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Case No: CR-2023-005539 and CR-2023-005542

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: 28 March 2024

Before:

INSOLVENCY AND COMPANIES COURT JUDGE GREENWOOD

- -

IN THE MATTER OF SHERWOOD OAK HOMES LIMITED (In Administration)
IN THE MATTER OF SHERWOOD OAK HOLDINGS LTD (In Administration)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between:

1. ARRON KENDALL	**Applicants**
2. MILAN VUCELJIC	
- and -	
1. TIMOTHY DORIAN BALL	**Respondents**
2. CAROL BALL	

- -

Mattthew Weaver KC (instructed by **Addleshaw Goddard LLP**) for the **Applicants**
Chloe Shuffrey (instructed by **HCR Legal LLP**) for the **Respondents**

Hearing dates: 19-20 March 2024

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JUDGMENT

This judgment was handed down remotely at 2.30pm on 28 March 2024 by circulation to the parties or their representatives by e-mail.

ICC JUDGE GREENWOOD:

Introduction

1. This is the final, expedited hearing of an application made by Mr Arron Kendall and Mr Milan Vuceljic ("**the Administrators**") in their capacity as the Joint Administrators of Sherwood Oak Homes Limited ("**Homes**") and Sherwood Oak Holdings Ltd ("**Holdings**"). The application was made by notice issued on 12 January 2024, supported by Mr Kendall's first witness statement dated 11 January 2024, and sought, under paragraph 63 of Schedule B1 to the Insolvency Act 1986 ("**the IA**") and/or s. 234 of the IA, a "*declaration that the property known as land on the south side of Clipstone Road East, Mansfield Woodhouse and registered at the Land Registry with title number NT 10531 ("**the Land**") is held by the Respondents on resulting and/or constructive trust for the benefit of Homes or Holdings*" and an order that the Land be transferred accordingly. The Administrators, who were appointed by a qualified floating charge holder on 3 October 2023, were represented by Mr Matthew Weaver KC of counsel.

2. The Respondents to the application are Mr Timothy Ball and his wife, Mrs Carol Ball, represented by Ms Chloe Shuffrey of counsel. Mr Ball is a director of both companies (and was a director at all times material to this application) and is the sole shareholder in Holdings, of which Homes is a wholly owned subsidiary. Mrs Ball was at no time a director of Holdings, but was a director of Homes between 1 April 2021 and 20 May 2021, and again, between 25 May 2023 and 9 August 2023. According to the Respondents' evidence, Mrs Ball was a director only during periods when her husband was unwell; they said that she had little to do with the company's day-to-day management or operation. In addition, albeit not a respondent, Mr Stephen Woolfe, a solicitor at Shakespeare Martineau LLP, was at all material times a director of Holdings. In his Statement of Concurrence with the Statement of Affairs produced in respect of Holdings, Mr Woolfe stated that "*I have played no part whatever in the management of* [Holdings] *and remained as a director solely to protect my position as Judicial Trustee of the estate of John Ball Deceased*".

3. In addition to his first statement, Mr Kendall made two further witness statements, dated 14 February and 15 March 2024; Mr and Mrs Ball each made a single statement, both of which were dated 7 February 2024. Although Mr Weaver had anticipated cross-examination, I was told that the Respondents had not. At the beginning of the hearing I

ruled that there would be no oral evidence both because the agreed directions made by order of 19 January 2024 made no provision for it, and because it would (in those circumstances) have been unfair; my decision also reflected my views about the ordinary purpose and scope of applications made under s.234 and paragraph 63; in any event, Mrs Ball was not present in court (and I understood her not even to be in England, since she and her husband live in Spain) and Mr Ball was to be present only on the first day, which began in court at 2pm. The Administrators were nonetheless content to proceed. However, not having heard cross-examination, it follows that the court, although not bound in every respect to accept unreservedly the content of a written witness statement, is constrained in the extent to which it can reject it.

The Background

4. Holdings was incorporated on 18 February 1997 and Homes on 22 February 2018. Their principal trading activity was the development of land south of Clipstone Rd, Mansfield ("**the Development Site**") which was acquired by the companies in 2018 with funding provided by West One Loan Ltd. The Development Site comprises land with two title numbers, NT145663 ("**Phase 1**") and NT542961 ("**Phase 2**"). Phase 1 is owned by Homes and is the site of 30 completed homes. Phase 2 is owned by Holdings and is currently undeveloped land in respect of which planning permission has been obtained for 313 additional residences.

5. The Land was bought from Mansfield District Council ("**MDC**") for £156,500 on 31 May 2023 and transferred by MDC to the Respondents jointly. The TR1 (the relevant Land Registry transfer form) executed as a deed by MDC and the Respondents, stated that "*the transferee is more than one person and … they are to hold the property on trust for themselves as tenants in common in unequal shares*". The ultimate intention was that together with the Development Site, the Land would be made subject to a "Section 278 Agreement" with Nottinghamshire County Council for certain off-site highway works to be carried out, including the construction of road water drainage systems and sewers. A draft version of that Agreement (to which the Respondents were not named parties) was exhibited to Mr Kendall's first statement.

6. Both relative to the size of the Development Site, and indeed on any sensible view, the Land occupies a very small area. It is, essentially, a bus stop. However, it is a bus stop

which happens to occupy a point between the Development Site and the highway, and in the context of the current project, although there was some disagreement between the parties regarding the possibility of alternative means of access to the Site (and whether or not therefore, it truly comprised a "*ransom strip*", as was said by the Administrators) its value lies in its use as part of the presently contemplated means of access, which would not be possible without it; certainly, whether or not it was or is an irreplaceable part of the project, the Land was in fact intended to be used for its purposes, and is therefore of particular value to it, and of course, to anyone hoping to complete and make profit from it, including the two companies, now in administration.

7. Thus, on 3 December 2021, Shakespeare Martineau wrote on behalf of the companies to MDC concerning the "*proposed dedication to highway of*" the Land (which was described as "*the MDC Bus Stop Land*") and referred to an access arrangement which had been granted technical approval by the County Council. They asked MDC to note that "*the land designated for access includes the MDC Bus Stop Land*", and that the Council had indicated that it should "*have been dedicated when other adjoining land was developed*". They said:

> "*During the extensive 7 year planning process, the removal of the existing bus stop on the MDC Bus Stop Land as part of the main site access has been in the contemplation of all parties for the duration of the planning processes."*

And further, that:

> "*Delays in dedicating the MDC Bus Stop Land will jeopardise our client's ability to deliver the development in a timely fashion which in turn impacts the delivery of much needed housing in Mansfield along with payment of significant s.106 contributions including those for health and education in the area.*"

8. Later, about two months before the Land was bought, on 16 March 2023, Ms Victoria Bovington, a solicitor at Shakespeare Martineau, emailed Mr Ball, and attached a draft TR1 in respect of the Land which named Holdings as the (intended) transferee, and stated the price to be £156,000. However, at some point in time between that email and the actual transfer of the Land on 31 May 2023, the intended arrangement changed.

9. Thus, on 18 April 2023, Ms Bovington wrote again to Mr Ball and said, "*I've considered further the merits or otherwise of purchasing the bus stop land in yours and Carole's name and asked a colleague in my banking team to check the OakNorth security documents. Are you available for a call tomorrow morning?*".

10. Subsequently, on about 25 April 2023, she emailed Mr Ball (first in advance of a telephone call, the email's subject being "*items for discussion on call*", and then afterwards, having added that part which is in bold below) and said, amongst other things:

> "*Bus stop transfer* - ***you are considering whether to seek to transfer the land into yours and Carole's names as you (rather than Sherwood Oak Holdings) are providing the purchase monies. We discussed whether it would be worthwhile doing this or buying in Sherwood Oak Holdings name and protecting yours and Carole's interest by putting a charge over the bus stop land. OakNorth and Rubicon's consent to that charge will be required. If the land is being purchased in your individual names, the planning documentation (eg s.278 agreement) would need to be amended as it is the landowner who needs to agree to the works. This is likely to delay the development works and will also mean that from a plot sales perspective, you and Carole will need to be party to the sales documentation***."

11. Exhibited to Mr Ball's statement (but not, I was told by Mr Weaver, previously in the possession of the Administrators) were the Minutes of a Holdings' Board Meeting, said by him to have been held on 16 May 2023, at which he was present, as a director, and at which Mrs Ball was also present, marked as "*in attendance*", and which in respect of the "*Land at Clipstone Road East*", stated, amongst other things:

> "*Raffingers* [who were Holdings' accountants] *to be advised to note within the next audit the payments to be made from the funds loaned to the company by* [Mr Ball]. *These payments being settled are for the acquisition of the bus stop land from* [MDC] *by* [Mr and Mrs Ball] - *costs amounting to £156,814.20 inclusive of SDLT Indemnity Insurance*."

12. Although Mr Woolfe was a director of Holdings, he was not present at the meeting, which was therefore - it was agreed - inquorate. Insofar as relevant, it was however also agreed that the Minutes (which were not disputed as a genuine or contemporaneous record) were capable of evidencing the Respondents' intentions, beliefs and thoughts at the time.

13. On 24 May 2023, the sum of £156,500 was paid by Homes from its bank account to Shakespeare Martineau, and on 25 May 2023, Ms Bovington emailed Mr Ball, acknowledged receipt of the "*purchase monies for the MDC land transfer*", and said, amongst other things ("*to confirm*" a discussion of the previous day):

> "*We discussed whether the s.278 agreement should be amended to include you and Carol in your individual capacity given that* [the Land] *is to be transferred to both in the first instance*.
>
> *It was decided that we'll work towards getting the s.278 agreement in a position to complete on/or before the day of the refinance with Pluto and the transfer of* [the Land] *from you and Carol to* [Holdings].

14. It was not said that the sum paid by Homes comprised or represented a sum previously paid to it (or to Holdings) by the Respondents specifically to enable the purchase price to be paid; it was, in other words, a sum which Homes at that time happened to hold.

15. On 26 May 2023, Mr Ball emailed Ms Bovington to confirm that Mrs Ball had been appointed as a director of both companies, and as said above, on 31 May 2023, the Land was transferred to them. On 1 June 2023, Shakespeare Martineau wrote to HMRC asking to amend the SDLT return to reflect "*a last minute change in the transaction*", which was that the Land had been transferred to Mr and Mrs Ball, not Holdings. As I have said, the TR1 executed as a deed by MDC and the Respondents, stated that "*the transferee is more than one person and … they are to hold the property on trust for themselves as tenants in common in unequal shares*".

16. In Mr Ball's statement, he said, amongst other things:

    16.1. that he opposed the application, because the Land was purchased "*using my personal money and not money from a lender or the Companies*";

16.2. that he "*was funding the purchase of the Land without any assistance from banks or funders*" and that he and Mrs Ball "*were advised by SHMA to hold the Land in* [their] *own names*";

16.3. that he had "*explained to Victoria Bovington and Stephen Woolfe that the funding for the Development Site had been exhausted so I would have to personally use the monies I had loaned to Holdings to purchase the Land. SHMA suggested that the land could be purchased by Carol and I, in our personal names, as it was my money that was being used*";

16.4. that his intention was that Holdings would purchase the Land from Mr and Mrs Ball, "*once funding had been arranged and a purchase price agreed*";

16.5. the reference to "*funding*" was to the possibility of financing which he was at that time "*exploring*", with "*Octopus and Pluto Finance*", and in respect of which he exhibited Heads of Terms with Pluto dated 4 July 2023 and 15 September 2023, and an Indicative Loan Summary with Octopus dated 18 April 2023; Mr Ball's evidence was that the desired funding (and thus the intended purchase of the Land by Holdings) "*did not happen because the Administrators were appointed*";

16.6. that the "*money used to purchase the Land was loaned to Holdings by me and appears in my Director's Loan Account*" in its financial statements for the years to 29 February 2020, 28 February 2021 and 28 February 2022; those statements were exhibited and showed Mr Ball to have been owed £2,653,238 (2020), £2,602,727 (2021) and £2,488,219 (2022); in other words, as mentioned above, the purchase price was not paid using a sum specifically provided by Mr Ball for that purpose.

17. Essentially, Mr Ball's evidence came to this: because development funding had been exhausted (this was the only reason given) the Land was bought using his own money (by which he meant money previously lent by him to Holdings over the course of several years, and so owed to him by Holdings) albeit subject to an intention of sorts to sell it to Holdings for the purposes of the project, at a price to be agreed in due course at a future time when new or additional financing had been agreed for the benefit of the

companies; on his view, the money to pay the price was therefore his, provided by him, and he was the purchaser, albeit subject to an agreement with Mrs Ball that the property be transferred beneficially to both of them, as reflected in the TR1, supported by advice from Shakespeare Martineau. The documents (at any rate, those in evidence) show that Shakespeare Martineau were told and proceeded on the basis that the purchase price money was being provided by Mr Ball; there is nothing in the documentary evidence to suggest that they advised against or positively in favour of the arrangements, or indeed, that they advised at all.

18. Mr Ball's belief that money previously lent by him to Holdings continued to be "his" money, was plainly wrong: the money had been lent by him, had become Holdings' property (and I assume very likely mixed with other monies) and had been replaced by a debt owed to him by Holdings, reflected in its accounts. Nonetheless, obvious misconception though it was, I am not able to find that it was not a genuinely believed misconception. Further, the Minutes of 16 May 2023, albeit produced in respect of an inquorate meeting, and Mr Ball's evidence overall, suggest to me that he intended that the debt owed to him by Holdings would be reduced accordingly – that being the obvious consequence of "his" money having been used by him to buy the Land, rather than having been repaid to him or remaining in the hands of Holdings; "his" money having been paid to MDC at his direction, it can no longer be owed to him. Were that right, then ultimately, in economic terms, the debt to Mr Ball would have been reduced by the transfer to him of the Land. Having said that, his statement made no reference to the possibility of any change to his loan account, and Ms Shuffrey's submission was that the precise method of accounting for the payment was, at the time of the Land's acquisition, yet to be decided upon, being something which would be worked out with the accountants at the end of the financial year when producing final accounts – a point which was and will never be reached because of the intervening administration.

19. Mrs Ball's evidence was that she had "*little to do*" with the running of either company, and had only been a director during periods when Mr Ball was unwell (for example, in May 2023, in order to sign documents in England, at a time when Mr Ball was unable to travel from Spain). She said that the purchase was from their own funds, and that they had been personally advised by Shakespeare Martineau that it could be in their

own names. There was no difference between the positions adopted by Mr and Mrs Ball.

20. There was nothing to contradict his own statement referred to above, that Mr Woolfe, despite being a *de jure* director of Holdings, "*played no part*" in its management.

21. Both Respondents said that despite requests made by Mr Ball and by their solicitors, Shakespeare Martineau had not provided copies of their files, containing the advice given to them personally in respect of the acquisition of the Land. In evidence were emails sent by HCR Legal LLP to Ms Bovington on 22 December 2023 and 4 January 2024, requesting "*our client's conveyancing file*", but to which, it was said, there had been no reply. Similarly, on 22 January 2024, Mr Woolfe emailed Mr Ball and said, "*I have just chased Victoria to make sure the file has been copied across*". I was not told that it had been received in the meantime, since the Respondents made their statements on 7 February 2024. Mr Ball's evidence was therefore that in the absence of those documents, he had "*managed to locate some documents from* [his] *own records*". As to that, in his second statement, Mr Kendall said that Addleshaw Goddard, the Administrators' solicitors, had asked for and received from Shakespeare Martineau a copy of their file held in respect of the Land, but had not either asked for or seen any "*personal*" files. It is therefore not clear whether further documents exist in the hands of Shakespeare Martineau or otherwise which relate to the Respondents' <u>personal</u> position in respect of the Land and the circumstances of its acquisition.

22. The companies' initial funding was repaid in December 2020 as a result of a refinancing with OakNorth Bank plc ("**OakNorth**") and mezzanine funding provided by Rubicon Capital Ef Ltd ("**Rubicon**") both of which have fixed and floating charges over the companies' assets.

23. In Mr Kendall's second statement, he said that the companies were facing "*obvious financial difficulties*" at the time of the Land's acquisition, and were in "*financial distress*", as, he said, the Respondents must have known. In that regard, he exhibited a letter from Rubicon to Homes dated 6 November 2023, which claimed payment of £6,629,100 and which referred to the obligation to repay outstanding borrowing having arisen on 31 May 2023. In addition, he exhibited a letter from Henry Boot Construction Ltd dated 18 May 2023 to Homes, seeking payment of £303,178.91, "*significantly*

overdue", having become payable on 21 April 2023. The statement of affairs signed by Mr Ball in the administrations on 1 November 2023 shows that Henry Boot was at that time owed just over £645,000 ("*plus prolongation costs*") by Holdings. Mr Ball's own evidence was that in May 2023 funding had been "*exhausted*", and that he was attempting to agree replacement or additional financing, which he had failed to do by the date of the Administrators' appointment.

24. On 3 October 2023, OakNorth served notice on the companies to repay their loans; on the same day, it appointed the Administrators.

25. Against that background, the Administrators' case (as it was advanced at the hearing) was that the Land is either held on resulting trust for Homes, which provided and paid the purchase price, or if not, on constructive trust for both companies (or one of them, more likely Holdings) because it was acquired by the Respondents in breach of their duties as directors, principally under s.175 of the Companies Act 2006 ("**the CA 2006**") to avoid conflicts of interest. The hearing was expedited because of the Administrators' wish to complete as soon as possible a proposed sale of the Site to an (undisclosed) "*national housebuilder*", on terms agreed after an extensive marketing process (including expressions of interest from 20 parties, and offers received from 9) at a price in excess of £15m, but wholly contingent upon the use and inclusion of the Land. As matters stand, as was explained by Mr Kendall in his 3rd statement, the estimated holding costs of the Site pending sale are £373,394 per month, a cost to the obvious detriment of the insolvent estates.

26. In brief summary, in opposition, the Respondents argued, first, that these claims cannot be brought under or within the scope of s. 234 or paragraph 63; second, that there was in any event no resulting trust, both because the beneficial ownership of the Land was conclusively settled by the trust expressly declared in TR1, and also on the evidence; and third, that the claim to a constructive trust was not fairly stated and particularised to enable the Respondents to understand and answer the case advanced against them at the hearing, and that had it been, certain issues would have been raised which the court cannot now decide, and that again, in any event, the constructive trust claim was defeated by the express declaration of trust.

27. I shall deal first with the law, including the scope of section 234 of the IA and of paragraph 63 of Schedule B1, and whether they provide an appropriate and proper (or at any rate, permissible) means of advancing the Administrators' case.

The Law

The Scope of Section 234 IA 86 and Paragraph 63 of Schedule B1

28. Section 234 states, in relevant part:

> "*(2) Where any person has in his possession or control any property, books, papers or records to which the company appears to be entitled, the court may require that person forthwith (or within such period as the court may direct) to pay, deliver, convey, surrender or transfer the property, books, papers or records to the office-holder*."

29. Relatedly, albeit not relevant to administrators, rule 7.78 of the Insolvency Rules 2016 provides that the powers conferred on the court by s.234, "*are exercisable by the liquidator or, where a provisional liquidator has been appointed, by the provisional liquidator*", and that any person on whom a requirement under s.234(2) "*is imposed by the liquidator or provisional liquidator must, without avoidable delay, comply with it*". So not only the court, but also a liquidator or provisional liquidator without court order, is able to require a person to transfer property to which (merely) the company "*appears to be entitled*", rather than is or is certainly entitled. S.234(3) and (4) protect an office holder (in certain circumstances and to some extent) who seizes or disposes of property which transpires not to belong to the company, if he had "*reasonable grounds for believing*" that he was entitled to act. Without reference to authority, the language of those provisions, and the entitlement of a liquidator to exercise s.234 powers without court order, suggest that it is not the primary purpose of s.234 to empower an office holder to raise, and the court to decide, issues of disputed ownership.

30. That reading is essentially consistent with the authorities. Thus, in Re Coslett (Contractors) Ltd [2001] UKHL 58, at [25]-[31], Lord Hoffmann observed (the emphasis is added):

"*25. This brings me to section 234 of the 1986 Act .... This section can be traced back to section 100 of the Companies Act 1862 (25 & 26 Vict c 89). Originally it was confined to applications against contributories and any "trustee, receiver, banker, or agent, or officer of the company". It provided a summary procedure by which they could be required to "pay, deliver, convey, surrender, or transfer" to the liquidator "any sum or balance, or books, papers, estate, or effects, which happen to be in his hands for the time being, and to which the company is prima facie entitled".*

26. In its original form, such an application was not an originating process. It was an application in the liquidation, invoking the summary jurisdiction of the Companies Court against certain persons connected with the company and in possession of its money or property. Its purpose was to enable the liquidator to carry out his statutory functions. It did not necessarily involve a determination of title. If, for example, the liquidator appeared on affidavit evidence to be prima facie entitled to property, books or records which he needed to proceed with the liquidation, the court could in its discretion order the person in possession to hand over the property and argue about ownership later.

27. ....

28. The scope of the summary procedure was enlarged by provisions of the Insolvency Act 1985 which are now contained in section 234 of the 1986 Act. It is now available against any person who has in his control "any property, books, papers or records to which the company appears to be entitled". ***It remains, however, a summary discretionary remedy, obtainable by a liquidator or other office-holder for the purpose of enabling him to carry out his functions and which does not necessarily involve any determination of title****.*

29. When administration was introduced by the Insolvency Act 1985, section 395 of the Companies Act 1985 was amended simply by adding the words "or administrator" after the word "liquidator". This seems to me to indicate that the section was to operate in relation to a company in administration exactly as it had in relation to a company in liquidation. An administration order did not vest any of the company's property in the administrator any more than a winding up order vested it in the liquidator. Instead, section 14 of the 1986 Act gave the administrator powers in many respects similar to those of a liquidator over the company's property:

"(1) The administrator of a company—(a) may do all such things as may be necessary for the management of the affairs, business and property of the company, and (b) without prejudice to the generality of paragraph (a), has the powers specified in Schedule 1 to this Act ..."

30. Paragraph 1 of Schedule 1 gives the administrator power to "take possession of, collect and get in the property of the company and, for that purpose, to take such proceedings as may seem to him expedient" and

paragraph 5 confers power to bring any action in the name and on behalf of the company.

31. ***Ordinarily, therefore, an action brought by an administrator to assert a claim on behalf of the company should be in the name of the company. The title to the claim will be vested in the company****. …*"

31. To similar effect, in Ezair v Conn [2020] BCC 865 at [26] Patten LJ said:

"*26. As provided in s.234(2), the court is given power to direct the transfer to the office holder of any property, books or records to which the company "appears to be entitled". "Property" can include real property as the reference to "convey" and "transfer" makes clear. But the provisions of subss. (3) and (4) also confirm that an application under s.234 may not (and probably is not intended to) provide a definitive ruling about title nor is the possibility of such a ruling a pre-condition to the exercise of the power. Sections 234 and 236 are designed to assist an office holder in the carrying out of the relevant insolvency process by placing under his control the property and records to which the company appears to be entitled.* ***Although, as Warner J recognised in Re London Iron & Steel Co Ltd [1990] B.C.C. 159, a determination of whether the company appears to be entitled to the property does not preclude the resolution at the hearing of the grounds upon which the application is resisted, it may not provide an appropriate procedure for determining complex issues about title involving, in particular, claims by third parties****. Section 234 creates a summary procedure whereby the office holder in his own name may seek the transfer of company property to him.* ***Although the entitlement to such an order will depend upon the company's apparent rights to the property in question and the judge will have to resolve any dispute about entitlement raised by the respondent in the proceedings****, the purpose of the power conferred on the court is and remains as Lord Hoffmann explained in Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend CBC [2001] UKHL 58; [2002] 1 A.C. 336; [2001] B.C.C. 740 at [26]–[28] that of enabling the office holder to carry out his statutory functions by placing the apparent property of the company under his control. This process does not therefore necessarily involve any determination of title and the final resolution of such a dispute may fall to be made in subsequent proceedings*."

32. In Ezair, the judge at first instance had decided that the administrators' claim to beneficial ownership of certain property could be determined within the s. 234 application, and "*there* [had] *been no appeal from this order*", but in that respect, Patten LJ continued (again, the emphasis is added):

" *… it is important to note that the judge did not rule on the exercise of the court's discretion whether to make an order under s.234 nor was he asked to consider the applicability or suitability of the s.234 procedure to a claim for specific performance of either the 1999 or the 2003 agreements. The administrators did not choose to pursue a contractual remedy by serving the*

> *requisite notices and seeking an order for specific performance in proceedings brought in the name of CSP. Their position, as I have explained, was and remains on this appeal that the effect of the two contracts was to vest in CSP beneficial ownership of the properties which entitles the company to an immediate transfer of the legal estates free of any requirement for the service of any contractual notice.* ***This is a pure point of law based upon an analysis of the legal effect of the transactions between Mr Ezair, NEL and CSP and is, I accept, suitable for determination under the s.234 procedure****. But although the point did not arise as part of the argument on the preliminary issue (and arises only obliquely on this appeal),* ***my own view is that s.234 was not intended to cover the prosecution of a claim for specific performance or for damages in lieu. The summary nature of the power to order an immediate transfer of the property in question to the office holder suggests that it is concerned with property to which the company appears to have title that could be asserted without the need for some kind of contractual enforcement and the possible resolution of a contractual dispute. The remedy in such cases is for the office holders to commence proceedings for specific performance in the name of the company*** *which is what they could have done but which they contend was unnecessary in the present case*."

33. Accordingly, the central purpose of s.234 is to provide a summary, discretionary remedy, enabling an office holder to carry out his functions, but without necessarily involving a determination of title; if title is in dispute, the usual appropriate course would be to commence proceedings in the name of the company itself. However, having said that, the court is not precluded from finally resolving issues raised in respect of title in opposition to an application under s.234, and in certain cases (for example, as in Ezair, where the issue was a "*pure point of law*") will do so. Ultimately, the decision whether or not to determine the issue is likely to depend on whether or not a summary process, without statements of case, disclosure and witness statements, is fair.

34. Paragraph 63 of Schedule B1 states, "*The administrator of a company may apply to the court for directions in connection with his functions*."

35. That provision is in broad terms, and has been used in a wide variety of situations. I accept that in principle it confers powers sufficiently broad to allow a court to resolve disputes with third parties, such as, for example, in Re Rodus Developments Ltd (In Administration) [2022] EWHC 3232, in which ICCJ Barber decided, on an application for directions, that an equitable charge claimed by a creditor was avoided for non-registration by virtue of section 859H of the CA 2006, and granted declaratory relief to

that end. I note that at [38], the judge observed that whilst in many cases it could be argued that a respondent should be given a final opportunity to put in evidence and attend a hearing before final relief is granted, it was not appropriate in that case because the creditor had been given ample pre-application notice of the intended process; the charge was plainly void and the creditor, despite having been given a number of opportunities to do so, had failed to articulate any alternative conclusion; furthermore, it was essential to grant urgent relief to ensure that the administration was not further prejudiced.

36. Again therefore, the decision whether or not to determine, on an application under paragraph 63, an issue such as that raised in the present case, will depend, certainly in part, on whether or not it is fair to use a summary process, without statements of case, disclosure and witness statements. Throughout, I have in mind that in many such cases, the usual and appropriate course would be to commence proceedings in the name of the company itself.

Resulting Trusts

37. For present purposes, it suffices to state the general rule by reference to Lewin on Trusts, 20th edition, at 10-021:

> "*… when real or personal property is purchased in the name of a stranger, a resulting trust is presumed in favour of the person who paid the purchase money (Rochefoucauld v Boustead [1897] 1 Ch. 196) if he did so in the character of purchaser*."

38. As to the "*character*" in which the payor acted, in Princess Tessy of Luxembourg v Prince Louis of Luxembourg [2018] EWFC 23; [2019] 1 F.L.R. 1203 at [74], MacDonald J said:

> "*74. A vital ingredient in creating a resulting trust is establishing that payment of the purchase money for the property was made in the character of a purchaser. In most cases, the person who claims to be the real purchaser pays the purchase money direct to the vendor, and, so long as it is clear that he was not a lender or giving a gift, there should be no difficulty in showing that it was he who was the provider of the purchase money in the character of purchaser (see Lewin on Trusts (19th Edtn.) at [09-049]). In Hashem v Shayif & Anor [2008] EWHC 2380 (Fam); [2009] 1 FLR 115 Munby J (as he then was), made clear at [114] that:*

> *"…whether A provided the money by way of gift, or by way of loan, or qua purchaser is, in the final analysis, a simple question of fact, to be determined in the light of all the evidence as to the relevant circumstances, including, subject to the rule in Shephard v Cartwright [1955] AC 431 (see per Viscount Simmonds at page 445), the parties' evidence as to their intentions at the time.'"*"

39. However, a presumption of resulting trust is of limited importance in comparison with evidence of actual intention. Thus, in Kyriakides v Pippas [2004] EWHC 646, at [76], Gabriel Moss QC, sitting as a Deputy High Court Judge, said:

> "*I suspect the position we have now reached is that the courts will always strive to work out the real intention of the purchaser and will only give effect to the presumptions of resulting trust and advancement where the intention cannot be fathomed and a "long−stop" or "default" solution is needed*."

40. Although there was no dispute between the parties as to the principles in respect of resulting trusts generally, there was an issue concerning the power of the court to find a resulting or constructive trust in cases (such as the present) in which there has been an express declaration of trust.

41. As to that, Ms Shuffrey's submission was that where a relevant conveyance contains an express declaration of trust which comprehensively declares the beneficial interests in the property, there is no room for the application of the doctrine of resulting or constructive trusts unless and until the conveyance is set aside or rectified. In support of that proposition she referred to Goodman v Gallantia [1986] 2 WLR 236, in which an express declaration of trust by the two purchasers that they held the property for themselves as joint tenants was held to preclude the case advanced by one of them, that she was entitled to a greater than half share. At 239F-240A, Slade LJ said:

> "*In a case where the legal estate in property is conveyed to two or more persons as joint tenants, but neither the conveyance nor any other written document contains any express declaration of trust concerning the beneficial interests in the property (as would be required for an express declaration of this nature by virtue of section 53(l)(b) of the Law of Property Act 1925), the way is open for persons claiming a beneficial interest in it or its proceeds of sale to rely on the doctrine of "resulting, implied or constructive trusts": see section 53(2) of the Law of Property Act 1925. In particular, in a case such as that, a person who claims to have contributed to the purchase price of property which stands in the name of himself and another can rely on the well known presumption of equity that a person who has contributed a share of the purchase price of property is entitled to a corresponding proportionate beneficial interest in the property by way of implied or resulting trust: see, for*

> *example, Pettitt v. Pettitt [1970] A.C. 777, 813-814, per Lord Upjohn. If, however, the relevant conveyance contains an express declaration of trust which comprehensively declares the beneficial interests in the property or its proceeds of sale, there is no room for the application of the doctrine of resulting implied or constructive trusts unless and until the conveyance is set aside or rectified; until that event the declaration contained in the document speaks for itself*."

42. More recently, the principle was confirmed in Pankhania v Chandegra [2012] EWCA Civ 1438, in which it was held that a claimant was entitled to rely on the terms of a transfer into his name and that of the defendant as joint tenants in common in equal shares and on an express trust to that effect contained in the transfer. At [16], Patten LJ said:

> "*The judge's imposition of a constructive trust in favour of the defendant was therefore impermissible unless the defendant could establish some ground upon which she was entitled to set aside the declaration of trust contained in the transfer. He seems ... to have misunderstood the significance of the transfer which not only made both claimant and defendant legal owners of the property but also spelt out their beneficial interests. The whole of his judgment proceeds upon the footing that he had a free hand to decide what was the common intention of the parties at the relevant time but that inquiry was simply not open to him unless the defendant had established a case for setting the declaration of trust aside*."

43. To the same effect, Mummery LJ made observations at [26]-[27], including:

> "*In the absence of a vitiating factor, such as fraud or mistake, as a ground for setting aside the express trust or as a ground for rectification of it, the court must give legal effect to the express trust declared in the transfer. In the absence of such claims the court cannot go behind that trust.*"

44. Essentially therefore, Ms Shuffrey's submission was that the court cannot, in the present case, go behind the express declaration of trust in the TR1 in favour of Mr and Mrs Ball, and that unless and until that declaration is set aside (relief for which there was no application) there is simply no room for finding a resulting or constructive trust in favour of one or other or both of the companies: until set aside, the express trust precludes the remedy sought.

45. I do not accept that submission. Unlike the present case, those referred to by Ms Shuffrey concerned claims made by one joint owner against another to establish a beneficial interest different from that created by a binding express declaration of trust to

which both were parties. However, in the Princess Tessy of Luxembourg case, in the context of an application for financial remedies, a claim was made by "the wife" that "the husband" had a beneficial interest in a certain property which had been transferred to the husband and his father, on the basis that the Form TR1 contained an express declaration by the transferees that the property was to be held on trust for themselves as joint tenants. The husband denied that he was a beneficial owner. His case, which succeeded, was that he and his father held the property on trust for the L'Administration Des Biens De S.A.R. Le Grand Duc De Luxembourg ("**the ADB**"), which had, amongst other things, paid the purchase price. In his judgment, Macdonald J set out the principle stated in Pettit, Goodman and elsewhere, but observed at [66], that "*the operation of this clear and long settled principle pre-supposes that the parties who make an express declaration of trust are entitled to do so*." The husband and the ADB contended that the husband and his father simply never reached a position in which they were able to declare a trust.

46. Ultimately, the judge held that the husband was not the owner of a beneficial share, despite, as he put it, being "*of course, acutely aware of the principle in Goodman v Gallant*" (see [110]]). At [111]-[115], he said (the emphasis is added):

> "*111 The declaration of an express trust purportedly evidenced by the TR1 can only be effective if, at the time they purported to declare it, the husband and the Grand Duke were "able" to declare a trust of the beneficial interest for themselves for the purposes of s 53(1)(b) of the 1925 Act. However, at the time they purported so to declare, I am satisfied that the beneficial interest in the former matrimonial home was vested in the ADB under a resulting trust …*"
>
> *112 It is important to note that this is not a 'consumer context case' in which a couple in an intimate relationship jointly purchase a property in which they intend to reside, perhaps with the assistance of a mortgage, and in the transfer document execute an express declaration of trust over the property in favour of themselves, thereby setting out their beneficial entitlement as part of the purchase they have made. In this case, the purchase monies for the former matrimonial home were provided from the GroBherzogliches Fideicommiss / fidéicommis grand-ducal and paid to the vendor by the ADB. The documentary evidence before the court confirms that the money in question was paid from the bank account of the ADB. It is common ground between the parties that the intention was that, on any sale of the former matrimonial home, the monies provided from the GroBherzogliches Fideicommiss / fidéicommis grand-ducal would be returned to the ADB as the proceeds of sale. I am satisfied that there is nothing in the evidence before the court to suggest that the monies originally provided from*

the GroBherzogliches Fideicommiss / fidéicommis grand-ducal constituted a loan or a gift to husband and the Grand Duke.

113. In the circumstances, satisfied as I am on the unchallenged expert evidence before the court that it is more likely than not that the GroBherzogliches Fideicommiss / fidéicommis grand-ducal and the ADB have separate legal personalities, I am satisfied that the purchase monies from the GroBherzogliches Fideicommiss / fidéicommis grand-ducal were paid to the vendor of the former matrimonial home by the ADB in the character of a purchaser. Further, on the evidence before the court, I am satisfied that at the time the purchase monies from GroBherzogliches Fideicommiss / fidéicommis grand-ducal were paid by the ADB it was the settled intention of the ADB, the Grand Duke and the husband that the ADB would hold the beneficial interest in the property. I derive that conclusion from the following matters: i) As I have noted, the property was purchased by the ADB with funds from the GroBherzogliches Fideicommiss / fidéicommis grand-ducal. ii) As I have also noted, the wife herself concedes that upon any sale of the former matrimonial home the proceeds of sale would return to the ADB. iii) Whilst the compromis de vente completed in relation to the former matrimonial home contains omissions in terms of the husband's signature and a date, its existence in my judgment evidences an intention that the ADB would hold the beneficial interest in the property purchased with funds from the GroBherzogliches Fideicommiss / fidéicommis grand-ducal. Firstly, by reason of the distinction the existence of the compromis de vente creates between the manner in which the property in US property was purchased. When using private funds of Grand Duke to purchase the US property, no compromis de vente was drafted by the ADB. When using funds from the GroBherzogliches Fideicommiss / fidéicommis grand-ducal to purchase the former matrimonial home a compromis de vente was completed by the ADB. Whilst Mr Ewins emphasised the similarities between these two property transactions, in my judgment it is the differences between the manner in which the respective properties were purchased that are more significant. In particular, the fact that when the funds came from the GroBherzogliches Fideicommiss / fidéicommis grand-ducal as distinct from the private funds of the Grand Duke, a compromis de vente designed, as I am satisfied it was, to evidence the ADB's interest was employed. Secondly, by reason of the fact that, whilst incomplete, the terms of compromis de vente themselves constitute evidence of the intention of the husband, the Grand Duke and the ADB that the ADB would retain the beneficial interest in the former matrimonial home. iv) The statement of the husband accepts he holds no share of the beneficial interest in the property. Whilst this might be regarded as a self-serving statement in the context of these proceedings, and therefore of lesser weight, it is consistent with the other matters I have set out in this paragraph.

114 Within the context of this evidence of intention, having regard to the modern approach to resulting trusts set out in Kyriakides v Pippas, I am satisfied that it is not necessary to go on to consider the operation of the presumption. ***In these circumstances and having regard to the legal principles set out above, I am satisfied that the effect of the matters set out in the foregoing paragraphs was to create, upon the payment of the***

purchase monies from the GroBherzogliches Fideicommiss / fidéicommis grand-ducal by the ADB, a resulting trust of the beneficial interest in the former matrimonial home in favour of the legal entity that provided the entirety of the purchase monies for that property. *Whether the beneficial interest in the former matrimonial home is owned under the resulting trust by the ABD, which paid the purchase monies, or the GroBherzogliches Fideicommiss / fidéicommis grand-ducal, which provided the purchase monies, is perhaps a point of some nicety. However, it is not necessary to decide that point for the purposes of the decision this court has to make. The key point is that the purchase monies did not, I am satisfied, come from the husband or the Grand Duke and they did not intend to own the beneficial interest in the property.*

115 I remain cognisant of the principle in Goodman v Galant. However, whilst in Goodman v Galant the Court of Appeal stated that there is no room for the application of the doctrine of resulting or constructive trusts "unless and until the conveyance is set aside or rectified", in Pankhania v Chandegra I perceive the point as having been expressed in somewhat less absolute terms, with the Court of Appeal stating that there is no room for the application of the doctrine of resulting or constructive trusts unless the defendant has "established a case for setting the declaration of trust aside". ***Within this context, it seems to me that, given the foregoing evidence before this court, it would be artificial in this case to proceed on the basis of the TR1 when it is plain on that evidence that the husband and the Grand Duke were not "able" to declare a trust of the beneficial interest by reference to the terms of s 53(1)(b) of the Law of Property Act 1925 and, as Mr Leech submits, any application to set aside the declaration on the grounds of mistake would be bound to succeed (accepting that no such application is before the court). A trust of the beneficial interest in the former matrimonial home was not the husband's and the Grand Duke's to declare. In short, you cannot declare an express trust in a beneficial interest that is not yours (or, to indulge in the Latin, nemo dat quod non habet)****."*

47. Essentially, the husband and his father ineffectively purported to vest in themselves the beneficial interest already vested in ADB. It follows from that decision that in a case such as the present, the court can find a resulting trust which precedes and therefore defeats an express declaration made at a time when the whole beneficial interest had vested in a third party, the true purchaser.

48. Ms Shuffrey sought to distinguish the Princess Tessy of Luxembourg case on two grounds.

49. First, she submitted that the decision cannot be reconciled with the principle that a conveyance containing a declaration as to the persons in whom the beneficial title vests is conclusive as to their intention. That submission is not correct: the intentions of the

husband and his father, as expressed in the TR1, were completely irrelevant, for the reasons explained by the judge: unlike cases such as Pettit, Goodman and Pankhania the claim was made by a third party, not by a person seeking to avoid the consequences of his own express declaration. The declaration made by the husband and his father was no more relevant or effective than one made by a complete stranger.

50. Second, she submitted that the decision was *per incuriam* because the judge mistakenly thought that s. 53(1)(b) of the LPA 1925 requires the transferees named in a TR1 to make the declaration, whereas in fact, the transferor - in the present case, MDC - is able to declare a trust.

51. In support, she cited the decision of HHJ Matthews in Taylor v Taylor [2017] 4 WLR 83. In that case, the transferor, but not the transferees, had signed the relevant form (a TP1) which contained the words, "*they* [in other words, the transferees] *are to hold the property on trust for themselves as joint tenants*". Again, this was a case in which one of the two transferees was seeking to establish an interest different from that stated in the form. The judge held that he could not do so, but was bound by the declaration. In that context, one of the claimant's arguments was that because the transferees had not signed the TP1, the declaration of trust which it contained was not valid, because it was not signed by the transferees (as those declaring the trust) in accordance with s. 53(1)(b) of the LPA 1925. The judge rejected that argument for various reasons, including that in the circumstances of the case, the form contained an express declaration of trust by the transferors, validly signed by them. As he said at [44]: "*in my judgment, although* [the transferees] *would have been able to declare such trusts once the legal title had been conveyed to them, at the time when the transferors signed the form they were the legal and beneficial owners of the land and well able to declare such trusts*." In so acting, the transferors had acted in accordance with the transferees' directions.

52. Taylor was a variation on the typical case in which one of two persons who have together expressly declared a trust in writing seeks to avoid its effect. It was not however a case in which the claim was made by a third party; it therefore concerned a different issue. Moreover, in the present case, the TR1 was signed by the transferees; if anyone declared a trust, it was them, not MDC, and similarly in the Princess Tessy of Luxembourg case, it was or would have been, the husband and his father, not the vendor. The problem in the Princess Tessy of Luxembourg was not the absence of

writing or a signature – it was that those purporting to declare the trust did not by then own the beneficial interest in the property at all. On the transfer of legal title in such cases, equity will, if appropriate in the circumstances, impose a resulting trust in favour of a third party, the true purchaser, the person who paid the price, which binds the transferees in accordance with the parties' intentions, actual and/or presumed, and which results in the beneficial interest vesting in the purchaser on the transfer of legal title to the transferees; their (effectively subsequent) written declaration of trust is rendered irrelevant.

Breach of Duty and the Constructive Trust

53. The CA 2006 provides as follows:

> ***172 Duty to promote the success of the company***
> *(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—*
> *(a) the likely consequences of any decision in the long term,*
> *(b) the interests of the company's employees,*
> *(c) the need to foster the company's business relationships with suppliers, customers and others,*
> *(d) the impact of the company's operations on the community and the environment,*
> *(e) the desirability of the company maintaining a reputation for high standards of business conduct, and*
> *(f) the need to act fairly as between members of the company.*
> *(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.*
> *(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.*
>
> ***175 Duty to avoid conflicts of interest***
> *(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.*
> *(2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).*

(3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.

(4) This duty is not infringed—

(a)if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or

(b)if the matter has been authorised by the directors.

(5) Authorisation may be given by the directors—

(a)where the company is a private company and nothing in the company's constitution invalidates such authorisation, by the matter being proposed to and authorised by the directors; or

(b)where the company is a public company and its constitution includes provision enabling the directors to authorise the matter, by the matter being proposed to and authorised by them in accordance with the constitution.

(6) The authorisation is effective only if—

(a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and

(b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.

(7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

54. As to s. 175 - breach of which was the primary and principal basis of the Administrators' case in respect of breach of duty - Mr Weaver referred to various explanatory passages in the judgment of Adam Johnson QC (as he then was) siting as a Deputy High Court Judge in Davies v Ford [2020] EWHC 686 (Ch). First, at [257] to [259], he said as follows:

> *"……as to section 175, this reflects an equitable rule of great antiquity and authority. In Bhullar v. Bhullar [2003] BCC 711, Jonathan Parker J. summarised it as follows, at [27]:*
>
> > *" ... The relevant rule, which Lord Cranworth LC in Aberdeen Railway Co. v. Blaikie described as being 'of universal application', and which Lord Herschell in Bray v. Ford [1896] AC 44 at 52 described as 'inflexible', is that (to use Lord Cranworth's formulation) no fiduciary 'shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect'".*

It also bears emphasis that a fiduciary must not profit from his position of trust, even if that profit could not have been made by his principal: Keech v. Sandford (1726) Sel Cas 61 (cited recently by the Supreme Court in FHR European Ventures LLP v. Cedar Capital Partners LLC [2015] AC 150 at [8]). The stringency of the rule in the context of the duties owed by company directors is reflected expressly in sub-section 175(3): "This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity)"

Finally, on the no conflict duty, it has been held that "the key question in every case is
whether, in the particular circumstances, there is a real sensible possibility of conflict" (see Commonwealth Oil Gas Co Ltd v. Baxter [2009] SLT 11233 at para. 78, per Lord Nimmo Smith, and Re Bhullar Bros. Ltd [2003] BCC 711 at para. 30, per Jonathan Parker LJ.) The corresponding language in CA 2006 s. 175 is that in subsection 175(4)(a): "This duty is not infringed ... if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest."

55. Second, as the Deputy Judge observed at [268], whilst breaches of duty by directors often take the form of a director misapplying assets of the company:

> "*Although a company director may certainly breach his duties to the company by misappropriating its existing assets, that is not a pre-requisite. He may also breach his duties on other ways, not at all dependent on the misapplication of preexisting corporate assets, for example by putting himself in a position of conflict and thereby making an unauthorised profit.*"

And at [269]:

> "*A good example is Re Bhullar Bros. Ltd [2003] EWCA Civ. 424, [2003] BCC 711. In that case, a company owned an investment property which was used as a bowling hall. Two directors of the company came to know that a plot of land next to the investment property was for sale, and they acquired it using another company which they owned and controlled called Silvercrest. They said that there was no breach of fiduciary duty in doing so because the company itself has shown no interest in acquiring the plot of land at the relevant time, and accordingly had not been deprived of any "maturing business opportunity". This argument was rejected and the Court of Appeal affirmed the declaration made by the judge at first instance that Silvercrest held the plot of land on trust for the company. It was not necessary, in determining that there had been a breach of duty, to show that the company*

had some pre-existing interest in the opportunity in question. Jonathan Parker LJ said as follows:

"[27]. I agree with Mr Berragan that the concept of a conflict between fiduciary duty and personal interest presupposes an existing fiduciary duty. But it does not follow that it is a pre-requisite of the accountability of a fiduciary that there should have been some improper dealing with the property 'belonging' to the party to whom the fiduciary duty is owed, that is to say with trust property …
[28]. In a case such as the present, where a fiduciary has exploited a commercial opportunity for his own benefit, the relevant question, in my judgement, is not whether the party to whom the duty is owed (the company, in the instant case) had some kind of beneficial interest in the opportunity; in my judgement that would be too formalistic and restricted an approach. Rather, the question is simply whether the fiduciary's exploitation of the opportunity is such as to attract the application of the rule."

56. Finally, Mr Weaver referred to the following additional observations relevant to remedy at [270]:

> "*Bhullar Bros. Ltd also neatly illustrates the point that even in cases not involving the misapplication of pre-existing corporate property, the appropriate remedy may nonetheless be a proprietary one. Thus, in Bhullar Bros. Ltd itself, a constructive trust was identified as the appropriate remedy, reflecting the equitable rule that where a fiduciary acquires a benefit in breach of duty, he is to be treated as having acquired the benefit on behalf of his principal, so that it is beneficially owned by the principal (see FHR Ventures LLP v. Mankarious [2014] UKSC 45, [2015] AC 250, per Lord Neuberger at [7].)*"

57. Ms Shuffrey did not dispute the principles as such. Instead, she submitted that the law in this regard (including the circumstances in which a breach may occur, the various possible defences and the appropriate relief) is "*notoriously complex*", and that in the present case (although impossible on this variety of application, by means of the process and procedure inappropriately chosen by the Administrators) the court would be required to determine at least the following:

    57.1. whether the s. 175 duty was disapplied by virtue of s. 175(3), because Holdings, as the intended future purchaser, was party to the arrangements under which the Land had been "*temporarily*" purchased by the Respondents,

and whether in that context, Mr and Mrs Ball had declared their interests in the arrangements to Mr Woolfe, or he already knew of them, under s. 177;

57.2. whether s. 175 was engaged in circumstances where Mr and Mrs Ball "*were not in fact seeking to exploit an opportunity for profit but rather to protect their position (in light of the extent of the Companies' indebtedness to Mr Ball) pending an intended resale to Holdings*";

57.3. whether, if s. 175 was engaged, the transaction or arrangement was validly authorised by the companies' directors in accordance with s. 175(4);

57.4. whether the Respondents could rely on shareholder ratification or acquiescence, which would raise the question of solvency;

57.5. whether the Respondents might seek relief under s. 1157 of the CA 2006; and,

57.6. whether a constructive trust is the appropriate remedy or merely an account of profits.

58. I shall return to these matters below in connection with the Administrators' case on constructive trust, but for the moment, observe first, that there was nothing to prevent the Respondents from raising these points in their evidence, and second, that to some extent, the points raised are points of law.

The Scope of the Administrators' Application

59. In principle, as I have explained, the Administrators' case that the Land is held on resulting and/or constructive trust is in principle capable of being brought under either or both s. 234 of the IA 1986 or paragraph 63 of Schedule B1.

60. The application itself sought "*a declaration that* [the Land] *is held by the Respondents on resulting and/or constructive trust for the benefit of Homes or Holdings*" and an order that the Land be transferred to Homes or Holdings. The grounds upon which relief was sought were said to be set out in the first witness statement of Mr Kendall.

61. In that statement, having set out the evidence, Mr Kendall stated at paragraphs 49-51, the Administrators' "reasons" justifying the relief sought. In short, they were:

61.1. that "*there was an intention*" to transfer the Land to Homes and/or Holdings;

61.2. that accordingly, the purchase price was paid by Homes to MDC;

61.3. that the Land was of evident and paramount value to the companies, and to the development project;

61.4. that they had not found or been given any reason for the transfer having instead been made to the Respondents rather than to Homes and/or Holdings, including in response to the "*extensive requests*" made in pre-action correspondence;

61.5. that relief was sought "*on the basis the Respondents owe fiduciary duties to the Companies, including duties to act in the best interest* [sic] *of the Companies and not put themselves in a position of conflict with the interests of each of the Companies*";

61.6. that the Land is held by the Respondents on resulting and/or constructive trust for Homes or Holdings.

62. It was therefore plainly stated, albeit perhaps somewhat summarily, that the constructive trust claim was brought by reference to a breach of the Respondents' duties as directors, on the basis that the Land was intended to be an integral part of the development, was very valuable to the companies, was paid for by Homes, and yet had been transferred to the Respondents for no discernible reason, and certainly not for a reason of any discernible benefit to the companies, which could not, as a result, complete the development as intended. In substance, all of that was clear.

63. Furthermore, the pre-action correspondence, including in particular Addleshaw Goddard's letter of 31 October 2023, included the allegation (at that point in support of a claim to compensation) set out by reference to the duties of directors as provided for in sections 171-176 of the CA 2006, that the Respondents had acted wrongly by "*allowing* [Homes] *to make the Purchase Payment and gift the Land to you and Mrs Ball for no immediate apparent benefit to* [Homes]".

64. Subsequently and in response to the application issued on 12 January 2024, the Respondents first agreed to the order of 19 January 2024 (which provided for an exchange of written evidence followed by a final hearing) and then served the evidence that I have summarised above. At no point until shortly before the hearing (in Ms Shuffrey's skeleton argument) did the Respondents complain, whether in correspondence or evidence, that either the resulting or the constructive trust claim was not understood by them, or open to the Administrators, or that a different procedure was required (albeit I acknowledge that they were entitled to hold the Administrators to any consequences of their own chosen approach).

65. In my view, in those circumstances, the Respondents, who are legally represented, were on notice of, and either understood or should have understood, that the Administrators had advanced a constructive claim based on breach of fiduciary duty. It was open to them to respond and state their case as they wished.

66. In Mr Kendall's second statement, which was made on 14 February 2024, at paragraphs 16-18, under the heading "*Conflict of Interest*", he said that there was a "*clear conflict of interest*" because "*the opportunity for the Companies to take ownership of the Land was taken away to the direct detriment of the Companies and the progress of the Development Site*", without there having been any explanation of possible benefit to the companies or justification of the "*significant advantage to the Respondents*". At paragraphs 19-24, under the heading "Acting the Best Interests of the Companies", he set out the detriment caused to the companies by the Respondents having taken the benefit of the transfer, and referred to the "*obvious financial difficulties*" and "*financial distress*" that I have described above.

67. Although again I acknowledge that it is not for the Respondents to inform the Administrators' choice of process, no complaint was raised about the presence of these allegations until the hearing before me.

68. In the circumstances, the Respondents knew the particulars and nature of the case which they faced sufficiently well to provide their response; they gave no sign otherwise. I shall therefore treat the whole of the Administrators' case, as it was advanced, as a case open to them in principle, but subject to the constraints inherent in the process which they have chosen – including that there was no cross-examination

and no disclosure. I reject the argument that as a matter of fairness, pleadings were a necessity.

The Resulting Trust Claim: Discussion

69. I reject the claim that the Land is held on resulting trust for Homes (and/or, to the extent argued, for Holdings).

70. Essentially, on the evidence, although the purchase price was certainly paid by Homes from its own bank account, it was not paid by Homes "*in the character of a purchaser*"; moreover, if and to the extent the issue is sensibly distinguishable, the parties plainly intended that the Respondents would acquire and own the Land, rather than Homes (or indeed Holdings).

71. That conclusion is based on the following.

    71.1. Mr and Mrs Ball's untested written evidence, which I therefore accept in this respect, was that they intended to acquire the Land, and to become and be its owners, to be sold to Holdings at some future time, in uncertain circumstances, depending upon further development funding and the agreement of a purchase price. That arrangement is wholly inconsistent with an intention that Homes (or indeed, Holdings) was to be the purchaser from MDC.

    71.2. Similarly, in substance, the Minutes of Holdings' Board Meeting on 16 May 2023 expressly stated that the Respondents were to be the purchasers and owners of the Land. Mr Weaver said, and I accept, that the Meeting was not quorate, because it was attended by only one of Holdings' directors, but it was nonetheless a contemporaneous record of the Respondents' intentions, and therefore of Homes' intention, since they were its only directors as at the date of transfer. In respect of Holdings, and as to Mr Woolfe, who was not present, the evidence was that his role in the business was nominal. Similarly therefore, the Respondents' intentions would likely be attributed to Holdings.

    71.3. In my view, the Minutes evidenced an intention that by some means – although not yet settled upon – the use of "*Mr Ball's own funds*" to make the purchase would be reflected in the companies' accounts. If true, it is irrelevant

that Mr Ball mistakenly thought that the money he had lent to Holdings continued to be "*his*" money to spend as he pleased. For present purposes, the important point is that however it was to be accounted for, the payment was not to be made by Homes as or intending to be or in the character of the true purchaser; whatever else might have been intended, it was certainly not that; it is plain that the Respondents intended to become the Land's owners.

71.4. To the same end, the email correspondence between the Respondents and Shakespeare Martineau, and the evidence it provides of their oral discussions, is only consistent with an intention that the Respondents would be the owners of the Land, for example, the emails of 18 and 25 April 2023, and of 24 May 2023, referred to above at paragraphs 9, 10 and 13. Again, I acknowledge that Ms Bovington might have thought that Mr Ball was "*providing the purchase monies*" and might therefore have thought, for example, that additional funds were being provided by him, but again, that is not relevant to this point, which is that the price was not paid by Homes as, and intending to be, the purchaser; quite the opposite.

71.5. Finally - leaving aside the question whether a resulting trust might in some cases render irrelevant the trust declared in the TR1 - that form, in the present case, signed by the Respondents, does evidence their subjective intention at that time to become the beneficial owners of the Land despite the price having been paid by Homes, of which they were the only directors.

71.6. Ultimately, other than the mere, and in my view adventitious fact of the payment having come from its bank account, there was no evidence at all to suggest an intention that Homes would purchase and own the Land beneficially. All the available evidence showed that the entire arrangement was otherwise; that the Respondents would acquire the entire interest, possibly to be sold by them to Holdings at a future time.

The Constructive Trust Claim: Discussion

72. I accept the Administrators' case that the Land is held on constructive trust for the companies: it was acquired by the Respondents in manifest breach of their duties under s. 175 of the CA 2006 (and also under s. 172).

73. I reach that conclusion for the following reasons.

74. Whether or not it comprises a ransom strip, the Land certainly was, and is, a valuable, integral part of the development project, required by the companies and intended to be used by them to construct the presently (and long) contemplated means of access to the Site. As Shakespeare Martineau wrote to MDC on 3 December 2021: "*During the extensive 7 year planning process, the removal of the existing bus stop on the MDC Bus Stop Land as part of the main site access has been in the contemplation of all parties for the duration of the planning processes*." Similarly, the draft Section 278 agreement exhibited by Mr Kendall named Holdings and Homes as parties, but not the Respondents. Accordingly, the commercial opportunity to buy the Land arose in the context of the development, and for its purposes, as the Respondents knew; it was an opportunity which the companies had long thought to exploit. It was not until about April 2023 - only the month before the eventual acquisition - that the proposed arrangement was changed, and the Respondents interposed themselves as owners.

75. The Respondents were bound to protect the companies' interests, and to act with undivided loyalty, in good faith and in their best interests. Manifestly, the acquisition in their own names of the Land, needed by the companies for the purposes of their business, placed the Respondents - as is now abundantly plain from the fact of this litigation - in a position where their interests and those of the companies were in sharp conflict. They exploited and diverted to themselves an opportunity to acquire property which the companies themselves needed. On their own evidence, they placed themselves in a position in which it would at some point be necessary (albeit there was no alleged obligation) to negotiate for a re-sale of the property to Holdings, at a "*purchase price* [to be] *agreed*". In no sense did any of that promote the companies' interests.

76. Furthermore, despite ample opportunity to do so, the Respondents have failed positively to advance any good reason for having acquired the Land themselves, consistent with the best interests of the companies. In their evidence, they referred to the companies' funding having been "*exhausted*", and in her skeleton argument, Ms Shuffrey said that the Respondents were "*not in fact seeking to exploit an opportunity for profit but rather to protect their position (in light of the Companies' indebtedness to Mr Ball) pending an intended re-sale to Holdings*". Those points however are not in

their favour: in effect, they accepted that they were acting to protect their own private interests, not those of the companies for which they were fiduciaries.

77. Moreover, the evidence that the companies' funding had been "*exhausted*" is not consistent with the admitted fact that Homes paid the purchase price. Similarly, Mr Ball's evidence that he funded the acquisition personally, himself, "*without any assistance from banks or funders*", using monies that he had loaned, was not true, as explained above – the money came from Homes, even if in some sense, possibly, the product of Mr Ball's previous lending. At best, the advantage to the companies was that Holdings might at some point have come to owe less to Mr Ball on his Loan Account. In any event (in consequence of s.175(2)) it would not excuse the Respondents' breach of duty to establish that the companies could not have taken advantage of the opportunity.

78. Ms Shuffrey in effect raised the possibility that the arrangement might have been agreed, authorised or ratified by the companies. As to that:

    78.1. there was nothing to prevent the Respondents, as I have said, from setting out their case in their own statements – even if at the same time they might have said that they required further evidence; they should have understood the case being advanced against them;

    78.2. they cannot rely on the Holdings' Board Meeting of 16 May 2023 as having authorised the acquisition because it was not quorate, and was therefore ineffective for the purposes of s. 175(6) of the CA 2006;

    78.3. but in any event, at the time of the acquisition, even if they might have survived by means of further negotiated funding, the companies were plainly unable to pay substantial debts that had by then fallen due (and were not subsequently paid): see paragraph 23 above; if anything, Mr Ball's own evidence (that funding had been "*exhausted*" and that further funding options were being "*explored*") supported that conclusion; in those circumstances, an arrangement made by the directors which resulted in one of them being preferred within the meaning of s.239(4) of the IA (as was apparently its very purpose – "*to protect their position*") is not one which benefitted the creditors

as a class or was even intended to do so; there was nothing at all in the evidence to suggest that the creditors' interests had been considered, let alone that they had in any sense been advanced or protected by the arrangements - quite the opposite;

78.4. it follows that the arrangement and the breach was not one which was properly authorised or forgiven by the companies.

79. In the circumstances, in my judgment, the appropriate remedy is the imposition of a constructive trust. Other than a submission that the issue of the appropriate remedy is or can be "*notoriously complex*", I was given no real reason not to reach that conclusion, which is consistent with the passage and principles set out above at paragraph 56.

80. For two reasons, returning to the point discussed above, I do not accept that a constructive trust is not appropriate or permissible in a case such as this where the directors have declared a trust of the property in favour of themselves in the TR1.

80.1. First, as in the Princess Tessy of Luxembourg case, the Respondents' declaration in the TR1 was ineffective, because the beneficial interest in the Land vested in the companies on transfer.

80.2. Second, in any event, the constructive trust imposed is not dependent upon or designed to reflect the parties' intentions (and therefore contradicted by the Respondents' intentions as expressed in the declaration). On the contrary, the intention, as I have described, was that the Respondents would become the beneficial owners, not the companies; had they not intended that result, there would have been no need or basis upon which to establish a breach of duty, and that they did so, cannot be a reason not to grant a proprietary remedy which results in a trust in favour of the companies of the whole property and interest which they hold, whatever its nature and extent; in effect, in consequence of their breach, all that they hold is subject to the trust. I do not accept that two directors acting in breach of duty might avoid the proprietary consequences of that breach by declaring a trust for themselves of property that they wrongfully acquire, any more than that a single director could do so as transferee of the whole legal and beneficial title.

81. Finally, it was suggested that the Respondents might seek relief under s. 1157 of the CA 2006 on the basis that the Respondents relied on the professional advice of Shakespeare Martineau, and that they intended to re-sell the Land to Holdings as soon as the re-financing was completed without any intention of profiting from the arrangement. It was suggested that the court's powers in that regard could not be properly considered on this application, without pleadings and further evidence. I do not agree:

    81.1. first, the point could have been raised by means of the Respondents' statements;

    81.2. second, Mr Ball's evidence was that a purchase price for the future sale to Holdings would have had to be agreed; it was not his evidence that he had no intention of making a profit; moreover, it was not his evidence that the Respondents were obliged to sell the Land to Holdings at all, or even to negotiate for its sale;

    81.3. third, whether or not they acted honestly and/or on advice and/or with any intention to make a profit on re-sale (rather than merely to reduce Mr Ball's exposure as a creditor) the Respondents acted in breach of their duties as directors; the disputed arrangement entailed an acute conflict of interest, and was not beneficial to the companies' creditors as a class; I was given no basis upon which to conclude that it was reasonable of the Respondents to protect their own interests - even if intended as some sort of temporary measure - at the expense of other creditors, or to conclude that the court ought now, in the exercise of its discretion, relieve them of liability to the detriment of the creditor class of companies in administration.

82. In the circumstances, for the reasons explained, I will declare that the Land is held on constructive trust for the companies, and make such consequential orders for its transfer as are appropriate.

Dated: 28 March 2024