Neutral Citation Number: [2022] EWHC 364 (Ch)

Case No: CR-2020-003226

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF CITY BUILD (LONDON) LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF ISS LONDON LTD (IN LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

The Rolls Building
London, EC4A 1NL
Date: 23/02/2022

Before :

Insolvency and Companies Court Judge Burton

- -

MANOLETE PARTNERS PLC

Applicant

- and -

(1) CLIFFORD NORMAN SMITH

First Respondent

(2) CHARLES JOHN DARTMOUTH

Second Respondent

(3) CHARLES DARTMOUTH LTD

Third Respondent

- -

James Hannant (instructed by **CooperBurnett LLP**) for the **Applicant**
Simon Hunter (instructed by **HA Law**) for the **Second and Third Respondents**
The First Respondent appeared in person
Hearing dates: 18 to 20 January 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

INSOLVENCY AND COMPANIES COURT JUDGE BURTON

ICC Judge Burton :

1. This is the trial of an action brought by Application, originally dated 30 July 2020 and amended on 8 March 2021, by Manolete Partners plc as assignee of claims by Mansoor Mubarik (the "Liquidator") in his capacity as liquidator of City Build (London) Ltd ("City Build") and ISS London Ltd ("ISS") (together the "Companies").

2. The Applicant seeks relief against:

   i) the First Respondent, Clifford Smith ("Mr Smith") as a *de jure* director and the Second Respondent, Charles Dartmouth ("Mr Dartmouth") as a *de facto* or shadow director of the Companies in the form of damages or equitable compensation for alleged breaches by them of their duties as directors of the Companies by causing or acquiescing in the Companies making payments between 19 September 2013 and 14 September 2015 (listed in Schedules attached to the Liquidator's witness statement dated 30 July 2020 (the "Payments")) to Mr Dartmouth and/or Charles Dartmouth Limited ("CDL") in circumstances where the Companies were under no legally enforceable obligation to make them, and that the Payments were therefore made in breach of trust; and

   ii) against Mr Dartmouth and CDL, declarations that each of the Payments which post-dated 6 November 2013 were transactions at an undervalue within the meaning of section 238 of the Insolvency Act 1986 ("the Act") and consequential relief.

Background

3. City Build was incorporated on 19 September 2011. Its sole director at the date of incorporation was Mr Dartmouth's son, Andrew Dartmouth. Mr Smith is recorded as having been appointed a director on 1 November 2012 with Andrew Dartmouth resigning the following day. City Build's records show that at the time of incorporation, there were 100,000 allotted shares with a nominal value of £1 per share. City Build's annual returns for the years 2012 to 2014 each state that the shares remain unpaid. The shares are shown as initially issued to Andrew Dartmouth, transferred on 1 February 2013 to Mr Dartmouth and transferred on 28 August 2013 to Mr Smith.

4. A resolution was passed on 6 November 2015 for City Build to enter creditors' voluntary liquidation and the Liquidator was appointed.

5. ISS was incorporated on 12 July 2012. Its sole director at that time was Claire Lucas whom Mr Smith described in his witness statement as his and Mr Dartmouth's secretary. Mr Smith was appointed as a director on 22 July 2013. Ms Lucas resigned on the same date. ISS's annual return states its entire issued share capital to be a single share, initially held by Ms Lucas and transferred in 2014 to Mr Smith.

6. The Liquidator was appointed to ISS on 6 November 2015 when it entered creditors' voluntary liquidation.

7. Mr Smith's written evidence states that the "overriding purpose" of each Company's business was to be engaged in business with Keltbray Limited ("Keltbray").

8. The statements of affairs signed by Mr Smith on behalf of the Companies showed an estimated deficiency for City Build of £230,064 and £232,316 for ISS. The vast majority of the debts were said to be due to HMRC. It initially lodged proofs of debt for £23,391 for City Build and £32,694 for ISS. Since then, by an email to the Liquidator dated 11 January 2022, Mr Axeby, HM Inspector of Taxes informed the Liquidator that having received copies of the Companies' bank statements a day earlier, and having noted that neither Company submitted any returns during their trading history (and paid only £345 by way of a contractor's CIS deduction) and "having briefly reviewed the bank statements, it appears that the following estimated figures are owed to HMRC". He sets out a table showing HMRC's estimated liabilities for each company in respect of PAYE, NIC, CIS tax and VAT and concludes that he has estimated City Build's total liability for tax to be £2,195,311.16 and £1,031,690.72 for ISS, to which, in each case, interest and penalties would apply.

9. Despite several requests, Mr Smith failed to provide the Liquidator with any books and records for either Company, other than what the Liquidator describes as "a series of inconclusive VAT calculations and a limited number of invoices". He obtained copies of each Company's bank statements from which he identified several payments which appeared to be to Mr Dartmouth and CDL and which, in the absence of any books, records, invoices or receipts, were unexplained. The payments are variously described in the bank accounts as: "CHARLES DARTM(REHTS)"; "C DARTMOUTH BX WOODBRIDGE"; "C DARTMOUTH MATERIALS"; "C DARMOUTH LTD"; "CJ BE DARTMOUTH (RPY)"; "CHARLES DARTM(RENTS)"; "CHARLES DARTMOUTH"; "C DARTMOUTH BACS".

10. The liquidator identified 68 such payments in respect of City Build between 18 September 2013 and 14 September 2015 totalling £853,476.83 – of which £545,216.62 took place in the two years preceding City Build entering CVL.

11. He has identified similar payments in respect of ISS. Between 28 March 2014 and 6 August 2014 (ie within two years of ISS entering CVL) payments totalling £831,530.57 were made in respect of entries bearing a Charles Dartmouth or CDL reference.

12. The total value of the Payments is £1,685,007.40 of which £1,376,747.19 were made in the period of two years before the Companies entered CVL (the "TUV Payments").

13. It is not in dispute that each of the Payments was made, nor that one or other of Mr Dartmouth or CDL was the recipient of the Payments.

Relevant legal principles

14. The Applicant's application notice sealed on 3 August 2020 initially referred only to Mr Smith's alleged breaches of duties owed by him as a director of each of the Companies and/or for breach of trust.

15. By order of ICC Judge Jones dated 5 March 2021 the Applicant was permitted to amend its application notice to include damages and/or equitable compensation against Mr Dartmouth for breaches of duties owed by him to the Companies in his alleged capacity as a *de facto* and/or shadow director of the Companies and/or for breach of trust.

De facto / shadow director

16. The Companies Act 2006 ("CA06") simply defines a director as "including any person occupying the position of a director, by whatever name called". A person who has been formally appointed as a director is known as a "*de jure* director". A *de facto* director is someone who acts as a director but who has not been formally appointed as such. A *de facto* director is subject to the same duties and liabilities as a *de jure* director under common law, the Companies Acts and the Company Directors Disqualification Act 1986.

17. Section 251 of the CA06 defines the term "shadow director":

> "(1) In the Companies Acts 'shadow director', in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act."

18. Helpful guidance on factors to assist in the identification of a person acting as a *de facto* director was given by Arden LJ (with whom Elias and Tomlinson LJs agreed) in *Smithton v Naggar* [2014] EWCA 939. At paragraph 33 she said:

> "Lord Collins [in *Holland v HMRC*] sensibly held that there was no one definitive test for a *de facto* director. The question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were director. However, a number of points arise out of *Holland* and the previous cases which are of general practical importance in determining who is a *de facto* director. I note these points in the following paragraphs."

19. At paragraph 34 she continues:

> "The concepts of shadow director and *de facto* are different but there is some overlap.
>
> 35. A person may be a *de facto* director even if there was no invalid appointment. The question is whether he has assumed responsibility to act as a director.
>
> 36. To answer that question, the court may have to determine in what capacity the director was acting, (as in *Holland*).
>
> 37. The court will in general also have to determine the corporate governance structure of the company so as to decide in relation to the company's business whether the defendant's acts were directorial in nature.
>
> 38. The court is required to look at what the director actually did and not any job title actually given to him.
>
> 39. A defendant does not avoid liability if he shows that he in good faith thought he was not acting as a director. The question

> whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief.
>
> 40. The court must look at the cumulative effect of the activities relied on. The court should look at all the circumstances 'in the round' (per Jonathan Parker J in *Secretary of State v Jones*).
>
> 41. It is also important to look at the acts in their context. A single act might lead to liability in an exceptional case.
>
> 42. Relevant factors include:
>
> i) whether the company considered him to be a director and held him out as such;
>
> (ii) whether third parties considered that he was a director.
>
> 43. The fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision.
>
> 44. Acts outside the period when he is said to have been a de facto director may throw light on whether he was a director in the relevant period.
>
> 45. In my judgment, the question whether a director is a de facto or shadow director is a question of fact and degree..."

20. Mr Hannant referred me to *Popely v Popely* [2019] EWHC 1507 (Ch), described by the judge, HHJ Hacon (sitting as a deputy judge of the High Court) as a double derivative action in which the claimants alleged that the defendant, in breach of fiduciary duty, transferred assets belonging to a company of which he was a *de facto* director. The defendant submitted that the correct analysis of the allegations against him were that he acted as a shadow director and not, as claimed, a *de facto* director. HHJ Hacon noted that the authorities have shown that the two concepts are not mutually exclusive. A shadow director does not necessarily influence the whole range of a company's activities. He may, for example, assume the functions of a director in relation to one part of the company's activities whilst giving directions to the board in relation to another. At paragraph 85 of his judgment, HHJ Hacon said:

> "[86] I take from those paragraphs firstly, that the concepts of *de facto* and shadow director are distinct, but they have the common characteristic of persons who exercise real influence, other than as a professional adviser, over the corporate governance of a company. Secondly, an individual can be simultaneously both a *de facto* and shadow director of a company. The capacity in which he acts will depend on the nature of the act. It follows that the question of whether an individual is acting as a *de facto* director must be considered in relation to each of the acts

> in question, as opposed to considering whether that individual qualifies as a *de facto* director overall.
>
> …
>
> [87] …It would follow that where an act of an individual is an act done in his capacity as a shadow director, that act cannot also be done in the capacity of a *de facto* director."

21. Mr Hunter referred to a decision of Jonathan Gaunt QC sitting as a deputy judge of the High Court in *Re Gemma Ltd* (in liquidation) [2008] BCC 812. The company's liquidator brought misfeasance proceedings against a husband and wife, alleging that the wife was a *de facto* director of the company (her husband having been formally appointed as a *de jure* director). At paragraph 40, the judge summarised the principles which emerge from the various authorities cited to him:

> "40. From those cases I derive the following propositions material to the facts of this case:
>
> (1) To establish that a person was a *de facto* director of a company, it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director (per Millett J. in *Re Hydrodan (Corby) Ltd (in liq.)* [1994] B.C.C. 161 at 163.
>
> (2) It is not a necessary characteristic of a *de facto* director that he is held out as a director; such 'holding out' may, however, be important evidence in support of the conclusion that a person acted as a director in fact (per Etherton J. in *Secretary of State for Trade and Industry v Hollier* [2006] EWHC 1804 (Ch); [2007] B.C.C. 11 at [66]).
>
> (3) Holding out is not a sufficient condition either. What matters is not what he called himself but what he did (per Lewison J. in *Re Mea Corp Ltd* [2006] EWHC 1846 (Ch);[2007] B.C.C. 288).
>
> (4) It is necessary for the person alleged to be a *de facto* director to have participated in directing the affairs of the company (*Hollier* (above) at [68]) on an equal footing with the other director(s) and not in a subordinate role (above at [68] and [69] explaining dicta of Timothy Lloyd Q.C. in *Re Richborough Furniture Ltd* [1996] B.C.C. 155 at 169–170).
>
> (5) The person in question must be shown to have assumed the status and functions of a company director and to have exercised 'real influence' in the corporate governance of the company (per Robert Walker L.J. in *Re Kaytech International Plc* [1999] B.C.C. 390).
>
> (6) If it is unclear whether the acts of the person in question are referable to an assumed directorship or to some other capacity,

> the person in question is entitled to the benefit of the doubt (per Timothy Lloyd Q.C. in *Re Richborough Furniture Ltd* (above)), but the court must be careful not to strain the facts in deference to this observation (per Robert Walker L.J. in *Kaytech* at 401). "

22. Counsel agreed that the burden of proving that Mr Dartmouth was a *de facto* or shadow director, lies with the Applicant.

Directors' duties under the Companies Act 2006

23. The Liquidator's first witness statement refers expressly to the duties owed by a director pursuant to sections 172 (duty to promote the success of the company), 174 (duty to exercise reasonable skill care and diligence) and 175 (duty to avoid conflicts of interest) of the CA06. He claims that at a time when the evidence suggests that the Companies were insolvent or of doubtful solvency and at a time when, as a result, the duties of a director extend to acting in the best interests of a company's creditors, whose interests should be considered as paramount, Mr Smith and Mr Dartmouth, in breach of their duties as *de jure* and *de facto*/shadow director respectively, caused the Payments to be made for no apparent consideration or good reason.

24. The liquidator has received almost no books and records from any party in relation to the Companies. Documentary evidence, particularly contemporaneous documents recording a company's affairs, is of particular assistance and value to the court. Sadly, it is often the case that when a company enters liquidation, its liquidator is faced with a challenging lack of books and records. In *Re Mumtaz Properties Ltd* [2011] EWCA Civ 610 the Court of Appeal considered the extent to which directors facing claims for misfeasance could rely upon absent records. In *Mumtaz* the director's sworn statement of affairs showed the respondents owing significant amounts under their loan accounts with the company. The liquidator was initially able to reconcile those amounts with the company's Sage accounting software but subsequently revised the figures in the light of other evidence of the amounts shown in the company's accounts as being due under directors' loan accounts. Arden LJ summarised the principles at paragraphs 16 and 17 of the Court's judgment:

> "16. The approach of the judge in this case was to seek to test the evidence by reference to both the contemporary documentary evidence and its absence. In my judgment, this was an approach that he was entitled to take. The evidence of the liquidator established a prima facie case and, given that the books and papers had been in the custody and control of the respondents to the proceedings, it was open to the judge to infer that the liquidator's case would have been borne out by those books and papers.
>
> 17. Put another way, it was not open to the respondents to the proceedings in the circumstances of this case to escape liability by asserting that, if the books and papers or other evidence had been available, they would have shown that they were not liable in the amount claimed by the liquidator. Moreover, persons who have conducted the affairs of limited companies with a high degree of informality, as in this case, cannot seek to avoid

> liability or to be judged by some lower standard than that which applies to other directors, simply because the necessary documentation is not available."

Transactions at an undervalue

25. Section 238(4) of the Act provides—

> "(4) For the purposes of this section and section 241, a company enters into transaction with a person at an undervalue if:
>
> (a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or
>
> (b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company."

26. The word "transaction" is defined widely at section 436 of the Act as "A gift, agreement or arrangement." Section 238(2) provides that where the company has at a relevant time (defined in section 240) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order.

27. To have occurred at a relevant time, the transaction must have taken place within two years ending with the onset of insolvency, in this case within two years of the date on which the resolution was passed to put each of the Companies into creditors' voluntary liquidation: 6 November 2015. The legislation provides that a time will not be a "relevant time" unless the company in question was, at that time, unable to pay its debts within the meaning of section 123 of the Act or became unable to pay its debts within the meaning of that section as a consequence of the transaction. In other words, the company must have been insolvent at the time of the transaction or rendered insolvent as a result of it, where insolvency under section 123 comprises both a cash flow and a balance sheet test.

28. A company's insolvency for these purposes is presumed in relation to any transaction at an undervalue that is entered into with a person who is connected with the company. A party may be connected with the company in a number of ways. At trial, Mr Dartmouth and CDL did not dispute that they fell within the definition of connected parties for the purposes of the section.

29. Where the Court is satisfied that a transaction comprises a transaction at an undervalue within the meaning of the section, it shall make such order as it thinks fit for restoring the position to what it would have been, if the company had not entered into the transaction.

30. Section 241(1) identifies specific types of orders available to the court, but they are not intended to fetter the general breadth of the court's discretion.

31. Section 238 includes its own statutory defence. Subsection (5) provides:

> "The court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied—
>
> (a) that the company which entered into the transaction did so in good faith and for the purposes of carrying on its business, and
>
> (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company."

32. The burden of proof in relation to the statutory defence falls on the respondent. Robust evidence will be required (see *Barton Manufacturing Co Limited* [1999] 1 BCLC 740).

Witnesses

The Liquidator

33. The circumstances giving rise to the Applicant's case were set out in the Liquidator's witness statements. By agreement between the parties, he was not called to give evidence in person.

Mr Smith

34. Despite orders permitting further evidence, Mr Smith filed just one witness statement from which it appeared that he did not intend to defend the claim against him.

35. The day before trial, I received an email from his son, Frazer Smith, who stated that he would be assisting his father who was a litigant in person and enquired what time the trial was due to start. As time was short, and it was not clear what Frazer Smith meant by "assisting" his father, Mr Smith and Frazer Smith were provided with the Court's guide for litigants in person and a guide for McKenzie Friends.

36. Frazer Smith responded promptly to clarify that he was not intending to address the Court in any capacity. He explained that Mr Smith is suffering with the onset of dementia and that whilst he was determined to attend to give evidence, "he will need some support so that he does not get confused". Frazer Smith informed the Court that Mr Smith would not be attending the first day of trial, but that Frazer Smith would be travelling from Scotland on the second day and would seek permission to help his father to use the IT required to join the trial (which took place remotely by Microsoft Teams). He informed the court that Mr Smith would not be able to attend the third day of trial because, as set out in an accompanying hospital letter, he was due to receive ongoing cancer treatment.

37. Frazer Smith also provided a letter which states that it was dictated on 26 January 2021 by Dr H Al-Saadi, Locum Consultant in Old Age Psychiatry at Fareham and Gosport's OPMH and CMHT centre. The letter provides Dr Al-Saadi's review of Mr Smith's condition following a brain scan and cognitive assessment. Dr Al-Saadi's diagnosis/ conclusion was that at that time (a year before trial) Mr Smith had a "mild degree of Dementia, most probably mixed type". His recommended management plan states that Mr Smith would need some help and support for his daily life.

38. Frazer Smith said that the Applicant's solicitors had been aware of these matters for some time.

39. The overriding objective requires that in order to deal with a case justly, the Court should ensure as far as practicable, that the parties are on an equal footing and can participate fully in the proceedings and that witnesses can give their best evidence.

40. It is disappointing that in this case, and notwithstanding the provisions of PD1A that provide for a witness' vulnerability to be identified at the earliest possible stage in proceedings, Mr Smith's condition was only brought to the Court's attention the day before trial. Taking into account:

    i) Dr Al-Saadi's diagnosis a year earlier;

    ii) Frazer Smith's assurance (not as his father's solicitor but as a party whose professional qualification involves an understanding of the court process) that his father was determined to give evidence;

    iii) Dr Al-Saadi's express reference to Mr Smith needing some help and support for his daily life; and

    iv) Frazer Smith's request to be allowed to provide practical assistance to enable him to do so,

    I gave directions that Frazer Smith be allowed to remain in the room when Mr Smith was giving evidence, to sit behind him whilst he did so, remaining at all times on screen so that all parties to the hearing could see that he was not seeking to influence his father's evidence and to come forward to assist his father, whenever counsel referred to a page in the bundle, for the sole purpose of helping his father find the relevant page. I explained to Mr Smith that this was his son's limited role.

41. I further directed counsel to be mindful, during cross examination, of Mr Smith's deteriorating mental health and to ensure that their questions were kept short and posed in a straightforward manner.

42. As the trial was taking place remotely and there was no court usher in attendance, I took Mr Smith through his affirmation, reading first to him all that I would be asking him to say by way of affirmation before then asking him to confirm that he understood it and asking him to repeat it in phrases after me. During the discussions regarding the adjustments which should be made to accommodate Mr Smith's condition and when taking him through his affirmation, I was satisfied that Mr Smith had a sufficient appreciation of the seriousness of the occasion and that his affirmation involved more than the duty to tell the truth in ordinary day-to-day life.

43. In his witness statement dated 19 November 2020, Mr Smith stated that he worked as a contracts manager for Mr Dartmouth and CDL between 1975 and 2018. He confirmed that he was appointed as a director of each of the Companies but stated:

> "[Mr Dartmouth], whilst not a director of City Build, was the controlling mind of City Build. [Mr Dartmouth] ran the business and affairs of City Build.

> Although I was a director of City Build, ostensibly controlling the business and affairs of the company, in reality my role was limited to acting as a signatory on behalf of City Build and to manage applications to Keltbray for payment. [Mr Dartmouth] had complete control so as to operate the company as he pleased."

44. He repeated the same statement, almost verbatim, in relation to ISS and said that he did not remember ever being the transferee of the Companies' shares or seeing an instrument of transfer. He recalled attending meetings with the Liquidator to approved resolutions to wind up the Companies and confirmed that the signature on the resolutions and statements of affairs were his. However he stated that he could not recall if the Liquidator explained what he was signing. He continued:

> "The decision to place each of City Build and ISS into liquidation and to appoint [the Liquidator] as liquidator would have been first decided by [Mr Dartmouth] before being implemented. In that regard, I would not have taken any action without it first being agreed to by the Second Respondent. I do not recall exactly when this decision was reached. To the best of my knowledge and belief this would have been decided, face to face, most likely in the office we shared at Unit 3 Delta Business Park.
>
> The decision for the winding up of each of City Build and ISS was as a result of the businesses no longer being considered viable."

45. The first paragraph of this extract from Mr Smith's witness statement is just one of several incidences where he states that he is unable to remember matters but sets out what, to the best of his knowledge and belief, he thinks would have happened. On those matters where he was unable to remember what actually happened, his evidence was speculative and can carry no weight.

46. In his statement, Mr Smith said that he did not remember approving any of the Payments. The references noted on the bank statements against the Payments, including "Woodbridge" meant nothing to him. Having reviewed the schedules of Payments, he suggested that the Liquidator may wish to extend his investigations to consider four specific withdrawals on ISS's debit card.

47. Mr Smith said that he was not aware that, as a director of each Company, he had duties at law.

> "[Mr Dartmouth for whom I worked, was not the type of person to take the time to explain these things to you. I doubt very much whether [Mr Dartmouth] was, or ever has been, aware of these duties himself.
>
> … I accept, however, that my ignorance is not a defence. To my failings as a director, I accept and admit liability for that.

> It was not ever my intention to cause the companies to suffer losses or to prejudice the rights of creditors."

48. He concluded his witness statement by saying that he accepted that he had not helped the Liquidator with his enquiries, that his failure to do so was not a deliberate attempt to undermine the Liquidator's investigations or to be obstructive:

> "I do not have, and have never been in control of, the statutory books, registers or accounts of either of City Build or ISS.
>
> I have acted always in the belief that the matters in issue would not proceed to litigation and that the person with full knowledge of the facts related to City Build and ISS, being [Mr Dartmouth] would be assisting the Liquidator with his enquiries."

49. I am satisfied that when giving oral evidence, Mr Smith sought to answer all questions put to him honestly and to the best of his recollection. However, he was asked about matters that took place approximately eight years earlier and there were material gaps in his knowledge. He readily confirmed that transactions recorded in documents must have taken place, although it became clear on further questioning that he did not recall the transaction in question. An example is when asked about the date on which he was appointed a director. He said that he did not remember being appointed, but he was sure that the date given was correct, if that is what the records show. A further example arose shortly after Mr Hunter started to cross-examine him. Mr Smith confirmed that the Companies undertook work for Keltbray but said that he could not remember whether they did any work at "Victoria Circle". When he was shown an invoice for £7,375 dated 26 September 2013 from City Build to Keltbray which expressly refers to Victoria Circle and Mr Hunter asked if City Build had provided the services described in the invoice, he replied:

> "A: They did.
>
> Q: And Keltbray paid for them?
>
> A: I'm sure they must have done.
>
> Q: But you don't recall them doing so?
>
> A: I believe they did but I don't know for sure."

50. He confirmed that he was previously employed by CDL and that he joined Mr Dartmouth about 50 years ago. He corrected counsel who suggested (in the light of Mr Dartmouth's evidence) that he did so as a plumber, saying that his original role was as a contracts manager. He became the general manager for Mr Dartmouth's business. His evidence was that during the time he worked for CDL, Mr Dartmouth was responsible for the office administration, whilst he was involved in "actually getting the work done". His role involved checking which suppliers needed to be paid and, with the assistance of office staff, making payments to contractors and suppliers. He would "make recommendations" to Mr Dartmouth about the work that had been done by each contractor and what needed to be paid to them. He would not approve invoices for

payment unless the work had been done. He did not recall ever going to the bank to get cash to pay subcontractors but said that he may have done so.

51. Mr Smith's witness statement referred to him working as a contracts manager for CDL until 2018 (which, I note, post-dated the Companies' liquidation). When counsel suggested that he left CDL in order to set up his own business because he wanted to run his "own show", he simply replied: "No". Having said that he did not recall Andrew Dartmouth setting up City Build, when counsel asked again whether City Build was set up so that he could run it as his own, he replied: "You could say that, yes". My written notes of Mr Hunter's cross-examination of Mr Smith record that it continued broadly as follows:

> "Q: Both [ISS and City Build] were set up specifically for the purpose of doing business with Keltbray. That was the object of the exercise?"
>
> A: That was the purpose of the exercise. That's what Charles and I wanted to get done.
>
> Q: I'd like to suggest to you that this wasn't what Charles wanted to get done. These were your companies to enable you to do business on your own account?
>
> A: Not true. Charles did know about them. Charles did agree we should get these companies in order to get this work done.
>
> Q: And although you weren't their first directors or shareholders, City Build and ISS were always *your* companies, weren't they?
>
> A: Yes you could say that they were. To the outside, yes, they were my companies.
>
> Q: That's why you were appointed: because they were your companies?
>
> A: Yes my companies."

52. He was unable to explain why there might have been any desire for the Companies to appear to be "his". He volunteered that it might otherwise seem odd to a supplier but said that he did not know. He did not specifically recall receiving any more than one share in either of the Companies.

53. Mr Smith's knowledge of the procedure around the receipt of requests for work, quotations, invoices and approval was vague. After some questions about the process, he volunteered:

> "I recall we would have got a quotation together. It could have been a combination of CDL or City Build or something else. A figure would be arrived at and would be agreed."

54. When asked who he meant by "we" he replied that it was difficult to say:

> "I would prepare a quotation for CDL. And if necessary to do one for City Build or ISS. I'd do those as well. Sometimes CDL would get the work done under its name or sometimes one or other of the two companies would get the work done under its name."

55. When shown a specific invoice dated 17 September 2014 from CDL to ISS for £10,820 and what appears to be a corresponding payment of £10,820 in the Applicant's schedule of Payments from ISS's bank statements, Mr Smith said that he accepted that would be the procedure although it would be:

> "more requiring Charles' attention than me. If payments came from customers, I was informed and asked to do something about it. I don't recall being told anything needed to be done for these payments."

56. He went on to confirm that if work had not been done, he would not have approved a payment.

57. When asked about Mr Dartmouth's role in the Companies, Mr Smith was initially taken to an undated letter (believed to have been sent in 2016) and an attendance note prepared by the Liquidator's solicitor, Mr Oates, dated 10 January 2017 in which Mr Smith had described Mr Dartmouth as the Companies' agent. He had no recollection of the letter or the discussion with Mr Oates. When counsel pointed out that, at no stage before these proceedings were commenced and before serving his witness statement had he described Mr Dartmouth as the Companies' "controlling mind" he said that he did not know but that he did know that Mr Dartmouth "ran the whole show".

> "Q: I would suggest you were in complete control of City Build and ISS?"
>
> A: No.
>
> Q: At no point did you ever take instructions from Mr Dartmouth about how to run your companies.
>
> A: I probably took plenty of instructions from Mr Dartmouth to run my companies as you call them.
>
> Q: In fact it was you who took the decisions about the business of City Build and ISS wasn't it?
>
> A: No.
>
> Q: You who ran their affairs?
>
> A: No.
>
> Q: You who attended on site to check up on the works that were going on?
>
> A: Possibly yes, if there was anything to check up on.

> Q: In relation to putting these companies into liquidation you say in your witness statement … you say, 'I would not have taken any action without that first being agreed to by Mr Dartmouth.' That's simply not correct, is it: this was your decision?
>
> A: That's not true. Mr Dartmouth would always be kept informed.
>
> Q: Mr Smith, I just have to be clear about something here. I said it was your decision; you said that he would be kept informed. Those two are very different things. I repeat my question to you: it was your decision to put the Companies into liquidation wasn't it?
>
> A: I would have had a meeting with Mr Dartmouth and it would be agreed that we would put them into liquidation for whatever reason at that time. It would be a joint decision.
>
> Q: When you say 'you would have had a meeting' do you recall having had such a meeting?
>
> A: Not really but I can tell you for sure that that is what the procedure would have been. I wouldn't have done anything without keeping him informed fully and we would have discussed things if he didn't agree.
>
> A: In fact I'd suggest to you that Mr Dartmouth never had any control over your companies.
>
> A: That's not true. He had full control over it. I never did anything without having told him what we were going to do and discussed it with him.
>
> Q: But it was you that took the final decisions?
>
> A: I wouldn't call it that. I'd say it was a joint decision. We agreed that this was the action we had to take.

58. When later asked by Mr Hannant whether he would have discussed the contents of his letter to the Liquidator's solicitors dated 7 March 2018 (in which he stated that the payments to CDL were for services provided to City Build and that the payments to Mr Dartmouth were for him to pay suppliers on behalf of the Company) Mr Smith's initial reply suggested to me that he thought the letter concerned a complaint from a customer's solicitor. At my request, Mr Hannant took him back to the letter and explained the content before repeating the question. Mr Smith replied that "yes" he would have discussed the letter with Mr Dartmouth before sending it.

59. Mr Smith was unable to recall any details regarding City Build's banking arrangements before it had opened the account for which the Liquidator has obtained statements. He could not remember who would have given the bank details to pay invoices from City Build addressed to Keltbray which pre-dated the opening of City Build's account.

When Mr Hannant asked whether it was possible that the money claimed in City Build's invoice was paid into CDL's bank account, Mr Smith replied that he had no idea, but that he couldn't see how payment for a City Build invoice would have been made "to Charles Dartmouth".

Mr Dartmouth

60. Mr Dartmouth is 76 years old and also suffers from a form or forms of dementia. The court was provided with an expert's report dated 17 September 2021 prepared by Dr Drew Alcott, consultant clinical neuropsychologist at Woking Hospital. Dr Alcott explains that Mr Dartmouth's wife first noticed that he was experiencing memory problems, approximately six months before he consulted his General Practitioner in 2015. The report refers to neuropsychological testing performed over a year ago in 2020. At that time, Mr Dartmouth displayed memory and reasoning impairment, the latter rendering him less able to understand some things, particularly complex statements or questions and less able to consider or grasp the implications associated with what he has been told or asked and what he might say in response to questions. The report explains that Mr Dartmouth's reduced executive functions will affect the accuracy of his recollections, that his reduced inhibitory regulation could lead to him answering questions without first reflecting and a reduced ability to control himself when he is irritated, frustrated or angry.

61. Dr Alcott's report concludes:

> "As explained above, the results of the neuropsychological assessment in December 2020 indicated impairments of several cognitive domains, including the functions of memory, reasoning and executive regulation. In my opinion those findings indicated that Mr Dartmouth's cognitive functions are not so seriously impaired that he would be unable to remember anything, accurately, which occurred more than 10 years ago. However, due to the combination of impaired memory and executive functions his ability to fully and accurately recall information and events from his long-term personal/ autobiographical memories would not be reliable; his recollections would be prone to inaccuracy and incompleteness as a result of impaired brain functioning. I also believe that as a result of impaired reasoning abilities, Mr Dartmouth's ability to grasp or consider the potential ramifications of what he is asked and what he says, is compromised and as a result he would be at risk of replying in a manner that could be to his detriment, without appreciating this.
>
> … For the above reasons, it is my opinion that, as a result of the brain disorder, Mr Dartmouth could not be relied upon to provide full and accurate memories when giving evidence."

62. Dr Alcott's prognosis for the various types of dementia he considered, was "continuous continuing deterioration, with some conditions progressing more rapidly than others". Whilst the report was over a year old at the time of trial, I consider it reasonable for the

Court to infer from it that at the date of trial, Mr Dartmouth's condition would not have improved.

63. Mr Dartmouth's solicitors confirmed, notwithstanding the report, that they had considered themselves able properly to take his instructions. It is again unfortunate that neither they, nor the Applicant's solicitors brought these matters to the Court's attention "at the earliest possible stage in the proceedings" as provided for by PD1A. At the start of the trial, Mr Hunter expressed his misgivings regarding Mr Dartmouth's ability to give evidence in light of Dr Alcott's report, and said that his solicitors had served a hearsay notice in case the Court were to decide that Mr Dartmouth should not be called to give evidence.

64. Ultimately it falls to a judge to decide, with the benefit of expert evidence, whether a witness is competent to give evidence or not and what adjustments should be made to take into account their vulnerability and to make appropriate provisions to further the overriding objective. As Mr Dartmouth's solicitors had felt able to take instructions from him, I decided that he should be called to give oral evidence but informed the parties that if I were to conclude, when he was making his affirmation, that he did not appear to understand the nature and effect of the affirmation, or if it became apparent to me, for any reason, that the quality of his evidence was so diminished as a result of his condition, that questioning was inappropriate or pointless, I would excuse him from giving evidence. However, if satisfied that he understood his affirmation and if I allowed oral evidence to proceed, (a) I would require counsel to make reasonable adjustments in their questioning, being (i) sensitive to the difficulties set out in Dr Alcott's report that Mr Dartmouth might experience and (ii) keeping their questions short and as uncomplicated as possible; and (b) Mr Dartmouth would be allowed to be assisted by a solicitor from his legal team who could help with the IT, positioning of the camera and finding documents in the court bundle when counsel referred to them, but would otherwise need to wait outside the room or behind Mr Dartmouth in full view of the camera. If at any time, I felt it necessary to reconsider my decision and bring an end to his oral evidence, I would not hesitate to do so.

65. As with Mr Smith, I first read the entire affirmation before asking Mr Dartmouth to repeat it after me. In my judgment, when giving his affirmation Mr Dartmouth understood that he was attending a remote court hearing and was required to tell the court the truth, the whole truth and nothing but the truth beyond the duty to tell the truth in ordinary day-to-day life.

66. On more than one occasion, Mr Dartmouth's demeanour towards Mr Hannant was combative, and he addressed the Judge as "my dear" or similar, reflecting some of the behaviour witnessed by Dr Alcott and provided in his report as examples of Mr Dartmouth's diminished inhibitions.

67. There were many occasions during cross-examination when Mr Dartmouth stated that he was unable to recall matters. Contrary to the Applicant's submission, it was not my impression that he deliberately sought to avoid questions by saying that he could not remember. His memory of the detailed arrangements between the companies that shared an office and, it seems, staff, some eight years earlier: CDL, City Build and ISS, was scant. On balance, I consider that on each occasion that Mr Dartmouth said he did not remember something, he was truthfully saying that was the case.

68. During cross-examination, Mr Hannant demonstrated to Mr Dartmouth that according to the records filed at Companies House, the statement in his written evidence dated 5 January 2021 that CDL's business is now operated by his sons who are its shareholders and directors, was not correct. At that time, Mr Dartmouth was CDL's only registered director. When asked whether he accepted that the statement was untrue, Mr Dartmouth replied that he did not know, either it was a mistake or the Companies House document was a mistake. Mr Hannant proceeded to ask him whether he checked the witness statement when he signed it and drew to his attention the statement of truth. He replied that he has always had good staff. "They prepare these documents and I sign them." He continued:

> "In 50 odd years this is the first thing brought to me that looks like it was incorrect".

69. Mr Hannant described this during his closing submissions as the clearest admission that the statement was prepared by someone else, not checked and that Mr Dartmouth signed it without any form of review, rendering it of very limited probative value. I am not prepared to reach such a conclusion. The statement was signed a year before the trial. In the same set of questions, Mr Dartmouth was asked which of his sons he thought had been appointed directors. He could not remember their names. The best he could do was to say that he has three sons and that it was not the youngest. In this context, I find Mr Dartmouth's reference to signing documents prepared by his "staff" without always checking them, to carry insufficient weight to justify the court inferring that he similarly would not have checked the witness statement prepared by his solicitors (themselves under a duty to ensure that it accurately reflected matters to the best of their client's recollection at the time) before signing it.

70. Consequently I reject Mr Hannant's submission that Mr Dartmouth's witness evidence is of no probative value. The fact that his written statement was made at a time when Mr Dartmouth was suffering from one or more forms of dementia does, however, affect the weight that I can attach both to it and to Mr Dartmouth's oral evidence.

71. At the end of the trial, Mr Hannant referred to section 4 of the Civil Evidence Act 1995. He submitted that if I were to choose to rely on those parts of Mr Dartmouth's evidence where he appeared to be clear, but to rely on his written evidence where it was unclear, section 4 of the 1995 Act would come into play. Subsection (1) of section 4 provides:

> "(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as the reliability or otherwise of the evidence.

72. Subsection (2) proceeds to set out particular factors to which the court may have regard. Having briefly explained why I wished Mr Dartmouth to give oral evidence and having given directions for adjustments to assist him when doing so, I saw no reason to bring an early end to his oral evidence, notwithstanding his clear memory lapses. Mr Dartmouth adopted his written evidence as his evidence in chief. In my judgment, the 1995 Act does not come into play and should not be applied in the manner proposed by Mr Hannant.

73. During cross-examination, Mr Dartmouth was shown:

i) City Build's annual return dated 27 August 2012 which showed Mr Smith as the Company's sole director and Mr Dartmouth as the holder of all of the company's 100,000 shares; and

ii) the statement in his written evidence that he had never had any involvement in the business, ownership, control or management of City Build or ISS.

74. He was asked whether he accepted that the statement in his evidence was not correct. He replied that he did not know, and would have to investigate it but that he could not recall doing anything for either Company.

75. Counsel pressed the inconsistency between Mr Smith's written evidence that Mr Dartmouth was the Companies' "controlling mind" and Mr Dartmouth's written evidence that he had no involvement in either Company. Mr Dartmouth's replies illustrate the Court's difficulty in understanding the relationship between the Companies, CDL, Mr Smith and Mr Dartmouth. When Mr Dartmouth was informed that Mr Smith had described him as the Companies' "controlling mind", Mr Dartmouth replied that it was wrong, because he had never run either of the Companies: "If you talk to the staff, they took all their instructions from Cliff". Twice more he did not accept that he was the Companies' "controlling mind", and stated that he thought Mr Smith ran the business. He later said that whilst he did not recall who incorporated ISS:

> "We were a team all of us and Cliff did most of these things himself. Not that I thought he did anything wrong. He just did them."

76. When counsel started to summarise his earlier statements:

> "Q: You said it was Mr Smith who ran these companies.
>
> A: Yes.
>
> Q: You had no involvement in them?
>
> A: Well I wouldn't say I had no involvement because we worked as a team.
>
> Q: When you say in your witness statement that you were not involved in the business that's wrong. You now accept that that was incorrect?
>
> A: No I don't, I don't accept that at all. Would you just remind me what you said I said.
>
> Q: My question, what I understood you to say was that you were involved in those companies. When I say these companies I mean City Build and ISS.
>
> A: I think both companies were run by Cliff. He didn't do anything wrong. He stuck to the rules. That's it. If ever we had a new company over the years, Cliff always sorted it out.

> Q: So I'm clear, you were not involved in either City Build or ISS?
>
> A: No.
>
> Q: If you were not involved in those companies, how do you know that Clifford Smith was?
>
> A: Because he shared an office with me for a start. We were quite close. Our biggest problem at the time was we employed all Irish people and lots of them never got paid. I can't remember how they didn't get paid but lots of them didn't get paid."

77. When asked about Mr Wyeth's role, Mr Dartmouth was very clear that he was not an employee "Not a PAYE person" as he described it, but a subcontractor of CDL. He did not recall Mr Wyeth being an employee of City Build or ISS. He recalled that Keltbray would often go straight to Mr Wyeth "short circuiting" instructions because Mr Wyeth often knew what was needed on site before even Keltbray knew:

> "He'd just get on with it and they sorted out the payment afterwards".

78. Mr Dartmouth said that he had no recollection of what happened to CDL's invoices, accounts, core excel spreadsheet or an AppleMac computer referred to in his written evidence but which he no longer appeared to know anything about. He referred to "the staff" sorting out all the payments.

79. When taken to the schedules of the Payments, he could not provide any explanation for them. He said that Mr Smith would be the person who could help: "Cliff dealt with all that".

80. He could not recall why the Companies were put into liquidation or who made the decision to do so, but when counsel suggested it could have been his decision, he replied "I don't think that's the case at all".

81. Mr Dartmouth's written evidence was shown to include many inaccurate statements, including:

    i) that he established CDL 50 years ago – the Company was not incorporated until March 1991. Whilst technically inaccurate, this could, in part, be explained on the basis that further questioning suggested that he started the business that was subsequently incorporated into CDL;

    ii) that he suffers from "advanced stage Alzheimer's disease" – his doctor's evidence described a combination of possible forms of dementia, and stated that his test results were not typical of Alzheimer's disease but presented in a manner which fitted with Multiple Domain Amnestic Mild Cognitive Impairment. When challenged on this, Mr Dartmouth replied: "I've used the wrong word. You know what he means". In a reply to another question he said that he could not remember: "I suffer from Alzheimer's or something like that, whatever it's called";

iii) referring on several occasions to Mr Smith having left CDL to set up the Companies, when it appears that in fact Mr Smith continued to work, in some capacity, for CDL; and

iv) as already noted, he stated that his sons were now directors and shareholders of CDL, whereas CDL's own documents state otherwise.

82. Mr Dartmouth's witness statement was almost certainly, and by no means unusually, prepared by his solicitors. It was drafted at a time when his condition was diagnosed to include impaired powers of reasoning and compromised executive functioning. His solicitors have nevertheless stated that they are satisfied that they were able properly to take instructions from him. Whilst I found Mr Dartmouth's oral evidence to be given, to the best of his ability, honestly, I approach his written evidence with caution. I find myself able to accept his written evidence only where it is corroborated by the very few contemporaneous documents, by other credible evidence or by the inherent likelihood, in the context of all other evidence, of the matters he described.

Mr Webb and Mr Taylor

83. Both Mr Webb and Mr Taylor work for Keltbray, the former as a site/project manager and the latter as an operations manager.

84. Mr Webb's written evidence states that he was making the statement:

> "for the purpose of recording the construction services provided to Keltbray by Dave Wyeth and his team, Citybuild Limited and ISS Limited."

However, later in the witness statement he states that he has never heard of "Citybuild", ISS and never dealt with Mr Smith or Mr Dartmouth. He explains that he has always engaged Dave Wyeth to deal with decommissioning work on sites and did so regularly between September 2013 and September 2015. He could only remember two specific sites during that period, both very significant demolition projects in Regents Street and Haymarket. He holds no records in relation to the work carried out by Dave Wyeth:

> "as site records are only retained for a specific period after the project is completed and the final account has been settled".

85. During cross-examination, he confirmed that the name of the company contracting with Keltbray would be on the daily worksheets that he was responsible for checking and signing, but he said that he could not remember the name of each company he dealt with:

> "they traded under various names. The figurehead was Dave. I never got involved in the small print. All I know was that Dave done the work. I've no idea what company he was working under".

86. Mr Taylor's witness statement similarly starts by saying that it was being made in order to describe the work carried out for Keltbray by Citybuild (sic) and ISS, but then proceeds only to describe the work which Dave Wyeth performed for Keltbray and that

all his dealings were with Dave Wyeth. He refers to Dave Wyeth undertaking work on projects at Victoria Circle, London Wall, and on contracts which he described as the Royal London contract (for the NHS in relation to the London Hospital and St Bartholomew's Hospital), "the Parabola contract" and "the Heygate and Trocadero contracts". His written evidence includes a statement that:

> "I have never had any contact with Clifford Smith or Charles Dartmouth in relation the construction services provided to Keltbray by Citybuild Limited and ISS Limited"

and

> "I am also not aware of the contractual arrangements of Citybuild Limited and ISS Limited as this is not my field, but my understanding was that Dave Wyeth worked for Charles Dartmouth Limited."

87. During cross-examination, Mr Taylor repeated that it was his understanding at the time, and still is, that Dave Wyeth worked for CDL. When he was reminded that his written evidence concluded saying:

> "In summary I confirm that Dave Wyeth, ISS Limited and Citybuild Limited as his employers carried out the construction services I have describe for Keltbray during the period 2013 to 2015"

and consequently referred to Mr Wyeth's employers being City Build and ISS, he replied:

> "That could very much have been [CDL]. Dave Wyeth was the one I dealt with. I didn't know what the name of the company was that he worked for".

88. Paragraph 19.6 of the Chancery Guide provides:

> "Witness statements must contain the truth, the whole truth and nothing but the truth on the issues covered. Great care must be taken in the preparation of witness statements. No pressure of any kind should be placed on a witness to give other than a true and complete account of his or her evidence. It is improper to serve a witness statement which is known to be false or which the maker does not in all respects actually believe to be true. In addition, a professional adviser may be under an obligation to check where practicable the truth of facts stated in a witness statement if he or she is put on enquiry as to their truth. If a party discovers that a witness statement which they have served is incorrect they must inform the other parties immediately."

89. In my judgment, it should have been apparent to the solicitor who prepared the draft statements that the references to City Build's (which was incorrectly named in both Mr Webb and Mr Taylor's statements) and ISS's apparent roles were at odds with the

remainder of the witness' evidence, putting them on enquiry as to the truth of those paragraphs which referred to the Companies.

90. Notwithstanding that Mr Webb and Mr Taylor's witness statements appear to breach these guidelines, I do not believe that when signing the statements, either of them intended to mislead the court. Nevertheless it is clear to me that those parts of their statements which refer to the Companies cannot be relied upon.

Mr Wyeth

91. Mr Wyeth's written evidence includes the same incorrect reference to "Citybuild Limited" and appears to have been prepared by the same party as the drafts prepared for Mr Webb and Mr Taylor. It commences by saying that it was made:

> "in order to describe the work I have carried out on behalf of Charles Dartmouth Limited ("CDL") for Citybuild Limited and ISS Limited during the period August 2013 through to November 2015."

92. It proceeds to explain that he is employed as an operations manager for CDL and that he started working for CDL in 2000. He summarises the work he performs for Keltbray which he describes as CDL's main client. He refers to work for Keltbray at Victoria Circle, Elephant and Castle, the Royal London Hospital, NLE, Circle Housing and London Wall. He describes Mr Smith as being:

> "in overall charge at head office. He often visited each contract to inspect"

and said that he was not involved in the payment side of his work which was "handled by Cliff Smith and/or head office". He states that CDL provide him with a company credit card to pay for materials and that he had minimal contact with Mr Dartmouth.

93. During cross-examination, Mr Wyeth was clear that the work he did for Keltbray was under the instruction of CDL and that he gets paid by CDL. When reminded that his written evidence refers to work carried on by CDL "for Citybuild Limited and ISS Limited" he said:

> "I don't know what company Charles is invoicing or billing as. All I know is that I work for [CDL]".

94. I find that Mr Wyeth sought to give truthful evidence but was careless in signing a statement bearing a statement of truth which referred to CDL undertaking work for City Build and ISS. It became clear during cross- examination that he had no knowledge of CDL contracting his services on behalf of either of the Companies.

Decision

95. When allegations of misconduct are raised, it is important to consider the whole of the evidence before reaching a conclusion. Oral evidence should be tested by reference to contemporaneous documents. In this case, there is a striking lack of contemporaneous documents. Mr Smith failed to engage properly with the Liquidator following his appointment and the deterioration in his mental health since then has severely

compromised his ability now to provide reliable information. Mr Dartmouth states in his witness statement that the files for CDL's contracts are shredded after settlement of the final account, and that historic information was not transferred to CDL's Sage accounting system.

96. In light of Mr Smith's and Mr Dartmouth's dementia, I have been cautious in accepting anything solely on the basis of their written and oral evidence. As a result, I have been forced to assess their evidence by reference to such documents and other evidence as are available and the inherent plausibility or implausibility of the accounts they have provided.

Did Mr Dartmouth act as a de facto or shadow director of the Companies at the relevant time?

97. The burden of proof in relation to this issue lies with the Applicant. It relies on:

i) Mr Smith's written evidence that Mr Dartmouth had complete control of the Companies and was their "controlling mind";

ii) Mr Smith's oral evidence that Mr Dartmouth "ran the whole show", that he would always keep Mr Dartmouth informed of what was going on and his unequivocal replies that he did not leave CDL to set up his own business or have his own show to run, and that Mr Dartmouth was involved in deciding to put the Companies into liquidation;

iii) City Build's annual return dated 27 August 2013 showing that on 1 February 2013 all of its shares were transferred to Mr Dartmouth before he transferred them, some 6 months later, to Mr Smith. Mr Hannant invited the court to infer that this shows that it was Mr Dartmouth, rather than Mr Smith who was responsible for arranging for Mr Dartmouth's son to incorporate City Build before later deciding that Mr Smith should be the one responsible for it "and the one to carry the can for Mr Dartmouth's misconduct";

iv) Mr Dartmouth (as well as Mr Smith) being on the Companies' bank mandates;

v) ISS's bank statements appearing to show that Mr Dartmouth had a debit card for its account;

vi) the bare denial in Mr Dartmouth's written evidence, despite (i) to (v) above, that he was involved in the Companies' business, ownership, control or management – a denial which he chose not to augment. Mr Hannant submits that Mr Dartmouth was at pains to distance himself from Mr Smith who was described as having left CDL, and to separate himself from the Companies of which Mr Smith was a *de jure* director, whilst, in fact, all three companies shared the same office at the same address and the evidence suggests that Mr Smith continued to work for CDL;

vii) Mr Dartmouth's "relaxed view of corporate governance" as demonstrated by CDL currently having no active, registered directors; and

viii) the inherent improbability that Mr Dartmouth would have been happy for Mr Smith "to poach the business of his major customer", Keltbray whose work, after the Companies' liquidation, Mr Hannant described as "coming back" to CDL.

98. I accept Mr Hannant's submission that when the court weighs the evidence, a material factor is Mr Dartmouth's and CDL's failure to provide any documentary evidence to explain the legitimate purposes and consideration for which the Payments were made.

99. Mr Hannant sought also to persuade the court that it should take into account their decision not to call on any of CDL's staff to give evidence to confirm Mr Dartmouth's account that books and records were destroyed once its invoices were paid, and not to call or obtain documentary evidence from CDL's accountants. This was not put to Mr Dartmouth when he was giving evidence and I am not prepared to draw the adverse inference Mr Hannant invited the court to draw from the absence of such evidence.

100. Whilst the factors listed at (i) to (viii) above demonstrate that Mr Dartmouth's written statement that he had no involvement with the Companies, was neither truthful nor correct, in my judgment, they are insufficient to prove, on the balance of probabilities, that he was either a *de facto* or shadow director of the Companies. In reaching this conclusion, I have taken into account the following points:

i) the Liquidator has provided no evidence of what Mr Dartmouth actually did or the role which he played as part of the Companies' corporate governance system beyond Mr Smith's written statement, much of which, I have noted, amounts to no more than speculation. In that statement, Mr Smith clearly described Mr Dartmouth as the "controlling mind" of the Companies. However, there is no evidence that when he attended the meeting with the Liquidator, he informed the Liquidator that Mr Dartmouth controlled the Companies' affairs or that Mr Dartmouth held all the Companies' records or otherwise to suggest that Mr Dartmouth's involvement with the Companies was such as to incline an insolvency practitioner, at that stage, to consider whether Mr Dartmouth might be a *de facto* or shadow director;

ii) in each of July 2016 and January 2017, before proceedings were issued, Mr Smith described Mr Dartmouth as an "agent" of the Companies;

iii) when giving oral evidence, Mr Smith did not appear familiar with the phrase "the controlling mind". Whilst I remind myself of the limited weight that should be attached to Mr Smith's oral evidence, particularly when the day-to-day work which he performed appears to have been for a combination of the Companies and CDL, I nevertheless find it striking that he conceded that City Build was set up so that he could run it as his own: "Yes you could say that". He volunteered that, to the outside world, they appeared to be his companies;

iv) Mr Smith's description of his working relationship with Mr Dartmouth gave me the impression that it was one of mutual cooperation, spread over the three companies operating from the same office. He confirmed that the Companies were set up to do business with Keltbray: "That was what Charles and I wanted to get done". He described CDL's staff as "the same staff would help *me* to do that" (my emphasis);

v) the thrust of both Mr Smith's and Mr Dartmouth's oral evidence was that decisions regarding the three companies' businesses were jointly made. Mr Smith said that he never did anything without telling Mr Dartmouth and if he disagreed, they would discuss it. In my judgment, such discussions were not inconsistent with decisions being made in respect of all three companies (which appeared to be used interchangeably for various projects) where both parties knew that Mr Dartmouth was the sole director of the original company (CDL), and Mr Smith was the sole director of the relatively new Companies;

vi) there was evidence of Mr Smith having performed a very senior role in relation to the work undertaken by the three companies. Mr Wyeth believed himself to have been employed by CDL and described Mr Smith as being in overall charge at "head office";

vii) Mr Dartmouth continued as the sole director of CDL, of which Mr Smith was an employee or to which he provided his services. In my judgment it is not surprising, therefore, that Mr Smith considered Mr Dartmouth to "run the whole show". However Mr Smith's oral evidence was sufficiently clear to persuade me that at the time, he was aware that he was the Companies' sole director. He consulted Mr Dartmouth and chose to agree courses of action with him because the companies' businesses were so closely related. The fact that he chose to keep Mr Dartmouth informed and to work cooperatively and collegiately with him, even arranging for him to be a signatory on the Companies' bank mandate and to have a company debit card, in my judgment falls short of proving on the balance of probabilities, in the words used by Jonathan Gaunt QC in *Re Gemma Ltd* (relying on the judgment of Timothy Lloyd QC in the directors' disqualification case *Re Richborough Furniture Ltd* [1996] 1 BCLC 507), that Mr Dartmouth was either the person directing the affairs of the Companies or acting on an equal footing with Mr Smith in directing the affairs of the Companies. As Arden LJ noted in *Smithton v Naggar,* the fact that a person is consulted about directorial decisions or his approval is sought, does not in general make him a director. He must be *shown* to have assumed the status and functions of a company director and to have exercised real influence over the corporate governance of the company. In my judgment, the Applicant has failed to show that.

viii) I have found Mr Dartmouth's evidence that he had no involvement with the Companies, not to be credible. But that does not require me to find Mr Smith's evidence that Mr Dartmouth was the controlling mind of the Companies, correspondingly credible.

ix) A decision was made, for reasons that were not explained to me and that Mr Smith was no longer able to recollect, that Mr Smith would be the sole director of the Companies. There was insufficient evidence before me of Mr Dartmouth assuming the functions of a director of the Companies nor, beyond and as a result of Mr Smith's decision or willingness to work cooperatively with him (whilst still himself working for Mr Dartmouth as part of CDL's operations) of Mr Dartmouth exercising real influence over the Companies' corporate governance.

x) I also approach, with considerable caution, placing too much reliance on Mr Smith's statement that Mr Dartmouth was the Companies' controlling mind. By the time this legally-loaded phrase appeared in Mr Smith's witness statement, proceedings were on foot. It is in Mr Smith's interests for the Court to find Mr Dartmouth to have been a *de facto* director of the Companies, as any consequent liability for breaches of the Companies' directors' duties would then fall to be met jointly between them. During cross-examination, Mr Smith did not appear to be familiar with the term, describing instead and consistently with Mr Dartmouth's oral evidence, that they worked as a team.

101. Whilst the Respondents should not, as noted by Arden LJ in *Re Mumtaz Properties*, be judged by some lower standard than that which applies to other directors, simply because they failed to keep or, in this case, to provide the necessary documentation, that does not shift the burden of proving that Mr Dartmouth was a *de facto* or shadow director from the Applicants to Mr Dartmouth. In *Re Richborough Furniture Ltd*, Timothy Lloyd Q.C. held that if it is unclear whether the acts of the person in question are referable to an assumed directorship or to some other capacity, the person in question is entitled to the benefit of the doubt. The absence of documentary evidence and the key witnesses' health difficulties undoubtedly makes the Court's task unusually challenging in this case. I am nevertheless satisfied that in concluding that there is insufficient evidence to determine that Mr Dartmouth was a *de facto* director I have not inadvertently strained the facts in deference to this observation.

102. Several of the factors listed as having influenced my decision that Mr Dartmouth was not a *de facto* director similarly persuade me to conclude that he was not a shadow director of the Companies. Quite simply, beyond Mr Smith's written evidence which I have addressed above, there is no other evidence before the Court of Mr Smith being accustomed to act in accordance with Mr Dartmouth's instructions or directions. I have explained why I do not consider Mr Smith's statement that Mr Dartmouth "ran the whole show" to justify the court concluding that Mr Dartmouth was a *de facto* director. The same reasons prevent me from inferring from Mr Smith's stated approach of consulting and seeking to agree courses of action with Mr Dartmouth across the three companies to which they were appointed directors, that he was accustomed to act in accordance with Mr Dartmouth's directions or instructions.

103. Having found that Mr Dartmouth was not a *de facto* or shadow director, the Applicant's breach of duty claims against him fall away.

The TUV Payments

104. The claims that remain against Mr Dartmouth and CDL are that the TUV Payments comprised transactions at an undervalue within the meaning of section 238 of the Act.

105. It is common ground that the TUV Payments were made. Mr Hunter also accepted, on behalf of Mr Dartmouth and CDL, that as CDL was Mr Smith's employer, it rendered CDL an associate of Mr Smith within the meaning of section 435(4) of the Act and therefore connected to the Companies for the purposes of section 249(2) of the Act. Consequently the Companies' insolvency is presumed, unless the contrary is shown. No evidence was adduced or submissions made to aver or prove the contrary.

106. The parties do not agree where the burden of proof lies. Mr Hannant relies on a decision of Deputy Master Linwood in a case concerning section 423 of the Act, *Pathania v Tashie-Lewis* [2021] All ER (D) 47, where at paragraph 46 the Deputy Master said:

> "46. This lies, at first, upon C. As Mr Hill-Smith submitted to Deputy Master Lloyd and as appears at [19] of his judgement, "…the legal burden of establishing the elements of [s.423] lay on [C] but to the extent Ms Okonye advanced a contrary case the evidential burden of proving that case lay on her." So if D2 advances a positive alternative case, the burden shifts to him."

He submits that as the Applicant has established (and it is not in dispute) that the TUV Payments were made, the burden of establishing, as contended by Mr Smith and CDL, that they were properly made for services, shifts to the Respondents.

107. I reject his submission. The Applicant must prove not only that the TUV Payments were made but also that they were made by way of gift or on terms that the Company received either no consideration or consideration, the value of which, in money or money's worth was less than the consideration given away by the Companies. *Pathania v Tashie-Lewis* concerned the sale of a property allegedly at an undervalue. Whilst the Deputy Master noted the circumstances in which the burden of proof would shift to the defendant, he held that in the case before him, the claimant had failed to satisfy the first hurdle: he had to prove that £38,000 of the consideration was paid by a third party, but later returned to him. The Deputy Master noted that the claimant had complained that the defendants had prevented him from obtaining documentary evidence of the alleged underpayments, leaving him with no more than speculative beliefs and a suspicion that the sale had been at an undervalue. It was not for the defendant to evidence or provide explanations as to who received the payments in question. Even factors suggesting that the sale had been collusive, and the Deputy Master's finding that the defendant's evidence was unreliable, could not tip the evidential burden in the claimant's favour:

> "The answer, one way or the other, may well be available, but the documents were not before me."

108. There are similarities with the case before me. The Respondents' failure to provide documents that they were statutorily obliged to keep, raises suspicion that no, or insufficient consideration was received by the Companies. The limited documentary evidence that has been recovered discloses matters of concern, in particular that the Companies claimed amounts in respect of VAT but never accounted to HMRC for that VAT. However neither factor relieves the Applicant of the burden of proving that the TUV Payments were at an undervalue. In my judgment, the Applicant has failed to meet that burden. Evidence that payments were made, the purpose or adequacy of which has not been explained by the documents given to the Liquidator, does not, without more, provide evidence of a transaction at an undervalue.

109. Whilst the burden of proof does not lie with the Respondents, Mr Dartmouth's explanation for the TUV Payments is set out in his written evidence:

> "Each and every [Payment] related to settlement of sums due to CDL in respect of work it carried out on the instruction of Citybuild and ISS in the manner detailed below. I refer to my

> solicitors letter dated 13th March in response to the Applicant's solicitors letter of claim in which I confirmed that the payments to CDL related to invoices rendered to Citybuild and ISS and that the payments to me personally were used for the purpose of discharging liabilities in respect of work to which the invoices related."

110. His solicitors' letter dated 13 March 2020, to which he refers, expressly stated that Mr Dartmouth did not receive the benefit of any of the Payments and that they were not made to him personally.

111. In November 2020, the Applicant's solicitors provided approximately 75 invoices they had received from Keltbray. They covered a period from 3 December 2012 to September 2013 (shortly before November 2013 which marked the beginning of the two-year period which preceded the Companies' liquidation). They refer to the supply of supervision, labour, materials and other services for sites at Victoria Circle, Paddington, Royal London Hospital, Fagans Close, London Wall Place and "NLE". The bundle also contains a handful of invoices from CDL to City Build and ISS and one from City Build to CDL.

112. Scant though they are, and even taking into account that almost all of the invoices precede November 2013, in my judgment, they provide some documentary evidence to support Mr Dartmouth's and CDL's case that there was a course of dealings between the Companies, CDL and Keltbray. They are supported by other evidence, including:

    i) Mr Smith's oral evidence that he would prepare quotations for CDL and that sometimes the work would be done by CDL (mostly, it seems, by subcontracting the services of Mr Wyeth) or sometimes by one of the Companies, and that he would not authorise a payment unless satisfied that the work had been done;

    ii) Mr Wyeth's evidence that whilst he was clear that he worked for CDL he did not know "what company Charles is invoicing or billing as";

    iii) Mr Taylor's evidence which expressly referred to several of the site names in the City Build invoices provided by Keltbray;

    iv) the amounts shown as leaving the Companies' bank accounts were rarely round figures and were often accompanied by a description such as "Materials", "Rents", "Woodbridge" "RPY" which suggest that the payments were being made for a particular purpose; and

    v) one specific invoice dated 17 September 2014 from CDL to ISS for £10,820 and what appears to be a corresponding payment of £10,820 in the Applicant's schedule of Payments from ISS's bank statements.

113. In my judgment, it is more likely than not that some, or possibly all of the TUV Payments formed part of the arrangements between the Companies, CDL and Mr Dartmouth for the services that the three companies under Mr Smith's and Mr Dartmouth's control provided, between themselves and by subcontracting Mr Wyeth's services to Keltbray (and possibly other construction or demolition companies). As the Deputy Master noted in the case before him, the answer as to whether proper

consideration was given for each and every one of the TUV Payments may well be available, but the documents were not before me.

Claim against Mr Smith for breach of duty

114. The Applicant seeks an order that Mr Smith breached duties he owed to the Companies by causing or otherwise acquiescing in the Companies making the Payments in circumstances where they were under no legally enforceable obligation to make those payments.

115. As the Applicant has provided evidence to show that the Payments were made, the burden of proving that they were for a legitimate business purpose lies with Mr Smith.

116. Section 1157 of the CA06 provides a statutory defence. If it appears to the court that the director may be liable, but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit.

117. In *Re Kirbys Coaches Ltd* [1991] B.C.C. 130, Hoffmann J (as he was) held that a director's defence to misfeasance proceedings, that he had acted reasonably and honestly, need not be pleaded. The decision preceded the introduction of the Civil Procedure Rules but taking into account that:

    i) this case proceeded by Application Notice and witness statements, without pleadings;

    ii) in *Stobart Group Limited v William Andrew Tinkler* [2019] EWHC 258 (Comm), HH Judge Russen QC (sitting as a Judge of the High Court) chose to adopt the Court's approach in *Kirbys Coaches* on the basis that it was unrealistic to ignore the potential impact of the section, when its existence and terms were "so unsurprising" to the parties; and

    iii) Mr Smith has acted throughout these proceedings as a litigant in person,

    in my judgment it would be unjust for the Court not to consider the potential application of the section, regardless of Mr Smith not having raised it.

118. Mr Smith's alleged misconduct relies upon him authorising or acquiescing in the Payments. He did not seek to defend these proceedings. He accepts that his ignorance of his duties as a director are no defence to his failings.

119. It forms no part of the Applicant's case that Mr Smith acted dishonestly. Having failed to cooperate with the Liquidator at the time and in the years that followed the Companies entering liquidation, by the time he made his witness statement in these proceedings, Mr Smith was unable to remember authorising the Payments or why they were made. Whilst I accept that this may well have been as a result of his dementia, it nevertheless results in there being insufficient evidence before the Court to conclude, for the purposes of section 1157 of the CA06, that when approving or acquiescing in the Payments, Mr Smith acted honestly and reasonably. The statutory defence is not, therefore, engaged.

120. Section 212 of the Act provides the Court with the power to compel a director who is found to have breached his duties or to have misapplied a company's money, to contribute such sum to the company's assets by way of compensation in respect of the misfeasance, as the court thinks fit.

121. Mr Smith did not attempt to meet the burden of proving that the Payments were for a legitimate business purpose. He could not remember authorising any of the Payments.

122. In my judgment, and for the following reasons, Mr Smith should not be ordered to pay compensation to the Companies for any of the Payments:

    i) it forms no part of the Applicant's case that Mr Smith personally benefited from any of the Payments;

    ii) the Applicant made no submissions regarding Mr Smith acting unreasonably;

    iii) his dementia is likely to have played a significant part in his inability to remember or provide any explanation for the Payments; and

    iv) when considering the Applicant's claim against Mr Dartmouth and CDL under section 238 of the Act, I found sufficient evidence to conclude that it was more likely than not, as stated by Mr Dartmouth, that there was a course of dealings between the Companies, CDL and Keltbray for which some or all of the Payments were made. There is no documentary or other evidence before the Court which would enable it to identify which of the Payments were legitimate and which were not. Consequently, in my judgment, there is no reasonable basis upon which the Court, in the exercise of its wide discretion, could arrive at any justifiable figure that Mr Smith could be ordered to pay by way of compensation for transactions which might just as well have had a legitimate business purpose, as not.

Conclusion

123. The Applicant's application is dismissed.