



Neutral Citation Number: [2025] EWHC 949 (Ch) Case No: CR-2023-CDF-000024

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

Cardiff Civil Justice Centre
2 Park Street Cardiff CF10 1ET

Date: 17 April 2025

Before :

HIS HONOUR JUDGE JARMAN KC

Sitting as a judge of the High Court

Between :

(1) GUORUI SONG
(2) YALI ZHAO

Petition
ers

- and -

(1) KES SMITH
(2) EMMA SMITH
(3) KESTRAL GROUP LIMITED
(4) KESTRAL CONSTRUCTION HOLTON ROAD
LIMITED
(5) KESTRAL CONSTRUCTION (ALBANY ROAD)
LIMITED
(6) KESTRAL CONSTRUCTION CARDIFF
LIMITED
(7) KESTRAL HOLDINGS LIMITED

Respond
ents

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- - -

Mr Samuel Parsons (instructed by **Huttons Solicitors**) for the **petitioners**
Mr James Pearce-Smith (instructed by **Darwin Gray LLP**) for the **respondents**

Hearing dates: 31 March-3 April 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

HIS HONOUR JUDGE JARMAN KC

HHJ JARMAN KC:

Introduction

1. The petitioners, Mr Song and Mrs Zhao, are husband and wife, as are the first and second respondents, Mr and Mrs Smith. They are the directors and own the shares between them equally in the third respondent (the Company) which was incorporated on 31 August 2020. The Company in turn owns all the shares in five other companies, including SGR Estates Limited (SGR) and Kestral Construction Limited (KCL). The business of these companies involved the acquisition of properties in Cardiff, Newport and Barry, and the conversion of them into residential flats. The relationship between Mr Song and Mr Smith became very close but in July 2022 they fell out and neither wanted to work with the other again, and did not do so.
2. The petitioners now accuse Mr Smith of fraud and/or breach of his duties as director, by wrongly making cash withdrawals, unexplained transfers payments and purchases, excessive salary and mileage payments, employing family members and working on his own projects. Further, it is alleged that after the break up, Mr and Mrs Smith fraudulently and/or in breach of fiduciary duty or of a joint venture agreement, diverted business from SGR or KCL to themselves through companies which they then set up, including the fourth and fifth respondents (referred to by their initials). The petitioners claim that all of this has unfairly prejudiced their position as shareholders in the Company within the meaning of section 994 of the Companies Act 2006, and seek remedies accordingly.
3. Mr and Mrs Smith deny any unfair prejudice. They say difficulties were caused when, in the summer of 2022, Mr Song stopped funding the business as he had been doing, withdrew sums standing to the credit of his directors loan account in order to buy an expensive home in London, and had nothing further to do with the Company or its business despite requests from Mr Smith. On top of this, the construction industry had been hit hard by rising prices and scarcity of labour and materials. They say that they did what they could to complete the three projects which were ongoing. They accepted that they then took on further similar projects through various companies, but say that they were entitled to do that because the men no longer wanted to work with one another because of Mr Song's disengagement, and the insolvency at that time of KCL. They say their shareholding has been unfairly prejudiced by this and related conduct by Mr Song. Furthermore they seek a declaration that their former home at 10 Cyncoed Road, Cardiff is held by Mr Song on bare trust for them. They also seek appropriate remedies.
4. Despite the men having become very close, each now accuses the other of dishonesty. Many factual issues were explored in evidence, not all of which were pleaded or which need to be resolved in order to determine the parties' respective claims. I deal only with those that are pleaded or assist me in determining those claims. I have, however, considered all the points made in evidence and submissions, including those not referred to here. Before I turn to the issues, I will set out the background in a way which I hope is relatively uncontentious.

Background

5. The petitioners are from China and retain business interests there. They are now resident in the UK. Their first language is Mandarin. They have property interests in Cardiff. Mr Smith left school at 16 and has always worked in the construction industry. In 2013 KCL was incorporated with Mr Smith's mother Fatima Omar, as sole director. It is not in dispute that he is a hard worker, often working six or seven days a week. The men were first introduced in 2016 when Mr Song was looking for a builder to convert a building in Cardiff into residential flats. At this time he was a director of a company called Muluhome Limited which carried on the business of estate agents. He engaged KCL to undertake that project which was successfully completed in 2017.
6. At about that time, Mr Song incorporated SGR to take on similar projects of converting buildings into flats. He lent money to that company to purchase property and then borrowed money, secured on his personal assets, to cover the conversion costs. The first project of SGR followed shortly afterwards, again by instructing KCL. By the autumn of 2017, the trust between Mr Song and Mr Smith had grown to the extent that Mr Smith successfully negotiated the purchase of a property in Barry called Provincial House. He also negotiated with Hafod Housing Association (Hafod) to apply for planning permission for conversion into social housing. It was agreed that if granted Hafod would purchase the property and engage SGR to carry out the conversion works with KCL as subcontractor. Mr Smith had for some time built up experience of dealing with social housing development projects.
7. The application was successful and in July 2018 Hafod purchased Provincial House from SGR for £900,000 and engaged that company to carry out the conversion works for just over £3 million.
8. Mr and Mrs Smith were at this time looking for a home to buy and found one, after looking at several, at 10 Cyncoed Road. They were unable and/or unwilling to secure a mortgage. It was agreed that Mr Song would purchase the property by providing a substantial deposit and take out an interest only mortgage, the repayments for which would be reimbursed by Mr and Mrs Smith. The purchase was completed in October 2018. In December 2018 a declaration of trust was drawn up by which Mr Song acknowledged that he held the property on trust for Mr Smith absolutely. The copy of that document in the trial bundle appears to be signed by Mr Song, which he accepts is his signature, but there remain issues as to what he signed and as to the circumstances of any such signing. At around the same time Mr Song made Mr Smith a director of SGR.
9. In March 2019 SGR purchased property in Cathedral Road and engaged KCL to carry out works to convert it into 17 flats for sale to private purchasers. This was the only such project of SGR and KCL. Further projects were entered into on the model of Provincial House, namely purchase of property by SGR to sell to housing associations and conversion into social housing flats by KCL. In this model, the contract with the housing association provided for monthly payments to KCL or SGR upon application

as the conversion works progressed. Two properties in Park Road, Cardiff were purchased later in 2019 on this model.

10. On 14 July 2019 Mr Smith took a 15% shareholding in SGR and Mr Song took a similar shareholding in KCL. On 5 June 2020, these shareholdings were increased to 50% respectively and Mr Smith became a 50% shareholder in Muluhome Limited.
11. The initial project on Provincial House was successfully completed in 2019 and brought a return on investment in the region of 30%.
12. Further projects on the same model were undertaken in 2020. In each one, Mr Song's involvement remained that of funding and managing funding. It was Mr Smith who organised all of the construction work. One was a property in Stow Hill, Newport sold to Newport City Homes (Newport CH) and works of conversion to social housing subcontracted to KCL for £4.2 million. Another was a property called Bay Chambers in Cardiff Bay, which was sold to Cadwyn Housing Association (Cadwyn) to convert to 44 flats. It was about this time that the first lockdown because of the Covid pandemic came into force in Wales. Later, a third project was at Holton Road in Barry, which was sold to Hafod.
13. Lockdown eased that summer. The Company was incorporated on 31 August 2020 with Mrs and Mrs Smith as equal shareholders with Mr Song and his wife. On 9 September 2020 Mr Song was made a director of the Company, and the above shareholdings were transferred the Company. On the same day Muluhome Limited was renamed KHL and the parties' shares therein also transferred to the Company. In October the second lockdown came into force in Wales, which was eased the following spring.
14. It is not in dispute that from this date onwards Mr Song and Mr Smith ran the business as a joint venture, whereby the Company and its subsidiaries would be run as a quasipartnership between Mr Song and Mr Smith with mutual duties of good faith. Mr Smith says that the joint venture had begun in about 2016. The timing of its beginning does not seem to have relevance given that the petition is based on events post-dating the time when it is agreed such joint venture existed.
15. SGR had an account with Barclays Bank and another with Lloyds Bank. Mr Song controlled the Barclays account and Mr Smith had no access to it. Both men had access to the Lloyds account and were able to make payments from it. The same applied to KCL's Lloyds account. That was used to pay salary and dividends to the four shareholders. KCL's accounting information was held on electronic platforms known as Xero and HubDoc, including payroll and invoices, to which both men had access as is shown by contemporary messages.
16. By the end of 2020 one of the Park Road properties was sold to Cadwyn for around £600,000 with an option of conversion works into social housing for £3.5 million, but that option was not taken up.
17. The Cathedral Road project was completed in 2021 and the flats sold one by one by private sale over a period of about 12 months. This project, against expectation, was not significantly profitable, but the proceeds of sale allowed Mr Song to be repaid

some of the loans which he had been putting into SGR in order to fund the projects. However, from May 2021 to July 2022 KCL experienced cash flow problems and during that period SGR made about two dozen payments of several thousand pounds each to KCL, totalling about £114,000. Some of these can be linked to text messages from Mr Smith to Mr Song asking for money to pay persons he named as Mike and Simon. In some of

the messages, Mr Smith said that he needed cash and that he had been paying these persons from his own money.

18. In November 2021, however, Mr Smith was messaging Mr Song to say the projects were progressing well. In January 2022 in another message he said that that year was going to be “big year.” Despite that outlook, by May 2022 the relationship between the two men was beginning to break down. In an email that month Mr Song referred to the fact that he was buying a home in London and that there was “a little problem.” He asked Mr Smith to borrow money from his mother, Mrs Omar, to fund the projects, and she did lend some £200,000. In a text message in May 2022, Mr Smith sent a text to Mr Song asking for £9000 cash to pay Simon and Mike. The message continued “I’ve been paying it out of personal money but need to use the balance of my personal money to make up with mum £265,000. She got £200k I’ve got £65,000.” It was about this time that Mr Song ceased to put funding into SGR. Some weeks later, Mr Smith told Mr Song that there had been a breakdown of trust and confidence between them. Mr Song completed his purchase of his London home in July 2022 for £1.5million.
19. A meeting took place between the two men (who refer to one another by their known names as Alf, or Alfred, and Kes) on 4 July 2023. Three days later, the latter emailed the former, copying in their wives and Diane White. The email included the following:

“Further to recent discussions with Alfred, please find attached draft head of terms based on three options, the first two giving options for the purchase of Alfred and Yali’s shareholding these are of course subject to formal agreement, due diligence and signature of a legally binding share purchase agreement. The £200,000 has been agreed by both Alfred and Kes. These terms are not exhaustive and I would request your response by Monday at the latest, so that we can then request the accountants to carry out a full due diligence investigation to address any of your concerns.”
20. The email continued that the accountant was coming to the office the following Tuesday and Mr Smith said that he and his wife and Diane White would be present and asked that Mr Song and Mrs Zhao attend. He continued:

Following our initial assessment of the company value it was very concerning to see that, as shareholders, we will need to put money into the company if the housing association contracts are to continue. Please note therefore that this needs to be

resolved at the earliest possible opportunity as the company is currently in a very vulnerable position due to the fact that you have taken out all your all of your director's loan.”

21. During this period there were many emails and texts from Mr Smith to Mr Song asking the latter to communicate about the projects, with only a few replies.
22. By 8 July 2022 both men had instructed solicitors, and by a letter of that day from Mr Smith’s solicitors he offered to buy Mr Song’s shares in the Company for £200,000. Mr Song’s ultimate reply was that he would not consider selling his shares until he understood why the projects were no longer as profitable as he had hoped. The housing associations stopped making payments into SGR’s Barclays Bank account (to which Mr Smith had no or limited access) and instead made them into its Lloyds Bank account, to which Mr Smith had access and control.
23. Mr Song then instructed BPU Ltd Chartered Accountants to undertake an audit of the Group’s finances including an audit of the payments made from SGR and KCL Lloyds Bank accounts. The results, and Mr Song’s own investigations, were such as to cause Mr Song to allege that the poor financial position of the KCL was due to a significant misappropriation of funds by Mr Smith. He accepts, and indeed relies upon the fact, that at this time KCL was in a poor financial position, but denies any wrongdoing.

The witnesses

24. Before I come to deal with the detail of such allegations, I will say something of the oral evidence which I heard. Mr Song gave most of his evidence through an interpreter. He said that whilst he could converse in everyday English, he sometimes made mistakes. He accepted that he has undertaken two degrees in the medium of English but said that these were scientific degrees which were concerned with calculations. Mr Smith is dyslexic and gave his evidence with assistance on the documentation. Their respective wives gave evidence, but only to a limited extent. Diane White was called to give evidence on behalf of the respondents. She has long experience firstly in banking and then as a commercial finance broker and then spent a year as a property development executive with the Development Bank for Wales. She came to know Mr Smith when she was a broker, and he persuaded her to work for SGR and KCL in 2018, and she still carries out work for him on a part time basis. In 2019, she approached Phillip Williams, then a tax partner with Gerald Thomas Accountants to help with the restructuring which later took place. He too was called as a witness by the respondents. These witnesses also deal with 10 Cyncoed Road and I shall return to them in due course.
25. Despite their former close relationship over several years, Mr Song and Mr Smith now accuse one another of dishonesty. Many issues of credibility were canvassed with them in cross-examination, including inconsistencies and lack of recall. Most of these, in my judgment, were no more than to be expected when each of them was asked about the details of several purchase and construction projects over several years. I did not gain the impression from the demeanour of either of them when giving evidence that either was giving dishonest evidence generally. There were a few

unsatisfactory aspects of the evidence of each of them which I shall deal with in due course.

26. In determining the relevant factual issues between the men, therefore, going back some eight years, contemporaneous documentation and inherent likelihoods will be particularly important. Although there is a great deal of documentation in the trial bundles, the contemporaneous documented communication between the parties is relatively limited for several projects over several years. Mr Smith in his oral evidence said that the reason for that is that there were often oral communications including by telephone. In my judgment, from the text messages, it appears that the relationship between Mr Smith and Mr Song was relaxed and that was no doubt due, in part at least, to the trust which undisputedly then existed between these men.

Pre- breakdown allegations

27. The re-amended petition in this case, originally dated July 2023 but amended and reamended in May 2024, pleads that it is to be inferred that Mr Smith has sought to exclude Mr Song from oversight of and involvement in the Kestral Group, defined to include the Company and SGR and KCL, and that such exclusion is a breach of the joint venture agreement, the legitimate expectation and statutory duties as a director. An allegation of fraud is then made, the reasons for which are then set out under a heading “The Respondent’s Fraud.”
28. Those reasons are then set out in the petition under ten sub-headings, which I shall deal with in turn. The allegations of fraud are serious allegations which should be established as pleaded by cogent evidence. It is not in dispute that where a director is in receipt of monies or assets of the company, it is commensurate with the statutory duty that the onus is on that director to show what has become of them.
29. First, it is alleged that during the financial year 2021/22. Mr Smith made cash withdrawals totalling some £83,500, which were initially debited to his director’s loan account but at the year-end were moved to the purchase ledger. The petition pleads that it is inferred that this alteration was to conceal removal of cash by Mr Smith. It is further pleaded that between April to August 2022 further cash totalling £29,000 was withdrawn. There is no evidence by way receipts of otherwise to show the payments of expenses on behalf of the projects. A similar inference is sought.
30. As indicated above, Mr Smith admits withdrawing these cash sums, he says to pay subcontractors to continue to work on the projects, to pay “gangers” undertaking work on various sites, and some other expenses such as concrete or skips. He says that he informed Mr Song of some of these by text and that Mr Song also made cash withdrawals of £22,500. There are text messages to support his evidence about informing Mr Song. When these were put to Mr Song in cross-examination, he said that he knew of the persons named Mike and Simon, and that they told him they were acting as consultants for KCL. He accepted that sometimes he would be told that they were being paid in cash, but other times was not told. He added that he didn’t know why they were paid in cash. Mr Smith in turn accepted in cross-examination that he did not keep documents to show these payments and said that Mike and Simon

worked on the projects as contract managers but also helped in making the applications to the housing associations for monthly payments.

31. In my judgment the contemporaneous text messages support, to some extent, the evidence of Mr Smith. Mr Song accepted knowing about some of these cash payments at the time. I accept the evidence of Mr Smith on these points and find that he did not keep any of these cash payments for himself.
32. The second allegation is that in May 2023 Mr Smith made an unexplained transfer of £250,000 to an unknown recipient. In response to his explanation that it was in partial repayment of money that he and his mother had loaned KCL, the amended petition pleaded that such borrowing was without Mr Song's knowledge or consent. However, as indicated above, it is clear that Mr Song sent a text suggesting this borrowing. Subsequent texts, to and from Mr Smith and Mr Song, show that not only did he know of the borrowing but agreed to the repayment out of the sale of proceeds of a flat in the Cathedral Road project. On 17 June 2022 texts from Mr Smith to Mr Song state that his mother should be repaid £200,000 and that he should be repaid £65,000, to which he

replied the same day simply saying "OK." I accept Mr Smith's evidence on this point and find that the transfer was not unexplained.

33. Third, it is alleged that between September 2020 and May 2023, there were unexplained payments to ElecCity Limited of just under £276,000, to Plumb City Limited of just under £60,000 and to OITC Limited of around £122,500. The petition alleges that in the absence of invoices or receipts, it should be inferred that these payments were a means of Mr Smith misappropriating funds.
34. In response, Mr Smith says that there is documentation to support these payments. Copies of these were only provided to the petitioners in the week before the trial and put into the supplemental bundle. In relation to ElecCity, the documentation comprises detailed statements dated 19 March 2025 of invoices from January 2021 to May 2023 onwards showing invoices to KCL of electrical supplies to named sites. The statement sets out the address of ElecCity and an account code. As for Plumb City, the documentation includes invoices to KCL from April 2021 and also a statement dated November 2023 and sets out details of plumbing supplies. The address and VAT number of the supplier was given as was the customer number of KCL, and the statement contained a logo.
35. When these invoices were put to Mr Song in cross-examination, he said that he had not seen them before, that there were no logos on them, and that he suspected that they were forged. Notwithstanding the unsatisfactory way in which this documentation was produced, in my judgment, given the number of flats which the ongoing projects involved that the nature and amount of these supplies over a period of some two years, the details set out are consistent with what may be expected as necessary for the conversion works in the projects. The detail is such that forgery is unlikely. In my judgment the documentation supports the evidence of Mr Smith, which I accept on these points.

36. He admits that OITC Ltd is owned and run by his mother's partner, Ian Davies, but says that he provided services for KCL, dealing with wages, tax and other payments, computer issues, invoices and some bookkeeping. Again, having regard to what services KCL required in order to carry out this construction work over this period, I accept his evidence.
37. Four, it is alleged that between March 2021 and March 2023 Mr and Mrs Smith drew over £147,000 more salary than did the petitioners, although it is common ground that the agreement was that they would draw equal salaries. In response Mr and Mrs Smith say that until June 2022 salaries were equal, even though Mrs Smith worked for KCL and Mrs Zhao did not. After Mr Song then withdrew loans and ceased funding the projects, they say it was in the interests of KCL for the continued payment to them of salaries for continuing to work in an effort to keep the projects going. Mr Song accepted in his oral evidence that from this time he no longer wished to work with Mr Smith. At that time, three projects needed to be completed, namely Stow Hill (for Newport CH), Bay Chambers (for Cadwyn) and Haydock House (for Hafod). The Lloyds Bank accounts for SGR in respect of the first two of these, and for KCL in respect of the third, show monthly receipts from the housing associations of five figure sums over the following 18 months to 2 years, totalling around £2 million, £1million and £2 million respectively.
38. Mr Smith in his oral evidence said that he continued to work very hard to keep these projects going and to find workers to work with him. Mrs Smith said that she started working part time but as the projects grew, her role grew and after her mother passed away in 2021, she was able to do more. She dealt with buying, administration, plant hire, warranties and consultants. In my judgment their evidence on this is consistent with the monthly payments being made by the housing associations, and I accept it. As Mr Song was no longer funding the projects and as he and Mrs Zhao were not providing any work in relation thereto, in my judgment the continued payments to Mr and Mrs Smith by way of salary were not excessive, let alone fraudulent.
39. Five, it is alleged that the KCL payroll includes payments to "Che Lewis" who has never worked for the company. The points of defence says that this is supposed to be a reference to their two sons, Che and Louis who both worked for KCL. In response it is said that they have not carried out any significant work for KCL and that this is another example of misappropriation of funds by Mr Smith. It is not in dispute that his son Louis worked on projects for a short time but alleged that that does not justify nearly £38,000 paid to him between November 2021 and June 2023.
40. In his oral evidence, Mr Song said that he knew Louis worked part time, but Che was still in school. Mr Smith sent a text message in November 2021 to Mr Song asking for Che and Louis to be put on the pay roll, to which the reply was simply "OK." Mr Song in cross-examination said that he read the message quickly whilst driving and replied without fully realising what was being asked. I found that answer wholly unconvincing and find that he did agree to Mr and Mrs Smith's sons being put on the payroll. Mr and Mrs Smith each gave evidence of the work they did. Mrs Smith said that Che worked part time when there was a great deal of administration to be done at time when there were only a few people to do it for work on 100 flats over three sites.

Louis, she said, had been working on sites periodically for several years when it was a family business, and his knowledge justified his pay. I accept that evidence.

41. Six, it is alleged that although KHL has been dormant since early 2020, Mr and Mrs Smith have submitted false mileage claims and been paid some £11,000 from KHL up to April 2022. That is said to amount to 25,000 miles at HMRC approved rates. They in turn say that they submitted claims and left it to the accountants to decide if and how to post them and say that they were constantly travelling back and forth to sites in Cardiff, Newport and Barry and further afield and clocked up these miles over 2 years. They say that Mr Song submitted mileage claims, something he admitted, as did Mrs Zhao. She was less clear, saying initially that she didn't know if her fuel was paid for with a company card, but then saying she used her own card and didn't submit invoices.
42. I accept what Mr and Mrs Smith say about constantly travelling between sites. Even so, the mileage on the face of it seems very high, but taking the period set out in the pleadings, namely two years, and the expense claims for two people, I am not satisfied that they were excessive or amount to fraud.
43. Seven, it is alleged that Mr and Mrs Smith paid salary payments to wider family members who provided no or no real services. I have already dealt with their sons and with the payments to OITC. In addition, it is alleged that some £30,000 was paid to Mr Smith's mother from March 2021 to March 2023 and over the same period £500,000 was paid to "individuals and companies connected with Mr Smith...by way of salary and benefits."
44. In cross-examination, a text message from Mr Smith to Mr Song in October 2021 was put to him which referred to wages to "F" and it was put that that referred to Fatima Omar, Mr Smith's mother. In response, Mr Song said that that was the only information he had, but he knew what she was being paid, and it was a "small matter" so he didn't mind. In my judgment that is the end of this allegation. As I understand the vague references to connected persons and benefits, this repeats particulars already dealt with.
45. Eight, it is alleged that Mr Smith caused KCL to undertake renovations, including a sound system, on a nightclub at 10 Mill Lane, Cardiff in which Mr Smith has an interest, without Mr Song's knowledge or consent, the costs of which should have been paid by Mr Smith or debited to his director's loan account. A similar allegation is made in respect of renovation and extension works to 14 Ty-Gwyn Road, Cardiff, which was purchased by the Smiths in September 2022 as a family home.
46. Mr Song was cross-examined about a text to him from Mr Smith in February 2022, in which reference was made to 10 Mill Lane and subcontractors working there, to which the reply was "Bro I just waiting for your invitation." Mr Song said he only knew about this after the event so all he could say was ok. It was also put to him that if some of the expenditure had not been added to Mr Smith's directors' loan account, which Mr Smith says was an omission, whether making that addition would put the matter right. Mr Song replied it depended on how many people were working there over how many days. In the points of defence, it was also alleged that KCL had

carried out work on several properties belonging to Mr Song, without payment from him. He claimed that he paid for these.

47. In my judgment Mr Song knew about 10 Mill Lane and works carried out there by KCL, albeit after the event. It is unlikely that Mr Smith would inform Mr Song of these and then deliberately fail to pay for these works. In my judgment the admitted omission was just that, and not evidence of fraud.
48. As for 14 Ty-Gwyn Road, Mr Song said in oral evidence that he saw employees of KCL working there. Mr Smith maintains that these were working on a subcontracted basis and paid by him. Mr Song's response is that he saw a couple of persons whom he knew to be employees of KCL working there. Mr Smith says that the work entailed two storey rear and side extensions and bay openings, which cost in the regions of £290330,000. This money came from his mother, and his mother in law's estate, as this was intended as a home for the wider family. He accepted that some materials supplied by Travis Perkins were booked to SGR, but included in the supplemental bundle is a letter from the regional account manager of that supplier dated May 2024 confirming that that was their error which has now been corrected and that no goods were delivered to SGR other than to the Snow Hill site of Haydock House site.
49. In my judgment, accepting that Mr Song did see employees of KCL working at 14 TyGwyn, that is not cogent evidence that they were being paid by KCL. The documentation supports the evidence of Mr Smith on these points, and I accept that evidence.
50. The above allegations relate essentially to the time leading up to the breakdown in the relationship. For the reasons already given, in my judgment there was no attempt to by Mr Smith to oust Mr Song from control, or any breach by him of the joint venture or of his statutory duties as director. The tenth sub-heading is "Diversion of Business and

Further Misappropriation of Funds" and relates to events at or after the breakdown. It is necessary to examine the breakdown in a little more detail.

Breakdown in relationships

51. A meeting took place between the two men on 4 July 2023. Three days later, the latter emailed the former, copying in their wives and Diane White. The email included the following:

"Further to recent discussions with Alfred, please find attached draft head of terms based on three options, the first two giving options for the purchase of Alfred and Yali's shareholding these are of course subject to formal agreement, due diligence and signature of a legally binding share purchase agreement. The £200,000 has been agreed by both Alfred and Kes. These terms are not exhaustive and I would request your response by Monday at the latest, so that we can then request the accountants to carry out a full due diligence investigation to address any of your concerns."

52. The email continued that the accountant was coming to the office the following Tuesday and Mr Smith said that he and his wife and Diane White would be present and asked that Mr Song and Mrs Zhao also attend. He continued:

Following our initial assessment of the company value it was very concerning to see that, as shareholders, we will need to put money into the company if the housing association contracts are to continue. Please note therefore that this needs to be resolved at the earliest possible opportunity as the company is currently in a very vulnerable position due to the fact that you have taken out all your all of your director's loan.”

53. Mr Song forwarded that email to his solicitor, saying that at the meeting he suggested that they should clear up the company account first, and then they could talk about buying out. His solicitor wrote to Mr Smith the next day, saying the proposal was not agreed and that it was intended to obtain an independent valuation of the clients’ interest and an audit. It was said that the prime concern was the decrease in net assets despite the projects being profitable. They raised a number of questions. Both men put in writing their respective recollections of whether a buyout had been agreed, just days after the meeting. In my judgment it is likely that each of them believed his own account, but that there had been no meeting of minds as to whether the £200,000 offer had been orally accepted.
54. Mr Song emailed Mr Smith on 12 July saying that as requested, he had transferred £307,000 to the KCL account in the past few days, and that was much more than normal monthly expenses and materials. He said that Easyliving Limited, a subcontractor for the works at Stow Hill, would have to be paid to keep the works going and that he would transfer money for that. After such payment, he said that there would be a cash flow shortage in the SGR account until the next monthly payment by the housing associations and asked him to repay £110,000 transferred on 1 July from KCL to his personal account.
55. Mr Smith replied some 40 minutes later that he had been phoning Mr Song constantly over the last five days and leaving messages and had no reply. He said that he would respond in detail and that he did the next day. He named some 20 suppliers which he had been paying only in part, he said because Mr Song had withdrawn his director’s loan with little notice and without agreement. As to the £110,000, that figure was disputed but Mr Smith suggested he would pay whatever was owed when Mr Song repaid his directors loan. He said that the accountants confirmed that they both owed money to the company and suggested a meeting so that figures could be agreed and the amount paid.
56. On the 18 July, Mr Smith wrote a very detailed response to the letter from the petitioners’ solicitors. He gave a number of reasons for the change of fortunes, including that the global pandemic had had a “massive” impact on construction costs since 2021, that Mr Song and Mrs Zhao had been putting pressure on him to repay money from the sale of flats at Cathedral Road, with the result that resources were moved from other projects to complete on Cathedral Road, and that difficulties had been caused by the withdrawal by Mr Song of his loans.

57. On 10 August 2022 the respondents' solicitors wrote to those of the petitioners saying that there had been an irretrievable breakdown in the relationship between the two sets of shareholders. The letter repeated the offer to buy the petitioners' shares, and included the following:

"Our clients have reached the decision that they will not take on any new projects under the current ownership structure. Our clients' intentions are to finish with the current sites and wind down the activities of the companies in an orderly manner...

As your clients have no real operational roles in the business, the obvious solution is for our clients to buy out yours. If this cannot be agreed, then as advised, our clients' intention would be to finish the existing contracts and wind down the businesses in an orderly manner."

58. An alternative was also put:

"An independent accountant be asked to value the business on a fair value basis. The company would pay for the valuation and the parties would agree to be bound by the valuation. Our clients would be prepared to pay 50% of the valuation in consideration for a transfer of shares, the resignation of your client's directorships and unwinding any security or banking arrangements.

The proposal is the equivalent remedy that your clients would be entitled to ask the Court to award in any unfair prejudice petition under section 994 of the Companies Act 2006.

The independent accountant would have access to all of the financial information necessary to reach a valuation... In practical terms, the exercise is the equivalent of the audits referred to in your 8 July letter, with the difference being that the process ends with a valuation which the parties agree is final and binding and represents the "buy out figure".

59. That offer was not accepted.
60. The respondents' solicitors asked the Company's accountants to value the shares in SGR and KCL, and this they did on 24 August 2022, based on the draft accounts for the year ended 31 March 2022 and a quantity surveyor report in respect of Bay Chambers. That estimated an overall loss on the contract of £480,938. SGR was valued at £83,000 on a net asset basis and KCL at nil, on a future maintainable earnings basis and a net assets basis. The accountants noted that KCL was loss-making and that it was insolvent, with net liabilities of £244,604.
61. It is not disputed that Mr Song withdrew all of his director's loan. In his witness statement, he says that he felt something was wrong, and that he had been told by

employees that Mr Smith seemed to have a lot of money all of a sudden but was not sure whether to believe what he'd been told. He was not happy to leave his money in the business with these concerns hanging over him. He continued that he had done what was agreed at the outset and that he was entitled to be repaid so that he could use the money "elsewhere."

62. When it was put to him in cross-examination that there was pressure from his wife to withdraw this monies to put towards the purchase of the house in London, he appeared reticent to answer questions on these matters, saying that they were personal matters. He added that this didn't impact upon the business as the projects were by then selffunding having regard to the monthly payments from the housing associations.
63. In relation to increased costs, it was put to him that the earlier profitable projects were before the Covid lockdowns. He appeared to accept that the housing associations were prepared to pay an uplift because of lockdown restrictions. That did not apply to Cathedral Road, where no housing association was involved. He said that the costs of this project exceeded expectations without explanation. He did not accept that the lockdowns had any impact. It was put to Mr and Mrs Smith in cross-examination, and by way of closing submissions, that there was no such impact, to which they each reacted with some incredulity at such a suggestion. They each referred to significant rises. Mr Smith said, for example that the day work rate for carpenters almost doubled. Mrs Smith gave more detail, saying that materials generally went up by 24% in 2021 and some, such as insulation went up by some 60% and were unavailable. The costs of some projects went up by 70%. This trend continued into 2022. This had some support from the Office of National Statistics, referred to in solicitors' correspondence, which indicates that there was a 35% increase in construction costs between March 2020 and December 2023. In my judgment it is likely that this evidence of Mr and Mrs Smith reflects the true position, and I accept it.
64. In relation to Cathedral Road, Mr Smith in his oral evidence repeated that Mr Song wanted to transfer resources from other projects to complete the flats as he wanted to sell them quickly to have money for the purchase of the London home. He said there was an added difficulty in selling the flats once completed because of the lack of availability of professionals such as agents, solicitors or valuers during lockdown. Again, that evidence is likely to be accurate and I accept it. He said that Mrs Zhao was ringing him often at this time asking about money, something she denied. She said that he only rang her, and that was when he wanted to speak to her husband, and they only exchanged pleasantries. However, when asked which phone he called on, she said that it was her mobile phone, which seems odd if he only wanted to speak to her husband. In my judgment, the recollection of Mr Smith on these points is likely to be the more accurate, and I accept it.
65. It is likely that the decision of Mr Song to withdraw his loans at this point was for a combination of reasons, but in my judgment one of the prime, if not the prime, reasons was, as he says, to use the money elsewhere, and that elsewhere meant buying the London home. It is also likely that the withdrawal of Mr Song's loans did have a

significant impact on the funding of the projects, despite his assertion that they were by now self-funding. Although monthly payments from housing associations were being made, as the contemporaneous documentation shows, including Mr Song's email of 12 July to Mr Smith, there remained, in his words, cash flow shortages and a need for injection of monies.

Post breakdown allegations

66. It is not in dispute that the three projects which KCL were working on at that time were carried on by Mr Smith, as indicated above, to completion in the case of Bay Chambers and Haydock House, and to near completion in the case of Stow Hill. In the latter case, the conversion was completed by others after the intervention of Newport CH. Nor is it in dispute that from then on, other similar projects were taken on by companies formed by Mr and Mr Smith from July 2022 onwards, namely the fourth and fifth respondents.
67. The petition alleges that these projects have been wrongfully diverted away from KCL using its knowledge, that KCL or SGR have been paying for materials and/or labour for some of these projects, and that these respondents have been competing with KCL and passing themselves off as KCL. Further, it is pleaded that that such matters amount to breach of the joint venture agreement and the legitimate expectations of Mr Song or in breach of Mr Smith's fiduciary duties as director of the Company and its subsidiaries under sections 171 to 175 of the Companies Act 2006.
68. In response, it is pleaded that the joint venture came to an end when, amongst other things, Mr Song took back his loans and ceased providing funding and that that point the Kestral Group had no money and could not properly enter into new building contracts. Mr Smith so informed Hafod, who then asked him to enter into a building contract in respect of 81-85 Holton Road through another company and so KCHR was formed and entered into such a contract. It is accepted that Travis Perkins mistakenly invoiced KCL for some materials for this project, but that has been corrected. It is denied that employees of KCL have worked on this project. Mr Smith admits that he was in discussion with Hafod in mid July 2022 as to the redevelopment of this site and that Hafod then entered into a contract with KHCL.
69. It is also admitted that in February 2023 Mr and Mrs Smith incorporated the fifth respondent, KCAR. Mr Smith in his oral evidence said Cadwyn put the conversion of a church in Albany Road Cardiff into flats out for tender, and that KCAR was the successful bidder. This part of Mr Smith's evidence was not satisfactory. Included in the documents is an email from an officer of Cadwyn saying that it was decided not to put this contract out to tender. In my judgment Mr Smith is mistaken in this recollection. Again, it is accepted that Travis Perkins mistakenly invoiced KCL for some materials for this site, but alleged that this was put right. It is denied, as alleged, that KCL employees worked on this site.
70. The other two corporate respondents have not traded. Mr and Mrs Smith say that the turnover generated from the contracts with KCHR and KCAR has allowed Mr Smith to lend money to KCL in order to complete its existing contracts. The Xero printout for Mr Smith's director's loan account shows that between July 2022 and March 2024

the balance increased from a debit of just over £69,000 to a credit of just over £1 million because of advances he has made to KCL. In my judgment, this also serves to show the insolvent position of KCL as at July 2022, as noted by the accountants the following month.

71. It is admitted that in mid July 2022, Mr Smith was in discussion with Hafod about another site in Holton Road called Haydock House and that KCL entered into a contract with Hafod for the conversion into flats. Hafod made monthly payments of five or six figures to KCL from October 2022 to April 2024 totalling nearly £2 million. Cadwyn made similar payments to SGR in respect of Bay Chambers from September 2022 to December 2023 totalling just over £1 million. Newport CH made similar payments to SGR from August 2022, until it took over the site in August 2024, totalling just over £2 million.
72. Mr and Mrs Smith counterclaim that they have suffered unfair prejudice as shareholders of the Company by the conduct of Mr Song and Mrs Zhao, including withdrawing monies standing to the credit of Mr Song's directors loan account so that it was overdrawn, Mrs Zhao aggressively demanding money, refusing to provide further funds, refusing them access to SGR Barclays Bank account and withdrawing cash therefrom, failing to release funds (timely or at all) from that account for Company business, repudiating the joint venture, exploiting Mr Smith by causing him to arrange for KCL to carry out work for Mr Song or his friends for free or below cost, misrepresenting Mr Song's wealth and failing to act with a duty of good faith.
73. In response, it is admitted that money was withdrawn and asserted that this was withdrawn at the end of projects with the agreement of Mr Smith. It is also admitted that Mr Song had control over the SGR Barclays Bank account and asserted this was part of the joint venture agreement or accepted by Mr Smith by conduct. It is also asserted that under that agreement, Mr Song had discretion whether or not to invest funds. The remainder of the allegations in the counterclaim as to unfair prejudice are denied.
74. The most fundamental issue of fact in this context is whether it was an express or implied term of the joint venture agreement that Mr Song committed to funding each project as it was taken on, as alleged by Mr Smith. There is nothing in writing to confirm this, even though the parties had accountants and solicitors acting in the restructuring. Such an open-ended commitment would be very onerous to Mr Song, and it may have been expected that if given this would have been recorded in writing. It would be surprising if such a commitment were given on an unconditional basis, so that whatever Mr Song's personal circumstances, or whatever losses were incurred, nevertheless Mr Song was contractually bound to keep on funding the projects. Although reference is made in the contemporary documents to the withdrawal of monies without consent, the language used by Mr Smith at the time does not clearly demonstrate that this was regarded as a breach of the joint venture agreement. In my judgment it is unlikely that such a term arose, either expressly, or even less likely, implicitly.
75. It is however likely that the withdrawal did impact upon the relationship of the men. They both accepted in oral evidence that in July 2022 they reached the position that

neither wanted to work with the other again, and there is some indication of that in the contemporaneous documentation. In my judgment the appropriate analysis is that the joint venture agreement was mutually determined in July by words and/or conduct of the men. Mr Song was entitled to refuse further funding.

76. In my judgment Mr Smith complied with his duty to the Company by completing two of the existing contracts and nearly completing the third. I accept his evidence that he was able to do this with the turnover generated by the KCHR and KCAR contracts and by bank borrowing. As the joint venture agreement was at an end, in my judgment it was open to him to take on these contracts through these companies. It was not a diversion of SGR or KCL business as those companies were not in a position to take up such contracts as a result of the men not wanting to work with another again and/or because of the financial difficulties of those companies at the time. Nor was this a case of Mr Smith using knowledge, names, or any other assets of those companies in order to secure these contracts. Mr Smith, I accept, already had experience and knowledge relating to housing association contracts and was already using the name Kestral before the joint venture agreement and there is nothing to suggest that by words or conduct Mr Smith assigned this name for the exclusive use of the Company or KCL.
77. In my judgment none of the post breakdown allegations are made out in terms of fraud, or breach of director's duties, or breach of the joint venture agreement. The pleaded duties of Mr Smith as director are the duty to exercise powers only for a proper purpose under section 171 of the Companies Act 2006, to promote the success of company (section 172), to exercise independent judgment (section 173), to exercise reasonable care, skill and diligence (section 174) and to avoid placing himself in a position where he has or may have a conflict of interest (section 175). By section 175(4)(a) that duty is not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest.
78. The duty under section 172 is subject to any enactment or rule of law requiring directors to consider or act in the interests of creditors of the company, see 172(3). In *BTI 2014 LLC v Sequana SA* [2024] AC 211, by majority of the Supreme Court held that the duty arose when the directors knew or ought to have known that insolvency was imminent, in which case the directors were required to take it into account and give appropriate weight to the interest of creditors and to balance them against shareholder's interest.
79. On my findings Mr Smith was not in breach of any of these duties. Even if he was, it does not follow automatically that that amounts to unfair prejudice, see *O'Donnell v Shanahan* [2009] EWCA Civ 751, [2009] BCC 822.
80. In *Hollington on Shareholders Rights*, 10th edition, [7-106], the elements, each of which must be established to found a successful claim of unfair prejudice are set out, namely conduct of the company's affairs, resulting prejudice to the shareholders' interests as members, which prejudice must be unfair. There was no dispute before me as to the principles to be applied. These include that the concepts of unfairness and prejudice are relatively broad, but must be assessed judicially, prejudice and unfairness must be

real and substantial, and context is important. Whether the value of a shareholding has been diminished by the conduct complained of is relevant to the question of whether there is real prejudice. The question of whether to grant relief and, if so, what relief to grant is a matter for the court's discretion. If the court finds that the petitioner has suffered unfair prejudice, it may nonetheless decline to grant relief if the petitioner has rejected a reasonable offer from the respondent, such as an offer to purchase his shares at a fair valuation.

81. In *O'Neill v Phillips* [1999] 1 WLR 1092 at 1107, Lord Hoffmann, with whom their Lordships in the House of Lords agreed, said:

“But I think that parties ought to be encouraged, where at all possible, to avoid the expense of money and spirit inevitably involved in such litigation (See Shakespeare, Sonnet 129) by making an offer to purchase at an early stage. This was a somewhat unusual case in that Mr. Phillips, despite his revised views about Mr. O'Neill's competence, was willing to go on working with him. This is a position which the majority shareholder is entitled to take, even if only because he may consider it less unattractive than having to raise the capital to buy out the minority. Usually, however, the majority shareholder will want to put an end to the association. In such a case, it will almost always be unfair for the minority shareholder to be excluded without an offer to buy his shares or make some other fair arrangement. The Law Commission (Shareholder Remedies (Law Com. No. 246) (1997) (Cm. 3769), paras. 3.26–56) has recommended that in a private company limited by shares in which substantially all the members are directors, there should be a statutory presumption that the removal of a shareholder as a director, or from substantially all his functions as a director, is unfairly prejudicial conduct. This does not seem to me very different in practice from the present law. But the unfairness does not lie in exclusion alone but exclusion without a reasonable offer. If the respondent to a petition has plainly made a reasonable offer, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out. It is therefore very important that participants in such companies should be able to know what counts as a reasonable offer.”

82. Here, the men were no longer willing to work with one another. Lord Hoffman went on to give guidance as to what constitutes a reasonable offer, namely one that was fair, reflective of expert opinion produced as the result of equality of arms, and taking into account costs. In this case, the offer was significantly more than the Companies' accountants then valued SGR and KCL. It was made within days of the breakdown, before any significant costs had been incurred. In my judgment it was a reasonable offer, and so if there was exclusion, it was not without a reasonable offer.

83. Accordingly, even if contrary to my findings, Mr Song was excluded, the offer made and rejected was a reasonable one and so there was no unfairness.
84. Similarly in my judgment the essential allegations of the counterclaim in relation to the Company are not made out either, giving my findings in relation to funding and the mutual ending of the joint venture agreement. Although Mr Smith did not have access to the SGR Barclays Bank account, he did not at the time complain about this and the contemporaneous documentation shows that he was able to participate in the management of SGR. The messages show that when Mr Song was asked for money, he gave it in a timely manner. Mr Smith admitted in cross-examination that if money was needed Mr Song generally would not refuse. In my judgment, the allegations of aggression, exploitation or misrepresentation of wealth are not made out.

10 Cyncoed Road

85. That leaves the issue whether 10 Cyncoed Road is held on bare trust for Mr and Mrs Smith. It is not in dispute that the original plan for that property, which included a transfer to SGR, was not put into effect. It is also common ground that the deposit was paid by Mr Song but there is an issue whether that represented Mr Smith's share of the profit from the Provincial House project, as he asserts, and which Mr Song denies.
86. Mr Song's evidence about signing the declaration that he holds this property on trust for Mr and Mrs Smith was not clear. He said he didn't know about the deed and when his signature on the document was put to him, he said he could not remember but added that he didn't think he had signed. He was pressed and then accepted that the signature was his but said that when it was sent "it was blank" and that he was asked to sign but what it wasn't explained to him "clearly."
87. Mrs White gave evidence about this. She admitted in cross examination that she had lied to the mortgage provider that this document had been retrieved from an archive when it had not. She said she did so in order to confirm the provider's requirement. She accepted that had she done this in the course of her employment at the bank, it would amount to gross misconduct. She also admitted that she had signed Mr Song's signature on a purchase order, although she claimed he authorised her to do so, something he denies. These answers cause me to be very cautious about accepting her evidence on any contentious point unless supported by other evidence. This is mitigated to some extent by the readiness with which Mrs White made these clear admissions.
88. She said she had a number of discussions with both men about this property and understood from both that it was bought by Mr Song for Mr Smith. She witnessed Mr Song's signature on the deed of trust, and it was clear he did not want advice upon it.
89. Phillip Williams also gave evidence about it. He was not involved in the execution of the deed but gave evidence as to the subsequent restructuring of the companies and had discussions with both men from August 2019, which included the issue of 10 Cyncoed Road. He understood from both men that Mr Song used Mr Smith's share of profit in SGR to pay the deposit and part of the overall plan was that Mr Song would give the property to Mr Smith. Mr Song was aware that he was holding the property for Mr Smith. As Mr Williams was acting for Mr Song as well as the companies, Mr

Williams was concerned to ensure that Mr Song understood the position under the deed, otherwise he would advise him to obtain separate advice. However, he said that Mr Song told him that he understood.

90. Mr William's evidence on this point rang true and I accept it. I find that Mr Song did use Mr Smith's share of profits to pay for the deposit and intended that the property was held for Mr Smith. I find that Mr Song did understand the nature of the deed and signed it on that basis. The document is a short clear document whereby Mr Song "irrevocably" declared that from the date of the purchase of the property on 2 October 2018, he had been "holding the property on trust" for Mr Smith "absolutely."
91. In my judgment, Mr Song is bound by his deed and Mr Smith is entitled to call for the transfer of the property into his own name.

Conclusions

92. The result is that the petition and the counterclaim as it relates to the Company are dismissed, but Mr Smith succeeds in relation to 10 Cyncoed Road. I direct that the parties file within 14 days of hand down of this judgment, a draft order agreed as far as possible, together with written submissions on any consequential matters which cannot be agreed, which will then be determined on the basis of such submissions.