Neutral Citation Number: [2025] EWHC 839 (Ch)

Case No: CR-2022-003036

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Rolls Building
Royal Courts of Justice
7 Rolls Buildings
London EC4A 1NL

Date: 9 April 2025

Before:

INSOLVENCY AND COMPANIES COURT JUDGE GREENWOOD

- -

IN THE MATTER OF HEALTH AND HOME LIMITED (In Liquidation)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986
AND IN THE MATTER OF THE COMPANIES ACT 2006

Between:

1. HEALTH AND HOME LIMITED (In Liquidation)
2. MR ANTONY NYGATE
3. MR SHANE CROOKS
(As the Joint Liquidators of Health and Home Limited)

Claimants

- and –

1. ELITE PROPERTY HOLDINGS LIMITED
2. MR ANDREAS STAVRINIDES
3. MR ANTHONY STAVRINIDES
4. MRS MARIA CHRISTOFOROU
5. HEALTH AND HOME (ESSEX) LIMITED

Defendants

- -

Mr Matthew McGhee (instructed by Simmons & Simmons LLP) for the Claimants
Mr Duncan Macpherson and Ms Emma Kiver (instructed by William Sturges LLP) for the First, Third, Fourth and Fifth Defendants
The Second Defendant appeared in person

Hearing dates: 21-25 and 28-29 October 2024

- -

JUDGMENT

This judgment was handed down remotely at 10.30am on 9 April 2025 by circulation to the parties or their representatives by e-mail.

ICC JUDGE GREENWOOD:

Introduction

1. This is the trial of claims and counterclaims made in respect of the business and affairs of the First Claimant, Health and Home Limited ("**the Company**"), which went into administration on 11 September 2013, and creditors' voluntary liquidation on 17 September 2015 (under paragraph 83 of Schedule B1 to the Insolvency Act 1986 ("**the IA 1986**")). The Second and Third Claimants, Mr Antony Nygate ("**Mr Nygate**") and Mr Shane Crooks, both partners at BDO LLP ("**BDO**"), are the Company's current joint liquidators; previously, Mr Nygate was one of the joint administrators appointed by Barclays Bank plc ("**the Bank**") on 11 September 2013.

2. Before its administration, until about 18 May 2013, the Company operated a care-home business from four properties in and around Westcliff-on-Sea in Essex ("**the Properties**"); the Properties belonged to the First Defendant, Elite Property Holdings Limited ("**Elite**") which is a company incorporated in the BVI, which had purchased the Properties (and certainly in the case of the first acquisition, the business which was operated from it) on various dates between March 2001 and September 2006. The Company occupied the Properties and operated the businesses on the terms of a written agreement made with Elite on 13 March 2001 ("**the 2001 Agreement**"); to do so, it held the requisite licence from the Care Quality Commission ("**the CQC Licence**").

3. The Second Defendant, Mr Andreas Stavrinides ("**Mr Stavrinides**") is the father of the Third Defendant, Mr Anthony Stavrinides (to whom I refer, for the purposes of clarity, without intending any disrespect, as "**Anthony**"); both were directors of the Company at all material times, although Anthony denied having had any involvement in its management apart from its day-to-day operations.

4. The Fourth Defendant, Mrs Maria Christoforou ("**Mrs Christoforou**") is Mr Stavrinides' sister. She lives, and has lived at all material times, in Cyprus. Until 25 March 2010, Mrs Christoforou was a director of the Company, although she too denied having had any involvement in its management; she was however Elite's sole appointed director.

5. The Company and Elite were part of an informal "group" of family-owned companies and trusts ("**the Family Group**"). As such, as the only registered holder of its two issued shares, Mrs Christoforou was, throughout, the Company's only shareholder, albeit that on the Defendants' case, she held those shares between 14 January 2000 (when the Company was incorporated) and 1 July 2013 (when she herself became a trustee of "**the Kambos Trust**") as bare nominee for her son, Mr Christopher Christoforou in his capacity as the trustee of the Kambos Trust, and thereafter, in her own capacity as trustee. Moreover, it was the Defendants' case that although Mrs Christoforou was the sole director and shareholder of Elite, she was in each respect acting in her capacity as a/the trustee of "**the Harvest Trust**". Both the Kambos Trust and the Harvest Trust are "Cyprus International Trusts"; it was the Defendants' pleaded case (denied by the Claimants) that such Trusts have independent legal personality; however, they adduced no evidence of Cypriot law to that effect.

6. Also part of the Family Group were: (i) Norm Consultants Limited ("**Norm**"), an English company of which Mr Stavrinides was a director, which was the appointed managing agent in the UK under the foreign landlords scheme for both Elite and Decolace Properties Limited ("**Decolace**"), and (ii) Decolace itself, which was incorporated in the BVI, and which owned the property at which the Fifth Defendant, Health and Home (Essex) Limited ("**Essex**") rented its offices.

7. Elite and the Company both had accounts with the Bank, which since 2006, had charges over the Properties and goodwill to support its capital loans and facilities totalling £3.35 million. The Company guaranteed these facilities. As part of the Bank's security for this lending, Elite was required to purchase interest rate hedging products ("**IRHPs**"). By 2012, an FCA investigation into the mis-selling of IRHPs generally gave rise to the possibility of a claim for compensation by Elite against Barclays.

8. In addition to the care-homes, in 2010, Elite acquired a hotel in Essex ("**the Skylark Hotel**") which was refurbished, apparently at some cost, and which from about the end of 2011, was operated by another associated English company, Travelforce Limited ("**Travelforce**") of which Mr Stavrinides and Anthony were again the directors.

9. Although there were issues regarding the scope of his formal authority to bind the foreign companies, Mr Stavrinides was undoubtedly the moving force behind the businesses of the Family Group.

10. The Company's main source of income was the NHS, and its business was successful, certainly for some time. Thus, in the year to 30 June 2010, its turnover was £2,956,068, it recorded profit after taxation of £460,284, and declared a dividend of £400,000; in the year to 30 June 2011, its turnover was £3,823,298, it recorded profit after taxation of £1,082,077, and declared a dividend of £1,200,000; in the year to 30 June 2012, its turnover was £3,833,242, it recorded profit after taxation of £970,576, and declared a dividend of £950,000 ("**the 2012 Dividend**"); in the year to 30 June 2013, although no Accounts were finally concluded, it was common ground that a dividend of £250,000 was declared, albeit at a point in time which was in dispute ("**the 2013 Dividend**").

11. However, the Company was the only cash generative member of the Family Group, and its income was therefore used to support the Group, and more generally, for the Group's broader purposes. To that end, by means of payments made under the 2001 Agreement, or as dividends, or simply as undifferentiated, irregular lump sum payments, very substantial sums were paid from the Company's bank account to that of Elite, which Mr Stavrinides described as the "*handler … helping all the other group companies*".

12. Notwithstanding its apparent success, on or about 19 March 2013, the Company received from HMRC a letter warning it that it owed £444,550.01 (principally comprising unpaid corporation tax in respect of the years to 30 June, 2007 – 2011 inclusive) and threatening the presentation of a winding-up petition. At that point, said Mr Stavrinides in his oral evidence, he realised that "*there was a risk of the Company being insolvent as a going concern*". A few days later, on 27 March 2013, the Company filed (out of time) its tax return in respect of the year to 30 June 2012, and on 1 April 2013, in respect of that further period, another amount, in the sum of £293,914.78, also fell due for payment. Accordingly, on 7 May 2013, albeit that £50,000 had been paid to HMRC on 12 April 2013, HMRC wrote again to the Company. This time they said that £690,960.89 was due and that unless the Company paid that sum in full within seven days, instructions would be given to present a winding-up petition.

13. In his evidence, although he maintained some variety of dispute in respect of earlier years, Mr Stavrinides accepted that the sums claimed by HMRC in respect of the years to 30 June 2011 and 2012 (respectively, in the principal amounts of £365,279.85, unpaid since 1 April 2012, and £293,914.78) were undisputed and unpaid. In those circumstances, despite a further payment of £50,000 apparently made on 15 May 2013, and despite Mr Stavrinides' attempts to negotiate an agreement with HMRC, a winding-up petition was presented by HMRC on Monday 20 May 2013, based on a debt stated to have been £640,960.89.

14. In that context, two days before the petition was presented, on Saturday 18 May 2013, the Company entered into two written agreements.

15. The first ("**the May 2013 Agreement**") was made between the Company (as the "Seller"), Elite (as the "Landlord") and Essex. In summary, on its face, having recited that Elite had "*cancelled all* [of the Company's] *tenancies with immediate effect*" such that the Company "*has no alternative but to vacate the properties forthwith*" and "*cease to trade as a care provider*", it provided for payment of "*consideration of £171,390.06*" to the Company by 15 August 2013:

    15.1. for the sale "*at par*" to Essex and Elite of the Company's book debts, at that time "*standing at £300,861.72*";

    15.2. for the sale to Elite of the Company's fixtures and fittings for £5,000;

    15.3. for the assumption by Essex and Elite of the Company's obligations and liabilities to staff and employees including in respect of accrued holiday pay, in "*lieu of notice*" and redundancy, and "*totalling £174,471.66*" (such sum having been taken into account in determining the "*consideration price*" payable to the Company (in the sum of £171,390.06).

16. Further, it provided for Elite to grant Essex a tenancy at will in respect of the Properties previously occupied by the Company, and that:

    16.1. any money paid into the Company's account was to be collected and held as agent for Elite and Essex, to be paid over immediately; and,

16.2. the trading names, Alexander House, Ravensmere Rest Home and Barling Lodge, were to be "*adopted and used*" by Essex.

17. Nothing I think turned on it, but on the face of the Agreement, the stated consideration figure (£171,390.06) appears to have been incorrect: it ought to have been £131,390.06, £40,000 less (equal to £300,861.72 + £5,000 - £174,471.66).

18. The second agreement ("**the Collateral Agreement**") was headed "*Appointment of Managers to Manage Business*", and was made between the Company (as "*Principal*") and Essex (as "*Manager*"). Essentially, pending an application to be made by Essex to the CQC to become a registered care provider, it provided for the Company, as presently the holder of a CQC Licence, to remain in ultimate control of the business being operated from the Properties (and therefore accountable under the Health and Social Care Act 2008). In addition, it provided for the entitlement of Essex to "*all the Income arising out of the business*", and for the assignment to it of all contracts; for Essex to provide all required resources for the operation of the business, and to be responsible for "*all outgoings*"; and for payment by Essex to the Company of a daily fee in the sum of £100.

19. Essex is a company incorporated in England and Wales. At the material times, Mr Stavrinides and Anthony were its directors, and on the Defendants' case, its entire issued share capital was held by Mr Stavrinides on trust for the trustees of "**the Petra Trust**", another Cyprus International Trust, also a member of the informal Family Group.

20. The May 2013 Agreement and the Collateral Agreement were said to have been made in immediate consequence and in the context of decisions taken at two Meetings of Elite's Board (the first at 10.15am, the second at 3.30pm on 18 May 2013) for which written Minutes, signed by Mrs Christoforou, were disclosed, and for the first time brought to the attention of the Company's liquidators/administrators, on 1 October 2024, by Mr Stavrinides, attached to an email which he sent to Mr Matthew Haddow of Menzies LLP ("**Mr Haddow**"). Mr Haddow was acting in this matter as a single joint expert instructed in connection with claims concerning the Agreements of 18 May 2013, and concerning in particular the value of the Company's business and property transferred, or said to have been transferred, by the Company to Essex and/or Elite.

21. The Minutes purported to record:

21.1. that at the first meeting, at 10.15am, Elite terminated with immediate effect the 2001 Agreement made with the Company, and resolved to instruct Norm to "*immediately take possession of the premises*" whilst exploring options for the continuation of the business, given that Elite was not a registered care provider; and,

21.2. that at the second meeting, at 3.30pm, Essex having in the meantime expressed its willingness to operate the care-home business on the terms previously agreed by Elite with the Company, and having negotiated the Collateral Agreement and the May 2013 Agreement, it was decided that the parties should be asked to proceed on that basis, and that Elite would make with Essex an agreement in the terms of the 2001 Agreement.

22. The Claimants did not admit the authenticity of the Minutes, or that they were to be treated as evidence of their contents; through William Sturges LLP in correspondence, Mr Stavrinides explained that the Minutes were "*kept by* [Mrs Christoforou] *in her office in a folder entitled statutory information. We understand there is only this document and there are no other documents in the relevant folder*". In a letter to the Claimants' solicitors, Simmons & Simmons, dated 17 September 2024, Mr Stavrinides said that "*his personal view*" was that "*if for any reason these minutes were not available or found at the disclosure is one thing that always be corrected*". There was no further explanation of how or when they came to be found, or of why they had not previously been disclosed in accordance with the court's orders.

23. On 21 June 2013, by a letter from Elite to Essex, signed by Mrs Christoforou, and countersigned by Mr Stavrinides for the Company, Elite agreed to the occupation of the Properties by Essex on the terms of the 2001 Agreement, all of which were expressly accepted by Essex (confirmed by Mr Stavrinides' attached signature).

24. The terms of the 2001 Agreement were important. It read and was signed, as follows:

> *This agreement is made on 13th March 2001*
>
> *Between:*
>
> *Elite Property Holdings Ltd hereafter called the Landlord*

And

Health and Home Ltd, hereafter called the Tenant

Whereas

The Landlords has purchased the business known as Ravensmere Rest Home at 13/15 Manor Road, Westcliff on Sea, Essex. The purchase includes the freehold interest, Fixtures and Fittings and Goodwill. It is the intention of the Landlord to purchase additional residential care business in due course. The Landlord wishes to allow a third party to operate the businesses of providing services of residential care from 13/15 Manor Road and from all other sites of such residential care businesses purchased by the Landlord from time to time

It is not the intention of the Landlord to grant a secured tenancy and shall at all times retain ownership of Fixture and Fittings and goodwill

It is hereby agreed:

The Landlord shall appoint the Tenant to operate the business of residential care Known as Ravensmere Rest Home and any other additional residential care home business it acquires from time to time.

The tenant shall pay rent/licence fee to the Landlord for the use of the Landlord's assets (Freehold, Goodwill and Fixtures and Fittings.

Tenants Responsibilities

Pay all outgoings and operating costs

Insure the premises to include the interest of the Landlord and its asset.

Keep the premises in good repair condition

Keep the fixture and fittings in good working condition and where appropriate provide replacement.

Allow the Landlord or its agents access to the premises at all reasonable times

Allow the Landlord or its agents access to books and records in order for the Landlords to ensure that the business is carried out in such manner so it does not prejudice its interest and in particular the goodwill of the business is not negatively affected.

The tenant shall keep the landlord informed at all times of any incidents, accidents or any other events that could be disruptive to the business.

The Tenants shall at all times protect and safeguard the interest of the Landlord and ensure continuity of the business

The Tenant shall pay to the Landlords the Rent/Licence fee without any deductions Rent/Licence fee

In assessing the Rent/Licence fee the following parameters shall apply.

Return on the value of Freehold interest Minimum 5% Maximum 10%

Return on the value of Fixtures and

Fittings and Goodwill Minimum 10% Maximum 20%

The rent/licence fee shall not exceed more than 75% of the operating profit of the tenant before such rent/licence fee.

In the event that the rent/licence fee so assessed using the minimum rates of return exceeds 75% of the operating profit, the rent/licence shall be set at 75% of the operating profit of the business.

The rent shall be determined as follows:

By mutual agreement within the parameters set by this agreement

Set by the Landlords provided the parameters above are followed.

The Rent/Licence fee shall be reviewed periodically and the Landlord has the option to back date such review for a maximum period of two years.

Tenancy

It is not the intention of the parties to create long term secured tenancy. The Landlord shall retain its right to sell the business (freehold, goodwill and fixtures and fittings) upon giving the tenant six months prior notice.

Termination

This agreement shall terminate by mutual agreement

This agreement shall terminate if the Tenants becomes insolvent or unable to pay its debts which prejudices the continuity of the business.

Upon written notice of six months given by either party.

Assignment

The Tenant has no right of assignment of this contract without the Landlord's consent. The Landlord has the right to refuse an assignment without giving any reason. Any value or value worth associated with an assignment shall be the ownership of the Landlord.

Signed

For and on behalf of the Landlord

Maria Christoforou (Director)

For and on behalf of the Tenant

Aurela Stavrinides

(Director)

25. On 25 June 2013, BDO were engaged by the Company and the Bank to conduct a "*Limited Scope Review*" in respect of the Company and Travelforce (and to some extent, Elite and Decolace) to enable the Bank to understand and consider the implications of HMRC's claims and the winding-up petition, and to decide whether to advance further financial support if requested. Mr Nygate was involved in the production of that Review ("**the July 2013 BDO Report**") which was, in final form, dated 23 July 2013. Ultimately, amongst other things, BDO did not positively recommend to the Bank that it should advance further lending, although it was acknowledged that some such lending might be considered justifiable if required to avoid a disorderly insolvency putting the Bank's security at risk.

26. On about 24 July 2013, Essex was granted its own CQC Licence, and the Collateral Agreement was terminated.

27. Against that background, at its first hearing, on 1 July 2013, HMRC's petition was adjourned to allow for the possibility of a voluntary arrangement. In the event, although a proposal for a voluntary arrangement was made (dated 1 August 2013, and in respect of which the nominee was Mr Ninos Koumettou, then of Alexander Lawson Jacobs – "**the CVA Proposal**") it was not approved; nonetheless, no order was ever made on the petition, because of the appointment of administrators by the Bank on 11 September 2013, the day before a proposed meeting of the Company's creditors convened to consider, and if thought fit, to pass a voluntary liquidation resolution. In the event, as I have said, the Company's liquidation began subsequently, on 17 September 2015.

28. On 28 June 2017, a written "**Standstill Agreement**" was made between the Company, its joint liquidators, and - each defined as a "*Respondent*" - Mr Stavrinides, Essex, Elite, and "*Kambos Trust*" ("*for and on behalf of*" which Mrs Christoforou signed as "*Authorised signatory*"). In respect of Mrs Christoforou, the effect of the Standstill

Agreement was in issue, but in essence, it provided for a period (until the earlier of 56 days after delivery of a notice, or 31 December 2018) during which the Company and its liquidators agreed not to commence proceedings against the said Respondents in respect of the defined "*Claims*", but during which time would "*stop running*" for the purposes of any "*Limitation Defence*". The standstill period was subsequently extended by further agreements dated 3 December 2018, 21 March 2019 and 11 June 2019; having started on 28 June 2017, it ended, about two and a half years later, at 4pm on 31 December 2019. Almost two years later, on 23 September 2021, the present proceedings were commenced by Part 7 Claim Form.

The Claims and the Counterclaim

29. Ultimately, the Claimants advanced the following claims, all of which were denied.

30. First, it was alleged that Elite owed the Company a debt of £659,022.66 ("**the Debt Claim**"). This was (as an asset subject to the Bank's floating charge) the sum stated to be due from Elite in a statement of affairs in respect of the Company signed by Mr Stavrinides with a statement of truth and sent to BDO on 29 October 2013; the statement also contained Mr Stavrinides' estimate that the debt due from Elite would realise payment in full.

31. Second, in the alternative to the Debt Claim against Elite (or at least, in circumstances where that claim failed because the court finds that the debt recorded in the Company's Accounts as having been owed by Elite, was not in fact owed at all) it was alleged that the dividends declared by the Company in the years 2010-2013 were unlawful, wholly or in part, and that relief ought to be granted against Mr Stavrinides as the Company's director and/or Mrs Christoforou as its former director and sole member.

32. Third, it was alleged that the declaration and payment by the Company of the 2012 Dividend in the sum of £950,000, and the 2013 Dividend in the sum of £250,000, were (or were central to) transactions at an undervalue under section 238 of the IA 1986, and that Elite and/or Mrs Christoforou, as recipients, ought to be ordered to repay those sums. Further, in respect of the declaration and payment of the 2013 Dividend, alleged to have been effected on or about 30 June 2013 at a time when the Company was insolvent, it was alleged (under section 212 of the IA 1986) that Mr Stavrinides acted in breach of his

duties as a director of the Company, and ought to be ordered to compensate it in a sum equal to the amount of the dividend (together, "**the Dividend Claims**").

33. Fourth, it was alleged that pursuant to the May 2013 Agreement, the Company transferred to Essex the whole of its business, including therefore - although not explicitly referred to in the Agreement - substantial goodwill, worth (on Mr Haddow's evidence) £5,441,244. It was alleged that in return for that goodwill, no payment was made or value given. Accordingly, the transfer was alleged to have been a transaction at an undervalue under section 238 of the IA 1986. Further, it was alleged that the discount of £174,471.66 given in respect of future and potential liabilities to staff was over-valued, such that in any event, the transaction was at an undervalue. These claims were advanced against Essex and Elite as recipients and parties to the May 2013 Agreement. In addition, in respect of the same circumstances, it was alleged under section 212 of the IA 1986, that Mr Stavrinides acted in breach of his duties as a director of the Company, and ought to be ordered to compensate it in a sum equal to the amount of the undervalues.

34. In the event, no claims were pursued against Anthony.

35. Finally, Essex counterclaimed in respect of sums received by the Company after 18 May 2013, and alleged to be held by the Company on trust for Essex in consequence of the May 2013 Agreement.

36. In summary, my conclusions in respect of these claims are stated at [286] below.

The Witness Evidence

37. Mr Nygate: For the Claimants, Mr Nygate made a statement dated 27 September 2023, and was cross-examined both by Mr Macpherson (who appeared with Ms Kiver, for Elite, Anthony, Mrs Christoforou and Essex) and Mr Stavrinides (who acted in person). He was an honest and careful witness. As well as being one of the Company's joint liquidators (and a former administrator) he was the partner principally involved in the production of the July 2013 BDO Report; he has had primary conduct of the insolvency processes, and of this litigation.

38. Mr Stavrinides relied on the contents of statements made on 26 June 2023, 28 September 2023, 11 October 2023 and 16 October 2024. I did not find him to be a satisfactory or

reliable witness. For example, for reasons expanded upon below, I have rejected as incredible and untrue his evidence concerning his involvement in the final approval of the July 2013 BDO, and his evidence concerning the events of 18 May 2013; much of his evidence in respect of the Debt Claim was not merely unsupported by documents, but directly contradicted by documents which he himself had created, and in certain cases confirmed with a statement of truth, but which he was nonetheless without any obvious reluctance willing to disclaim. Moreover, his late, casual (and in substance) unexplained disclosure of important documents – in particular, the Cashbook – and his involvement in the production of Mrs Christoforou's statements (which I deal with below) causes me to treat his whole approach to this litigation, and his evidence, with real caution.

39. Mrs Christoforou: The Defendants sought to rely on two witness statements made – or at any rate, on their face signed – by Mrs Christoforou, notwithstanding that she was not present at the trial, and was not made available to give oral evidence or be cross-examined. The statements were dated 20 June 2023 and 9 August 2024, and both were written in English; the first was made at a time when Mrs Christoforou was legally represented, by Kyriakides & Braier, and was made to explain the extent of the given disclosure, and the second at a time when she was acting in person (before SBP Law came on the record with effect from 18 September 2024) in opposition to an application for costs made by the Claimants. Neither statement was compliant with CPR PD 57AC – neither contained the confirmation required by paragraph 4 of that PD, and neither listed the documents that had been referred to, or which had been referred to Mrs Christoforou, under paragraph 3.2.

40. On 4 October 2024, although neither of the two statements had been made as a statement of evidence for trial, notice was given on Mrs Christoforou's behalf, by her solicitor at that time, and pursuant to paragraph 3 of the Order made by ICC Judge Prentis on 25 September 2024 at the PTR, that she proposed to rely upon her statement of 9 August 2024.

41. In support of an application to cross-examine Mr Haddow (which I refused, for reasons given orally on Day 3 of the trial, and explain again below, at [52]) a witness statement was made by Mr Donald MacFarlane of William Sturges LLP on 16 October 2024, in the course of the week before the trial. In that statement (made on behalf of the Defendants other than Mr Stavrinides) he said, amongst other things, that "*For the largest*

part of this litigation … the Defendants have all been acting as litigants-in-person and reliant upon [Mr Stavrinides]. *The litigation on behalf of all the Defendants was, in effect, managed by* [Mr Stavrinides]. … [Mr Stavrinides] *had also been unofficially managing the litigation behind the scenes for* [Anthony] *and* [Mrs Christoforou]*, and he has equally not excelled in that process*."

42. At the trial, in relation to Mrs Christoforou, Mr Stavrinides himself explained that "*She cannot speak English. She can speak some English words but she cannot have a conversation*." In respect of her ability to understand written English, he said that it was the same – "*Words*"; he said that both orally and in writing, her ability to understand and communicate was "*very limited*". Moreover, albeit not in the course of his evidence, Mr Stavrinides said that he would "*question it whether* [Mrs Christoforou] *can actually follow … a witness statement, even if it's written in Greek. She's 78 years old. It's getting on.*"

43. The two statements signed by Mrs Christoforou and made in English, a language which she neither speaks nor understands to any substantial degree, were therefore made in breach of CPR PD 32A, paragraphs 18.1, 19.1(8) and 20.1. In my view, it is highly likely that these statements – certainly the second, dated 9 August 2024 – were drafted by or with the substantial involvement of Mr Stavrinides. I have no confidence whatever that they were to any real extent the product of Mrs Christoforou's own words or genuine recollections, rather than a statement of the case that Mr Stavrinides wished to advance.

44. At the trial, it was explained to the court by Mr Macpherson that Mrs Christoforou was in Cyprus, but that steps were being taken to draft and enable her to make a compliant trial witness statement in Greek, and for a sworn translation of that statement to be made and served. In the event, neither such document was produced.

45. Moreover, at the beginning of the trial, the court was told that Mrs Christoforou, as a result of her age and physical condition, would be unable or unwilling to travel to London to give evidence, and that therefore, were she to appear as a witness, it would necessarily be by remote means from Cyprus.

46. In connection with her physical condition, and her ability to travel to London, first, a written "*General Certificate*" was produced, signed by her GP and dated 22 October

2024, which stated, in the barest terms, without elaboration, that "*Due to her medical history she is advised to avoid air travel*", and second, a document headed "*Sick Leave*", also dated 22 October 2024 and signed by her GP, which stated her diagnosis to have been "*Back syndrome with radiating pain, Vertigo, Migraine*", to be managed by "*Pharmaceutical Treatment*" and "*Rest*", and which recommended "*sick leave*" between 22 October and 27 October 2024, being Days 2 to 5 of the trial.

47. Regardless of the adequacy of that somewhat slender evidence, the court was told that in addition, in order to give evidence remotely, it would have been necessary to obtain the permission of the local Cypriot court or authority (given on a case by case basis) but that in the event, in the time available, it had not been possible to obtain it. On any view, it was therefore not possible for Mrs Christoforou to give oral evidence, and she did not do so.

48. In summary therefore, there was no compliant written statement of evidence from Mrs Christoforou, no statement even purporting to be a trial statement, and in any event, she was not able or available to give evidence orally.

49. These proceedings began over two years ago, and questions about Mrs Christoforou's ability to attend a trial, and concerning the language of her statement/s, have been raised previously. For example, on 5 January 2024, Deputy ICC Judge Agnello KC ordered that if "*and insofar as* [Mrs Christoforou] *considers that for medical reasons she is unable to attend the trial or requires reasonable adjustments to be made, and/or insofar as she considers that she requires the assistance of an interpreter to engage with the trial process, then she is at liberty to serve and file evidence of such matters. Any such evidence must be filed and served by 4pm on Monday 5 February 2024*." No such evidence was served and no steps were taken (of which the court was told) to obtain the permission required to give evidence remotely from Cyprus.

50. Against that background, Mr Macpherson invited the court to consider and attach weight to both statements signed by Mrs Christoforou (not only that in respect of which notice was given on 4 October 2024); Mr McGhee (Counsel for the Claimants) suggested that they should be given no weight at all. I agree with Mr McGhee. The statements were, for the reasons I have explained, highly unsatisfactory, fundamentally uncompliant with important requirements of the CPR and untested by cross-examination; in each respect,

there was no real excuse for the failures. Mrs Christoforou and the other Defendants have had ample time in which to consider and deal appropriately with these matters, all of which have been raised and canvassed in correspondence and court, but have simply failed to do so, without good reason. The consequence, which I regard as practically inevitable, is that for present purposes, no weight can safely be attached to Mrs Christoforou's statements.

Mr Haddow:

51. Also by the order of Deputy ICC Judge Agnello KC made on 5 January 2024, Mr Haddow was appointed as a single joint expert, and his instructions were approved. By order of ICC Judge Prentis made on 27 February 2023, his evidence was to be given at trial by written report. His report was dated 3 July 2024, and on 10 October 2024, he produced written responses to a lengthy series of questions put to him on behalf of Elite, Mr Stavrinides and Mrs Christoforou.

52. Nonetheless, at the beginning of the trial, the Defendants applied to cross-examine Mr Haddow. In essence, by reference to the principles set out in, for example, FTAI AirOpco UK Limited v Olympus Airways S.A. [2021] EWHC 2614 (Ch) by HHJ Pearce sitting as a Judge of the High Court at [46]-[56], I declined that application (in a separate judgment given *ex tempore*) because:

    52.1. first, it was made very late, at the trial itself, and notwithstanding that the order for evidence by written report was made on 27 February 2023, and that the parties had been given ample time in which to ask questions, or indeed to apply to cross-examine; that different advisors had recently been instructed and wished to pursue a different course was a result of the Defendants' own litigation decisions; although not for the whole period, but certainly for parts of it, the Defendants have had the benefit of legal advice and assistance; and,

    52.2. second, to have allowed cross-examination would have risked real unfairness to the Claimants: the questions would have been put without notice to Mr Haddow and without notice to Mr McGhee or his clients; the Claimants did not have their own expert; there was a serious risk that there would be no real or genuine opportunity for the Claimants to react to whatever Mr Haddow might come to say, and to proceed accordingly; the Claimants would have come to trial without

any expectation of a need to cross-examine Mr Haddow or deal in this regard with some new evidence; they would have been unfairly exposed to a real prospect, part way through a trial, after a considerable litigation process, of new and unpredictable evidence, but without the means of meeting it; that would have been unfair. The Defendants made no application to adjourn, and no application to adduce the evidence of their own expert. Finally, I also had regard to Mr Macpherson's acknowledgment that although not perhaps his desired course, he could, if necessary, by way of submissions, make the points he would have wished to put to Mr Haddow in cross-examination.

52.3. On balance therefore, I considered that the fairest outcome was to refuse the application.

53. Anthony: Anthony accepted that his recollection had faded over time, and added that "*I've actually learned more about the business from reading the claim bundle than I did being in there for sixteen years, so it's difficult trying to separate that*", a comment which underlined the extent to which his role had been confined to matters of day-to-day executive business, and that, as he said, the Company's "*sole decision maker*" had been Mr Stavrinides. Nonetheless, although Mr McGhee accepted what he described as the "*key points*" of Anthony's evidence, there were aspects which I found fragile and unconvincing. In particular, as I shall explain, his evidence about the events of 18 May 2013, appeared to be an uncomfortable compromise between his desire to tell the truth, and his understandable desire to support, or at least, not to contradict his own father.

The Documentary Evidence

54. The Claimants expressed serious concerns about the adequacy of the Defendants' disclosure, in my judgment justifiably. Their concerns were raised in correspondence by Simmons & Simmons as long ago as August 2023, and heightened by the Defendants' revelation, on 10 February 2023, in their draft disclosure review document, that over three years previously, "*On 26 December 2019, the server… that held all documents for the* [the Company, Elite and Essex], *Norm Consultant, Decolace Properties Limited, Travel Force Limited suffered a cyber-attack in which all the data on the server was lost*."

55. There were two important disclosures at or very shortly before the trial itself: first, part of a previously undisclosed "*cashbook*" created by Mr Stavrinides, a copy of which, unheralded, he produced in court on Day 3 of the trial, and which apparently recorded Elite's receipts from the Company, and payments made by Elite, in respect of the period from 1 July 2011 to 22 May 2013 ("**Elite's Cashbook**"), although not before; and second, the Minutes referred to above at [20]-[21], provided to Mr Haddow on 1 October 2024. Assuming for a moment that they were genuine, those documents were of very obvious and real significance; they ought to have been disclosed previously; their sudden and belated appearance cast doubt on the thoroughness and adequacy of the Defendants' disclosure.

The Debt Claim against Elite

Introduction

56. The Company claimed to be owed £659,022.66 by Elite, and it sought an order for payment of that debt, or any part of it held to be due on a claim not barred by limitation.

57. Its case, in summary, was that as the only cash generative member of the Family Group, it was caused by its directors over a number of years (but in particular, by Mr Stavrinides) to make payments to Elite, from time to time, in various undifferentiated sums, which Elite used for its own purposes and/or for those of the wider Family Group and/or for other purposes beyond those of the Group as I have defined it.

58. It was said that the objective understanding between the parties was that Elite was entitled to the benefit of those payments but that they were not gifts. Accordingly, each such payment was said to have been made pursuant to a "*contract of loan*" for the purposes of section 6 of the Limitation Act 1980 ("**the 1980 Act**"), and was recognised in the Company's Accounts, Elite's own accounting records, and elsewhere, as having created or contributed to a single debt owed to the Company; against that debt, from time to time, by means of entries made in the companies' records, Mr Stavrinides would set-off or record a credit in respect of liabilities owed by the Company to Elite - for example, in respect of rent or fees payable by the Company under the 2001 Agreement, or in respect of dividends declared by the Company.

59. On that basis, it was said that under section 6 of the 1980 Act, the six year limitation period did not begin to run until payment was demanded on 28 October 2015, less than six years before these proceedings began, on 23 September 2021. Although the Claimants also pleaded reliance on section 29 of the 1980 Act, that there had been an acknowledgment of the debt within the relevant period, that case was not ultimately pursued.

60. In response, Elite's case, as advanced by Mr Macpherson, supported by Mr Stavrinides, was that no debt was due because:

    60.1. first, although the financial records of the Company and Elite stated or reflected the fact of a debt owed by Elite to the Company (or appeared to do so), they were wrong because (and to the extent that) they included "*speculative provisions*" inserted by Mr Stavrinides in respect of Elite's potential but not settled or formally agreed liability to meet the costs of "*improvements*" made to the Properties (owned by Elite but occupied by the Company) and paid for by the Company, directly;

    60.2. Mr Stavrinides' evidence was that by the end of the financial year to 2011, the Company had in this manner spent, in aggregate, £610,000, which although provided for in the records as a debt owed by Elite, ought in fact to have been included as a fixed asset owned by the Company, in the same sum, meaning that the Company's value was unaffected;

    60.3. second, there was in any event no contract of loan - in fact, there was no relevant binding agreement *at all* between the Company and Elite (for which Mr Stavrinides was not entitled to act, at least in this respect) whether in respect of Elite's responsibility for the cost of improvements, or otherwise in relation to alleged lending;

    60.4. in the absence of a loan contract, the claim was limitation barred (unless to any extent it arose after 20-23 March 2013).

61. There were therefore two aspects of the ultimate issue before the court:

61.1. first, whether there was a binding arrangement made or established between the Company and Elite to the effect that Elite was responsible for the cost of improvements to the Properties, and the Company for the cost of repairs, or whether the sums recorded in, for example, the Company's Accounts, were (or more accurately, reflected the existence of) merely "*speculative provisions*";

61.2. second, if there was such an arrangement, was all or part of the debt or sum said to be owed to the Company due under a contract of loan, or otherwise, for example, under a contract to indemnify or reimburse the Company in respect of relevant expenditure.

The Relevant Documents

62. Of necessity, the Company's case (advanced by its liquidators) was substantially based on various documents produced at different times, including in particular:

62.1. the Company's own signed, final Accounts to 30 June 2011 and to 30 June 2012;

62.2. the Company's draft Accounts to 30 June 2013, produced by Mr Stavrinides, and sent to Mr Nygate on 21 October 2013 and again on 29 October 2013;

62.3. a "*Schedule re Elite*" ("**the Elite Debt Schedule**") also sent by Mr Stavrinides to Mr Nygate on 21 October 2013;

62.4. a Statement of Affairs in respect of the Company, signed by Mr Stavrinides with a statement of truth, and sent by him to Mr Simon Jagger of BDO, on 29 October 2013;

62.5. the CVA Proposal made by Mr Stavrinides and Anthony (as its directors) in respect of the Company, dated 1 August 2013, and signed by them both, confirming its contents to be true to the best of their knowledge and belief;

62.6. Elite's Cashbook, disclosed during the trial, and referred to above at [55], which apparently recorded Elite's receipts from the Company, and payments made by Elite, in respect of the period from 1 July 2011 to 22 May 2013;

62.7. the July 2013 BDO Report, and an earlier Report also produced by BDO, dated 25 February 2010 ("**the 2010 BDO Report**").

The Company's Accounts

63. The Company's Accounts to 30 June 2011 were dated 23 December 2011, and included in the Balance Sheet, in respect of "*Debtors and prepayments*" (described as "*Trade and sundry debtors*" in the Notes) an asset in the sum of £139,115 (stated as £301,093 as at 30 June 2010). Elite's Balance Sheet as at 30 June 2011, albeit produced "*For Management Information Only*", recorded a liability to the Company in the sum of £106,285, presumably included within the corresponding debtor figure in the Company's Accounts.

64. The Company's Accounts to 30 June 2012, dated 13 November 2012, included in the Balance Sheet, in respect of "*Debtors and prepayments*" (again described as "*Trade and sundry debtors*" in the Notes) an asset in the sum of £384,394. Although there was no Elite Balance Sheet corresponding precisely in time, its Balance Sheet to 31 March 2012, recorded a liability to the Company in the sum of £366,448.

65. As to the Company's Accounts to 30 June 2013, by an email sent to Mr Nygate by Mr Stavrinides on 11 October 2013 (subject, "*Health and Home Ltd*") soon after the beginning of the Company's administration, Mr Stavrinides said that, "*Over the next few days I will devote time to address all the outstanding issues relating to the Administration of* [the Company]" including, in particular, "*the proposed statement regarding Elite,* [the Company] *and* [Essex] *and the May transactions*". Accordingly, on 21 October 2013, Mr Stavrinides sent a further email to Mr Nygate, to which he attached various documents, including, (i) revised draft accounts of the Company ("*with comparatives*") to 30 June 2013 ("**the Draft 2013 Accounts**") and the Elite Debt Schedule. In creating those documents and providing that information, Mr Stavrinides was, I assume, acting or purporting to act in accordance with his duties as a director of the Company in respect of the administration, and in order to enable the administrators to fulfil their own duties.

66. The Draft 2013 Accounts recorded, in respect of "*Debtors and prepayments*", an asset in the sum of £662,123 (again described as "*Trade and sundry debtors*" in the Notes). In the "*Additional Notes*" provided by Mr Stavrinides, in respect of "*Debtors*", Elite was recorded as having owed £659,022.66.

The Elite Debt Schedule

67. The Elite Debt Schedule, produced by Mr Stavrinides, was in the following form:

"*HEALTH AND HOME LTD*

ACCOUNT WITH ELITE PROPERTY HOLDINGS LTD

DATE	*DETAILS*	*DR*	*CR*	*BALANCE*
01.07.2012	*BALANCE B/F*			*366447.66*
18.05.13	*FIXTURES AND FITTINGS*	*5000*		*371447.66*
	RENT (1.07.12 TO 18.05.13)		*800425*	*-428977.3*
30.06.13	*BANK (WHOLE YEAR)*	*1456000*		*1027022.7*
	MANAGEMENT FEES		*88000*	*939022.66*
	DIVIDEND		*50000*	*689022.66*
	REPAIRS		*30000*	*659022.66*"

68. Accordingly, the Elite Debt Schedule confirmed the statement made in the 2013 Draft Accounts, that the debt due to the Company from Elite as at 30 June 2013 was £659,022.66. The purpose of the Schedule was to explain to the administrators the means by which the sum due to the Company as at 30 June 2012 (£366,447.66) had become, in the course of the year, the sum due as at 30 June 2013. Mr Stavrinides provided that explanation by reference to:

68.1. first, the sum of £5,000 payable by Elite under the May 2013 Agreement in respect of fixtures and fittings; and,

68.2. second, the sum of £1,456,000 received by Elite (by transfer into its bank account) from the Company over the course of the year;

68.3. both of which increased Elite's debt; and,

68.4. sums due under the 2001 Agreement from the Company to Elite in respect of rent (£800,425) and management fees (£88,000); and,

68.5. sums due from the Company to Elite in respect of repairs to the Properties (in the sum of £30,000) and also in respect of a dividend in the sum of £250,000 (being the 2013 Dividend);

68.6. all of which decreased Elite's debt;

68.7. and which overall produced a debt of £659,022.66 owed by the Company to Elite.

The Statement of Affairs

69. Also on 29 October 2013, Mr Stavrinides sent to Mr Simon Jagger of BDO a Statement of Affairs in respect of the Company, with a signed statement of truth, which once more stated that the Company owed Elite £659,023, as an asset subject to the Bank's floating charge; the Statement also contained Mr Stavrinides' estimate that the debt due from Elite would realise payment in full.

The CVA Proposal

70. At least as to the existence of a debt, if not the amount, those documents were consistent with the CVA Proposal which was made by Mr Stavrinides and Anthony (as its directors) in respect of the Company, dated 1 August 2013 and signed by them both, confirming its contents to be true to the best of their knowledge and belief.

71. Amongst other things, that Proposal confirmed that it was "*the wish of the Company to pay in full its commitment to HMRC so long a* (sic) *repayment programmes* (sic) *is achieved that is affordable, achievable and sustainable. Elite acknowledges its indebtedness to the Company and has every intention to repay this obligation in full. However, due to its own predicament, and other financial constraints it is unable to do so, in the short term, and proposes repaying the same over a reasonable time period, dictated by ability and affordability*." It further stated that the amount due from Elite to the Company, as an "*intercompany loan*" as at 31 July 2013, was £334,085.20, and that amount was also included in the "*Estimated Statement of Affairs as at 31 July 2013*".

The Elite Cashbook

72. On Day 3 of the trial, during the course of his opening, Mr Stavrinides produced in court the Elite Cashbook. During his cross-examination, he said that it was a printout of an Excel workbook which he had kept and found in a office at his home in Cyprus, shared apparently with Mrs Christoforou, but which it had not previously "*crossed his mind*" to relate to the issues in the case. Despite its belated appearance, the authenticity of the Cashbook was not challenged by the Claimants; indeed, they sought to rely on it.

73. Essentially, the Cashbook, by reference in each case to a very brief description, recorded Elite's receipts (which almost exclusively comprised substantial round figure sums from the Company in various different amounts, on various unpatterned dates) and payments, which enabled a running bank balance to be recorded. In respect of receipts, although in addition to the "*H&H*" column, there were columns in respect of "*Rent*" (in respect of which no receipts were recorded) and "*Sundries*", and although Mr Stavrinides explained that the template was designed to record those varieties of receipt, he said that in practice, the sums received from the Company were "*not separated at the point of entry, whether it's rent, whether it's anything else …*"; they were made and recorded as undifferentiated receipts. Of those sums, it was common ground that ultimately, a large part would have been referable to the rental/licence fees payable by the Company, and that there was no payment in the exact sum of the dividends said to have been declared in the years to 30 June 2012 or 2013. The sum of £1,456,000 recorded in the Elite Debt Schedule was, accordingly, the aggregate sum paid in this fashion by the Company to Elite in the course of the year to 30 June 2013.

74. The recorded payments made by Elite were further broken down into a VAT element (where applicable), and also, "*Masaccio*", "*Charges*" (which was a reference to bank charges), "*Improvements*", "*Sundries*" (for example, payments to HMRC), "*Euro a/c*" (into which no payments were recorded), "*Loans*", and "*Collar*". As to those categories of payment, Mr Stavrinides explained that:

    74.1. the "*improvements*" figure, where sums were paid for certain products or services (briefly described, and in terms such as, to take examples, "*walls & floors*", "*PPG Architectural*" and "*Maplin*") was the whole sum paid, minus the VAT element;

74.2. the "*Loans*" payments were to the Bank, and the "*Collar*" payments were of fees for an interest rate hedging product.

75. Finally, in addition to the financial and accounting records, the provenance of Elite's alleged debt was to some extent described in the two BDO Reports.

The BDO Reports

76. On 25 February 2010, the 2010 BDO Report was produced by BDO, on the instructions of the Bank: a "*Limited scope pre lend due diligence report*" in connection with a proposed refinancing, and in particular, a proposed increase of the Bank's facilities to Elite.

77. It stated that it had been prepared "*from information supplied by and from discussions with the key director of the Company Mr Andreas Stavrinides*", and that he had "*reviewed a draft copy of sections 2 to 8 of this report … He has confirmed to us that he is not aware of any material errors of fact or omission that might cause the report to give a misleading view of the current state of, or prospects for, the Company, and that where this report attributes opinions to him, it accurately reflects his views*."

78. In Section 2, under the heading "*Ownership, structure and commercial activities*", the Report stated as follows:

> *All improvements and maintenance is undertaken by a subcontracted company, North Consulting Limited, which we are informed is not related to Health And Home Limited.*
>
> *Mr Stavrinides stated that the annual cost of all repairs and improvements is considered on an annual basis, with repairs being borne by Health And Home and improvements being borne by the sister (property owning) company, Elite Property Holdings.*
>
> ….
>
> *We note that the allocation between repairs and improvements is based on Management's estimate and is not supported by detailed analysis. From a review of the expenditure in FY09 and via discussions with Mr Stavrinides, it*

appears that at least £135,000 of total expenditure of £196,000 related to property improvements. This compares with the estimate of £110,000 of improvements included within the financial statements.

 Accordingly, the impact on profits of reallocating amounts between improvements and repairs would be an increase in profit of approximately £25,000, less any related tax charge, in FY09.

 Although a detailed review of capital expenditure in FY08 has not been performed, we note that this period covered the majority of the development of Barling Lodge. The chart opposite shows that the value of improvements in that period was approximately £50,000 greater than in FY07. However, repairs also increased by approximately £17,000 so it is possible that certain costs were incorrectly allocated to repairs, thereby artificially reducing profits.

79. Under "*Related party transactions*", the Report stated:

 During FY09, £1.04 million was paid by the Company to Elite Property Holdings. In addition Mr Stavrinides determined that £110,000 of repairs, paid for by the Company, were in fact property improvements. Accordingly, the total payments in respect of Elite Property Holdings amounted to £1.15 million.

 Although these payments comprise numerous transfers, and are not directly allocated to invoices, we are aware that in FY09 the Company has reported that it declared £400,000 in dividends to its shareholders and owed Elite Property Holdings £600,000 in rent and £71,500 in management charges.

 We have attempted to reconcile these cash out flows with the movement on the shareholders account for FY09 although there remains a difference of approximately £22,000. Given the relatively small size of this balance and the number of bank transfers involved we have not undertaken any further reconciliation work on this area.

 In FP10 the Company made further payments of £515,000 to Elite Property Holdings, on account of rent other charges payable. The expected movement

in the shareholder's account in FP10 would be a decrease of £215,000. We are informed by Mr Stavrinides that no dividends were declared in FP10.

 Mr Stavrinides does not prepare balance sheets for the Company's internal management accounts. Accordingly, we have been unable to compare this expected movement with an actual movement in the shareholder's account.

80. Accordingly, amongst the 2010 BDO Report's "*key findings*" were that:

80.1. the Company made a number of payments each year to Elite, albeit without formal, arms-length arrangements having been made, such that there was a risk that the level of payments could be challenged by HMRC resulting in additional tax liabilities; and,

80.2. management had not maintained detailed analysis of expenditure relating to property repairs and improvements, and that as a result, the level of recharges from the Company to Elite may be inaccurate; it was recommended that appropriate records be kept which distinguished accurately between expenditure related to repairs (to be borne by the Company) and expenditure related to improvements (to be borne by Elite).

81. The second BDO Report – the July 2013 BDO Report - referred to above at [25] , was dated 23 July 2013, and was produced on the instructions of the Company and the Bank contained in an engagement letter dated 25 June 2013. It was stated to be a "*Limited Scope Review*", expressly not in the nature of an audit, which had been reviewed by the directors of the Company, who had "*reviewed a draft copy*" and "*confirmed to us that there were no material errors of fact or omission in the context of the scope of the report*".

82. Concerning the source of information contained in the July 2013 BDO Report, Mr Nygate said that Mr Stavrinides had been BDO's main point of contact, and that he had displayed "*knowledge of the operations and finances*" of the Company, Elite, Essex, Travelforce, Decolace and Norm; he said that he had understood that Mr Stavrinides played a "*key role*" in their management; his contact with Anthony had been "*minimal*" and he could not recall ever having met Mrs Christoforou, whose role he did not know. As to the engagement letter, Mr Nygate said that he had been told by Mr Stavrinides that

he could not sign on behalf of Elite because he was not a director of that company (so that the names of Elite and Decolace had been deleted from the draft above his signature, added on 5 July 2013) but that Mr Stavrinides had nonetheless provided information about Elite (and indeed, about Travelforce and Decolace). Mrs Christoforou appears subsequently to have signed the Letter of Engagement on behalf of Elite and Decolace on (or dated) 11 July 2013, although according to Mr Nygate's email to Mr Stavrinides on 26 February 2016, BDO had no record of ever having received that signed copy.

83. Mr Stavrinides agreed that although (on his case) he had not been authorised to sign the Letter of Engagement on Elite's behalf, he had nonetheless had "*authority from these companies to provide the appropriate financial information, to assist the Company to complete a pre-lending review*"; in cross-examination, he said that he had done so as a director of Norm, and sought to draw a distinction between his (admitted) "*limited authority to provide information in* [his] *possession*", and his (denied) authority to "*speak on* [Elite's] *behalf*", or formally instruct BDO. To the extent that the information provided was inaccurate, Mr Stavrinides sought to blame BDO for having failed to interrogate the precise limits of his authority. That accusation was unrealistic – there was nothing to suggest to BDO that Mr Stavrinides would not provide accurate information. Even assuming a limitation on Mr Stavrinides' authority, it was not suggested that he had been authorised by Elite to provide BDO with information positively known or believed by him to be inaccurate, incomplete or misleading – particularly given that Elite had signed the Letter of Authority; on the contrary, I would and do for the purposes of this judgment assume that any authority was to provide accurate and useful information, and that that is what he did; in any event, it would not have been in the Company's best interests to mislead BDO abut its financial affairs, or allow it to be misled.

84. Moreover, on 22 July 2013, Mr Stavrinides wrote to Mr Nygate with comments on a draft of the Report, made a comment on rental income payable to Decolace (but omitted from the draft) and said that, "*With regards to the rest of the financial figures I take it that they represent extraction of what I provided, analysed and collated. I have not gone through these in close scrutiny. If there is anything that is not in line with the financial supplied please let me know*".

85. Mr Nygate replied that, "*The report is based on the information that you gave us but we do need you to confirm that it is factually accurate as it is possible that we may have*

misinterpreted some detail", to which Mr Stavrinides replied, "*With regards to the figures I have not scrutinised his workings. Where more information was required this was provided to Andy* [Mr Smith, of BDO]".

86. Mr Nygate replied, with a further draft, and said, "*As discussed I attach a revised draft document for your comments and confirmation of factual accuracy. I look forward to hearing from you*." Later that day, Mr Stavrinides wrote with various comments, including about financial matters, and in response, on 25 July 2013, Mr Nygate sent a further draft, "*for your approval*".

87. Also on 25 July, at 10.25am, Mr Stavrinides replied and said, "*Thank you for the report. You can no* (sic) *release the report a* (sic) *complete and final*", to which Mr Nygate replied, asking whether "*no*" was intended to have read "*now*", and Mr Stavrinides replied, at 11.04am:

> "*You are absolutely right*
>
> *I should double check things before I press the send button*
>
> *Please release the report as final*".

88. In respect of that apparently unqualified approval of the draft Report's contents, in his oral evidence, Mr Stavrinides said that in the time "*between these emails*" - contrary to the impression given in the emails themselves, and indeed, contrary to their plain language – he had spoken to Mr Nygate by telephone, and "*expressed my doubts on certain areas, and we failed to agree, and the final quotation by Mr Nygate, it was that, "if you don't agree, we are not going to send the report to the bank. We are going to stop acting with serious consequences." So I was put into a situation of either going along and accepting the report/approving the report, whatever word you want to use −− Now, to move things forward, I specifically wrote this email, 25 July at 10.25, and I said clearly "You can now"−−or it should be "now," not "no," "You can now release the report as complete and final." Now, I made damn sure that that wording is used in such a way which does not say I approved the report. Otherwise, if I did approve the report, I would have clearly said it. There was no need to use those words. Now, how it's interpreted on the other side, that's their business, but that was exactly what happened, how it happened,*

and why it happened. On one hand, I'm caught at ransom that the report were not going to bank with serious consequences. At the same time, I was rug−pulled at ransom, being pushed to agree on something that I didn't quite agree. So, those words served the purpose, so the report was released."

89. I regard that evidence as incredible and untrue; it was, in my judgment, nothing more than an attempt to escape from the otherwise practically inevitable (but now unwelcome) consequence that the financial information contained in the Report was provided by Mr Stavrinides and was confirmed by him at the time to be accurate. BDO would have had no reason to ignore his concerns amounting to disagreement, or to conceal them from the Bank; they would have had no reason to state, in the body of the Report, that its contents had been confirmed by Mr Stavrinides, and it would have been dishonest of them to do so; it is very highly unlikely that the emails in fact exchanged would have been written, without reference to such disputes, had in fact they been raised; my conclusion is that they were not raised, that there were no such disputes, and that therefore the July 2013 BDO Report is a valuable source of information and evidence about the affairs of the Family Group in July 2013, provided by and with the agreement of Mr Stavrinides and indeed, with the authority of Elite (even on Mr Stavrinides' evidence).

90. Moreover, Mr Stavrinides was the person best placed to provide information about the Family Group and its members' affairs. Thus, Anthony confirmed that his father was, in respect of the Company, "*effectively acting as the sole director*", "*the sole decision maker*", "*focussed on ... the overall company*", whereas his own responsibility was confined to day-to-day management, dealing, for example, with local authorities, and the generation of new business; Anthony said that his father had been solely responsible for the production and approval of the Company's Accounts, and indeed, for the declaration of dividends (of which Anthony said he was not even aware, until these proceedings began) and for any payments made by the Company to Elite; Mr Stavrinides agreed. In his opening, Mr Macpherson described Mr Stavrinides as the "*moving force behind the business*", as plainly he was.

91. The purpose of the July 2013 BDO Report was to enable the Bank to consider the implications for the "*Group*" (defined as comprising the Company, Elite, Essex, Decolace, Norm and Travelforce) of the Company's liability to HMRC and of the winding-up petition presented on 20 May 2013, and to consider in that context the extent

to which it might support the Group if requested to do so. Ultimately, amongst other things, BDO did not positively recommend to the Bank that it should advance further lending, although it was acknowledged that some such lending might be considered justifiable if required to avoid a disorderly insolvency putting the Bank's security at risk.

92. Within the Report, it was recorded that the care-home business had been the Group's "*main cash generator*", and had, "*in the past two years … paid c.£1.7m to Elite in rent and loans*" and had declared dividends "*of which £1.35m had been lent to Elite*". It was recorded that in consequence, the Company was owed £510,000 by Elite, which Elite was unable to pay immediately.

93. Further documentary evidence of a debt in that sum was contained in Elite's Balance Sheet as at 30 June 2013, produced "*For Management Information Only*", which recorded a liability to the Company in the sum of £510,448. Although undated, I infer that this document was produced at some point between 30 June 2013 and 23 July 2013 (the date of the July 2013 BDO Report) but before the documents sent to Mr Nygate in October 2013.

Mr Stavrinides' Evidence

94. As I have explained, Elite's case was that it had not agreed to bear the cost of improvements, but that the extent to which (if at all) it might ultimately agree to do so, was and remained at all times wholly within its discretion (to be decided by its director, Mrs Christoforou).

95. In his evidence, Mr Stavrinides said that "*speculatively*" therefore, the Company had provided for payment by Elite to the Company of £610,000 in respect of improvements for which the Company had paid, but for which Elite had not in fact finally agreed to bear responsibility, meaning that, correctly understood, it was and had been for the Company to pay those sums, not Elite, and that Elite's debt was thus overstated. Those "*speculative provisions*" were said to have been as follows:

	Provision Made	Cumulative Provision
June 2007	£100,000	£100,000

June 2008	£150,000	£250,000
June 2009	£110,000	£360,000
June 2010	£120,000	£480,000
June 2011	£130,000	£610,000

96. As a result, said Mr Stavrinides, for the most part (until the year to 30 June 2013, at the end of which it was accepted that Elite had been overpaid in the sum of £49,023) rather than being owed anything at all by Elite, the Company was in fact significantly indebted to Elite, including in the sum of £503,715 as at 30 June 2011 (being £106,225, Elite's "*purported*" debt, minus £610,000, the "*speculative provision*") and £225,606 as at 30 June 2012 (being £384,394, Elite's "*purported*" debt, again minus £610,000). There was no evidence regarding the particular components of the total alleged provision, or indeed, of where exactly they had been recorded or could now be found.

97. His evidence was that therefore, properly characterised, the payments made by the Company to Elite in the period after 1 July 2011 were partly in satisfaction of that pre-existing debt owed to Elite, and that to the extent that as at 1 July 2013, the Company had overpaid (in the sum of £49,023, equal to £659,023 (the sum claimed against Elite, and which would otherwise be due) minus the £610,000 provision) it was "*accidental*".

98. Essentially, Elite's case was that its liability in respect of improvements had never been agreed and ought now to be excised, or reversed out of the Company's Accounts in order to show the true position. In his 11th witness statement, Mr Stavrinides explained it as follows:

> "*Since at least 2005, I began apportioning the costs associated with repair and improvement works into their own respective categories. Anything falling within repair works was reflected within the First Claimant's profit and loss accounts, with tax relief claimed. Improvements, however, had not been capitalised and instead were kept as suspense items, consolidated with other items and appearing in the balance sheet, as sundry debtors*."

"*The reason that this had been done was principally because of the close relationship between the First Claimant, ran by me, and the First Defendant, operated by the Fourth Defendant. When it was accepted that the 2001 Agreement had provided the First Claimant with no contractual entitlement to recover the said sums from the First Defendant, in light of the First Claimant's successful trading and the mutual support understanding between the parties, I gave it the benefit of doubt that the First Defendant may one day agree to reimburse these costs to the company, voluntarily. If not, the sums would have been transferred to improvements and shown as an asset in the Balance Sheet, as the company had a continuing benefit from such assets*."

"*This would be strictly outside the bounds of the 2001 Agreement and would be entirely dependent on the goodwill of the First Defendant. This is why they were classified as "speculative" provisions. The costs I would apportion into improvements varied from year to year, depending on the works undertaken, which I had to estimate. The basis of my estimates was to assess what HMRC could accept as repairs and what HMRC would consider as improvements. The improvement part was accounted as speculative re-imbursements from the First Defendant*."

"*Ultimately, I had been unable to conduct this exercise before the First Claimant went into administration. This meant that the sums were instead badged by the Liquidators as the equivalent of an inter-company debt owed by the First Defendant … This was certainly not my intention in the course of creating such an apportionment between these costs. The entries made in the various financial statements were not made to establish any form of money claim, liability or obligation*."

99. Mr Stavrinides' oral evidence was to the same effect. Furthermore, he repeatedly emphasised that whether the debt provision was treated as increasing the sum otherwise due to the Company from Elite, or as reducing the sum due to Elite, or (as he now contended to be the appropriate treatment) as creating a fixed asset in the Company's balance sheet in the sum of the amount spent, there would be no effect on the Company's value, or on the amount and availability of its distributable profits. Accordingly, his evidence was that from the Company's perspective, at the time in question, the

characterisation of the provision as a debt or asset was unimportant. For example, he said:

> "*Whether you make the adjustment under, "Debtors and prepayments," or you make the adjustment under, "Creditors," it makes no difference. It does not affect, one way or the other, the balance sheet value. Whether you are amalgamated into debtors, whether you are amalgamated into creditors, whether you put them under improvements. Any of those do not change the value of the company*."

100. Although the Company went into administration on 11 September 2013, and voluntary liquidation on 17 September 2015, the first occasion on which a demand for payment of the debt was made by or on behalf of the Company was by Mr Nygate's email to Mr Stavrinides sent on Wednesday 28 October 2015, apparently following their meeting two days earlier. In that email, Mr Nygate said, "… *we agreed that whatever is the legal position on point 1 the debt from* [Elite] *is due and payable. Please take this email as formal demand to pay the debt of £659,023 (as per your signed statement of affairs) forthwith*". The reference to "*point 1*" was to the possibility of a "*subrogated claim*" between the Company and Elite in relation to the Bank, but was not said (either at the time, or at trial) to have had any effect on the question of Elite's liability in respect of the asserted debt.

101. In response to that demand, on 6 November 2015, Mr Stavrinides wrote:

> "*The amount provided is the amount that was shown in the accounts of Health and Home Ltd at the relevant time. As you are aware Elite was not obliged to prepare any accounts, therefore this amount was not agreed by Elite. We are now in the process of preparing financial statements for Elite for all the years from 2001 onwards. This will determine the intercompany balance to be agreed by both parties and identify any areas of dispute. In the circumstances the amount claimed in disputed. We shall endeavour to clarify this situation as soon as possible*."

102. Albeit over two years after the beginning of the administration, this was the first occasion on which Mr Stavrinides (acting for Elite, presumably) had raised (certainly in any

document in evidence) any possibility of a dispute in respect of the debt's very existence. Subsequently, on 9 March 2016, Mr Stavrinides wrote again to Mr Nygate, this time on Norm's headed notepaper, and said, "*Further to previous communications and discussions I recently had a meeting with the Director of the company. Elite denies liability but recognises that there are benefits in reaching a monetary settlement*." I assume and infer that the reference to "*the Director of the company*" was intended to be a reference to his sister, Mrs Christoforou, Elite's director.

103. It was common ground that notwithstanding the intention apparently expressed in Mr Stavrinides' letter of 6 November 2015, no further or replacement "*financial statements for Elite*", whether for all years from 2001 onwards or otherwise, were at any time produced.

104. As to Elite itself, although Mrs Christoforou was formally the sole director, Mr Stavrinides agreed that albeit "*through Norm*" (for which he was "*effectively*" the only natural person who could act) he was responsible for all of Elite's business and banking in the UK.

105. Furthermore, whenever required, Mr Stavrinides was, apparently without delay or difficulty, able to obtain authority to act for Elite.

106. For example, in evidence there were Minutes of a Board Meeting of Elite apparently held on 29 December 2023, at which Mrs Christoforou was present (as the company's director) and Mr Stavrinides was in attendance. The Minutes recorded that since 27 June 2023, Elite had not been represented in the present proceedings, but that Mr Stavrinides had been in "*regular communication both with the court and the Claimants and made representations in good faith, on the basis of representing all the Defendants, including* [Elite]. *During this period the Claimants asked questions to establish if* [Mr Stavrinides] *had to* (sic) *authority to speak on the behalf of all the Defendants, which he did*". Nonetheless, it was recorded that at and as a result of a hearing on 22 December 2023, it had become apparent that Mr Stavrinides was not formally able to represent Elite in court (not as a "*question of authority, but of law as to who can appear*"), and that steps would have to be taken to enable Elite to represent itself (pending the instruction of solicitors). According to the Minutes of a further Board Meeting, apparently held on 31 December 2023, at 10.00am, it was thus resolved to appoint Mr Stavrinides as a

director. Subsequently, on the same day, at a Meeting apparently held at 3.00pm, at which Mrs Christoforou and Mr Stavrinides were both present as directors, it was recorded that Mr Stavrinides had updated the Board on urgent matters in relation to this litigation, and it was resolved, amongst other things, to instruct Mr Stavrinides and authorise him to represent Elite in the litigation. Each of those Minutes was written in English, despite Mrs Christoforou's inability to speak or understand that language.

Discussion

107. Essentially, the two aspects of the issue identified at [61] above concerned the existence and nature of the arrangements, if any, made between the Company and Elite in respect of responsibility for the cost of improvements to Properties, and in respect of payments made by the Company to Elite. Ultimately, the question was whether there was (and any sum is now due under) a "*contract of loan*".

108. As to the first aspect, in my judgment, the conclusion that Elite would bear responsibility for the cost of improvements was neither "*speculative*" nor based on a mere hope, harboured privately by Mr Stavrinides on the Company's behalf, that it (in effect, Mrs Christoforou) might at some future point be persuaded to do so. For the following reasons, however made, there must have been (and on the evidence, I find that in fact there was) a binding agreement made to that effect between the Company and Elite.

109. First, not one contemporaneous document supported, to any degree, the suggestion that the Company was (and Elite was not) responsible for the cost of improvements to the Properties, and moreover, that there was not an agreement to that effect.

110. On the contrary, all of the documents considered above (the Company's Accounts, approved, signed and filed at Companies House, the Statement of Affairs produced in the administration and signed by Mr Stavrinides and Anthony, the CVA Proposal made by Mr Stavrinides and Anthony, the BDO Reports, the Company's draft Accounts, and the Elite Debt Schedule) reflected an unqualified belief that Elite would bear the cost, and had agreed to do so. Similarly, there was nothing in the Management Accounts produced on behalf of Elite to suggest that the sum said to be due to the Company was in any degree speculative or provisional (let alone that in truth, Elite was a substantial creditor of the Company until 2012-2013). Neither in any event was the allegation of a provision in the particular sum of £610,000 documented or substantiated. Simply, there

was no record and no reference in any contemporaneous document to the allegedly provisional nature of Elite's agreement to meet the cost of improvements, or indeed, to the suggested possibility that the Company had accrued a fixed asset equal in value to the sum which it had spent on improvements.

111. In producing those documents or the information to enable them to be produced by others (for example, by BDO) Mr Stavrinides must have intended and believed them and the relevant information to be accurate. The documents were formal, and important, and were stated by Mr Stavrinides to be true (and in certain instances, by Anthony also). Certain of them were made public – for example, the Company's Accounts. They were all relied on, and were intended to be relied and acted on, by others – including HMRC, BDO, the Bank and the administrators/liquidators: it would have been dishonest and contrary to the Company's and Elite's and the Family Group's interests to produce information and documents known to be misleading in this fundamental respect. Certain of them were produced pursuant to a duty – for example, the filed Accounts and the Statement of Affairs and information produced to the liquidators/administrators. In the circumstances, it was not open to Mr Stavrinides – not with any degree of credibility – to perform such a dramatic *volte face*.

112. Moreover, the existence of a debt was relied on by the Company itself in declaring dividends. Mr Stavrinides' evidence that in respect of expenditure on improvements, the Company acquired a fixed, capital asset with a value exactly equal to the amount spent, such that its ability to declare dividends lawfully was unaffected, would have raised both issues of fact (about, for example, the nature, purpose and effect of the expenditure) and a point of proper accountancy practice, as to which there was little factual, and no expert evidence: there was therefore no basis upon which to find or assume that sums spent on improvements would have translated into a fixed asset in precisely the same aggregate amount. Indeed, that assumption would have been highly questionable. The effect (this being the alternative case referred to above at [31]) of removing reference to the debt allegedly owed by Elite from the Company's Account would therefore have been to render certain dividends unlawful, whether wholly or in part: the far more likely and straightforward conclusion is that the Company declared dividends on the basis of its signed Accounts, which included the debt from time to time owed to it by Elite, because correctly, it believed that debt to be owed.

113. Second, it was not until November 2015 that Mr Stavrinides and/or Elite said (in or reflected in any document in evidence) that Elite was not responsible for the cost of improvements. Had that possibility been in Mr Stavrinides' mind, or realistically available to Elite, it is most unlikely that it would not have been raised before then.

114. Third, there was no evidence from Mrs Christoforou to contradict the existence of Elite's agreement in respect of the cost of improvements, or to explain or contradict the documents. These proceedings began in 2021. Had Elite wished to rely on the evidence of Mrs Christoforou, it had ample opportunity and time in which to do so – and that evidence would have been of obvious centrality to its case. As a matter of ordinary common sense, the court is entitled to infer (as I do) from the absence of any evidence from Mrs Christoforou that it would not have supported the case that there was no binding arrangement between the companies as to Elite's responsibility for the cost of improvements. The statement made in the Defendants' Part 18 Response dated 30 May 2022, that Elite and Mrs Christoforou were "*unaware*", over many years, that the Company might at some future point claim or seek payment in respect of improvements was wholly unrealistic – I reject it: Elite's own Management Accounts recorded a debt, as did the BDO Reports; Mrs Christoforou relied (even on the Defendants' case) on (her brother) Mr Stavrinides' advice in the conduct of business; Mr Stavrinides recorded and acted on the existence of a debt owed by Elite – it was inherently unlikely that if Mrs Christoforou had any real or genuine role in the conduct of Elite's business she would not have known of the parties' arrangements. Furthermore, I have already explained that I treat Mr Stavrinides' own oral evidence with caution.

115. Fourth, to similar effect, as I have said, I do not consider that the Defendants have given proper or prompt documentary disclosure. The very late, incomplete production of the Elite Cashbook was a case in point. That failure causes me to treat their case in this respect with caution.

116. Essentially, Mr Stavrinides' evidence in this regard, and Elite's case, was that there was no agreement regarding the cost of improvements, because only Mrs Christoforou was entitled in this respect to act on behalf of Elite and bind it to a contractual arrangement, and that she had never done so; Mr Macpherson submitted that Mr Stavrinides could not be said to have been a *de facto* director of Elite entitled to act on its behalf because there

was no evidence of the law of the BVI, and that this circumstance precluded the conclusion that Elite was bound.

117. I reject that argument. Even on his own evidence, Mr Stavrinides himself, as a director of Norm, was the natural and only person with conduct of Elite's business in England: he caused payments to be made by the Company and by Elite, and he recorded them and their characterised effect in the Accounts, the Cashbook and elsewhere; he was the decisive moving force behind the business of the Family Group; as I have explained, at times he appeared for Elite, or purported to do so, in these proceedings. The arrangements made on Elite's behalf must have been within the scope of his authority, or that of Norm, or must have been made or approved by Mrs Christoforou: in order to undermine, outweigh or displace the otherwise overwhelming evidence in support of that conclusion would have required more than what was, in effect, a bare denial.

118. Accordingly, in this regard, I do not accept Mr Stavrinides' explanation or his evidence, or his case or that of Elite, which amounted to an impossible attempt to recast past events according to immediate needs. In my judgment, the effect of the evidence was overwhelming: there was an established agreement between Elite and the Company to the effect that Elite would bear the cost of improvements to the Properties. How precisely it was made is not material – and could only be known with any degree of certainty were Mr Stavrinides and Mrs Christoforou to produce a full account of their dealings, which they have not; the most probable explanation was that Mr Stavrinides was empowered to act for both companies. The conclusion that Elite would bear the cost of improvements makes commercial sense – it was, after all, the owner of the Properties, and the Company's rights of occupation and use under the 2001 Agreement, even if not wholly precarious, were certainly not wholly secure, being in any event expressly terminable on six months' notice.

119. As to the second aspect of the problem, which concerned the nature and source of Elite's ultimate payment obligation, the answer to the question whether or not Elite or the Company was to bear the cost of improvements did not in itself answer the question whether the sums now claimed are due under a contract of loan or otherwise.

120. Broadly, the debt might have arisen on (or on a combination of) two different bases.

120.1. First, sums were paid by the Company in respect of property improvements: if Elite was responsible for payment of those improvements, as I have found it was, then it owed the Company a sum equal to that paid by the Company in respect of improvements. The debt would then be due under a contract of indemnity or reimbursement, but not of loan.

120.2. Second, payments were made by the Company to Elite, and used by Elite itself to pay for improvements (and/or for other purposes of its own, or of the Group): if again, as I have found, Elite was responsible for the cost of improvements, then Elite's obligation to the Company arose not out of payments made by Elite for improvements, but out of the prior circumstances of its receipt of money from the Company.

121. In either case, against the debt owed by Elite could be set-off the Company's liabilities to Elite in respect of, for example, rent or fees (or, as happened, the assigned benefit of declared dividends, which I consider below).

122. The position reflected on the face of the Company's Accounts was consistent with either basis, or indeed, with a combination of both. However, the late disclosed Elite Cashbook showed decisively that at least from 1 July 2011, the arrangement proceeded on the second basis: it showed that undifferentiated *ad hoc* payments were made by the Company to Elite without reference to a particular liability, or even the existence of a liability, and were used by Elite, acting by Mr Stavrinides, for any purpose thought fit for the broader family enterprise, including (so it was said) to make improvements to the Properties. As to the nature of the arrangements before 1 July 2011, the evidence was not sufficiently clear to know or decide how the arrangement was conducted.

123. In my judgment, Mr McGhee was therefore correct to characterise those payments (post-1 July 2011) as having been made pursuant to a contract of loan, albeit of a somewhat informal character: money was paid by the Company to Elite, as and when required, or available, to be used by Elite for its own purposes, on the understanding that subject to any sums owed by the Company to Elite, the amount received by Elite was repayable as a debt due to the Company: that is how it was recorded in the documents, and no real alternative characterisation was suggested; none other was inherently probable. In particular, there was nothing in the evidence to support the notion, proposed by Mr

Stavrinides that the payments were consciously referable to a pre-existing debt owed to Elite, as at 1 July 2011, in the sum of £503,715 (said to be based on the absence of any agreement that Elite would pay for improvements) or that to the extent of any overpayment by the time of the administration, it was, as proposed by Mr Stavrinides, "*accidental*", leaving the Company with some sort of limitation barred claim in restitution; as I have explained, the Company was not in debt to Elite as at 1 July 2011.

124. Again, essentially for the reasons explained above, I would reject any suggestion that no contract was created for reasons of limitations on the scope of Mr Stavrinides' authority; the probability, and the simplest and most straightforward explanation, was that he acted for both companies – certainly he alone caused the payments to and by Elite to be made, and he recorded their effects. But in any event, given the evidence that I have referred to, and the consistent record of a debt owed by Elite in circumstances where the Cashbook proved the fact of the payments made to Elite, it was unrealistic to suggest that those payments did not create in return a simple obligation in debt.

125. In consequence, regardless of the nature or source of the debt as at 1 July 2011 (in the sum of £106,285, impliedly accepted by Mr Stavrinides - see paragraph [96] above), to the extent that the debt increased after that date (taking into account sums owed by the Company in respect, for example, of rent or fees, therefore £659,022.66 minus £106,285) it did so by virtue of sums paid and received (and repayable) under a contract of loan. It follows that at least £552,737 of the sum claimed was due under a contract of loan.

Limitation

126. Finally, as to limitation, section 6 of the Limitation Act provides:

> *(1) Subject to subsection (3) below, section 5 of this Act shall not bar the right of action on a contract of loan to which this section applies.*
>
> *(2) This section applies to any contract of loan which—*
>
> *(a) does not provide for repayment of the debt on or before a fixed or determinable date; and*

(b) does not effectively (whether or not it purports to do so) make the obligation to repay the debt conditional on a demand for repayment made by or on behalf of the creditor or on any other matter;

except where in connection with taking the loan the debtor enters into any collateral obligation to pay the amount of the debt or any part of it (as, for example, by delivering a promissory note as security for the debt) on terms which would exclude the application of this section to the contract of loan if they applied directly to repayment of the debt.

(3) Where a demand in writing for repayment of the debt under a contract of loan to which this section applies is made by or on behalf of the creditor (or, where there are joint creditors, by or on behalf of any one of them) section 5 of this Act shall thereupon apply as if the cause of action to recover the debt had accrued on the date on which the demand was made.

(4) In this section "promissory note" has the same meaning as in the Bills of Exchange Act 1882.

127. Section 6 of the 1980 Act contains special rules relating to certain loans. These rules vary the principle stated in section 5 that an action founded on a simple contract is barred six years after the cause of action accrues. Section 6 applies to contracts of loan which do not either: (a) provide for repayment of the debt on or before a fixed or determinable date or (b) make the obligation to repay conditional upon a demand for payment or upon anything else. At common law such loans would be repayable immediately, so that (in accordance with section 5) time would otherwise run from the date of the advance: Norton v Ellam (1837) 2 M. & W. 461; Re J. Brown's Estate [1893] 2 Ch. 300. Loans of a formal, commercial character will usually deal expressly with these matters, and so the provision is most commonly relevant to loans of an informal character.

128. In the present case, the loan between the Company and Elite was of exactly this nature: informal, unwritten and neither due for repayment on any particular or ascertainable date, nor made conditional upon a demand or other specific event. The agreement was of simple loan, generative of a repayment obligation in debt.

129. It follows that the limitation period did not begin until 28 October 2015, when repayment was demanded, and that the limitation period had not expired before proceedings began.

130. In conclusion therefore, the Debt Claim against Elite succeeds to the extent of £552,737.

131. It follows that there is no need to consider the alternative claims (based on the allegation that dividends were unlawfully declared because the Company's Accounts were inaccurate to the extent that they included the debt owed by Elite), and that to do so (including make further findings about the state of mind of Mr Stavrinides and Mrs Christoforou in respect of those hypothetical, alternative circumstances) would be unrealistic; I have recorded, above, my conclusion that if the Elite debt were not owed, an assumption or submission that sums paid by the Company in respect of improvements would have created a fixed asset worth exactly the aggregate of those sums would have been, at best, highly questionable, and was unsupported by sufficient or any evidence of fact or accounting practice.

The Dividend Claims: Transactions at Undervalue

132. The joint liquidators advanced claims under section 238 of the IA 1986 in respect of the payment of the 2012 Dividend (in the sum of £950,000) and the 2013 Dividend (in the sum of £250,000), in each case against Elite (primarily) and Mrs Christoforou (in the alternative).

The Relevant Provisions

133. Section 238 of the IA 1986 provides as follows:

> *(1) This section applies in the case of a company where—*
>
> *(a) the company enters administration, or*
>
> *(b) the company goes into liquidation;*
>
> *and "the office-holder" means the administrator or the liquidator, as the case may be.*

(2) Where the company has at a relevant time (defined in section 240) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section.

(3) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.

(4) For the purposes of this section and section 241, a company enters into a transaction with a person at an undervalue if—

(a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or

(b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.

(5) The court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied—

(a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and

(b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company.

134. Section 240 provides:

(1) Subject to the next subsection, the time at which a company enters into a transaction at an undervalue …. is a relevant time if the transaction is entered into …–

(a) in the case of a transaction at an undervalue … at a time in the period of 2 years ending with the onset of insolvency (which expression is defined below),

(b) …,

(c) …, and

(d) ….

(2) Where a company enters into a transaction at an undervalue … at a time mentioned in subsection (1)(a) …, that time is not a relevant time for the purposes of section 238 … unless the company–

(a) is at that time unable to pay its debts within the meaning of section 123 in Chapter VI of Part IV, or

(b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction or preference;

but the requirements of this subsection are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by a company with a person who is connected with the company.

(3) For the purposes of subsection (1), the onset of insolvency is–

(a) …

(b) …

(c) …

(d) in a case where section 238 … applies by reason of a company going into liquidation at the time when the appointment of an administrator ceases to have effect, the date on which the company entered administration (or, if relevant, the date on which the application for the administration order was made or a copy of the notice of intention to appoint was filed), and

(e) ...

135. Section 241 provides, in relevant part:

> *(1) Without prejudice to the generality of* [section 238(3)] *... an order under* [that section] *with respect to a transaction ... entered into ... by a company may (subject to the next subsection) –*
>
> *(a) ...,*
>
> *(b) ...,*
>
> *(c) ...,*
>
> *(d) require any person to pay, in respect of benefits received by him from the company, such sums to the office-holder as the court may direct,*
>
> *(e) ...*
>
> *(f) ...*
>
> *(g) provide for the extent to which any person ... on whom obligations are imposed by the order, is to be able to prove in the winding up of the company for debts or other liabilities which arose from, or were released or discharged (in whole or in part) under or by, the transaction ....*
>
> *(2) An order under section 238 ... may ... impose any obligation on, any person whether or not he is the person with whom the company in question entered into the transaction ...; but such an order–*
>
> *(a) ...,*
>
> *(b) shall not require a person who received a benefit from the transaction ... in good faith and for value to pay a sum to the office-holder, except where that person was a party to the transaction ....*
>
> *(2A) Where a person has ... received a benefit from the transaction ..., and at the time of ... receipt –*

(a) …

(b) he was connected with, or was an associate of, either the company in question or the person with whom that company entered into the transaction …,

then, unless the contrary is shown, it shall be presumed for the purposes of … paragraph (b) of subsection (2) that the … benefit was received otherwise than in good faith.

136. For present purposes, the issues in principle in respect of the claims made in connection with each relevant Dividend were:

136.1. was there a transaction at an undervalue, and if so, who was party to it (and were they connected with the Company);

136.2. if so, was it at a relevant time;

136.3. if so, under section 238(5), was the Company, when it entered into the transaction, acting in good faith and for the purpose of carrying on its business and were there reasonable grounds for believing that the transaction would benefit the Company;

136.4. what if any relief should be granted, and in that regard, were either Elite or Mrs Christoforou able to rely on section 241(2)(b), as having received a benefit from the transaction, but in good faith and for value, and not as parties to the transaction.

137. In addition, as against Mrs Christoforou, there was a limitation issue, which resolved itself into a question of construction of the Standstill Agreement.

The Transactions

138. It was common ground that in respect of each Dividend, nothing was in fact paid by the Company to Mrs Christoforou, its sole member, in whatever capacity she might have been acting. Instead, as was for example shown in the Elite Debt Schedule, as between the Company and Elite, the Company's obligation to pay each Dividend came by some means to be owed to Elite, and then in effect set-off against Elite's debt to the Company.

139. Mr Macpherson explained the process as having comprised:

139.1. a dividend declaration in favour of Mrs Christoforou, the Company's sole member, albeit in her capacity as either the trustee of the Kambos Trust or a nominee for Christopher in his capacity as the trustee of the Kambos Trust, followed by,

139.2. a distribution in the same sum made by the Kambos Trust to the Harvest Trust (of which, again, Mrs Christoforou was said to be trustee), followed by,

139.3. a loan made by the Harvest Trust to Elite (of which Mrs Christoforou was the sole *de jure* director) again in the same sum, followed by,

139.4. the creation of a credit in favour of Elite in the context of its account with the Company, to be paid to Elite or set-off in due course against any debt or other liability owed by Elite to the Company: in effect, an assignment or transfer of Mrs Christoforou's right to receive the dividend, with payment by the Company treated as fulfilment of the Harvest Trust's obligation to lend to Elite;

139.5. by means of this alleged arrangement, so it was said, the Company was relieved of any further obligation to pay the dividend to Mrs Christoforou/the Kambos Trust, although Elite came to owe a debt to the Harvest Trust.

140. On that basis, said Mr Macpherson, there were four consequences:

140.1. first, albeit admittedly at an undervalue, the relevant transaction (which he confined to the dividend declarations) was made by the Company with Mrs Christoforou as trustee/nominee for the trustee of the Kambos Trust;

140.2. second, that Elite was thus not party to a relevant transaction at an undervalue made with the Company;

140.3. third, that in any event, no order should be made against Mrs Christoforou, because her involvement in the transaction was as a trustee/nominee, and in fact, she herself personally received nothing of value;

140.4. fourth, that as a result of section 241(2)(b) of the IA 86, no order could be made against Elite because even if it had received a benefit from the transaction, it had done so in good faith and for value (its own commensurate obligation to the Harvest Trust) but not as a party to the transaction.

141. There were no documents to support Mr Macpherson's description of the relevant alleged steps. Furthermore, the description was unsupported by Mr Stavrinides' written evidence, in which he said, in his 11th witness statement:

> *28. Upon approval of the dividends, the Fourth Defendant as the trustee of Kambos Trust, assigned them to Harvest Trust with instructions to make them available to the First Defendant. Further instructions were then given to the First Defendant to make transfers on behalf of Harvest Trust to Masaccio Co Ltd, a Cyprus trust company.*
>
> *29. In the two years to June 2013, there was standing arrangements and instructions by Kambos Trust to distribute/donate the dividends to Harvest Trust, with further instructions to pay those to the First Defendant. The First Defendant was acting as a banker to send money to Masaccio Co Ltd in Cyprus and others as directed. For this reason, the First Claimant was crediting the First Defendant with the whole amount of the dividends as they were approved. This is why there is a running account between the First Claimant and the First Defendant.*

142. That description seems to have entailed that the benefit of the dividend was transferred to the Harvest Trust, and by the Harvest Trust to Masaccio Co Ltd, through Elite, but acting (as a "*banker*") for and on the instructions of the Harvest Trust (which would not be the same as the sum having been lent to Elite by the Harvest Trust, or Elite having somehow provided "value" comprising a repayment obligation). In any event it was not supported by any documents; the Cashbook for example, did not suggest that certain payments made to Elite were somehow hypothecated to unpaid dividends, and then paid to Masaccio.

143. Mr McGhee, for the liquidators, said that probably, at the time, there had been no real thought given to the precise or formal details or internal machinery of the transaction/s,

but that the (very few) documents and evidence showed simply a direct transfer of value by the Company to Elite – whether by payment/s or credits in its favour: in short, a direct transfer of the benefit of the dividends by Mrs Christoforou to Elite.

144. Ultimately, the arrangement was obscure, because, in common with other aspects of the Group's business, the Defendants chose not to explain it plainly (and in the case of Mrs Christoforou, in effect chose not to give any evidence) and/or chose not to disclose the documents that would have enabled it to be understood. The best that Mr Macpherson could do was by reference to Elite's Management Accounts, "*For Information Only*" to 30 June 2013, which referred to a liability owed to "*Shareholders current account*" – being the Harvest Trust – in the sum of £2,997,212 – a sum which was undifferentiated and unparticularised. In passing I note that the same document (relied on by Elite in this respect, and said to be accurate) recorded the debt due to the Company in the sum of £510,448 – said by Elite not to be due (as I have explained above).

145. In my judgment, given that obscurity, combined with the inconsistency of Mr Stavrinides' own explanation with the case now advanced on behalf of Elite and Mrs Christoforou and the absence of a proper and comprehensible contemporaneous documentary record, the truth was far closer to the suggestion made by Mr McGhee, of an informal arrangement made or effected by Mr Stavrinides in respect of which a certain more formal justification was - as and when it became necessary to do so - retrospectively nominated, again by Mr Stavrinides.

146. Ultimately however, that issue is immaterial, because even assuming the accuracy of the more convoluted description now advanced by Mr Macpherson on behalf of Elite and Mrs Christoforou, I do not accept either that Elite was not party to the transaction, or that the transaction properly described was not at an undervalue.

147. A "*transaction*" for the purposes of section 238 is to be understood in accordance with the (inclusive) definition at section 436 of the IA 86, which provides that "*transaction*" "*includes a gift, agreement or arrangement, and references to entering into a transaction shall be construed accordingly*". As has often been said, the word therefore has, in this context, a very broad meaning. It is not confined to contracts, but extends to gifts and other arrangements which are not based on contract, and where there is a contract, the "*transaction*" may comprise not only that contract but any linked transaction/s, even

though involving a different party: Phillips v Brewin Dolphin Bell Lawrie Ltd [2001] 1 W.L.R. 143, Re Taylor Sinclair (Capital) Ltd, Knights v Seymour Pierce Ellis Ltd [2001] 2 B.C.L.C. 176. There must however be some element of dealing, this being implicit in the word "*transaction*" itself, and underlined by the references to the "*entry into*" a transaction, "*with a person*", "*on terms that provide*": Re Taylor Sinclair (Capital) Ltd, Knights v Seymour Pierce Ellis Ltd [2001] 2 B.C.L.C. 176, *per* Robert Englehart Q.C. (sitting as a Deputy High Court Judge).

148. In the present case, the steps described by Mr Macpherson plainly comprised an "*arrangement*": they were connected and were designed to achieve a particular end, which was payment to Elite in consequence of the dividend declarations made by the Company. Indeed, that was in substance admitted by the relevant Defendants, whose case (under section 238(5)) was that the declarations were positively beneficial to the Company because, amongst other things, they enabled Elite to service debts owed to the Bank and guaranteed by the Company, for the good of the Company and the broader Family Group.

149. Accordingly, in opening, Mr Macpherson said that the position must be viewed holistically: in order to continue its business, the Company had to "*transfer money to or on behalf of Elite to pay the Barclays debt. This can be done by payment of an indeterminate rent to Elite or by dividend to Kambos, which is then passed to Elite. The means is less important than the effect*." Effectively, that submission comprised an acknowledgement that the real transaction went well beyond the boundaries of a mere declaration of a dividend – crucially, in addition, indeed as the arrangement's very purpose, it included the benefit of the dividend being given to Elite. On the Defendants' own case, each of the Company, Mrs Christoforou, the Kambos Trust, the Harvest Trust and Elite were necessarily parties to the relevant transactions.

150. Moreover, the transactions as so described were at an undervalue because, fundamentally, they involved the creation of debts owed by the Company (by means of the dividend declarations, the benefit of which were transferred to Elite) in return for no consideration. The satisfaction of that obligation (in the first instance owed to Mrs Christoforou, in whatever capacity) by the reduction or repayment of Elite's debt to the Company - if that is how it was achieved - did not comprise relevant value: the debt owed

by Elite to the Company existed beforehand, and would have been in a greater sum had it not been set-off against the debt gratuitously created by the transaction itself.

151. Overall, however viewed, the transactions had one very simple effect: they depleted the Company's assets, and its financial position deteriorated; to the extent of any set-off, the Company lost the benefit of the debt owed by Elite.

152. It follows that section 241(2)(b) is not relevant: Elite was a party to the transaction (as indeed, was Mrs Christoforou).

Relevant Time

153. In order to found the court's power under section 238, a transaction must have been entered into at a "*relevant time*" within the meaning of section 241.

154. In the present case, it was common ground that:

154.1. however described, and however many there were, the relevant transactions were all entered into within the period of 2 years which began on 11 September 2011 and ended with *"the onset of insolvency"* on 11 September 2013, when the Company went into administration (see section 241(3)(d));

154.2. Elite and Mrs Christoforou were both connected with the Company, and that therefore each transaction (again, however described) was entered into at a relevant time unless Elite and Mrs Christoforou could show (the burden being on them) that at that time, the Company was not "*unable to pay its debts within the meaning of section 123*" of the IA 1986, and moreover, that it did not become unable to do so in consequence of the transaction.

155. The timing issue therefore resolved itself into an issue concerning the Company's solvency. As to that however, there was a prior issue, as to when precisely, within the potentially relevant two year period, the relevant transaction in respect of the 2013 Dividend was entered into.

The Date of the Transactions

156. Although he accepted that there was no documentary evidence to support that evidence, Mr Stavrinides said that dividends were declared by reference to, and on the basis of, the quarterly management accounts which were produced for the purposes of the relationship with the Bank, providing it with relevant information concerning its lending. Accordingly, the relevant Defendants' case was that the 2013 Dividend was declared in or about January 2013, and the 2012 Dividend, during the course of the year to 30 June 2012, albeit in various unspecified amounts on various unspecified dates (the first of which would have been in or about October 2011).

157. There were no documents which recorded specifically the decisions to declare the dividends themselves, or which evidenced the occasions on which they were declared, or the process undertaken, or the documents relied on: in particular, there were no minutes of meetings, or copies or records of resolutions. In his oral evidence, Mr Stavrinides accepted that the decisions to declare dividends were taken by him alone on behalf of the Company, and that he was the "*only party implicated with the voting*".

158. Anthony's evidence, consistent with that, was that although he had been one of the Company's only two directors, he had not even known that the Company declared dividends (at all, in any sum/s) until the present proceedings had been commenced against him: "*To be honest, I thought that only PLCs ... paid dividends. So I'm ashamed to say, but yeah, surprised when the claim came through and I saw that there was the issue of dividends. It's not something that I had any awareness of*." He continued: "*I didn't know dividends were paid never mind who they're paid to*." None of that was contradicted by Mr Stavrinides, and it was not explained by what formal means, if any, dividends were declared. In common with other aspects of the Group's business, the "declaration" of dividends appeared to have been undertaken informally, and by Mr Stavrinides alone.

159. Accordingly, as to the dates on which the Dividends were declared, and separately, the dates of the relevant transactions for the purposes of section 238 (which were not necessarily the same) the only documentary evidence was the Company's 2012 Accounts, the Company's draft Accounts to 30 June 2013, the Elite Debt Schedule, and the Cashbook. As to those documents:

159.1. the 2012 Accounts, to 30 June 2012, were dated 13 November 2012, and referred to a (singular) "*Dividend*" in the sum of £950,000, but contained nothing about the date of its declaration;

159.2. the draft 2013 Accounts were first sent to Mr Nygate on 21 October 2013, and referred to a (singular) "*Dividend*" in the sum of £250,000, but contained nothing about the date of its declaration;

159.3. the Elite Debt Schedule - on which Mr McGhee placed much reliance in respect of the date of the 2013 Dividend – stated, alongside and by reference to the date "*30.06.13*", as set out above at [67], receipts into Elite's bank account from the Company during the "*(whole year)*" of £1,456,000, and in addition, credits in favour of Elite in respect of (i) management fees of £88,000, (ii) a dividend in the sum of £250,000 and (iii) repairs in the sum of £30,000; in addition, it recorded a debit (pursuant to the May 2013 Agreement) of £5,000 in respect of fixtures and fittings by reference to the date, 18 May 2013;

159.4. Mr McGhee's submission was that the inclusion of the date alongside the reference to the 2013 Dividend was meaningful, and that it signified that the dividend had been declared on 30 June 2013; Mr Stavrinides' evidence was that this was not so, that it would have been wrong to declare a dividend at that point in time (after the May 2013 Agreement) and that the date was shown as part of a "*mathematical presentation*" or summary of the relevant whole year's events; Mr Macpherson submitted that the date could not bear the weight suggested by the Claimants, because neither the Company's liability for management fees nor in respect of repairs was incurred on 30 June 2013;

159.5. the Cashbook recorded payments to Elite by the Company, but none either described as having been made as a "*dividend*" or part of a dividend, and none in the amount of any dividend declared by the Company.

160. In closing, I asked Mr Stavrinides about the absence of any other documents concerning the dividend declarations. He answered that he had prepared "*working papers*" for each quarter, and said, initially, that they had not been disclosed, although they were in his possession, because "*I never thought the relevance of anything*" and he had "*never been*

asked", which cannot have been correct; he then seemed to some extent to qualify or retreat from that comment, and suggested that they might have been collected by BDO, or perhaps, "*accidentally … archived*". As to that, the documents - if they exist - were plainly relevant and ought to have been disclosed; I do not accept that Mr Stavrinides would not have understood that obligation.

161. Accordingly, the evidence regarding the circumstances and dates of declaration of the Dividends was meagre and unsatisfactory; it was probable that other relevant documents have not been disclosed by the Defendants or some of them, or at any rate, that they exist or existed but were not in evidence.

162. In respect of the 2013 Dividend, I do not accept that the dates stated in the Elite Debt Schedule were insignificant: the correct date was used in respect of the sum due to the Company under the May 2013 Agreement; again accurately, in respect of the Company's aggregate payments to Elite, the words "*whole year*" were added to indicate that the sum was not wholly received on 30 June 2013; and similarly, the Company's liability in respect of rent was stated as having been incurred in respect of the period "*1.07.12 to 18.05.13*". The 2001 Agreement provided for payment of a licence fee, but made no provision as to the date of its payment, and the sum in respect of "*repairs*" appears to have been Mr Stavrinides' estimate of the amount which had been spent by Elite, but which it ought to be indemnified by the Company, but again, not by reference to any certain date.

163. It is therefore my conclusion that in respect of "*management fees*", "*dividend*" and "*repairs*", the Elite Debt Schedule indicates that it was as at, and with effect from, 30 June 2013, that Elite was given the benefit of those credits, in those sums (even if, in respect of management fees and repairs, there was some variety of contingent or unliquidated debt or obligation before then). In particular therefore, the relevant transaction under section 238, by which Elite took the benefit of that Dividend, was entered into on 30 June 2013.

164. Finally, that this represents the best description of events in respect of the 2013 Dividend is supported by my conclusion that Mr Stavrinides appears to have sought to operate these businesses with the least possible documented formality, in order to (hope to) maintain, so far as possible, a state of ambiguous uncertainty which could, if necessary

(even if not possible) be subsequently resolved to his and their best advantage, taking account of later events – that, for example, was consistent with the nature of the approach he proposed in relation to Elite's allegedly "*provisional*" responsibility for the cost of improvements.

165. I do not attach great weight to Mr Stavrinides' evidence that all relevant events must have taken place in January 2013, because by June 2013, it would have been too late: that evidence was premised on the supposition that Mr Stavrinides has acted in respect of these matters with complete propriety and in accordance with all his duties, which I do not accept. Moreover, as I have said, I am not persuaded that Mr Stavrinides or the other relevant Defendants have given proper disclosure in this case – and in respect of dividend declarations, his explanations again suggested the real possibility that he had withheld material documents. Moreover, no documents at all were disclosed in respect of the means by which Elite came to receive the benefit of the Dividends declared in favour Mrs Christoforou. In circumstances where transaction dates were plainly in issue, it is reasonable to conclude that any such documents would not have supported the Defendants' case.

166. In respect of the 2012 Dividend, the Accounts stated a single undated event; in any event, whether or not there was more than one declaration, and whether or not the declaration/s were made on dates other than the date or dates of the relevant transactions for the purposes of section 238, it was common ground that none were before 11 September 2011. In those circumstances, but taking into account my findings and reasons in respect of the 2013 Dividend, on the available evidence it was more probable than not that: (i) there was a single declaration, but made at a time which it is simply not possible to identify more precisely than that it was made after 11 September 2011; (ii) the transaction by which Elite took the benefit of the Dividend was entered into with effect from the end of the financial year to 30 June 2012, or at about that time.

167. In conclusion, in my judgment the relevant transaction in respect of the 2012 Dividend was entered into on or about 30 June 2012, and in respect of the 2013 Dividend, on about 30 June 2013.

168. The second aspect of the relevant time issue concerns the Company's solvency as at those dates.

Solvency

169. In this regard, as I have said, the burden rested on Elite and Mrs Christoforou, to show that at the time of each transaction the Company was not unable to pay its debts, and did not become so as a result of the transaction. It was accepted that if, as I have found, the 2013 Dividend transaction was entered into on or about 30 June 2013, the Company was at that time insolvent, and the transaction was at a relevant time.

170. However, as at 30 June 2012, it was asserted that the Company was solvent, and that the relevant transaction was therefore not entered into a relevant time.

The Legal Test

171. Section 123 of the IA 1986 provides (to the extent relevant):

> (*1) A company is deemed unable to pay its debts –*
>
> ....
>
> > *(e) if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due.*
>
> *(2) A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into accounts its contingent and prospective liabilities.*

172. The test at section 123(1)(e) is sometimes referred to as "*commercial insolvency*" or the "*cash-flow test*", and the test at section 123(2) as the "*balance-sheet*" test. The leading case on the test for insolvency is BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc [2013] 1 WLR 1408, which followed the decision of Briggs J (as he was) in Re Cheyne Finance Plc [2007] EWHC 2402.

173. More recently, the Court of Appeal applied the tests enunciated in Eurosail in Bucci v Carman; Re Casa Estates Ltd [2014] EWCA Civ 383, where Lewison LJ explained:

> *27. In my judgment the following points emerge from the decision of the Supreme Court in Eurosail (and in particular the judgment of Lord Walker):*

i) The tests of insolvency in section 123 (1) (e) and 123 (2) were not intended to make a significant change in the law as it existed before the Insolvency Act 1986 : para [37].

ii) The cash-flow test looks to the future as well as to the present: para [25]. The future in question is the reasonably near future; and what is the reasonably near future will depend on all the circumstances, especially the nature of the company's business: para [37]. The test is flexible and fact-sensitive: para [34].

iii) The cash-flow test and the balance sheet test stand side by side: para [35]. The balance sheet test, especially when applied to contingent and prospective liabilities is not a mechanical test: para [30]. The express reference to assets and liabilities is a practical recognition that once the court has to move beyond the reasonably near future any attempt to apply a cash-flow test will become completely speculative and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test: para [37].

iv) But it is very far from an exact test: para [37]. Whether the balance sheet test is satisfied depends on the available evidence as to the circumstances of the particular case: para [38]. It requires the court to make a judgment whether it has been established that, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to meet those liabilities. If so, it will be deemed insolvent even though it is currently able to pay its debts as they fall due: para [42].

28. In the course of his judgment in Eurosail Lord Walker approved what he described as the "perceptive judgment" of Briggs J in Re Cheyne Finance plc (No 2) [2007] EWHC 2402 (Ch); [2007] 2 All ER 987. Two of the points that Briggs J made bear on our case:

i) Cash-flow solvency or insolvency is not to be ascertained by a blinkered focus on debts due at the relevant date. Such an approach will in some cases fail to see that a momentary inability to pay is only the result of temporary

illiquidity. In other cases it will fail to see that an endemic shortage of working capital means that a company is on any commercial view insolvent, even though it may continue to pay its debts for the next few days, weeks, or even months: para [51].

ii) Even if a company is not cash-flow insolvent, the alternative balance-sheet test will afford a petitioner for winding up a convenient alternative means of proof of a deemed insolvency: para [57].

Discussion

29. It is in my judgment clear from Eurosail and its approval of Cheyne Finance that the balance sheet test in section 123 (2) is not excluded merely because a company is for the time being in fact paying its debts as they fall due. In the case of Eurosail that is clear from Lord Walker's approval at [42] of what Toulson LJ had said in the Court of Appeal, and his description of the two tests as standing side by side. In the case of Cheyne Finance it is clear from Briggs J's description of the balance sheet test as an alternative test. Thus I agree with Warren J at [34] that the two tests feature as part of a single exercise, namely to determine whether a company is unable to pay its debts. In addition, even when applying the cash-flow test it is not enough merely to ask (as HH Judge Purle QC did) whether the company is for the time being paying its debts as they fall due. As Briggs J said in Cheyne Finance a realistic examination may reveal that a company is on any commercial view insolvent, even though it may continue to pay its debts for the time being.

The Position as July 2012

174. In respect of the Company's solvency as at the date of the transaction in respect of the 2012 Dividend, the Defendants relied on the following documents:

174.1. the Company's Accounts to 30 June 2012, which recorded in the Balance Sheet, net assets in the sum of £58,652 – although I pause to note that they showed net current assets of -£36,260 (in other words, a deficiency) and of course, that on Defendants' own case, if at that point the Company had been in debt to Elite in

the sum of £225,606 (rather than owed a debt by it) its net current deficiency would have been very much greater; and,

174.2. the July 2013 BDO Report, which stated:

174.2.1. in respect of the financial year to 30 June 2012, that the Company had generated a profit before tax of £1,172,000, and that despite reduced and reducing revenue during the year which began on 1 July 2012, the Company's management accounts showed that it had nonetheless continued to generate profits which (had it traded between 18 May 2013 and 30 June 2013) would have been expected or estimated to be in the sum of £772,000;

174.2.2. and that the care-home business was expected to continue to generate cash sufficient to enable Elite to service its loans from the Bank, and that although further lending was not recommended ("*given our concerns over Management, the lack of quality accounting records and concerns over the transfer of the care home business*") further lending "*may*" be justified if required to prevent a disorderly insolvency which would put the Bank's security at risk.

175. As I have described, the sums claimed against the Company by HMRC in respect of the years to 30 June 2011 (in the sum of £365,279.85, due on 1 April 2012) and 30 June 2012 (in the sum of £293,914.78, due as at 1 April 2013, albeit not calculated until later, because of the Company's failure to file a Return until 27 March 2013) were both undisputed and unpaid (and remain so).

176. In his oral evidence, Mr Stavrinides accepted that the Company had not in fact paid HMRC in respect of 2011 and 2012. However, he denied that there had been a "*failure*" to do so: "*there is a difference between one and the other*". Instead, he maintained that it could have paid the debt in respect of 2011 (which fell due on 1 April 2012), "*at all times*", at least until it received HMRC's letter of demand dated 19 March 2013, at which point he realised that "*a different story arises. … Now, when that demand came along, I knew that we're not dealing with £360,000 a year; we are dealing 360 plus what was to become due relating to the 2012 accounts which was becoming due on the 1 April 2013.*

Now, if that second part was not part of the equation, the company could easily pay the £360,000 with not too much difficulty." His evidence therefore, was that the Company could pay the debt in respect of the year to 30 June 2011, as long as it could ignore its obligation to pay its tax bill in respect of the year to 30 June 2012. That was, effectively, an admission of insolvency.

177. Mr Stavrinides said that it was only then, when demand was made in respect of the year to 30 June 2012 - for the "*first time*" - that he "*realised that there was a risk of the company being insolvent as going concern*", and that before the Company belatedly submitted its Return in respect of 2012, "*I didn't quite - I had an idea but I couldn't quite know what the amount would be payable*".

178. I reject this evidence; it was wholly unlikely: Mr Stavrinides plainly knew that the 2012 debt was unpaid, and must have known that another very substantial debt would soon (on 1 April 2013) fall due, albeit that he had either deliberately or carelessly failed to ascertain (or allow HMRC to ascertain) its exact amount; in effect, he must have known well before March 2013 of the Company's insolvency.

179. Furthermore, in closing, Mr Stavrinides said that the Company "*at all times maintained very rich cash balances*" and that it never defaulted in respect of any debt, "*except one debt which ... habitually you can say - was late, which is the corporation tax*". He sought to explain that somewhat unpromising admission, as follows:

> *The biggest ... the problem there primarily arise because H&H was late in submitting corporation tax returns. Really, that was my personal responsibility. We do not employ an accountant. We produce our own accounts. We file our own returns to HMRC. We don't have anybody to assist, and that responsibility is really down to me. I agree that I've always been late. I was late in submitting the 2011 return for something like 9 months, and when I submitted it, it was around possibly Christmas time of 2012.*
>
> *I knew what the liability was for the 2011 accounts which, theoretically, that was due in April 2012. I can't dispute that I knew that around Christmas 2012. It didn't bother me. At any time, the company could pay it with no problem at all. Maybe a little bit of credit control for a week or two and we could pay that*

completely in full. So I have no doubt whether the company was insolvent on a going concern basis.

HMRC asked for the money on 19 March 2013, and that maybe made me think, "What's happening with corporation tax? We owe this money, give and take we can squeeze a little bit here and there and we can pay it, but what about the following year, which was due on 1 April, two weeks after?" So my first step was to establish what that amount was.

So, I've rendered the returns to HMRC on 27 March 2013 and a couple of days later, HMRC approved that and sent the statement of account. So, at that point, I had two years' corporation tax to consider. I could have done a number of things: use up all the cashflow for H&H, seek some help from the rest of the group, or, if necessary, to get some help from friends and family. Before I considered any of those, the obvious thing was to speak to HMRC and see whether it was possible to agree payments by instalments, because it was not really a question of discharging just the liability for the previous year. It was settling that year as well as the following year which became due 22 on 1 April. So, I wanted to address both issues.

180. To address those "*issues*", Mr Stavrinides explained:

180.1. first, that he began to negotiate with HMRC, whom he had expected to "*do what it normally does, negotiate something reasonable*", although in this case, they refused to do so;

180.2. second, that the debts could have been paid by raising cash from "*the rest of the* [Family Group], *family and friends*", but more importantly, from "*internal money*", by which he meant sums owed by certain of the Company's customers where it was necessary to raise an invoice, but where he had not done so: "*you can call me lazy or overcommitted with other jobs, or lousy - I never really send invoices regularly*". His argument was that had he done so, he could have raised, in comparatively short order, £300,000 - £400,000, and paid the whole debt "*immediately*". However, he did not do so, he said, because he "*wrongly relied on … HMRC to be reasonable, and things were moving fast.*"

181. In my judgment - the burden being on them - the (relevant) Defendants failed to show that the Company was not at the time of the 2012 transaction unable to pay its debts within the meaning of section 123 of the IA 86 and/or - importantly - that it did not become unable to do so in consequence of the transaction:

181.1. as at 30 June 2012, the Company owed HMRC a substantial sum, £365,279.85, which it had not paid, and which had been due since April 2012 (in respect of the Company's profits to 30 June 2011); that sum remained unpaid as at the date of administration, and it has never been paid; a failure to pay a very substantial debt is in itself evidence of insolvency; as at 30 June 2012, for example, a winding-up petition could properly have been presented by HMRC;

181.2. that failure to pay required a convincing explanation – for example, that the inability or failure was "*momentary*" or "*temporary*" (to use the language of Briggs J in Cheyne Finance) - but which was not supplied; Mr Stavrinides' explanation – that the Company could have paid, but chose not to – was anything but;

181.3. the Company's Accounts to 30 June 2012, showed cash at bank in the sum of only £108.893, and (on the footing of a debt owed by Elite, albeit at trial denied by Elite and Mr Stavrinides) net current assets of -£36,260, a deficiency;

181.4. to enable the Defendants to satisfy their burden, the court would wish to have seen evidence of the state of the Company's financial position and, to the extent relevant, informal resources as at the date of the transaction; the evidence however was insubstantial: Mr Stavrinides simply asserted that there were cash reserves, or that the wider Family Group, or even friends and family members, could have given support (which in the event, they did not); or that debts could at any moment have been collected and the proceeds used to meet liabilities (which again, they were not); but none of that was properly substantiated by documents or accounting records; if and to the extent that the Company might have relied upon payment by Elite of its debt to the Company, there was no evidence of Elite's ability to pay (or that of any other member of the Family Group);

181.5. in any event, a hope that HMRC would agree some variety of payment plan, or that the Bank would extend further lending, or the wider Family Group would come to the rescue, does not support a finding of solvency; on the contrary, a need to turn to others for support – support which they were not obliged to give, and in the event, never gave – was itself strongly suggestive of insolvency;

181.6. moreover, Mr Stavrinides must have known of the prospective 2012 tax year liability, that it would inevitably fall due on 1 April 2013, and that it had not been paid or provided for; by March 2013, about 9 months after the end of the year to 30 June 2012, Mr Stavrinides accepted that the Company had, or was soon to accrue debts to HMRC which it could not pay (although as I have said, he affected in evidence that I have rejected to express some surprise about that); as at June 2012, it would have been possible to estimate with some accuracy, the tax debt prospectively due in respect of the year to 2012;

181.7. as I have said, Mr Stavrinides' evidence was, in substance, that the Company could pay the debt in respect of the year to 30 June 2011, as long as it could ignore its obligation to pay its tax bill in respect of the year to 30 June 2012; that was, effectively, an admission of insolvency;

181.8. had it not given away £950,000 in the year to 30 June 2012, the Company would have been able to pay its debt to HMRC.

182. In the circumstances, I am not satisfied that the Defendants have proved that Company was cash-flow solvent as at the date of the 2012 transaction – and in any event, am not satisfied that they have proved that it did not become cash-flow insolvent as a result of that transaction, which depleted its liquid assets by almost £1 million, notwithstanding (in addition to its unpaid present debt) the existence of its prospective liability to HMRC (albeit in respect of past events).

183. It follows that both the 2012 transaction and the 2013 transaction were entered into a relevant time.

The Surrounding Circumstances and Purposes of the Transactions: the Section 238(5) Defence

184. Under section 238(5), the court "*shall not*" make an order if the Company, when it entered into the transaction, was acting in good faith and for the purpose of carrying on its business, and there were reasonable grounds for believing that the transaction would benefit the company.

185. Again, it was common ground that it was for the Defendants to prove this defence.

186. Essentially, the case advanced by Elite and Mrs Christoforou, was that in order for the Company's business to continue, it had to transfer sums (including, in effect by way of the dividend declarations) to Elite – it was in part on that basis that I held Elite to have been party to the relevant transaction. It was said that the payments enabled Elite to pay the Bank, and that had it defaulted, receivers would have been appointed, and the Company's business terminated. Moreover, the payments were said to have allowed for the Group to flourish and grow, meaning that the Company would be more able to rely on their support in times of need.

187. I do not accept that this defence has been proven, for the following reasons.

188. The Cashbook showed that sums paid by the Company to Elite were used for a whole variety of purposes, including payment to the Bank, but also for non-specific improvements to various unidentified properties, various sundry costs, and also payments to Masaccio - an entity of which there had been no explanation before the sudden appearance of the Cashbook in the course of the trial, and which has no formal connection with the Company. Asked by Mr McGhee about the use to which Masaccio put the sums paid to it (£207,500 in the course of 2012, and £195,000 in the course of 2013) and in particular, whether any member of the family received payments from it, Mr Stavrinides replied, "*The answer is they may have done, but I cannot confirm*"; given the centrality of his role in the conduct of the family businesses, I consider that answer to have been deliberately guarded.

189. In the course of the year to 30 June 2013, Elite received from the Company, a sum equal to £1.456 million, attributed to five different sources of obligation. As was explained in closing by Mr McGhee, even without payment of the dividends, there appears to have been enough to pay the Bank, which could have been paid from sums received otherwise. It could not be shown that payment to the Bank was the purpose, at any rate, the sole

purpose of the dividend declarations. Nor could it be shown that Elite had to pay all the other sums that in fact it paid (and thus that the dividends were enabling of its ability to pay the Bank) – it could not be shown, because the Defendants produced no evidence to explain properly the other payments made by Elite, and their purpose (and whether they were to any degree "necessary" from the perspective of the Company). In any event, Elite could have borrowed from the Company, if necessary, as I have found that to some extent it did: the transactions were not a method of releasing cash to Elite, but a method of reducing what was otherwise Elite's accruing indebtedness.

190. In my judgment, in general terms making payments for the benefit of the wider informal Family Group, of which the Company was a "member", was not enough to comprise acting for the "*purpose of carrying on*" the Company's business (or indeed a ground for believing that the payments would benefit the Company): the Group's business was *not* the Company's business, and its other members were under no obligation to support the Company (which ultimately, they did not); if and to the extent made for those purposes, they were made for the purposes of the Stavrinides family, or other Group "members" – but not for the purposes of the Company, which as I have explained, was unable as a result to pay HMRC, a failure which in substance caused it to collapse into insolvent administration, which otherwise it could have avoided.

191. Finally, there was no evidence from Mrs Christoforou, who on Elite's case, and that of Mr Stavrinides, was Elite's sole director and necessary decision maker, as well as the trustee of the Kambos Trust and the Harvest Trust (and there was no evidence from her son Christopher, if and to the extent that he was at some time a trustee). There was therefore no, or at most a weak evidential basis upon which to assume that Elite and the Trusts would have been willing to support the Company, and/or what were the limits or terms of that willingness (or ability).

192. Ultimately, the Claimants' case was that the failure to treat the Company as distinct from the other Group "members" and to recognise its discrete obligations, was at the heart of what had gone wrong. The Defendants were unable to escape the consequences of their conduct under section 238 by means of reliance, in effect, on that very failure.

193. It was for the Defendants to prove this defence. To do so, they had to show, on the balance of probabilities, that the dividend transactions were entered into by the Company: (i) in

good faith, (ii) for the purpose of carrying on the Company's business, and (iii) that there were reasonable grounds for believing that the Company would benefit from the transactions (at a time when it had not paid HMRC, and was insolvent). Essentially, they failed to do so because they failed to show that the transactions were for the purposes and benefit of the Company (which went into administration) rather than those of the other Group "members" and/or the Stavrinides family.

194. It follows therefore that the joint liquidators' claim under section 238 succeeds. It is therefore necessary to consider the appropriate relief, if any.

The Appropriate Relief

195. The court's powers under section 238 are essentially "*restitutionary in nature, not compensatory*": Johnson v Arden [2018] EWHC 1624 (Ch), *per* Deputy ICC Judge Kyriakides, at [92].

196. Furthermore, notwithstanding the use of the word "*shall*" in section 238(3), the court retains a discretion whether or not to grant relief, conferred by the words, "*such order as it thinks fit*": Re Paramount Airways Ltd [1993] Ch 223, at 239-240 *per* Sir Donald Nicholls V-C, and Singla v Brown [2007] EWHC 405 (Ch) *per* Thomas Ivory QC sitting as a deputy High Court Judge, at [51]-[59] (considering the court's similar powers under section 339 in respect of personal bankruptcy). At [59], Mr Ivory QC said:

> "*Of course in the vast majority of cases where the conditions for the application of the section are satisfied, the court will make an order. Nevertheless, the court retains an overall discretion which is wide enough to enable it to make no order where, exceptionally, justice so requires, and in my judgement that is not limited to extraterritorial considerations*."

197. In the event, in Singla, the court made no order, because the transaction at an undervalue (a transfer of a 49% beneficial interest in a house) had been executed to give effect to an established intention that the bankrupt should have only a nominal interest in the property: the purpose of the transaction was to reverse what would otherwise have been an unmerited windfall (see [61]-[63]).

198. Similarly, in Re MDA Investment Management Ltd [2003] EWHC 227 (Ch), Park J declined to grant relief under section 238 in respect of a proven transaction at an undervalue comprising a sale of the insolvent company's business for a consideration less than its value because he concluded that had it not been for the transaction the company would "*not have been better off*". At [121]-[124] he said:

> *121. I therefore consider that another condition for liability under s.238 - that the transfer at an undervalue took place at a relevant time within the meaning of s.240 - was satisfied. I have reached that conclusion by reference to the first of the two meanings of 'unable to pay its debts' in s.123 - the cash flow insolvency meaning. The liquidator's case is that I can and should reach the same conclusion by reference also to the second of the two meanings - the balance sheet insolvency meaning. I will pass over the arguments on that issue just for the moment, because I wish to explain now why, notwithstanding what I have said in the last few paragraphs, I do not think that the liquidator's claim under s.238 can be upheld.*
>
> *122. The reason is this. Where the conditions for s.238 to apply exist, the consequence is described in subsection (4): the court is to make such order as it thinks fit 'for restoring the position to what it would have been if the company had not entered into the transaction'. That requires me to assume that IM Ltd had not entered into the sale transaction at all, and to ask: what would the position have been in that eventuality? Usually where a company has transferred an asset at an undervalue it would have been better off not to have done it. But in the particular circumstances of this case, I consider that (paradoxical though it may seem) IM Ltd would not have been better off if it had not entered into the quadripartite transaction between itself, MDA Partnership, Farlake and IPS. The reason is that the company was on the verge of collapse and, if it had not entered into the agreement, it would in my view have been in an even worse state. Farlake valued the business at £2.41m, but IM Ltd was in no condition to keep on running the business itself, and there was no other purchaser willing to step in. There had been some contacts with another potential purchaser called Frazer Smith, but for reasons which I do not know it was not in a position to proceed.*

> *123. If IM Ltd had not entered into the transaction with Farlake (the hypothesis which s.238(3) requires) I believe that it would have had to close down its business, so it would not have been able to receive anything for it. It is of course true that IM Ltd would have been better off if it had entered into a transaction of sale to Farlake but without the feature whereby the consideration was split between itself and MDA partnership. However, the section permits me only to restore the position to what it would have been if IM Ltd had not entered into the transaction at all: it does not permit me to reconstruct the position to what it would have been if IM Ltd, as well as not entering into the actual transaction, had entered into a different transaction instead. On the facts of the case, although I consider that IM Ltd did not get full value for what it parted with under the actual transaction, it would have been in an even worse condition if it had not entered into the transaction at all.*
>
> *124. I should add that the reason which I have just explained for concluding that the liquidator's claim cannot succeed under s.238 was not the subject of argument in the hearing. It comes from my own deliberations after the hearing was concluded. Since I agree with the liquidator's claim in so far as it is based on breach of duty by Mr Doney, my view that the claim does not succeed additionally under s.238 does not affect the ultimate result of the case. If it had I would have asked the parties whether they wished to make further submissions about it. As matters actually are, however, I believe that the convenient and proper course is for me simply to state my view on the point, as I have done in the immediately foregoing paragraphs*.

199. Thus, subject to the existence of its discretion, and to the broad remedial powers referred to in section 241, which enable the court to fashion an appropriate and just remedy, the court is empowered under section 238 to restore the company to the position in which it would have been had it not entered into the particular transaction in issue; the court is not permitted to reconstruct the outcome to reflect what would have been had the company entered into a quite different transaction, and the order ought not to place the company in a better position than it would otherwise have been.

200. In the present case, the liquidators sought relief primarily against Elite, as the ultimate beneficiary of the value transferred by the Company, and against Mrs Christoforou in the

alternative, as the Company's member and immediate beneficiary of the declared Dividends; they sought an order for (re)payment in the whole aggregate sum of the Dividends.

201. Mr Macpherson proposed three grounds on the basis of which, in the exercise of its discretion (and on this hypothesis, notwithstanding that the requirements of section 238 had otherwise been established) the court ought not to grant any relief at all. Essentially:

201.1. First, it was said that the Company's (attempted) exit from administration had been unreasonably prevented by the administrators, and that in those "exceptional circumstances" the court should exercise its discretion against making an order under section 238.

201.2. As to that, the Company's only known creditor was HMRC; by about 15 May 2013, as I have said, £100,000 of the sum which they were owed had been paid, using the Company's own cash. In September 2014, Elite offered to make full payment of the HMRC debt. In early 2015, after receiving basic redress from the Bank for IRHP misselling, Elite offered to discharge all claims in the administration. The administrators' progress report dated 30 January 2015 noted that the Bank had indicated that it may be prepared to accept that proposal. Mr Macpherson suggested that there was no obligation on Elite or the Family Group to make that offer, and no benefit to them, but that Elite sought to make payment as a matter of "honour".

201.3. However, the offer was refused by the administrators, who required the sum to be increased by 30% to allow for the possibility of any new claims. That request, and thus their refusal, was said to have been unreasonable because 18 months had passed since the beginning of the administration without any other significant creditors making a claim, and the administrators knew from the July 2013 BDO Report that it was highly unlikely that the Company had any other significant creditors.

201.4. Second, in opening, Mr Macpherson said that the liquidators could not specify how much of the 2012 Dividend or 2013 Dividend was paid to Elite, and that neither could Elite or Mrs Christoforou; he suggested that the liquidators' delay

in bringing the claim had resulted in, or contributed to, a loss of relevant records and recollection, and that it would be unfair to Elite for the court to make an order against it where, in those circumstances, the "quantum" of its benefit could not be identified. That submission did not survive the belated production of the Elite Cashbook, which showed that Elite had been the recipient of the whole benefit of the Dividends, and that any uncertainty was the product of Elite's failure to give disclosure, rather than the liquidators' failure to proceed more quickly.

201.5. Third, it was said that before she became its trustee, Mrs Christoforou's role as bare nominee shareholder on behalf of Christopher, the Kambos trustee, was purely administrative; in that capacity she had no meaningful authority over the "receipt" of the dividend or in directing to whom payment would be made by the Trust; it would be unfair to make an order against her where she neither benefitted from nor had control over the dividends that the liquidators seek to recover. Whatever its merits, this submission was irrelevant, because I intend to make an order against Elite.

202. As to the first submission, even if it were established in fact, I do not accept that the allegedly unreasonable conduct of the administrators in respect of the Company's possible exit from administration would have been capable of justifying a refusal to grant relief in this case. Cases in which the elements of the claim having otherwise been established, relief has nonetheless been refused, are exceptional, and have tended to turn on the circumstances surrounding or connected with the transaction itself, and/or the perceived injustice of making an order reversing its effect.

203. However, in the present case, the complaint was about the administrators' conduct, quite apart from the circumstances of the transactions themselves, or the consequences of reversing them. If an administrator acts improperly in some fashion - as here apparently alleged - the IA 86 provides powers by which to control or direct his conduct, or grant relief; those powers were not invoked in the present case. There is no reason at all, and it would be unprincipled, to deprive creditors of the benefit of relief under section 238, in circumstances where the elements of the claim have otherwise been established, and where the respondents' complaint, if proven, concerned the wholly collateral, unrelated conduct of the administrators.

204. Moreover, I do not in any event accept that the administrators' conduct was "unreasonable", or that it prevented the Company from exiting administration: first, the additional sum required was to have been returned if not required, and second, it appeared that the Family Group did not have the means to pay the Company's debts, even without the additional sum. In an email sent by Mr Stavrinides on 21 April 2015, he said that aside from the uplift, the shortfall was about £400,000, but that it was not possible to raise that sum: "*I am now looking at the funding this from borrowing (primarily on asset owned by Decolace). I am having meetings with a couple of Banks this week/early next week and I should know what the chances are in securing such funding. I will keep you informed at all times. If this proves to not possible I will need to come and see you with a view of changing course to say a CVA with part of the payment on a deferred basis*."

Conclusion as to Relief

205. Section 238 requires the court to make such order "*as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction*". The liquidators do not have to show "beneficial receipt" of the Dividends, or even that it was the "Dividend" as such that was received by Elite; that is not the nature of the claim under section 238. I have described the relevant transactions. Had they not been entered into, Elite would not have been given the benefit of debts or sums in the amount of each Dividend, and the Company's assets would not have been diminished in those amounts.

206. Therefore, the appropriate order, restoring the position as best I can, is to order Elite to pay the Company the aggregate amount of the Dividends. An alternative, but to the same end, would be to deprive Elite of the benefit of the debts which were transferred to it, and against which it set-off its own liability to the Company, as I have explained above.

Limitation: Reliance on the Standstill Agreement against Mrs Christoforou

207. It was accepted by the Claimants that the claim under section 238 against Mrs Christoforou was limitation barred but for the application of the Standstill Agreement. Mrs Christoforou denied that she was party to that Agreement, and that the claim against her was governed by its terms. Given that I have accepted the claim under section 238 against Elite, this issue no longer arises, but in brief terms, had it done so, I would have held her bound by the terms of the Standstill Agreement.

208. The Agreement was made between the Company, the liquidators, Mr Stavrinides, Essex, Elite and "*Kambos Trust*", and was signed by Mrs Christoforou as "*Authorised signatory*" "*for and on* [its] *behalf*". It applied to claims defined at Clause 1.1 as "*all and any claims which the Claimants may have against the Respondents arising out of alleged facts set out below as to which no admissions are made.*" The "*alleged facts*" were then set out at Clause 1.2 in relation to the Debt Claim and at Clause 1.3, in relation to the "*wrongful payment of dividends*", including the 2012 and the 2013 Dividends. Clause 1.3(E) stated that "*without limiting the nature and basis of the Claims against the Respondents potential claims include: (1) against the Fourth Respondent* [a reference to Kambos Trust] *as* [the Company's] *shareholder*".

209. There were two issues: first, whether the claim under section 238 in respect of the transaction explained above, was a claim in relation to the "*wrongful payment of dividends*", and second, if so, whether it might be made against Mrs Christoforou by reference to the Standstill Agreement.

210. As to the first issue, in my judgment, the claim fell within the scope of the Agreement: in respect of each transaction, central to the undervalue was the payment of a dividend; each was "*wrongful*" because it was the central element of a transaction in respect of which the court has seen fit to grant relief under the IA 86.

211. As to the second:

    211.1. despite pleading that the Kambos Trust has separate legal personality (which was denied by the Claimants) the Defendants advanced no evidence to that effect; the court is therefore driven to assume that as in English law, a trust has no such separate existence; it follows that Mrs Christoforou must have been party to the Agreement (which was governed by English law) because "the Trust" was not; each party warranted that "*it* [had] *the full right, power and authority to execute, delver and perform*" the Agreement, which covered the whole period of the specified claims;

    211.2. manifestly, it was the objective intention of the parties to include claims against the Company's "*shareholder*": Mrs Christoforou was the Company's sole shareholder and member (in whatever capacity she might have been acting);

211.3. whether a trustee's liability is restricted in some way under a contract (to which necessarily, in English law, they are party) depends on the construction of the contract; liability might be limited to a specified amount, or to the extent of available trust property - Lewin on Trusts, (20th Edition) at 19-011-19.012; in the present case, Mrs Christoforou went further, and proposed that she was not bound (or "liable") at all;

211.4. in my judgment, in the absence of evidence that the Trust has separate personality, the Agreement inescapably encompassed claims against Mrs Christoforou as the Company's shareholder in relation to the wrongful payment of dividends in 2012 and 2103, including the claims under section 238 which in the event succeeded, regardless of whether she was, at that time, the trustee of the Kambos Trust, or a mere nominee for Christopher; that was the plain import of the Agreement and of her execution of it. Moreover, there was nothing in its language (and in any event, it was not submitted on her behalf) that her liability was limited by reference to her rights of indemnity against the Trust.

212. In the event, for the reasons explained, the issue was not ultimately material.

The Misfeasance Claim in respect of the 2013 Dividend

213. Under section 212 of the IA 1986, the joint liquidators claimed that Mr Stavrinides acted in breach of his duties as a director of the Company by causing it to declare and pay the 2013 Divided, in the sum of £250,000. For the benefit of the Company, they claimed compensation in that sum.

214. Section 212 provides for a remedy against a person who is or has been an officer of a company, and has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company.

215. Mr Stavrinides was a director of the Company, and was responsible (in fact, on his own admission, solely responsible) for the declaration of the 2013 Dividend. As a director, he owed duties, including under section 172 of the Companies Act 2006 to act in good faith to promote the success of the Company, and in certain circumstances of insolvency or imminent insolvency, to consider or act in creditors' interests, give them appropriate

weight, and balance them against shareholders' interests where they might conflict: BTI 2014 LLC v Sequana SA [2022] UKSC 25.

216. The liquidators' case was that the 2013 Dividend was declared on or about 30 June 2013, after HMRC had presented a winding up petition, at a time when the Company was, as Mr Stavrinides knew insolvent. Mr Stavrinides denied the claim, first, on the basis that the 2013 Dividend was declared in about January 2013, and in any event before March 2013, and was therefore limitation barred, and second, as I understood it, on the basis that there was no breach of duty, because the dividend was considered to be in the best interests of the Company, for the reasons explained above at [184]-[194].

217. As to limitation, it was common ground that by virtue of the Standstill Agreement, by which Mr Stavrinides was undoubtedly bound, the claim would not be barred if it arose after about 20-23 March 2013 (the precise date and calculation of time was immaterial).

218. In my judgment, as explained above, the 2013 Dividend was not declared until about the end of June 2013, at a time substantially after 20-23 March 2013; there was therefore no limitation defence. Furthermore, at that time – again, on his own evidence – Mr Stavrinides knew that the Company was insolvent.

219. The 2013 Dividend was therefore declared in breach of duty - all that it achieved, at a time of acute financial difficulty, was to reduce the debt owed by Elite; it provided Elite with nothing which it did not otherwise have; it in no sense enabled Elite to service bank debts; but in any event, for the reasons explained above at [184]-[194], I reject the submission that the declaration was for the benefit of the Company and its creditors. It follows that Mr Stavrinides should compensate the Company in the sum of the dividend.

The May 2013 TUV Claim

220. The joint liquidators' case was that the May 2013 Agreement had the effect of transferring the Company's business to Essex, and that this was a transaction at an undervalue because:

220.1. it failed to take account of the value of the goodwill belonging to the Company, and valued by Mr Haddow in the sum of £5,269,854; and,

220.2. it applied a discount of 100% for contingent liabilities which never crystallised.

221. The claim was made under section 238 of the IA 86 against Elite and Essex as the counterparties to the transaction, defined by its terms as the "*Purchasers*". It was common ground that the May 2013 Agreement comprised a transaction made between the Company and connected persons, and that it was entered into at "*a relevant time*", when the Company was insolvent. The only real issue was whether the transaction was at an undervalue.

The Claim in respect of Goodwill

222. Mr McGhee relied on Mr Haddow's description of goodwill as "*... the extent to which the value of the business exceeds its net assets*" - a premium paid by a buyer to recognise the acquisition not merely of a collection of assets, each capable of being independently valued, but also a trading business which is profitable, and which can be expected to generate profits in the future.

223. The liquidators' case was that before the transaction, the Company held all the relevant contracts with local authorities and employed the staff; it was the CQC-registered entity, and it operated the business; it generated profit for its own account, and paid dividends. By the May 2013 Agreement, it was said to have transferred its whole business to Essex, which paid no premium to represent the value that it received by way of going concern, but which then continued the business on the same terms.

224. Elite's business was said to have been distinct from that of the Company; it was said to have conducted the business of a landlord, and to the extent that as such its business generated goodwill, it was limited and referable to that property-owning business, rather than to the business of the care-homes. Accordingly, on that case, the 2001 Agreement provided for the Company to enjoy certain rights of occupancy.

225. The claim was denied. It was said that the Company did not transfer its business to Essex and/or Elite (and in any event not by the May 2013 Agreement) and that the transaction was for full value. In particular, it was said that by virtue of the 2001 Agreement, the goodwill relating to the care-homes had throughout remained with, and been owned by Elite, albeit licenced to the Company, and later Essex. Mr Macpherson characterised the 2001 Agreement as "*an OpCo/PropCo*" agreement made between two companies in the context of an informal family group enterprise. The purpose of such agreements in general - and of this Agreement in particular - was to protect the operating business and

the Properties from problems, as far as possible, should the business encounter financial difficulties: a common and sensible protection against unknown potential misfortunes. In that event, the OpCo might be wound-up but the PropCo nonetheless free to appoint another, successor OpCo to run the business in its place. These features were said to be particularly material in connection with care-home businesses, which can only continue if licensed. That licence can be lost if the care-home manager runs into financial difficulty. The OpCo/PropCo arrangement allows the PropCo to continue the care-home business by appointing a new manager, which will have or can obtain a new licence, as did Essex in the present case. Accordingly, it was said, in such cases, the parties do not intend the OpCo to build, accumulate and own valuable goodwill; the value of the business, including its goodwill, is intended to remain with the PropCo. Thus it was agreed by the Defendants that the May 2013 Agreement did not explicitly or otherwise transfer any goodwill to Essex, because the Company had no goodwill to transfer.

226. In that regard, in respect of the Agreement's construction, the Claimants' Reply pleaded that "*the recital stating that* [Elite] *shall "retain ownership" of goodwill was a reference only to such goodwill as had been acquired by* [Elite] *from the previous owner of Ravensmere Rest Home not being granted to* [the Company]".

227. Furthermore, in any event, it was said by the Defendants that the May 2013 Agreement was made in the context of the earlier termination by Elite (with immediate effect, on the morning of Saturday 18 May 2013) of the tenancy under which the Company had previously occupied the Properties, such that it had no physical premises from which to operate. It was said that subsequently, albeit during the course of the same day, following negotiations with Essex and Elite, the May 2013 Agreement and the Collateral Agreement were made. The purpose of the latter was to appoint Essex as manager of the care-homes *pro tem*, pending the registration of Essex as a registered provider under the Health & Social Care Act 2008. For that purpose, the Company assigned the benefit of all contracts in respect of the business to Essex, and in return, Essex agreed to pay the Company £100 *per* day, which it duly paid when demanded by the liquidators on 16 September 2013. This arrangement ended when Essex became the registered provider on 24 July 2013, and entered into a new agreement with Elite, on the same terms as the 2001 Agreement. Accordingly, the Defendants argued that there was no transfer of goodwill by the Company to Essex, and certainly not by virtue of the May 2013 Agreement.

The Nature of Goodwill

228. Goodwill is an item of property, a variety of pure (rather than documentary) intangible personalty. As was said by Lord Macnaghten in IRC v Muller and Co's Margarine [1901] AC 217 at 223-224, "*It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom* …". In the same case, at [1901] AC 217, 235, Lord Lindley described it as, "*whatever adds value to a business by reason of situation, name, and reputation, connection, introduction to old customers, and agreed absence from competition*".

229. In respect of goodwill, as an item of property, a person (or more than one person) may hold property rights. Amongst other things, such rights are ordinarily, by their nature, capable of being asserted against the world at large; they are transferable; importantly, they entitle their holder to exclude others: apart from cases in which a property right is shared, the attribution of a property right to one person is inconsistent with the attribution of the same right to another.

230. In Re Sofra Bakery Limited [2013] EWHC 1499, an application was made by a company's liquidators for relief under section 238 of the IA 86 in relation to a payment of £438,608 made by a company to its owner/director following the sale of the company's business, including goodwill, to which the contract of sale had attributed a value of £476,000. The respondent's case was that the goodwill had belonged to him, so that the payment which he received was in respect of his own property. On appeal, his case succeeded. In essence, the deputy judge, Mr Andrew Sutcliffe QC (as he then was) held that "*there was as a matter of law an implied licence granted by* [the respondent] *to the Company to make use of the goodwill which* [the respondent] *had built up over the previous 9 years in his sole trader business*" before the company's incorporation; that therefore although the company had been permitted to make use of that goodwill, it had never been sold or otherwise transferred to the company; on the contrary, it had continued to belong to the respondent, and he was entitled to the proceeds of its sale, or to a sum in that amount, which was more than he had received. In reaching that conclusion, the judge relied on the respondent's oral evidence of what had been agreed when the company was incorporated; there was no written agreement.

231. Similarly, in Re CSB 123 Limited, Reynolds v Stanbury [2021] EWHC 2506, ICC Judge Barber rejected an application made by a company's liquidator under section 212 of the IA 86, also in relation to a sale of the company's business and assets for no consideration. For present purposes, in broad summary, an important part of the successful respondent's case was that all relevant value in the transferred business resided in her own personal goodwill, an asset which belonged to her, to be used as she wished. On the evidence, the judge found that the respondent's goodwill (as in Sofra Bakery, generated as a sole trader before the company's incorporation) had never been assigned to the company, whether expressly, impliedly or informally, although (at [376]) she accepted that the company had used that goodwill to make substantial profit, a fact "*(at the very least) equally consistent, as a matter of law, with an implied or informal licence (as was found in the case of Sofra)*".

232. Both cases depended on what the court found, as a matter of fact, to have been agreed (or not agreed) between a company and its owner/s in respect of the ownership and use of the goodwill of the business being operated by the company. In neither case was there a formal written agreement by which the parties had together attempted to set out expressly the terms of their arrangement. By contrast, in the present case, the parties made and proceeded on the basis of the 2001 Agreement, the construction and effect of which was therefore central to this aspect.

The Construction and Effect of the 2001 Agreement

233. The issue was whether, by virtue of the 2001 Agreement, ownership of the goodwill attached to the business of the care-homes was owned by Elite or by the Company, or whether Elite owned only the goodwill attached to its business as a landlord plus (possibly) the goodwill which it had acquired from the previous owner of the Ravensmere Rest Home (and presumably, from any subsequent acquisitions).

234. In my judgment, for the following reasons, the construction and effect of the 2001 Agreement was as suggested by Mr Macpherson: goodwill belonged to Elite, but was licenced in favour of operating companies, first the Company itself, and subsequently Essex, which were allowed to use that goodwill to make profits, but only for as long as the licence subsisted. The position was as it was found to be in Sofra Bakery and

Reynolds v Stanbury, albeit far more plainly so, because the terms were expressly agreed between the parties in the written 2001 Agreement.

235. The material terms of the Agreement were as follows.

236. It recited that Elite had purchased a certain business, including its "*Goodwill*", and that it intended "*to allow a third party to operate the business of providing services of residential care*", but that it would "*retain ownership of Fixture and Fittings and goodwill*" (emphasis added). The context therefore was that Elite had bought a business (including associated goodwill) and that by this agreement, it intended to allow another person to operate the business, whilst nonetheless retaining ownership of certain assets including goodwill. Accordingly, although that goodwill might increase in value over time, there was nothing at all to suggest that any or some part of it was to be transferred or (if such a thing is possible) that "newly generated" goodwill might come to be held as separate property, by the operator.

237. It was agreed, expressly, that the Company was appointed "*to operate the business of residential care*", and that it would, in return, pay "*rent/licence fee to* [Elite] *for the use of* [Elite's] *assets (Freehold, Goodwill and Fixtures and Fittings*". Again, that central provision was consistent only with Elite's retention and ownership of goodwill, and in return, the payment to it by the Company of a licence fee – a fee paid in return for permitting the use of assets including goodwill (which belonged to Elite) in order to enable the Company to operate the business.

238. I reject Mr McGhee's submission that this would be to misunderstand the nature of goodwill, because a person cannot "*use*" the goodwill of another person in this way (it being simply the economic premium inextricably associated with the contracts and assets that indubitably belonged to the Company, and which Elite could not compel transfer to itself): that submission was inconsistent with Sofra Bakery and Reynolds v Stanbury, but in any event, wrong in principle, inconsistent with the nature of goodwill as a variety of personal property, capable therefore of being owned, transferred, charged - and licenced.

239. Further, the Agreement provided for the Company to give Elite access to its books and records in order to ensure that Elite's interests were not prejudiced, and that "*in particular the goodwill of the business is not negatively affected*". Again, the purpose of this

provision was to enable Elite to protect the value of its own property – including the goodwill "*of the business*", which was plainly a reference to the business of the care-home reflected in the Company's books and records (rather than the business of a landlord).

240. It provided for payment of a "*rent/licence fee*", in an indeterminate sum, to be fixed (by agreement, or simply "*set by*" Elite unilaterally) within certain "*parameters*", including as a "*Return on the value of Fixtures and fittings and Goodwill*", "*Minimum 10% Maximum 20%*". Again, the payment of a rental or licence fee assumed that ownership remained with Elite – the payment was in return for the use by one company of property belonging to another.

241. Under the heading "*Tenancy*", it provided that Elite was entitled on six months' notice (indeed, it "*retained*" the right) to sell the business, including "*freehold, goodwill and fixtures and fittings*" – without payment or compensation in any sum to the Company. Furthermore, under the heading "*Assignment*" it provided that the Company had "*no right of assignment*" of the contract without Elite's consent, which could be refused "*without giving any reason*", and in any event, that "*any value or value* (sic) *worth associated with an assignment shall be the ownership of*" Elite. These provisions were only consistent with Elite's retained and continuing ownership of the goodwill of the care-home business – the reference to goodwill cannot have been to the goodwill associated with its business as a landlord (or some originally extant "part" of the goodwill). The Company was not entitled to assign the benefit of the contract; if it did so, any value realised would belong to Elite, being the product of Elite's own property; Elite could at any time terminate the contract on six months' notice, and sell the business for its own exclusive benefit, without any compensation or payment to the Company. The Company was not the owner of a saleable asset.

242. Finally, it provided that the Agreement "*shall terminate*" if (as it did) the Company "*becomes insolvent or unable to pay its debts which prejudices the continuity of the business*". The operation of that provision was not (expressly at any rate) made dependent on the giving of notice. In combination with the other provisions referred to, the effect was that on the insolvency of the Company, the agreement was terminated (was certainly immediately terminable) and having been terminated, that Elite was free to sell the business and retain the proceeds, none of which would be for the benefit or account of

the Company. The relief sought by the liquidators would have had an effect directly contradicted by this provision.

243. Mr Macpherson suggested that the Defendants' construction corresponded to the understanding of the Bank, which in 2006, had obtained security over Elite's assets including its goodwill; this must, he said, have been intended to refer to the goodwill which existed in 2006 and in relation to the business, rather than either the residual goodwill from 2001 (which would by then have been of limited and diminishing value) or the goodwill of its business as a landlord.

244. In my judgment therefore:

    244.1. the contract was of an unexceptional variety; its genuineness was not challenged; it was commercially comprehensible and rational; it was designed to achieve legitimate ends; in return for a fee, it allowed the Company (or licenced it) to occupy premises and manage/operate the business using assets and property, including goodwill, of which Elite explicitly retained ownership;

    244.2. the references in the Agreement were to the goodwill of the care-home business; the business of the Company was the business of an operator, not owner;

    244.3. where the same Agreement was applied where Properties were subsequently acquired, and to the extent that from those premises a newly formed business was operated (rather than acquired and continued or improved) the Agreement had the same effect, of contractually allocating ownership of goodwill to Elite.

245. In that context, by the terms of the May 2013 Agreement:

    245.1. the effect, as I have described it, of the 2001 Agreement was accurately recited, and in particular, that the ownership of goodwill had been "*retained*" by Elite, which had "*allowed*" the Company to carry on the business;

    245.2. the cancellation by Elite of all tenancies with immediate effect was recited;

    245.3. the failure to refer to goodwill, or to attribute any value to it was therefore justified; there was no undervalue in this respect. Even if it had been transferred,

any value attributed to it would have belonged to Elite: the May 2018 Agreement could therefore never have benefitted the Company to the value of the goodwill, because that value would have been held to the account of Elite; there is no reason why, under section 238, the liquidators would have been entitled to be placed in a vastly superior position.

The Events of 18 May 2013

246. Although unnecessary given my construction of the 2001 Agreement, the second aspect of the defence to this claim concerned the events of 18 May 2013.

247. On that day, according to Mr Stavrinides' oral evidence, there was at least one telephone conversation between Mr Stavrinides and Mrs Christoforou, conducted in Greek. Anthony was said to have been present with Mr Stavrinides in England, and his evidence was that following the conversation, which he said he recalled, he was told by his father that the business of the care-homes was safe, and would be operated by Essex.

248. Mr Stavrinides' account was different. He said that he had discussed in detail with Anthony various options (including the possibility of Elite operating the business, or a third party) and that there had been a three-stage process, by which first, at the 10.15am meeting, the 2001 Agreement was terminated by Elite; second, Norm took possession of the Properties and Elite's assets and was "instructed" to find some means of continuing the business; and subsequently, following detailed discussions, the May 2013 Agreement was entered into, together with the Collateral Agreement, following the second Elite Board meeting at 3.30pm. Mr Stavrinides said that Anthony's evidence was of the "*overall*" position.

249. In my judgment, the suggestion that there was a three-stage process, or a series of events unfolding during the course of 18 May 2013 as suggested by Mr Stavrinides, was inherently highly unlikely - essentially inconceivable - as well as being contrary to Anthony's evidence (which was, more broadly, consistent with the agreed but limited extent of his involvement in management). It was highly unlikely because for no good reason it would have seriously jeopardised the business, which for a time would have been without premises from which to operate, in a state of imminent collapse, indeed emergency (given the nature of its business). I found Anthony's evidence unconvincing in any event: a single conversation in Greek which in his oral evidence at trial he said he

recalled but could not understand was in my judgment an uneasy compromise between his desire to tell the truth as a witness, and his reluctance to undermine his father's case.

250. It was far more likely that the agreements and events of 18 May 2013, were made and unfolded in conjunction with one another, as part of a composite whole, designed to ensure that the business of the care-homes would continue without interruption, and that they were conceived, documented and conducted by Mr Stavrinides. It follows that I do not accept that the Minutes of the two meetings said to have been held on that day were proved by Elite (there having been a notice to prove them): they were disclosed only belatedly; Mrs Christoforou gave no evidence about them, or about the events of the day (or her alleged involvement in them); their content was inherently unlikely, and the three-stage conceit was not consistent (on any view) with Anthony's evidence.

251. As I understood it, the point of the Defendants' allegation that events had unfolded over the course of Saturday 18 May 2013, rather in arranged conjunction with one another, was to support the submission that any goodwill vested in the Company had "*evaporated*" before the May 2013 Agreement was made in the afternoon, and so could not have been transferred by it. Having said that, Mr Macpherson argued that this would have been so in any event, whether the process was "*one-stage*" or "*three-stage*", because the May 2013 Agreement was preceded by the termination of the 2001 Agreement by Elite.

252. As Mr Macpherson described it, the Company's tenancy had been cancelled and it had to leave the Properties with immediate effect, and as acknowledged by Mr Haddow, if "*there was no premises to trade from then the value of the business would likely be nil*"; Elite's intention was to appoint Essex as the new manager and tenant; in the meantime, the Company had to appoint Essex as manager pending statutory registration; in that role, Essex would take over the Company's contracts, client lists, and so on, and there was no need for the Company to transfer any goodwill to Essex by the May 2013 Agreement. Thus, he said, the May 2013 Agreement did what it said it did, but no more: it transferred book debts, fixtures and fittings, and liabilities for employees, but not goodwill.

253. Mr McGhee submitted that the 2001 Agreement was about occupancy, and he accepted that it was terminated; the Collateral Agreement transferred nothing, but allowed Essex to "*borrow*" the Company's certificate and registered status temporarily; and the May

2013 Agreement transferred the business, including, necessarily, goodwill, which was associated with the transferred assets.

254. As I have concluded above, the May 2013 Agreement did not transfer goodwill, because the Company did not own it; it therefore achieved what it was expressed to achieve, but no more; in that respect, I agree with Mr Macpherson. Had I concluded otherwise, that goodwill was owned by the Company, and was transferred with and attached to the assets transferred, I would not have accepted the submission that it had "*evaporated*" immediately on termination of the 2001 Agreement, and for that reason, been rendered valueless: if it had owned goodwill, and if that goodwill had been attached to the assets – if, in other words, the liquidators' description of its rights was accurate - then until the business in fact came to an end it would have been able to transfer goodwill to a company which had the required premises, as, in the event, did Essex.

The Claim in respect of Contingent Liabilities

255. The second aspect of the liquidators' claim in relation to the May 2013 Agreement was that the agreed purchase price discount (of £174,471.66) given to Essex in respect of various liabilities to staff to which the Company was contingently subject (including in respect of accrued holiday pay, in lieu of notice and redundancy) and which Essex agreed to assume, comprised an undervalue, because the price discount was in a sum greater than the value of the transferred contingent liabilities (which were not themselves discounted to any degree), and never eventuated. The effect of applying a discount at 100%, meant that Elite and Essex avoided paying £174,472 which otherwise ought to have been paid pursuant to the transaction contained in the May 2013 Agreement.

256. In his written evidence (in response to a question from the Defendants) Mr Haddow said:

> *2.92 … A contingent liability would not typically give rise to a reduction in the amount paid for an asset (it would be dealt with as an adjustment via the sale agreement). It would not be recognised in circumstances where the risk of that contingent liability would be extinguished by the business continuing to operate.*
>
> *…*
>
> *2.94 In my experience a contingent liability, if one existed, would be dealt with as an adjustment via the sale agreement, for example, deferred consideration / a claw back mechanism to protect the buyer and seller in a transaction.*

2.95 ... if the business and staff were expected to and did transfer then there would be no liability for the Company (or the acquirer).

257. Mr Haddow's evidence was that there was therefore a "*gain*" to the extent that Essex did not, in the event, have to meet the relevant liabilities, and that in his "*experience, I would expect a deferred consideration or clawback element to exist whereby the seller,* [the Company], *would receive payment for the rest of the assets transferred*"; and that " ... *arms' length transaction would have dealt with it as a deferred consideration and not as a full crystallising loss for the Company*".

258. The Defendants' case, stated in their Part 18 Response, was that the discount was appropriate, and not at an undervalue, because it protected the Company from potential claims by former employees. Mr Macpherson submitted that:

258.1. the liquidators were improperly using hindsight to assess the potential value of the Company's contingent liabilities; it was not clear what would happen in May 2013; there was a real risk that Essex would have to make its staff redundant if the Bank appointed receivers; this is, in fact, what it later did, albeit not until 18 March 2016 (by a letter of that date, which gave six months' notice);

258.2. the Liquidators had therefore failed to provide any evidence of the value of their claim – they had provided no evidence of the true value of the contingent liabilities; merely because the parties could have dealt with a potential redundancy liability in another way does not mean that it was a transaction at an undervalue for the parties to deal with it as they did;

258.3. finally, the agreement of Essex and Elite to assume these liabilities at full value was matched by their agreement to buy the Company's book debts at par; the absence of any discount in respect of either sum, supported the conclusion that the agreement was entered into at full value; if a discount should have been applied to the potential liabilities, it should also have been applied to potential assets.

259. In my judgment, the Defendants' argument that there was no evidence of the contingent liabilities' value (by reference to an assessment of the nature and scale of the risks at the time) ignored the distinction between two issues: first, whether or not there was an

undervalue at all, and second, if so, what is the appropriate relief. There is nothing in the express provisions of section 238 that requires the court to ascribe a precise figure either to the outgoing value or to the incoming value; the provision will apply whenever the court is satisfied that, whatever the precise values may be, the incoming value is on any view "*significantly less*" than the outgoing value. Although not cited, this was the view of the Court of Appeal in Thoars (Deceased), Re, Ramlort Ltd v Reid [2004] EWCA Civ 800, and it reflects the language of the statute.

260. On the evidence, there was a significant undervalue:

260.1. the structure of the May 2013 Agreement in this respect fixed the Company, immediately and in any event, with the full liability for the whole amount of the sum;

260.2. this was despite both Anthony and Mr Stavrinides' plain evidence that as at 18 May 2013 (without therefore any need for retrospection) they did not consider there to be a risk of staff redundancies – in effect, that the risk had been met, or met to a substantial degree, by the transfer of employees to Essex; even if, objectively assessed, a risk of redundancies existed, it was not a certainty; there was no justification for the full extent of the agreed reduction, whether assessed subjectively or objectively.

261. Although true, it was not relevant to this allegation that Essex and Elite agreed to buy the Company's book debts at par; the submission that if a discount should have been applied to the potential liabilities, it should also have been applied to potential assets, was a *non sequitur*; the value of debts owed to the Company was not related to the value of contingent liabilities in respect of employees, and in any event, even if the Company *had* been overpaid for assigned debts (which was not alleged) that fact would not support the conclusion that it was fully paid for the price reduction given by reference to the assumption of contingent liabilities to employees.

262. Finally, although I am not necessarily persuaded that in this case the court was precluded from taking account of events since May 2013 in order to value the liabilities that were contingent at that time (by reference to the decision in Phillips v Brewin Dolphin Bell Lawrie Ltd [2001] UKHL 2; [2001] 1 W.L.R. 143, and on general valuation principles

that later events might illuminate or reveal the truth of earlier events), the parties made no detailed submissions on that point, which therefore I shall neither decide nor rely on.

Appropriate Relief

263. I have set out above the relevant principles regarding relief under section 238.

264. Had it not been for the transfer of liabilities at full value (by specific reference to which the purchase consideration was calculated) the price payable would have been greater, but the Company would have remained subject to the prospect of the liabilities crystallising; in other words, had it not been for the transaction, the Company would have retained the value of the transferred assets - book debts plus fixture and fittings, together worth £305,861.72 - but would have remained subject to the contingent liabilities; similarly, had it not been for the transaction, Essex and Elite would not have been the beneficiaries of the undervalue to that extent. In the event, in return for those assets, the Company received an underpayment.

265. In my judgment, the fairest and simplest means of reflecting the extent to which the transaction by virtue of the undervalue increased the assets of Elite and Essex as purchasers under the Agreement, and to the same degree depleted those of the Company, would be to order payment by Essex and Elite of a sum equal to £174,471.66 (being the full reduction in the ultimate purchase price) minus the extent to which any such contingent liabilities in fact eventuated. Mr Macpherson's submission that there was no evidence that either Elite or Essex could have paid that sum was irrelevant to liability and relief (if not to the prospects of recovery): it was the amount of their gain under the transaction in fact entered into, and of the Company's loss.

Misfeasance in respect of the May 2013 Agreement

266. In respect of any undervalue in the transaction comprised in the May 2013 Agreement, the liquidators sought relief against Mr Stavrinides, in his capacity as a director of the Company, under section 212 of the IA 86, the provisions and effect of which I have explained above.

267. In the circumstances as I have found them to be, that claim must inevitably succeed in respect of the undervalue in respect of the Company's contingent liabilities to employees:

Mr Stavrinides, at a time when the Company was insolvent, caused it to make the Agreement, and thus caused it to suffer loss, in a sum equal to the amount to be calculated in accordance with the principles at [265] above.

The Counterclaim

268. Essex counterclaimed. Essentially, it alleged that the Company and/or the joint liquidators had received sums to which Essex was entitled under the May 2013 Agreement, and which belonged to Essex beneficially. It sought an account, and ultimately, it sought payment.

269. I described the terms of the May 2013 Agreement above at paragraph [15]. For present purposes, in relevant part, it provided:

    269.1. that the book debts at that time owed to the Company in the sum of £300,861.72 were to be sold "*at par*" to Essex; as I have explained, it was that sum plus the sum (£5,000) in respect of fixtures and fittings, minus the sum in respect of contingent liabilities (£174,471.66) that produced the consideration actually payable;

    269.2. that the Company undertook to inform and instruct "*Trade Debtors*" to make payments directly to Essex, and that it would provide to Essex any information and records required to facilitate the collection of money from "*Debtors*";

    269.3. for the transfer of title to assets (sold under the Agreement) by the Company to Essex;

    269.4. and finally in this regard, that: "*Any money paid into the account of* [the Company] *shall be collected as an agent for* [Essex] *and* [Elite] *and shall be paid over immediately.* [Elite] *and* [Essex] *have the right to deduct such money from the consideration price*." I should note that in the Agreement itself, although agreed to be an obvious error, the second sentence referred to Elite and the Company, not Essex.

270. Mr Macpherson submitted that the effect of these provisions was that any such book debts that were paid to the Company, rather than Essex, were held by the Company on trust for Essex. He said, in particular:

270.1. that sums received by the Company were to be held as agent, and that whether in addition, a trust was created, was an issue of construction of the contract (see Bowstead & Reynolds On Agency, 23rd Edition, at 6-041); in that regard, there was agreement;

270.2. that any receipt would be in respect of debts to which beneficial title had been assigned to Essex in equity, and only bare legal title retained by the Company;

270.3. that the explicit right given to Essex, to set-off any such sums against its liability to pay the purchase price would have been unnecessary had the receipt by the Company been intended merely to create a debt in favour of Essex (because such right would have existed in any event);

270.4. that in the context of the Company's insolvency and (presumed) imminent liquidation (or other formal insolvency regime) the parties must have intended a trust (rather than personal debt) arrangement since otherwise Essex would have been exposed to the serious and obvious risk of having paid in full for debts in respect of which it would in that case receive, at most, a dividend (in part payment).

271. I accept those submissions, to which I would add, as an additional supporting consideration, that to allow the Company a personal right to use these receipts would be inappropriate in a situation in which it would not necessarily have been expected to handle money for Essex at all.

272. In any event, in this regard, by the end of the trial, there was no dispute between the parties: Mr McGhee accepted that any such sums would be held on trust, and would be paid in full to Essex. In the first instance, he accepted that (as was sought, and I shall direct) an account would be necessary to identify the relevant sums.

273. There then arose, potentially, a series of further issues:

273.1. first, in respect of sums (if any) received by the Company, not in payment of book debts assigned under the May 2013 Agreement, but in return for any work done by Essex after 18 May 2013, which generated new debts, but which were then paid to the Company;

273.2. second, whether Essex has a personal claim against the liquidators as constructive trustees, or in "*conversion*", and if so, whether it was compromised under a settlement agreement made on 3 August 2020.

274. As to the first of those, concerning post-Agreement work, it was accepted by Mr McGhee that the aggregate sum generated and received would be payable by the Company to Essex, and provable as a debt in the liquidation. However, for the following reasons, I will make no order in respect of any such sums, other than inevitably, to the extent of the account, that they will or ought to be identified.

275. First, the counterclaim was advanced on the basis of the May 2013 Agreement. As I have explained, in respect of the claim concerning goodwill, and the transfer of business, Mr Macpherson stressed that the Agreement should be given and limited to its explicit effect and no more. In this respect, I agree: the Agreement said nothing about post-Agreement work, and nothing about any debts that might arise subsequently. It was plain from the language that the assigned debts were those that already existed: they were sold "at par" for a specific sum; there was an obligation to tell "*Trade Debtors*" to pay Essex and Elite, and an undertaking to provide information and records to enable collection from "*Debtors*" – all of those provisions referred, in my judgment, to extant debts, as therefore did numbered paragraph 1, which provided for the Company to collect sums as agent for Essex and Elite (now accepted also to have been as trustee) and for the specific linkage of those sums to the purchase price by means of an agreed set-off. The Agreement was, in this respect, limited to the sale of book debts for £300,861.72, and if to any extent that sum was received by Essex, for it to be held on trust, but it said nothing about future business, if any. To the extent that any such sums were generated and paid, the issue whether or not they were held on trust was not governed by the May 2013 Agreement.

276. Second, in the event, I understood Mr Macpherson's submissions in closing to have been concerned only with extant book debts. Furthermore, as I have described it, his argument on construction was directed at those debts – for example, as having been assigned in

equity, and as being held on trust to reflect the fact that otherwise Essex would have been exposed to the risk of having paid in full for debts in respect of which it would receive no more than part payment.

277. In circumstances where it was ultimately accepted that there should be an account and payment in full to Essex in respect of assigned debts, the second set of further issues, concerning the potential personal liability of the liquidators, were of little if any consequence.

278. Nonetheless, as to the points raised, first, the allegation of "conversion" was not pressed (and on the contrary, in respect of the settlement agreement considered below, Mr Macpherson emphasised that the claim against the liquidators was not "*for breach of tortious, contractual or statutory duty*"). That may have been because, in law, apart from a pragmatic extension to documentary intangibles, conversion has historically been, and remains, confined to tangible property; it requires proof of possession or of the right to immediate possession at the time of the impugned act: OBG Ltd and others v Allan and others [2007] UKHL 21. It would not obviously apply to debts owed to Essex, but paid to the Company.

279. As the settlement agreement, on 21 August 2019, Elite, Decolace and Travelforce brought a claim against BDO. The essence of the claim was that BDO had conspired with the Bank to enable the Bank to foreclose on properties owned by the claimants, including the Properties from which the Company had operated. BDO successfully applied for the claim made against it to be struck out, which it was, by a judgment dated 20 July 2020.

280. On 3 August 2020, by correspondence between their respective English solicitors with conduct of proceedings, BDO offered to settle the costs of the proceedings "*on the condition*" that Elite, Decolace, Travelforce and Mr Stavrinides (for the purposes of the offer, "*the Claimants*") agreed (amongst other things):

> "*that this agreement is reached in full and final settlement of all and any direct or indirect claims, rights, demands and set-offs, whether existing or future, whether in this jurisdiction or any other, whether or not presently known to the Claimants or to the law, and whether in law or equity,* ***that the Claimants (or their parents, subsidiaries, subsidiaries of parents, assigns, transferees,***

representatives, principals, agents, officers, directors or associates – which, for the avoidance of any doubt, are agreed to include (but are not limited to) *Norm Consultants Limited,* ***Health & Home (Essex) Limited*** *and Mr Andreas Stavrinides) ever had, may have or hereafter can, shall or may have against BDO LLP (****or any of its members, partners or employees and/or former partners or former employees)***". (Emphasis added.)

281. Later that day, the offer was accepted.

282. Those terms were clear: Mr Stavrinides agreed that he and Essex (among others) settled all claims that they might have against any member or partner of BDO, a description that covers the Second and Third Claimants in the present proceedings.

283. On 10 August 2020, the legal representatives to "*the Claimants*" (as defined in the agreement itself, which by then had been made) purported to clarify that the "*agreement was reached on the basis that the settlement does not in any way relate to or affect any claims or counterclaims… that our clients may have… against those persons… acting in their capacity as administrators, receivers, liquidators or agents of any of the parties in this matter and Health and Home Limited (in liquidation)*". That purported clarification was irrelevant because it was too late; the contract had already been formed. If anything, it suggests that it had by then been appreciated, albeit belatedly, that the contract was in unqualified, broad terms, from which some sort of retreat might, if possible, be desirable.

284. Mr Macpherson suggested the agreement should be construed to apply only to claims against BDO and associated persons "*in their capacity relating to the underlying claim*", and therefore not the present counterclaim. That submission was unsupported by anything in the agreement itself, which was in the broadest terms, and I reject it.

285. In addition, he suggested that it ought not to apply to proprietary claims, "*for the return of money that belongs to Essex*". The arguments in this respect were not greatly developed, whether by reference to precedent or otherwise, and would turn on whether or not a proprietary claim (if the property was and continues to be held identifiably by the liquidators) was a relevant "*claim … in law or equity*". At least on the face of the agreement, a proprietary constructive trust claim is a "*claim in equity*", and would be encompassed by the agreement, but whether or not correct, as I have said, it was not

ultimately in issue that following an account, any such sums would be paid to Essex, however so held, and it is therefore not necessary to determine the point.

Conclusions

286. For the reasons stated, my conclusions, in summary, are therefore as follows:

286.1. As to the Debt Claim, pursuant to a contract of loan, Elite owes the Company £552,737, not subject to a limitation defence, and I shall give judgment in that sum.

286.2. As to the Dividend Claims:

286.2.1. under section 238 of the IA 86, as against Elite, I shall order payment of £1,200,000 in respect of transactions at an undervalue involving the declaration and payment of the 2012 and the 2013 Dividends;

286.2.2. under section 212, as against Mr Stavrinides, I shall order payment of compensation in the sum of £250,000 in respect of the declaration and payment of the 2013 Dividend.

286.3. As to the claims in respect of the May 2013 Agreement:

286.3.1. under section 238 of the IA 86, as against Essex and Elite, I shall order payment of a sum equal to £174,471.66 (being the full reduction in the ultimate purchase price) minus the extent to which any such contingent liabilities in fact eventuated (but nothing in respect of alleged goodwill allegedly transferred under the Agreement);

286.3.2. under section 212 of the IA 86, I shall order payment by Mr Stavrinides of compensation in the same sum.

286.4. As to the counterclaim, I shall direct that there be an account to establish the amount received by the Company after 18 May 2013 in respect of debts at that

time owed to it but transferred under the May 2013 Agreement; it was agreed that any such sums would be paid, in full, to Essex.

Dated 9 April 2025