Neutral Citation Number: [2024] EWHC 739 (Ch) Case No: CR-2020-003578

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

IN THE MATTER OF NEXBELL LIMITED (Company No: 09221066) AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice Rolls Building, London, EC4A 1NL

1 May 2024

Before :

INSOLVENCY AND COMPANIES COURT JUDGE BURTON

- -

Between :

SUJATA CHOHAN	**Claimant /Second Part 20 Defendant**
-and-	
(1) JAYENDRA VED	**Defendant/ Part 20 Claimant**
(2) NEXBELL LIMITED	**Defendant/ Third Part 20 Claimant**
-and-	
PARESH CHOHAN	**First Part 20 Defendant**

- -

Tim Calland (instructed by **VMA Solicitors**) for the **Claimant**
Hugh Sims KC and Richard Ascroft (instructed by **Vyman Solicitors**) for the **Defendant**

Hearing dates: 3rd to 5th July 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 1 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

INSOLVENCY AND COMPANIES COURT JUDGE BURTON

ICC Judge Burton :

1. This judgment follows the trial of:

   i) Mrs Chohan's derivative claim under Chapter 1 of Part 11 of the Companies Act 2006 (the "Act") on behalf of Nexbell Limited (the "Company") alleging breaches by Mr Ved of duties he owed to the Company as (at all relevant times) its sole director. The claim in particular concerns Mr Ved procuring that the Company grant him a lease, with security of tenure, of the Company's principal asset: office premises at 5 Theobald Court, in Elstree ("5TC"). Mrs Chohan claims that the lease was void ab initio or has since been avoided; and

   ii) Mr Ved's Part 20 claim for declaratory and other relief in relation to a joint venture agreement which he entered into on behalf of himself and his family with Mrs Chohan's husband (on behalf of Mrs Chohan and their family) relating to the terms upon which it is claimed Mr Chohan and Mr Ved agreed that 5TC would be occupied.

Background

2. Mr Chohan and Mr Ved attended the same school in Mombasa, Kenya. They became reacquainted some time after they both came to live in the UK. Mr Chohan is a solicitor and Mr Ved an accountant. From November 2008, Mr Ved ran his accountancy business, "Sterling Associates" from part of the premises comprising 5TC pursuant to a series of written licence agreements with the then tenant of 5TC, Eutopia Ltd ("Eutopia").

3. In or around March 2014, Mr Chohan left his former firm of solicitors, Magwells and a receiver and manager was appointed. Mr Chohan was looking to set up a new firm, VMA Legal Services Ltd ("VMA") but needed first to obtain approval from the Solicitors' Regulation Authority ("SRA"). Whilst Mr Chohan was working as a consultant for Osmond & Osmond, Mr Ved allowed him to operate from a room on the first floor of 5TC, initially for no charge.

4. Some time later in 2014, Mr Ved learned that the trustees of the retirement benefit scheme that owned 5TC (the "Trustees") were intending to sell their freehold interest. Mr Ved and Mr Chohan agreed that their families should buy it via a joint venture company. The Company, that had been incorporated in September 2014 for a different

purpose, was to be the joint venture vehicle. On 1 October 2014, Mr Ved received one subscriber share and the Company allotted to him a further 99 shares. On 12 January 2015, Mr Ved was registered as the Company's sole shareholder and appointed as its sole director. Two days later, he transferred 50 of the shares to his wife. This was on the basis of an understanding or agreement that 50% of the shareholding would be held for the benefit of Mrs Chohan.

5. It was intended that 5TC would be purchased with a bank loan with each family equally contributing the balance. A few days after the freehold of 5TC had been purchased by the Company, Mr and Mrs Ved each declared a trust of 25 shares in favour of Mrs Chohan.

6. Both parties recognise that there was an oral joint venture agreement concerning 5TC (the "JVA"), but the dispute now before the Court centres around its terms, in particular in relation to their occupation of 5TC.

7. At the time of the Company's intended purchase of 5TC, there was still some time to run on Eutopia's lease. The parties agreed that it would be more tax efficient for the Company to buy 5TC subject to that lease, which would then be assigned to Mr Ved. However, when it seemed likely that the proposed lender would be unlikely to fund the acquisition of a lease with so little time left to run, it was decided that Eutopia's lease would be surrendered to the Trustees, who would then grant a new lease to Mr Ved immediately before the Trustees sold the freehold to the Company, now subject to that new lease.

8. On 31 October 2015, the Trustees granted Mr Ved trading as Sterling Associates a lease of 5TC for five years, due to expire on 28 September 2020 (the "Original Lease"). Although neither the Company nor Mr and Mrs Chohan were to be parties to the Original Lease, it was drafted by Mr Chohan. The Original Lease expressly excluded the security of tenure provisions of Part II of the Landlord and Tenant Act 1954 (the "1954 Act"). The rent reserved by the Original Lease was £45,000 with stepped increases to £51,000. Despite drafting the Original Lease and seemingly amending the draft at Mr Ved's request (on 7 September 2015 Mr Ved informed Mr Chohan that the user clause should not refer to class A2 use) when directly asked by the Trustees' solicitor who was acting for Mr Ved/Sterling Associates in relation to the grant of the Original Lease, Mr Chohan replied to say that Mr Ved was representing himself. Mr Ved confirmed this in writing on 15 September 2015.

9. On the same day that the Trustees granted the Original Lease, the Company exchanged contracts to purchase the Trustees' interest in the freehold of 5TC.

10. The Company completed its purchase of 5TC on 11 November 2015. The following day, Mr Ved/Sterling Associates granted Mr Chohan and his new solicitors firm, VMA, a licence to occupy part of the first floor of the premises until 31 December 2015. Further licences, each for the same period and each drafted by Mr Chohan were granted

on the same day to two accountancy firms in which Mr Ved had acquired an interest, AU Chauhan and XAT Accountancy Ltd.

11. Mr Ved engaged property agents to find a sub-tenant for the ground floor of 5TC. When a prospective sub-tenant was found, it became apparent that Mr Ved was no longer in a position to grant a 5-year sub-lease because the Original Lease was now shorter than that. Mr Chohan informed Mr Ved that the Company could grant an extended lease to him which would then have sufficient time to run to enable him to grant the required sub-lease. He suggested that alternatively, they could restructure things so that the Company would grant the lease.

12. That particular, proposed sub-tenant fell away, but around August 2016, Mr Ved agreed that he would grant a five-year sub-lease of the ground floor to Success Appointments Limited ("Success"), which would again require an extension to the Original lease. On 12 August 2016, Mr Chohan's colleague at VMA, Krishan Kerai, emailed Mr Ved regarding the proposed ground-floor sub-lease and enclosed a client care letter addressed to Mr Ved. On the same day, VMA emailed Success' solicitors stating that they would be acting on behalf of Mr Ved. They provided the draft lease,

a warning notice regarding exclusion from the security of tenure provisions of the 1954 Act, a statutory declaration in relation to the exclusion, a draft rent deposit deed and office copy entries relating to the freehold of 5TC. Around the same time, VMA prepared an extension to the Original Lease as well as the draft sub-lease.

13. A couple of days later, on 15 August 2016 Mr Ved emailed Mr Kerai, copied to Mr Chohan, saying:

> "The lease does not refer to the three month rent deposit – I have seen the rent deposit Deed but does the lease not mention this.
>
> Superior lease term to be varied to extend to time beyond the five year period.
>
> We have all the utilities in the store room in the ground floor to which we will require access. How do you propose we deal with this issue.
>
> Otherwise all appears fine."

14. On 30 September 2016, Mr Chohan emailed Mr Ved referring to the difficulties he had recently experienced with his former partner at Magwells and saying that both he and his wife felt it would be best to regularise matters between their respective families. He asked Mr Ved to arrange for the Company shares held on trust for Mrs Chohan to be transferred by Mrs Ved to her. He said that he had asked his wife to pay £200,000 to whichever of the Company's or Sterling Associates' account Mr Ved preferred. He also asked Mr Ved to propose how the rent for 5TC should be varied or adjusted, as well as any shortfall contribution he required to take into account the period during which one floor of 5TC remained vacant. Mr Ved replied:

> "We had brief discussion and what we had agreed was to regularise sometime later and not immediately.
>
> I am not happy with the tone of the email and we need to have one to one and not have this in writing."

15. In early October, the parties were engaged with solicitors acting for Success, trying to conclude the lease of their existing premises so that they could move forward with their proposed occupation of the ground floor.

16. On Thursday, 6 October 2016, Mr Chohan wrote to Mr Ved suggesting they have a meeting at the weekend to discuss the Company. Mr Ved replied to say that he was happy to meet but wanted the meeting to be just the two of them. He referred to Prakash who I understand is Mr Chohan's former partner at Magwells. He said:

> "I wish to go alone on this matter as I do not wish to be Prakash's place in five years' time being bombarded with emails and legal threats. I do not have the money or the energy to fight anyone and therefore it is better that the split takes place now.

> I agreed to you coming in on the basis that you were to take a floor in the buil ding but you are now treating this as an investment which was never agreed. I therefore feel that I should go alone and should be grateful if we could discuss this and resolve this amicably.
>
> You have dictated your terms on the building from day one and we both have different prospective in life and despite my mentioning that we nee d to discuss, you sent an email to Sujata and Vishal stating that I had agreed t o formalise matter when I clearly had not done so. You also want you children to be part of the property which was the first because we had not discussed this.
>
> We need to resolve this amicably and go our own ways and I sincerely hope that you will neither object nor make it difficult for me." (sic)

17. Mr Chohan replied half an hour later, saying:

> "Can we meet this weekend and resolve the matter.
>
> The matter with Prakash has nothing to do with the investment that was jointly undertaken, as you are well aware. There are no legal threats in any of the emails sent to you previously. Numerous investments are jointly held, which you have considerable experience managing and assisting with, like I do.
>
> We have numerous clients that are successfully able to own such investments in a JV structure, so I am unsure of your concerns.
>
> I agree that the intentions of both partners need to be similar, which is to create an investment vehicle for future generations. That was our respective objective. I don't believe that has changed, irrespective who owns shares in the Company for succession purposes. You decided that the 50% shareholding was to be held by [Mrs Ved] and you were happy for the other shareholding to be held by [MrsChohan]. I am considering succession planning as you are well aware.
>
> When this matter was brought up between us and in [Mrs Chohan's] presence at my home, you had no issues either. I agree that it is best that matters are dealt with amicably in a manner which creates clarity.
>
> What time and where, please?"

18. Mr Ved replied the same night, saying that having seen how Mr Chohan had acted so far, he could not see them being in partnership in the building. He wanted a meeting to resolve matters amicably. Mr Chohan replied that he also wanted things to be resolved in a fair and reasonable manner and asked Mr Ved to explain what he meant by "having seen how you have acted". He said:

> "Even after I expressed my desire to move to Central London (which is in the best interest of my business) in the presence of Milan and yourself, you never raised any concern with the jointly held investment. Until the email today, this has never been suggested to either [Mrs Chohan] or myself to date."

19. It appears that they met at 5TC early on Friday 7 October 2016. Mr Chohan emailed the following Monday asking if they could discuss the outstanding issues saying he had some options that they could put to the bank regarding the restructuring (which I take to be the restructuring of the Original Lease as his email noted that it only had 4 years to run and they were in the process of negotiating a 5-year sub-lease with Success) and that they could discuss them "along the lines we discussed when we met last Friday".

20. Mr Ved replied, forbidding Mr Chohan from speaking to the Bank's representative and saying:

> "… and if you do then you might as well forget the friendship and I will walk away from this office which has always been your intention."

21. Mr Chohan replied that he was doing no more than implementing the declaration of trust and that whilst Mr Ved had apparently asked to purchase Mrs Chohan's 50% interest for £300,000, they did not currently wish to sell it.

22. There were many further exchanges that day. One involved Mr Ved saying that either Mr Chohan should walk away with Mr Ved paying him £200,000, or he would walk away with Mr Chohan paying him £200,000 plus the amount spent on 5TC and Mr Chohan's share of the rent, whereupon Mr Ved would vacate 5TC within one year. Mr Chohan replied to say that he had never asked Mr Ved to vacate 5TC.

23. At 5.18pm on 12 October 2016, Mr Ved said:

> "I brought you into this good faith. I could have used Mama's funds if I wanted to.
>
> Your insistence on regularising the matter has caused all this issues as I do not want to look stupid in front of the bank. I can understand [Mrs Chohan] has put pressure on you and like I said I would rather deal with this now than five years down the line."

24. The following day, further progress was made between Mr Chohan and the solicitors acting for Success. Mr Chohan appears to have forwarded the correspondence to Mr Ved who replied on 14 October 2016 saying that they needed "to resolve the pending issue before I complete on the lease as I do not wish to be held at ransom after the event". Later that evening, Mr Ved sent his wife what appears to be a draft email to Mr Chohan, setting out the terms under which: (i) they would transfer their shares in the Company to Mr Chohan's designated family recipients; (ii) they would pay him and his wife approximately £200,000; (iii) he would find new premises; (iv) the Company would accept a surrender of his lease without penalty or any claim for dilapidations; and saying (v) that once "SACA Ltd" had moved, it would invoice the Company for

the cost of refurbishing the second floor, including the furniture, which he did not intend to take to a new office.

25. The email that was sent to Mr Chohan on 17 October 2016 included a longer introduction, setting out Mr Ved's understanding of their agreement and his reasons for now wanting to bring it to an end:

> "On Wednesday, 12 October 2016, following our brief telephone conversation, we entered into a frenzy of email exchanges when you basically threw the kitchen sink at me by questioning my honesty, integrity, motive, ability to fund the purchase of 5 Theobald Court on my own and finally as a last insult throwing my late Kaka's name into the dispute.
>
> Let me put the whole situation into perspective, I have from the first day acted in the manner in which you have dictated - by not wanting your or [Mrs Chohan's] name as shareholder in Nexbell. It was entirely your decision. As a result, I applied to Lloyds for a loan stating that I personally had the funds and I together with [Mrs Ved] were solely acquiring the premises. Despite you not wanting to accept the two DOTs, I handed them to you which you took home. For reasons you have already explained to me, you now want to formalize the agreement and make me lose my credibility with the bank. Furthermore, you have copied the email of 30 September 2016 to Sujata and Vishal (in your own words for IHT planning), without discussing the same with me. It appears that when you click your fingers, I have to jump.
>
> You have not considered my side and the impact it would have on me. Jas I resisted to formalize the situation, you threatened me - that you would call Peter at the bank and not deal with the lease with Success Appointments until I made you a shareholder and director of Nexbell which is totally unprofessional.
>
> You brought this subject up when you realized that the rent from the ground floor was in excess of what I was paying for each floor and kept on insisting when we met at your offices that I surrender my lease and formalize so that all rent can go to Nexbell. This is pure greed on your part. However, I have never accused of you being greedy.
>
> At that time, you did not consider the fact that I had been paying rent, rate and service charges on the entire office solely since last November. You did not offer to pay your share. It was only after I mentioned the fact (during our Sunday walk) that you were supposed to have occupied one floor and shared the rent that you stated that this can be dealt with at the same time as formalizing everything.

> I have in one of my emails in the past mentioned that both of us have a different outlook for this building, i.e. I use this as my office whereas you have moved out and are now treating it as an investment. I want to spend money on this building to improve the outlook whereas your wish is to pay loan quicker. You want to be debt free on this property whereas paying interest at 2.55% OBR for next 25 years is something I prefer to do for tax purpose. We clearly have two different views which will cause problems in the future.
>
> In the absence of a reply from you to my email sent to you early Friday morning, (14 October 2016 at 6.53 am) I have, for the sake of my health, decided to transfer both Suchita's and my share in Nexbell to your family members.
>
> This I believe is the best action to take since receiving your first email on 30 September 2016 (when I had specifically requested you not to do so) on this subject, Based on acrimonious email exchanges on Wednesday, when you accused me of being greedy and mentioning my late Kaka's teachings, I think it is better that this matter is resolved now rather than anytime in the future."

26. Mr Chohan did not respond until 21 October when he said that he had been abroad and suggesting that they meet upon his return to the UK. Mr Ved did not wish to discuss matters further and informed him that he and his wife would be instructing lawyers. Mr Chohan sent a detailed reply on 27th October 2016 maintaining that he had never desired or intended for Mr Ved/Sterling Associates to vacate the building and that it was simply as a result of the expensive and challenging dispute surrounding his departure from Magwells that he had wanted to regularise the shares held on trust. As regards rent, he referred to his earlier email of 20 September 2016 inviting Mr Ved to propose how the rent should be adjusted in whichever way he considered appropriate. He said that he wanted to continue the joint venture but if Mr Ved insisted on bringing it to an end, he would need to see the various documents and financial statements to enable him and his wife to consider the proposed terms for his departure from the partnership, as set out in the email of 17th October.

27. Having not received a reply by 4 November 2016, Mr Chohan wrote again asking for the various documents they would need in order to consider an offer for him to leave. In the same email, he appeared impliedly to reject Mr Ved's suggestion that the Company would accept a surrender of the lease without penalty and would pay for the second-floor furniture, suggesting instead that Mr Ved/Sterling Associates could assign the lease to a third party with the Company's consent, for a premium which could include the cost of the furniture.

28. By 11 November 2016, Mr and Mrs Ved had instructed Ingram Winter Green solicitors ("IWG"). They wrote to Mr Chohan asking that all future correspondence regarding 5TC and their interest in the Company be directed to them.

29. On 25 November 2016, VMA sent a letter before action to IWG (i) directing that the Company shares held on trust for Mrs Chohan be transferred to her; (ii) demanding

receipt of the documents requested to enable the proposed sale by Mr Ved of his shares in the Company to progress; (iii) stating that Mrs Chohan did not wish any lease or underlease of 5TC to be granted and requesting that all concerned refrain from granting any such lease or underlease pending completion of the sale of the Veds' interest in the Company; and (iv) demanding that Sterling Associates return the Chohan's private documents for which they would send a courier, confirming that they would immediately pay an invoice for any outstanding fees on receipt.

30. On 9 December 2016, Mrs Chohan issued a claim to enforce the trust by demanding delivery of the Company shares to her (the "Trust Proceedings").

31. On the same date, Mr Ved procured that the Company granted him a new lease, drafted by Gandecha & Pau solicitors, for a term commencing on 31 October 2015 and expiring on 28 September 2021 (the "New Lease"). The New Lease extended the term of the Original Lease and was in largely the same terms except that it now included the security of tenure provisions of the 1954 Act and also included a tenantonly rolling break clause. The rent reserved by the New Lease reflects the rent in the Original Lease but took no account of any anticipated rent to be received by Success.

32. The Trust Proceedings came to an end on 11 December 2017 when Mr and Mrs Ved served notice of discontinuance in respect of their Part 20 claim and submitted to judgment. Three days later, Mr Chohan was appointed as an additional director of the Company. In the absence of agreement on any issue, his appointment placed the Company into deadlock.

33. On 30 June 2020, VMA sent a letter before action on Mrs Chohan's behalf inviting Mr Ved to confirm that the New Lease is void. Mr Ved instructed Kapoor & Co to respond saying, inter alia, that it was agreed and understood on 12 November 2015 when the Company purchased 5TC that Mr Chohan's former legal practice would also become a subtenant of 5TC, but following his failure to do so, Mr Ved sought to meet the rent due under the Original Lease by subletting the surplus parts of 5TC, including to Success. As regards the security of tenure granted to Mr Ved under the New Lease, his solicitors stated that from the Company's point of view, there would have been no good reason "to insist on exclusion from renewal rights" because:

> "i) no rent due to Nexbell was adversely impacted
>
> ii) the Property had been acquired with intent that our client and his business would be the long-term tenants of the Property as would be your client (the 1954 exclusion only having been agreed when the freehold was owned by a third party) and so the continuation in occupation (under any lease renewal which would be in market terms at the time of renewal) by our client was not an interest that would obviously be adverse to the interests of Nexbell

> ii) our client, who had an equal interest in Nexbell, must surely and in any event be more preferred as a tenant than a third party".

34. The letter continued that the dispute between Mr Chohan and Mr Ved arose because Mr Chohan sought to take advantage of the position presented by Success, to renegotiate the terms of the Original Lease as a condition of proceeding to comply with instructions given by Mr Ved to VMA in his capacity as the Company's sole director, to grant a new headlease of 5TC. It asserted that whilst Mr Ved was acting in good faith, Mr Chohan was seeking to exploit what he perceived to be an opportunity to renegotiate the terms of the Original Lease in a manner that would have benefitted only his family:

> "The Conflicts which compromised his professional duty to our client at the time are obvious."

35. On 27 August 2020 Mrs Chohan issued her derivative claim. On 15 May 2021 James Pickering QC sitting as a deputy High Court Judge granted her permission to continue it pursuant to section 261 of the Companies Act 2006 and ordered that she be indemnified out of the Company's assets in respect of the legal costs of the claim.

36. On 17 September 2021, the Court of Appeal refused Mr Ved's application for permission to appeal the grant of permission to continue the derivative claim. Mr Ved's Part 20 claim was issued a few days later on 24 September 2021.

Witnesses

37. Mrs Chohan relied upon her evidence, that of her husband and his colleague, Mr Kerai. Mr Ved gave evidence on his own behalf.

38. This case has arisen because Mr Chohan and Mr Ved have very different accounts of what they agreed would be the terms of the joint venture they entered into when procuring that the Company purchase 5TC in 2015. Neither their short nor long-term intentions in relation to the joint venture were set out in writing.

39. In ***Gestmin SGPS SA v Credit Suisse (UK) Limited*** [2013] EWHC 3560 (Comm), Leggatt J, as he then was, made the following observations about the effect of litigation on memory:

> "[19] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

> [20] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events."

40. Mr and Mrs Chohan and Mr Ved each have a financial interest in the outcome of this case. They cannot be regarded as detached or objective witnesses. I consider it more likely than not that their memories have been influenced and tainted by the passage of time and by Mr Chohan and Mr Ved's desire to persuade the court that what they thought they had in mind around 2015, or now think they had in mind around 2015, was communicated and known to the other and agreed with them.

41. Whilst this case does not concern allegations of fraud, I have nevertheless drawn upon and derived assistance from the approach set out by Robert Goff LJ in *The Ocean Frost* [1985] 1 Lloyd's Rep 1 in order, as best I can, to test the veracity of their accounts:

> "I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities".

Mr Chohan

42. I shall start by providing a few examples to explain why I consider it necessary to approach Mr Chohan's evidence with caution.

43. Mr Chohan's witness statement described, at paragraph 16, Mr Ved suggesting that they buy a commercial property together. It continued:

> "The intention was to give both of us the comfort of being able to continue our different practices without interruption, and after we both moved to central London (although his intended timeframe was longer than mine) to convert this new property to a commercial investment for the benefit of our families"

44. During cross-examination, Mr Chohan immediately sought to distance himself from this statement. He asserted that by "the intention" he meant to refer only to Mr Ved's intention. His reason for doing so was not obvious to me other than his desire, demonstrated repeatedly during cross-examination, to impress upon the Court his certainty that Mr Ved had intended to move his own practice to central London. As paragraph 16 does not appear to conflict with this assertion (it expressly refers to Mr Ved moving to central London) Mr Chohan's attempt to backtrack on, or at the very least, to qualify the words he had chosen to use in his statement, suggested to me that he allowed his desire not to say anything that might potentially harm his case, to influence the reply he gave during cross-examination.

45. During opening submissions, Mr Calland had informed the court that it was common ground that the way that the JVA was implemented was to buy 5TC "and that Mr Ved was to occupy it at the point of purchase and into the future until such time as he didn't want to occupy it". Mr Chohan did not seek to dispute or correct the statement when it was made, but when asked during cross-examination to confirm that it accurately described his position, he refused to do so. He insisted that Mr Ved's intention:

> "was to move to central London with me. The purpose of the purchase was not the occupational intention. It was an investment decision and the intention was to move to central London."

46. During opening submissions, Mr Calland had said that the five-year term of the Original Lease was in no way definitive of the parties' agreement regarding Mr Ved's entitlement to occupy the premises. However, during cross-examination, Mr Chohan blew hot and cold about the significance of the five-year term. When asked to confirm that no specific timeframe had been agreed for Mr Ved to move to central London, Mr Chohan was noticeably reluctant to do so. He insisted that Mr Ved had "indicated" that he would be moving within a short period of time and that he was not going to be occupying 5TC for as long as five years: "that was never indicated to me". He refused to agree that Mr Ved could stay at 5TC for as long as he wished, asserting again that the impression Mr Ved had given him was that he intended to move to central London in one or two years' time. He then said (thus suggesting that the fiveyear period of the lease *was* a definitive stop-date) that any flexibility regarding the period Mr Ved could remain in occupation was limited to five years because Mr Ved took a five-year lease and whilst they could agree to an early surrender, there was no provision for Mr Ved to stay beyond five years.

47. Mr Sims did not let the matter drop and after further questioning, Mr Chohan was forced to concede that neither his particulars of claim, nor his written evidence include a statement that the five-year period of the Original Lease represented the maximum period during which Mr Ved would be permitted to occupy 5TC.

48. Moments later, he went on to contradict himself again regarding the term of the Original Lease representing an agreed long-stop date:

> "What I am saying is I understood Mr Ved's intention to move to central London within the five-year period. Now if he had decided to stay longer, then we would have had a discussion about that. And if he agreed to pay market rent, I would have agreed; because who occupies the property is immaterial, what is important is that market rent is paid."

49. Mr Sims seized upon this statement and asked:

> "what I am going to suggest to you is at its heart the fundamental agreement between you and Mr Ved, so far as Mr Ved's occupation was concerned, was that as long as he paid market rent he could continue to occupy and that's true, isn't it?"

50. Mr Chohan replied:

> "At that time, correct, yes".

51. When Mr Sims asked him to confirm that that remains the position, namely that the Chohans have no reason to object to Mr Ved continuing to occupy the premises, provided he pays commercial rent, Mr Chohan said that it was no longer the case:

> "The relationships have soured, the relationships have broken down."

52. Mr Chohan then obdurately refused to engage when counsel asked him, three times, to confirm that it forms no part of Mrs Chohan's claim that the joint venture agreement is no longer binding.

53. I consider that Mr Chohan adequately explained, during cross-examination why he sent an email to the bank saying that his company, VMA Management Limited would be taking a 5-year underlease of part of the second floor of 5TC, when it was apparently never his intention to stay at 5TC for an extended period of time. He explained that he initially informed the bank that that would be the case because he had understood from Mr Ved that for security purposes, the bank would want to see five-year sub-leases. He explained that even though he did not intend to remain at 5TC, if the bank had required it, he would have taken a five-year sub-lease with a view to assigning it when he wanted to vacate and move his practice to central London.

54. I was not persuaded by Mr Chohan's evidence regarding the extent to which, if at all, he *considered* the possibility of a self-interest conflict. He failed, on three occasions, to answer the question, repeatedly insisting, instead, that there was no such conflict. His refusal initially and repeatedly to engage with the question inclines me to disbelieve the statement he made on the fourth time of asking, when he said that he *did* address his mind to it.

Mrs Chohan

55. Mrs Chohan's written evidence comprises just three pages. She largely explains that all relevant matters were handled by her husband. However she also recalls a social event in August 2016, some five months after her husband relocated to central London when, she said, Mr Chohan's and Mr Ved's behaviour at the time did not suggest that there was anything amiss between them. Her evidence on this point was not undermined during cross-examination.

Mr Kerai

56. Mr Kerai has worked with Mr Chohan since 2011. He described the relaxed working relationship between Mr Chohan and Mr Ved in 2015 when the Company was purchasing 5TC, reflected by the absence of attendance notes of the many discussions which he recalled took place when Mr Ved came to the office that he and Mr Chohan were occupying at 5TC. He was not aware of the joint venture arrangements that lay behind the Company's acquisition of 5TC. **Mr Ved**

57. I provide the following three examples of Mr Ved's evidence to explain why, as was the case with Mr Chohan, I concluded that I should approach his evidence with caution.

58. Mr Ved's written evidence states that it was only shortly before completion that Mr Chohan "sprung" on him "that he would not after all be taking up occupation of 5TC and that was a surprise to me." He maintained this insistence despite:

i) Mr Chohan formerly having practised in central London;

ii) Mr Ved having visited with Mr Chohan, premises in Margaret Street, W1 and in May 2015 having been given a copy of the Margaret Street licence agreement and asked for his comments;

iii) on 26 June 2015, Mr Chohan copying Mr Ved into an exchange with the bank's solicitors which clearly stated that VMA solicitors would be granted only a three-month licence agreement for part of the second floor of 5TC;

iv) the same email of 26 June 2015 including, in the footer beneath Mr Chohan's auto-signature, details of VMA Solicitors' offices at both Elstree (5TC) and "London Office" at Margaret Street;

v) on 13 October 2015 Mr Ved receiving a forwarded copy of an email from Mr Chohan to the bank explaining that VMA solicitors would only be occupying 5TC for a short period of time:

> "it is a temporary arrangement, which will change following completion. Sterlings and the Bank have agreed to enable such temporary occupation to continue …";

vi) on 19 October 2015 the bank's Mr Rees forwarding to Mr Ved an email from the bank's solicitor to Mr Chohan that clearly refers to VMA Legal Services being granted a licence due to expire on 31 December 2015; and

vii) Mr Ved approving and subsequently signing each licence.

59. I was not persuaded by Mr Ved's account that Mr Chohan had told him, on the way to Margaret Street, that he was only going to rent some space there in order to be able to charge London rates for one of his client's cases.

60. Mr Ved's own evidence was that he could have afforded to purchase the freehold of 5TC without any money from Mr Chohan. Nevertheless, despite his apparent shock that Mr Chohan no longer intended to occupy 5TC and despite Mr Chohan on 6 November 2015 inviting him to reconsider the JVA, he sent nothing in writing to Mr Chohan objecting to this apparent change of plan. He chose, instead, to complete the acquisition via their intended joint venture vehicle (the Company). Whilst the reason for Mr Chohan's offer on 6 November 2015 to step away was not disclosed in his email, the Court was taken to evidence in the Trust Proceedings which indicates that it may have been because earlier that month, Mr Chohan had refused to draft an important agreement for Mr Ved on another matter.

61. The documentary evidence does not suggest that Mr Ved raised any complaint about Mr Chohan's apparent failure to occupy 5TC until October 2016, some six months after Mr Chohan had relocated his business to St James's in central London (SW1) and some two months after Mrs Chohan detected no notable difficulties between Mr Ved and her husband at the social event in August 2016.

62. Much of Mr Ved's written evidence relies upon his apparent ignorance of the details of the transactions that took place to acquire the freehold interest of 5TC and to grant the sub-leases. He refers to his complete reliance upon Mr Chohan to look after his interests when dealing with the legal matters:

> "[Mr Chohan] took the lead in attending to all the legal matters. I left that up to him and trusted him implicitly".

63. I did not find credible Mr Ved's statement that he was "wholly unaware of the implications for me of an excluded Lease". Mr Ved is an accountant and appears to be a fairly sophisticated businessman. He has not only established his own accountancy practice but also acquired an interest in others. His correspondence displays to me a fair degree of familiarity with property letting arrangements. An example can be seen when, on 4 September 2015, Mr Chohan sent Mr Ved the proposed new lease (which became the Original Lease). Mr Ved replied commenting:

> "The use clause should be general clause and not specifically to Class A2 use."

64. I do not consider that parties unfamiliar with property matters would be alert to permitted user provisions, nor the permitted use designated by Class A2.

65. Mr Ved notably appeared happy in his own emails to use the term "contracted out" to refer to leases from which the security of tenure provisions of the 1954 Act would be excluded. When Mr Ved was sent an email in January 2015 explaining 1954 Act issues, he did not reply seeking any explanation or clarification.

66. Mr Ved did not strike me as the type of businessman who would sign documents lightly, let alone a statutory declaration, the evidential significance of which should most likely have been familiar to him following his accountancy training and years of experience. Before entering into the Original Lease, Mr Ved signed a statutory declaration confirming that he had been given a notice explaining the consequences of entering into a contracted out lease. The statutory declaration is short. It expressly states (with the underlining and emphasis replicated below):

> "**You are being offered a lease without security of tenure. Do not commit yourself to the lease unless you have read this message carefully and have discussed it with a professional adviser**.
>
> Business tenants normally have security of tenure – the right to stay in their business premises when the lease ends.
>
> **If you commit yourself to the lease you will be giving up these important legal rights**".

67. Mr Ved was at pains to explain to the Court his recollection of the circumstances under which he made the statutory declaration. He said that he made the statutory declaration before a solicitor at Spalterfisher LLP, at 1 Theoboald Court, without reading it and without there being any form of lease attached to it. He said that he did so simply because Mr Kerai had asked him to "go across the road to get it signed". He professed to being entirely ignorant of the contents or purpose of the statutory declaration and explained that he was nevertheless happy to make it, without reading it, because he trusted Mr Chohan. I did not find his account credible.

68. The clear impression I gained from comparing, on the one hand, the documentary evidence and on the other, Mr Ved's written and oral evidence was that once things turned sour between Mr Ved and Mr Chohan and Mr Ved sought independent legal advice, he positively chose to "hang his hat" firmly on any suggestion or advice given to him that Mr Chohan might have had a conflict of interest when (i) liaising with the Trustees' solicitors and drafting the Original Lease; (ii) acting on the Company's acquisition of the freehold of 5TC from the Trustees; and (iii) drafting the various proposed licences to be granted by Mr Ved for occupation of parts of 5TC. It now served his purposes to profess to have no understanding of the terms of the various transactions entered into in the pursuit of the JVA and to claim, instead, that he had blindly relied upon Mr Chohan to look after his interests.

69. In my judgment, Mr Ved and Mr Chohan were two professional businessmen with differing areas of expertise. Whilst Mr Ved was happy for Mr Chohan to be responsible for drafting and negotiating the legal documents, he did not, as he claims, abdicate all responsibility for what was proposed and agreed. The emails suggest, as confirmed by

Mr Kerai's evidence, many conversations taking place in the office at 5TC regarding the proposed structure of the transaction.

70. I consider it more likely than not that when Mr Ved signed the statutory declaration regarding the Original Lease being contracted out of the security of tenure provisions of the 1954 Act, he understood that he was thereby taking on the risks highlighted in the accompanying notice. He signed a document saying that he would be giving up important legal rights. In my judgment he did not, as he now asserts, simply ignore the warning because he blindly trusted Mr Chohan to look after his interests. He had already written to the Trustees' solicitors saying that he was acting on his own behalf in the grant of the Original Lease. Whatever his motives were for sending such an email, in my judgment, that alone would have alerted him at least to look at the warning very clearly set out on the document which itself was sufficiently important for him to have to take it to another solicitor before whom he could make a statutory declaration and sign it.

71. I consider, on the balance of probabilities, that a professional accountant and businessman such as Mr Ved, who is himself required in private practice to be alert to potential conflicts of interest, would have known, even if not before that moment, then from then, that the Trustees required him to confirm who was acting on his behalf because Mr Chohan was unable, in relation to the transactions involving the Trustees, to act both for Mr Ved and the Company.

72. In my judgment, it is more likely than not that Mr Ved consciously decided, nevertheless, not to take independent legal advice regarding the terms of the Original Lease (which he knew had been drafted by Mr Chohan).

73. I am not swayed against reaching this conclusion by Mr Chohan's professional failure to send client engagement letters, nor the invoice sent by Mr Chohan, some 14 months later once the relationship turned sour, in which Mr Chohan claimed £4,400 for acting in relation to the Original Lease. The parties were by then in conflict. It was a wholly inappropriate and careless demand on Mr Chohan's part to send or permit or direct that such an invoice be sent to Mr Ved. However that does not alter my rejection of Mr Ved's assertion that at all times, he signed documents, never queried arrangements and even said that he was acting on his own behalf simply because he had complete, blind faith that Mr Chohan was at all times, looking after his interests.

Issues for determination

74. The only issue to be determined in the derivative claim against Mr Ved is whether the Court should make the declaration sought, namely a declaration that the New Lease granted by the Company to Mr Ved was void, or alternatively a declaration that the Company is entitled to avoid the New Lease and that it has done so.

75. Pursuant to section 171(b) of the Companies Act 2006 ("CA06") Mr Ved owed the Company a duty to exercise his powers for the purposes for which they were conferred and, pursuant to section 172 CA06 to act in a way that he, in good faith, considered would be most likely to promote the success of the Company for the benefit of its members as a whole.

76. The duties set out in section 171(b) and 172 CA06 are fiduciary in nature such that to establish breach, Mrs Chohan must show more than incompetence (see *Extrasure Travel Insurances Ltd and anr v Scattergood and anr* [2003] 1 BCLC 598). Mr

Calland did not take issue with Mr Sims' reliance upon the summary of the Court's task when considering an alleged breach of section 171(b) as set out by Lord Wilberforce in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 281, as refined in *Extrasure*. I therefore extract the following from Mr Sims' skeleton argument, commencing with paragraph G on page 835 of Lord Wilberforce's judgment:

> "In their Lordships' opinion it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line.

> "In *Extrasure* (supra) the Court considered it convenient to add a fourth stage to the 3-stage test postulated by Lord Wilberforce in *Howard Smith*, stating (at [92]) that the Court must:

> (1) identify the power whose exercise is in question;

> (2) identify the proper purpose for which that power was delegated to the directors;

> (3) identify the substantial purpose for which the power was in fact exercised ; and

> (4) decide whether that purpose was proper."

77. Mr Ved's defence and counterclaim contend that his purpose when entering into the New Lease was not improper because it was merely giving effect to the JVA. In his witness statement, having described the tension that arose between him and Mr Chohan when the latter, inter alia "maintained his position for an increase in the head lease rent" he explained that he:

> "changed the headlease for it to be within the Act because I felt that this was the true basis of our joint venture agreement."

78. He states, in relation to the insertion of the break clause in the New Lease:

> "I inserted the rolling break clause because by then the relationship between Paresh and myself had deteriorated to the point that we were discussing separation. To my mind there was no realistic prospect of a reconciliation. As far as I was concerned it was inevitable that we would have to go our separate ways. I was not willing to remain in the property if Paresh acquired my family's shares in Nexbell. I needed to be able to terminate the head lease and not be committed to remain in the building with Paresh as my effective Landlord.
>
> 99. I did not know how long it would take for us to reach a solution as regards the ending of our joint venture. It is for this reason only that I inserted the break clause. I did not believe when I was doing so that I was acting unfairly or against the interests of Nexbell Limited. There was no other motivation for the changes that I made."

79. It thus becomes necessary to establish what Mr Ved describes as "the true basis of our joint venture agreement".

(i) What were the terms of the JVA?

80. Messrs Chohan and Ved agreed jointly to purchase 5TC via a joint venture company in which their two families would have equal interests.

81. The terms of the JVA were, in my judgment, intentionally susceptible to change. That flexibility can be seen from the manner in which Messrs Chohan and Ved were both involved in working out the best way to ensure that the acquisition of what Mr Ved described in an email dated 14 July 2015 of "the investment property" was treated for tax purposes as a transfer as a going concern. Mr Ved sought advice regarding the tax consequences of the Trustees accepting a surrender of Eutopia's lease and simultaneously granting a new lease of the whole property to Sterling Associates, whilst Mr Chohan suggested that an alternative approach would be to procure that the stamp duty was paid on the Eutopia lease so that it could then be registered.

82. The fluid nature of the arrangements that comprised the JVA can also be seen when the parties initially discussed granting 5-year sub-leases in order to obtain bank approval for the proposed loan, but then changed the sub-leases to short-term licences.

83. Another reason why I have concluded that the JVA impliedly allowed for changes to be made was because of the uncertainty surrounding Mr Chohan's ability to continue practising as a solicitor. Mr Chohan appeared, during that uncertain period, to appreciate Mr Ved permitting him to practice from part of 5TC, initially as a consultant for Osmond & Osmond and later on his own account as VMA. However, I saw no evidence beyond Mr Ved's assertion (including in his email dated 6 October 2016 which was sent after the relationship had started to turn sour) that Mr Chohan ever gave Mr Ved cause to believe that if authorised by the SRA to practice on his own account again, that he would do so at 5TC for any extended period of time.

84. Having noted when setting out my conclusions regarding Mr Ved's written and oral evidence, that I have seen no documentary evidence to support Mr Ved's contention that the JVA was premised on, or otherwise provided for Mr Chohan to continue to occupy or base some of his practice at 5TC beyond the term of the proposed licence, I find that no provision of the JVA *required* Mr Chohan to occupy any part of 5TC. I do not therefore accept, as contended in Mr Ved's Points of Defence, that there was ever a "Chohan Occupation Obligation".

85. Not everything goes Mr Chohan's way, however. I also saw no evidence that Mr Ved genuinely held or communicated to Mr Chohan a firm intention to move his practice away from 5TC (which is close to his home in Elstree) to central London. He may at one stage have discussed and explored with Mr Chohan the potential benefits of such a move in terms of attracting a different type of client, but in my judgment, whether over time by self-persuasion or perhaps heavily influenced by his desire to support his wife's case in these proceedings, Mr Chohan has built such a possibility into a firm proposal or intention that I do not consider ever existed.

86. In my judgment, and as confirmed by Mr Chohan during cross-examination, the JVA either expressly (by oral agreement) or impliedly provided that for as long as Mr Ved/the firm(s) through which he practised his accountancy business paid a fair market rent, he/the firm(s) would be able to continue to occupy as much of 5TC as he wanted, for as long as he wanted. There was no discussion regarding a date, year or time when Mr Ved might want to vacate 5TC. It was clear to me from the discussions at one time contemplating granting Mr Ved/Sterling Associates a 15-year lease, as well as Mr Chohan's unsatisfactory oral evidence on the issue, that the term of the Original Lease was never intended to define the end date of Mr Ved's occupation. I therefore accept that there was a "Ved Occupation Right". However for the reasons that follow, I do not believe that the Ved Occupation Right entitled him to procure that the Company gave him, in the New Lease, the benefits of the 1954 Act which he had expressly recognised by statutory declaration were not included in the Original Lease.

87. Similarly, in my judgment, the evidence showed that it was more likely than not that if Mr Chohan had wanted to continue practising as a solicitor from 5TC, provided he paid a fair market rent, and assuming there remained sufficient room to enable him to do so, he would be entitled to do so. I do therefore accept that there was a "Chohan Occupation Right".

88. Reminding myself of the guidance set out by Robert Goff LJ in *The Ocean Frost* and testing the veracity of Mr Ved's evidence by reference to the documents, his apparent motives and the overall probabilities, I find on the balance of probabilities, that Mr Ved was fully aware that the Original Lease was contracted out of the security of tenure provision of the 1954 Act. I consider that he consequently understood that any extension or variation of the Original Lease would need to be discussed and agreed with Mr Chohan. I find it more likely than not that as:

i) the JVA was entered into at a time when his relationship with Mr Chohan was cordial;

ii) the terms of the proposed lease, sub-leases and licences were being adapted to the needs of the bank and prospective sub-tenants; and iii) they were both entitled, upon paying a fair market rent, to occupy 5TC,

he either did not consider how vulnerable that might make him in the future if their relationship were to sour or he did consider the potential risk, but decided to continue with the arrangement regardless.

89. Paragraph 6.1.9 of Mr Ved's Defence states:

> "6.1.9. Because of the longstanding friendship, and relationship of trust and confidence between Mr Ved and Mr Chohan, and because the latter was a solicitor who had previously performed legal work for Mr Ved and his businesses, Mr Ved implicitly trusted Mr Chohan. Mr Chohan accordingly owed Mr Ved fiduciary duties as a result, including in particular in relation to any legal work undertaken by Mr Chohan, via his legal business entities, in relation to the joint venture ("the JVA Fiduciary Duty");"

90. At paragraphs 63 to 66 I have explained why I consider Mr Ved to be a sophisticated businessman, running his own accountancy practice, investing in other accountancy practices, and familiar with many of the nuances of property letting arrangements. Notwithstanding that Mr Chohan is a solicitor closely involved in all aspects of the acquisition of 5TC, the drafting of the Original Lease and the drafting of the licences to be granted by Mr Ved to occupiers of parts of 5TC, I have seen nothing in the relationship between Mr Ved and Mr Chohan that would justify the court implying into the JVA, the JVA Fiduciary Duty as claimed. The relationship between Messrs Chohan and Ved was professional. The JVA was embarked upon by two professional businessmen for commercial purposes. Whilst they relied on each other to concentrate on their respective areas of expertise (I note Mr Ved focussed on the transfer-as-a-going-concern VAT issue) I have rejected Mr Ved's assertion that he comprehensively delegated all responsibility for the legal structure of the JVA to Mr Chohan, blindly allowing Mr Chohan to make all decisions on his behalf.

91. Whilst I accept that it was an implied term of the JVA that each party owed the other a duty to act in good faith, which required them to act honestly and fairly with each other, having found that the terms of the JVA were intentionally fluid, in my judgment the duty extended to discussing with the other and honestly and fairly considering any proposals in relation to 5TC or desired alterations to the current arrangements. Consistent with my findings regarding the terms of the JVA, the duty of good faith owed by Mr Chohan to Mr Ved was not breached when Mr Chohan drafted the Original Lease in terms that excluded the 1954 Act security of tenure provisions. He provided the draft Original Lease for Mr Ved to use but expressly told Mr Ved and Mr Ved expressly told third parties that Mr Chohan was not acting as his solicitor in relation that part of the transaction.

92. In reaching this conclusion, I have taken into account that Mr Chohan was prepared to consider the possibility of a sub-lease being granted to Conway & Company Solicitors Limited which would not include the 1954 Act security of tenure provisions. Importantly, the proposal was not pursued to a final conclusion. In line with my findings that Mr Ved understood and appreciated the significance of the statutory declaration he made when entering into the Original Lease, I consider it more likely than not that Mr Ved was not, as a result of this "contracted-out" proposal being considered, and was not, as set out in his Points of Defence, thereby reassured that the security of tenure provisions within the head lease were not considered to be material to the interests of the Company. Mr Ved was a sufficiently sophisticated businessman to understand, when he signed the statutory declaration, the importance to the Company of the Original Lease being contracted out of the 1954 Act security of tenure provisions. I find on the balance of probabilities that Mr Ved appreciated,

    when discussing the possible arrangements with Conway & Company, that such terms could only be put in place if, once all the terms had been settled, both he and Mr Chohan considered it to be in the best interests of the Company.

93. In my judgment, when Mr Ved granted to himself the New Lease, which did not exclude the 1954 Act security of tenure provisions, he knew he was procuring for himself a material advantage over and above that which he currently had and over and above that to which he was entitled under the JVA. He knew that by doing so he would gain an indefinite right to remain at 5TC in circumstances where the Company could only terminate his occupation if one of the limited grounds set out in the 1954 Act could be proved. Such rights were alienable and substantially exceeded the Ved Occupation Right. In my judgment he did this not because, as he asserts, he considered he was only securing in writing that which had always been agreed, but because his relationship with Mr Chohan had irretrievably broken down and he wanted to put himself in the best possible position before being forced to transfer the agreed shares to Mrs Chohan and becoming the tenant of a deadlocked company. He rushed to give himself "a bird in the hand".

(ii) A breach of director's duty?

Section 171(b) – duty to exercise powers for the purposes for which they were conferred

94. Applying the above findings to the four-stage test set out in *Extrasure:*

    i) the power whose exercise is in question is the Company's power, as owner of the freehold, to grant leases of 5TC;

    ii) the proper purpose for which that power was delegated to the directors was, in broad terms, to promote the Company's business for the benefit of its members, or, in the circumstances of this case, in my judgment that can be interpreted as obtaining a rental stream for the Company without unnecessarily imposing upon it an obligation to comply with the terms of the 1954 Act to regain possession or increase rent;

iii) the substantial purpose for which Mr Ved in fact exercised the power was to safeguard his own position as tenant, ensuring that despite the Original Lease being contracted out of the provisions of the 1954 Act, the New Lease was contracted in, thus not only providing him and his business with the protections afforded by the 1954 Act but also the upper hand in any negotiations with Mr Chohan regarding 5TC.

iv) Mr Ved's exercise of the power was not for a proper purpose.

95. Consequently I find that in granting the New Lease to himself, Mr Ved acted in breach of his duty under section 171(b) CA06 to exercise his powers as a director of the Company for the purposes for which they were conferred.

96. Subject to the issue of unanimous shareholder approval, consent or ratification, Mr Sims accepts that insofar as Mr Ved is found to have breached his duty to exercise his

powers for the purposes for which they were conferred, he will have acted without proper authority with the consequence that the Court will declare the New Lease to be void

97. Having decided, subject to the issue of ratification, that Mrs Chohan is entitled to the declaration sought in these proceedings that the New Lease is void, it is not necessary for me to consider whether Mr Ved also breached the duty he owed to the Company pursuant to section 172(1) CA06. However the point was argued before me and I suspect, having set out my conclusions on the evidence, my decision in relation to section 172 will come as no surprise.

Section 172(1) CA06 – duty to act in good faith to promote the success of the company

98. In *Re Regentcrest plc v Cohen* [2001] 2 BCLC 80 at [120] Jonathan Parker J (as he then was) explained the subjective nature of the director's common law duty now codified under section 172 CA06:

> "The duty imposed on directors to act bona fide in the interests of the company is a subjective one (see Palmer's Company Law para 8.508). The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test. "

99. In *HLC Environmental Projects Ltd* [2014] BCC 377, John Randall QC sitting as a deputy judge of the High Court explained that the subjective test will only apply where there is evidence of actual consideration by the director of the best interests of the company. Where there is no such evidence, the proper test is objective, and the court should ask whether an intelligent and honest man in the position of a director of the company concerned could, in all the circumstances, reasonably have believed that the transaction was for the benefit of the company.

100. I have seen no evidence of Mr Ved actually considering whether entering into the New Lease was in the best interests of the Company. His evidence merely explains why he considers that he was not acting *against* the Company's interests. Consequently, the proper test is objective. I do not consider that an intelligent and honest man in Mr Ved's position would consider that altering the terms of the Company's lease from a contracted-out to a contracted-in lease was in the best interests of the Company, nor that it would promote the success of the Company. The disadvantages to the Company are inescapable.

101. Having considered the evidence, I am in no doubt that when procuring that the Company granted him the New Lease, Mr Ved acted in breach of the duties he owed to the Company as codified at section 172(1) CA06.

(iii) Did Mr Ved, as the sole legal shareholder, ratify the entering into by the Company of the New Lease?

102. Mr Ved's Points of Defence assert that not only was he, as sole shareholder and director at the time, acting within the scope of his authority when causing the Company to enter into the New Lease but also that it reflected the unanimous agreement of all of the Company's beneficial shareholders. Mrs Chohan's Reply and Defence to Part 20 Claim states, in relation to this paragraph of Mr Ved's pleading:

> "As to paragraph 18, which is denied generally, if it is alleged that any breach of duty Mr Ved as director was authorised by the unanimous agreement of the beneficial shareholders, that is denied both as a matter of fact and it is in any event denied that the JVA could itself amount to such authorisation."

103. I have held that the JVA did not include provision for Mr Ved to have the "contracted-in" benefits of the New Lease and that the New Lease is void. However, I have been reminded by counsel that this did not address a point not set out in the pleadings but on which I nevertheless heard submissions. That is the question of whether, notwithstanding the absence of the beneficial shareholder's consent, Mr Ved had the power, as the Company's sole legal shareholder at the time, to ratify the entering into of the New Lease.

104. In *Re Duomatic Ltd* [1969] 2 Ch 365, Buckle J stated:

> "Where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry

> into effect, that assent is as binding as a resolution in general meeting would be."

105. The effect of what has become known as the *Duomatic* principle is that in certain circumstances, a director has a defence to a breach of duty claim if he can show that his actions were assented to by all of the company's shareholders.

106. This gives rise to the following issues:

i) Assuming the *Duomatic* principle applies to steps taken by a director that have been found to be in breach of his "proper purpose" power (as to which see (iii) below), can it be said that Mr Ved, as sole legal shareholder, has demonstrated some decision-making process or other steps that amounts to ratification?

ii) What, if any, is the effect on the application of the principle in circumstances where the sole legal shareholder holds 50% of the shares on trust and does not consult the beneficiary in relation to the matter that was in breach of duty: is the legal shareholder's ratification sufficient?

iii) Does the principle apply, at all, where the director is found to have been in breach of his "proper purpose" power where the consequence of that breach, in this case, is that the New Lease is void?

107. I shall address the first and second issues together.

i) *Sufficient to constitute assent? (ii) Is the legal shareholder's ratification sufficient?*

108. Perhaps not surprisingly, there are very few cases outside an insolvency context (where the principle is of limited application) in which the Court has considered the application of the *Duomatic* principle to a company whose sole director is also its sole shareholder. Mr Calland referred the Court to the decision of Newy J in *Re Tulsense Ltd* [2010] 2 BCLC 525 where the company's sole shareholder, B, held one share for himself and one as sole-surviving executor of his late brother W's estate. The evidence showed that neither B, nor his agent, regarded B as entitled to make decisions in relation to W's share, such entitlement lying instead with W's children who were beneficially entitled to the share. Newy J held in relation to the share beneficially held on behalf of all of W's children, that the assent of just one of them, who by then had been appointed a director, was not enough. At paragraph 40 of his judgment he stated:

> "[40] In the first place, in my judgment if an individual who holds some shares for himself and other shares as a trustee or executor has expressed assent, he is not to be taken to have given that assent in respect of the shares held as a trustee or executor if he did not intend or purport to be making a decision in relation to those shares, at any rate if it would have been apparent to an observer that the assent was not intended to extend to the shares held as a trustee or executor. To take an example with similarities to the case before me, suppose that an individual who held one of a company's 100 issued shares beneficially and the remaining 99 as a bare trustee concluded that a director should be appointed. The

> requirements of the Duomatic principle should not, without more, be taken to be satisfied were it is evident that the shareholder had considered that it was for the beneficial owner of the 99 shares, and not for him, to make decisions as regards those shares.
>
> [41] Secondly, I do not accept that a shareholder's mere internal decision can of itself constitute assent for Duomatic purposes. I was not referred to any authority in which it had been decided that a mere internal decision would suffice. Further, for a mere internal decision, unaccompanied by outward manifestation or acquiescence, to be enough would, as it seems to me, give rise to unacceptable uncertainty and, potentially, provide opportunities for abuse. A company may change hands or enter into an insolvency procedure; in either event, it is desirable that past decisions should be objectively verifiable. In my judgment, there must be material from which an observer could discern or (as in the case of acquiescence) infer assent. The law applies an objective test in other contexts: for example, when determining whether a contract has been formed. An objective approach must, I think, also have a role with the Duomatic principle. ” 109. In *Ciban Management Corpn v Citco (BVI) Ltd* [2020] UKPC 21 the ultimate beneficial owner, Mr Byington, chose to conceal his ownership of shares in a company but procured via an agent that various steps were taken to ensure that his instructions in relation to the company were carried out. The Privy Council recognised that the *Duomatic* principle could apply as regards the consent of the ultimate beneficial owner. At paragraph 47 of Lord Burrows JSC giving the judgment of the Board stated:
>
> “A further possible qualification of the Duomatic principle is that, in some cases, doubts have been expressed as to whether the principle applies where it is the beneficial owners, rather than the registered shareholders, who consent. See, eg, *Palmer's Company Law*, looseleaf ed, vol 2, para 7.439. But the correct view is that, at least as here where the ultimate beneficial owner and not the registered shareholder is taking all the decisions in the relevant transactions, the Duomatic principle applies as regards the consent of (and authority given by) the ultimate beneficial owner.”

110. The Privy Council’s decision hinged upon Mr Byington having set up the mechanics to give his instructions via a director who acted at all times with his ostensible authority. Thus, whilst Mr Byington did not in fact know about the transaction which led to the litigation, he was deemed to have consented to it. The decision in *Tulsense* similarly centred around consent having been given by a beneficial owner of the share, albeit that was held to be insufficient where there were other beneficial owners.

111. Whilst, in contrast, the case before me concerns the absence of the sole beneficial owner, Mrs Chohan’s consent, that does not, in my judgment, render the judgments in

Tulsense and *Ciban* entirely distinguishable. They each demonstrate a willingness by the Court to look at the circumstances which led to the share(s) being held on trust, the reasons for it and, in *Ciban* the mechanics that were put in place to convey and/or carry out the beneficial shareholder's instructions in relation to the company.

112. No evidence has been put before me of Mr Ved consciously considering and ratifying the decision on behalf of the shareholders or it being more than an "internal decision".

113. I not here, that I have referred throughout this section of my judgment to Mr Ved being the sole legal shareholder as that is set out in his Points of Defence. However his Points of Defence also include a note that all references to the interests of Mr Ved are to be taken to include, unless otherwise stated, the interests of Mrs Ved who agrees to be bound by the outcome of the proceedings. I have recorded earlier in this judgment that Mrs Ved also held shares in the Company. If that is correct, then there is also no evidence of her having knowingly assented to the Company entering into the New Lease.

114. Following the requirements set out in *Tulsense,* on the facts before me, that alone, renders the *Duomatic* principle nugatory. However, in case more is required to address issues *(i)* and *(ii)*, in my judgment, the absence of such consideration is not surprising: Mr Ved's own case was that the Company was the vehicle through which the JVA would operate. Without Mrs Chohan's authority to make decisions on her

behalf, there would be no element of *joint* venture if all shareholder decisions could be taken, whether formally or informally, alone by Mr Ved.

115. In these circumstances, and having noted the readiness of the Court in *Tulsense* and *Ciban* to consider the consent of a beneficial owner for the purposes of the *Duomatic* principle, even if Mr Ved (or Mr and Mrs Ved) as legal shareholder(s) had assented in manifestly clear terms beyond an internal decision to the entering into of the New Lease, that would not, in my judgment and by inference from the Court's approach in *Tulsense and Ciban*, be sufficient for this Court to determine that the Company's shareholders had unanimously consented, with knowledge of what they were consenting to. In my judgment, on the facts of this case, unanimity requires the assent also of the beneficial shareholders.

(iii) Can the Duomatic principle even apply following a "proper purpose" breach?

116. In light of my conclusions at *(i)* and *(ii)*, it is not necessary to consider this third point which was not, in any event, fully argued before me. It perhaps suffices to record that Mr Calland referred me paragraph 269 of Popplewell J's decision in *Madoff Securities International Limited & Ors v Raven & Ors* [2013] EWHC 3147 (Comm) as authority for the contention that the *Duomatic* principle cannot relieve directors of transactions that fall within the scope of the powers of a company, express or implied, but are entered into in furtherance of some purpose which is not an authorised purpose. In reaching that conclusion, Popplewell J relied on the Court of Appeal's decision in *Rolled Steel Products (Holdings) Ltd v British Steel Corporation and Ors* [1989] Ch 246. However, the Court of Appeal's decision in *Rolled Steel* was not without qualification. At page 246, the Court concluded, obiter that:

> "none of the authorities which have been cited to us have convinced me that a transaction which (i) falls within the letter of the express or implied powers of a company conferred by its memorandum, and (ii) does not involve a fraud on its creditors, and (iii) is assented to by all the shareholders, will not bind a fully solvent company merely because the intention of the directors, or the shareholders, is to effect a purpose not authorised by the memorandum."

117. As no submissions were made suggesting that the entering into of the New Lease amounted to a fraud on the Company's creditors, it may be that the correct application of Popplewell J's judgment to the circumstances of this case would not lead to the outcome contended for by Mr Calland.

Conclusion

118. The Claimant is entitled to a declaration that the grant of the New Lease by the Company to Mr Ved was void.

119. Mr Ved's Part 20 claim seeks declaratory relief. However both parties recognised in closing submissions that it may be more appropriate for the parties first to consider the Court's findings of fact, before seeking any further order or declaration of the Court.

120. I therefore invite counsel to agree an appropriate form of order consequent upon this judgment, with any unresolved issues being considered at a consequentials hearing.