Neutral Citation Number: [2019] EWHC 2994 (Ch)

Case No: CH-2018-000294

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
ON APPEAL FROM ICCJ BARBER

IN THE MATTER OF GUARDIAN CARE HOMES (WEST) LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOVLENCY ACT 1986

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2019

Before :

The Honourable Mr Justice Zacaroli

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Between :

(1) KEVIN JOHN HELLARD **(2) AMANDA WADE** **(as joint liquidators of Guardian Care Homes (West) Limited)**	**Appellants**
- and -	
(1) GRAISELEY INVESTMENTS LIMITED **(2) GARY MITCHELL HARTLAND** **(3) KAREN ANN HARTLAND**	**Respondents**

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Christopher Parker QC and William Edwards (instructed by **Howes Percival** for the Appellants
Stephen Davies QC and Jeremy Bamford (instructed by **Lewis Onions**) for the Respondents

Hearing dates: 9 and 10 October 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

Introduction

1. This is an appeal against an order of Insolvency and Companies Court Judge Barber dated 12 October 2018.

2. The appellants are joint liquidators of Guardian Care Homes (West) Limited ("West"). West was placed into creditors' voluntary liquidation on 27 April 2010. Mr Paul Masters was appointed liquidator. He resigned on 23 November 2015. The appellants were appointed in his place.

3. The first respondent, Graiseley Investments Limited ("GIL"), was a company formerly in the same group of companies as West. It was alleged by the appellants to be the counterparty to a transaction at an undervalue, within the meaning of s.238 of the Insolvency Act 1986 (the "1986 Act").

4. The second and third respondents (respectively, "Mr and Mrs Hartland") were at the material times directors of West. Mr Hartland was also a director of GIL.

5. On 22 April 2016 the appellants issued the application commencing these proceedings, asserting a claim against GIL under s.238 of the 1986 Act and claims against Mr and Mrs Hartland under s.212 of the 1986 Act.

6. By her order of 12 October 2018 the judge dismissed the appellants' claims. Her reasons for doing so are contained in a written judgment of the same date ([2018] EWHC 2664 (Ch)). The appellants were ordered to pay the respondents' costs of the Application, to be assessed on the indemnity basis, for reasons contained in a further oral judgment, also dated 12 October 2018.

7. Permission to appeal was refused on the papers by Fancourt J on 21 December 2018. The appellants renewed their application for permission to appeal at an oral hearing before Mann J who, on 8 February 2019, granted permission in respect of the claim against Mr Hartland and GIL but refused permission, save in relation to the question of indemnity costs, as against Mrs Hartland.

The alleged transaction

8. The background to this matter is set out in the judge's judgment at [13] to [47].

9. The appellants' pleaded case was that the impugned transaction arose in the following circumstances:

    i) By book entries made in the "Sage" accounting system of each of West and GIL, the effective date of which was 29 August 2009 but which were processed on 12 October 2009, the fixtures and fittings owned by West (the "F&F") were transferred to GIL;

    ii) The value shown on the ledger in respect of this transaction was £3.551 million, being the net book value of the F&F;

iii) There was no written contract between West and GIL and no board meeting or resolution in respect of the transfer of the F&F;

iv) No entry was made in West's accounts recording a loss arising from the sale of the F&F at less than their book value;

v) It is to be inferred that, in or about October/November 2009 a restructuring was effected by which West transferred the F&F to GIL and GIL assumed an obligation to pay West for the F&F transferred to it the sum of £3.551 million;

vi) On or about 22 February 2010 the transfer of the F&F was "reversed", the "reversal" being effected by a journal entry (No.2261) given an effective date of 31 October 2009;

vii) The effect of that transaction was to transfer title to the F&F from GIL to West, and to release GIL from the obligation to pay West £3.551 million;

viii) Immediately upon the transfer to West, the F&F were transferred to West's parent company, Guardian Care Homes (UK) Ltd ("UK"), effected by the same journal entry 2261, but that transfer was also subsequently reversed.

10. The points of claim then asserted that the "reversal" transaction was a transaction at an undervalue, because the consideration received by West (being the F&F, which had a value of no more than £177,600) was significantly less than the value of the consideration provided by it (being the release of the debt owed to it by GIL in the sum of £3.551 million) and the transaction had been entered into at a relevant time within s.240 of the 1986 Act.

11. Finally, the appellants pleaded that in causing or permitting West to enter into the "reversal" transaction, Mr and Mrs Hartland breached their duties to West, in particular the duty to have paramount regard to the interests of creditors when the company was insolvent or of doubtful solvency.

12. The respondents, in their points of defence, denied that the alleged transaction occurred at all, contending that the book entries purporting to record a transfer of the F&F to GIL had been made by a Mr Mike Spruce, the financial controller of West, in error, and that the book entry purporting to record the "reversal" transaction had been made in order to correct that error.

The judge's judgment

13. I will address the relevant details of the judge's judgment when considering the appellants' particular criticisms of it. For now, I simply record her conclusions, which were as follows.

14. The judge dismissed the appellants' claim under s.238 for three reasons:

i) The appellants "…have failed properly to plead or define the "transaction" for the purposes of [s.238] and have failed adequately or at all to address in their evidence the value alleged to flow from West and to be received by West in relation to the 'transaction' as properly defined."

ii) The appellants had failed to establish, on the balance of probabilities, (1) that there was a transaction by which West sold the F&F to GIL; and (2) that there was a transaction on or about 22 February 2009 by which the alleged sale was reversed and GIL was released from an obligation to pay the price for the F&F.

iii) On the evidence she had heard and read, the judge was satisfied that Mr Hartland did not instruct Mr Spruce to effect, and did not in any way authorise a transfer of the F&F from West to GIL. She also expressed herself satisfied that Mr Hartland did not know of or authorise the relevant journal entries or the purported transfer of the F&F to GIL.

15. The judge also dismissed the claims under s.212 because they were based on, and thus failed together with, the claim under s.238.

Appellants' grounds of appeal

16. Fourteen separate grounds of appeal were asserted by the appellants in their written Grounds of Appeal. However, in essence, Mr Parker QC's submissions fell under three headings:

i) The judge's conclusion that the appellants' case as asserted at trial had not been properly pleaded was wrong (the "pleading point");

ii) The judge should have found in the appellants' favour because, on the basis of evidence given by Mr Hartland for the first time in cross-examination, the only pleaded defence had been abandoned, such that the defendants had no defence to the claim (the "abandonment point"); and

iii) Even if the respondents were entitled to advance a case that there had been a transfer of the F&F, just not to GIL, the judge was wrong, on the basis of all the evidence, to conclude that there was no transfer to GIL (the "evidence point").

The pleading point

17. The judge's conclusion that the transaction at an undervalue case did not "get off the ground" on the pleadings was based on two connected points.

18. First, the "reversal" transaction was pleaded as having been effected by journal entry 2261. Leaving aside the fact that the release of debt was recorded in a different journal entry (2262), a journal entry is incapable of *effecting* a transaction.

19. Second, if the journal entries were to be taken at face value, then they needed to be read together with all relevant journal entries, including those that recorded the debt due from GIL to West having been assigned to Monmore six weeks before it is alleged to have been transferred back and then released. It was in this context that she concluded (at [64] of the judgment) that the appellants had failed adequately to address the value alleged to flow from West and to be received by West in relation to the 'transaction', as properly defined.

20. The appellants contend that the judge was wrong because (1) there was no doubt about what the substance of their case was; (2) there was no requirement to plead anything other than the facts necessary to prove their case; and (3) the journal entries relating to the transfer to Monmore were irrelevant because (as the respondents themselves claimed) the purported declaration of a dividend in favour of Monmore was of no legal effect and in any event Monmore held the receivable on a bare trust for West.

21. I consider that the judge was correct to hold that the pleading was defective in that it failed to identify any particulars of the relevant transaction other than the journal entries. Journal entries alone are clearly incapable of effecting (as opposed to recording) the transfer of assets and the creation of a debt. Moreover, I consider the judge was correct to hold that if, as happened here, the transaction was pleaded as being effected by a journal entry, then it was necessary to identify all the journal entries relating to the F&F and the alleged debt owed by GIL, if only in order to explain why one was to be taken at face value but the others were not.

22. I nevertheless accept that the respondents were in no doubt as to the substance of the case they had to meet, in particular because they did in fact proceed to address at trial the substance of the appellants' case that there was a transfer of the F&F to West in return for the release of a debt of £3.551 million owed by GIL to West. Had the judge dismissed the claim on the basis of the pleading point alone, therefore, that might have been open to criticism. She did not do so, however, but went on to reach a determination on the basis of the substance of the case advanced by the appellants.

The abandonment point

23. At the heart of much of the appellants' case on this appeal was the submission that the respondents' case as to what instructions had been given in relation to the transfer of the F&F had substantially changed during the course of the proceedings. Mr Parker QC, for the appellants, contended that there had been four different versions.

24. Version 1 was to be found in a letter from the respondents' former solicitors, Hausfield & Co LLP, dated 30 March 2016. This was prepared in response to a letter before action sent by the appellants' solicitors, Howes Percival, on 3 September 2015, after reviewing the relevant SAGE records and liaising with external accountants.

25. Under the heading "Transfer of Assets from the Company to GIL", the letter stated that

> "after a conversation between Mr Hartland and Mr Spruce about a possible re-structuring whereby it was proposed that GIL would hold all of the fixed assets, Mr Spruce processed three journals 2044, 2045 and 2083 which record three transfers of assets from the Company to GIL."

26. Journal entries 2044 and 2083 related to freehold property and HP liabilities respectively. Journal entry 2045 is the one relied on by the appellants in this case.

27. The letter went on to say that the proposed restructuring had not gone ahead, and the F&F were by journal entry 2261 recorded as transferred back to West for the same

value (being the net book value of £3,551,756.46). They were then, by the same journal entry, immediately transferred to UK in respect of a proposed dividend, although that dividend did not in fact occur and the transfer was subsequently reversed. The respondents acknowledge that Version 1 is inconsistent with the defence they advanced at trial. I address the significance of that inconsistency below.

28. Version 2 was set out in paragraph 168 of a witness statement of Mr Hartland dated 12 January 2018 which (referring to journal entry 2045) read:

> "I wish to emphasise that I had not given any instructions to Mike Spruce between August 2009 and 12 October 2009 or subsequently: (i) To make such an entry or any similar entry in the Sage records of West; (ii) To transfer any fixtures and fittings from West to GIL (or for that matter to anyone else); or (iii) For GIL to take on any liability to or agree pay for any such fixtures and fittings, whether in the sum of £3,551,756.46 of any sum".

29. Mr Parker stressed that the important feature of this version was that there had been no instruction to transfer the F&F to GIL "or to anyone else".

30. Version 3 was first intimated in that same witness statement, at paragraph 177, in which Mr Hartland said that

> "during the course of the refinance and restructuring I had said to Mike Spruce that we would be setting up 3 new Opcos and 3 new Propcos and that ultimately, we would then be transferring the fixtures and fittings to the new Propcos. I also said to him that we needed to get the fixtures and fittings into West's ultimate holding company, which was proposed to be Monmore."

31. I think that the suggested distinction between versions 2 and 3 is more semantic than real. The witness statement has to be read as a whole. In paragraph 176 Mr Hartland reiterated that he believed journal entry 2045 was made by Mr Spruce by mistake. The remainder of paragraph 176 and 177-178 contains a possible explanation (expressly offered as conjecture) why Mr Spruce may have made that mistake. It is in the course of that, that he refers to having said to Mr Spruce that "we needed to get" the F&F into West's ultimate holding company.

32. Version 3 was repeated in Mr Hartland's fourth witness statement, dated 21 May 2018, at paragraph 18 of which he said:

> "It was around this time that I told Mike Spruce that we were restructuring and we were to transfer the fixtures and fittings in West. I believe I told Mike that we were to pay a dividend to UK and that subsequently the fixtures and fittings would be transferred to the Propcos. What I was meaning by this was that the assets would be transferred up to UK by West via a dividend and then, when the new Propcos were formed, the assets would be transferred from UK to the new Propcos after

> the new VAT group was in place so there would be no VAT implications. Ultimately the holding company would not be UK but Monmore Properties Limited."

33. The appellants accept that, although version 3 was not pleaded, they took no objection at trial on that ground. Accordingly, they accept that the respondents were entitled to adduce evidence at trial that Mr Hartland had instructed Mr Spruce to transfer the F&F to the holding company of West, by way of a dividend.

34. Version 4 was to be found in numerous passages of cross-examination of Mr Hartland. The appellants say that the essence of his answers, taken together, was that he accepts that he instructed Mr Spruce to transfer the F&F to UK, so as to create an inter-company debt due from UK, which would subsequently be the subject of a dividend to UK. The following passages, in particular, are relied on:

    i) At day 1, p.137, Mr Hartland was asked to explain why he says Mr Spruce made a mistake. It is important to remember that he had not said he knew how Mr Spruce made a mistake, and he was simply offering a possible explanation. In the course of that, however, he gave evidence as to his conversation with Mr Spruce. When first asked about this, his evidence went no further than his witness statements. He said that he told Mr Spruce about the intention, ultimately, to have the F&F transferred to the restructured Propcos, and that in the meantime "we also need to pay a dividend to get the assets out of West up to, which I thought then and was correct, UK". He reiterated that he could only think that Mr Spruce had misunderstood this instruction when he made journal entry 2045.

    ii) At day 1, p.143, Mr Hartland reiterated that his intention had been to move the F&F out of West by way of a dividend, and he said that was because it was necessary to do it that way to avoid giving rise to a VAT liability.

    iii) At day 1, p.147, Mr Hartland explained that the process of moving the assets to UK by way of dividend would involve two steps: first, the transfer of the assets so as to create a debt and, second, the declaration of a dividend in respect of the debt, the second step occurring at the year end. It is important in this regard to note that the year-end of West was 31 October 2009. At Day 3, p.5 he came back to this, explaining that he thought that the dividend would occur in the year ending 31 October 2009, albeit that the paperwork would be "raised subsequently".

    iv) At day 2, p.57, Mr Hartland was challenged with the fact that when the paperwork was produced relating to the declaration of a dividend by West, it did not simply net-off a debt owed by the holding company, but transferred inter-company indebtedness to the holding company. Mr Hartland's answer pointed to the fact that the fixed asset debt, being £3.15 million as shown on the schedule, was transferred up, and the only problem was that the inter-company balance should have been with UK, not GIL, and he simply did not spot that.

35. Mr Parker submits that the fundamental difference between versions 3 and 4 is that under version 4, while the declaration of a dividend was provisional, in the sense that

it would be undertaken if at the relevant time it was appropriate to do so, the transfer of the F&F in return for the creation of an inter-company debt from UK was *not* provisional, but was to be done in any event. The consequence, Mr Parker submits, is that if it turned out that the dividend could not be declared for some reason, then the transfer of the F&F could not simply be reversed, because that would have involved the release of a debt of £3.5 million in return for F&F worth a fraction of that sum. He submits that the transaction which Mr Hartland accepts instructing Mr Spruce to carry out was thus exactly the same as the transaction which is pleaded against him, save only for the identity of the recipient of the F&F.

36. Mr Parker accepted that the respondents did not advance at trial a case that a transaction had occurred on the basis of Version 4. Nor did the judge reach any finding that such a transaction had occurred. The complaint in the appellants' skeleton, therefore, that the only way in which the respondents "could ask for the Court to hold that there had been a transfer otherwise than to GIL was to ask for permission to amend the Points of Defence" misses the point. The respondents did not ask the court to reach such a conclusion, and they did not need to do so. The judge's finding (at [68] of the judgment) was limited to the nature of the instruction that Mr Hartland gave; the relevance of that finding being in its negative – i.e. that there had been *no* instruction to transfer the F&F to GIL.

37. He submits, however, that once Mr Hartland gave that evidence, he had effectively abandoned the defence as pleaded and that, there being no other pleaded defence to the claim, the judge should have found for the appellants.

38. I reject this submission. The respondents, in their defence, denied that the alleged transaction (namely the release of a debt owed by GIL to West in return for the receipt of the F&F) had occurred at all. That denial was further particularised by the averment that there had never been any transfer of the F&F to GIL so as to create a debt in the first place, on the basis that the journal entries purporting to reflect that transaction were made in error. I reject the appellants' contention that it is necessarily implicit in the defence that the respondents were asserting that no instruction at all had been given to Mr Spruce. The defence clearly pleads that there was no instruction given to Mr Spruce to transfer the F&F "to GIL". I do not accept that the defence was misleading by omitting a full description of the instruction given to Mr Spruce. In any event, the appellants acknowledge that although the defence itself did not mention Version 3, they were aware that the respondents' contention was that an instruction had been given by Mr Hartland to Mr Spruce to cause the F&F to be transferred to West's holding company by way of dividend, and they had raised no objection to evidence being led at trial to that effect notwithstanding that it had not been pleaded.

39. In those circumstances, I simply do not see how Mr Hartland's evidence in cross-examination that he believed that the error came about because of a misinterpretation by Mr Spruce of instructions he (Mr Hartland) accepts that he *did* give, to effect a dividend of the F&F to West's holding company via the two-stage process I have already mentioned, constituted an abandonment of the defence that there was no transaction involving GIL at all.

40. Moreover, for reasons which I develop below, I do not accept that his evidence amounted to an admission of the appellants' allegation that there had been a transaction at an undervalue, save only as to the identity of the recipient of the F&F

(which would, in any event, have amounted to an alternative claim which was never advanced by the appellants).

The evidence point

41. It is well-established that the circumstances in which an appeal court will interfere with findings of fact made by a trial judge, particularly one who has heard oral evidence, are limited. This is not merely because the trial judge has had the advantage of observing witnesses giving live testimony, but because of the much greater familiarity the trial judge has with the evidence as a whole, as was explained by the Canadian Supreme Court in *House v Nikolaisen* [2002] 2 SCR 235, at para 14 (cited with approval by Lord Briggs in *Perry v Raleys Solicitors* [2019] UKSC 5, at [50]):

> "The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged."

42. Accordingly, an appeal court will interfere in findings of fact only when it is satisfied that the judge's conclusion was rationally insupportable or one that no reasonable judge could have reached.

43. Recent guidance on the approach of an appeal court was provided in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41. At [57] Lord Reed said:

> "I would add that, in any event, the validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although, as I have explained, it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him, subject only to the requirement, as I shall shortly explain, that his findings be such as might reasonably be made. An appellate court would therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable."

44. At [62] he provided further guidance on what it means to say that the trial judge has gone "plainly wrong", noting that there is plainly a risk that it may be misunderstood:

> "The adverb "plainly" does not refer to the degree of confidence felt by the appellate court that it would have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different

> conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

45. He concluded, at [67] as follows:

> "It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

46. The central finding of fact of the judge was that the transaction pleaded as the transaction at an undervalue had not taken place. There was no release of a debt due from GIL, in return for the F&F because there had never been a transfer of the F&F to GIL.

47. That conclusion was based, in turn, on the finding that the journal entries apparently recording the transfer of the F&F had been made by Mr Spruce in error, were not authorised by Mr Hartland and did not reflect any actual transfer of the F&F. As I have noted above, a transaction may not be "effected" by mere journal entries. It would be necessary to prove, at the very least, a decision by Mr Hartland in his capacity as director of both GIL and West that the transfer of the F&F should take place in return for the assumption by GIL of a liability to pay West £3.551 million.

48. Mr Parker's attack on the judge's findings principally involved identifying evidence inconsistent with Mr Hartland's claim that he had not caused the F&F to be transferred to GIL. Before considering whether this attack overcomes the substantial hurdle facing an appeal against findings of fact, the respondents raised a preliminary point as to whether it was even open to the appellants to make it, given the terms of the grounds of appeal.

49. Mr Davies referred me to *Hickey v Secretary of State for Work and Pensions* [2018] EWCA Civ 851, in which the Court of Appeal stressed the importance of properly particularised grounds of appeal, and the need to guard against the grounds being covertly extended in a skeleton argument. If an appellant wished to rely upon a ground for which permission had not previously been granted, it was necessary to seek permission to amend.

50. Nowhere, in the appellants' 14 grounds of appeal, was there any clear identification of the contention that the judge had been wrong to conclude that there had been no transfer of the F&F to GIL, no debt owed by GIL and thus no release of that debt so as to constitute a transaction for the purposes of s.238. In fact, the main focus of the grounds of appeal was the contention based on Version 4. This was exemplified by paragraph 8 of the introduction to the grounds of appeal, purporting to identify the reasons why the judge had dismissed the claim. This identified – as the only substantive reason given by the judge for dismissing the claim – that "Mr Hartland had in fact intended that the transfer of the Fixtures and Fittings should have been to a

company other than GIL." That is a clear mischaracterisation of the judge's conclusions.

51. Mr Parker contended that Ground 7 of the grounds of appeal was a challenge to the judge's core finding of fact. This stated that "The judge's finding that the transfer of the Fixtures and Fittings by West was intended to be to GCH(UK) was against the weight of the evidence and such as no judge could reasonably have made." The focus of this ground, however, was again the case based upon Version 4. It is clearly *not* a challenge to the judge's finding that there had been no transaction with GIL at all. Mr Parker also referred to Ground 6, but this is a general contention that the judge erred as a matter of law "in failing properly to analyse and test the witness evidence against the inherent probabilities, the documents and the previous statements of Mr Hartland…" It does not identify which, if any, particular finding of fact was said to be wrong.

52. Following the end of the hearing of this appeal, without prejudice to their contention that the existing grounds of appeal were sufficient, the appellants submitted a draft amendment to the grounds of appeal. This added a new ground 7A contending that the findings at paragraph 113 of the judgment (that Mr Spruce acted in error and that there had been no transactions whereby the F&F were sold to GIL or whereby that sale had been reversed) "were not properly open to the judge given the evidence, the Points of Defence and the Respondents' case as relied on at trial."

53. Subsequently, the respondents indicated that they would not object to the grounds of appeal being so amended. For the record, I conclude that the existing grounds of appeal did not include the ground that the judge was wrong to conclude that there was no transaction with GIL but I grant permission to amend the grounds of appeal to add new ground 7A.

54. Mr Parker relied on a number of matters which he submits indicate that Mr Hartland had authorised Mr Spruce to effect the relevant journal entries, such that he had caused West to enter into the transactions to transfer the F&F to GIL in October 2009 and to reverse that transaction in February 2010:

    i) The inconsistencies in the four versions given by Mr Hartland as to the instructions given to Mr Spruce;

    ii) The inconsistency between Mr Hartland's evidence at trial (that he instructed a transfer to UK) and the evidence in his first witness statement that he did not want to transfer the F&F to UK;

    iii) Documents seen by Mr Hartland in connection with the proposed dividend to Monmore, including a spreadsheet in January 2010 identifying the intercompany debts of the group, which proceeded on the basis that there was a debt due to West from GIL and that the F&F were no longer in GIL;

    iv) The logical impossibility in Mr Hartland having instructed Mr Spruce to effect a transfer to West's holding company, because it was not known who the holding company was.

v) The discrepancy between Mr Hartland's evidence that he only became aware of the relevant journal entries after these proceedings commenced, and his pleaded defence, which stated that when Mr Hartland became aware of journal entry 2045 he "reasonably believed that the position of creditors of the Company was being protected by Journal 2261 correcting the mistaken Journal 2045."

vi) The distinction between Mr Spruce's journal entries relating to the F&F, which he "corrected" by entering transfers having the effect of reversing the original transfer, as opposed to making a correction (i.e. rectifying) the journal entries as he did on other occasions.

vii) To the extent that the judge relied on the evidence of Mr Hartland, Mr Parker submitted that this was wrong, because his evidence was "totally unreliable".

55. The first point to note is that the appellants do *not* contend either that there was no basis in the evidence for the judge's findings or that there was a demonstrable failure to consider relevant evidence. It is clearly insufficient merely to point to evidence which was taken into account by the judge and to assert that she should have come to a different conclusion in light of it.

56. This is particularly so in light of the numerous findings identified by Mr Davies for the respondents, which are either agreed or not challenged by the appellants.

57. These include the following (which Mr Davies described as "macro-facts", being important background matters against which the possible theories must be tested):

i) GIL was in dispute with Barclays, who had security over GIL's assets. To resolve the dispute, Mr Hartland was attempting to restructure the group with new Opcos and new Propcos, but without GIL.

ii) Mr Hartland specifically wanted to dismantle GIL, as demonstrated in an email dating from July 2009 (relied on by the judge at [97] of her judgment). This was broadly contemporaneous with the discussion Mr Hartland had with Mr Spruce as to the transfer of the F&F, via the holding company, to the new Propcos.

iii) The ultimate destination of all of the assets depended on whether Barclays and other banks agreed terms.

iv) It was Mr Spruce's practice to create many documents in "escrow", that is on a provisional basis, not intended to reflect actual transactions, pending agreement over restructuring and financing proposals. This was something the judge relied on at numerous points in her judgment (see for example, [61], [78], [90] and [98]).

58. In addition, he refers to a number of other "micro-facts", as follows:

i) There was no board minute, invoice, acquisition agreement, or written communication ever referring to a proposal to transfer F&F to GIL. As the

judge noted at [96] in testing rival case theories against the contemporaneous documents, what is *not* there is equally important.

ii) It was the evidence of Mr Plant (which had largely been unchallenged) that Mr Spruce used SAGE as a sort of notepad to see what transactions looked like. Moreover, at the relevant time Mr Spruce had formally retired and was in failing health. There were many examples of Mr Spruce having made errors in journal entries, and subsequently correcting them.

iii) It was also Mr Plant's evidence that he did not take at face value journal entries showing transfers, and that he would always want to have seen a paper trail confirming them.

iv) So far as the spreadsheet relied on by the appellants is concerned, it was the product of a collection of Mr Spruce's journal entries. Mr Davies pointed out that it was itself plainly a work in progress, since the two columns of inter-company debt failed to balance by a sum in the region of £6 million. That was corroborated by the fact that it contained the dividend to Monmore, which never happened. Moreover, the timing of its production was important, being shortly before Mr Plant met with Mr Spruce for the purpose of commencing the audit process.

v) The only contemporaneous document showing that GIL owned the F&F was the draft accounts of GIL. The fact that they were immediately corrected corroborates Mr Hartland's evidence that as soon as he saw them he said they were incorrect.

vi) Finally, it was Mr Hartland's evidence that he never had access to SAGE, so could not have known of the existence of the journal entries.

59. Mr Davies submits that in light of these facts, the most plausible conclusion remains that Mr Hartland did not authorise a transfer of the F&F to GIL. As I have pointed out above, he need not go that far: it is sufficient to conclude that in light of the totality of the evidence – including these points – it cannot be said that the judge's core findings were irrational.

60. Mr Parker put at the forefront of his argument that the judge fundamentally misunderstood the difference between Version 2/3 and Version 4 as explained by Mr Hartland in cross-examination. In particular, the appellants criticise the judge's finding at [105] of the judgment that the inconsistencies related to mechanics, and not as to the identity of the intended recipient of the F&F. The key point in that paragraph of the judgment is that there was no inconsistency in Mr Hartland's oral evidence that he had no intention to transfer the F&F *to GIL*. The characterisation of the inconsistencies as "mechanics" was thus a secondary point. For the following reasons, I do not in any event accept that the judge was wrong to characterise such inconsistencies as "mechanics".

61. The cross-examination of Mr Hartland began in the afternoon of Day 1 and lasted until the middle of the morning on Day 3. It covers some 245 pages of transcript. The judge had the advantage of listening to the whole of Mr Hartland's cross

examination. As the authorities to which I have referred show, an appeal court is at a distinct disadvantage in this respect.

62. The passages from Mr Hartland's cross-examination that I have cited above support the conclusion that Mr Hartland told Mr Spruce in July or August 2009 that the F&F should be the subject of a dividend to West's holding company (as a precursor to their transfer to new Propcos), and that while this should be effective in the year ending October 2009 he would not expect the paper work (e.g. the companies' accounts) to reflect this until after January 2010 when discussions commenced between Mr Spruce and Mr Plant as to the finalisation of the accounts.

63. While I accept that in the course of later passages in his cross-examination Mr Hartland acknowledged that this would be achieved in two steps (the transfer of assets to the holding company, then the declaration of the dividend in respect of the resulting debt) I do not accept that it follows from this that he intended the first step to have been independent from the second such as to create an irrevocable debt due from the holding company equal to the book value of the F&F.

64. Mr Parker relied on passages in cross-examination where Mr Hartland appeared to accept that the intended transfer of the F&F to UK was not provisional (for example, where Mr Hartland agreed – at Day 2, p.108 – with the proposition that "the decision for the court is not whether or not the decision to move the fixtures and fittings out of west was in some way provisional or something to be altered later, the decision for the court was simply what was the instruction that you gave to Mr Spruce").

65. As I have already noted, it was neither party's case that a transfer of the F&F to UK had actually taken place. It was accordingly not part of the appellants' case being put to Mr Hartland that there had been such an irrevocable debt created from UK to West. Had that been the appellants' case, then it would have raised a number of issues, none of which were explored. These would have included the inherent improbability that if an anticipated restructuring by which assets were to be transferred to a parent company by way of dividend could not be completed, it was nevertheless intended that an intermediate step in the process involving a transfer of the assets at net book value would be irreversible, thus creating an irrevocable debt from the parent to the subsidiary in an amount that was some 20 times greater than the value of the assets transferred. The questioning of Mr Hartland in the passages relied on by Mr Parker was not made in the context of such a case. The suggestion is also contradicted by other passages in Mr Hartland's evidence (for example, Day 2, p.151, where he said that the instruction to transfer the F&F to the holding company was always provisional until West's accounts were signed). I do not think it is open, therefore, to build a case, on appeal, that Mr Hartland's evidence is to be interpreted as an admission that the instruction which he gave Mr Spruce was to transfer assets to UK on terms that created an irrevocable debt due from UK in an amount equal to the book value of those assets.

66. For similar reasons, I reject the appellants' contention that Mr Hartland's evidence in relation to Version 4 amounts to an admission that he gave instructions for a transaction that was the same as that which was pleaded, save only for the identity of the recipient. Accordingly, I also reject the criticism of the judge that she failed to conclude that the claim in breach of duty was made out in light of that evidence of Mr Hartland.

67. Mr Parker also placed reliance on the (admitted) inconsistency between Version 1 and the defence later advanced by Mr Hartland. He submitted that no explanation was given by Mr Hartland as to how his solicitors came to write, in their letter of 30 March 2016, that the F&F had been transferred to GIL. It is important, however, to see precisely what was said in paragraph 31, the key passage, of that letter. The second half of the paragraph recites what is common ground, that Mr Spruce made the various entries recording transfers of assets from West to GIL. It is the first part of the paragraph which is inconsistent with the respondents' case. What is said there is that there was a conversation between Mr Hartland and Mr Spruce "about a restructuring whereby it was proposed that GIL would hold all of the fixed assets".

68. While it is true that Mr Hartland did not waive privilege so as to provide evidence from his solicitors of the mistake he says they made in writing the letter, he did say that he thought the solicitors must have misunderstood what he said about the restructuring, because what he had told them was that his discussion with Mr Spruce had been that the F&F were to go to the Propcos, because the Propcos, not GIL, were part of the restructuring. This is not only plausible, but is consistent with the 7 July 2009 email I have already referred to, indicating an intention to dismantle GIL. I do not consider this inconsistency in evidence (which was something specifically addressed by the judge) to be something which establishes that the judge's conclusion was irrational.

69. As to the appellants' reliance on the documents relating to the Monmore dividend and the January 2010 spreadsheet, it is true that there is evidence which – had Mr Hartland appreciated its significance at the time – would have led him to realise that the F&F were recorded in the draft management accounts/spreadsheets as no longer in West, and that the book value of the F&F was recorded as a debt due from GIL. The judge reviewed this evidence, but concluded that Mr Hartland had not in fact appreciated its significance. In my judgment the matters relied on by Mr Parker do not reach the threshold of establishing that the judge's conclusion in this respect was irrational. Indeed, the fact that, just a few weeks later, when Mr Hartland accepts that he was presented with draft accounts showing the F&F transferred to GIL, his immediate reaction was to require the accounts to be changed, begs the question why he would not have had the same reaction had he appreciated the significance of the spreadsheet shown to him in January.

70. The point behind the appellants' contention as to logical impossibility (see paragraph 54(iv) above) is that in the absence of certainty as to the identity of the holding company, Mr Hartland must have intended Mr Spruce to effect a transfer to GIL in the meantime. This is no more than a point to weigh in the balance against the judge's conclusion that there was no transfer to GIL. It is counterbalanced by the consideration (upon which the judge placed reliance) that it would have been perverse to transfer assets to GIL because they would be subject to Barclays' security (thus depriving Mr Hartland of a bargaining chip in his negotiations with Barclays) and because it was Mr Hartland's intention to dismantle GIL. Additionally, it seems to me that the appellants' case always faced the inherent problem that it required GIL to have assumed – as a result of the transaction said to have been recorded in the journal entries – an unconditional liability to pay £3.551 million for assets worth no more than approximately £177,000. Not only would that have constituted a breach of Mr

Hartland's duties to GIL but it would almost certainly have placed it in breach of its covenants with Barclays.

71. The appellants' contention based on the difference between the way in which Mr Spruce was alleged to have "reversed" the relevant journal entries and the manner in which he corrected other mistakes (see paragraph 54(vi) above) faltered on the lack of underlying evidence with which to make a reasoned comparison. The assertion that Mr Hartland's evidence was "totally unreliable" (see paragraph 54(vii) above) falls far short of the threshold required to demonstrate that the judge's conclusion was irrational. The same is true, in my judgment, of the remainder of the evidential matters relied on by the appellants.

72. Overall, it was Mr Parker's contention that the judge had failed to set out the essential building blocks of the reasoned judicial process, such as defining the issues, marshalling evidence and providing reasons, citing *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] 4 WLR 112. I have no hesitation in rejecting that submission. Reliance on the *Simetra* case (where the circumstances were completely different) was misplaced. As I have demonstrated above in dealing with the appellants' more specific criticisms, the judge – having correctly identified the core issue (whether the transaction alleged by the appellants took place) – dealt fully and carefully with the written and oral evidence relating to that issue, including in a passage specifically devoted to the inconsistencies in the evidence as identified by the appellants' Counsel.

Indemnity Costs

73. In a short, oral judgment on 12 October 2018, the judge explained her reasons for awarding indemnity costs. She concluded that the action was "misconceived, vexatious and irresponsible" and a "plain case" for indemnity costs, noting that the appellants "could not plead or even articulate at trial, still less prove on the balance of probabilities, a coherent transaction at an undervalue claim."

74. She provided, by way of example, the following factors which took the case out of the norm:

    i) The case, as formulated, was wholly misconceived;

    ii) The appellants had no meaningful evidence to support their application, and ignored what should have been clear from the company documentation considered at trial;

    iii) The appellants did not take time to understand the journals that formed the bedrock of the application;

    iv) The appellants ran a case which was an aggressive case and went materially beyond the pleaded case, notwithstanding clear warnings at the start of the trial that they should confine themselves to the pleaded case;

    v) The appellants pursued in cross-examination a s.423 case and allegations that were tantamount to allegations of criminal offences (when none was pleaded);

vi) So far as Mrs Hartland was concerned, she had been put through the stress of a five-day trial in circumstances, without a case against her having been properly pleaded or thought through.

75. In their grounds of appeal, the appellants contend that the order was perverse in light of: (1) the frequent changes in Mr Hartland's account of what happened; (2) his professed ignorance of matters that it was his duty as a director to understand; (3) his disavowal at trial of statements made in letters from his solicitors and in his points of defence; and (4) because the respondents' defence succeeded on the basis of a story that was inconsistent with his points of defence.

76. The appellants' skeleton argument made the same points. In addition, they contended that since Mrs Hartland had admitted being a director in name only, that was clearly a breach of duty having "abrogated directorial responsibility to her husband".

77. The general approach to appeals on questions of costs was reiterated by the Court of Appeal in *Blindley Health Investments Ltd v Bass* [2015] EWCA Civ 1023, per Hildyard J delivering the judgment of the court at [127] to [128]:

> "127. Appeals in relation to costs are discouraged. An appeal court will be particularly loath to interfere with a decision on costs. As Wilson J (as he then was) said (sitting in the Court of Appeal) in *SCT Finance v Bolton* [2002] EWCA Civ 56:
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> > "This is an appeal…in relation to costs. As such, it is overcast from start to finish by the heavy burden faced by any appellant in establishing that the judge's decision falls outside the discretion in relation to costs…For reasons of general policy, namely that it is undesirable for further costs to be incurred in arguing about costs, this court discourages such appeals by interpreting such discretion widely."
>
> 128. In other words, the generous ambit within which a reasonable disagreement is possible is at its most generous in such a context."

78. Where, as here, the issue is as to the basis of assessment of costs at the end of a trial, where the judge's reasoning is based on her analysis of the way that the case as a whole was framed and pursued before her, it is all the more appropriate to afford the judge a generous ambit of discretion.

79. I do not regard any of the matters relied on in the grounds of appeal as justifying interfering with the exercise of the judge's discretion in relation to costs. I have already addressed above, and rejected, the contention that the respondents succeeded on the basis of an unpleaded defence. I have also addressed in detail the alleged frequent changes in Mr Hartland's version of events: in short, I do not accept that the changes between Versions 2, 3 and 4 were as fundamental as the appellants seek to make out, particularly when seen in the context of the numerous passages in cross-examination spread over three days some nine years after the events in question. I do not think that Mr Hartland's professed ignorance of matters which it was his duty to

understand reaches the threshold of showing the judge's conclusion was perverse, seen in the same context.

80. I accept that Version 1 is indeed inconsistent with the defence advanced by the respondents and provided at least some support for the appellants' case. I do not accept, however, that this factor (which is one the judge was well aware of, having specifically addressed it in her judgment) vitiates the judge's conclusion as to the appropriateness of the claim being pursued in the manner it was, which was based on her review of the entirety of the case.

81. In his reply submissions, Mr Parker referred to further matters which he contended demonstrated that the judge's conclusion was wrong. He said that the judge's reference to there being no meaningful evidence to support the application was extraordinary, given all the documents that were contrary to the defence. By this, however, I consider that the judge intended to refer to the fact that aside from the journal entries, which Mr Hartland did not see, and other internal draft or provisional documents which were derived from the journals, there was nothing to indicate that a transfer of F&F to GIL had taken place. Indeed, the appellants themselves pleaded that there was no written agreement, no board minute or resolution, and nothing in the actual accounts of West which suggested the transfer had taken place.

82. He said it was not clear what the judge meant by her reference to the aggressive manner in which the claim was pursued. Without more, however, I am unable to second guess the judge's assessment in this regard, and I am certainly not in a position to conclude that it was one that no reasonable judge could have made.

83. Mr Parker said that the judge had been wrong to characterise the appellants as having made allegations that Mr Hartland's conduct amounted to a criminal offence. He said that the context of the reference in cross-examination to the criminal offence of failing to keep proper accounts (under s.386 of the Companies Act 2006) was in fact the opposite: the appellants were contending that the record was accurate because it would have been a criminal offence otherwise. It is true that Mr Nash QC made clear – in the course of the cross-examination – that the purpose of his raising s.386 was to challenge the proposition that until the financial statements were signed-off the accounting records were provisional. However, it is also true that it was expressly put to Mr Hartland that on his version of events he committed a criminal offence. For my part, I would not have viewed this incident as having great relevance to the basis of assessment of costs. That, however, is not the question. I do not think that the judge's reference to it was so unreasonable as to vitiate her exercise of discretion.

84. Mr Parker also said that the judge had been similarly wrong to characterise the appellants as having pursued in cross-examination a claim under s.423. The passage in the cross-examination on which this submission was based was one where it had been put to Mr Hartland that the plan to reverse the alleged transfer to GIL had been conceived after he realised that West was very likely to go into insolvent liquidation. Mr Parker submitted that this was relevant to the case, as pleaded, that Mr Hartland failed to take into account the interests of creditors at a time that he knew the company was likely to become insolvent. There is an inherent difficulty (which illustrates the reluctance to interfere with a judge's exercise of discretion) in picking out limited passages, let alone just one passage, in lengthy transcripts. I note, for example, that on Day 2, at p.144, it was put to Mr Hartland that the reason he wanted

to eliminate the debt owed by GIL was because he thought it would be more advantageous to him and the group. This was tantamount to an allegation of deliberate conduct designed to benefit the group to the prejudice of creditors. In this regard it is important to recognise that the pleaded case was one of a *failure* to take into account the interests of creditors. At its highest it was pleaded that Mr Hartland "must have appreciated" that the reversal would prejudice the creditors. Again, while I myself would have regarded this factor as relatively minor to weigh in the balance, I do not consider that the judge's reference to it vitiated her exercise of discretion.

85. So far as the point made in the appellants' skeleton as regards Mrs Hartland is concerned, even if she was in dereliction of her duties as director (by over-reliance on her husband) this was legally irrelevant unless it caused the loss claimed by the appellants. The only pleaded case against her was for damages for permitting the impugned transaction to take place and was thus parasitic on the claim in respect of the alleged transaction at an undervalue. Accordingly, I consider the judge was justified in reaching the same conclusion, so far as the basis of assessment of costs was concerned, in relation to Mrs Hartland as in relation to the other respondents.

Conclusion

86. For the above reasons, I dismiss the appeal against the judge's order.