Neutral Citation Number 2018 EWHC 2664 (Ch)

CR-2016-002235

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST
IN THE MATTER OF GUARDIAN CARE HOMES (WEST) LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 12/10/2018

Before :

ICC JUDGE BARBER

Between :

(1) KEVIN JOHN HELLARD
(2) AMANDA WADE

Applicants

- and –

(1) GRAISELEY INVESTMENTS LIMITED
(2) GARY MITCHELL HARTLAND
(3) KAREN ANN HARTLAND

Respondents

Jonathan Nash QC and William Edwards (instructed by **Howes Percival LLP**) for the Applicants
Stephen Davies QC and Jeremy Bamford (instructed by **Lewis Onions Solicitors Limited**) for the Respondents

Hearing dates: 11, 12, 13, 14 and 15 June 2018

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.

.....

ICC Judge Barber

1. This is an application issued on 25 April 2016 brought by the liquidators of Guardian Care Homes (West) Limited ('West') against the First Respondent, Graiseley Investments Limited ('GIL') pursuant to s.238 IA 1986 in respect of an alleged transaction at an undervalue and against the Second and Third Respondents, Mr and Mrs Hartland, pursuant to s.212 IA 1986 for misfeasance as directors of West in causing or allowing the alleged transaction at an undervalue to take place.

Written Evidence

2. For the purposes of this trial, I have read the following witness statements and their attendant exhibits.

   (1) First witness statement of Mr Kevin Hellard dated 22 April 2016;

   (2) First, second, third and fourth witness statements of Mr Gary Hartland dated 12 January 2018, 11 April 2018, 20 April 2018 and 21 May 2018 respectively;

   (3) First and second witness statements of Mr Peter Plant dated 10 January 2018 and 20 April 2018 respectively; and

   (4) First witness statement of Mrs Karen Hartland dated 12 January 2018.

   I have also considered further documents set out in the bundles agreed for use at the hearing, to which reference will be made where appropriate.

3. On the first day of the trial, I directed that the statement of Ms Amanda Wade dated 12 January 2018 should be excluded from evidence but that, save for Appendix 1, all documents exhibited to the statement should stand as evidence. I did so for the following reasons.

4. This application has proceeded by way of pleadings. By his initial witness statement in support of the application, Mr Hellard invited the court to direct that the draft points of claim exhibited to his statement should stand as points of claim and to set out a timetable of directions for pleadings thereafter. In introducing the draft points of claim, he very properly stated (at paragraph 13 of his statement) "It would not be appropriate for me to comment on these claims". That is correct. He was not a witness of fact and could not give any factual evidence on any pleaded issue.

5. Following close of pleadings, directions for trial were given by order dated 29 September 2016. This order provided, inter alia, for parties to file and exchange signed statements of witnesses of fact. Thereafter, Ms Wade made and filed her statement of 12 January 2018. In reality, however, Ms Wade does not and cannot give any direct factual evidence on the issues pleaded. Those issues relate to events which occurred in 2009 and 2010. Ms Wade was not appointed as a liquidator until 2015 and does not appear to have had any real involvement in this matter until 2017 (seven or eight years after the events in issue).

6. Ms Wade's statement provides no evidence of any specific investigative work which she herself has carried out. The only attempt at describing her involvement is at

paragraph 4, in which she refers, in general terms, to "enquiries made by my staff under my direct supervision, material supplied to me by various third parties, documents located on files obtained by my solicitors..., enquiries made by my solicitors pursuant to my instruction and ... documentation disclosed by the Respondents in the course of these proceedings."

7. Paragraph 19.3 of the Chancery Guide provides that a witness statement should be confined to facts of which the witness can give evidence. It continues: "it is not, for example, the function of a witness statement to provide a commentary on the documents in the trial bundle, nor to set out quotations from such documents, nor to engage in matters of argument, expressions of opinion or submissions about the issues, nor to make observations about the evidence of other witnesses."

8. Paragraph 19.4 of the Chancery Guide goes on to confirm the long-standing principle that witness statements must indicate 'which of the statements made are made from the witness's own knowledge and which are made on information and belief, giving the source of the information or basis for the belief'. As a general rule, the witness should 'identify by name' any such source: Consolidated Contractors International Co SAL v Masri 2011 EWCA Civ 21.

9. Ms Wade's statement of 12 January 2018 breaches each of these guidelines. It sets out at length Ms Wade's own interpretation of documents. Such interpretation is a matter of opinion only and is of no real probative value. It also contains factual assertions for which no source of knowledge is provided. This is unhelpful.

10. I would add that, at times, the prose reads as if the statement was a pleading. The statement also contains allegations which, on their face, differ from, and go significantly beyond, those set out in the Points of Claim.

11. Having considered Ms Wade's statement of 12 January 2018 de bene esse with some care, I have concluded that clothing it with the status of evidence for the purposes of this trial would put the Respondents in an impossible position. They are entitled to know the case they are to meet. They are entitled to proceed on the footing that the case they must meet is as pleaded.

12. Cross examination of Ms Wade would simply take up valuable time at trial which could be put to better use. It would be of no practical utility beyond establishing that Ms Wade's statement is of no probative value to the trial judge – and yet to decline to cross examine would put the Respondents at risk of an objection in closing that a given point was not put to the witness. Counsel for the Applicants sought to reassure the Court that they would not take points on whether given issues had or had not been put to Ms Wade. This, however, only served to emphasize the fact that, beyond introducing documents, the statement had no real probative value.

13. I would add that, even allowing for such assurances and assuming that the same would be workable in practice, there would remain the difficulty of how to approach those aspects of the witness statement which appeared to allege a broader (or different) case than that pleaded, or which put forward factual assertions without identifying the source of information for the same.

14. The Applicants argued that there is a custom or practice of permitting an officeholder to put in a statement or report for the assistance of the court. I am aware of that custom; in cases where an officeholder's application proceeds by way of application notice and supporting statements, for example, the filing of one or more statements by the officeholder is to be expected. Similarly, in the context of some applications, it may be appropriate for an officeholder to file an 'updating' statement shortly before trial. But in a case such as this, where pleadings and full disclosure have been directed, officeholders should refrain from filing witness statements which do little more than set out their own views on given documents. Still less should they by their witness statement put forward a case at variance with that pleaded.

15. The Applicants were at pains to remind me that the Respondents applied to Deputy ICC Judge Prentis some months before trial to have Ms Wade's statement excluded from evidence ahead of trial and that their application was rejected. Naturally, I have the greatest of respect for the decision reached by the learned deputy as to whether he should, prior to trial, rule out reliance on the witness statement in question. His decision as to whether to exclude the witness statement prior to trial, however, does not bind the trial judge, who may consider the matter afresh. Having done so, for the reasons which I have given, I have decided that Ms Wade's statement should be excluded from evidence.

Oral Evidence

16. The Applicants did not call any witnesses. I heard oral evidence from Mr and Mrs Hartland and Mr Plant.

Background

17. West was incorporated on 30 March 2004. From September 2007 until 31 October 2009, West carried on a substantial care home business operating 30 care homes throughout England and Scotland, in a 'Propco/Opco' structure within a wider group of companies known as the Guardian Group.

18. West was the 'OpCo' within this structure and owned the moveable property required to carry on the nursing home business. This included furniture, kitchen equipment, linen and so forth, used (and variously located) in each of the nursing homes, collectively referred to in West's accounts (somewhat inaccurately) as 'Fixtures and Fittings'. In West's filed accounts for the year to 31 October 2008, fixtures and fittings are shown at a net book value of £3,298,019. It is common ground that the net book value of the Fixtures and Fittings was markedly greater than their open market value.

19. The 'Propco' companies which owned the freeholds to the care homes were GIL and Graiseley Properties Limited ('GPL'). The main property portfolio (comprising freehold titles to 28 care home properties) was vested in GIL. GPL owned the freeholds to only 6 care home properties, 2 of which were leased to third parties. Barclays Bank Plc held security over GIL's and GPL's assets but not over West's assets.

20. At all material times, Guardian Care Homes (UK) Ltd ('UK') was the holding company of West, holding a single £1 share. UK held the licence for each of the care homes. Barclays did not hold security over the licences.

21. Mr Hartland was a director of West and of each of the Group companies and was the managing director of the Group. He was also the founder, having grown the Group business organically from one care home in November 1988. Mrs Hartland became a director of West in 2007. The company secretary of West was Mr Hartland's brother, Andrew Hartland.

22. The 'Propco/Opco' structure employed by the Group had been put in place as a requirement of Barclays Bank Plc on refinancing the Group over the period 2007-2008. These refinancing arrangements (inter alia) required GPL and GIL to enter into interest rate collar agreements ('Swaps'), which the Respondents maintain ultimately proved disastrous for the Group.

23. Mr Hartland was in dispute with Barclays from November 2008 onwards regarding the refinancing arrangements. By 11 November 2009, a formal letter of complaint had been served on Barclays on behalf of GIL and GPL, alleging mis-selling of the Swaps. By July 2012, the Group had issued proceedings against Barclays. That claim was listed for trial on 29 April 2014 for 6 to 8 weeks but was settled by Barclays at the start of April 2014, on terms involving a substantial confidential settlement without admission of liability. The case attracted considerable press interest, including an article in the Daily Telegraph dated 7 April 2014 included in the bundles before me.

24. Given the dispute with Barclays, over the period 2009-2010, the Group attempted to reverse and/or to modify the 'Propco/Opco' structure in place, with a view to restructuring and refinancing the GIL loan. As Mr Hartland explained by email dated 7 July 2009 to Jonathan Thompson, 'I am looking to dismantle [GIL] and break the assets down across 3 or 4 banks'.

25. The first stage of the proposed process was to involve a restructuring of 'Opco'. At 'Opco' level (where Barclays did not have security), it was proposed that West (as existing 'Opco') would be the subject of a solvent wind-down, having transferred its business to three or four new operating companies set up for the purpose.

26. Some changes went ahead at 'OpCo' level. The OpCo business was ultimately transferred out to four successor companies known as Guardian Care Homes (Mercia) Limited ('Mercia'), Guardian Care Homes (One) Ltd ('One'), Guardian Care Homes (Caledonia) Limited and Guardian Care Homes (Trinity) Limited ('Trinity'). Changes at OpCo level were relatively easy, as Barclays did not hold security over West's assets. The harder part of the exercise was the second stage of the proposed restructuring/refinancing process at 'Propco' level, outlined below.

27. The second stage was to involve a restructuring of the main existing 'Propco', GIL, in order to enable a three or four-way partition of debt, Swap liabilities and the care home properties. This plan (which was dependent upon Barclays' cooperation which ultimately was not forthcoming) envisaged a breakup of the Group's freehold property portfolio in GIL into several separate portfolios, with new property holding companies put in place to hold each of the same. Various options were considered,

but as at June/July 2009, the proposal was that one portion would be refinanced by Santander/Alliance and Leicester, another portion would be refinanced by RBS and a remaining portion would stay with Barclays.

28. As part of the proposed restructuring, Mr Hartland also explored changing the holding company of West. In the events which occurred, it is common ground that at all material times UK remained the holding company of West. At various stages, however, it was proposed that other companies should become West's holding company. The companies considered included a company known as Bilbrook Ltd ('Bilbrook'), which had originally been set up to manage the Group's Jersey portfolio. Bilbrook, however, was a Jersey registered company and, as part of the overall plan was to set up a new group VAT registration, Bilbrook was abandoned as an option. It did not pay VAT and was not a popular choice with the banks. Nonetheless, some aborted paperwork was prepared with a view to putting Bilbrook in place as West's holding company in place of UK; a point which I will come back to. Another option considered was putting a newly incorporated company known as Monmore Properties Ltd ('Monmore') in place as West's holding company, in place of UK. Again, this generated some aborted paperwork; a point to which I shall return, but ultimately West's holding company, UK, remained unchanged.

29. It is common ground that, in the context of these proposed restructuring arrangements over 2009/2010, an employee of the Group, by the name of Mr Mike Spruce, created and posted onto the Group's 'Sage' system a number of accounting journal entries, including two journals (numbered 2045 and 2261) to which express reference was made in the Applicants' Points of Claim.

30. I pause here to summarise Mr Spruce's role within the Group. Mr Spruce was a costs and management accountant who had joined the Group in 2008 and was by 2009 employed at head office as financial controller. He was responsible for producing management accounts and would process journal entries on the Sage system. He had day-to-day responsibility for overseeing the accounts department of six people. Mr Hartland described Mr Spruce as a 'trusted friend'.

31. By 2009, Mr Spruce had significant health problems. According to Mrs Hartland, who worked on the same floor as Mr Spruce and whose evidence I accept, Mr Spruce was at times visibly in pain at the office. Perhaps unsurprisingly in the circumstances, he decided to retire on health grounds in August 2009, accepting 5 months' salary to 31 January 2010. He agreed to do whatever was required to ensure a smooth transition and continued to work on an ad hoc basis through to the end of January 2010 and into February 2010 in order to finish off. Mr Hartland's evidence, which in this regard I accept, was that after August 2009, Mr Spruce only worked a few days a month and Mr Hartland rarely saw him.

32. Mr Spruce was unable to attend trial due to health problems. Both Mr Hartland and Mr Plant, however, gave evidence as to Mr Spruce's favoured approach in accounting matters. Mr Plant's evidence, which I accept, was that Mr Spruce 'wasn't great with spreadsheets.... what he liked was Sage, which is why the records were kept on Sage while Mike was doing it ... He liked to put it on to Sage and see what it looked like... So he would .. put the journal onto Sage and then see what the trial balances looked like. And that's how Mike did things, and I know it meant sometimes that they had to be reversed but that was just Mike's way of doing things'.

33. On 12 October 2009, Mr Spruce created and posted journal 2045 onto Sage with an effective date of 31 August 2009. This journal included the entry 'Tfr of fixtures and fittings from West to [GIL]' in the sum of £3,551,756.46. This is the first of two journals referred to in the case as pleaded against the Respondents.

34. Mr Hartland maintains that he did not know of this entry at any material time and did not intend or authorise a transfer of the Fixtures and Fittings to GIL. He contends that it made no sense to transfer more assets into GIL, as he was seeking to dismantle GIL at the time and Barclays held security over GIL's assets. He also pointed out that it would have been a breach of his banking covenants to Barclays if he had caused GIL to take on a further liability of £3.5 million.

35. Mr Hartland maintains that (in accounting terms) his plan in 2009 was not to move the Fixtures and Fittings to GIL, but rather, to move them to West's holding company, as an interim measure pending the proposed restructuring at Propco level, and thereafter, once the new Propcos and their respective property portfolios had been agreed and put in place, to move the Fixtures and Fittings relevant to each property portfolio from the holding company to the new Propcos. He also contends that journal entries of this nature are in any event provisional and of no legal effect. Mrs Hartland's case is that she left the running of the business to Mr Hartland and did not know of the entry or authorise a transfer of the Fixtures and Fittings.

36. Further journals were posted by Mr Spruce onto Sage in November/December 2009, including journals 2132 and 2249. These, together with journal 2846 entered on 7 January 2010, purport to relate to dividends declared by West in favour of Monmore. These were clearly either provisional or based on a fundamental error, as Monmore was not a shareholder of West at the time and in fact has never been a shareholder of West. At one stage it was proposed that UK should be replaced by Monmore as holding company of West, but ultimately UK remained the holding company.

37. An additional journal (journal number 2252), entered by Mr Spruce on to Sage on 7 January 2010, set out what, on their face at least, purported to be a number of further inter-company movements, including an assignment by West to Monmore of a purported debt of £5.2 million stated to be owed by GIL to West, as part of a process of satisfying the provisional or misconceived 'dividend' in favour of Monmore reflected in journals 2132, 2249 and 2846.

38. In the event, the proposed restructuring at Propco level was ultimately rejected by Barclays at a meeting on 22 January 2010. Mr Hartland maintains that he was forced to agree far more onerous terms put forward by Barclays instead. At Mr Plant's suggestion, Mr Hartland then sought insolvency advice regarding the future of West.

39. On 11 February 2010, Mr Hartland sought general insolvency advice regarding West from an insolvency practitioner by the name of Mr Masters. At that stage no concrete decisions appear to have been taken but initial contact was made with a view to ongoing advice thereafter.

40. On the morning of 22 February 2010, Mr Spruce met with Mr Plant of Plant & Co, the Group's accountants, to discuss preparation of accounts for the Group. As part of that process, ahead of the meeting Mr Plant had run searches at Companies House and had used the information from these searches to prepare group structure charts for the

Group. At the meeting of 22 February 2010, Mr Plant provided Mr Spruce with group structure charts for the Group. These charts (inter alia) showed UK as the shareholder of West, rather than Monmore.

41. Following his meeting with Mr Plant that morning, on the afternoon of 22 February 2010, Mr Spruce posted two further journals (2261 and 2262) onto Sage: (1) reversing journal 2045 (which, on its face at least, had recorded a transfer of the Fixtures and Fittings from West to GIL), (2) reversing the earlier journals relating to a proposed or mistaken dividend to Monmore, (3) reversing the previous journals in respect of the assignment of various inter-company balances from West to Monmore in settlement of the proposed or mistaken dividend to Monmore, (4) posting a dividend by West to UK and (5) posting a transfer of the Fixtures and Fittings from West to UK in settlement of that dividend.

42. Mr Plant's evidence (which I accept) was that Mr Spruce had made no mention that morning of his intention to create and post journals 2261 and 2262. Both Mr Plant and Mr Hartland expressed their belief in evidence that these journals are likely to have been prompted, at least in part, by sight of the group structure charts considered by Mr Spruce and Mr Plant at their meeting in the morning.

43. In the event, the proposed dividend and transfer of Fixtures and Fittings in favour of UK was later abandoned on the advice of Mr Masters.

44. Mr Masters obtained a professional valuation of the Fixtures and Fittings from MGR Appraisals on 23 February 2010, who valued them at £177,600 in situ and £62,650 ex situ. Then on 18 March 2010, Mr Masters advised Mr Hartland that West should be placed into liquidation. Pursuant to that advice, on 27 April 2010, West entered creditors voluntary liquidation. Mr Masters was appointed as liquidator and sold the Fixtures and Fittings to Wingate Associates Limited (a Group company) for £150,000, less outstanding finance of £96,004.80, realising a net sum of £53,995.20 for West's estate. The sales invoice dated 27 April 2010 was in evidence before me.

45. It is common ground that the Fixtures and Fittings themselves remained in situ throughout; that is to say, they remained in integrated use in the 30 care homes owned by the Group.

46. On 23 November 2015, Mr Masters resigned as liquidator and the Applicants, Mr Hellard and Ms Wade, were appointed in his place. Prior to his resignation, Mr Masters had instructed the Applicants' current solicitors, Howes Percival LLP, to send a letter before action dated 3 September 2015 claiming an 'Incorrect Reversal of Dividend'. This letter alleged that Mr and Mrs Hartland were in breach of duty as directors by (paragraph 33) 'causing or allowing the Company to reverse the dividend paid to Monmore'. The letter went on to allege that the reversal constituted a transaction at an undervalue. The proposed claim was clearly misconceived. The Applicants contend that this was due to 'incomplete accounting records'. The most elementary of enquiries at the outset of the liquidation, however, (such as a straightforward company search) would have disclosed that Monmore was not (and never had been) a shareholder of West. Moreover, in relation to accounting records, Mr Masters had been provided with a full back-up of the West Sage data on a memory stick in 2010 and had lost it. The liquidators subsequently worked from an incomplete and wrong Sage back-up file for West. It was Mr Plant who identified their error.

Thereafter the Respondents, by their then solicitors Hausfield, alerted the liquidators to their error and supplied a further full version of the Sage data on 30 March 2016, together with their response to the letter before action of 3 September 2015.

47. The Respondents maintain that they have been thanked for their efforts by yet further misconceived allegations, which on this occasion have been brought to trial.

The Witnesses

Mr Plant

48. Mr Plant is a fellow of the Institute of Chartered Accountants of England and Wales. He is a senior statutory auditor and registered by the Institute to undertake audit work in the UK. By 2009, Mr Plant was the Group's accountant. His firm, Plant & Co, was first approached by Mr Hartland in 2007 to undertake some book-keeping and to prepare some financial statements and corporation tax returns for some of the Group companies based in Jersey and the non-trading UK based companies. In or around June 2008, his firm's role was extended to preparation of the tax computations for all of the Group companies. In April 2009, Mr Hartland asked Plant & Co to take on some compliance work for three of his UK based companies. By July 2009, Plant & Co's instructions extended to another fourteen of the UK based companies in the Group. In or around December 2009, Plant & Co was instructed to act for the remaining three UK based companies in the Group, comprising West, GIL and UK. Plant & Co undertook compliance work for GIL and UK in respect of the accounting year ended 31 October 2009. Plant & Co did not undertake any compliance work for West as it went into liquidation in April 2010 before work commenced. The previous tax advisors, accountants and auditors for the Group were Adams Moore in Staffordshire. They undertook the audit work for West for the year ended 31 October 2008.

49. In cross examination, Mr Plant was knowledgeable, clear and precise in his answers. Save for what was ultimately a fairly philosophical debate as to the nature and status of an accounting journal, his evidence was barely challenged. I have every confidence in the veracity of his testimony, both written and oral.

Mr Hartland

50. Mr Hartland was a director of West and of each of the Group companies and was the managing director of the Group. He was also the founder, having grown the Group business organically from one care home in November 1988.

51. Mr Hartland qualified as a certified accountant in February 1986 and is now a fellow of that association. He recently received a commendation from the association for 25 years of unblemished service.

52. On behalf of the Applicants Mr Nash submitted that Mr Hartland's evidence was 'unreliable'. I disagree. It is fair to say that Mr Hartland's oral testimony was confused at points, but this was entirely understandable given the complexity of the subject matter on which he was being questioned and the fact that, on many occasions, he was being asked to explain and comment on accounting entries which, on his case, he had not created or authorised and had only seen years after the event.

On fundamental issues, such as the issue whether at any material time he had intended or authorised the transfer of the Fixtures and Fittings to GIL, his evidence was entirely clear and consistent. Overall, on the evidence which I have heard and read, I am satisfied that Mr Hartland was a truthful witness who did his best to answer questions put to him accurately and to the best of his knowledge and ability.

Mrs Hartland

53. Mrs Hartland is a certified accountant and described herself as a working mother. She became a director of West in 2007, as she put it, 'the year we got married.' She explained that at the time, 'there was plenty of paperwork that required to be signed and Gary's brother is a consultant at a hospital and he just could not keep popping out for three, four hours to pop to Birmingham solicitors to sign paperwork and so I was appointed director so we could have two people to sign, and it would be easier for Gary and I to do that than his brother, Andrew.'

54. By 2009, her main function in West on a day to day basis was to produce sales invoices on an Excel invoicing system and load them onto Sage. She relied upon Mr Hartland to run the business and was not aware of what Mr Hartland's intentions were in relation to the movement of assets from West to other companies within the Group in 2009/2010.

55. In oral testimony, it was clear that Mrs Hartland found the court process distressing and bewildering. She was not entirely clear why she was there at all and I must say that, given the way the case was pleaded and presented, her confusion was entirely understandable. Ultimately, it was not even put to her in cross examination that she had caused or allowed the alleged transaction at an undervalue said to underpin the breach of fiduciary duty claim alleged against her.

56. Overall, I am satisfied that Mrs Hartland answered the questions put to her in cross examination truthfully and to the best of her ability. Whilst I have every confidence in the veracity of her answers, however, it is clear that Mrs Hartland had very little knowledge of the matters under scrutiny for the purposes of the application.

The case as pleaded

57. As pleaded, the Applicants set out their case on the alleged 'transaction' as follows:

> '10. By an entry on the Company's journals (No 2045) the effective date of which was 31 August 2009 and which was processed on 12 October 2009 under the narrative "Tfr of fixtures and fittings from West to GI", all the fixtures, fittings, furniture, equipment etc., required to operate the Care Homes owned by the Company as at that time were transferred to GIL. The value shown on the ledger in respect of this transaction was £3,551,756.46, which (so far as the Applicant has been able to establish) was the net book value of the relevant assets held at that time.
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> 11. So far as the Applicant has been able to establish:

(1) No written contract was entered into between the Company and GIL.

(2) No board meeting was convened or board resolution passed in respect of the transfer on the part of the Company.

(3) The effect of the journal entry did not alter the recorded net asset position of the Company. In particular, no entry reflective of a loss arising on a sale of assets at less than the value which the assets were carried in the Company's accounts was booked....

14. .... in or about October/November 2009 a restructuring, effected informally, was undertaken by which:

(1) the Company transferred the fixtures, fittings, etc., required to operate the Care Homes to GIL....

(3) GIL assumed an obligation to pay the Company for the assets transferred to it the sum of £3,551,756.46 referred to above. That inference is to be drawn because:

(i) The transfer was between companies in the same group as part of a restructuring effected without formality. It was in the nature of a sale of the assets by one group company to another group company, in the context of a transfer of the operations to the Successor Companies,

(ii) There was no basis upon which the Company could properly have made a gift of its assets to GIL (and GIL was not a shareholder in the company, and so the company could not have had a distribution to GIL)

(iii) No loss was booked in the Companies records as a result of the transfer. Had the transfer been at any consideration less than the figure of £3,551,756.46 referred to above, the resulting loss would have had to have been booked (in particular because of the obligation to maintain accounting records arising under Section 386 of the Companies Act 2006).

(iv) The combined effect of the restructuring was to leave the Company with no assets but substantial liabilities (in particular, to HMRC). Had GIL not come under an obligation to pay the Company for the assets transferred to it the sum of £3,551,756.46, the

> Company would have been rendered immediately insolvent by the transaction.
>
> C2 Reversal
>
> 15. On or about 22 February 2010, the transfer of assets from the Company to GIL referred to above was "reversed". The "reversal" was effected by Journal No 2261 given an effective date of 31 October 2009 (which was the last day of GIL's accounting period). The value shown in the Journal in respect of the transaction was £3,551,756.46.
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> 16. The effect of that transaction was (i) to transfer title to the fixtures, fittings, etc., as they stood at that date from GIL to the Company; and (ii) to release GIL from the obligation to pay the Company the sum of £3,551,756.46 referred to above....
>
> 20. The transaction referred to in paragraph 16 above amounted to a transaction at an undervalue...'

58. It will be seen that the Applicants' pleaded case is that the 'transaction' forming the subject matter of the s.238 challenge was *effected by* journal 2261 (POC, para 15). It is said that the effect of journal 2261 was (i) to transfer title to fixtures and fittings back from GIL to the Company and (ii) to release GIL from an obligation to pay West the sum of £3,551,756.46 (POC, para 16).

59. The Respondents dispute any suggestion that the journals of themselves could create a contractual liability or release a contractual liability for GIL to pay West the book value of the Fixtures and Fittings. They also maintain that, even taking the journal entries at face value, the effect of journal 2261 was not to "release GIL from an obligation to pay West the sum of £3,551,756.46.' On behalf of the Applicants, Mr Nash had to concede the latter point. In closing, he asserted that "paragraph 15 of the Points of Claim ought also to have referred to journal number 2262".

60. Mr Nash's problems did not end there however. Even if one generously reads into the Points of Claim a reference to journal 2262, and treats the pleaded references to transactions having been 'effected' by given journals as transactions 'evidenced' by such journals, the Applicants' case is pleaded in a way which suggests that GIL had incurred a contractual liability with effect from 31 August 2009 (journal 2045) to pay West £3,551,756.46 in respect of fixtures and fittings (POC para 10) and had remained under an obligation to pay West £3,551,756.46 until released from that obligation (journal 2261 and journal 2262) on or about 22 February 2010 (POC para 15-16).

61. Intermediate journal entries made on 7 January 2010 (journal 2252), however, show GIL's intercompany 'indebtedness' to West being assigned to Monmore, as part of a process of satisfying the provisional or misconceived 'dividend' in favour of

Monmore reflected in journals 2132, 2249 and 2846. That is to say: even if, for the sake of argument, one takes these journal entries at face value and one assumes they were more than provisional workings or 'in escrow' preparations for an intended restructuring, as of 8 January 2010, *GIL owed West nothing*. There is then a gap of six weeks or so when, on the Applicants' own case, GIL owed West nothing.

62. It is only as a result of journals 2261 and 2262, effected on 22 February 2010 at 15.20 and 15.47 respectively, that, (again, taking the journal entries at face value, for the sake of argument), at 15.20, the Fixtures and Fittings are first returned from GIL to West (by journal 2261, somewhat ironically *creating a debt owed by West to GIL, not GIL to West*) - and then, at 15.47, some 27 minutes later, by journal 2262, inter-company indebtedness of GIL to West is both restored and negated (by a reversal of journal entries in journal 2252).

63. This only serves to emphasise the crucial importance of defining one's transaction for the purposes of s.238. In this case, there were clearly a series of inter-related journals referring (on their face at least) to a number of inter-company movements. These included journals numbered 2044, 2045, 2083, 2132, 2249, 2251, 2252, 2261 and 2262. The Applicants' pleaded case mentions only one or two items in journals 2045 and 2261. It ignores the other items in journals 2045 and 2261 - and ignores completely the other journals mentioned above. Even allowing for the Applicants' belated attempt, in closing submissions, to include journal 2262, there is no mention in the Applicants' case of journal 2252; and to understand journal 2252, one has to consider journals 2132, 2249 and 2251.

64. It seems to me that the application could be dismissed on this ground alone. The Applicants have failed properly to plead or define their 'transaction' for the purposes of s.238 IA 1986 and have failed adequately or at all to address in their evidence the value alleged to flow from West and to be received by West in relation to the 'transaction' as properly defined. Their transaction at an undervalue claim simply does not get off the ground. The other limb of their case, misfeasance, is based upon the alleged transaction at an undervalue. A fortiori, that too must fail.

65. I do not base my dismissal of the application on this ground alone, however. Having considered the evidence, both written and oral, over the course of a five day trial, and having heard detailed submissions from leading counsel on both sides, I also base my dismissal on the findings and conclusions set out below.

66. On the evidence which I have heard and read, I am satisfied that Mr Hartland did not instruct Mr Spruce to effect, and did not in any way authorise, whether by Mr Spruce or otherwise, a transfer of the Fixtures and Fittings from West to GIL, whether in consideration of the sum of £3,551,756.46 or any other sum, and whether qua director of West or qua director of GIL. I am also satisfied that Mrs Hartland did not know of or authorise the journal entries or a transfer of fixtures and fittings from West to GIL either. She left the management of West to Mr Hartland and her knowledge of its affairs was limited.

67. From the evidence which I have heard and read, I find that Mr Hartland's intention at all material times from July 2009 onwards was

(1) for West to transfer the Fixtures and Fittings to West's holding company, pending the intended restructuring of the Group at 'Propco' level with a view to facilitating a refinancing of Group debt with separate bankers and a loosening of the hold of Barclays over the Group; and

(2) thereafter, once the new Propcos and their respective property portfolios had been agreed and put in place, to move the Fixtures and Fittings relevant to each property portfolio from the holding company to the new Propcos.

68. I further find (1) that in or about August 2009, Mr Hartland instructed Mr Spruce to move the Fixtures and Fittings from West to its holding company and explained to Mr Spruce that his ultimate plan was to move the Fixtures and Fittings from the holding company to the new Propcos as per Paragraph 67(2) above; and (2) that Mr Spruce acted in error and without Mr and Mrs Hartland's knowledge or authority when purportedly documenting a transfer of the Fixtures and Fittings by West to GIL in the journals that he created.

69. On a balance of probabilities, the most likely reason for this error is that Mr Spruce mistook the instruction by Mr Hartland to transfer the Fixtures and Fittings to the holding company pending their transfer out to the new Propcos as an instruction to move the Fixtures and Fittings to the existing 'Propco', GIL. As Mr Hartland put it in oral evidence: 'what I think Mr Spruce did is he misinterpreted PropCos for PropCo, because under the Barclays structure as it was [GIL] was the PropCo. The PropCo. [GIL] was a PropCo. He took out a step.' Ultimately, however, it matters not why the error occurred, simply that it did occur.

70. From the written evidence, it is clear that these errors were not Mr Spruce's only errors of this kind. There were numerous unchallenged examples set out in the written evidence of Mr Hartland and Mr Plant: see by way of example those summarised at paragraph 74 of Mr Hartland's first witness statement. Mr Hartland's evidence, which I accept, was that Mr Spruce did not raise any of these journal errors with him at the time. Mr Spruce simply set about correcting or reversing the same as and when appropriate.

71. I further find that Mr Spruce corrected his error (in recording a transfer of the Fixtures and Fittings by West to GIL) by his later journal entries of 22 February 2010, without informing Mr and Mrs Hartland or Mr Plant of the error or of its correction.

72. Notwithstanding their reliance on s.386(2) and (3) CA 2006, the Applicants rightly accept that data entry mistakes and casting errors in a company's books and records may be corrected (Applicants' skeleton argument, para 43).

73. The Applicants' case, as developed during the course of the trial (which was not entirely in accordance with its pleadings), that the alleged sale by West to GIL of the Fixtures and Fittings was a reality which Mr Hartland later sought to unravel once he realised that West was likely to end up in insolvent liquidation, was simply not made out on the evidence.

74. On the evidence before me, it was clearly never the intention of Mr Hartland to transfer the Fixtures and Fitting from West to GIL. As made clear by his email of 7 July 2009 to Jonathan Thomson, Mr Hartland was planning to 'dismantle' GIL. It

made no sense to move the Fixtures and Fittings into GIL at this time. Barclays had security over GIL's assets and the object of the proposed restructuring was to loosen Barclays' hold over the Group.

75. The Applicants had no persuasive answer to the perversity of their position on this issue. Their theory (as set out at paragraph 3(b) of their skeleton argument) that the alleged sale by West to GIL was intended to give rise to a debt due from GIL to West, which West could then assign to Monmore by way of a dividend paid in specie (by an assignment of the debt due from GIL to West in respect of the Fixtures and Fittings) simply did not hold water. Mr Hartland's evidence, which I accept and which was supported by GIL's filed accounts, was that GIL had no cash at the time. Moreover its assets (in real terms) were all charged to Barclays. Even leaving to one side the fact that Monmore was not the holding company of West at the material time, there was therefore no advantage to be gained by satisfying the 'dividend' to Monmore by way of an assignment by West to Monmore of a debt owed by GIL, rather than by satisfying it by way of a direct transfer from West to Monmore of the Fixtures and Fittings themselves.

Documents as best evidence

76. During the course of submissions, Mr Nash referred me to a decision of Bryan J in the case of JSC BM Bank v Kekhman and others [2018] EWHC 791 at paragraphs 67-69:

> "67. As C identifies at paragraph 43 of its Written Closing, it is now widely accepted that memories are fallible, people can convince themselves of the veracity of false recollections of events and retain confidence in their false recollection, and a judge's ability to evaluate honesty and reliability merely from a witness's demeanour is also fallible, and therefore where possible a court should rely on documentary evidence and any other objectively provable facts: see for example the comments of Lord Pearce in Onassis v Vergottis [1968] 2 Lloyds Rep (HL) at 432 column 2, Robert Goff LJ in The Ocean Frost [1985] 1 Lloyds Rep 1 (CA) at 57, and Leggatt J in Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) at paras 15-22.
>
> 68. In such circumstances, as Robert Goff LJ stated in the Ocean Frost (at page 57):
>
> "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives,

> and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth."
>
> 69. Where there is a lack of contemporaneous documentation it is necessary to have regard to the inherent plausibility or implausibility of witnesses' accounts. As Moore-Bick LJ stated in Jafari-Fini v Skillglass Ltd [2007] EWCA Civ 261 at [76] and [80]:
>
> '76 ..... Whenever an allegation of fraud or similar misconduct is made it is particularly important to consider the whole of the evidence before reaching a final conclusion, to test the oral evidence by reference to any contemporaneous documents and to consider the inherent probabilities. Having said that, however, it must be recognised that since the final conclusion must be capable of accommodating any facts which are admitted or which are established by evidence which is not capable of being seriously challenged, such facts provide a useful starting point for the assessment of the more controversial part of the evidence.....
>
> 80. It is necessary to bear in mind, however, that this is not one of those cases in which the accounts given by the witnesses can be tested by reference to a body of contemporaneous documents. As a result the judge was forced to rely heavily on his assessment of the witnesses and the inherent plausibility or implausibility of their accounts. In these circumstances considerable weight must be given to the fact that the judge had the great advantage of seeing most of the principal actors give evidence. We have not had that advantage and in my judgement are not well-placed to differ from his assessment of the truthfulness and reliability of Mr Rowland or any of the other witnesses, particularly in relation to matters that are not reflected in any of the documents..."

77. In the present case, Mr Nash accepted at trial that journals 2045, 2261 and 2262 were not 'in the nature of transactional or conveyancing documents', but urged me nonetheless to treat these journals, along with certain other documents referred to below, as the 'best possible evidence' of the transactions taking place at the material time, stressing that 'the Sage records were maintained in accordance with the obligation to keep accounting records under CA 2006, section 386.' (Applicants' skeleton argument, para 45). He maintained that all of these contemporary documents pointed one way.

78. Dealing first with journals 2045, 2261 and 2262: for the reasons given in paragraphs 60 to 64 of this judgment, it is not possible to view the entries relied upon in journals 2045, 2261 and 2262 in isolation. Moreover when one considers the other related journals listed at paragraph 63 of this judgment, it is clear that the same contain a number of entries which were, at best provisional, 'in escrow' entries, or at worst, outright errors; an obvious example of this being the recording of a dividend by West in favour of Monmore (and attendant inter-company entries to satisfy that dividend),

when Monmore was not even a shareholder of West. Considered as a whole, the presence of provisional or mistaken entries such as this, in one or more of the inter-related journals, undermines the reliability of the entire set, insofar as they are relied upon as evidence of actual transactions.

79. I would add that there were numerous other unchallenged examples of significant errors in Mr Spruce's journal entries and related work set out in the evidence of Mr Hartland and Mr Plant; the journals listed at paragraph 63 of this judgment did not stand alone in this regard. I also remind myself of Mr Plant's evidence, which I accept, of Mr Spruce's style of working; in particular Mr Spruce's habit of putting entries onto Sage to see what they looked like: and of Mr Spruce's failing health over this period, which had prompted his retirement in August 2009.

80. Overall, notwithstanding their undoubted status as contemporaneous documentation, journals 2045, 2261 and 2262 are a rather shaky starting point from which to mount a case.

81. Mr Nash further relied upon management accounts for West for September, October and November 2009, seen by Mr Hartland and shown to Barclays, all of which show the Fixtures and Fittings as having left West. As Mr Davies rightly submitted however, these management accounts were a product of what was entered by Mr Spruce onto the Sage system, including the journals.

82. Moreover the management accounts in question only show the Fixtures and Fittings as *having left West*, not their destination. Mr Hartland was expecting the Fixtures and Fittings to leave West as he had by this stage given instructions to Mr Spruce to move the Fixtures and Fittings to West's holding company. Sight of these management accounts would not of itself have alerted Mr Hartland to the fact that Mr Spruce had entered onto the Sage system a transfer of the Fixtures and Fittings by West to GIL.

83. Mr Nash also relied upon a spreadsheet attached to an email dated 9 January 2010 from Mr Plant to Mr Hartland, copied to Mr Spruce. The spreadsheet was said to set out the net position of each Group company and a series of proposed dividends. Mr Plant's evidence, which I accept, was that in putting together the spreadsheet with Mr Spruce at this time, Mr Plant had only been supplied by Mr Spruce with trial balances for each company, rather than the underlying detail. By his email of 9 January, Mr Plant informed Mr Hartland that a dividend from West to Monmore had been processed on to Sage but that other dividends listed on the spreadsheet had not yet been processed. The email asked Mr Hartland to confirm that he wanted the additional dividends processed and stated that the point of the spreadsheet was to enable Mr Hartland to see the overall net position, explaining that the plan was to assign various intercompany debts in order to effect the payment of a dividend from West to Monmore.

84. In the event, Monmore never became a shareholder of West and accordingly was not entitled to a dividend. Nonetheless, Mr Nash submits that the spreadsheet attached to the email of 9 January 2010 (and Mr Hartland's reaction to it) is of significance. The importance of the spreadsheet, Mr Nash QC maintained, was that it revealed under the fixed asset column that the Fixtures and Fittings were no longer in West and that there were no fixed assets at all in UK (which was then, and at all times remained, West's holding company).

85. In cross examination, Mr Nash put to Mr Hartland that he must have known from the spreadsheet that Mr Spruce had not done what he claimed to have instructed him to do, because the Fixtures and Fittings were not in UK. Initially, Mr Hartland thought the answer to be that the value of the Fixtures and Fittings would appear somewhere in intercompany indebtedness, but ultimately he accepted that was incorrect. Mr Nash invited me to take this as 'a good illustration of the unreliability of Mr Hartland's .. oral evidence' I reject that invitation. Mr Hartland was being questioned about a complex spreadsheet setting out draft figures based on trial balances dating back eight years. In the context of his oral and written testimony overall, I am satisfied that his incorrect assertion as to where the value of the Fixtures and Fittings would be represented in accounting terms at the material time was not a deliberate attempt on his part to mislead the Court and was not such as to lead to the conclusion that his oral testimony overall was unreliable.

86. Moreover it was no part of the purpose of Mr Hartland's consideration of the spreadsheet at the material time to check where the Fixtures and Fittings were; as confirmed by Mr Plant's email of 9 January 2010, the point of the spreadsheet was to enable Mr Hartland to see the overall net position.

87. I would add that the figures set out in the spreadsheet did not of themselves point firmly one way or the other on the issue of where the Fixtures and Fittings were at the time. At best, had he been scrutinising the spreadsheet for this purpose, Mr Hartland would or could have deduced that the Fixtures and Fittings were not in UK at that time. As there were moves afoot to replace UK as West's holding company over this period, however, that of itself may not have sounded alarm bells. Working from the global fixed asset figures set out in the spreadsheet for the companies within the Group, it is clear that there were a number of companies showing fixed asset values large enough to accommodate the net book value of the Fixtures and Fittings. These included GIL, but also included GPL and Wingate. I also note that Monmore (which had been set up to be the proposed successor holding company for West) showed a credit in the 'net assets' column on the spreadsheet of £3.15 million. This was not dissimilar to the figure for Fixtures and Fittings.

88. Overall, I am not persuaded that the spreadsheet attached to the email of 9 January 2010 is of any significant assistance to Mr Nash. If anything, it serves to undermine his reliance on the journals as evidence of actual transactions. The figures set out in the spreadsheet sent under cover of the email of 9 January 2010 were presented by Mr Plant as largely provisional and subject to approval – and yet *some two days prior*, on 7 January 2010, Mr Spruce had already created journals (including journal 2252) which purported to record a number of the intercompany movements said to be awaiting approval as at 9 January 2010.

89. Mr Nash also relied upon signed off dividend vouchers and back dated board minutes for West ostensibly dating from 25 October 2009 (before year end, 31 October 2009), but signed by Mr Hartland and his brother (as Company Secretary) in early 2010, resolving to declare an interim dividend of £3.5m in favour of Monmore for the year ended 31 October 2009, and resolving that the dividend was to be settled as fully paid to Monmore by assigning to it the same amount in debt owed by GIL, Sitepride, Care Control, Wingate, GPL, UK, Whim Hall and Branksome up to Monmore.

90. The backdating of documentation forms no part of the case as pleaded against the Respondents and at best goes only to credibility. Moreover, Monmore was not a shareholder of West at the material time and it was not suggested at trial that this purported declaration of a dividend in favour of a non-shareholder had any legal effect. Mr Davies submits that these documents only serve to support his clients' case further, as they are yet further examples of what was, at best, a range of provisional or 'in escrow' documentation prepared in readiness for a variety of eventualities in the context of a proposed restructuring which ultimately did not take place. I accept that submission and would add that the Bilbrook share certificate and attendant documentation, which again was ultimately of no effect, falls into a similar category.

91. The Applicants also relied upon some draft accounts for GIL which were presented by Mr Plant to Mr Hartland on 3 March 2010. Mr Plant's evidence, which I accept, was that these draft accounts were drawn up by an employee of Mr Plant's firm known as Mr Tim Hawker from trial balance figures and nominal ledgers obtained from Mr Spruce, which Mr Hawker had tapped into a programme known as Sage Accounts Production Advanced. The draft accounts so prepared showed the Fixtures and Fittings coming into GIL and going out of GIL within the accounting year ending 31 October 2009. Mr Plant's evidence was that when he presented these draft accounts to Mr Hartland, he was told that the draft accounts were wrong and that consequently, the next draft of them, produced on or about 8 March 2010, do not show the assets moving into GIL and out again.

92. Mr Nash sought to suggest that by insisting that GIL's draft accounts be corrected in this way, Mr Hartland was seeking to 'cover up' an actual transfer of the Fixtures and Fittings to GIL which by March 2010 he was having second thoughts about. On the evidence as a whole, I reject that contention. The initial draft accounts prepared for GIL simply reflect Mr Spruce's earlier error summarised at paragraphs 68 and 69 of this judgment and the steps taken by Mr Spruce on the afternoon of 22 February 2010, without notice to Mr and Mrs Hartland or to Mr Plant, to correct that and other errors.

93. Mr Hartland's own evidence on his reaction when presented with the first draft of GIL's accounts was entirely clear. In oral testimony, he confirmed that when he saw the relevant entries in GIL's draft accounts he told Mr Plant: 'that is not right. We would never do that.'

94. Mr Plant confirmed in evidence that he was not troubled by the request to correct GIL's draft accounts in this way, as he knew that they were still subject to audit. As he put it, 'If Mr Hartland calls, as with any of my clients, and says: I think the accounts are wrong, can you put this entry through or can you correct it, this is all subject to audit, so I'm – personally I don't mind what the accounts say, because I know I am going to audit them eventually. So Mr Hartland can do what he likes with the accounts because I know at some stage what he thinks is the final set of accounts I am going to audit. So if Mr Hartland says, can he do this journal, yes, I don't care because when I come to the audit then I'll make the issues that I want to make and I'll find out whether I'm happy with them or not, and if Mr Hartland doesn't want to make any adjustments then I'll qualify the report. That's the way it works.' The final accounts for GIL as filed at Companies House for the year ending 31 October 2009 do not show a transfer in and out of the Fixtures and Fittings.

95. Mr Plant's evidence, which I accept, was that for the purposes of an audit, he would not take at face value a simple journal entry showing a transfer of fixtures and fittings. As he put it 'I would like to see the paperwork supporting that transfer of fixtures and fittings... the whole paper trail...because unless there's other paperwork supporting it, it's going to be reversed.' In re-examination, he confirmed that, in relation to a sale of the Fixtures and Fittings by West to GIL, he would expect to see 'a set of board minutes of the two companies referring to the transfer and both companies agreeing to the transfer and, moreover, probably agreeing the value of that transfer or the method of valuation of that transfer, as a minimum.' He added that if there was VAT involved he would also expect to see a VAT invoice raised.

96. In the context of this case, reliance upon contemporary documentation is therefore something of a double-edged sword for the Applicants. Consideration of contemporaneous documentation in this context includes consideration of what is not there as well as what is. As confirmed by Mr Hartland's first statement, (which was unchallenged in this respect), there are no board minutes, invoices, acquisition agreements, or written communications recording, or even suggesting, any agreement between West and GIL for the sale by West to GIL, or the purchase by GIL from West, of the Fixtures and Fittings, whether at net book value or at any other price.

97. Moreover as rightly noted by Mr Davies, such contemporaneous documentation as there is in evidence includes the email of 7 July 2009 from Mr Hartland to Mr Thompson, confirming that Mr Hartland was 'looking to dismantle [GIL], and break the assets down across three or four banks.' This clear contemporaneous evidence of Mr Hartland's intentions at the time is not consistent with the allegation that he instructed Mr Spruce to transfer the Fixtures and Fittings into GIL in or about July/August 2009.

98. The contemporaneous documentation in evidence which falls to be considered in this context also includes (1) numerous unchallenged examples of other significant errors on the part of Mr Spruce at or around the time of the journal entries relied upon by the Applicants (see paragraph 74 of Mr Hartland's first witness statement and the documents referred to therein), and (2) documentation relating to aborted transactions such as the transfer by UK to Bilbrook of its one share in West. That too must be taken into account. Both are consistent with the Respondents' case that (1) Mr Spruce acted in error and without instruction in recording a transfer of the Fixtures and Fittings from West to GIL and (2) that numerous documents were prepared on what was at best a provisional, in escrow, basis over the material period pending agreement over the restructuring and refinancing proposals under consideration at the time.

Alleged inconsistencies in the Respondents' case

99. Mr Nash also relied upon alleged inconsistencies in the manner in which Mr Hartland had put his case, alleging that Mr Hartland's story had changed over time. By way of example, he relied upon the response dated 30 March 2016 to the letter before action dated 3 September 2015. Paragraphs 31 to 35 of that letter refer to a conversation between Mr Hartland and Mr Spruce about a possible restructuring in which it was proposed that GIL would hold all of the fixed assets. This, he argued, was very different from the case run at trial. A similar reference to moving assets to GIL in a proposed restructuring is made in a later letter from Mr Hartland's solicitors dated 20

April 2016 at paragraph 5, albeit largely by way of cross-reference to the letter of 30 March 2016.

100. The response dated 30 March 2016 and its follow-up of 20 April 2016 were, however, written in response to the first letter before action, which related to the alleged reversal of a dividend to Monmore. The focus of the allegations (and therefore of the response) was elsewhere. On the evidence as a whole, I am satisfied that Mr Hartland's solicitors acted in error in referring in their letters of 30 March and 20 April 2016 to a restructuring proposal which involved GIL holding all of the fixed assets. In oral evidence Mr Hartland's response to being shown the relevant extracts from these letters was immediate: he confirmed that they were wrong. He also explained that he had not spotted the errors at the time. As he put it on day 2, 'There was a lot of things to read, there was a lot of things going on at the time and I clearly didn't pick that point up.' I accept his explanation.

101. Reference was also made to an affidavit sworn in disqualification proceedings brought against Mr Hartland. This affidavit, however, was in answer to disqualification proceedings in which the subject of inquiry was not West, but rather, Mercia and One. Again, the focus of attention was elsewhere. Moreover, when judged against objectively provable facts, the account of events set out in that affidavit is clearly muddled, cutting across two purported dividends in the time line, the purported dividend to Monmore and the proposed dividend to UK which, on the advice of Mr Masters, was abandoned. Little can be drawn from this affidavit for the purposes of these proceedings.

102. Mr Nash also relied on a pleading point, arguing that paragraph 37 of the Points of Defence amounted to an admission that Mr Hartland knew of and authorised journal 2261. I accept Mr Hartland's evidence that, whilst he knew of and authorised a declaration of dividends in favour of UK, to be satisfied by a transfer by West to UK of the Fixtures and Fittings, he did not know of or authorise journal 2045 or the steps taken to correct journal 2045 in journals 2261 and 2262 and did not know of journals 2261 and 2262 themselves, at the time that they were made. To the extent that paragraph 37 of the Points of Defence suggests otherwise in relation to journal 2261, I am satisfied that it was either an error on the part of the draftsman or an attempt to deal with a counterfactual scenario, that is to say, the position if Mr Hartland had known of journal 2261.

103. A further pleading point taken was that there was no reference in the Points of Defence to an instruction to transfer the assets to the holding company, UK. In my judgment, little turns on this. The Respondents were responding to the matters alleged against them by Points of Claim. Whilst some draftsmen may have included in the Points of Defence specific reference to the instruction to get the assets up to the holding company rather than GIL, the omission to do so is hardly fatal to the Respondents' case. It may be a factor to consider when weighing up credibility overall, but it is merely one factor of many. Moreover, Mr Hartland did flag the point in his fourth statement at paragraph 18, where he said 'I believe I told Mike that we were to pay a dividend to (UK) and that subsequently the fixtures and fittings would be transferred to the Propcos'. Whilst he developed this point more fully in his oral evidence, the seeds of it were there in his fourth witness statement.

104. Mr Nash also highlighted an inaccuracy in Mr Hartland's first witness statement as to what the VAT consequences of a transfer of the Fixtures and Fittings by West to GIL would have been. Mr Hartland corrected this error in his fourth witness statement, however, and, when giving evidence in chief, took care to draw that correction to the Court's attention. Moreover, a comparison of the fiscal impact, perceived or actual, of a transfer of the Fixtures and Fittings (a) by West to GIL and (b) by West to UK, is only one of many factors to be considered when determining, on the evidence as a whole, whether there was a transaction on or about 12 October 2009 by which West sold the Fixtures and Fittings to GIL and whether there was a transaction on or about 22 February 2010 by which that 'sale' was reversed and GIL was released from its obligation to pay the purchase price.

105. Mr Nash also submitted that there were inconsistencies in Mr Hartland's testimony as to whether he intended (a) to declare a dividend by West in favour of UK and to satisfy that dividend by a transfer of the Fixtures and Fittings or (b) to transfer the Fixtures and Fittings by West to UK at net book value, giving rise, in accounting terms at least, to an intercompany debt, and then declare a dividend in favour of UK to clear that debt. It is true that, in the cut and thrust of cross examination, Mr Hartland's responses on this issue differed at times. Viewing his oral testimony overall, however, such inconsistencies as there were went to the issue of mechanics and not the identity (in generic terms) of the intended recipient; at all times in oral testimony, Mr Hartland was consistently clear that he wanted to get the Fixtures and Fittings up to West's holding company. I accept Mr Hartland's evidence on this issue.

106. Mr Nash also sought to challenge Mr Hartland's stated belief that a vertical transfer by West to UK of the Fixtures and Fittings as an interim measure pending restructuring would be the safest option from a fiscal perspective. He maintained that option (b) in paragraph 105 above would trigger a VAT charge. Ultimately however,

(1) what matters on that issue is not what the true tax analysis might have been at the material time, but rather, what Mr Hartland believed it to be; on the evidence which I have heard and read, I am satisfied that, rightly or wrongly, Mr Hartland believed at the material time that a transfer of the Fixtures and Fittings by West to its holding company 'via a dividend' was the safest fiscal option, regardless of whether, as a matter of book-entry timing, the transfer of the Fixtures and Fittings was entered into the books first, with the declaration of a dividend entered second, or vice versa. In short, he did not see the mere entry onto the books of a transfer of the Fixtures and Fittings at net book value pending declaration of a dividend as the equivalent of a 'sale' for tax purposes. He may be right or wrong on that (I heard no detailed submissions on the point), but I am satisfied that was his belief; and

(2) in any event, as previously stated, a comparison of the fiscal impact, perceived or actual, of a transfer of the Fixtures and Fittings (a) by West to GIL and (b) by West to UK, is only one of numerous factors to be considered when determining, on the evidence as a whole, whether there was a transaction on or about 12 October 2009 by which West sold the Fixtures and Fittings to GIL and whether there was a transaction on or about 22 February 2010 by which that 'sale' was reversed and GIL was released from its obligation to pay the purchase price.

Absence of witnesses

107. I was also invited to draw 'adverse inferences' from the Respondents' failure to call Peter Cooke, an employee of West at the material time, or Andrew Hartland, the company secretary of West. Mr Hartland's oral testimony, which I accept in this regard, was that Mr Cooke had been 'more than willing' to give evidence but that his legal team at the time these decisions were made had said that they did not need him to. Similarly, Andrew Hartland had been available to give evidence but given his limited role in the Group it was felt that he was not needed.

108. Mr Nash argued that both could have given important evidence as to what was happening between August 2009 and the date of liquidation. This rather begs the question why the liquidators of West did not make fuller inquiries of both individuals at an earlier stage of investigations, or call them as witnesses. It is, after all, the Applicants' burden of proof.

109. The Applicants were in something of a glass house on this issue themselves. They failed to call Mr Masters as a witness, notwithstanding his involvement with West from early February 2010, prior to the creation of journals 2261 and 2262 on 22 February 2010.

110. Overall, I was not greatly assisted by this line of argument.

Conclusions

111. In my judgment, this application fails for a number of reasons.

112. Firstly, for the reasons explored in paragraphs 57 to 64 of this judgment, the Applicants have failed properly to plead or to define their 'transaction' for the purposes of s.238 IA 1986 and have failed adequately or at all to address in their evidence the value alleged to flow from West and to be received by West in relation to the 'transaction' as properly defined. Their transaction at an undervalue claim simply does not get off the ground. As the other limb of their case, misfeasance, is based upon the alleged transaction at an undervalue, a fortiori that too must fail.

113. Secondly, even leaving to one side the technical objections to the Applicants' case explored in paragraphs 57 to 64 of this judgment, on the evidence which I have heard and read, the Applicants have failed to satisfy me on a balance of probabilities (1) that there was a transaction by which West sold the Fixtures and Fittings to GIL, whether on or about 12 October 2009 or on any other date and (2) that there was a transaction on or about 22 February 2010 by which the alleged sale in (1) was reversed and GIL was released from an obligation to pay the price for the Fixtures and Fittings. Ultimately, I am satisfied that this was a book-keeping error; Mr Spruce clearly acted in error in documenting a transfer of the Fixtures and Fittings by West to GIL in the journals that he created. This error filtered through to other documents produced using information drawn from the Sage system. Journals 2261 and 2262 were part of his attempt to put that error right.

114. Thirdly, on the evidence which I have heard and read, I am satisfied that Mr Hartland did not instruct Mr Spruce to effect, and did not in any way authorise, whether by Mr Spruce or otherwise, whether prospectively or retrospectively, a transfer of the Fixtures and Fittings from West to GIL, whether in consideration of the sum of £3,551,756.46 or any other sum, and whether qua director of West or qua director of GIL. I am also satisfied that Mrs Hartland did not know of or authorise the journal entries or a transfer of fixtures and fittings from West to GIL either. From this it follows that, even if the journal entries and other documents relied upon by the Applicants might otherwise have been sufficient to establish on a balance of probabilities a sale of the Fixtures and Fittings by West to GIL, on the facts as found in this case, any such 'sale' would be void for common mistake and West would lose nothing by its later 'reversal'.

115. For all of these reasons, the s.238 application fails. As the s.212 application is based on the s.238 application, that too fails. In the light of my conclusions, it is not necessary for me to rule on the limitation points raised.

116. In conclusion, I must express my concerns as to the manner in which the Applicants have prepared and pursued this case. A liquidator conducting an investigation into a contentious issue arising in a company's affairs should strive to gather and review all readily available evidence on that issue on an impartial basis. He should be alive to the possibility of conjecture and unsubstantiated opinion. He should re-evaluate evidence as the investigation progresses.

117. In the present case, there appears to have been a wholesale failure on the part of the Applicants properly to analyse, interrogate and vouch the journal entries which formed the bedrock of their case. As Mr Davies put it in closing: 'Plainly the liquidators didn't understand the journals or they could not have pleaded [their application] in the way that they did.'

118. By way of example, it was only partway through trial that the Applicants appear fully to have appreciated the impact of the fact that, even on their own case, taking the journal entries at face value:

(1) nothing was owed by GIL to West from 8 January 2010 to 22 February 2010;

(2) journal 2261 did not, as pleaded, reverse (or even evidence a reversal of) an obligation by GIL to pay West £5.2m;

(3) given the order in which journals 2261 and 2262 were created on 22 February 2010, the effect of journal 2261 was to create an obligation on the part of West to pay GIL £5.2m. This obligation was only extinguished later that day by journal 2262.

119. Such deficiencies in the process of investigation in this case have been compounded by a failure properly to analyse or accurately to plead the causes of action upon which they rely. By way of example, whilst scantily pleaded, the Applicants' case in misfeasance against Mrs Hartland was confirmed in submissions to be based upon a breach of *fiduciary* duty in allowing the alleged transaction at an undervalue. Yet no knowledge of the alleged transaction on her part, be it actual or constructive, was alleged. Quite the contrary: the thrust of the cross examination was that she had no

knowledge or involvement at all. As Mr Davies so colourfully put it: 'I had to pinch myself at times. You cannot allege a breach of fiduciary duty against someone who has no relevant knowledge': see Cohen v Selby 2001 1 BCLC 176. Ultimately, it was not even put to Mrs Hartland in cross examination that she caused or allowed the alleged transaction to take place. Quite why it was considered appropriate to put Mrs Hartland through the stress of a five day trial in such circumstances was entirely unclear.

120. The reliance at trial on allegations and insinuations going materially beyond the case as pleaded was also unfortunate. In cross examining Mr Hartland, for example, Mr Nash effectively put a section 423 case to him, when none was pleaded. He also accused Mr Hartland of seeking to 'cover up' a transfer of the Fixtures and Fittings to GIL by insisting on corrections to GIL's draft accounts before they were finalised and filed at Companies House. This was tantamount to alleging a criminal offence.

121. Overall, whilst I acknowledge the hard work and commitment of the Applicants as office-holders, I would encourage them to take greater care as to the manner in which investigations are conducted, and cases presented, in their names in the future.

122. I will hear submissions on costs on the handing down of this judgment.

ICC Judge Barber

12 October 2018