

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST

Rolls Building
Fetter Lane
London, EC4A 1NL

24 July 2024

Before :

DAVID MOHYUDDIN KC sitting as a Judge of the Chancery Division

Between:

LIME AND BLACK BPS LIMITED (in liquidation)

Claimant

- and -

(1) DHARMINDER SINGH GILL
(2) KIRAN KUMAR MISTRY (aka KIRANKUMAR MISTRY, KIRANKUMAR NAROTTAM MISTRY, KIRAN MISTRY, KIRAN DAZ and/or KIRAN DAS, t/a FAIRPLAY ACCOUNTING AND TAX)
(3) OBERON 11 LIMITED
(4) LIME & BLACK CORP LIMITED
(5) SQUARED CIRCLE LIMITED

Defendants

Mr Christopher Brockman (instructed by Wedlake Bell LLP) for the Claimant
Mr Ali Tabari and Miss Natalie Kearney (instructed by VLaw Limited) for the Second Defendant

Hearing dates: 20-22 February 2024, 11 March 2024

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.

This judgment was handed down remotely by circulation to the parties' representatives by email and release to the National Archives.

The date and time for hand-down is deemed to be 10.30am on 24 July 2024.

DAVID MOHYUDDIN KC:

Introduction

- 1 This is a claim brought by Lime and Black BPS Limited ('**Company**'), acting by its joint liquidators, against five Defendants. The claim has been compromised against all of them except the Second Defendant, Mr Kiran Kumar Mistry ('**Mr Mistry**'). The claim against him came on for trial before me on 20 February 2024 with an estimate of three days. The first morning was taken up with resolving an issue (which had arisen upon the exchange of skeleton arguments for trial) about the scope of the claim against Mr Mistry. That only left sufficient time for me to hear the evidence. Oral closing submissions were made on 11 March 2024.

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Parties

- 3 A CPR Part 7 Claim Form was issued by the Company on 19 July 2022. It gave brief details of claim as follows:

"Claims for breach of fiduciary duty, dishonest assistance, knowing receipt and unlawful means conspiracy. Short Particulars of Claim to follow."

- 4 The Company was incorporated under the Companies Act 2006 on 24 March 2020 with registration number 12531478. It went into creditors' voluntary liquidation on 18 March 2022 when Mr Steven Illes ('**Mr Illes**') and Mr Manjit Shokar were appointed as its joint liquidators ('**Liquidators**').

- 5 The defendants named in the claim form were:
- (i) Mr Gill. He is also known as Pete Gill or Peter Gill and was the Company's sole statutory director and shareholder;
 - (ii) Mr Mistry;
 - (iii) Oberon 11 Limited, a company of which Mr Gill was the sole director and shareholder;
 - (iv) Lime & Black Corp Limited, another company of which Mr Gill was the sole director and shareholder;
 - (v) Squared Circle Ltd, a yet further company of which Mr Gill was the sole director and shareholder.

Procedural history

- 6 On 21 July 2022, Chief Insolvency and Companies Court Judge Briggs, sitting as a high court judge, made a freezing order against all the defendants. As against Mr Gill and Mr Mistry, the amount frozen was £4,291,134.02. A proprietary injunction was made against Mr Mistry in respect of payments made by the Company to him in the total sum of £822,928.01. The Company relied on an affidavit sworn by Mr Illes on 19 July 2022 and an affidavit sworn by a Stephen Holder of HMRC ('**Mr Holder**') on 15 July 2021.
- 7 The same day, Judge Briggs made a search and seizure order against Mr Mistry, the Company having relied upon two affidavits both sworn by Mr Illes on 19 July 2022 and the affidavit sworn by Mr Holder on 15 July 2021. The premises to be searched were Flat 8, Stoneleigh Manor in Leicester.
- 8 The next day, 22 July 2022, Falk J made a further search and seizure order. The Company relied on an as then unsworn affidavit of Frances Coulson. 23 Ashover Road in Leicester was added as one of the premises to be searched.
- 9 On 4 August 2022, Insolvency and Companies Court Judge Jones, sitting as a high court judge, continued the freezing and proprietary injunctions were continued over the final determination of the claim or further order. The same day, Judge Jones also continued the search and seizure orders for the purpose of copying and giving directions for access to or inspection of electronic documents.
- 10 The Company's Particulars of Claim are dated 8 September 2022. They were not drafted by Mr Brockman.
- 11 Mr Mistry's Defence is dated 21 October 2022. It was not drafted by either Mr Tabari or Ms Kearney.
- 12 On 27 January 2023, Master Kaye varied the freezing injunction against Mr Gill, Oberon 11 Limited and, on 27 January 2023, she varied the freezing injunction against Mr Gill, Oberon 11 Limited and Lime & Black Corp Limited so that the steps to be taken in compliance with a consent order those parties had agreed would not constitute a breach of the freezing injunction. The Master then went on to make a consent order entering judgment in default against Mr Gill, Oberon 11 Limited and Lime & Black

Corp Limited for a sum to be determined, ordering them jointly and severally to make an interim payment of £1.2 million and making additional and consequential orders.

- 13 On 4 April 2023, Master Kaye made a costs and case management order in the claim which then continued against Mr Mistry alone.
- 14 The Company's first disclosure statement was signed by Mr Illes on 26 June 2023; a supplemental disclosure statement was signed by him on 2 November 2023; a further supplemental disclosure statement was signed by him on 7 December 2023 and a fourth disclosure statement was signed by him on 22 December 2023. Mr Mistry provided a list of initial disclosure and signed a disclosure statement on 11 December 2023.
- 15 Some further procedural orders were made on 19 October 2023, 20 November 2023 and 9 January 2024.
- 16 The trial came on before me on 20 February 2024. I heard opening submissions and the evidence on 20, 21 and 22 February 2024 and closing submissions on 11 March 2024.

Claim against Mr Mistry

- 17 As set out in its Particulars of Claim, which remain in their original form, and as the case was presented at trial, the Company alleges that:
 - (i) Mr Mistry was its de facto director; he therefore owed it the duties set out in sections 171 to 177 of the Companies Act 2006; he dishonestly breached those duties by causing or allowing the Company to engage in a significant VAT fraud which, in essence, involved it in receiving output tax VAT from its customers but failing to account for it and pay over that which was due to HMRC and instead diverting that money to or for the benefit of Mr Gill and Mr Mistry, directly or via the Third Defendant, Oberon 11 Limited;
 - (ii) alternatively, Mr Mistry dishonestly procured and/or induced and/or assisted Mr Gill's breaches of duty and is liable to pay equitable compensation to the Company;
 - (iii) alternatively, Mr Mistry knew that the payments he received were made in breach of duty making it unconscionable for him to retain them, such funds as he received being held by him on trust for the Company;
 - (iv) alternatively, Mr Mistry conspired with one or more of the other Defendants to use unlawful means intending by doing so to cause loss to the Company.

Evidence

- 18 A very lengthy trial bundle had been prepared for use at the trial which was separated into 9 sections, labelled A-H and X. Section E comprised a chronological run of documents. At the start of the trial, it extended to 4,819 pages and, during the trial, one document was added taking it to 4,833 pages. Further documents were also added to bundle F, increasing its size to 993 pages. In total, across all its sections, the trial bundle extended to 9,019 pages. As will be apparent from the remainder of this judgment, only a handful of those documents were deployed at trial, the inclusion of the remainder having been dispiritingly unnecessary.

- 19 I heard oral evidence, in the following order, from:
- (i) Miss Yazmin Hassan, an officer of HMRC ('Miss Hassan'); and
 - (ii) Mr Illes;
 - (iii) Mr Gill;
 - (iv) Mr Mistry.
- 20 I set out below my general impressions of those witnesses and I deal with their evidence in more detail below when considering the issues that I have to resolve.
- 21 My approach to the evidence in this case has been informed by the following guidance.
- 22 There is the well-known passage from the judgment of Robert Goff LJ in *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1, 56-57:

"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."

- 23 This was described by the Judicial Committee of the Privy Council as the "salutary approach ... of testing the witnesses' account against objective facts proved independently of their testimony, particularly by reference to the documented history." See *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11 *per* Lord Mance at [164].
- 24 Then there is the passage in the judgment of Arden LJ in *Wetton v Ahmed; Re Mumtaz Properties Ltd* [2011] EWCA Civ 610 at [10]-[17]:

"The judge's judgment

10. The judge's judgment raises a point of general importance. The judge starts his judgment with a section dealing with the factual issues. He gave himself the following direction with regard to his task of fact-finding:

'18. Prior to the commencement of the substantive hearing of the application, Counsel for the parties helpfully agreed the sequential factual questions to be answered upon the evidence, both oral and documentary, before the court.

19. I will take each in turn.

20. In doing so, the Court bears well in mind that this is a case where the events in issue are now between 5 and 10 years ago and the contemporaneous documentation is far from complete. However, the witness statements are relatively recent. This judgment will therefore analyse the issues and the evidence in accordance with the guidance provided in the dissenting speech of Lord Pearce in the House of Lords in *Onassis v Vergottis* [1968] 2 Lloyds Rep 403 at p 431:

"'Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part."

11. By the end of the judgment, it is clear that what has impressed the judge most in his task of fact-finding was the *absence*, rather

than the presence, of contemporary documentation or other independent oral evidence to confirm the oral evidence of the respondents to the proceedings.

12. There are many situations in which the court is asked to assess the credibility of witnesses from their oral evidence, that is to say, to weigh up their evidence to see whether it is reliable. Witness choice is an essential part of the function of a trial judge and he or she has to decide whose evidence, and how much evidence, to accept. This task is not to be carried out merely by reference to the impression that a witness made giving evidence in the witness box. It is not solely a matter of body language or the tone of voice or other factors that might generally be called the 'demeanour' of a witness. The judge should consider what other independent evidence would be available to support the witness. Such evidence would generally be documentary but it could be other oral evidence, for example, if the issue was whether a defendant was an employee, the judge would naturally consider whether there were any PAYE records or evidence, such as evidence in texts or e-mails, in which the defendant seeks or is given instructions as to how he should carry out work. This may be particularly important in cases where the witness is from a culture or way of life with which the judge may not be familiar. These situations can present particular dangers and difficulties to a judge.
13. Care must also be taken by the appellate court. As a general rule, the appellate court would treat the trial judge as having had a special advantage in seeing the witnesses give their evidence. Where the evidence is largely documentary, this advantage is of less worth than where, as in this sort of case, the oral evidence constitutes the primary evidence in the case. In this sort of case, an appellate court is slow to interfere with a trial judge's finding on a question of fact. As Lord Sumner held in *SS Honestroom v SS Sagaporak* [1927] AC 37 at 47:

"What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: Order LXVIII., r.1. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher

Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone."

14. In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.
15. That was the predicament in this case. The liquidator could not show that Munir and Zafar were de facto directors from the Company's books and papers because the directors had not handed over the necessary documents to the administrators. The judge held, in the context of Munir's denial that he was a de facto director despite the fact that he had acted as chairman of the meeting convened to pass a resolution for voluntary liquidation, that, had it been necessary to do so, he would have been entitled to draw adverse inferences against the respondents to the proceedings:

"26. It is accepted by the Applicant [the liquidator] that he can only place this example before the Court. However, as regards this, the explanation is quite simple. The Company's books and records are not within the possession or control of the Applicant despite his enquiries to ascertain the whereabouts of the books and records, and hence the Applicant could only prepare his case on the papers he has in his possession. The Respondents each asserted they did not have the books and records and that these were with either the accountant or Kiran Mistry. Both of these individuals, who were witnesses for the Respondents, confirmed in cross examination that any Company documents they had, had been passed to the Applicant and that they did not have possession of any of the missing books and

records and these remained with the Company. Therefore the books and records of the Company must have remained with the Company. The Respondents have chosen not to deliver them up to the Applicant and nor to disclose them within the proceedings. The Court can draw adverse inferences against the Respondents for this but does not need to do so as this single piece of documentary evidence is compelling and, indeed in my judgment, overwhelming."

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."

25 Finally, in *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413 at [48] Males LJ said:

"In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including e-mails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence. The classic statement of Robert Goff LJ in *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1, 57 is frequently, indeed routinely, cited..."

Miss Hassan

- 26 Miss Hassan is an officer of HMRC based in its Economic Crime Team. She had made a witness statement dated 13 December 2023. She made one correction to paragraph 8, telling me that the amount of VAT which has been assessed as owing by the Company was in fact £3,120,379. She otherwise confirmed her statement and adopted the evidence of Mr Holder which she said she had reviewed in November 2023.
- 27 Miss Hassan was courteously cross-examined by Miss Kearney. Mr Brockman did not re-examine.
- 28 Miss Hassan was plainly a truthful witness who answered the questions put to her fully and candidly.

Mr Illes

- 29 Mr Illes made a number of affidavits and witness statements during the progress of this claim:
- (i) First Affidavit sworn on 19 July 2022 made:
 - (a) to provide further details as to the claims;
 - (b) in support of the without notice application for freezing injunctions against each of the Defendants; and
 - (c) in support of the without notice application for proprietary injunctions against the Second to Fifth Defendants in respect of specific sums of Company money received by them;
 - (ii) Second Affidavit also sworn on 19 July 2022 made further to his First Affidavit and in support of his application for a search and seizure order in respect of Mr Mistry's mother's residential property;
 - (iii) First Witness Statement dated 4 August 2022 made in support of the addition of two alias names of Mr Mistry to the "continuation freezing and proprietary injunction order". Those names were Kiran Das and Kiran Daz;
 - (iv) Second Witness Statement originally dated 13 December 2023 which was heavily redacted by agreement between the parties (as I understand it) and, I infer, re-verified by a statement of truth dated 22 December 2023. This was Mr Illes' statement made in accordance with Master Kaye's directions; and
 - (v) Third Witness Statement dated 23 January 2024 in opposition to Mr Mistry's application to use certain monies subject to the freezing or proprietary injunction order to pay his legal fees.
- 30 He made no corrections to any of his written evidence.
- 31 Mr Illes was cross-examined by Mr Tabari in the afternoon of 20 February 2024 and the morning of 21 February 2024. He was then briefly re-examined by Mr Brockman.

32 It was clear that Mr Illes was doing his best to assist me and was plainly telling me the truth despite being nervous and (without meaning him any disrespect) inexperienced. Nonetheless, despite initially seeking to justify the stance he had taken, he was forced during his cross-examination to make concessions about the Company's reliance on Mr Gill's evidence (which I deal with below) and the way in which his own evidence on the Company's applications for the Freezing and Search Orders had been presented. Mr Illes was of course unable to provide any first-hand evidence of what had actually happened between Mr Mistry and Mr Gill or about the conduct of the Company's business prior to his appointment.

Mr Gill

33 Mr Gill swore an affidavit on 29 July 2022 providing information in compliance with the freezing injunction made on 21 July 2022. He also made a witness statement dated 12 December 2023, in accordance with Master Kaye's directions ('**2023 Witness Statement**').

34 He made no corrections to either his affidavit or his 2023 Witness Statement.

35 Mr Gill was extensively cross-examined by Mr Tabari on 21 February 2024 and was then re-examined by Mr Brockman. He remained quite calm and measured during his cross-examination. I have borne in mind the time that has elapsed since the events in question and the fallibility of human memory as well as the fact that, judgment having been entered against Mr Gill, there was no apparent benefit to be gained by him by giving evidence on behalf of the Company. However, I generally treat Mr Gill's evidence with real caution having heard and reflected on his evidence as a whole. Particular points which cause me to take such an approach are:

- (i) He was the sole director of the Company, which was used as the vehicle for a VAT fraud. Mr Brockman described him in his skeleton argument as having "extracted money from the Company". But Mr Gill refused to accept that he had committed a fraud on HMRC in respect of the Company's VAT affairs even though he had submitted to a judgment for £1.2 million. His suggestion that he submitted to that judgment based on what had been presented to him and because it was necessary to get to the bottom of what had happened is implausible.
- (ii) His answers to Mr Tabari's questions were partial and sometimes evasive. Particular examples are the evidence he gave about his failure to tell the Liquidator that he was the only person who had signed contracts of employment on behalf of the Company; the evidence he gave about his reluctance to be involved with the Company as it grew and the potential for him to earn more without much if any increased workload; the evidence he gave about the fact that HMRC had no record of dealing with anyone at the Company other than him; and the evidence he gave about his reaction once he knew how much HMRC said it was owed by the Company.
- (iii) Mr Gill was taken to a letter dated 11 May 2022 from him to Mr Illes. He was taken to materially identical letters from Mr Barrett, Mrs Myatt and Mr Myatt, all also dated 11 May 2022. During his cross-examination, Mr Tabari first showed Mr Gill the letter from Mr Barrett which Mr Gill described as being

similar to something he had seen before. When asked which of him, Mr or Mrs Myatt or Mr Barrett wrote the letter, he said he wrote the one with his name on and that he did not send it to the others electronically but they had it on paper. He then said that he might have emailed it before telling me that he probably emailed it and that it was more than likely he sent a draft letter by email to Mr and Mrs Myatt and Mr Barrett. Mr Tabari asked Mr Gill whether he sent the others a working document for them all to collude on and all send on the same day. Mr Gill said that could be inferred. He was unwilling to tell the whole story about the letters until pressed in cross-examination, despite having asserted in his witness statement that their content was correct.

- (iv) There is an email dated 22 June 2020 from Mr Dean Fiveash at IFX Payments which appears twice in the bundle. One version is timed at 11:27 and, on its face, is sent to "Fairplay Accounting & Tax kiran@fairplay4u.co.uk". It opens with "Hi". The other version is timed at 11:25 and, on its face, is sent to "Martyn Myatt; Fairplay Accounting & Tax". It opens with: "Hi Martyn". Despite being the source of the version timed at 11:27, Mr Gill accepted that he was unable to explain who had deleted the references to Mr Myatt, denying it had been him.

36 In the circumstances, I have sought to test what Mr Gill told me in his written and oral evidence against such contemporaneous documents as were available. Where there are no documents to assist me, I have had to choose between his and any competing versions of events.

Mr Mistry

37 Mr Mistry made a number of affidavits and witness statements:

- (i) First Affidavit sworn 29 July 2022;
- (ii) Second Affidavit sworn 18 August 2022;
- (iii) First Witness Statement dated 18 April 2023 which related to disclosure;
- (iv) Second Witness Statement dated 13 December 2023 in accordance with Master Kaye's directions (**'Trial Witness Statement'**);
- (v) Third Witness Statement dated 4 January 2024;
- (vi) Fourth Witness Statement dated 16 January 2024 in support of an application to vary the freezing injunction against him to enable him to pay legal fees;
- (vii) Fifth Witness Statement dated 18 January 2024;
- (viii) Sixth Witness Statement dated 23 January 2024; and
- (ix) Seventh Witness Statement dated 24 January 2024.

38 He did not make any corrections to them.

39 Mr Mistry was extensively and forcefully cross-examined by Mr Brockman on 22 February 2024 and briefly re-examined by Mr Tabari.

- 40 During his cross-examination he remained calm and courteous.
- 41 He was taken through earlier instances of him giving evidence which was rejected by the court:
- (i) In 2012, following a 6-day trial before Newey J, he was disqualified from acting as a company director for a period of 12 years. In that case, the judge
 - (a) recorded that in 2010, in a case called *Re Mumtaz Properties Ltd*, Judge Simon Brown QC had concluded that Mr Mistry, who was a witness in that case, had told "bare faced lies" and
 - (b) concluded that "Mr Mistry knowingly gave untruthful evidence" [2012] EWHC 1899 (Ch) at [33].
 - (ii) As he explained in paragraph 5 of his Second Witness Statement, on 11 December 2015, Mr Mistry "was found guilty by a jury in the Southwark Crown Court of failure to report on a fraud being perpetrated on a "company/companies" in relation to which [he] was a joint Liquidator." His conviction, however, was not for a "failure to report on a fraud" but rather for conspiracy to defraud nine companies between November 1998 and July 2007, as can be seen from the press release dated 5 February 2016. In his oral evidence, Mr Mistry described the case against him as having been reduced in the end to one count of failure to report a fraud, part of a conspiracy to defraud. He denied being part of the conspiracy and maintained that the sole charge was one of failing properly to report the fraud that had taken place. He said that he accepted the jury's decision but genuinely believed that he had done everything correctly.
- 42 Of course, it does not follow that, because on three previous occasions Mr Mistry's evidence given to different courts has been rejected (and, in civil proceedings, twice on the grounds that it was deliberately untruthful), his evidence to me was also untruthful and I bear that in mind.
- 43 Again, I have borne in mind the time that has elapsed since the events in question and the fallibility of human memory. Whilst, of course, Mr Mistry has an obvious interest in defending himself that does of itself not mean that he has manufactured his evidence to achieve that end.
- 44 However, Mr Mistry's evidence (the whole of which I have considered and reflected on) also needs to be approached with real caution for these reasons:
- (i) He was asked about what he had said in paragraph 11 of his witness statement dated 16 January 2024 about the payment of his legal fees which he accepted was incorrect and was a lie. He was re-examined about it by reference to an explanation he gave in paragraph 22 of his witness statement dated 24 January 2024 that what he had said in his 16 January 2024 statement had been an error. Even the making of errors means that care needs to be taken when considering Mr Mistry's evidence.

- (ii) Mr Mistry used two aliases, Tony and Kiran Das. His explanation for the latter was that he had been asked to adopt that pseudonym to avoid the adverse effect of a potential client Googling his real name and discovering his regrettable history. Even if true, that explanation demonstrates Mr Mistry's willingness to present an image of himself which is not entirely truthful. As for the use of the pseudonym Tony, there was no plausible explanation why Mr Mistry would use that moniker other than to hide his real identity. Mr Mistry admitted to that effect in relation to an email dated 20 May 2021 from the email address support@limeandblack.com.

45 In these circumstances, I have sought to test what Mr Mistry told me in his written and oral evidence against such contemporaneous documents as were available. Again, where there are no documents to assist me, I have had to choose between his and any competing versions of events.

Burden of proof and Company's reliance on Mr Gill

46 The Company bears the burden of proving its case against Mr Mistry on the balance of probabilities, save in one instance in which Mr Mistry bears the burden as I explain in paragraph 159(ii) below. It is for me to decide whether the Company or Mr Mistry has discharged that burden by reference to the evidence available to me.

47 The Company's case is heavily dependent on the evidence of Mr Gill but also on the answers given in interviews conducted by the Liquidators' staff with Mr Myatt on 11 July 2022 and with Mr Barrett on 3 August 2022. Neither Mr Myatt nor Mr Barrett was called to give evidence on behalf of the Company and so what they said in interview is untested by their cross-examination and, as such, I give little weight to what they are recorded as having said save where it is corroborated by contemporaneous, independent evidence.

48 As I have indicated above, I treat Mr Gill's evidence with a great deal of caution, especially so where his version of events is not corroborated by any contemporaneous documentation or is supported by only the interview answers given by Mr Myatt or Mr Barrett.

49 It was surprising to see the extent to which the Company relied on the evidence of Mr Gill, which was a risky strategy for it to take, especially where the major part of its case was directed at proving Mr Mistry to have been its de facto director.

Absent documentation

50 It was a major part of the Company's case that Mr Mistry:

- (i) had been untruthful in his written evidence about the extent to which he had access to Fairplay's emails and
- (ii) had deleted the Dropbox account used to hold the Company's documentation.

51 The first of those allegations was the subject of cross-examination of Mr Mistry about his witness statement dated 18 April 2023. On 4 April 2023, Master Kaye had ordered

Mr Mistry, by 4pm on 18 April 2023, to make a witness statement confirming that he did not have:

- (i) access to, possession and/or control of any Company books and records;
- (ii) access to, possession and/or control of any relevant material in respect of the claims;
- (iii) access to, possession and/or control of documents relating to the business carried on by the Company;
- (iv) documents relating to the role the Second Defendant (or persons or entities with which he was associated) had in the business of the Company;
- (v) documents/materials relating to the monies received by the Defendants from the Company or in connection with the business of the Company; and/or
- (vi) documents/materials, in addition to those which have already been provided, in respect of the location of the monies received by the Second Defendant from the Company.

52 Mr Mistry gave those confirmations in paragraph 3 of his witness statement dated 18 April 2023.

53 Mr Mistry agreed that the effect of this evidence was that he was saying that he did not have any documents at all relating to the Company. He also said that there were two sources of documents: a Dropbox used by the Company and Fairplay's books and records which included a different Dropbox. He accepted that when he made his witness statement he still had access to Fairplay's emails. Mr Mistry was then asked whether he was saying that amongst the thousands of Fairplay emails not one was relevant to this claim or the business carried on by the Company. His answer was that the Liquidators had the same information that he had on his laptop because they had imaged it following the search order. That became a refrain during the following part of his oral evidence. Having accepted that an email dated 25 January 2022 from him to Mr Gill about the Company's Dropbox related to the business carried on by the Company, he then accepted that he had disclosed it three or four days before the start of the trial. He maintained that the Liquidators already had it because they had an image of his laptop. It was put to Mr Mistry that he had told the Court, in his witness statement of 18 April 2022, that he did not have access to documents relating to the business carried on by the Company but was now saying that he did have access. His answer was that he had always had access to Fairplay's emails. That, of course, was no answer to the point that what he had said in his witness statement of 18 April 2022 had to have been wrong: if he had always had access to Fairplay's emails then he had access to relevant material in respect of the claims and/or documents relating to the business carried on by the Company, the email of 25 January 2022 being a clear example. Mr Mistry refused to accept that he had told a lie in his witness statement.

54 In my judgment it is clear that what Mr Mistry said in his witness statement was wrong. He did have the access he denied. That was illustrated when he produced the email of 25 January 2022. It follows that I am entitled to draw adverse inferences where necessary.

- 55 The second allegation is that Mr Mistry deleted the Company's Dropbox. Mr Illes said that his information that Mr Mistry had deleted the Dropbox came from Mr Gill. When asked about what he did and did not believe of the information emanating from Mr Gill, Mr Illes said that he believed that the Dropbox was deleted by Mr Mistry. There was nothing other than what Mr Gill said to found that belief.
- 56 It was put to Mr Mistry that he deleted the Dropbox but he denied it. In answer to one of my questions, he said that there were two Dropboxes, one for the Company and one for Fairplay. He said that when the Company became the subject of a freezing order obtained by HMRC, its payroll clients were transferred to a woman called Nafeesah Abid who traded under the name Natural Recruits. He said that the Company's Dropbox was rebadged under Natural Recruits' name. He said that before he went into hospital in about August 2021, Mr Gill and Mr Myatt had told him to give Ms Abid full access to the Company's Dropbox. He went on to deal with an email dated 25 January 2022 from Mr Gill to him timed at 11:50 in which Mr Gill recorded that he had been told by Mr Mistry's office (I infer that he meant staff at Fairplay) that the Company's Dropbox had been deleted. He asked for the information because it was needed for the ongoing HMRC enquiry. Mr Mistry's reply at 12:17 was to correct Mr Gill's understanding and to say that the Company's Dropbox had been rebadged as "Natural Recruits" and was going to be closed the following day once the data had been moved onto Ms Abid's own systems. He said in oral evidence that by January 2022 Ms Abid had also acquired Fairplay's business and had been given the option to renew the Dropbox.
- 57 There are two draft sale agreements in the trial bundle. One, dated 1 November 2021 was to be made between NSA Accountants Ltd ('NSA') and Fairplay (Midlands) Accounting and Tax Ltd ('FMAT') by which FMAT was to sell the shares in itself to NSA, which is a nonsense. The other, dated 5 November 2021, was to be made by Mr Mistry and FMAT by which Mr Mistry was to sell his sole trader business (Fairplay) to FMAT which was then to sell it on immediately to NSA. Nothing, in my view, turns on the difference in the dates of the two draft agreements. What is notable, however, is that the agreements were never executed. That and the impossibility of FMAT selling the shares in itself lead me to the conclusion that the Dropbox was not transferred to Ms Abid and I reject what was said in Mr Mistry's email to Mr Gill of 25 January 2022 at 12:17. In my judgment, on the evidence available, it is more likely than not that Mr Mistry deleted the Dropbox and I so find. It follows that I am entitled to draw adverse inferences where necessary.
- 58 As for the email from Mr Mistry dated 7 February 2022 at 17:05 to "Rakesh, Vaishali and Ash", in my judgment it does not relate to the Company's Dropbox. The subject matter is the removal of office and computer equipment, which is different.

Factual findings

VAT fraud

- 59 At paragraphs 24-25 of its Particulars of Claim, the Company alleges that it substantially under-declared and underpaid the VAT properly due to HMRC, the total amount of which is said to be £3,791,134.02. Mr Mistry's defence, paragraph 23, asserts that the Company's assertions are embarrassing for want of particularity because no details have been provided as to the Liquidators' qualifications in tax related matters (so as to be able to calculate the output tax due to HMRC) and because the Liquidators

do not know what business the Company carried out making it difficult to understand how they have been able to calculate its estimated liability to HMRC. However, the Company does assert in paragraph 16 of its Particulars of Claim that its business was the supply of services which was chargeable to VAT which (in paragraph 16 of his Defence) Mr Mistry notes and then asserts that the Company was entitled to offset input tax against output tax. As such, in reality Mr Mistry has put forward no defence to the Company's assertion that it was used for to perpetrate a fraud on HMRC.

- 60 In these circumstances, I consider the Company's assertion made out and find that it was used to perpetrate a fraud on HMRC in the amount of £3,791,134.02.

Mr Mistry's sole trader business

- 61 Mr Mistry conducted his accountancy practice on a sole trader basis under the name 'Fairplay'. I find that he started to trade under that style in April 2019. Having come out of prison in 2017, he learnt new skills and started to do payroll processing work, which he was doing before the Company was incorporated on 24 March 2020. References in this judgment to 'Fairplay' are to Mr Mistry's sole trader business.

Stated cases why Mr Mistry is or is not a de facto director; also relied on for other heads of claim

- 62 As the Company's case is set out in its Particulars of Claim and as it was presented at trial, the matters upon which it relies in respect of its assertion that Mr Mistry was the Company's de facto director are also relied upon for its alternative dishonest assistance and knowing receipt claims. As such, I turn to those matters now.
- 63 The Company's case why Mr Mistry is a de facto director is set out paragraph 7 of its Particulars of Claim:

"7. The Second Defendant [Mr Mistry] assumed to act as a director of the Company and was a de facto director of the Company. He undertook functions in relation to the Company which, whether individually or taken together, could properly be discharged only by a director. The Second Defendant:

- 7.1 in or around March 2020 suggested to the First Defendant [Mr Gill] that the First and Second Defendants form a new company with a view to providing services to clients of the Second Defendant and/or companies owned or controlled by him;
- 7.2 (once the Company had been incorporated) introduced clients to the Company;
- 7.3 agreed between himself and the relevant client the fee which would be charged by the Company for processing payments;
- 7.4 approached individuals with a view to their becoming employed by the Company and undertook interviews of prospective staff;

- 7.5 set and calculated levels of commission for the Company's employees;
- 7.6 was the person to whom all the Company's employees reported;
- 7.7 administered the Company's workplace pension scheme;
- 7.8 gave instructions to the Company's employees to process particular payments;
- 7.9 processed some payments himself on behalf of the Company;
- 7.10 set up an IFX payments account for the Company; and
- 7.11 acted on (at least) an equal footing with the First Defendant in directing the affairs of the Company."

64 Mr Mistry addresses these allegations in paragraph 10 of his Defence:

"10. Paragraphs 7-7.11 are denied. D2 pleads as follows:

- 10.1.1 D2 via his sole trader business, Fairplay, was instructed by the Company to process the payroll for the Company employees, make the net salary payments to the employees and ensure that the Pensions for the employees were properly calculated.
- 10.1.2 At no time has D2 acted as a de facto director of the Company. He was not involved in the management, formation or control of the Company. He was not involved in the day to day running of the Company.
- 10.1.3 He did not suggest to the First Defendant (D1) [Mr Gill] that they should form a new company together. D2 had no involvement in the incorporation of the Company.
- 10.1.4 D2 does not recall introducing any clients to the Company.
- 10.1.5 D2 did not agree any fees with the Company's clients. It was Martyn Myatt and D1 who was responsible for agreeing the fees. Fairplay submitted invoices to the Company in accordance with the Supply of Services agreement it had with the Company.
- 10.1.6 D2 did not approach individuals with a view to them becoming employed by the Company and did not interview prospective staff. D2 had no involvement with the recruitment process at the Company.
- 10.1.7 D2 did not calculate levels of commission for the Company's employees. D2 simply provided services to the Company via Fairplay.

- 10.1.8 The Company's employees did not report to D2 at any time. On the contrary, Fairplay was required to report to Mr Myatt. Mr Myatt and D1 regularly visited Fairplay's offices to ensure that work was being done as instructed.
- 10.1.9 D2 is unsure whether Fairplay set up the pension scheme at the Company. This is a service that Fairplay offers to its clients where payroll services are undertaken, and therefore D2 accepts that it is possible that Fairplay did set up the pension scheme.
- 10.1.10 D2 denies that he instructed the company's employees to process payments. The payroll processing was undertaken by staff within Fairplay. All client approved BACs payments were approved by D1 before they were made.
- 10.1.11 D2 was authorised by D1 to make net salary payments to the company employees, once they had been approved by D1.
- 10.1.12 D2 was instructed by Mr Myatt to assist him with making an application to open a bank account with IFX. D1 was fully involved in the application process, and any due diligence documents would have been requested from him by the bank. D1 told D2 that he used to be a corporate bank manager for HSBC.
- 10.1.13 It is denied that D2 acted on an equal footing with D1 in directing the affairs of the Company. D2 had no involvement in directing the affairs of the Company."

65 The Company did not serve a Reply to Mr Mistry's Defence.

66 When Mr Tabari saw Mr Brockman's skeleton argument for the trial, he raised a concern that the Company was seeking to extend its case beyond the corners of paragraph 7 of the Particulars of Claim. The controversy was debated in front of me on the first morning of the trial and I resolved it for the reasons I gave at the time, which dealt with the extent to which Mr Mistry could be cross-examined about particular material which had been included in the trial bundle. In order to achieve fairness between the parties and so that Mr Mistry was not required to deal with something that had not been included in the Particulars of Claim (which is why, as I understood it, Mr Illes' third witness statement had been so heavily redacted), I considered it appropriate to hold the Company to its pleaded allegations of de facto directorship.

Formation of the Company

67 There is no documentary evidence showing whose idea it was to incorporate the Company, as Mr Illes confirmed. What I am therefore left with is the competing evidence of Mr Gill and Mr Mistry.

68 In his 2023 Witness Statement, Mr Gill says that he became a client of Mr Mistry (trading as Fairplay) in about January 2020. Then, in March 2020, Mr Mistry suggested that they form a new company to do payment or payroll processing for his clients. Mr

Gill says that the conversation took place at Mr Mistry's offices in Leicester. His evidence is that Mr Mistry was the driving force behind the formation of the Company and sketched out a rough business plan on a bit of paper of which he does not have a copy. He says nothing about anyone else taking part in that conversation.

- 69 In his oral evidence, he told me that he and Mr Mistry were talking about what other business they could do together. He said that he wanted to help Mr Mistry expand his practice and to be able to refer clients to Mr Mistry and receive referrals from Mr Mistry. He said that he would advise clients how they could improve their business arrangements and gave an example of suggesting to a client that they should have a shareholders' agreement for which he would refer them to a different adviser and take a fee from the client for his advice. He went on to tell me that Mr Mistry said that there was a market for processing payments and that he was going to be paid for being a director and for assisting with the processing. He accepted that, despite him advising clients to enter into shareholders' agreements, nothing was put in writing about how the Company's business would be run. He also accepted that he was the director of a number of limited companies. In his First Affidavit, Mr Illes listed ten companies of which Mr Gill was a director.
- 70 In his Trial Witness Statement, Mr Mistry says that Martyn Myatt introduced him to Mr Gill in about September 2018. He says that, after that, in around February 2020, Mr Gill and Mr Myatt came to see him though he cannot remember where, and they told him that they were proposing to utilise a new limited company under the "Lime & Black" brand to provide payroll services and that Fairplay, Mr Mistry's sole trader business, would be contracted as a supplier to that new limited company to provide the processing services.
- 71 In his oral evidence, he told me that he had started doing payroll processing work when he came out of prison and that he was looking to build up his practice, including looking to provide payroll services to other companies and by February 2019 he was conducting outsourced payroll services for clients.
- 72 There is some documentary evidence about the services to be provided by Mr Mistry's sole trader business to the Company. There are two agreements, one dated 2 April 2020 ('**2020 Agreement**') and the other dated 13 May 2021 ('**2021 Agreement**'). There is also a letter dated 26 May 2021 ('**2021 Letter**'). Mr Mistry maintained that the 2020 Agreement and the 2021 Letter were fabrications. He said that the 2021 Agreement was genuine. I return to these documents in more detail in paragraph 132 below. There is also some documentary evidence to suggest that some services were provided by Fairplay to the Company in the form of the invoices for services provided, even though they bore no resemblance to the charges which Mr Mistry said had been agreed. Those documents do not really assist me on the question whether Mr Mistry suggested to Mr Gill that they form the Company.
- 73 It is, however, common ground between Mr Gill and Mr Mistry that there was a meeting in February or March 2020. It is also common ground that there was a discussion about a business which would do payment processing. Insofar as it matters, I find that Mr Myatt was present.
- 74 I further find that Mr Gill, Mr Mistry and Mr Myatt agreed that the Company would be incorporated to conduct that business. Mr Mistry had experience of such work, and

could provide payroll processing services, through Fairplay; he wanted to expand his sole trader business. As he knew, he could not formally be appointed as a director of the Company because he was still subject to the twelve-year disqualification order made by Newey J in 2012. But the Company needed a director and it is likely, in my judgment and I find, that Mr Gill agreed to be appointed as the Company's sole director. He had experience of being a company director including in respect of Lime & Black Corp Limited.

75 To that extent I consider paragraph 7.1 of the Particulars of Claim to be made out.

Introduction of clients

76 In his First Affidavit, Mr Illes relied on what Mr Gill had said in his interview with the Liquidators' staff on 29 March 2022, i.e. that the Company's customers came via Mr Mistry. In cross examination, however, he accepted that Mr Barrett, during his interview dated 3 August 2022, attributes every client introduction to either himself or Mr Myatt.

77 In his 2023 Witness Statement, Mr Gill says that the customers for the Company initially came from Mr Mistry and that subsequently the Company employed two or three sales people.

78 During his cross-examination, Mr Gill accepted that all but two customers about whom he was asked had been introduced by Mr Myatt or Mr Barrett. Of those two, he went no further than saying that he thought that they had been introduced by Mr Mistry; his evidence was tentative at best about Mr Mistry's involvement in introducing customers.

79 In his Trial Witness Statement, Mr Mistry says that all the Company's clients were introduced by Mr Myatt and Mr Gill, who dealt with the senior management and/or directors of client companies and agreed pricing and terms. Fairplay only got involved once clients had been on-boarded; Fairplay was introduced to the client's representatives with whom it was to liaise for the purpose of processing payroll.

80 Mr Mistry was cross-examined about an email sent to him by Mr Gill on 23 June 2020 to which a document entitled Payroll Solutions was attached. It was suggested to him that he was going to send it to one of his clients. His evidence was that Mr Gill had been asking "us", by which I understood him to mean his sole trader business, Fairplay, to see if they could get any more payroll clients. He accepted that he must have asked for the document with a view to introducing clients to the Company, but the opportunity never arose. I was not taken to any evidence to contradict what Mr Mistry said.

81 In closing Mr Brockman also sought to rely on a WhatsApp message between Mr Mistry and his employee Aimee Hare on 2 September 2019 but it was not put to him in cross-examination. Mr Brockman pointed to other WhatsApp messages dated 18-20 March 2020 which, he said, showed that Mr Mistry was aware of Green Group prior to the Company's incorporation; Green Group became one of the Company's clients. But that awareness does not mean that Mr Mistry introduced Green Group to the Company and Mr Mistry's evidence was that Green Group was a contact of Mr Myatt's. There was then another text message dated 18 June 2020 whereby Mr Mistry sent Coulson Transport's details to a Mr Hemal Bakrania. But that does not amount to evidence of Mr Mistry introducing Coulson Transport to the Company. Mr Brockman also

submitted that DDL was a contact of Mr Mistry's. His evidence was that DDL was a client of another accountant at whose request he had asked a Mr Mohammed Eglain to set up a website for it. He was consistent in his oral evidence that he had not introduced DDL to the Company.

82 Mr Brockman made two other points in his closing skeleton argument. First, he said that Mr Mistry moved clients on after HMRC had obtained its own freezing order against the Company in July 2021. He pointed to an email dated 26 July 2021 to a client of the Company's called Frontline Recruitment. Mr Brockman said that this was evidence of Mr Mistry's control of the client base. Whilst I accept that it is evidence of Mr Mistry telling one of the Company's customers that it was about to receive invoices from Natural Recruits, it does not amount to evidence that Mr Mistry had control over the Company's client base. Finally, there was the suggestion that Mr Mistry was "the main point of contact for the [Company]'s clients which demonstrates his plan coming to fruition". I disagree that the evidence showed that he was the "main point of contact" for the Company's clients.

83 As such, the Company is unable to make out its assertion at paragraph 7.2 of the Particulars of Claim that once the Company has been incorporated, Mr Mistry introduced clients to it.

Agreement of fees paid by clients

84 In his First Affidavit, Mr Illes relied on what Mr Gill had said in interview, i.e. that Mr Mistry agreed the amount to be charged by the Company for processing payments. There is, however, no contemporaneous documentary evidence to support the Company's assertion that Mr Mistry agreed between himself and the relevant client the fee which would be charged by the Company for processing payments, as Mr Illes agreed during his cross-examination. He was then taken to documents which showed that Mr Gill dealt with at least some of the Company's clients.

85 In his 2023 Witness Statement, Mr Gill said that the amounts paid by the Company's customers were negotiated between each customer and Mr Mistry and that Mr Gill had no involvement in that. He referred to the transcript of his interview, which is what Mr Illes had himself relied upon.

86 During his cross-examination, Mr Gill agreed that all but two of the contracts with clients were signed by him.

87 As for the other two, one is with Broughton's Plastering Limited and the other with Sadlers Waste Limited. On both occasions, whilst Mr Mistry's name is given as the supplier representative and both are signed "pp KM". As Mr Gill accepted in cross-examination, neither is signed by Mr Mistry but rather has had his initials added purportedly on his behalf. Mr Gill also said that some of the contracts with clients were drafted by Mr Mistry's office and that he would sign them when he went in, but there was nothing to corroborate that.

88 In his Trial Witness Statement, Mr Mistry said that Fairplay only got involved once clients had been on-boarded. The contract with Broughtons was put to him and Mr Mistry said that it was a "doctored" document.

- 89 In his oral evidence, he confirmed that he and his staff raised invoices on behalf of the Company for services it provided to its clients. He was asked who decided the amount to charge. He did not identify anyone but did explain the formula.
- 90 As for the introduction of clients, the evidence falls short of supporting the Company's assertion that Mr Mistry agreed between himself and the relevant client the fee which would be charged by the Company for processing payments. and I dismiss it, rejecting the assertion in paragraph 7.3 of the Particulars of Claim.

Engaging staff, calculating commissions and employee reports

- 91 The Company's employees who had written service agreements were Mr Gill, Mr Myatt, Mrs Joanne Myatt and Mr Christopher Barrett. There was no suggestion there were any other employees of the Company.
- 92 In his First Affidavit, Mr Illes recited what Mr Gill had told the Liquidators, namely that he (Mr Gill) had interviewed them but that they reported to Mr Mistry.
- 93 In cross-examination, Mr Illes said that there were no documents to support the Company's assertion that Mr Mistry had recruited the Company's employees beyond those employees' own letters, which I have already referred to at paragraph 35(iii) above. As Mr Gill told me, and I find, they were not prepared by the employees themselves but rather by Mr Gill. As such, they are no more than Mr Gill's unsupported assertion that Mr Mistry interviewed and recruited Mr and Mrs Myatt and Mr Barrett which conflicts with what he told the Liquidators (i.e. that he had interviewed the employees). Mr Illes accepted that Mr Gill already knew Mr Myatt before the Company was set up. He accepted that Mr Myatt likely introduced his wife to the Company and that Mr Myatt was responsible for his daughter having a car paid for by the Company. Mr Illes accepted that, from their interviews, it looked like Mr Myatt had introduced Mr Barrett to the Company and that Mr Mistry did not appear to have recruited any of those employees. He accepted that the allegation that Mr Mistry had interviewed and recruited the Company's employees was not supported by any of the material put to him in cross-examination.
- 94 Mr Gill says in his 2023 Witness Statement that Mr Mistry contacted Mr Myatt and subsequently Mrs Myatt and Mr Barrett, offering each of them a job with the Company. He says that Mr Mistry interviewed them, they reported to him and worked out of his offices in St Nicholas Place in Leicester when they needed offices. He accepts that he signed the employment contracts for himself, Mr and Mrs Myatt and Mr Barrett but asserts that Mr Mistry negotiated their terms, merely asking him to sign the contracts.
- 95 In cross-examination, Mr Gill could not remember Mr Mistry interviewing Mr Myatt although he did say that Mr Mistry met with Mr Myatt alone on many occasions. He did not know whether there had been a formal interview. He said that he knew of Mr Myatt and that Mr Myatt did not need an interview with him (Mr Gill). He said that Mr Mistry must have interviewed Mr Myatt. He accepted that there was no record of any interview of Mr Myatt.
- 96 Mr Mistry says in his Trial Witness Statement that he does not recognise the employment contracts exhibited to Mr Illes' witness statement, had not seen them before and can give no explanation for their content.

- 97 It was not put to Mr Mistry in cross-examination that he approached individuals with a view to their becoming employed by the Company and undertook interviews of prospective staff.
- 98 In my judgment, on the evidence available to me, the allegation at paragraph 7.4 of the Company's Particulars of Claim is not made out. I prefer Mr Mistry's evidence in this regard to Mr Gill's. There was no need for any of the Company's employees to be interviewed because Mr Myatt was already known to Mr Gill and the others were related or known to Mr Myatt. I reject what Mr Gill had to say about the recruitment of employees.
- 99 There are no contemporaneous documents to support the Company's assertion that Mr Mistry set and calculated levels of commission for the Company's employees. Rather, Mr Gill signed the employment contracts and it was he who wrote to Mr Myatt and Mr Barrett with regard to their commissions being used to purchase cars: see the letters from the Company signed by Mr Gill to:
- (i) Mr Barrett dated 29 November 2020;
 - (ii) Mr Myatt dated 10 July 2020;
 - (iii) Mr Myatt dated 24 November 2020 (two letters, concerning different vehicles).
- 100 The evidence does not support the Company's assertion at paragraph 7.5 of the Particulars of Claim and I reject it.
- 101 Save for what Mr Gill and Mr Myatt said in their interviews, there is nothing to support the Company's assertion at paragraph 7.6 of the Particulars of Claim that Mr Mistry was the person to whom all the Company's employees reported and I reject it.

Pension scheme

- 102 The Company's assertion is that Mr Mistry administered its workplace pension scheme. In his First Affidavit, Mr Illes referred to a letter addressed to Mr Mistry at the Company. As he then accepted during his cross-examination, it was not necessarily unusual that the administration of a pension scheme was sometimes done by the person who conducted the finance function in a company. He also accepted that the email from Scott Bamber to Fairplay dated 22 September 2020 did not suggest that Mr Mistry was acting as a director of the Company and that it appeared from the account set up forms for The People's Pension Scheme that they did not require the application to be made by a director.
- 103 In his 2023 Witness Statement Mr Gill suggested that he knew nothing about the establishment of the pension scheme with the People's Pension. However, one of the emails he himself exhibited, dated 5 August 2020, was copied to him. The other document he exhibited, being a letter from the People's Pension dated 22 October 2021 chasing overdue pension contributions (the same letter to which Mr Illes referred), was addressed to Mr Mistry at "Lime and Black BPS Monthly Office". It does not suggest that Mr Mistry was acting as a director of the Company and is consistent with him having been named as the contact at the Company, as he was on the application form.

- 104 Mr Mistry was asked about the setting up of the pension scheme. He accepted that he had set it up. As for the payments to be made to it, he said they were calculated automatically and came out of the Company's HSBC bank account by direct debit.
- 105 In my judgment the evidence demonstrates that Mr Mistry set up the pension scheme and administered it to the limited extent necessary given the automatic calculation of the amount of the contributions to be made. To that extent, the Company has made out its assertion in paragraph 7.7 of its Particulars of Claim.

Instructing employees to process payments, processing payments and the IFX payments account

- 106 As set out in the Company's Particulars of Claim, its assertion is that Mr Mistry gave instructions to the Company's employees to process particular payments, but those particular payments are not identified. The suggestion that the Company's employees processed payments was not pressed at trial.
- 107 In his First Affidavit, Mr Illes says that Mr Mistry "also dealt with authorising Company payments". He exhibited an email from Mr Mistry to IFX Payments regarding a transfer from the Company to Oakford Bright Trading which had not been received and IFX's reply. He accepted in cross-examination that it would not be unusual for the person exercising the Company's payroll function to process payments and that access to a company's bank account was not something reserved to directors.
- 108 Mr Illes' second witness statement had been heavily redacted. No doubt Mr Mistry had agreed the extent of those redactions and, therefore, was well aware of what remained. At paragraph 20, Mr Illes recited the number of references to IFX (719) and Payfect (1,770) that had been identified on Mr Mistry's electronic devices which were imaged following the execution of the search order. At paragraphs 42-47, Mr Illes recited further information which had been obtained from Mr Mistry's electronic devices. What Mr Illes said in those paragraphs was not challenged by Mr Mistry in his written evidence or on his behalf when Mr Illes was cross-examined. What his evidence shows is that there were just under 2,500 hits for IFX and/or Payfect and that Mr Mistry had access to the login details for the Company's account with Payfect and other companies. His browsing history showed that he accessed the website IFXpayments.com, the IFX data room for "Lime and Black" and the website for iBanq.com.
- 109 In his 2023 Witness Statement, Mr Gill said that Mr Mistry set up, ran and controlled the IFX and Payfect bank accounts. Mr Gill said that he signed the mandate letter with IFX and Payfect, Mr Mistry having his passport details and a copy of his utility bill and therefore being able to set up the accounts without his input. He exhibited what he referred to as the "initial correspondence" between Mr Mistry and Mr Fiveash at IFX, being the email of 22 June 2020. I have already referred to that email and the two versions of it in paragraph 35(iv) above. He also referred to an exchange of emails between Mr Mistry and Mr Fiveash on 20 August 2020 when Mr Mistry asked for information about a returned payment.
- 110 When cross-examined, he said that he was the only person with access to the Company's account with HSBC which was used to pay employees. When asked whether he was the only person who could have authorised payments through IFX, he said that Mr Mistry was a signatory and had the same authorisation as him. He was shown an email

from IFX dated 7 April 2022 in which it confirmed that it did not require a traditional bank mandate to be issued by a company's directors. As for Payfect, he initially denied that he was the only person responsible for payments from Payfect. He was then shown an email from Payfect dated 8 April 2022 in which it confirmed that it did not issue bank mandates but that he was only person responsible for payments on the Company's account. He was then asked whether he accepted what Payfect had said in that email, which he did, contrary to what he had earlier said.

- 111 In his Trial Witness Statement, Mr Mistry said that Mr Gill controlled all of the Company's bank accounts which he understood to be held with HSBC, IFX Bank (also known as iBanq) and Payfect. The phraseology of paragraph 40 of his Trial Witness Statement is, in my judgment, deliberate. Mr Mistry's words are: "Through my dealings with the operation, I understand the bank accounts were held with: HSBC Bank; IFX Bank (also known as iBanq); and Payfect." As I see it, this was an attempt by Mr Mistry to distance himself from any knowledge of the Company's bank accounts or how they operated.
- 112 In his oral evidence, Mr Mistry remained keen to maintain that appearance of distance. He was shown an email from Mr Fiveash dated 22 June 2020 (which I have already considered in paragraph 35(iv) above which was consistent with him and Mr Myatt having spoken with Mr Fiveash in the absence of Mr Gill, as he accepted. He said that he was there in his role as the "payroll processor". He was then shown an email from him to Mr Fiveash at IFX dated 23 June 2020 13:14 telling him that "your application has been completed and submitted this morning. It has been done in the name of Lime and Black BPS Limited. The Director is a partner of our team." He was asked to explain the second and third sentences of that quotation. He suggested that it was loose wording. He suggested that the reference to "team" was to Fairplay. He said that he did actively assist with opening the account.
- 113 He was taken to an email dated 24 June 2020 to Louise Humphreys at tlphaulage.co.uk, signed using his pseudonym "Tony". Further up the chain is an email from Mr Mistry to Mr Gill, forwarding the emails with Ms Humphreys. It reads "Hi Pete Just for your information when you are making payments – I might re-run the payroll and resubmit to you for this one adjustment."
- 114 He was also shown an email chain dated 29 June 2020 between Mr Fiveash and Mr Gill about the opening of the Company's IFX account, which Mr Gill forwarded to Mr Mistry on 29 June 2020 at 12:41. Mr Mistry said that he was dealing with IFX but was not able to authorise payments. He said that Mr Gill was the only person who could authorise payments from the IFX account, although he would upload payments ready for Mr Gill to approve.
- 115 He was shown an email chain between him and Mr Fiveash on 2-3 July 2020 in which he asked for help "in finding an easy way to upload the attached beneficiaries onto our Ibanq account". Mr Fiveash replied to say that there did not appear to be a problem at IFX's end. It was put to Mr Mistry that the email showed him arranging for payments to be made from the IFX account. He agreed and then went on to say that he was unfamiliar with the IFX/iBanq system and how they required payments to be dealt with so he was trying to agree with Mr Fiveash how to do it. He said that we (which I understand to mean Fairplay) would upload payment requests ready for Mr Gill to approve.

- 116 He was then shown emails 22 and 24 July 2020 in which he dealt with queries about failed payments, which he suggested he dealt with as part of the payroll function he said he was providing as Fairplay. The emails are sent to "Fairplay Accounting & Tax" and to Mr Gill. There are similar emails dated 14 and 30 December 2020.
- 117 When asked to identify emails to Mr Gill asking him to approve payments, Mr Mistry's explanation was that there were none because Mr Gill knew that he would have to approve payments to be made on Fridays. Mr Mistry said that there would have been a lot of calculations sent to Mr Gill on the "support@limeandblack" email, for Mr Gill to cross check against the payment received from the client and to make sure there were no client queries to resolve before payments were made to employees. Mr Mistry accepted that there was no evidence in the bundle of Mr Gill authorising payments.
- 118 Although he was not shown it during his cross-examination, there is a note of a conversation between Frances Coulson, the Liquidators' solicitor, and Mr Mistry at the time the search order was executed. The note records that Mr Mistry said: "I could make payments off platforms (i.e. Payfect and iBank) but not HSBC, and that was for convenience as there were so many employees to pay but Pete would authorise it." The note records that Mr Mistry went on to say that payments were authorised verbally.
- 119 As for the operation of the bank accounts, I found Mr Mistry's evidence unimpressive. It is plain from the information harvested from his electronic devices that he was able to access the IFX and Payfect accounts. He was, however, coy about his proximity to their day-to-day usage as can be seen from the deliberate phraseology of paragraph 40 of his Trial Witness Statement.
- 120 As for documentary evidence, what is also striking is the absence of any record of communications between Mr Mistry and Mr Gill about payments which needed to be authorised and the provision to Mr Gill of information which would have enabled him to confirm that the payments which Mr Mistry said he had uploaded ought to be authorised. I reject Mr Mistry's evidence to the effect that Mr Gill would refer to a BACS file uploaded to IFX. If Mr Gill was genuinely the only person who could authorise payments uploaded to the bank, I would have expected to see some form of back and forth between him and Mr Mistry about then. The absence of such communications leads me to the conclusion that, in fact, both Mr Gill and Mr Mistry were able to authorise payments because they could both access the IFX and Payfect accounts with a sufficient level of control.
- 121 That is consistent with the contemporaneous documentary evidence of Mr Gill forwarding to Mr Mistry the email from Mr Fiveash dated 29 June 2020 confirming that the account had been opened. It is also consistent with Mr Mistry dealing with queries about payments and about "uploading ... beneficiaries" to the IFX account. As for the email of 24 June 2020, that is not inconsistent with both Mr Mistry and Mr Gill being able to access the accounts at a sufficient level of control to authorise the making of payments.
- 122 As for the HSBC account, I find that only Mr Gill could operate it.

123 In these circumstances:

- (i) I reject the Company's assertion in paragraph 7.8 of its Particulars of Claim that Mr Mistry gave instructions to the Company's employees (i.e. Mr and Mrs Myatt and Mr Barrett) to process particular payments (which were not identified);
- (ii) the Company succeeds in its assertion in paragraph 7.9 of its Particulars of Claim that Mr Mistry processed some payments himself on behalf of the Company; and
- (iii) the Company succeeds in its assertion in paragraph 7.10 of its Particulars of Claim that Mr Mistry set up an IFX payments account for the Company.

General assertion of acting on an equal footing with Mr Gill

124 I consider that this general assertion is too vague to assist the Company.

Responsibility for and knowledge of Company's VAT returns

125 There was an issue about the services which Mr Mistry, through his Fairplay business, was to provide to the Company.

126 In her witness statement, Miss Hassan explained that the user account associated with the filing of VAT returns for the Company was registered in Mr Gill's name with the associated email address: myemail.gill@googlemail.com. She adopted the evidence of Mr Holder. In his affirmation dated 15 July 2021, he said that Mr Gill submitted the application to register the Company for VAT. A printout of the application shows Mr Gill's details.

127 In oral evidence, Miss Hassan said that contact between the Company and HMRC was conducted by Mr Gill or his solicitors and that HMRC's internal systems did not record any contact with Mr Mistry. HMRC's internal notes did not record Mr Gill saying that Mr Mistry was dealing with VAT or that he was not aware of the VAT position.

128 In his First Affidavit, Mr Illes referred to invoices which he said purportedly related to a supply of services agreement with "Fairplay Accounting" dated 2 April 2020. He noted the services listed in the schedule to that agreement. His view was that Mr Mistry was trading as a sole trader under the name Fairplay Accounting and Tax.

129 In oral evidence, Mr Illes accepted that there was no evidence of anyone other than Mr Gill dealing with the Company's registration for VAT and no evidence of any other than Mr Gill dealing with HMRC more generally.

130 In his 2023 Witness Statement, Mr Gill said that he asked Mr Mistry about the Company's VAT position and was told that everything was being taken care of. He said that it was not until he received HMRC's letter of 23 July 2021, giving notice of an assessment of £971,722, that he knew how much VAT was owed by the Company. He said that he did not look at or sign any VAT returns, assuming that Mr Mistry was dealing with them. He did not know "at that time" that the Company had not submitted any VAT returns; I understand "at that time" to be a reference to the date of the notice of assessment. He also referred to the 2 April 2020 agreement and said that it was the

supply of services agreement between Mr Mistry's firm Fairplay and the Company. He referred to the services that were to be provided under that agreement. He said that he signed a further engagement letter with Fairplay dated 26 May 2022.

- 131 In his oral evidence, Mr Gill said that he knew about the Company's registration for VAT but that Mr Mistry's office did it, Mr Mistry having told him in advance. He said that he had asked Mr Mistry about the Company's VAT liabilities and had been told that they were up to date. He did not ask to see the VAT returns themselves because Mr Mistry told him that they were up to date and he would be given the documents, even though that never happened. He followed that up with a phone call and a visit to Mr Mistry when he was told that everything was in order. He accepted that HMRC had no contact with anyone else at the Company and that he had not told HMRC that he did not deal with VAT even after the notice of the assessment had been hand delivered to him. He told HMRC that he would make payment but could only pay in tranches. He put that down to the shock of the assessment and when asked why he did not tell HMRC a few days later that Mr Mistry was responsible, he said that Mr Mistry was unwell and that he went to Mr Mistry's offices to find information. He denied that his oral evidence was untrue or that she specifically told Mr Mistry not to deal with VAT returns. He accepted that a company director was responsible for its tax affairs but said that none of his other businesses had been registered for VAT.
- 132 In his Trial Witness Statement, Mr Mistry listed the services he said that Fairplay had been instructed to provide to the Company. They did not include the preparation or submission of VAT returns until after HMRC obtained a freezing order in July 2021. He went on to refer to a Supply of Services Agreement dated 13 May 2021 and an exchange of emails between him and Mr Gill dated 17 May 2021. As for the 2020 agreement, said that that he did not recognise it at all and that, because it was substantially different to the version he had (by which he can only have meant the 2021 agreement), it must have been altered. He supported that by referring to the reference in the 2020 agreement to pricing on a "works completed" basis.
- 133 During his cross-examination, he said that the services he was to provide were pure payroll processing services, dealing with employees and being a service desk to deal with queries. He denied that he was the "front face" of the company or that he had a role in the Company's management. He was unable to explain why, on 15 April 2020, Mr Gill had sent him the Company's Government Gateway ID and password but in re-examination told me that a company's invoices were required to display its VAT number and that he had created some invoices for the Company. He denied that he was responsible for the Company's VAT returns. He said that he had an agreement in March or April 2020 with Mr Gill and Mr Myatt about his fees; work then started building up slowly and the arrangement was properly documented in April or May 2021. He said that he tended to work on fixed fees, and agreed £75,000 for the first month rising to £100,000 from the second month onwards, based on £3 per transaction processed and that there were about 5,000 transactions per week. He accepted that the majority of the fees due had not been paid and that he had not invoiced them but denied that was because there was no agreement for his fees. He said that he thought the 2020 Agreement was a copy of the 2021 Agreement which had been altered because of the "works completed" pricing basis and the services listed in schedule 1. He said that no accountant would agree to make the payments listed. He was taken to the invoice from Fairplay to the Company dated 1 June 2020 in the sum of £2,250 plus VAT of £450

making a total of £2,700 which referred to the provision of "Accounting Services pursuant to terms of Engagement". He said that there was an agreement for the supply of services even though the invoice pre-dated by a long time the 2021 Agreement. He said those terms of engagement mirrored exactly the 2021 Agreement. He suggested that the wording of the invoice was automatically generated by the invoicing software. He then said that "we had a verbal agreement". He was taken to an email to Mr Bakrania dated 11 October 2021, forwarding the 2021 Agreement (although I note that the underlying email which he forwarded to Mr Bakrania does not record in its header that anything was attached to it). In the email, Mr Mistry referred to "an earlier one when we had commenced the provision of services". He said that he had assumed there was an earlier written agreement. He denied that he had manufactured the 2021 Agreement.

- 134 A further document was put to him, being an engagement letter addressed "Dear Dharminder" (i.e. to Mr Gill) dated 26 May 2021 which stated that Fairplay would prepare and file VAT returns for the Company. The section on fees is confused and does not make very much sense at all. It also does not appear to require a fee to be paid for the preparation of VAT returns. Then, the terms and conditions referred to in the engagement letter are said to be "in respect of the work undertaken for Osman Ozer". Mr Ozer was a client of Mr Mistry. Mr Mistry said that the engagement letter was a forgery and denied being responsible for the Company's VAT returns.
- 135 Mr Mistry was taken to an email dated 23 April 2021 from one of his own employees, Rakesh, asking him for information required "to file the outstanding VAT returns due" for the Company. It was put to him that this showed that his own employee considered him to be in day to day management of the Company. Mr Mistry could not comment on what information Rakesh considered that he (Mr Mistry) could provide, but he said that Rakesh was doing his job, chasing up information. He could not understand why Rakesh asked him (Mr Mistry) for the information because none of it related to payroll.
- 136 I was unimpressed by the evidence of both Mr Gill and Mr Mistry. Standing back and looking at the evidence available, including the documentary evidence, I find that Mr Mistry was aware of the Company's VAT position. On his own case, Mr Mistry was able to compile VAT returns after July 2021 using information in his possession. He observed in his Trial Witness Statement that the information was incomplete because supplier invoices were missing. However, supplier invoices are relevant to input tax deductions. The mischief in the VAT fraud was the under-declaration of output tax. Mr Mistry was aware of the amount of output tax from the preparation of invoices to be sent to the Company's clients. I have drawn the inference against Mr Mistry that, had the Fairplay emails or Dropbox been available, all those invoices would have been discovered.
- 137 As for the 2020 Agreement, the 2021 Agreement and the 2021 Letter, all three documents were unsatisfactory, as were the competing explanations for them. In my judgment it is most likely and I find that neither Mr Gill nor Mr Mistry was particularly concerned with the detail of those documents. It is also likely and I find that neither of them was concerned to see that VAT returns were submitted to HMRC even though they both had the Government Gateway credentials which would have enabled that to be done.
- 138 I reject Mr Mistry's explanation for having been sent the Government Gateway credentials, given in re-examination, that he needed the VAT number to put on the

Company's invoices. I do so because the template which Mr Gill sent to him the following month already bore the VAT number and Mr Mistry confirmed in his oral evidence that it was after he received the invoice template that he started to use it.

De facto directorship

Legal framework

- 139 The leading case is *Revenue and Customs Commissioners v Holland; Re Paycheck Services 3 Ltd* [2010] UKSC 51 (in my judgment, see especially [26]-[43] per Lord Hope; [82]-[92] per Lord Collins and [98] per Lord Saville) as was observed by Arden LJ in *Smithton Ltd v Naggar* [2014] EWCA Civ 939 at [20]. She went on (up to [27]) to review the decision in *Holland* before observing at [28] that in some context the real issue will be whether the acts relied upon demonstrate the assumption of acts as a director.
- 140 At [31] she went on to explain that the term "is to be tested against the usual split of powers between shareholders and directors under Table A, ie on the basis that the powers of management of the company's business are delegated to the directors and the shareholders cannot intervene except by special resolution. On that basis it means a person who either alone or with others has ultimate control of the management of any part of the company's business."
- 141 At [32] she said that "[t]he role of a de facto or shadow director need not extend over the whole range of a company's activities." At [33] she agreed with Lord Collins JSC that there was no one definitive test for a de facto director, the question being 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 a director.
- 142 Nonetheless, Arden LJ was able at [34]-[45] to identify points of general practical importance when considering what makes a person a de facto director. She said:
- "34. 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's case*).
 - 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 for Trade and Industry v Jones* [1999] BCC 336).
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 de facto 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...”

143 I also note that in *Re Mumtaz Properties Ltd* [2011] EWCA Civ 610 at [47] Arden LJ described a de facto director as “one of the nerve centres from which the activities of the company radiated.” Such a test can be helpful where a company’s affairs have been conducted informally such that a focus on corporate governance is of less relevance and assistance; see *Ingram v Singh* [2018] EWHC 1325 at [105].

Conclusion on de facto directorship

144 The factual findings I have made in respect of the Company’s case that Mr Mistry was a de facto director and the acts he carried out are:

- (i) he was involved in the conception of the Company;
- (ii) he administered the Company’s workplace pension scheme;
- (iii) set up an IFX payments account for the Company; and
- (iv) he processed and authorised payments from the Company’s IFX and Payflect accounts.

145 Those acts, when looked at cumulatively and in the context of the Company with what I consider to be its loose and limited corporate governance, are directorial in nature. I have taken into account the absence of any evidence that Mr Mistry was held out by the Company as one its directors or that he himself used the title “director”. I have also taken into account the request made to him by his own employee Rakesh for information. That request, regardless whether he read it, in my judgment shows that Rakesh considered Mr Mistry to be the source of information for the Company. I find that Mr Mistry was the Company’s de facto director.

Duties owed by directors

- 146 It follows that Mr Mistry owed to the Company the duties set out in sections 171-175 of the Companies Act 2006. In the interpretation and application of those statutory duties it is necessary to have regard to the common law rules and equitable principles upon which the statutory codification of directors' duties is based.
- 147 The primary fiduciary duty relied upon by the Company is that set out in section 172 of the 2006 Act but a further key fiduciary duty is that set out in section 175. See the analysis of Edwin Johnson J in *Umbrella Care Ltd v Nisa & ors* [2022] EWHC 86 (Ch) at [87]-[97].

Breach of duties by Mr Mistry

- 148 At paragraph 22 of its Particulars of Claim (which Mr Mistry says is embarrassing for lack of particularity), the Company asserts that it belatedly filed VAT returns for the six periods 1 April 2020 to 30 September 2021. At paragraph 25 it asserts that it substantially under-declared and underpaid VAT properly due to HMRC.
- 149 At paragraph 26, the Company asserts that Mr Gill and Mr Mistry caused or permitted the Company to do the acts mentioned in paragraphs 22 and 25 dishonestly and knowing that they were perpetrating a fraud on HMRC and breaching the fiduciary duties they owed to it. Mr Mistry says that the Company's assertion is embarrassing for want of particularity as to who was party to the fraud and denies that he acted dishonestly or was in any way involved in a fraud against HMRC.
- 150 At paragraph 28, the Company alleges that Mr Mistry had the knowledge and was dishonest as set out in paragraph 26 because:
- (i) he was a de facto director of the Company;
 - (ii) he had a detailed knowledge of and control over the Company's finances;
 - (iii) the acts set out in paragraphs 22 and 25 were not consistent with innocent mistake or negligence but only with dishonesty;
 - (iv) he received substantial sums from or representing the sum that should have been paid to HMRC as is set out further later in the Particulars of Claim.
- 151 By paragraph 26 of his Defence, Mr Mistry denies paragraph 28 of the Particulars of Claim because:
- (i) he was not a de facto director of the Company;
 - (ii) he did not have a detailed knowledge of and control over the Company's finances, rather he provided services to the Company;
 - (iii) he was not responsible for any of the acts;
 - (iv) the monies he received were properly invoiced by Fairplay and he did not receive monies from the Company that were otherwise due to HMRC.

- 152 At paragraph 31, the Company sets out the payments about which it complains and which it says comprise part of the monies which should have been paid over to HMRC:
- (i) £822,928.01 to Mr Mistry;
 - (ii) £305,142 to the Third Defendant;
 - (iii) £59,801 to the Fourth Defendant; and
 - (iv) £655,593.78 to the Fifth Defendant.
- 153 Mr Mistry says in paragraph 30 of his Defence that the £822,928.01 was paid to him in accordance with the 2021 Agreement. He states no case in respect of the payments to the other Defendants, saying that he was not responsible for them.
- 154 At paragraph 33 of its Particulars of Claim, the Company says that the payments were intentionally diverted and/or misappropriated away from the Company for the benefit of Mr Gill and/or Mr Mistry and comprise or represent part of the monies that should have been paid to HMRC.
- 155 Mr Mistry denies paragraph 33, saying that the monies paid to him were due and owing to him.
- 156 At paragraph 37 of the Particulars of Claim, the Company asserts that Mr Mistry knew that the payments were made in breach of fiduciary duty or breach of trust and was dishonest by virtue of:
- (i) his having caused or permitted the payments to be made;
 - (ii) his knowledge of the fraud as set out in paragraph 28 of the Particulars of Claim;
 - (iii) his having received the payments totalling £822,928.01;
 - (iv) the payments not being consistent with innocent mistake or negligence.
- 157 Mr Mistry denies paragraph 37 and says that it is embarrassing for want of particularity.
- 158 By paragraph (4) of the prayer to the Particulars of Claim, the Company seeks equitable compensation for breach of fiduciary duty in the sum of £3,791,134.02 alternatively £1,843,464.79 which is the sum of the payments listed in paragraph 31. The larger sum is what was said to be the Company's liability to HMRC but Miss Hassan corrected that figure to £3,120,379.
- 159 I consider that the allegation that the payments made (i) to Mr Mistry himself from any of the Company's bank accounts and (ii) to other recipients from the IFX or Payfect accounts were made in breach of the fiduciary duties he owed to the Company as its de facto director are made out:
- (i) given the findings I have made above and
 - (ii) because I reject Mr Mistry's assertion that the payments made to him were payments for services. As such, Mr Mistry is unable to discharge the burden he

faces of proving that the payments he received were properly made to him. I reject what Mr Mistry says about those payments and find that there was no genuine agreement to pay fees for professional services rendered by Fairplay because:

- (a) I have found that he was unconcerned about the detail of the 2020 Agreement, the 2021 Agreement and the 2021 Letter;
- (b) the amounts invoiced bear no resemblance to the fee he says was agreed;
- (c) no invoices were raised for fees amounting to some £1 million.

160 As for the Company's assertion that Mr Mistry had "a detailed knowledge of and control over the Company's finances," I have found that he had knowledge of its VAT position because he was preparing its invoices to its clients. However, the evidence does not show that he had control over the Company's finances generally. I have, however, found that Mr Mistry processed and authorised payments from the IFX and Payfect accounts, but not from the HSBC account.

Loss caused by Mr Mistry's breaches of duty

161 I was not addressed at any length about the proper measure of loss. The Company's case is that it is entitled to equitable compensation in the full extent of its liability to HMRC. Mr Tabari, on behalf of Mr Mistry, asked me to be careful when considering causation but also said in his oral closing submissions that if I found that Mr Mistry was involved in the VAT fraud it would be difficult for him to say anything against the VAT deficiency being the appropriate measure of damages.

162 The essential question is what sum is required to put the Company in the position in which it would have been had Mr Mistry not breached his duties. On the facts of this case, had he not done so, monies which were (i) paid to him and (ii) paid to the other defendants from the IFX and Payfect accounts would have been available to the Company, which they are not. That is the Company's loss caused by Mr Mistry's breaches of duty.

163 I therefore reject Mr Brockman's submission that the loss suffered by the Company is its full liability to HMRC. Its alternative case was that its loss was the total of the payments it had listed in the Particulars of Claim. However, I have found that Mr Mistry was not responsible for making payments from the HSBC account to the other defendants.

164 I also reject Mr Tabari's submission that the "VAT deficiency" would be the proper measure of loss if Mr Mistry was involved in the VAT fraud given the generality of that submission which did not take account of the findings of breach of duty that I have made.

165 As such, the total loss suffered by the Company which was caused by Mr Mistry's breaches of duty is the total sum of the payments listed in the schedule to the Particulars of Claim less payments made to the other defendants from the Company's HSBC account.

Alternative claims

- 166 Whilst the Company had pleaded a claim for equitable compensation for breach of trust, it was not pursued at trial. In any event, in my judgment, it would have added nothing to the claim for equitable compensation for breach of fiduciary duty.
- 167 I do not need to deal with the Company's alternative claims that Mr Mistry dishonestly assisted Mr Gill's breach of fiduciary duty or that he knowingly received monies from the Company. The same goes for what Mr Brockman's skeleton argument for trial identified as a "final alternative claim for unlawful means conspiracy" which was not pursued by the Company at trial in any event.

Disposition

- 168 For these reasons there will be judgment for the Claimant to be calculated as set out in paragraph 165 above.