) MR explained this presented a conflict. MR had told Mr McD that he would investigate and come back to him about the position, but he flagged up the conflict of interest.

149. It was put directly that it was not true that the call to the SRA about 30 May enquiring about a conflict of interest, concerned only shareholders. Rather, the real concern was that Mr McD had in fact complained about DLS's own behaviour. MR denied that explaining Mr McD was told he needed independent legal advice, but he was persistent that he wished for their help, indeed there was an email on 31 May which wanted to send materials to instruct directly. Mr Dass asked MR to contact Mr McD, repeating the advice that they could not assist. He had that conversation on 1 June, but there were in fact a great deal of conversations with Mr McD on the telephone about entirely unrelated matters involving other legal matters and not only the present matter.

150. Mr McD was not calling DLS in respect of the Land, having been told that they could not act for him, but was making his own enquiries and went off and got his own advice. He had decided to pursue criminal proceedings against CG. MR accepted that a 19 June 2017 email from Mr Dass suggested that at least by that time Mr McD was saying to some that he had wanted DLS to draft a Deed of Trust. Mr Dass had concluded he did not accept that he had expressly asked DLS to draft such a deed which, in any event, would not have changed anything and was inconsistent with the case that he held signed share transfer forms.

Potential conflict of interest

151. The email from Mr Dass on 19 June sent to David Pilgrim said, among other things:

> "*Sean, of course, unfortunately chops and changes his instructions according to what mood he is in on a particular day. Fortunately, and for that reason, we have attendance notes of our meetings with him and I am satisfied following my review of this situation and also following my various discussions with you, Sean and Maninder, that Sean did not instruct us expressly to draft a Deed of Trust. He asked Imelda from his office to send Maninder the letter following Maninder's attendance at Sean's house on 14 February 2017 – when Sean (and his accomplices)*

> *discussed many matters that we are dealing with on Sean's behalf with Maninder.*
>
> *I have also discussed this ARC situation with the SRA's ethic's line and have guidance on the way forward.*
>
> *As you say, Sean is not our client on this ARC matter. As I understand it Charlie has not responded to your correspondence with him lately nor has he responded to Sean's direct correspondence. My view is that Sean does not have any right to call a shareholder's meeting, however I agree with you that in practical and pragmatic terms Sean should call the meeting in any event – Sean seems to be claiming a beneficial interest, or in the alternative, that Charlie's holding the shares on Trust for him and Andrew McGee; as per the signed letter between them. That is the biggest problem for Charlie. Sean's assertion that he wanted us to draft a Deed of Trust goes against his own case that he was holding signed share transfers executed by Charlie which were in the process of being filed at Companies House before Charlie "stole them" from Sean's office. Why would we need to draft a Deed of Trust when Sean was holding executed transfers? Anyway, that is a matter of evidence in any civil action.*"

152. It was suggested to MR that the "*matter of evidence in any civil action*" was a potential action between Mr McD and the firm, but he said, "*no*". At that time Mr McD wanted to instruct DLS this was not about our own interest conflict.

Mr Dass' email had continued:

> "*In my view we ought to write to Charlie and state that we are aware that a potential dispute has arisen and that if that is the case then given that we have acted for Sean long before we have acted for Charlie, we cannot act for Charlie in the dispute. That in turn causes us problems in acting for ARC as it currently stands and Charlie is free to take the file elsewhere subject to paying our further fees.*"

153. Mr Dass added: "*I'm happy to take this up with him directly – as he knows. I don't know why he keeps calling you to deal with this when I have asked him not to.*"

154. The advice taken from the SRA was taken by DD and MR, each on their mobile phones in different places, MR said that at this point, on 30 May, Mr McD had not asserted to him that DLS should have prepared a Trust Deed. MR had spoken to him on 26 May and that was not his position. Accordingly, it was not a question of own interest conflict but that the Arc/Mr McD conflict that was discussed. They called Mr McD in the evening from home, and he was told then to get independent legal advice which he did. MR records that Mr McD persisted in asking for advice. There was then a gap and there were no requests asking for them to act during June. Mr McD was progressing other work with DLS however including in particular trying to buy some land on the M1. He also made several calls, some of them introducing new people for ad hoc advice. He did not contact DLS at this time in respect of preventing the sale of land as

he was trying to make his own enquiries with others and pursue the criminal proceedings.

155. MR was shown a copy of the subsequent letter of instruction, when DLS felt free to act for Mr McD alone. It recounts the agreement between CG and Mr McD setting up Arc and the shares always held in Trust 70/30 in Mr McD's favour. It records also:

> "*Charlie signed a letter to this effect in the presence of a solicitor from this firm on 14 February 2017. A Trust Deed was not requested of this firm as Charlie subsequently signed a stock transfer form with you effecting the above arrangement in respect of the shares. That document was being stored in your office and awaiting to be filed at Companies House.*"

156. The letter also records the dis-instruction by email of DLS by Arc through Charlie and the enquiries they had made in terms of compliance and ethics as to whether they were at liberty to act for Mr McD. The letter of engagement records that Counsel had been instructed to prepare a letter to address the Arc/Charlie issues. It also sets out in the usual form the charges and the terms of engagement of DLS. A draft letter to CG contained the following:

> "*Following the execution of 14 February letters on or about [date] Mr McDonnell informed this firm that he intended to instruct this firm to prepare a formal Trust Deed in respect of the company shares, in order to reflect the agreement reached on 3 February. In the event that document was not prepared. On or about [date] Mr McDonnell and his employee Imelda [surname] both witnessed your downlead from Companies House website and execute blank share issue and transaction forms the filing of which at Companies House would have been effective to issue the required further shares in the company Arc Ltd and allot them to Mr McDonnell, yourself and Mr Lynch respectively, in accordance with the agreed proportions. Mr McDonnell relied on the execution of these documents as evidence of your intention to procure that the shareholding of the company would shortly be updated and considered it was no longer necessary to instruct this firm to prepare a Trust Deed. You did not send these forms to Companies House, but placed them in an unlocked draw in Mr McDonnell's office, to which you have had subsequent access.*
>
> *The forms have been removed from that draw without Mr McDonnell's knowledge, permission or agreement …*"

[Emphasis added.]

157. MR said the information was based upon what Mr McD was saying and of MR's recollections at the time. It was put to MR that the document was effectively self-serving as were other materials sent to Counsel at around this time. MR said it was based upon what Mr McD was saying to them and seeking to put as strong a case as possible.

158. This passage is relied upon by DLS as consistent with the note made by MR of the meeting with Mr McD on 14 February, after MR had attended Slough County Court.

Instructions and statements October 2017

159. MR was cross-examined on a witness statement signed by Mr McD that had crossed his desk drafted by others on behalf of Mr McD. That document included the following statement (referred to above):

> "*On 20 January 2017 I attended a meeting with Maninder Rupal and David Pilgrim of DLS Law solicitors to whom I introduced Mr Giblin. The purpose of the meeting was:*
>
> *To instruct DLS Law to agree and execute the Land purchase contract between Arc Holdings and Investments Ltd and Mr McGee;*
>
> *Draw up a Deed of Trust in accordance with the shareholding agreement as per the eventual letter of contract prepared by Pria De Souza dated 14 February 2017.*
>
> *Unfortunately, while the Deed was not drawn up by DLS Law the respective shareholdings were made clear at the meeting, as was the fact that Mr Giblin was the director acting as my nominee.*"

[Emphasis added.]

160. MR denied that SM was telling them from late May that the purpose of the meeting was in part to draw up a Deed of Trust. The statement, he said, was to put as much pressure on others as possible to get them to the table and do a deal. He accepted he was unhappy with the statements, they were "*slightly all over the place*" and he was not happy the matters had been raised since Mr McD was himself telling him something very different. He had reservations about the material, but it had not been prepared by them, and was for separate proceedings. MR denied that he was acting in a position of conflict at the time. At the same time, he emphasised, Mr McD was instructing DLS on new matters and recommending others to the firm at this point, there was no suggestion at all that they had done anything wrong.

161. MR explained that when there was a consultation in 2018 with Counsel, it was common ground between MR and Mr McD that DLS had not been instructed to produce a Trust agreement, and they were not instructed to do so because Mr McD trusted CG.

162. In that consultation Mr McD expressly asked Counsel whether he had a claim against DLS, his instructing solicitors, to which she (quite properly) said she could not advise. She says she had not seen any evidence but then she had not been looking. MR recalled that others were prompting Mr McD to ask the question in consultation, many people were talking over one another. He said "*I don't feel Mr McD asked the question on his own volition whatsoever. … He was encouraged to ask the question by the people who he had surrounding him preparing these documents, he asked the question and moved on very quickly. The purpose of the con was not about negligence.*"

163. MR was asked about the sum of £2 million used in the damages claim and it was described as being at the highest end of what Mr McD thought it was worth in order to draw the attention of AMG. The letter of claim was sent on 2 March 2018.

164. In answer to me, MR said the question of own interest conflict had been there "*as a matter of awareness*" and it was considered in the context of what weight they should place on what Mr McD was saying. Whether there was real substance to it or whether it was just off the cuff and whether it was in fact Mr McD who was saying it. In his view an own client conflict did not arise, nor a significant risk of one.

165. I have no hesitation in accepting the evidence of MR. He was cross-examined skilfully and thoroughly but the manner in which he gave his evidence was clear, and consistent. It bore no sign of exaggeration nor evasion and the coherent picture he painted of his relationship with Mr McD at this time was convincing context to what he recollected about the exchanges on 14 February.

166. I accept MR's interpretation of the documents in the context of the events at the time and DLS' working relationship with Mr McD.

CONCLUSIONS on the EVIDENCE

167. It was clear to me that to the extent that Mr McD had any dislike of or difficulty with paperwork, he had nonetheless an acute and sophisticated business understanding. He had surrounded himself with advisors of various types, administrators and helpers. His evidence was that he had them read documents to him and take his dictation. As DLS submitted, the evidence in the bundles showed he was well able with the assistance of secretaries and legal (including as to tax) advisors, to send detailed sophisticated letters concerning his various business affairs.

168. I regret to say that, while I do not doubt that Mr McD has limitations in his education and certain limitations in his communication faculties that may well amount to or include dyslexia, I found the emphasis put upon them to be quite disproportionate to any real difficulty encountered in conducting his affairs, recalling detail, or giving cogent evidence. As I have said he struck me as astute, intelligent, and very experienced. This view derives from having seen him in the witness box, having heard about him from DLS, and having read his business documentation and considered his various interests, legal involvements and enterprises. I regret that I regard the emphasis on disability as an attempt to avoid an unfavourable interpretation of events, documents and encounters, and of a piece with his evasiveness in his answers under cross-examination.

169. I accept the characterisation by MR, that Mr McD was a man who often preferred to operate "off-book" (my words not his). Mr McD had on more than one occasion in the past adopted a similar approach to corporate engagement as he did here: he was not reflected as being a director of an entity but rather chose a person as nominee, in order to remain undetectable to the casual observer. He nonetheless often exercised, to a greater or a lesser extent, some control. In those situations there is clear evidence that he directed DLS as to their required involvement with him when he needed them,

whether as client when he needed or not, or as interested family member, or sometimes merely as an introducer of business, or otherwise, according to the situation.

170. In this case I find as a fact that he was explicit that Arc was to be the client of DLS and CG as its director was introduced to DLS as the face of Arc from whom DLS were expressly to take their instructions. CG was "his man" and he trusted him. Instructions were to come from CG even though Mr McD had a majority interest in profit - or shares - as he told DP in January, and MR in February. These facts are not conclusive of the legal relationship between the Claimant and the Defendant, but are an important part of the relevant context.

171. I find as a further fact that the interpretation put on the manuscript notes of meetings by their authors DP and MR are the true ones. This conclusion derives from the fact that I accept both men were witnesses of truth, but also as a matter of common-sense construction of the words in context. It appeared to me that, rather as DP articulated, Mr McD was looking back to the paperwork and seeking to attach meanings that now suited his case to words that, at the time, just did not support the suggested constructions. Further, having observed DP's diligence, and considered his testimony about the run-up to the 20 January 2017 meeting it is inconceivable that the notes he made reflect the giving of an instruction by DLS to create a Trust Deed in respect of the Arc shareholding.

172. With regard to MR, I accept what he says about his knowledge of Mr McD and the relationship that had existed between them. Mr McD was in frequent contact with the firm over many matters. It is not credible that, had he believed an instruction had been ignored or forgotten, he would not have tackled MR about it. I find that he did not do so at once, as was suggested. I find also that Mr McD was concerned in May to stop the sale of the Land, by CG, and was thus worried about his beneficial share, hence the re-transmission of the February letters in May, but DLS told him they could not act for him after the rift with CG/Arc emerged. Although he may have thrown around some blame to DP in May (email of Mr Dass dated 19 June 2017), it appears that Mr McD was taking other advice regarding CG at this time. MR became aware in June of this blame. MR's recollection of the later consultation with Counsel is consistent with a picture of Mr McD only later formulating the case which he now says was consistently made at the time. Others were encouraging him to suggest putting blame on DLS rather than Mr McD himself in any consistent or significant way.

173. I see nothing sinister in the materials passed via DLS to other advisors nor indeed in the reactions of DP to the discovery of the 14 February letters. In my judgement the correspondence and communication with DLS at this time was all about the shareholding divisions. It was that that was concerning Mr McD at that point – and he wanted to be sure DLS had the documents that he had caused to be drafted reflecting his previous agreement with CG and ML.

174. I also find that Mr McD did not in any way rely upon anything done or not done by DLS in respect of his own personal share in Arc. Had Mr McD wanted his own interest, separately, to be protected I am quite sure he would have given instructions for that to be done. Whatever he might have thought he once might do (and that cannot be known) he did not in fact give any instructions because, exactly as set out in documents (which he must have approved), he relied upon the signed share certificate which he acknowledged gave him all the power he needed.

175. MR's evidence that he expressly asked Mr McD on 14 February if he meant he should be doing anything, and was told, "*no*" is consistent with Mr McD's earlier behaviour towards CG and also his own knowledge that he already had the share certificates signed in blank, which he was relying upon.

176. It is clear that DLS recognised that the time came when Mr McD sought to instruct them (as a new instruction) on his own account, and that his interests were not coterminous with their existing client Arc's interests in the Land transaction. Indeed, he wished them to act against their existing client Arc/CG.

177. There did come a time in my view when DLS ought more carefully to have considered whether there was a difficulty with their own interest conflict, but, given what I accept was the behaviour of Mr McD at this time – seeking advice elsewhere on the Land sale in late May and June/July – that did not present itself clearly to them at that stage and the delay was not of any legal significance given my other factual findings. I do not accept that DLS's documents or actions revealed a desire to cover up a potential mistake, nor otherwise to act improperly - as was put to MR. It was also suggested as a reason why I should reject his evidence. I have however, accepted his evidence.

178. It is interesting and instructive that DP, who had not worked before for Mr McD thought of Mr McD as being a client himself, whereas MR, who had dealt with him closely for several years on a variety of directly instructed and other matters, did not. MR was clear that when Mr McD wanted to be a client, he would be such; when he wanted direct input, he would arrange for that, and that in the current situation (unlike some others), he had stated expressly that CG was giving the instructions and it was clear that Arc was the client.

179. These findings together with the observations made in the course of examining the witness evidence lead me inexorably to a finding that there was no express instruction given and no express retainer between the parties, I do not believe Mr McD's assertions as to instructions in either January or February 2017. It is fair to say his oral evidence as to the giving of those instructions appeared far less clear in the event, than his written pleading and his case on paper had been.

180. I now turn to the legal framework, which was generally uncontentious, to examine the claim that either an implied retainer or a tortious duty arose.

LEGAL FRAMEWORK

Duties – express retainer

181. It is well established and not in dispute that where a client provides an instruction to a solicitor an express retainer results, whether or not the instruction is reduced to writing. (*Jackson and Powell on Professional Liability*, 8th edition paragraph 11-006.) Mr McD's case has varied to an extent between pleading and close of the case. In essence, the primary case resolved itself into the position that Mr McD gave an express instruction, and thereby brought into being an express retainer with DLS, on 20 June 2017 when he spoke with DP from DLS at the meeting alone for a few moments. That case I have rejected.

182. The alternative case was that an express retainer arose through the letters of 14 February 2017 which constituted a written instruction to DLS to draw up a Trust Deed. That case I have also rejected.

Implied retainer

183. The alternative way of framing the case was to the effect that an implied retainer arose through the parties' conduct. *Jackson and Powell*, 8th edition at paragraph 11-005 says the following:

> "*In a situation where the parties act as if the relationship of solicitor and client existed, although there is no express agreement to the effect, the court will readily hold there is an implied retainer to be inferred from the parties' conduct.*"

Mr McD asserts he may rely upon this statement as encompassing the facts of this case.

184. However, a number of clear principles apply to the implication of a solicitor's retainer and the courts are not swift to imply one. Thus,

i) The test is for implication is necessity. See for example *Caliendo v Mischon de Reya* [2016] EWHC 150, where Arnold J describes the key question at paragraph 682, as being

> "*Was there conduct by the parties which was consistent only with Mischon de Reya being retained as solicitors for the Claimants?*"

ii) Choosing not to enter an express retainer indicates an implied retainer is unlikely. This is of particular resonance in the current circumstances, where per Moore-Bick LJ in *James-Bowen v Metropolitan Police Commissioner* [2016] EWCA Civ 1217 at [24]: it was said:

> "*In circumstances where the parties could have entered into an express retainer but have not chosen to do so, I think the court should be slow to find that they have entered into such a contract by conduct. In my view it cannot properly do so unless they have behaved towards each other in a way that can be explained only by the existence of an intention to enter into legal relations of a particular kind.*"

iii) An objective consideration of all the circumstances is necessary to determine whether an intention to enter a contractual relationship must be implied. In *Caliendo*, Arnold J had recalled the dicta of Lightman J in the Court of Appeal in *Dean v Allin & Watts* [2001] PLNR 921 at [22]:

> "*… As a matter of law, it is necessary to establish that A&W by implication agreed to act for Mr Dean: an implied retainer could only arise where on an objective consideration of all the circumstances an intention to enter into such a contractual relationship ought fairly and properly to be imputed to the parties.*"

In *Dean v Allin & Watts* "*all the circumstances*" included that the person in question was not liable for the solicitor's fees and did not directly instruct the solicitors. Other circumstances identified were where a contractual relationship had existed in the past – if that were so, the court might assume the parties intended to resume that relationship, and a failure to advise the former client to obtain independent legal advice might indicate the advice was not necessary because the solicitor was acting for him.

iv) An implied retainer will not be imposed for convenience. In *Searles v Cann & Hallett* [1993] PNLR 494 (a case where the issue was whether borrowers' solicitors had impliedly agreed to act as solicitors for the lenders) it was said at first instance:

> "*No such retainer should be implied for convenience but only where an objective consideration of all the circumstances makes it so clear an implication that [the solicitor himself] ought to have appreciated it.*"

185. Whilst there certainly had been a previous - and were ongoing - relationships between Mr McD and DLS, here, in my judgement, Mr McD was astute to choose in each case how he interacted and here, the intention objectively judged was not to enter a retainer with DLS as to the Land transaction.

186. In the present case it seems to me that Mr McD attended the meeting on 20 January 2017 in order to introduce CG and thereby Arc, as a client to DLS. Although he had personally had a retainer with DLS in respect of previous cases, that was not always so when he was involved. It was a matter of his particular choice. He was also involved in a series of other contemporaneous transactions, and in those it was as a client of DLS. All the circumstances must of course include the character of Mr McD, and his knowledge, and the history of the parties. Mr McD was well-versed in seeking and taking advice, I have set out elsewhere my findings on his business acumen and awareness of the legal framework to his activities. That necessarily feeds into my conclusion there was no implied retainer here.

187. Further, the series of signed client care letters where Mr McD chose to be a client stand in contradistinction to the absence of such a document here, where Arc through CG signed as clients. MR's evidence that Mr McD was perfectly able to present himself as a client when he wished to, was credible. I infer that Mr McD chose not to be a client for the Land transaction.

188. Of course, the view of DP that he regarded Mr McD as a client for the purposes of the Land transaction is important evidence. However, DPs view is not conclusive of the position. The court will look at all the objective evidence. In my judgement it does not assist Mr McD in spelling out an implied retainer given the other circumstances.

189. In reflecting the circumstances of relevance to an implied retainer, the *Caliendo* case involved evidence that the solicitors had acted previously for the Claimant without a retainer letter. Further, no other firm of solicitors had acted for the Claimants, and the solicitor dealing with the issues had also been appointed as a general agent in related proceedings by the Claimants. In *Caliendo*, as here, there was in evidence an acknowledgement of a client relationship by one of the solicitors acting. In that case,

the Claimant described him as "*my lawyer*" which was not corrected by the solicitor and in emails he had been described as "*Mr Caliendo's solicitor*". The solicitor in that case also said he had done everything he was instructed to do to protect Mr Caliendo's position, but as a gesture of good will, he was not charged for the services. Arnold J commented that he considered the solicitor must be taken to have accepted Mr Caliendo had been his client – but that was his view looking back about eight months after the relevant period. The judge then says, "*it is rightly not suggested that Mischon de Reya is bound by it*" [paragraph 707]. Further materials showed that the particular individual accepted Mr Caliendo had been his client, but this did not bind the firm, nor characterise the relationship without more. *Caliendo* is instructive, that even in the face of the solicitor's acceptance of a client relationship, the court concluded that the actions of the parties were not consistent only with the solicitors being retained as solicitors for the Claimant. Arnold J held they were equally consistent with them acting as solicitors for (in that case) a holding company and its directors in their capacity as directors [see paragraph 713].

190. Arnold J indicated that the involvement of other professionals, whilst not conclusive, was a factor that pointed away from there having been an implied retainer of the solicitors. Similarly, the absence of any bill was not fatal, but the absence of contemporaneous evidence that the Claimant ever expected to have to pay the solicitor for their services was, in *Caliendo*, of significance. These factors are of relevance here and contribute to the picture that there was no implied retainer.

191. Necessity is the appropriate test for such an implication. If the parties would or might have acted as they did without such a contract there is no necessity to imply one: that is to say no intention to form contractual relations will be inferred.

192. It is not irrelevant here that the letters of 14 February 2017, as Mr McD understood, reflecting his shareholding, were drafted not by DLS, but by his in-house lawyer. He sought, later, to "attach" them to DLS, but they show, as does Mr McD's case concerning the share transfer forms which were independently procured and signed by CG for Mr McD - that his relationship with DLS was not one of implied solicitor/client retainer in respect of his own interests in Arc. His actions with regard to his interests in Arc was part of the pattern in which Mr McD had introduced Arc and CG as a new client, his own interests being separately considered and protected by the steps that he himself took.

193. It is in my judgement therefore not a necessary inference from these circumstances that he was a client of DLS for the purposes of the Land transaction.

194. I must then consider next whether irrespective of my findings to this point, a duty of care arose by reason of an assumption of responsibility in Tort.

DUTY OF CARE IN TORT

195. The alternative case is put on the basis that an assumption of responsibility to Mr McD was made by DLS and the tortious duty which arose was breached by their failure to draft the Trust Deed, alternatively, otherwise protect his interests. This is on the basis, necessarily, that there was no retainer, express or implied as to the drafting of a Deed or the protection of his interests.

196. The cases of *NRAM v Steele* [2018] 1 WLR 1190 and *P and P Property Ltd v Owen White and Caitlin LLP* [2019] (CA) Ch 273 have clarified that a person who seeks to prove reliance upon a solicitor, where that person is not the solicitor's client, may only fix them with liability where there was an assumption of responsibility. The assumption depends upon it being

    i) reasonable to rely on the solicitors, and

    ii) that the solicitors should have reasonably foreseen that the Claimant would so rely.

197. Where a solicitor is retained by one party, however, and where there is a conflict of interest between that party and another to the transaction the court will be slow to find the solicitor assumed a duty of care to that other party to the transaction: such an assumption is ordinarily improbable. It is in special circumstances only (see *Dean v Allin & Watts* supra) that such a duty of care will be established - in that case it was in part because the solicitors knew that the other party was relying upon its advice. There, very importantly in my view, the transaction in question was of benefit to each of the parties.

198. I accept the submission of Mr Harris for DLS that that is different from the current circumstances, where what is alleged is reliance in respect of an alleged Trust Deed or the giving of advice, that was to the benefit of Mr McD alone, and not to Arc, who were the clients instructing DLS under a retainer. As was noted by Patten LJ in *P&P Property Ltd v Owen White & Catlin LLP* [2018] EWCA Civ 1082 at [76]:

> "*There will rarely be an actual, conscious and voluntary assumption of responsibility* [in a non-client situation] *not least because the solicitor or other professional will have a client to whom he is contractually bound. But, on the basis that the Court is deciding whether to treat the defendant as having assumed legal responsibility to the third party, non-client, for his actions, it will be necessary to balance the foreseeability that the third party will rely on the professional to perform their task in a competent manner against any other factors which would make such an imposition of liability unreasonable or unfair.*"

[Emphasis added.]

That case was different on its facts from the present case, but the present case is different again from *Dean v Allin & Watts* where there was

> "*An expectation that the arrangements the solicitor was instructed to put in hand would enure for their mutual benefit. The third party was in as approximate a position to the solicitor as he would have been had he been their client*."

– as described by Patten LJ in *P&P Property*, drawing the distinction between those two cases (see paragraph [73]).

199. The intention of Mr McD might have been described as to protect himself against the possibility of his interests and those of CG/Arc ceasing to be coterminous. Although there was no immediate conflict of interest between them it could not be said that the benefit of his proposed document inured in any way to the benefit of Arc, DLS's client. In the current circumstances it is impossible in my view to find that there was an assumption of responsibility to Mr McD and the scope of the duty did not extend to drafting a Trust Deed to protect (as he saw it) him, nor to advising him upon interests generally.

200. I should indicate that, in any event I am unconvinced that, even were there a retainer, that DLS would have been in breach. There was no dispute between the parties as to the scope of a solicitor's duty. In *Minkin v Landsberg* [2015] EWCA CIV 1152 Jackson LJ summarised the applicable principles on the scope of the solicitor's duty to its client as follows:

> "*i) A solicitor's contractual duty is to carry out the tasks which the client has instructed, and the solicitor has agreed to undertake.*
>
> *ii) It is implicit in the solicitor's retainer that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out.*
>
> *iii) In determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client.*
>
> *iv) In relation to (iii), it is not possible to give definitive guidance, but one can give fairly bland illustrations. An experienced businessman will not wish to pay for being told that which he/she already knows. An impoverished client will not wish to pay for advice which he/she cannot afford. An inexperienced client will expect to be warned of risks which are (or should be) apparent to the solicitor but not to the client.*
>
> *v) The solicitor and client may, by agreement, limit the duties which would otherwise form part of the solicitor's retainer. As a matter of good practice the solicitor should confirm such agreement in writing. If the solicitor does not do so, the court may not accept that* any *such restriction was agreed.*"

201. Jackson LJ explained that the principal question as to the scope of the solicitor's duty is the second of these, and whether the giving of advice is "reasonably incidental" to the work being carried out under the retainer. Even had there been a retainer here, I do not accept that Mr McD could bring himself with the scope as described in the case law. This involves pointing out hazards which should be obvious to the solicitor but which the client might not appreciate. Bingham LJ stated that:

> "*If in the exercise of a reasonable professional judgment a solicitor is or should be alerted to risks which might elude even*

> *an intelligent layman, then plainly it is his duty to advise the client of these risks or explore the matter further.*" (*Personnel (Employment Agency) Ltd v Alan R Pulver and Co* [1987] 1 WLR 916 at 922E).

202. I do not accept that the risks of which Mr McD now says (on this hypothesis) he ought to have warned, were risks that in any way eluded Mr McD, who was in any event far more than just an intelligent layman nor should DLS reasonably have thought they might.

203. There is a large number of cases emphasising that the scope of the duty is very fact sensitive: the characteristics of the client as known to the solicitor are relevant and that includes business experience and relevant personal characteristics. I do not accept as argued by Mr McD that the scope of duty owed to Mr McD included in present circumstances an obligation to warn of the danger to his own interests in respect of the beneficial interest he asserted over the shares. This was not one of those cases in my view, like *Higgins v Naugler* (1994) 133 NSR (2d)157 relied upon by the Claimant.

204. A useful pointer to the type of client that Mr McD was is seen in DLS's history of dealing with Mr McD. It was a history of assisting an experienced and well-versed businessman, used to operating whether directly or, often, indirectly through corporate entities in the manner which suited him at the relevant time. He had had a colourful commercial career; there had been liquidations, bankruptcies, criminal proceedings by the Revenue and threats of foreclosure. He was plainly by temperament an entrepreneur and a taker of commercial risks. He had a wide variety of advisors available to him. There is evidence he had at least one other firm of solicitors involved in his affairs at the same time as DLS, and he had the services of Pria, his "in-house free-lance" who had drafted the 14 February letters. He had a history of presenting the issues he wished to be dealt with squarely, of asking for such advice as he needed, to be resolved in a manner that he chose. He was not a client of the firm for the Land transaction of Arc, and the duties asserted were not owed to him.

REMAINING ISSUES

205. I will deal relatively shortly with the remaining issues.

Causation

206. On the premiss that there had been a breach of duty, the court must consider what would have happened had Mr McD received reasonable advice. It is not in contention but that such advice must be in the middle range ("*broadly in the middle rather than at the edges of advice which might have been given without negligence*") per Briggs J in *Magical Marking Ltd v Ware & Kay LLP* [2013] EWHC (59) (Ch) at paragraph 157).

207. Mr McD asserts he would have chosen to be a director and majority shareholder if he had been advised this was the simplest and safest way of protecting his position – as he claims he should have been.

208. In my judgement, Mr McD was very well aware of the options of being a director and majority shareholder or taking the route of nominees. His activities with regard to Ace, Biffa, MPD and Penygroes all of which involved the use of nominees at some time, showed his sophistication and awareness. Indeed, it was Mr McD, without assistance from DLS, who had identified that signed stock transfer forms would assist him. I accept the submission on behalf of DLS, that the circumstances of the history as between AMG and Mr McD concerning the Land gave him every incentive to stand back from the transaction and not be named as a director or shareholder.

209. In light of the existence of the blank stock transfer forms, which Mr McD believed were his protection, I do not accept it is more likely than not that he would have taken any advice, if given, that he should be a director or shareholder particularly in light of the history of his dealings with the Land in respect of the creditors of Ace.

210. I also accept the DLS's contention that it is most unlikely that even if a Deed of Trust had been drawn up, Mr McD would have registered as a person with significant control of Arc under Schedule 1A of the Companies Act 2006, before CG and he had broken off good relations in May 2017. As DLS point out, in the case of Biffa, James Connaughton was registered as the PSC even though Mr McD was the beneficial owner of the business; the same was so of LBC.

211. An important element in the picture is the fact that CG was the sole director and shareholder: his presence and powers trumped those of Mr McD and had Mr McD registered himself as PSC, he could have been removed from the register. Indeed, when he did so over a year later, in September 2018, CG removed him on 3 October 2018. The presence or absence of a Deed of Trust would have made no difference to that action so long as CG was in sole legal control of Arc.

212. The new and ingenious notion that in fact what should have been advised was that the creation of a Deed of Trust exhibiting the share transfer certificates signed in blank, does not take the matter further for Mr McD. Firstly, it was not Mr McD's evidence that this is what he instructed, and it is not what was pleaded. DLS make the pertinent point this is effectively using the benefit of hindsight. The argument does, as suggested, amount in effect to saying that the stock transfer forms, which were the material part, had not been safe where they were - but Mr McD who had what he needed, believed that in his own office, they were.

213. Accordingly, on the assumption that the instruction was given, and there had been negligence, what would have been the likely outcome: would the sale to AMG have been prevented? Mr McD asserts that CG would have been deterred from acting as he did if there had been a signed Deed of Trust. Again, I agree with DLS this is unrealistic and speculative in the context of the personalities and the actions at play. A Deed of Trust recording Mr McD's interest in Arc would not have made any difference at all in my view to the outcome concerning the sale.

214. Evidence was called about what happened following the rupture between CG and Mr McD. DLS, correctly, deduced that they were not in a position to act for Mr McD whilst they still held a retainer in respect of Arc given that their interests were no longer coterminous. I reject the suggestion that either Mr Dass, MR or DP were contemplating solicitor/own client conflict at the time when they spoke with the SRA at the end of May 2017.

215. I accept the submission of DLS that there is nothing in respect of a Deed of Trust that could have assisted Mr McD in his struggle with AMG. There was no magic to such a document that could have turned the tide in respect of CG's ability to direct and control Arc and its involvement in the sale of the Land.

216. DLS gave evidence that they did tell Mr McD that they could not assist him once the problems had arisen, in respect of his immediate concerns: namely stopping the sale of the Land. Once able to act in early July 2017, DLS drafted a letter before action in mid-July sent to CG in early August. There was a procedural misstep and following further advice from Counsel, it was realised at the end of August that proceedings were required but, by that time the Land had already been transferred to Midwest on 25 July 2017. As DLS assert, there is nothing that the possession of a Deed of Trust could have achieved during this time. It would not have been adequate or helpful in seeking to stop the sale. Had he chosen to, Mr McD could have anyway gone to court and applied for an injunction relying upon the letters and agreement in February 2017 and asserting that CG held the shares on Trust for Mr McD.

217. In my judgement, the evidence that a Deed of Trust might bring to the Court could equally have been proffered by means of the letters and indeed by a statement on oath from Mr McD as to his interest. Again, it cannot be said that the absence of some Deed of Trust was causative of the failures with regard to the transfer of the Land.

218. I certainly cannot accept the argument on behalf of Mr McD to the effect that Mr McD would have come out of the shadows, and put himself on the books.

219. Further, I do not accept that if DLS had advised/acted as Mr McD said they were duty bound to do, there would have been no sale to Midwest. In my judgement it is not the case that there was a month of lost opportunity in DLS's offices, as suggested by Mr McD. I accept the evidence that in respect of the Land transaction, at this time, Mr McD was pursuing his own remedies and attempted solutions, and not relying on DLS in this regard. I accept the evidence that he was regularly in touch about a number of other matters which were carried on, on his behalf by them. The Land transaction was not one of them.

220. I have accepted the evidence that Mr McD was told about the conflict of interest and the impossibility of DLS acting for him against CG, the legal director and shareholder in Arc. Mr McD is accordingly wrong to say that there would have been no sale to Midwest and DLS "*could actually have taken some action rather than wasting the key months of May, June and July 2017*". This does not reflect what I find to actually have been going on at this time.

221. It is asserted that a Deed of Trust "*would have made all the difference evidentially and practically*" to the actual position of SM in mid-July. I disagree for the reasons given.

222. I also do not accept that DLS were either dilatory or mistaken about time limits.

223. Accordingly, even were DLS in breach in one of the ways alleged against them by Mr McD, I find it impossible to spell out a causative link in any failure to draft the Deed of Trust (either with or without an annexed signed share transfer form) and the effecting of the sale to Midwest, cutting out Mr McD.

DAMAGES

224. I will go on briefly to deal with the issue of damages in any event as the approaches of the two parties were starkly opposed. I deal with this issue on the basis that I am wrong about the absence of breach whether of an express retainer, an implied retainer or a duty of care and that I am wrong that any such breach was not causative of the claimed loss to Mr McD.

225. Mr McD asserts he has lost the value of his 70% interest in Arc - which represents the value of the Land - and he has also suffered consequent costs and expenses as a result of DLS's breaches. His case on damages was refined between initial pleadings and his final Schedule of Loss read with the written closing submissions made on his behalf.

226. He claimed the loss of the opportunity to purchase and then re-sell the Land but his preferred case was that he would have retained the land and thus benefitted from its increase in value over time. He therefore calculates his loss by reference to the present value of the Land.

227. The value of the Land is put at £1,645,650.00 in May 2017 but as having risen to £3,657,000.00 by March 2021, as estimated by his expert witness Chris Monkhouse BSc MRICS MCIWM RICS, who is a registered valuer. Mr McD claims as his share 70% of that value in 2021, namely £2,559,900.00 together with £55,000 odd of costs including the costs of attempting to pursue Midwest, the Land Tribunal etc and other legal fees.

228. Mr McD initially claimed he lost the opportunity to continue trading with his other enterprise, London Borough Contractors (Co No 07282969), and a lost director's loan. However this claim was withdrawn as was an initial claim for damages for mental distress and pain and suffering.

229. Expert valuation evidence was relied upon by both sides in this case to ascertain the value of the land at the 2017 date and just before trial, but there was a divergence of view as to the most helpful approach to the evidence obtained. Whilst I am prepared to accept, as their qualifications testify, both Mr Monkhouse for Mr McD and Mr Crawford for DLS were well used to the valuation exercise and experts in their field with wide-ranging experience, it was clear that this was a very difficult piece of land to value. Essentially two different approaches were adopted by the experts, I mean to do them no disservice by not descending into detail about their evidence, given my earlier conclusions on the issues arising in this case.

230. Put broadly, Mr Monkhouse for Mr McD, who had himself valued the Land in the past, felt able to proffer a number of comparable sites which he said were helpful in indicating land values. He sought to place a capital valuation on the Land and dismissed the approach adopted by Mr Crawford, who sought to ascertain a rental value and calculate the worth from that figure. Mr Crawford was criticised in cross-examination for adopting an unorthodox (and, it was suggested, erroneous) approach for testing market value. Mr Crawford however stated he found it impossible to find any realistic comparables and therefore used a rent and yield approach..

231. He explained that land developers routinely calculate land values in this way by reference to a putative tenant. I agree there were no realistic comparables. I was struck

by how different the asserted comparables from Mr Monkhouse were. Accepting that the Worminghall land was in a rural, secondary location nonetheless he proffered a parcel in Haddenham, in a traditional industrial location advertised as "*commercial development land*" which was seven miles from the M6 with direct access to a station and had outline planning consent. There was nothing to prevent building there whereas, apparently unnoticed by Mr Monkhouse, the Land in question was in the greenbelt. It is fair to say Mr Monkhouse said adjustments had to be made but I was compelled by the evidence of Mr Crawford that in truth this was not a useful comparator. Similarly, a piece of land in Banbury was by a junction on the M40 with surrounding light industrial use. It was a prime distribution site with motorway connections and, again, nothing to prevent development taking place. It was fairly accepted that there was no actual similar site found in evidence. Mr Monkhouse indicated that it was a question of the discount you applied which was necessarily a matter of expert experience.

232. Mr Monkhouse did not agree Mr Crawford's comparables; he said that they were more rural and not appropriate. He disagreed firmly with the rental yield approach to evaluation which was appropriate only if you were considering an investment. This was not investment land and without a tenant, as this land was, it was very difficult to value he said on a rental basis. He disagreed that it was even legitimate to test what value might be, were one to look at rental.

233. Perhaps the most striking feature of the evidence was the large element of necessary (if informed) speculation, or indeed, better expressed, expertise and experience that was required to place a value on the Land absent an actual price that had been paid for it.

234. Mr McD disclaimed the sale price in 2017 to Midwest as properly representative of the price at that stage. Mr Monkhouse valued the property in July 2017 as £1.645 million, whereas Mr Crawford puts the value at £1 million, the sale price. Mr McD suggests that the price at which it was in fact sold has to be regarded as heavily discounted because of the fraud of CG; the sale was tainted by it and the circumstances of the unauthorised transfer to Midwest, from which CG was taking a quick profit. I disagree. There was no actual evidence to justify that conclusion, and the two "*bids*" that Mr McD claimed to have received in May 2017, were likewise not properly evidenced and themselves were tainted by what I judge was Mr McD's attempt to elevate the on-sale price he was trying to negotiate from Midwest.

235. As set out above, Mr Monkhouse puts a value on the Land as at March 2021 at £3.657 million and Mr Crawford after discussion in evidence, at £1.5 million in 2021.

236. Mr McD argues that the court should assess damages at the date of the trial. This is contrary, of course to the normal rule that damages are assessed at the date of the breach (of the contract of retainer, or the tortious duty). Recognising that the Court may depart from that rule, Mr McD urges that it is fairer for him, and more closely reflects full compensation for his losses to be assessed at the date of trial (when the value of the land, on his case, has almost trebled).

237. He invites the Court to accept he would have continued to occupy the site and to trade from it. He refers to the fact he had had a meeting with tax advisors, Mr Avari, and had spoken to his accountants in February 2017 further that he had Arc and Aylesbury, as companies holding the property and/or able to trade from it.

238. I do not accept that it is more likely than not that Mr McD would have bought the Land and traded from it. I do not accept that he is likely to have had finance available to him to fund the purchase at the end of the year (completion was anticipated in December 2017) given the state of his finances as set out earlier in this judgment.

239. There was no cogent evidence to make it more likely than not that any institution was ready, willing and able to lend him sufficient funds to complete the purchase. There was no evidence from the Mr Philip Townend mentioned by Mr McD in evidence who had apparently previously invested in property belonging to Mr McD; nor did Mr McD in evidence give any coherent picture of financial support in what were, it appeared, quite dire financial circumstances. I accept, as suggested by DLS, it is far more likely that Mr McD was intending to act as in fact CG acted, namely, to be the "middleman" on a sale transaction, and sell the Land on at a time before the completion date in December 2017. Accordingly, his profit from the transaction would have been the difference in price he was able to negotiate. His loss, of course, would have been as to 70% as to any differential, given his share. This was calculated by DLS in their Counter-Schedule. Taking the valuation of £1,000,000 in 2017, subtracting the £850,000 purchase price (by reference to the proposed AMG transaction) and netting off costs, interest payable to AMG under the 3 March 2017 contract with him, and tax, DLS arrive at a figure of less than £65,000 for his loss. DLS argue, and I accept as a matter of principle, that the claim for loss on the basis of a lost sale transaction must take into account the necessary expenditure such transaction would have entailed.

240. In summary, any other course of action than an onward sale is in my judgement highly speculative, and was not proven to have been the likely outcome. This is so, even though I accept Mr McD had had a long interest in the Land and had occupied it for various purposes. It is the financial picture given to the Court that makes these probabilities so clear. I note also, as advanced by DLS, that in his Particulars of Claim, Mr McD asserted that the sale of the Land would have allowed him to inject capital into LBC to protect the debt which the company owed to Mr McD and would have enabled LBC to continue to trade. Such an intention is at odds with an assertion as to future occupation and trading from the Land.

241. Given that there was no evidence of an affordable offer of funding before the Court, nor other material dealing with the time in question that showed sufficient funds to pay the £850,000 odd plus duties, etc, and given Mr McD's position with Ocelot Resolutions Ltd and with NatWest in January 2017, in my judgement it is overwhelmingly likely that the real interest Mr McD retained was the hope of a swift on sale of the Land to assist in his other financing issues.

242. I agree with DLS, that on the evidence before the Court, the most likely outcome was a sale shortly after the proposed purchase in December 2017.

243. Had I found any breach of contract or tortious duty to Mr McD, I would have placed a value on the Land in 2017 as assessed by Mr Crawford, whose approach to giving evidence and his consideration of the difficulties with regard to valuation of this land, were careful and in my judgement suggested his view was the more reliable. Accordingly, I accept the Land was then worth as he indicated, £1 million. The best evidence of the value was indeed the price that had been negotiated for a willing buyer and seller.

244. I have rejected what I regard as the speculative possible offers from Modebest and HDD and there is therefore no evidence beyond Mr Crawford's assessment, to set against the value of the sale in July 2017 and damages would have had to be calculated on that basis.

SUMMARY

245. I find:

i) DLS did not have an express retainer with Mr McD in respect of the Land purchase by Arc.

ii) DLS did not have an implied retainer with Mr McD in respect of the same.

iii) No tortious duty was placed on DLS to advise Mr McD as he alleges.

246. Accordingly, this claim fails.

247. Had I found a breach, such breach was in any event not causative of any loss to Mr McD.

248. Had there been any breach causing loss, then it is overwhelmingly more likely that Mr McD would have disposed of the Land within 2017, before completion in December 2017.

249. Any damages would, on this basis be calculated on a valuation of the Land in July 2017 and be taken at £1 million, subject to the 70% interest of Mr McD and less any costs he would in any event have incurred in purchase and onward sale.

250. I would not have awarded the sums claimed as special damages. They were in my estimation, not in fact to be characterised as damages flowing from any breach damages, alternatively they could be described as too remote - or indeed not reasonably incurred, being in the main the costs of various abortive proceedings which it could not be said were reasonably pursued in the circumstances - and indeed were in part expressly advised against in the disclosed materials.