Neutral Citation Number: [2020] EWHC 1114 (Ch)

Case Number 006183 of 2018

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (Ch D)
IN THE MATTER OF GROSVENOR PROPERTY DEVELOPERS LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 13/05/2020

Before :

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE AGNELLO QC

- -

Between :

(1) PAUL ATKINSON
(2) GLYN MUMMERY
(as Joint Liquidators of Grosvenor Property Developers Limited)

JLs

- and –

(1) SANJIV VARMA also know as SANJEEV VARMA
(2) ARJUN KHADKA
(3) GROSVENOR CONSULTANTS FZE
(4) SIDDHANT VARMA also known as SID VARMA
(5) JONATHAN ENGLAND

Respondents

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Mr Rory Brown (instructed by gunnercooke) for the Applicants
The First Respondent in person

Hearing date: 19 November 2019, 20 January 2020, 2 April 2020

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.

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Deputy Insolvency and Companies Court Judge Agnello QC

Introduction

1. This is the hearing of the applications dated 17 June 2019 and 23 September 2019 issued by the Joint Liquidators ('the JLs') of Grosvenor Developers Limited ('the Company'). The First Respondent ('Mr Varma') appears before me acting in person. There was no attendance and/or representation from the other respondents to the current applications being the Second and Third Respondents ('Mr Khadka' and 'GCFZE' respectively), save that Mr Varma sought to be able to make submissions on behalf of GCFZE. I am satisfied that all three respondents against whom the applications were issued were served with the applications and evidence in support thereof.

The hearing days

2. This matter was listed before me for a half day. That was clearly on any view extremely optimistic. The matter was then adjourned for a further day and thereafter for a further half day. The fact that the matter was listed with such a hopeless time estimate is a matter which will in my judgment have a bearing on the costs which are sought in the event that the JLs succeed in part or the whole of their various claims. The reading time estimate was also extremely optimistic. No real excuse as to why the matter was listed with such an inadequate time estimate was given, beyond the JLs being keen to have the matter dealt with quickly. Instead, the case has dragged on over three days, from November 2019 until April 2020. Additionally, after the first hearing date, further evidence was sought to be filed and served by the JLs. It was

clear to me that after the first hearing, the JLs considered that their evidence was somewhat lacking and sought to improve the position. However this somewhat chaotic way to prepare and present a case has added to the time it has taken to deal with both in time of Court time and preparation.

The Applications

Mr Varma

3. The application in relation to Mr Varma seeks that judgment be entered against him by reason of his non-compliance with paragraph 2 of the order of ICC Judge Burton dated 12 July 2019. The order of ICC Judge Burton of 12 July 2019 was an 'unless order' stipulating that unless Mr Varma filed and served his Points of Defence by 4 pm on 2 August 2019, he would be debarred from defending the claims against him in these proceedings and the JLs would have permission to apply for judgment to be entered against him. Mr Varma did not file his defence by the stipulated date.

4. The application notice seeks a declaration that Mr Varma is liable as an express or constructive trustee for the 'Second Applicant' (I understand this to be the Company rather than one of the two liquidators) in the sum of £4,703,893, being the £3,122,841 paid to GCFZE, the £925,000 paid to him directly from the Kennedys account and the £656,052 paid to Mr Varma from the Casa Account. Mr Brown, acting on behalf of the JLs has indicated that, additionally, certain revised sums are being sought which have been entitled below as 'luxurious spending' being sums withdrawn from the Casa Account and used, according to the JLs by Mr Varma on items of a personal nature and therefore were taken by Mr Varma in breach of the duties he owed as a shadow/de facto director. These sums total £1,466,343.

5. The application seeks the following further orders

(1) Judgment be entered for the Claimants ('the JLs') acting as the Joint Liquidators of the Company on their claims against Mr Varma

(2) Delivery up by Mr Varma to the JLs of Company property, as defined in paragraph 3 of the Points of claim that he has in his possession or control

(3) That Mr Varma do pay by 3 December 2019 to the JLs

- The Company's money or alternatively equitable compensation for the Company's money received in that sum (or higher if so received by Mr Varma)
- Interest on the sum referred to above at 8% per annum or interest on such sum at the highest available exemplary rate or such other rate as the Court thinks fit for such period as the Court shall determine pursuant to s 35A Senior Courts Act 1981 and/or the equitable jurisdiction of the Court
- All accounts and inquiries into the application of the Company's money by Mr Varma shall be taken as are necessary to trace and recover from Mr Varma in so far as he or persons connected with him remain in possession of the Company's money or assets acquired directly or indirectly with the Company's money
- Costs

GCFZE

6. By order dated 1 May 2019, Mr Justice Birss granted a worldwide freezing order. As part of that order, paragraphs 9 and 10 required GCFZE to inform the Applicants' solicitors of GCFZE's assets located worldwide and also within 7 working days swear and serve an affidavit setting out the information relating to the assets. According to the JLs these paragraphs of the order of 1 May

2019 were not complied with. By order dated 15 May 2019, Mrs Justice Falk directed that if GCFZE did not comply with paragraphs 9 and 10 of the 1 May 2019 order, it would be debarred from defending the claims set out in the Points of Claim and the Applicants would be at liberty to apply to the Court for judgment to be entered against it. Accordingly, this application is made against GCFZE with GCFZE being debarred from defending the claim in accordance with the order of 15 May 2019.

7. In that application, the JLs seek the following :-

(1) Judgment be entered for the JLs on their claims against GCFZE;

(2) GCFZE shall pay the sum of £3,122,841 by way of equitable compensation for the Company's money received in that sum (or higher if received by GCFZE) ;

(3) Interest thereupon at 8% or interest on such sum at the highest exemplary rate as the Court thinks fit for such period as the Court shall determine pursuant to section 35A of the Senior Courts Act 1981 or equitable jurisdiction of the Court

(4) Accounts and inquiries into the application of the Company's money by GCFZE to be taken as necessary to trace and recover from GCFZE in so far as it or persons connected with it remain in possession of the Company's money or assets acquired directly or indirectly with the Company's money

(5) Costs

Arjun Khadka

8. Unlike in the case of Mr Varma and GCFZE, there is no debarring order as against Mr Khadka. He is according to the JLs, in breach of certain orders, namely by failing to deliver up the diamonds and jewellery which according to Mr

Varma, was handed to Mr Khadka by Mr Varma. (1 May 2019 order for delivery up). By order dated 15 May 2019, Mrs Justice Falk ordered that Mr Khadka provide information in relation to the whereabouts of all of his passports and any document or travel warrant that might facilitate travel to and from the jurisdiction and deliver these documents to the JLs' solicitors. By reason of the breaches of these orders, by order dated 9 July 2019, Mr Adam Johnson QC (sitting as a Deputy High Court Judge) issued a bench warrant in respect of Mr Khadka. On 4 June 2019, Chief ICC Judge Briggs ordered that Mr Khadka do serve and file Points of Defence on or before 2 July 2019. In breach of that order, no Points of Defence have been served by Mr Khadka.

9. The application against Mr Khadka seeks that judgment be entered against him for delivery up. Further or alternatively, in reliance upon Mr Khadka being a director of the company appointed on 6 June 2018, in breach of the duties owed to the company, the JLs seek by way of equitable compensation such sum to be paid to the JLs as represents the value of the diamonds and jewellery. I have summarised to a large extent what is set out in the application against Mr Khadka above.

The basis of the applications – establishing the case against the respondents

10. Early on in the hearing before me, I sought clarification from Mr Brown as to the applications being made. Mr Brown clarified and confirmed that the JLs were seeking to prove their cases as against the various respondents. The application notices are perhaps somewhat unclear in this respect but Mr Brown confirmed that this was effectively the trial of the action in relation to Mr Varma and GCFZE. He accepted that as regards Mr Khadka, he was also seeking to make this the trial of the action as against him.

11. This meant as Mr Brown readily agreed, that the JLs had to prove their case in order to satisfy me that judgment should be entered. It is important to distinguish this trial of the action as against the three respondents from any application seeking summary judgment, judgment in default or judgment based upon admissions. The Points of Claim are dated 10 May 2018 and Points of Defence were filed by two of the respondents, being the Fourth Respondent ('Siddhant Varma') dated 2 July 2018 and the Fifth Respondent ('Mr England') dated 17 July 2018. As is set out below, there are no Points of Defence from Mr Varma and GCFZE. Both are subject to debarring orders. Mr Khadka has not served Points of Defence and he is out of time to do so. There is no debarring order against him and no application seeking such a debarring order has been made to date.

Remedies

12. I raised with Mr Brown the issue of alternative remedies pointing out that the applications, as well as the Points of Claim sought various remedies which were simply not capable of being claimed cumulatively. As section 212 of the Insolvency Act 1986 makes clear, the JLs can seek a proprietary claim, represented by an account and inquiry or equitable compensation (roughly speaking, a damages claim - see section 212 (3)(a) and (b)). Mr Brown confirmed that in relation to the judgments being sought, the JLs had made an election seeking in essence a monetary judgment (being equitable compensation) as against Mr Varma and GCFZE. This meant that no accounts or inquiries were being sought even though the same were sought in the Points of Claim as well as in the applicatios notices. These alternatives were also referred to in the witness statements and in the skeleton. So I am asked to consider in relation to the three Respondents to order a monetary judgment representing equitable compensation. As is set out below, Mr Brown addressed me as to the quantum as well

as the interest being sought thereon. In relation to Mr Khadka, the JLs already had an order for delivery up but sought now a judgment as against Mr Khadka.

Evidence

13. The evidence relied upon at the start of the hearing by the JLs consisted of the sixth witness statement dated 8 November 2019, of Paul Atkinson (Mr Atkinson) and the eighth witness statement of Seamus Balloch Gray dated 19 November 2019. I granted permission at the first hearing date for the eighth witness statement of Mr Gray. It had been served upon the parties to the three applications. As I deal with below, Mr Varma's position in being able to oppose the filing and reliance of further evidence is limited by reason of the debarring order. However, as I did throughout the hearing, I asked Mr Varma what, if any objections, he had in relation to the new evidence and any prejudice arising from the late filing of the relevant evidence. This enabled me to assess whether his representations or objections were such that they fell within the terms of the debarring order and therefore not to be taken into account by me. Mr Varma did not oppose the further evidence being filed and relied upon at the first day of the hearing.

14. At the adjourned hearing on 20 January 2020, an application was made for permission for further witness statements to be filed and relied upon on behalf of the Liquidators. These witness statement are as follows: witness statement of Mary Liu dated 21 November 2019, witness statement of Dennis Ko dated 22 November 2019 and a ninth witness statement of Mr Atkinson dated 15 January 2020. All these further witness statements and exhibits had been served upon Mr Varma, albeit somewhat later than after the dates when they were prepared and signed. Mr Brown sought permission to file the three new witness statements, although he also informed me that neither Ms Liu or Mr Ko were in attendance and therefore not available for cross

examination. I therefore had to consider what if any weight to give to the two new factual witness statements being that of Ms Liu and Mr Ko. Mr Varma's ability to cross examine was in any event extremely limited because of the debarring order. I gave permission for the witness statements to be filed and relied upon. Their contents seemed to me to be relevant to the issues I had to determine. As I have already mentioned, I found it unsatisfactory that these statements had only been prepared and served after the case had commenced before me and was part heard. Moreover, it was also of concern that the JLs sought to rely upon these statements but that the deponents were not in attendance for the purposes of being cross examined. There was no satisfactory explanation for this. However, by reason of the debarring orders, even if the deponents had attended, it was unlikely that Mr Varma would have been able to challenge their evidence either on his own behalf or on behalf of GCFZE. As I have set out below when dealing with the contents of this new evidence, I would consider any ambiguity as against the JLs because no one had attended to answer questions on the the issues raised.

15. Both Mr Atkinson and Mr Gray attended to give evidence and both formally confirmed the content of their respective witness statements as well as the exhibits thereto. Mr Varma did not have any questions for either of these two deponents which did not touch upon issues relating to the defence he sought to be able to present. His main concern was to seek to prevent large judgments being entered as against himself and GCFZE.

The debarring orders – effect

16. On 12 July 2019, ICC Judge Burton made an order that 'unless the First Respondent files and serves Points of Defence by 4 pm on 2 August 2019 he shall be debarred from defending the claims against him in these proceedings and the JLs shall

have permission to apply to the Court for judgment to be entered against him' On 15 May 2019, Mrs Justice Falk had directed that unless GCFZE complies by 4 pm on 30 May 2019 with paragraph 10 of the order of 1 May 2019 , it shall be debarred from defending the claims set out in the Points of Claim dated 10 May 2019 and the Applicants shall be at liberty to apply to the Court for judgment entered against it. Both Respondents failed to comply with the terms of the orders and are therefore before me debarred from defending along the terms of the two orders.

17. Right at the start of the hearing, I wanted to hear submissions as to the effect of the debarring order as against Mr Varma, who attended the hearing. Mr Brown informed me that Mr Varma understood the debarring order was effective but wished to make submissions relating to quantum. The order made debarred Mr Varma from defending the claims against him. Mr Brown submitted that the claims being made were set out in the JLs' points of claim and therefore the order debarred Mr Varma from defending what was set out in the points of claim which would include quantum. He referred me to certain authorities in relation to the effect of a debarring order, including *Thevarajah v Riordan [2015] EWCA Civ 14*, as relied upon by Mrs Justice Proudman in the later case of *Michaela Hall v Lili Petrou Elia [2016] EWNC 1697*, in particular at paragraphs 15 – 26. In seeking to ascertain the role of a defendant who had been debarred, Mrs Justice Proudman referred to the history and relevant passages in the Thevarajah case as follows :-

> "15. Mr Russen QC submitted that the consequence of Mrs Elia being debarred from defending was that she was unable to make any submissions upon either the evidence or the law. He relies on the Court of Appeal's two decisions in *Thevarajah*
> *v. Riordan* [2015] EWCA Civ 14 and Civ 41.
>
> 16. Andrew Sutcliffe QC was one of the judges at first instance appealed against in *Thevarajah*. He held that relief from the sanctions and

debarring order imposed by Henderson J and Hildyard J respectively should be granted to the respondents, but the Court of Appeal overturned that judgment. Mr Sutcliffe QC said,

> "I consider that, notwithstanding the fact that they are currently debarred from defending the claim and subject to the Court's inherent jurisdiction to regulate its own process, the Respondents are entitled at trial to require the Claimant to prove his claim, to cross-examine and to make submissions."

17. But the Court of Appeal (Richards, Aikens and Davis LJJ) said (at [38]), "…we are troubled by the deputy judge's observation that even

> if the respondents remained debarred from defending the claim they would be 'entitled at trial to require the Claimant to prove his claim and make submissions'…The cases to which he referred in that connection, namely *Culla Park v. Richards* [2007] EWHC 1687 and *JSC BTA Bank v. Ablyazov (No 8)* [2013] 1 WLR 1331, do not appear to us necessarily to support so sweeping a proposition. This issue, however, will be a matter for decision by the judge who hears the trial; and having put down a marker in relation to it, we think it better to say no more on the subject at this stage."

18. Then the matter came on before Sales J for directions before trial. He ordered that there should be a difference between liability and quantum (the barred parties being allowed to dispute quantum), although Mr Bailey for the appellant said that the respondents (see [25] of the Court of Appeal judgment),

> "…cannot do anything. They are not in a position to contest anything that we say; they are not entitled to participate. However, that does not mean, of course, I can have any order I want, I am going to have to demonstrate to the Court on my pleadings and on my evidence that I am entitled to the relief that I seek…."

19. Tomlinson LJ, with whom Newey J and, significantly (as he was in the Court of Appeal in the appeal against the judgment of Mr Sutcliffe QC) Richards LJ, agreed, said at [26], "Mr Bailey's first instincts were in my view correct… ".

20. The second Court of Appeal judgment was an appeal from David

Donaldson QC, sitting as a deputy judge of this Division. It is important that there was no appeal from the decision of Sales J, (see [30] of the Court of Appeal judgment), although it is plain that the Court of Appeal did not agree with it. Tomlinson LJ set out the position, reversing the decision of Mr Donaldson QC,

> "[33]…the Deputy Judge also referred to the Defence and Counterclaim as having been "erased" and said that "any statement dependent for its vitality on the continued existence of the now erased Defence and Counterclaim cannot be invoked to supply, cure or support any claim not, or inadequately advanced in the Particulars of Claim." I do not entirely understand the ambit of this approach but I do not agree with the notion that the Defence had for all purposes ceased to exist. What had happened is that the Respondents had been debarred from defending. To that extent the Defence could not be relied upon by the Respondents, but it would be absurd if the document could not be relied upon by the Claimant as indicating the ambit of the dispute. Were that not the case, matters which were never in issue because of admissions in the pleadings would suddenly become contentious, with the extraordinary and perverse effect that the burden on the claimant at trial would be increased. The obverse would equally be true- a defendant may by virtue of being debarred from defending avoid the consequences of his admissions, thereby casting upon the claimant a burden which may, in reliance upon the admission, have become more difficult or even impossible to discharge. I agree with Mr Smith [of counsel]'s happy observation that "a defence will have left a lasting legacy on the statements of case as a whole. By virtue of what is said in a defence, the content of any reply, or the decision not to rely upon one, will have been affected. Further if the defence indicates to a claimant that the parties are in agreement as to what they disagree about, it will impact upon any consideration of whether to amend the particulars of claim to clarify anything that might be said to have been unclear." It might also for example have been necessary to look at the Claimant's Reply and Defence to Counterclaim which would most likely be difficult to follow without resort to the pleading to which it was responsive.
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> [34] It follows that I do not consider that the Deputy

> Judge was precluded from having regard to the Defence and Counterclaim if that document helped him to understand the ambit of the dispute between the parties. However I consider that the Particulars of Claim were in any event sufficiently clear."

21. The Registrar found (see [15] of his judgment) that whilst Mrs Elia could not contest the claim, the Trustee still had to prove her case on the balance of probability; in doing so, Mrs Elia's Defences were not erased and did not have to be ignored. They

were potentially relevant when considering whether there were any admissions and in identifying areas of disagreement. The position was different with regard to evidence. The Trustee's case had to be advanced upon the evidence filed in support of the claim.

22. The Supreme Court's decision on the first appeal in *Thevarajah* ([2015] UKSC 78; [2016] 1 WLR 76) was given on 16 December 2015 by Lord Neuberger, with whom Lord Mance, Lord Clarke, Lord Sumption and Lord Hodge agreed. Lord Neuberger said (at [11]) that but for a feeling of grievance for the appellants he would have simply said that the appeal should be dismissed for the reasons given by the Court of Appeal at [23]-[32]. The decision of the Supreme Court was that relief from sanctions should not be given without a change of circumstances.

23. Mr O'Mahony submitted that the remarks of the Court of Appeal in *Thevarajah* (first decision) were obiter and the extent of the operation of the debarral was a matter for the trial judge.

24. Mr O'Mahony points out that the comments were not addressed when the Court of Appeal's decision was unsuccessfully appealed to the Supreme Court at [2016] 1 WLR 76. However, the Supreme Court did not need to address them. In any event, if the Supreme Court had disagreed I would have expected them to say so. Moreover, although the remarks were obiter in the sense that they did not form part of the decision on the appeal from Mr Sutcliffe QC (see [29]), the Court of Appeal did "put down a marker" in relation to them and I would be foolish to ignore what they said. Indeed it would be a brave puisne judge who would ignore such a marker. I would always start from the proposition that the Court of Appeal is more likely to be right than I am.

25. And it is instructive to note that Mr Collings QC (without demur from Mr Fenwick QC) (and indeed Mr Hill on behalf of Mrs Elia in the present case) declined to make submissions after orders debarring his clients had been made in *Apex Global Management Limited and another v. FI Call Limited and Others* [2015] EWHC 3269 (Ch); [2015] WL 6757849, heard by Hildyard J: see [3], [67], [68] and [70] of his judgment. See also Mr Fenwick's stance in an earlier version of the case that went to

> the Court of Appeal, *HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v. Apex Global Management Limited and Another* [2014] EWCA Civ 1106; [2014] WL 3671752, and see [85] of Arden LJ's judgment, with which the rest of the Court of Appeal agreed.
>
> 26. Mrs Elia was therefore debarred from disputing any of the respondents' claims in the proceedings. Mr O'Mahony rightly said that would not prevent Mrs Elia from pointing out a manifest error in the judgment. However, he did not point to any such error, despite having time between the last hearing on 23 March 2016 and this one (on 3 May 2016) to find one. Instead, he dipped into the bundles attempting to show that things might have come out differently on the evidence. However Mrs Elia was debarred from adducing or relying on any evidence."

18. As the lengthy passage set out above demonstrates, the approach of the trial judge is not one where the defence is necessarily ignored or that equally, claimants need to establish matters which in essence are not in dispute. Some regard can be had to evidence or defences filed by those barred, but this does not allow a defendant who has been debarred to rely on evidence. I have sought to deal with the current case by considering the content of the witness statements of Mr Varma as well as what he has said when examined before a Judge, or interviewed by the JLs. I have also considered documents disclosed by him.

19. When considering what claims which Mr Varma is debarred from defending, I turn to the Points of Claim which stand in this case (see order of Chief ICC Jude Briggs) as the Statement of Case. Paragraphs 21 to 33 set out the claims made as against Mr Varma. The relief sought is set out in paragraph 33. That paragraph does not set out the sums being sought. Paragraphs 33.2 specifically seeks damages and paragraph 33.5 seeks accounts and inquiries. The claims made against Mr Varma are made on the basis that he is alleged to be a shadow and/or de facto director and as such the pleading asserts:-

(1) delivery up of company property which Mr Varma is believed to have in his possession or control being money , a Bentley, any money collected for the Company and held by Kennedys to Mr Varma's order, and £656,052 (the reference to paragraph 16.2.12 must be to paragraph 16.2.21), relating to 58 payments made between 21 February and 4 December 2017 directly to Mr Varma for an unknown purpose

(2) in breach of the fiduciary duty owed by him to the Company, he misapplied company monies by causing or permitting payments directly or by instructing Mr England. This claim for breach is made also on the basis of a breach of trust. This claim includes a claim, in the event that the diamonds exist, breach of duty for causing the Company to acquire the diamonds without declaring a personal interest in the said purchase;

(3) as shadow and/or de facto director, Mr Varma carried on the business of the Company with the intent to defraud creditors or for the fraudulent purpose of misapplying Company money for his personal benefit or for fraudulent purposes unrelated to the purpose for which the Company was incorporated

20. In relation to GCFZE, the claim against it is based upon the transfers of large sums of money totalling £3,122,841 for no consideration (or for a value significantly less than that received by the Company) and/or alternatively that the transfers being made by Mr Varma in breach of the duties owed by him as de facto and/or shadow director and in breach of trust. The JLs assert that the knowledge of Mr Varma can be

attributed to GCFZE on the basis that he is the sole director and owner of all its shares (the knowing receipt claim). The JLs plead that in those circumstances, GCFZE was aware that it provided nothing of value to the Company in exchange for large sums of money transferred and that the sums transferred deprived the company of its ability to achieve the purposes for which the sums had been paid over investors to the Company.

21. Mr Varma accepted before me that the debarring order prevents him from raising defences. That admission by him is of course correct. This would relate to evidence for example relied upon by the JLs to demonstrate that he was a shadow/ de facto director. I raise this as a specific example because at the end of the first half day in this matter, it was clear that Mr Varma wanted to be able to rely upon documents which he asserted established that he was not a shadow and/or de facto director. In considering the issue of whether the JLs have made out the case that Mr Varma was a de factor and/or a shadow director, I have considered the documents which are in evidence before me. There was only one document actually in the evidence at that stage, but during the course of the adjourned hearing as well as the second adjourned hearing, the JLs sought to place before me in evidence further documents/evidence which had been produced and relied upon by Mr Varma in his evidence. In my judgment, Mr Varma is debarred from making submissions relating to what he asserts are the significance and effect of the documents he seeks to rely upon. Allowing him to do this is in effect allowing him to defend the claim which he is debarred from doing. This applies equally to any submissions he would seek to make in relation to the position of GCFZE, the existence or otherwise of the diamonds and jewellery and the existence or otherwise of Mr Maneet Singh. Having said that, it is important for me to consider these issues and any documents and for the JLs to bring them to my attention and thereafter to make submissions relating to them.

22. As in the case of *Hill v Elia*, Mr Varma is debarred from adducing or relying on evidence. He can raise any manifest errors and I expressly asked him to bear this in mind. Mr Varma was concerned about a large judgment being entered against him when, according to him, he had a defence. In line with the approach I took throughout the trial, I asked him at various stages during the case being presented by the JLs, whether he had questions for either witness and also what those questions related to. I asked him after the JLs had presented their evidence in relation to the judgment they sought as against Mr Varma and also after the JLs had presented its case against GCFZE. In doing so, I sought to ascertain whether what Mr Varma sought to raise was a defence matter or a manifest error. It is clear that Mr Varma wanted essentially to make points and present his defence or the defence of GCFZE. I had to explain to him several times that he and GCFZE were debarred from defending and the points being made by him were defence points. In my judgment, seeking to make submissions relating to the significance of a document relied upon by Mr Varma is a defence matter. This is not to say that I ignored any document which had been produced by him and the JLs' Counsel took me to the documents, and I considered them alongside the submissions made by the JLs. No points of manifest error were presented to me by Mr Varma during the hearing.

23. As to quantum, there is no difficulty in Mr Varma raising issues relating to manifest errors in relation to the quantum claimed by the JLs. Mr Brown was not seeking to argue otherwise. In relation to what is the role of Mr Varma and whether he can make submissions relating to quantum, during the course of the first half day of the hearing, it became clear that what Mr Varma wanted was to challenge effectively a judgment being entered against him in relation to large sums when his assertion was that he had done nothing wrong and that the jewellery acquired by him

using company property was a good investment. In my judgment, Mr Varma is not entitled to defend the JLs' claims by seeking to persuade me that there was some legitimate purpose for the money being used. Of course, as I have already set out, I will not and have not ignored any documents which may tend to support or challenge the case being made by the JLs. Equally, as I have set out above, I have read the witness statements and affidavits filed by Mr Varma. However this does not entitle Mr Varma to seek to argue that the documents provide evidence of his defence. Equally, although I have read the various witness statements and affidavits, in my judgment the debarring order means that Mr Varma is not entitled to raise and invite me to consider the contents of those statements by way of some defence.

24. As I have already referred to above, during the hearing, I expressly invited Mr Varma to inform me what he wanted to say so that I would be able to judge whether what he wanted to say fell within the debarring order or not and whether I was prepared to allow him to make submissions. Had he been legally represented, then this approach would not have been necessary. In the event, Mr Varma's position was a difficult one, because his submissions were to the large extent, an attempt by him to seek to defend the case which he is debarred from doing. He had no points relating to quantum which were separate from 'defence issues'. His submission relating to the acquisition of the jewellery being in the interests of the Company was, by way of example, a defence and not an issue of quantum. Accordingly, I do not need to consider whether any quantum issues fell in some way outside the scope of the debarring orders made. As the JLs had elected to seek specific sums by way of equitable compensation which related to the sum diverted from the Company, there was also no need to consider any valuations. There was in any event no valuation evidence relating to the diamonds and jewellery.

The background to the current application – procedural history

25. The claims made against the various respondents have a somewhat complicated history. I do not seek to set out the entirety of the procedural history, but sufficient for the purposes of this judgment. On 27 March 2019, an application notice was issued against Mr Varma seeking orders for his examination pursuant to section 236 of the Insolvency Act 1986 and for certain orders pursuant to section 234 of the Insolvency Act 1986. The section 234 application was set out in extremely wide terms, seeking orders for Mr Varma to pay, deliver, convey, surrender or transfer the property, books, papers or records set out in Schedule A to the application and for the production of all the books and records of the Company.

26. On 2 April 2019, ICC Judge Jones made the section 236 order as well as part of the section 234 order against Mr Varma. The section 234 order required Mr Varma to deliver up to the JLs' solicitors all documents belonging to the Company which are in his possession or control. The Judge also gave directions relating to the pleadings being served to deal with the section 234 application. The private examination which had been ordered by the Court on 2 April 2019 ended up subsequently being adjourned. It appears from the order made on 16 April 2019, that Mr Varma was ill and directions were given by ICC Judge Mullen on 16 April 2019 relating to the necessary medical evidence. On 1 May 2019, the JLs sought and obtained a worldwide freezing order by order of Mr Justice Birss. That freezing order froze Mr Varma's assets within England and Wales up to the value of £3,250,000. Additionally, the order prevented Mr Varma from dealing with diamonds and jewellery which Mr Varma and GCFZE asserted had been purchased by the Company from the Third Respondent. The order also froze the proceeds of sale of the diamonds and jewellery. The JLs gave an undertaking to issue and serve the unsealed application notice which was before the Court seeking the appropriate relief. The

order of 1 May 2019 also contained the provisions relating to GCFZE providing information relating to its assets and producing an affidavit within 7 working days of the service of the order upon it. It is the breach of these provisions of this order which culminated in the debarring order made against GCFZE.

27. On 10 May 2019, the JLs had issued an application seeking to amend the application notice of 27 March 2019 to include claims under section 212 and 213 of the Insolvency Act 1986 as against Mr Varma. Additionally, the 10 May 2019 application sought to join to the application the further Respondents being Mr Kadka, Mr Siddhant Varma, GCFZE and Mr England. The application notice of 10 May 2019 made reference to the relief being sought by the JLs against the Respondents and stated that, 'all these parties were innocently or otherwise involved in a systematic misapplication of assets belonging to the Company totalling £6.5 million between February and December 2017. It is desirable for them to be joined in the proceedings under CPR r 19.2 in order to resolve this dispute and ensure an effective and efficient liquidation of the Company'.

'Points of Claim to follow'

28. By order of 4 June 2019, Chief ICC Judge Briggs gave permission for the JLs to amend their application notice of 27 March 2019 to include the additional claims against Mr Varma as well as bring the claims against the other respondents. The order also stated that the Points of Claim shall be treated for all purposes as the JLs' Statement of Case. Directions were also given for the service of Points of Defence and Points of Reply. The order went on to provide for directions to take the matter to trial, with the trial being then estimated at 10 days, to include 1.5 days reading time. Disclosure was ordered as well as inspection.

29. By order dated 15 May 2019, Mrs Justice Falk continued the order made on 1 May 2019 by Mr Justice Birss. There have been further orders in this case relating to attendance for cross examination, further freezing orders as well as dealing with an application by Mr Varma for the delivery back to him of his passport so as to enable him to travel. That last matter was dealt with by Mrs Justice Falk on 11 September 2019 when the Judge refused to direct that Mr Varma be allowed his passport back until after the application for committal for contempt of Court was dealt with. The latter application is listed for some time later this year.

30. Mr Brown informed me that the trial of this case is listed for June 2020. That was the trial date in relation to the case against all respondents, but it seems to me that the time estimate for that may well have to be revised by reason of the applications before me. Additionally at the hearing held on 2 April 2020, Mr Brown informed me that Mr England had been made bankrupt (on his own petition) and does not intend to make any representations at the trial. That will again shorten the trial duration in my judgment.

31. On 4 October 2019, Deputy ICC Judge Sherkerdemian QC dismissed the applications made by Mr Varma seeking relief from the debarring sanction.

32. The current application seeking judgment is dated 17 June 2019 and was listed for a half day hearing for 19 November 2019. As I have already stated in the introduction part of this judgment, I expressed concern about the time estimate provided and it was clear from the skeleton lodged by Mr Brown, that the proper time estimate was at least one day. As I said to both Mr Brown and his solicitors, the Court needs to be notified as soon as it appears clear that a time estimate is inadequate. It was an absolutely hopeless time estimate and as will become clear later in this

judgment, this will have a bearing upon the costs sought by the JLs. Had a proper time estimate been provided and the matter had proceeded without the need for an adjournment, the additional costs sought by Counsel and solicitors would not, in my judgment have been incurred. As I have not heard submission in relation to costs from the JLs, this matter will need to be listed for a hearing when judgment is handed down.

Factual Background

33. The Company was incorporated on 16 December 2016, registration number 10528987. According to the evidence of Mr Atkinson (6th witness statement dated 8 November 2019), the Company had obtained investment in order to acquire the Grosvenor Hotel in Bristol and redevelop it as student accommodation. The investment was obtained from numerous investors who sought, under contracts for sale of units, to acquire units in the student accommodation. The prospectus indicated that the units would yield a significant investment for holders. Mr Atkinson asserts that instead of the funds raised being used to acquire the development site and develop student accommodation, funds were diverted into bank accounts belonging to or controlled by entities connected with Mr Varma and Mr England (who was the de jure director for a period of time). According to Mr Atkinson, the funds were used 'for other illegitimate purposes'. The hotel was not acquired by the Company and there was no planning permission for the proposed conversion from hotel to student accommodation. During the period from early 2017 until mid 2018, substantial sums were transferred out of the company's bank account as well as from the bank account of another company, being Casa Investments Limited. The JLs seeks to establish that certain sums paid into the Casa Bank account belonged to the Company and were transferred to Mr Varma or to GCFZE or used by Mr Varma in breach of the duties the JLs assert he owes the Company as a de facto and/or shadow director. There is

also a claim based upon fraudulent trading. A winding up petition was presented as against the company on 26 July 2018 and a winding up order was made on 14 November 2018, with the JLs being appointed on 6 December 2018.

34. Although Mr Varma is now debarred from defending the action, he has to date filed many witness statements in these proceedings relating to other applications made previously. This included the application pursuant to section 236, the application for delivery up of his passport, the freezing order application and its return date, to name but a few. Included in my trial bundle are many of his witness statements, namely first witness statement dated 2 April 2019, second witness statement dated 11 April 2019, affidavit sworn on 7 May 2019, second affidavit sworn on 16 May 2019, third witness statement dated 26 June 2019, fourth witness statement dated 27 June 2019, fifth witness statement dated 1 July 2019, sixth witness statement dated 1 July 2019, seventh witness statement dated 26 July 2019, eighth witness statement dated 15 August 2019, affidavit of 27 August 2019, affidavit of 27 August 2019 (in relation to GCFZE) and ninth witness statement dated 28 August 2019. I do not know if these are all his witness statements, but from reading them, I have a good picture of what Mr Varma says to date is his position and effectively the points he has made so far which could amount to a defence. Additionally, the witness statement of Mr Atkinson also deals with what Mr Varma has asserted in relation to his position and his dealings with the Company. Mr Varma asserts that he was a consultant for the Company but the JLs assert that he was in fact a de facto and/or shadow director who received directly in excess of £1,375,500 of Company money and indirectly through GCFZE, received a further £2,892,000. I will need to be satisfied that on the evidence, the JLs can establish on a balance of probabilities that Mr Varma was a de facto and/or shadow director.

35. The Second Respondent, Arjun Khadka, became the sole director of the company on 9 June 2018. The claims against him are for delivery up of company property pursuant to section 234 of the Insolvency Act 1986 and damages for breach of fiduciary duty and breach of trust pursuant to section 212 of the Insolvency Act 1986. Again, as I have set out above, Mr Brown confirmed that the JLs have elected and seek a monetary judgment. Mr Brown invited me to enter judgment but accepted very fairly that if I was not minded to deal with the applicaiotn for judgment in the circumstaces, then he would invite me to adjourn that application over to trial.

36. The Third Respondent, GCFZE, is a company registered in Dubai, United Arab Emirates. According to Mr Atkinson, GCFZE is solely owned and controlled by Mr Varma. Again this is a matter which I need to be satisfied of on the evidence before me. The claim against GCFZE is one of a transaction at an undervalue pursuant to section 238 of the Insolvency Act 1986 and knowing receipt as I have already described above.

37. The Fifth Respondent , Siddhant Varma, is the son of Mr Varma. No orders are being sought against him in relation to the current applications. The Fourth Respondent, Jonathan England, was the sole director of the Company up until his resignation on 9 June 2018. He has filed a defence but as Mr Brown informed me on the third day of hearing this matter, Mr England is now subject to a bankruptcy order and will not be making representations at the trial listed for June 2020.

The case against Mr Varma

38. As is set out above in the background section, I need to be satisfied in relation to the following matters :-

(1) that Mr Varma acted as a de facto or shadow director at the relevant times
(2) that relevant sums belonging to the Company were diverted by him in breach of the duty owed by him to the Company,
(3) that the sums so diverted were not applied for Company purposes or for the benefit of the company's business.

Although the pleading asserted a case of fraudulent trading pursuant to section 213 of the Insolvency Act 1986, the skeleton argument does not really engage on this alternative claim. There is, in my judgment insufficient particularisation of the allegations relating to fraudulent purpose of the Company in the pleadings and this again was not a matter dealt with by Mr Brown before me. Whilst Mr Brown did not formally abandon this part of the claim, he concentrated upon the claims being made against Mr Varma and GCFZE in relating to the misappropriation of large sums from the company. I will therefore not deal with any claim under section 213 on this basis.

39. The duties owed by a director are those set out in sections 171-177 of the Companies Act 2006 alongside those which exist at common law. They include a duty to act in the way he considers, in good faith, would be most likely to promote the success of the company and a duty to exercise reasonable skill and care. What is being alleged here is that Mr Varma, as a de facto and/or shadow director, misappropriated company monies for his benefit as well as transferring sums to GCFZE in circumstances where no consideration was received from GCZE. If proved, then in my judgment, those misappropriations would constitute breaches of the duties owed by Mr Varma as a de facto director and he would liable to account, as a constructive trustee for such sums.

40. Although the debarring order prevents Mr Varma from raising a defence in relation to the case against him, Mr Atkinson sets out in his witness statement details of what is alleged by Mr Varma. This also relates to Mr England. The case against Mr England is not before me so nothing in this judgment can bind or be used against him. Mr Varma asserts that he acted as a consultant and that he acted at all material times only as a 'nominee director'. Essentially Mr Varma asserts he acted on behalf of the 'controlling person' being a Mr Maneet Singh. Mr Atkinson states (para 25) that despite writing to Mr Singh and requests being made to Mr Varma to contact him, Mr Singh has not been in communication with the JLs. An email address was provided for Mr Singh by Mr Varma, but no verification of this being the email address of a Mr Singh was provided. Correspondence on the email address has been silent since 11 May 2019.

41. The JLs have not been able to satisfy themselves of either the existence of Mr Singh or his assumed role in the Company. Moreover, the JLs have not located any documents in the Company records which establish or evidence his alleged role. Mr Varma has produced copies of two letters dated 27 June 2017 and 9 June 2018 which he alleges are from Mr Singh. I have considered these letters below, but I need to place them in the context of the investigations carried out to date by the JLs as set out in the witness statement of Mr Atkinson. Mr Varma had provided in his interview a contact address and email for Mr Singh. There has been no reply to the attempts made by the JLs to contact Mr Singh. Bearing in mind the debarring order, in any event, it is not open to Mr Varma to seek to raise by way of a defence the role and/or existence of a Mr Singh. However, it is worth noting that from the point of view of the JLs, they have not located any evidence in support of Mr Varma's allegations in this respect.

42. In fact, the evidence from the Kenndys files which are dealt with by me in the section considering whether Mr Varma is a shadow and/or de facto director do not support the existence of a Mr Singh either. In my judgment, the evidence does not support the existence of Maneet Singh or his alleged involvement in the Company and its affairs. In reaching this conclusion, I have noted the two letters allegedly from a Mr Singh, but I have weighed this against the evidence accumulated by the JLs of the involvement of Mr Varma and in particular of his use of the company bank card as well as significant sums being used by him and diverted to his own personal bank account as well as into the bank account of GCFZE. Also, the exchanges between Mr Varma and the solicitors acting on behalf of the company at the time, Kennedys are especially revealing in that they contain no reference to Manjeet Singh. I deal with this evidence below.

Shadow/de facto director

43. The differences between a de facto and a shadow director have been summarised by Mr Brown in his skeleton. A de facto director is someone who acts as a director without actually being registered as a director. The question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director (Paragraph 33 of *Smithon Ltd v Naggar [2014]* referred to below) A shadow director is someone in accordance with whose directions or instructions the directors of the company are accustomed to act. Mr Brown submitted that on the facts of this case, Mr Varma was a both a de facto and a shadow director. He relied upon *HMRC v Holland [2010] UKSC 51* in support of the premise that a person can be both a shadow director and a de facto director (paragraph 91). He also referred to paragraph 46 of the judgment of Mr Justice Hildyard in *Secretary of State for Business Innovation and Skills v Choham [2013]EWHC 680* which again states that a person

may act as both, ‘the one in fact shading into the other’. Additionally, the Judge also commented that the same sort of evidential indicia are likely to be relevant to establishing both shadow and de facto directorship. The principles have been usefully set out by Lady Justice Arden (as she then was) in *Smithton v Naggar [2014] EWCA Civ 939* at paragraphs 22 – 45 . For present purposes, the following passages are relevant :-

“Practical points: what makes a person a de facto director?

29 Lord Collins JSC sensibly held that there was no one definitive test for a de facto director. The question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director. However, a number of points arise out of *Holland's* case and the

previous cases which are of general practical importance in determining who is a de facto director. I note these points in the following paragraphs.

30 The concepts of shadow director and de facto are different but there is some overlap.

31 A person may be de facto director even if there was no invalid appointment. The question is whether he has assumed responsibility to act as a director.

36 To answer that question, the Court may have to determine in what capacity the director was acting (as in *Holland's* case).

37 The Court will in general also have to determine the corporate governance structure of the company so as to decide in relation to the company's business whether the defendant's acts were directorial in nature.

38 The Court is required to look at what the director actually did and not any job title actually given to him.

39 A defendant does not avoid liability if he shows that he in good faith thought he was not acting as a director. The question whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief.

40 The Court must look at the cumulative e›ect of the activities relied on. The Court should look at all the circumstances in the round" (per Jonathan Parker J in *Secretary of State for Trade and Industry v Jones* [*1999*] BCC *336*).

41 It is also important to look at the acts in their context. A single act might lead to liability in an exceptional case.

42 Relevant factors include: (i) whether the company considered him to be a director and held him out as such; (ii) whether third parties considered that he was a director.

43 The fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision.

44 Acts outside the period when he is said to have been a de facto director may throw light on whether he was a de facto director in the
relevant period.
In my judgment, the question whether a director is a de facto or shadow director is a question of fact and degree"

44. So did Mr Varma assume responsibility to act as a director and/or was the director of the Company accustomed to act in accordance with Mr Varma's instructions ? The evidence relied upon by the JLs is set out in paragraphs 74 – 76 of Mr Atkinson's witness statement, the supporting exhibit as well as the second witness statement of Mr Gray (19/11/19) as well in in the exhibit. As set out in Mr Atkinson's evidence, the solicitors who acted on behalf of the Company, Messrs Kennedys, were appointed by the Company through Mr Varma and were instructed by him to receive investors' funds and deal with eventual conveyancing of the units as well as to purchase the hotel. Mr Atkinson states at paragraph 75.2, that a review by the JLs (he does not state if it is a review by him or a member of his team), in relation to the Hotel, demonstrates that it was Mr Varma who gave instructions to Kennedys on behalf of the Company rather than the de jure director at the time, being Mr England. At pages 458 – 469 are examples of Mr Varma giving instructions to Kennedys. The email dated 9 January 2017 from Mr Varma to Mr Dennis Ko, a partner in Kennedys, provides details of the project, giving details of the 154 self contained students rooms, that 'we' will be selling every room and states at the end of the email, 'We will be using Grosvenor Property Developments Ltd- an SPV for this transaction'. In March 2017, Mr Ko sent an email to Mr Varma (6 March 2017) stating that exchange confirmed on the Bristol property. That email is not copied to anyone else, not even to Mr England who was then the only director (de jure). Mr Ko also states in that email, 'I shall revert to you on the unit sale contract tomorrow'. Further emails relating to the draft contract and lease as well as the management

agreement appear as between Mr Varma and Mr Ko, including one on 20 March 2017 where Mr Varma states that 'we will have draft copies today to forward to sales agents as several prospective purchasers who are waiting to see the above before committing to purchase'. Subsequent emails make it clear that in actual fact no exchange took place but all these emails are between Mr Varma and Mr Ko. No other person has been copied in. The email dated 6 March 2017 from Mr Ko to Mr Varma attaches the execution copy of the agreement to assign and asks Mr Varma to arrange for 'Jon' as director of the Company, to print off final pages and sign in the presence of a witness. On 6 March 2017, Mr England sends the requisite document back to Mr Ko copying in Mr Varma in his email. Additionally, in the emails I have been taken to, there is no reference to Mr Singh who is relied upon by both Mr Varma and Mr England as being the owner for whom both Mr Varma and Mr England were working for.

45. The acquisition of the hotel and the development appears to have been the only business of the Company. Accordingly, as the JLs submit, it was Mr Varma who was dealing with this rather than Mr England. The JLs also rely upon an email dated 6 March 2019 (after their appointment) when Kennedys (Ms Alexandra Denyer) stated in reply to questions asked by the JLs, 'Alyson – in response to your second email, I can confirm that Jonathan England of Grosvenor Property Developers Limited confirmed to Kennedys that he held the shares on trust for Sanjiv Varma. He confirmed that Sanjiv Varma was the beneficial owner'. As the start of this email makes clear, as at the time of the email being written (March 2019), none of the relevant fee earners were at Kennedys and the replies to questions raised were provided by Ms Debyer's consideration of the electronic files. So the details relating to the role of Mr Varma clearly arose from an examination of the files retained by

Kennedys. I do not have the emails with the actual questions posed to which the email of 6 March 2019 is the reply.

46. At page 002 of SBG 8, being the exhibit to Mr Gray's second witness statement is a copy of an email dated 27 January 2017 from Mr England to Mr Ko (of Kennedys) where he states, 'In relation to Grosvenor Property Develops Ltd set up. I confirm to you that I am holding the shares in trust for Sanjiv Varma who is the beneficial owner of the company.'

47. The JLs also point to the fact that it was on the instructions of Mr Varma that Kennedys transferred funds held in the Company's client account to third parties and across to another client's account file opened in Mr Varma's name (see the evidence of Mr Ko). At pages 3 and 4 of SBG 8, there is an exchange of emails whereby Mr Varma first asks Kennedys to advise as to the total amount held in the client account (email 29/6/17, 10.32) and once the reply received stating £928,500 is provided (email 29/6/17 15.15), Mr Varma then gives instructions (email 29/6/2017 13:00) for the sum of £925,000 to be transferred to Grosvenor Consultants FZE (Emirates NBD Bank account). I suspect that Mr Varma was on a different time zone. His email also states, 'as explained to Denis yesterday, they are the main contractors for the Bristol development and this payment is against their invoice for the works'.

48. Although not relevant in relation to the issue I am currently considering, being the position of Mr Varma and whether I am satisfied he was acting as a de facto and/or shadow director, the email also raises issues relating to the genuineness of the role played by GCFZE. As appears from the evidence of Mr Atkinson, no works were actually carried out. Moreover, the JLs have not been able to find in the Company records which they have any invoices relating to building works which in an event

were not carried out. The freehold had not been purchased at the date of this email. In fact as is clear from the exchange of emails and the evidence of Mr Ko, the freehold was not purchased by the Company. I will come back to the issue of payments made and whether such payments were made in breach of any duty owed to the Company by Mr Varma later. However the emails sent by Mr Varma demonstrate in my judgment the conflict as between what Mr Varma informed the Company's solicitor at the time, as to what the purposes of the transfer was, and what he has subsequently set out was the purpose of the transfer (the jewellery acquisition). I note that Mr England was copied into the email directing the transfer to GCFZE .

49. Mr Atkinson also relies upon the replies provided to the Company's subsequent solicitors, being Messrs Candey. In particular, Mr Daniel Howard, who took over when Kennedys were dis-instructed on 28 February 2018, replied to correspondence from the JLs' solicitors, Messrs GunnerCooke llp. In an email dated 30 May 2019, Mr Howard stated that his engagement related to the purchase of the freehold and the sale of individual units. He confirmed that there had been a conference call relating to the winding up petition and that was with Mr England and Mr Varma. He states that at that time, he understood that Mr England was the owner of the Company. As Mr Atkinson points out in his witness statement, there is no reference to a Mr Singh.

50. In her witness statement dated 21 November 2019, Ms Mary Yongqing Liu explains that she, alongside others, were interested in investing in the proposed Grosvenor development. She had read the brochure and been in touch with Mr Gary Streeter of Sterling Woodrow Property Agency who said they were acting as agents for the developers. As Ms Liu wanted to acquire (with others) a significant number of units, she wanted to negotiate a discount with the developers. On 24 March 2017, she travelled to London and met with Mr Varma and Mr England as well as a Mr

Adam Syed (described to her as a 'Master Agent') . Mr England was introduced to her as a shareholder in the company. From her evidence, it is not clear whether Mr Varma explained precisely his role in the Company at that meeting but it is clear from the contents of her witness statement that all negotiations at that meeting (and other meetings) and thereafter in email correspondence were carried out by Mr Varma. In fact as explained by Ms Liu, at some stage, there was a 'misunderstanding' in relation to the offer made by Mr Varma at that meeting and what Mr Syed tried to say it was later.

51. Mr Varma was the one who became involved and the agreement went effectively back to what had been agreed between him and Ms Liu at the meeting on March 2017. Subsequently, concerns of Ms Liu relating to lack of progress as well as wanting to visit the site to see how much work had been carried out and concerns in relation to the delay, all of these matters were raised with Mr Varma by Ms Liu. At a later meeting, on 28 November 2017, Ms Liu asked about the Company set up and was informed by Mr Varma that he was not a director but was a consultant, 'for tax purposes'. Ms Liu states in her witness statement that it was clear to her throughout her dealings with the company that Mr Varma had the ability to agree things on behalf of the company. She states that he also emphasised his own investment in the development.

52. In his witness statement dated 21 November 2019, Mr Dennis Kin Tong Ko, a solicitor, explains that he was a partner at Messrs Kennedys from May 2014 until his departure in September 2017. He states that he was introduced by a Middle East client to Mr Varma in the summer of 2016. According to Mr Ko, Mr Varma contacted him in relation to the hotel in around September 2016. Mr Ko states that the instruction was not to act for Mr Varma personally, but for the Company. Mr Ko states that

although he thought an engagement letter had been prepared, none has been located. He states that although he was aware that Mr England was the director and sole shareholder of the Company, Mr Ko states that Mr Varma had made clear to him that the shares in the Company were held on trust for Mr Varma. This actually also appears in the email dated 27 January 2017. M Ko's recollection appears to have been without the benefit of sight of the email. Mr Ko states that as far as he can remember, Mr Varma said that his official role in the Company was as a consultant but that it was clear to him that Mr Varma was in effect the sole director and shareholder of the Company. Mr Ko states, 'Mr Varma was clearly in charge. He certainly did not defer to anyone. It was in effect all him'.

53. Of Mr England, Mr Ko states that, 'It was clear that Mr England was wholly subordinate to Mr Varma. Mr England always deferred decisions to Mr Varma. Mr England may have been there in the sense he was involved as the statutory director, but he would not do anything without Mr Varma's say so and guiding hand'. Importantly, to the best of his recollection, Mr Ko stated that all his instructions came from Mr Varma. Mr Ko does then exhibit two emails which demonstrate instructions coming from Mr England, but believes these are the only occasions.

54. Mr Ko also provides details relating to payments made into accounts. Mr Ko states that prior to the Company opening its own account around 31 July 2017, Kennedys had been paying sums received on behalf of the Company into an HSBC account in the name of Casa Investments Limited (Casa). Then on 31 July 2017, by email, Mr England informed Mr Ko that the Company had opened its own bank account.

55. Mr Ko also confirms that Kennedys also operated files in relation to the company into which Company money was paid in Mr Varma's own name. Mr Ko does not recollect why this happened but suggests that Mr Varma had cleared the 'Know your client' procedures which had not as yet been cleared in relation to the Company. This may well be speculation by Mr Ko, but his evidence of company monies being paid into accounts in the name of Mr Varma is clear. Mr Ko also provides evidence relating to there being various extensions to the completion date with the owner of the Hotel, Earlcloud Limited. In fact, it appears that the contracts for the purchase were to be exchanged as between Earlcloud Limited and Park Ltd with Earlcloud Limited having agreed to assign the contract to the Company thereafter. Mr Ko always provides evidence relating to other work carried out for Mr Varma where the files would be opened in the name of Mr Varma and thereafter as matters progressed, it was anticipated that the work in progress would be transferred to a new file in the name of the relevant SPV.

56. In his ninth witness statement, dated 15 January 2020, Mr Atkinson exhibits the company consultancy agreement which Mr Varma had sought to submit to me was relevant. As I have dealt with above, Mr Varma is debarred, but despite that it does seem to me that I should consider documents which may have a bearing on the case which the JLs seek to prove before me. The consultancy agreement is dated 19 December 2016 and is stated to be between Mr Varma and the Company. It states that the Company employs the consultant to perform the following services in accordance with the terms and conditions set out in this agreement. The Consultant's scope of work is limited to dealing with the acquisition of the property, liaising with solicitors, co-ordinating the marketing and selling of the units, liaising with the architects and administrative support generally, consulting and liaising with the director and beneficial owner of the Company.(clause 1) Payment under the terms of the

consultancy agreement is stated to be the sum of £10,000, payable upon execution of the agreement.

57. From the evidence set out above, in my judgment, what Mr Varma actually carried out went much further than what is set out in the consultancy agreement. By way of example, the evidence of Ms Liu indicates the role of Mr Varma being one of 'running the show' and in particular relating to the negotiation of the discount she was seeking. Mr Varma gave instructions to the solicitors about where sums should be transferred including into accounts in his own name and for his benefit. The solicitors files of Kennedys contain evidence that the sole de jure director was Mr England and that Mr Varma was the beneficial owner. Accordingly, the evidence contradicts the terms of the consultancy agreement. I am satisfied that Mr Varma acted as a de facto director at the material times, being from when he contacted and retained Kennedys. He gave instructions to Kennedys in relation to the transfer of significant sums. It is clear that in reality all instructions and directions came from Mr Varma. The evidence of Ms Liu supports this. There is really no evidence of what role Mr England took in relation to the company. There is also a letter dated 20 November 2019 from BBA Architects which sets out the history of the architects' involvement in relation to the development project. Two matters come out of that letter. Firstly, the architects noted both Mr England and Mr Varma as well as the company, being the client contacts. They were dealings with Mr Varma in relation to the fees for the work carried out. All that BBA architects actually did was the pre-application enquiry in April 2017. The actual planning permission did not proceed as the company failed to pay the fees. A payment was made on 30 November 2017 and thereafter as no further payments were made, the architects ceased work. Secondly, the proposal had been addressed to Mr Varma and he had agreed the fees proposed.

58. I am not persuaded that Mr Varma also acted as a shadow director. The evidence set out above points to Mr Varma acting as essentially the director (one of the factors referred to by Lady Justice Arden). The evidence of both Mr Ko and that of Ms Liu establish that Mr Varma was the de facto director. I have little to no evidence relating to Mr England being accustomed to act at the direction of Mr Varma. This is mainly because there is little evidence of Mr England actually acting as a director. The evidence shows him signing the contract when it was sent to him. Mr Ko indicates that Mr England was well aware of what was going on, but in order to establish shadow director, in my judgment, there must be evidence relating to acts of Mr England as director being carried out at the direction of Mr Varma. What the evidence points to in this case, as set out above, is Mr Varma carrying out all the acts, negotiating about the costs of units, instructing both the solicitors and architects. Additionally the evidence demonstrates Mr Varma asking for sums paid to be paid into the Casa Account or the Santander Account or going to his accounts or other accounts. In the circumstances, in my judgment, Mr Varma was a de facto director of the Company.

The pleaded case in relation to misappropriation of monies

59. At paragraph 4 of the Points of Claim, the JLs aver that Mr Varma was the de facto (or alternatively) shadow director of the Company at all material times. Paragraph 11 avers that Messrs England and Varma used two bank accounts for their receipts of and dealings with Company money, being the account at Santander sort code 09-01-29, account number 14943500 (the Company Account) and the HSBC account sort code 40-01-06, account number 62647818 opened in the name of Casa Investments Limited into which, it is averred investors were told to pay into sums in relation to the acquisition of units.

60. At para 25 to 29, the pleading sets out the case against Mr Varma in relation to him being either a de facto or a shadow director. I will consider this in light of my finding that Mr Varma was a de facto director. The pleading makes references back to the sums set out in paragraph 16.1 and 16.2 as being sums which have been misappropriated by Mr Varma. The claim made as against Mr Varma in this respect is straightforward in law in my judgment. Mr Varma paid to himself or for his own benefit substantial sums of money in breach of the duties he owed to the Company by reason of being a de facto director. The only document in evidence where there is some alleged agreement as between the Company and Mr Varma relating to remuneration or fees is the consultancy agreement dated 17 December 2016. That agreement allowed for a sum of £10,000 which was to be paid in December 2016. The sums being claimed by the JLs as misappropriations by Mr Varma of Company monies occur later than December 2016. The real issues here is whether the JLs can establish on the evidence that the sums were Company monies and that Mr Varma misappropriated those sums. I therefore turn to the evidence. I bear in mind that the JLs also seek to rely on what they assert is a course of conduct namely that the Company was used for a mullti million fraud.

(i) £925,000 – June 2017- paid into Mr Varma's account

61. An email dated 12 June 2019 from Alexander Denyer of Kennedys to Ms Alyson Reilly of Gunnercooke (B2-125) states that a payment of £925,000 was made to Mr Varma on 30 June 2017, into an account in his name at Emirates NBD Bank PJSC, account IBAN AE730260000315282060103 (the '103 account'). Additionally there is clear evidence (referred to above) of Mr Varma directing Kennedys to transfer this sum to him. An email dated 29 June 2017 from Mr Varma addressed to Mr Joseph Dean and Mr Ko, both of Kennedys, asks Kennedys to advise the total amount held in their client account. The reply email from Mr Dean dated 29

June 2017 states that the Kennedys client account holds the sum of £928,500. The next email is from Mr Varma to Mr Dean (copying in Mr Ko and Mr England) directing Mr Dean to transfer the sum of £925,000 to an account in the name of GCFZE at Emirates NBD Bank. However the bank statements which have been obtained by the JLs in relation to the bank account in the name of Mr Varma of the 103 account show the sum of £925,000 being paid into this account in the name of Mr Varma on 1 July 2017. The reference for the entry states that the payment came from Kennedys Law LLP.

62. The explanation provided at the time for the payment, in the email from Mr Varma directing the transfer dated 29 June 2017 states that 'as explained to Denis, yesterday, these are the main contractors for the Bristol development and this payment is against the invoice for the works.' There is no evidence of any works having been carried out and as set out above, the premises had not even been acquired by the Company at any stage prior to the liquidation. Additionally, there is no evidence that GCFZE was the main contractor. In his eighth witness statement, Mr Gray states at paragraph 11 that the sum of £925,000 was paid into the personal account of Mr Varma. The evidence I have referred to above establishes this. Moreover, Mr Gray states that after this evidence was obtained, Mr Varma then asserted that this payment to himself was his personal 'share' or 'commission' for the diamonds and jewellery sold to GCFZE. In my judgment, the evidence shows clearly that Mr Varma personally received the sum of £925,000. The explanation given at the time by him to Kennedys was clearly untruthful. Equally, I am not satisfied that the later attempt by Mr Varma to explain why this substantial payment was made to him was true either. I am satisfied that this sum was clearly misappropriated on the evidence by Mr Varma from the Company. The JLs have established that Mr Varma

acted in breach of the duties he owed as a de facto director in relation to the payment to him of £925,000.

(ii) Sums paid to Mr Varma personally from the Casa account - £450,500

63. The JLs point to sums totalling £450,500 which have been paid to Mr Varma's account, the 103 account, from the Casa Investments Limited account during the period 23 February 2017 until 21 June 2017. These sums have been identified by Mr Atkinson at paragraph 77 of his sixth witness statement. They are as follows, £155,000 on 23 February 2017, £60,000 on 27 February 2017, £95,000 on 28 February 2017, £25,000 on 29 March 2017, £3000 on 24 May 2017 and £112,000 on 21 June 2017. In order to deal with this claim, the position of Casa Investments Limited needs to be considered. The JLs aver that the sums in the Casa account belong to the Company.

64. At para 11 of the Points of Claim, the JLs aver that Messrs England and Varma used two bank accounts for the receipts of and dealings with Company money, being 'the account at HSBC with sort code 40-01-06 account number 62647818, opened in the name of Casa Investments Ltd, into which investors were told to direct money.' The other account is one in the name of the Company opened in late July 2018, at Santander with sort code 09-01-29 account number 14943500.

65. They point to the fact that the Casa Account had essentially nominal money in it prior to the sums which the JLs assert were company monies were paid in. At paragraph 20 of his witness statement, Mr Ko states that Kennedys had been paying 'funds for the Company' into the Casa Account prior to being notified on 31 July 2017, that the Company had opened an account at Santander. On the basis of Mr Ko's evidence and also from an examination of the Casa bank statements for the relevant

period (to which I refer in more detail below), I am satisfied that payments of sums belonging to the Company were made into the Casa account. However this finding in itself does not entitle in my judgment for the JLs to claim that effectively all sums in the Casa bank account were company monies. The JLs' pleaded case does not plead this to be the case, merely that the Casa bank account was used for 'receipts and dealings' with Company money.

66. The JLs do not in their pleading set out any details as to the business of Casa Investments limited. Mr Ko states in his evidence at paragraph 20, 'we were told at an early stage by Mr Varma that Casa was involved in the development of the Hotel.' I note that Mr Varma was keen during the hearing to address me on the master sale agreement as well as the existence of a consultancy agreement between him and Casa. I have looked at these documents carefully. Mr Brown made no submissions on these documents at all, taking the stance that Mr Varma was debarred. In my judgment in this case when there is a debarring order against a defendant, the Court still needs to be satisfied on the evidence in its entirety that the JLs have made out and proved their case. A copy of the consultancy agreement dated 10 October 2016 is at B2 – 596 and it is stated to be between Mr Varma and Casa Investments Limited. It is signed by Mr Varma and by Mr England on behalf of Casa Investments limited. It states that Casa have clients interested in buying properties in the Middle East, mainly in UAE. Casa will charge its clients 8% of the purchase price in the event of a successful introduction to properties. The terms of the agreement state that Mr Varma is entitled to his search services and 60% of the total fee chargeable by Casa to its client (which would be upon a successful acquisition). The evidence relied upon by the JLs does not contain any invoices raised by Mr Varma to Casa. An examination of the sums paid into the Casa account does not appear to demonstrate commission payments being made into that account in relation to properties with the commission due

thereafter to Mr Varma being taken out. No documents have been produced (although other documents relating to diamonds and jewellery have been produced) and they are no documents relating to properties located and successful acquisition.

67. In my judgment, it is not possible on the evidence before me to be satisfied that the charges by Casa to successful clients have actually been paid into the Casa Account. There is no evidence relating to there being any situation where commission would have been payable to Mr Varma. In fact, as becomes clear on a careful consideration of the entries in the Casa bank account, the majority of the payments into that account arose from investors' deposits relating to the Company's business. Other sums paid in by Kennedys relate to investors' monies as well. Other sums were paid in by the company. There are, as I consider below, payments made into the account which have not been claimed by the JLs as Company money. In my judgment, I have no evidence to be able to ascertain what those payments are for and I am therefore not in the position to consider any of those other payments fell within the consultancy agreement. The terms of the consultancy certainly did not enable Mr Varma to take such sums as he needed to spend in Harrods, on foreign trips or in restaurants as he has done.

68. The Casa bank accounts are at PA6, Vol 2, starting at 138. It is clear that prior to February 2017, there was, as has been asserted by the JLs, nominal movement on the Casa Account. Mr Brown took me to page 143, being the entries for the period from 13 February 2017 until 23 February 2017. This page was, in his submission, an example of company monies, being investors' deposits, being paid into this account. Mr Brown also handed to me a three page of schedules relied upon by JLs as setting out the deposits into the Casa Account which the JLs asserted were company money. These sums totalled more than the sums paid out of the Casa Account to Mr Varma

personally (being the sums totalling £450,500). The JLs' claim as against Mr Varma includes what I have called below, 'luxurious spending' which the JLs assert was made by Mr Varma using sums in the Casa account which the JLs assert belong to the Company. It is therefore important for the JLs to establish that sums in the Casa account belong to the Company.

69. Page 1 of the schedule sets out payments which the JLs aver were deposits paid into the Casa Account without an agent being used. These sums were paid in from 17 February 2017 until 9 January 2018 and total £177,000. The references for the entries are varied. For example on 17/2/17 £6,000 was credited to the account with a reference, 'Hickey Flat 412'. On 2 March 2017, the sum of £6,000 was credited with a reference of '110208 00304769 Halifax' On 21 March 2017, the sum of £11,000 was credited with a reference 'Freeman JA 308/309'. There are some entries with the name 'Mary Liu', namely 24/3/17, £10,000 and on 27/3/17, 'Liu/Mary Liu' for a credit of £25,000 and a further credit of £5,000 on the same day with the reference, 'Y :Liu/Mary Liu Unit 305'. The JLs have not produced any further evidence relating to these entries being company, effectively investors' deposits. There is no evidence for example of proofs of debts asserting that these payments represents a creditor's claim.

70. However, the witness statement of Ms Liu assists the JLs because it is clear from that statement that Ms Liu made numerous investments. In fact, the first £10,000 paid by her according to her witness statement by direct bank transfer into the 'GDL' account on 24 March 2017 after her meeting with Mr Varma on that date appears in the Casa Account as a bank transfer from Ms Liu on 24 March 2017. As the Company did not, according to the evidence of Mr Ko, have its own bank account until end of July 2017, in my judgment I am satisfied on a balance of probabilities that investors' sums were paid into the Casa account and accordingly those sums are company

monies. As Mr Brown has pointed out, many of these entries refer to a unit/plot number which also supports these payments as being investors' sums. Page 1 lists these payments being made during the period 17 February 2017 until 9 January 2018.

71. Page 2 of the schedule are a list of payments made into this account from, according to the JLs, three known agents. I asked Mr Brown where was the evidence that these three agencies were retained by the company. Mr Brown was unable to point to any evidence. The pleading does not refer to these three agencies and neither does Mr Atkinson's witness statement (or the other statements filed.) The three names referenced in the bank statements are Harbourside Lettings, Alesco Investments and One Investments Global Ltd. There is a further small column headed 'Payments' which appear to be sums paid out to agencies. These may well have been commission payments made to the agencies. In her evidence, at paragraph 5, Ms Liu refers to an agency, being Sterling Woodrow Property Agency, but this is not one of the names of the agencies relied upon by the JLs. There is at least one payment out of the Casa account to Sterling Woodrow. Some of the payments in from agencies helpfully refer to a unit number and in some cases, a name. For example, the 21 February 2017 payment in from Harbourside lettings refers to PLOT 401 Sue SMITH. In fact, all the Harbourside lettings entries refer to a unit or plot number and in many instances, a name. In the case of Alesco Investments, the details on the payments in refer to 'reservation deposit'. One Investment Global has the description of 'reservation fee'. On a balance of probabilities, I am satisfied that these payments into the Casa account were also company monies, being investors deposits paid into the Casa account by the relevant agencies. There is no evidence that Casa itself was seeking to sell investments. In so far as Casa's business was that described in the agreement referred to and described above, in my judgment, commission payments made by its clients would not be described as 'reservation fee' or 'reservation deposit'

or contain plot/unit numbers. The payments made out to the various agencies reinforce the payments in as being relating to investor deposits to belonging to the Company. These payments into the Casa account total £629,929.94.

72. Page 3 of the schedule sets out payments which the JLs aver have been made into the account by Kennedys and which they aver were payments by Kennedys of investors funds. On this list, between 23 May 2017 and 4 September 2017, a total of £656,952.73 was credited to the account from Kennedys. The bank statements do not contain specific references as to what these payments in were for. On 23 February 2017, a payment to Kennedys was made out of this account in the sum of £100,000.

73. As already referred to above, Mr Ko's witness statement provides evidence of the use by the company of the Casa bank account, at least, until the Company opened its own bank account at Santander at the end of July 2017. There is one payment made after the end of July 2017 which the JLs assert represents Company money. This is in the sun of £39,785.73. It may well have been the case that had Mr Ko been called as a witness, clarification could have been sought in relation to the payments into the Casa Account and also whether Kennedys made payments to Casa which did not relate to the Company. All Mr Ko states about Casa is that Kennedys had been told that Casa was involved in the development of the Hotel. Again, had Mr Ko been called, further clarification may well have been asked. He was not. At paragraph 21, Mr Ko states, 'I can confirm that Kennedys did operate files in relation to the company, into which Investors' money (Company money) was paid that were not in the name of the Company but rather in Mr Varma's own name.'

74. In my judgment, the payments transferred to the Casa Account prior to the opening of the Santander account were sums belonging to the company. Additionally,

the last payment made after the end of July 2017 was in my judgment, on a balance of probabilities, also company money. Although I do not have any direct evidence relating to the last payment, it certainly followed a pattern of the Casa Account being used for the purpose of paying in sums which belonged to the Company. There is no evidence which shows that Kennedys transferred other sums unrelated to the Company to the Casa Account.

75. It is the JLs' case that sums which were paid into the Casa Account as well as later into the Company account, were shortly thereafter paid out to Mr Varma or for his benefit. Evidence in support of this averment is the payment out as directed by Mr Varma of £925,0000 in June 2017. In relation to the sums totalling £450,500 paid to Mr Varma from the Casa Account, I have considered the bank statements in this context. Prior to the investor sums starting to be paid into the Casa account, modest sums were paid out to Mr England and to Mr Varma. The first investor money paid in with the reference Hickey H &M, Hickey flat 412 is the sum of £6,000 on 17 February 2017. A £1,000 payment out to Sterling Woodrow is made 20 February 2017. There is then a payment out to Mr Varma of £5,000 on 21 February 2017. This sum is not claimed by the JLs. At paragraph 77 of Mr Atkinson's witness statement is a table of the sums claimed by the JLs. The first sum claimed in that table, as I have already set out above, is the sum of £155,500, transferred to Mr Varma from the Casa Account on 23 February 2017. On page 143, there are two further payments in which the JLs aver are investors founds, being a Harbourside Letting payment in (reference is Sue Smith Plot 401) on 21 February 2017 in the sum of £5000 and on 21 February 2017 a payment of £1,000 with a reference of Cochrane Shal.

76. There is then a large payment into the Casa account in the sum of £330,000 on 22 February 2017 with a reference 'Advice confirms GBN220270P4WF8Go,

Earlcloud Limited'. There are then a series of payments out of the account totalling £183,000 which are all claimed by the JLs as being misappropriation of company monies. These payments out include the £155,500 (23 February 2017) which is claimed by the JLs as being a misappropriation of company monies by Mr Varma. However as at the date of 22 February 2017, there were in my judgment insufficient investors' monies paid into the account (as identified by the JLs) which would have enabled the total sum of £155,500 to be paid out. The JLs have not claimed that the payment in of £330,000 was investor monies. It does not feature in the schedules relied upon and provided to me by the JLs. Accordingly, I am not satisfied on a balance of probabilities that the payment to Mr Varma of £155,500 on 23 February 2017 was a misappropriation of company monies. The payments made out to Mr Varma including the sum of £155,500 could only have been made in my judgment by the application of the sums paid in on 22 February 2017, which have not been claimed as company monies by the JLs. As I have observed earlier in this judgment, the JLs have not pleaded that the Casa Account was in reality the company's account or that all sums which were paid into the Casa Account belonged to the company. The JLs presented to me the three pages of schedule which they rely upon. Accordingly, the claim relating to the sum of £155,500 fails because on a balance of probabilities the JLs have failed to establish that this sum paid to Mr Varma came from company money.

77. On 27 February 2017, a payment of £60,000 was made to Mr Varma. This is another payment which the JLs aver was a misappropriation of company monies. However from the date of the payment in of £330,000 22 February 2017) and the 27 February 2017, three investor funds payments in are identified by the JLs, being Harbourside Lettings Plot 301 (£5000), Harbourside Lettings, Plot 407 (£5,000) and Cochrane Shalun (£4,000) Additionally, there is a payment out to Kennedys of

£100,000 on 23 February 2017. In my judgment the JLs have failed to discharge the burden of proof that the payment made out to Mr Varma in the sum of £60,000 was made from sums belonging to the Company. The sums identified as having been paid into the Casa Account are insufficient for the payment of £60,000 to have been made from investors' monies. In particular the sum of £100,000 was paid out to Kennedys in 23 February 2017. Accordingly, the claim of the JLs in relation to the sum of £60,000 also fails.

78. On 27 February 2017, a further large payment into the account is made, in the sum of £155,477.81. The reference states, 'Advice confirms, GBP27027HE5D79QB'. This large sum is not one relied upon by the JLs in their schedules as being company money. On 28 February 2017, a payment out to Mr Varma in the sum of £95,000 is made from the account. Having identified all the investor payments made into the account between the 17 February 2017 and the payment out to Mr Varma of the £95,000, again in my judgment the JLs have failed to discharge the burden of establishing that the sums paid out to Mr Varma on 28 February 2017 were company monies. There were insufficient sums in the Casa account from the investor payments into the account at that date for the payment out to Mr Varma to have been made from company monies.

79. There is a pattern of Mr Varma receiving large sums of money from the Casa Account shortly after large sums have been deposited into the Casa Account. The next large payment made into the account which the JLs have not asserted is investor monies is the sum of £60,000 paid in to the account on 27 March 2017. The reference is 'Advice confirms, GBS270370K7VZITC, Miro Group Limited'. Thereafter, large sums from investors are paid in, being £25,000 from Ms Liu on 27 March 2017, a further £5,000 from Ms Liu on 27 March 2017, the sums of £5,000 and £20,000 paid

in by Harbourside Lettings on 28 March 2017. On 29 March 2017, Mr Varma withdraws the sum of £25,000. As the bank statements demonstrate, there were sufficient investor funds in the account prior to the withdrawal by Mr Varma of £25,000, in my judgment, this sum is capable of being claimed by the JLs. I am satisfied that there is no reason as to why sums paid on behalf of the Company have been paid to Mr Varma. I accept there is a pattern of large sums being paid out to Mr Varma. Those sums which I have been able to satisfy myself can be traced to being company monies have been paid out to Mr Varma in breach of the duties owed by him as a de facto director of the company.

80. From the period after 29 March 2017, all sums which were paid into the Casa Account are in my judgment sums belonging to the Company. Some of the payments which were made were from Mr Varma. However Mr Ko gives evidence that in certain cases, sums due to the Company were paid to Mr Varma. I am therefore satisfied that the other two payments out to Mr Varma, being £3,000 on 24 May 2017 and £112,000 on 21 June 2017, were sums belonging to the Company which were paid out to Mr Varma in breach of the duties he owed to the Company as a de facto director In summary therefore I am satisfied that Mr Varma is liable for the misappropriation of a total of £140,000 of Company monies out of the £450,500 sought by the JLs.

The further spending (Casa and Company)

81. Mr Brown also pointed to sums which were paid from the Company's Santander account into the Casa Account. Sums were transferred in varying amounts during the period 1 August 2017 until 30 November 2017. During this period, there are no sums paid into the Casa Account which do not come from either the Company's Santander account or investors. The sums transferred from the company's

bank account to Casa during this period total £1,078,500 (less a credit in the sum of £13,000). This is the starting point for the next part of the JLs' claim. The JLs also seek further sums from Mr Varma by way of equitable compensation relating to sums used from the Casa Account for the payment of restaurant bills, department store spending, and other luxury goods. The JLs aver that Mr Varma was using the Casa Account for his own use and that the spending of him of matters which do not relate to company matters are clearly a misappropriation of Company money.

82. Mr Gray sets out in his eighth witness statement details of the so called luxurious spending made from the Casa account which the JLs aver was spending by Mr Varma and accordingly forms part of the sums claimed as against Mr Varma. The sums claim total £1,466,343. This spending forms part of the case urged upon me by Mr Brown that Mr Varma treated the sums in the Casa Account which during the relevant period were company moneis as essentially being money which he was free to spend for his own use.

83. It is clear from consideration of the evidence detailed below, that Mr Varma extensively used the Casa Bank card and account. The card appeared to be in the name of Mr England and it may well be that some of the spending was that of Mr England and not that of Mr Varma. That is one of the difficulties in my judgment in seeking to establish who was responsible for the spending. None of the spending which is set out below (unless otherwise stated) is spending in relation to the company business, in my judgment. Some of the spending is clearly that of Mr Varma, when either his or his wife's loyalty card are used at the same time. Other spending, such as the restaurants, have Mr Varma's name on the bills. However there remains some spending where the JLs have no evidence to indicate that this is Mr Varma rather than Mr England. As I set out below, in those instances, I am not

satisfied on a balance of probabilities that all the spending was indeed Mr Varma and therefore I will not make any order in relation to those items. Clearly Mr England had access to this account and was the director of this company. There are cash withdrawals on the account and it is impossible on the evidence before me to establish that those withdrawals related to Mr Varma and not Mr I England.

84. I will go through the list of spending on which Mr Brown relies on as evidence to establish that the spending made on the account was that of Mr Varma and as such spending was in breach of the duties owed by him as de facto director of the Company. One of Mr Brown's submissions was that the pattern of spending by Mr Varma was such that even in cases where the JLs had presented no evidence that the particular items related to spending by Mr Varma, I could be satisfied that the spending was that of Mr Varma and was therefore part of the sums misappropriated by him. I was not persuaded by this argument. The reason for this is that it was not the JLs' pleaded case that effectively the Casa Account was for all intents and purposes, the Company's bank account and that all sums which were paid into that bank account belonged to the Company. Additionally, as I have already set out, there is evidence that Mr England also used the account. In fact, the pleaded case for the JLs is that Mr England is liable to account for the same sums as Mr Varma. Accordingly, I need to be satisfied that each item claimed was a misappropriation of sums which belonged to the Company by Mr Varma.

(i) Harrods - £49,830.

85. This sum covers spending on the Casa account at Harrods when Mr Varma's Harrods loyalty card was presented at the time that payment was made for items using the Casa bank card in the name of Mr England during the period 31 March 2017 and 18 December 2017. Mr Gray has exhibited to his eighth witness statement the

statements provided by Harrods indicating the spending incurred on the Casa card during this period and additionally that the loyalty card of Mr Varma was used in relation to the spending. The items of expenditure are in my judgment spending which does not relate to company business. Examples are spending on Dolce and Gabana, men's designer shoes Kurt Geiger, beds and bedroom furniture, Chanel, Chanel shoes, fashion lab, Gucci, food hall, Fashion lab and pizzeria. In his eighth witness statement, at paragraph 20.2, Mr Gray refers to the explanation provided by Mr Varma in relation to this spending and the use of his loyalty card. The explanation provided before Mr Adam Johnson QC sitting as a Deputy High Court Judge was that Mr England was present during this spending and that there was an agreement between them that Mr Varma could accumulate the points on his loyalty card. Mr Varma also asserted that Mr England 'has bought a lot of luxury goods and sold them abroad to a person in Hong Kong, sold for extra premium'. In my judgment, the spending at Harrods relates to Mr Varma. That is indicated by the use of his loyalty card. Moreover, as submitted by the JLs, the spending does not relate to the Company's business and is in my judgment a misappropriation of Company monies. Mr Varma is debarred from defending so I do not need to consider his explanation, but in any event, the explanation provided in Court by him at the earlier hearing is implausible as it stands.

(ii) Selfridges - £62,287.68

86. The purchases at Selfridges were made using the Casa Account bank card during the period 31 March 2017 and 18 December 2017. According to the evidence provided by Selfridges, most of these purchases were made using the loyalty card of Taru Varma, being according to Mr Gray, the wife of Mr Varma. Some of the purchases are related to the loyalty card of Mr Varma. When the list of purchases is considered, as with the Harrods purchases, the items are clearly nothing to do with the

business of the Company. The descriptions are jewellery and gifts, skincare, perfume, couture beauty, designer room fresh food, ladies shoes, and wine and spirits. In my judgment the use of the Casa bank card at Selfridges, as with Harrods, are misappropriations by Mr Varma of Company money, in breach of the duties owed.

(iii) £15,279.93 – restaurants

87. In his eighth witness statement, Mr Gray sets out the evidence that the restaurant spending was also spending by Mr Varma and therefore in the submission of the JLs, part of the misappropriation of company monies by Mr Varma. The majority of the spending in restaurants was in the W1 area of London. One of the restaurants, Bagatelle has produced copies of the receipts which have Mr Varma's name on them. In my judgment, the restaurant spending on the Cara bank account are also misappropriations by Mr Varma of company money.

(iv) Gucci spending Moscow - £10,255 made up of six payments between 14 June and 19 June 2017

88. The JLs rely on six payments made out of the Casa Account to Gucci Moscow between the dates 14 June 2017 and 19 June 2017. From the passport stamps in the sections of Mr Varma's passport that the JLs have been able to inspect, the JLs have located two Russian visas in Mr Varma's passport. The JLs rely on an interview held with Mr England on 2 May 2019. Mr England was asked whether he had been to Moscow or Dubai and he replied that he had not been to Moscow or to Dubai. In fact, Mr England confirmed in his interview on 2 May 2019, that he had never left the jurisdiction on Company or Casa business. Mr Brown submitted in those circumstances, the spending in Russia was that of Mr Varma. In my judgment, on a balance of probabilities, I am satisfied that the spending on the Casa Account in Moscow was carried out by Mr Varma in breach of the duties he owed to the

Company. The spending was not for the benefit of the Company on the evidence before me.

(v)Other clothing shops, restaurants – Moscow - £15,693 – 10 payments between 14 June and 20 June 2017

89. These payments in Moscow were made out of the Casa Account during the same period as the Gucci Moscow payments were made. In my judgment, for the same reasons as set out in relation to the Gucci spending in Moscow, I am satisfied that these payments are also made by Mr Varma and are in breach of the duties owed by him as a de facto director of the Company. This, submitted Mr Brown demonstrated a pattern of spending both in luxury stores as well as in restaurants, using the Casa bank account into which I am satisfied that sums were deposited which belonged to the Company.

(vi) International expenditure (various locations) - £43,379between 20 March and 11 December 2017.

90. These sums relate to spending in various different locations overseas. Mr Brown submitted that the evidence demonstrated that Mr Varma was also responsible for these payments and that therefore this was also part of the sums which the JLs assert were improperly used by Mr Varma in breach of the duties he owed to the company.

The JLs have considered the stamps (copies also exhibited) in Mr Varma's passport, in so far as legible and have set out in a schedule details of the stamps therein which demonstrate when Mr Varma entered various different countries. They then compared the date of entry with the spending on the Casa Account which corresponded to someone using the Casa bank card in that particular country. Again, relying upon what Mr England said in interview about not going overseas for either the company or

Casa, the JLs invite me to find that this spending is also a misappropriation of company funds by Mr Varma.

91. At page 247, bundle 2 is the statement for the Casa Account showing £1295.42 spent in Istanbul on 15 August 2018. The passport stamps demonstrates an entry by Mr Varma to Istanbul on 13 August 2018. There is a passport stamp entry for Cote d'Azur on 31 August 2018. Spending on the Casa bank account in France during this period includes many small payments for motorway toll charges as well as at the airport, such as a payment at Relay, being a magazine and newspaper outlet at French airports. There is spending in St Tropez in July 2018. Additionally, as Mr Brown took me to, during this period on Mr Varma's own bank account, there are payments made to hotels and restaurants in St Tropez, France. Again in early September 2018, there is a payment to Eurostar on the account (10 September 2018). At this time, Mr Brown points out there is spending by Mr Varma on hotels and restaurants in Paris. Again, I am satisfied that these payments are again spending by Mr Varma in breach of the duties he owed. A total of £20,770.38 has been identified and is claimed by the JLs as being spending in Dubai in December 2017. The sums claimed are set out in SBG 8 at page 71 and have been extracted from the Casa bank statements which I have in evidence before me. The sums spent are hotels, restaurants, flights and other shopping such as Dubai duty free shopping. Again I am satisfied that these sums have been misappropriated by Mr Varma and accordingly they form part of the judgment in favour of the JLs.

Ian Williams - £42,591.00

92. This sum was paid as a series of debits during the period 10 March 2017 and 4 December 2017. In correspondence as between Mr Williams and the JLs, Mr Williams sets out in his letter addressed to the JLs dated 21 June 2019, that he acted

for Mr Varma. He expressly confirms that he has not acted for Mr England or Casa Investments, although he accepts payments were made to him out of the Casa Account. Later in the letter, Mr Williams asserts that he was contracting with Casa. His description of the work he was to carry out was the provision of legal services via third parties to Mr Varma. Mr Williams asserts later that Casa agreed to fund the action. There is a letter dated 1 March 2017 addressed to Mr Williams from Casa Investments Ltd. It is signed by Mr England and states that Casa will be responsible for Mr Williams' fees related to defending the action brought against Mr Varma. That letter then states that, 'Casa will adjust the costs from his entitlements from the projects.' However these sums paid to Mr Williams from the Casa Account, in my judgement, were sums belonging to the Company. They are, in my judgment, further misappropriations by Mr Varma of Company monies.

C O Coutant - £59,000

93. This was paid out of the Casa account, by way of five payments between 23 February 2017 and 2 August 2017. By letter dated 28 May 2019**,** the JLs wrote to Mr Claude-Olivier Countant seeking to claim against him the sums which had been paid to him from Casa. In his email in reply dated 17 June 2019, Mr Coutant explained that he and Mr Varma had entered into a business venture which ended up losing large sums of money for Mr Coutant. This business did not relate to Casa Investments Ltd. According to Mr Coutant, Mr Varma accepted that he was responsible and 'committed to reimburse' to Mr Coutant £88,000. Mr Coutant states that he received a total of £59,000 from the Casa account which he asserts, 'This bank account was used by SV [Mr Varma] for all his cash movements in the UK as I understand being a Dubai tax resident, he did not have other bank accounts in the UK'.

94. In my judgment, I am satisfied that the sums paid to Mr Coutant were misappropriated by Mr Varma from company monies in the Casa Bank account. Although Mr Coutant did not make a witness statement, there is no evidence before me which contradicts what he is set out in his email dated 17 June 2019 and in particular that payments were made to him by Mr Varma using the Casa bank account.

Legal/other advisors £34,296- 8 payments between 24 March 2017 and 28 September 2017

95. In his eighth witness statement, Mr Grey provides little detail relating to this claim made by the JLs. In the Points of Claim, paragraph 16.2.27 refers simply to '£34,296 to other legal advisors that were not Kennedys (by 8 payments …)' . No further detail or particulars are given in the witness statement of Mr Atkinson in support of this application for judgment. Mr Gray states at paragraph 20.7 that he refers to various spending for the Casa Account on legal and other advisors, one of whom is Jawal Johnson. Mr Grey asserts that in a letter dated 12 June 2019, this firm confirmed the receipt of £26,696.17 from the Casa Account was received in settlement on behalf of Mr Varma. The letter exhibited at pages 56 and 57 of SG8 is somewhat unhelpful in that the letter to which it replied is not in evidence before me. The letter equally does not actually stipulate the sum received from Jawal Johnson from the Casa Account. Whist I have noted and accepted the extensive use by Mr Varma of the Casa Account, the JLs need to establish each payment which they assert was a misappropriation of company monies. It is not the JLs' pleaded case that in essence the Casa Bank account was entirely a vehicle used by the company from which Mr Varma misappropriated sums. In my judgment, the JLs have failed to establish the sum of £34,296 as being a misappropriation of Company monies by Mr Varma. There is insufficient evidence provided before me.

Other sums

96. The JLs invite me to find that other payments made out of the Casa bank account must also fall into the same pattern of spending by Mr Varma for his own personal use of Company monies. In the Points of Claim, these sums are claimed both against Mr Varma as being misappropriation and also as against Mr England. The JLs elected to seek judgment and establish their case against Mr Varma separately from the case against Mr England. So I need to be satisfied that the sums claimed are misappropriation by Mr Varma. There is no possibility of making a joint and several order. The evidence provides no real detail of this other spending. In this current category, Mr Brown on behalf of the JLs, claims , 'Cash withdrawals' (£114,850.86) 'personal expenditure' £47,155, 'J England' £59,409, 'Flights ' £12,719, £70,000 to Alexandra Panaite (who the JLs believe is a Reiki healer), £50,000 to Rob Harwood, £123,522 to A Jain, £26,000 to Kamesh Jain, £32,462 (referred to in the Points of Claims as £22,623) as payments to other individuals referencing Mr Varma, £93,300 to Mr Vinany Varma. As to the last item, I have no evidence from the JLs as to who Vinay Varma is. The JLs claim the sum of £76,388 paid to various other individuals, £47,155 as other miscellaneous expenditure of apparently a personal character, £80,000 to Fieldfisher (Manchester), £108,000 to Portner Law Client, £80,000 to Itish and Tejal Popat (referencing Mr Varma) £9,093 to Kookcha Ltd and T Farhang which the JLs say appears to be a jam start-up company and its director, and £145,833 to Meenakshi Mathur which the JLs suggest is a former Miss India. In interview, Mr England was asked to provide details and he apparently said 34 times that he could not recall or explain where the company money had been spent. In relation to the Kookcha Ltd, T Farhang and the payment of £9,093, in a conversation, this lady denied receiving the sum. However no other detail is given beyond the assertion by the JLs that she knew Mr Varma well and had spoken to him. There is a reference in

Mr Gray's witness statement to evidence having been elaborated at other Court hearings relating to these matters or in earlier witness statements. Mr Brown did not seek to take me to this further evidence.

97. As I have already set out above, the JLs' pleaded case is not that the Casa Account was essentially an account held on trust for the Company and used exclusively by the Company. There are payments into that account which the JLs have not asserted in the schedule provided to me during the hearing (and which I have analysed above) were company money being paid into the Casa Account. So the evidence is that other sums were paid into the Casa Account. Additionally, there is uncertainty relating to whether the payments now being claimed as being Mr Varma's responsibility are Mr Varma or Mr England. Although I have considerable sympathy with the position of the JLs, there is a lack of evidence relating to almost all the payments claimed in the preceding paragraph. In my judgment on a balance of probabilities, the case is not made out in relation to any of these payments. The matter may well have been different had this matter proceeded to trial in the normal way and both Mr England and Mr Varma were the respondents, but that is not what the JLs have sought to do.

98. Toward the end of the hearing on 20 January 2020 when I invited Mr Varma to tell me, what he wanted to say bearing in mind that the debarring order stood, he referred me to there being invoices between Casa and himself. On instructions, Mr Brown stated that there were no invoices which formed part of the disclosure which the Court would be able to see. I did not fully understand this point in that in so far as those invoices exist and in order for me to see them, the JLs would ask for permission from me. They did not. So I am left with Mr Varma telling me there are invoices, the JLs appearing to admit that invoices exist but no application being made in relation to

those invoices being before the Court. On the evidence before me it is not possible to be able to ascertain whether invoices were raised, when and for what amounts. However, in my judgment the existence of invoices as between Casa and Mr Varma does not alter the fact, which I have found established, namely that the spending being carried out was of sums belonging to the Company. Accordingly, even if Mr Varma was able to defend and point to invoices, this does not defeat as such the claim by the JLs being one of use of Company monies located in the Casa Account. I have already sought to analyse the sums paid into the Casa Account, from both investors as well as Kennedys and also from the Company itself. The JLs assert that it is the use of Company monies by Mr Varma which creates the liability. I agree. The issue relating to invoices, which are in any event not before me, does not alter the findings I have made above.

The case against GCFZE and Mr Varma in relation to the payments made by the Company to GCFZE

99. This claim is made under different basis in relation to Mr Varma and GCFZE. It is convenient to deal with them together. As is set out above, GCFZE is a Dubai registered company. The JLs have identified several payments transferred from either the Company account or from sums which the JLs assert are Company monies paid into the Casa Account and then transferred to GCFZE. The case on behalf of the JLs is that the sums which total £3,122,841.75, either represented

(1) in relation to Mr Varma sums he transferred to GCFZE in breach of the duties he owed to the Company as de facto director:

(2) in relation to GCFZE:

(a) transactions at an undervalue pursuant to section 238 of the Insolvency Act 1986, or alternatively,

(b) the sums were received by GCFZE with the knowledge that the sums, being Company monies, were paid out in breach of the duties owed by Mr Varma as a de facto director/shadow director of the Company and therefore GCFZE holds such sums as constructive trustee on behalf of the Company.

Mr Brown submitted that the only real difference in relation to the two possible causes of action in relation to GCFZE, if proved, was that the JLs would seek the 'knowing receipt'(the second cause of action) in preference because of the ability of seeking compound interest.

100. The transfers of sums from the company, either from the Company's bank account or from the Casa Account, consist of the following,

28 June 2107	£1,000 (Casa)
18 July 2017	£50,000 (Casa)
1 August 2017	£1,048,000.00
15 August 2017	£99,000.00 (Casa)
15 August 2017	£500,000.00
18 August 2017	£150,000.00
24 August 2017	£89,000.00
8 September 2017	£56,841.75
15 September 2017	£225,000.00
15 September 2017	£119,000.00
22 September 2017	£200,000
26 October 2017	£15,000
26 October 2017	£570,000.00

101. As Mr Brown pointed out, the payments were made during the period June 2017 until October 2017. They total £3,122,841.75. During this period, as noted above, the

site in Bristol had not been acquired and no planning permission had been sought. Sums had been collected from investors who had signed a contract for the acquisition of the unit or units. Mr Brown took me to one of these contacts, namely the contract for the sale of unit 614 to Richard Payne date 8 August 2017. The contract refers to two dates, the 'Intended Completion Date' being 8 September 2017 and the 'Long Stop Date' being 30 September 2018. The 'completion date' is defined as ten working days after the date of dispatch of a written notice from the Seller's Solicitors to the Buyer's Solicitors to the effect that (a) the Property is ready for occupation and that (b) the Seller has received the Certificate of Practical Completion. If the Certificate of Practical Completion had not been issued by that long stop date, then the Buyer and the Seller were entitled to rescind the contract and the deposit and reservation fee. There appears no reason for the sums to be transferred during this period of time to GCFZE. From the terms of the contract entered into with the investors, the Company had taken on major obligations relating to the completion of the student flats.

102. In order to establish the case against Mr Varma, the JLs have to establish that the payments were made by the Company, acting through Mr Varma as the de facto director and the payments made were in breach of the duties owed by Mr Varma to the Company. Having read the witness statements of Mr Varma, there is no challenge to the fact that the payments which I have set out below were made from the Company to GCFZE. The issue raised by Mr Varma in his evidence, which also have a bearing on the case against GCFZE, is that such payments were made at the instruction and direction of Mr Singh, alleged to be the owner of the Company and were made for the acquisition of diamonds and jewellery by the Company from GCFZE.

103. In order to establish the case against GCFZE, the JLs need to establish

(1) that GCFZE was aware that Mr Varma transferred the said sums in breach of the fiduciary duty owed by him to the Company and as such held those sums as a constructive trustee;

(2) for the transaction at an undervalue, that GCFZE was owned and controlled by Mr Varma. This enables the JLs to establish the connected test under section 238 of the Insolvency Act 1986 for the purposes of presumed insolvency.

Additionally, the knowledge element of the knowing receipt is met if the evidence establishes that GCFZE is owned and controlled by Mr Varma;

(3) for the transaction at an undervalue, that the transfers were made for no consideration or consideration which is significantly less than that provided to the Company. The JLs' case here is that no consideration as provided.

104. The JLs have also addressed before me documents which were provided by Mr Varma in support of his assertion that the transfers were made as payment for jewellery and diamonds which the Company had agreed to purchase (and according to him, did acquire). Although both Mr Varma and GCFZE are debarred from defending, in my judgment, I should consider the documents. In particular the documents should be considered in relation to the case that the JLs seek to establish before me.

105. The JLs rely on the following evidence to establish that GCFZE was owned and controlled by Mr Varma. In summary, the evidence of the JLs consists of admissions made by Mr Varma in relation to his control and ownership of GCFZE. Firstly, the transcript of an interview with Mr Varma which was held on 26 February 2019 and conducted by Mr Russell Herbert, employed by FRP Advisory. At page 11 of the transcript, Mr Varma was asked about £3 million which was paid out to a company called Grosvenor Consultants FZE. Mr Herbert asked if Mr Varma was aware of that

company and Mr Varma replied, ‘Yes’. Mr Herbert asked, ‘Whose company [GCFZE] is that?’ Mr Varma replied, ‘Mine’. Mr Herbert then continued, ‘It’s yours?’ and Mr Varma replied, ‘Yes’. Later he was asked again by Mr Herbert about GCFZE and again confirmed that it was ‘his company’. Mr Varma in his replies also asserts that Maneet Singh was the ‘owner’ of the Company.

106. On 3 May 2019, Mr Varma signed a statement of truth in relation to the replies he provided to questions which had been presented to him by the JLs. Mr Varma was required under Court Order of Mrs Justice Falk to reply to the questions with a Statement of Truth. Under the title, “Diamonds & Jewellery”, Mr Varma was asked the following question, “in order to buy the diamonds and jewellery, you explained that the Company had to make payments to a company known as Grosvenor Consultants FZE …that is solely owned by you and registered in UAE, is that correct?” The reply states, ”FZE is solely owned by me and is registered in UAE, that is correct. The company made payments to FZE as that was my loan to the company – from proceeds of the sale of my jewellery & assets.” In a reply to a later question (number 60), Mr Varma again confirmed, ‘I am though the sole owner of FZE’ He stated that the jewellery belonged to FZE and that this represented ‘his’ investment into FZE.

107. The JLs also took me to the transcript of the hearing before Adam Johnson QC sitting as a Deputy High Court Judge which took place on 3 July 2019. The JLs sought further orders as against Mr Varma, including an order for his cross examination. For the purposes of this hearing, Mr Varma had filed a witness statement dated 26 June 2019 (being a month after his replies to the questions referred to above and provided under a statement of truth). In that statement, Mr Varma then stated (paragraph 18) , “In relation to FZE Consultants, I apologise to the

Court for not dealing with the parts of the freezing order relevant to them. Frankly, and honestly, I have been so vexed and engaged trying to defend myself I simply haven't given it any thought. I have disclosed it's only assets as Mr Atkinson says in his witness statement. The fact of the matter is that the company's license to trade has been revoked. Although I am recorded as the sole shareholder and director, there are other silent shareholders. Their involvement in the company is covered by a confidentiality agreement governed by the law of the UAE. I was in a quandary as to whether to mention this as I did not want the Company to be in breach with of the UK order or the Dubai agreement. I appreciate that the Applicant will paint all kinds of prejudice against me but the fact of the matter is that the shareholders are Dubai residents who wanted to participate with me but did not want to disclose their involvement for a whole variety of reasons…" This non disclosure agreement has not been disclosed and there are no further details in the documents before me at this trial as to the ambit and scope of UAE law in this respect.

108. As the JLs point out, this statement was the first time that Mr Varma mentioned there being 'silent shareholders'. For current purposes, Mr Varma does not deny that he is **the** director and a shareholder of GCFZE. Additionally, in his earlier signed replies to the questions, he had stated that the jewellery which he averred had belonged to him and had been transferred by him to GCFZE, was his investment in GCFZE. In those circumstances, I do not need to deal with the inconsistencies in Mr Varma's evidence. In my judgment, the evidence presented by the JLs establishes that at the relevant time (being when the transfers of sums belonging to the company were made from the company to GCFZE), Mr Varma was the director and the sole shareholder or at least one of the shareholders of GCFZE.

109. Mr Brown referred me to the case of *Meridian Global Funds Management*

Asia Ltd v Securities Commission [1995] AC 500 on the issue of attribution. The primary rule of attribution is that a company must necessarily have attributed to it the state of mind of its directing organ under its constitution, i.e. the board of directors acting as such or for some purposes the general body of shareholders. In the current case, there is evidence of there being only one director, Mr Varma. In my judgment the evidence before me satisfies the attribution of Mr Varma's wrongful acts to GCFZE and accordingly, GCFZE is equally liable to account for the sums received, subject only to the points made below in relation to the jewellery and consideration provided.

110. The JLs' case is that the sums transferred from the company to GCFZE were transferred for no consideration. Mr Brown submitted that Mr Varma's explanation that the decision made by Mr Maneet Singh to acquire the diamonds and jewellery as an investment, was odd. This was a building company which stated that it was acquiring (or indeed had acquired) the property in Bristol which was then to be converted into student accommodation. Potential investors had been presented with a prospectus inviting them to purchase units. In his interview on 26 February 2019, Mr Varma asserted that Mr Singh had been concerned about losing money by reason of delays and that he would be losing money on the deposits which had been paid by purchasers of the units. So the acquisition of the diamonds and jewellery from GCFZE by the Company was, according to Mr Varma, a way of investing the deposit sums which had been collected by the Company.

111. As Mr Brown points out, the literature which had been sent to potential investors contained no reference to what would happen to the deposit monies paid over. It also did not say that those sums would be invested elsewhere. Additionally, the timing of the deposit payments made and the dates set out in the contracts of sale

for the intended completion date and long stop date, made this explanation and assertion presented by Mr Varma as implausible.

112. So at the time when the building had not been acquired, there was no planning permission and the contract set out an Intended Completion Date of September 2017. It is, submitted Mr Brown, simply not commercially plausible for the Company to be investing in diamonds and jewellery. The timing of the alleged investment is on the date I have set out above, pretty extraordinary. The transfers I have listed above include one in excess of £500,000 in late October 2017, which is after the intended completion date. Even at that stage, the Company had not acquired the building site or obtained planning permission and no building works could therefore have been carried out. In my judgment, there is a lack of credibility in the explanation provided by Mr Varma about diamonds and jewellery being acquired by the Company. As I have already held, during this period, Mr Varma was a de facto director of the Company. His explanation which I have held to be implausible (leaving to one side whether or not the diamonds and jewellery actually

113. Documents have been disclosed by Mr Varma in support of his assertion that the company had invested in the diamonds and jewellery, that the sums transferred from the Company's bank account or sums which belonged to the Company which had been paid into the Casa Account would be paid back to the Buyer and that the diamonds and jewellery were subsequently handed to the Second Respondent, Mr Khadka, when he acquired the Company and became director. Mr Brown took me to those documents. Before turning to those documents, it is worth considering the evidence of the JLs. They have not seen any evidence of the existence of the diamonds and jewellery. Although in emails, Mr Khadka has stated that he has the

diamonds and jewellery, he has failed to hand them over or produce any evidence that they actually exist and are in his possession. In so far as Mr Varma asserted at some stage that the value of the diamonds and jewellery is in the region £4 million, this is somewhat surprising. No valuations have been located in the Company records and certainly none provided to date from any of the Respondents. There are no photographs, no evidence of any bank safe where they are kept. Equally, there is a complete lack of evidence about the existence and role of Mr Maneet Singh. Mr Varma asserts that he exists, but has to date provided no evidence in support and attempts by the JLs to contact Mr Singh have not produced any person replying to the emails sent. The email address was provided by Mr Varma has not produced any reply.

114. As already set out above, the JLs assert that Mr Singh does not exist. They assert that in reality, all steps taken by the company, the transfers of such significant sums of money from the company to Mr Varma and GCFZE, was all actions of Mr Varma. There is no evidence before me which demonstrates the existence of Mr Singh. Equally there is as I have set out above, ample evidence demonstrating the misappropriation by Mr Varma of company monies.

115. Although Mr Varma and GCFZE are debarred from defending, I did consider the documents which had been disclosed by Mr Varma. These documents are likely to have been relied on by him in his and GCFZE's defence. However, as both these respondents are debarred from defending, I have considered the documents to examine whether they have a bearing in on the case the JLs seek to establish. The documents are extremely unsatisfactory and lack credibility. The most suspicious document is that entitled, 'Settlement, Receipt, Release and Discharge'. This document is apparently signed by Mr Varma on 11 June 2018. The JLs dispute that it

was actually signed by him on that date in Mumbai because they say, in reliance upon the 'luxury spending' I have referred to above, Mr Varma was spending money on the company bank card in Selfridges at that time.

116. The document states in its recital that the Company 'has asserted claims of amounts due and payable by GCFZE' pursuant to the terms of an agreement. The terms of this alleged agreement and its date are left blank. Just pausing there, at the date of this 'settlement agreement', the entirety of the sums which form the subject matter of the claim by the JLs against GCFZE had been paid over to GCFZE from the company. So there is no evidence of any claims of the company against GCFZE for 'amounts due and payable'. The agreement states that it is a settlement of claims and acknowledge 'safe receipt' of the assets as listed in the schedule. The schedule is a list of jewellery, quite basically described. I observe that in so far as the alleged agreement for the acquisition of diamonds and jewellery had been entered into as between the company and GCFZE, the lack of detail of what exactly was being acquired, including evidence of the value of each piece, is astonishing.

117. In my judgment, this 'settlement document' does not support what Mr Varma asserts in his interview occurred. According to Mr Varma, the Company agreed to invest in the said diamonds and jewellery. There is no evidence relating to the existence of these items, beyond the bare assertion of Mr Varma and that of Mr Khadka. However as at the date of the settlement agreement, sums in excess of £3,122 million had been paid over by the Company to GCFZE. Had that diamonds and jewellery actually existed, then it would have been, prior to the settlement agreement, the property of the Company. This is different from the Company asserting ,'claims of amounts due and payable'. As it stands, I am not satisfied that the 'settlement agreement' is a document which prevents the JLs establishing their case in relation to

the sums being paid over for no consideration or knowing receipt. Mr Brown submitted that the document was a fabrication. In my judgment, the document raises more questions than it answers. A further example is that the document makes little sense when considered along with one of the other documents produced by Mr Varma. This is a letter dated 9 June 2018 when Mr Singh notifies Mr Varma that he, Mr Singh, has sold the shares in the Company to Mr Khadka and asks Mr Varma to hand over the jewellery which Mr Varma was holding on trust for the Company to Mr Khadka. The settlement document is dated barely two days later and is written in the language of 'claims'. It is inconsistent with the letter dated 9 June 2018 which asks for Mr Varma to hand over the jewellery which of course according to these letter and invoice already belong to the Company. There is a lot of force in what Mr Brown submits, namely that the terms set out in the settlement agreement attempt to prevent GCFZE being liable for anything. As Mr Brown submitted, if one were to draft something to prevent liability arising upon GCFZE, the terms of the settlement agreement would be perfect.

118. The other document which was produced by Mr Varma is a copy of an invoice dated 27 June 2017 addressed to the Company from GCFZE. It then lists items of jewellery, giving a total amount of £4,950,000. There is also a letter dated 27 June 2017 from Mr Singh addressed to Mr Varma requesting Mr Varma to hold the jewellery 'on trust' on behalf of the Company.

119. In my judgment, I am satisfied that these documents do not defeat the claim made by the JLs. I have taken into consideration the following :- (1) the complete lack of evidence relating to the existence of the jewellery; (2) the purported acquisition of the jewellery at a moment when the Company needed sums to be able to develop the Bristol property as well as complete the purchase of the freehold; (3) the lack of any

evidence relating to a Mr Singh; (4) the inconsistency as between the wording of the settlement document and what appears to have been the position relating to the jewellery; (5) the use made by Mr Varma during the entirety of the Company's existence of sums belonging to the Company at times when those sums had been paid over by investors in relation to the contracts entered into by the investors.

120. Furthermore, as set out in the witness statement of Ms Liu, it was Mr Varma who sought to explain to Ms Liu in July 2017 why access could not be given to the site. He even produced videos purporting to be footage from the Bristol property to Ms Liu. Ms Liu had also been seeking clarification relating to the longstop date since late April 2017. However at this precise moment, when Mr Varma was well aware that no works had been carried out and the freehold had yet to be acquired, he asserts that the jewellery was acquired (see letters he relies upon 27 June 2917). In my judgment, based on the evidence, the alleged settlement agreement is a fabrication. Equally, there is no evidence of any jewellery transaction. From the evidence, there is no doubt that sums were paid over to GCFZE by Mr Varma in breach of the duties he owed to the Company. The transfers of such large sums were not in the interest of the company or indeed carried out in good faith. The payments certainly did not promote the success of the Company.

121. Accordingly, in my judgment, the breaches by Mr Varma and his knowledge as attributable to GCFZE, means that GCFZE is a knowing recipient of the sums. Equally, I am satisfied that the JLs have established their case that the sums were paid over for no consideration. However, I need not deal any further with this cause of action because the preference indicated by Mr Brown is a finding in relation to knowing receipt which I have already determined in favour of the JLs. It seems to me that the liability in this case should be joint and several. Mr Brown did not argue

against this when I canvassed this with him as a possibility. In my judgment the JLs are entitled by way of equitable compensation to an order that Mr Varma and GCFZE are jointly and severally liable to pay to the JLs as the sum of £3,122,841.75.

Mr Khadka

122. As accepted by Mr Brown, the case for judgment as against Mr Khadka differs from that sought as against Mr Varma and GCFZE. There is already an order for him to deliver up company property, being the diamonds and jewellery. There is no debarring order as against Mr Khadka. He is in default of the order requiring him to serve his defence and there is also a warrant issued against him. However the application being made before me is not seeking judgment in default. I am not prepared to consider dealing with judgment against him at this hearing. In anticipation of that view by me, Mr Brown invited me to adjourn the application to the trial fixed in relation to the other respondents, which is due to take place on 15 June 2020. I will adjourn the application in relation to Mr Khadka to the trial with the costs reserved.

Interest on sums held to be payable from Mr Varma and GCFZE

123. In my judgement, interest should be paid on any sums which I have held are payable from the Respondents to the JLs, at the rate of 8%. The issue which arises is whether the interest should be calculated on a simple or compound basis. In the event that I determined that the Respondents (or any of them) were liable to pay sums to the JLs, Mr Brown invited me to order the payments of interest on any such sums on the basis of compound interest. He referred me to the House of Lords case of *Westdeusche Bank v Islington LBC [1996] AC 669*, being a case relating to the liability of the council in relation to interest rate swap transactions. In that case, the House of Lords considered the equitable jurisdiction to award compound interest and at page 702, Lord Browne-Wilkinson stated, after reviewing the established

authorities, ‘These authorities establish that absence of fraud equity only awards compound (as opposed to simple) interest against a defendant who is a trustee or otherwise in a fiduciary position by way of recouping from such a defendant an improper profit made by him.‘ The position relating to there being an equitable jurisdiction to order interest on a compound basis rather than simple has existed in relation to fraud and fiduciary cases for a long time.

124. In the case of Mr Varma, the liability arose from his various breaches of fiduciary duty owed to the Company. This places him in the position whereby the Court has a discretion, under its equitable jurisdiction to consider ordering interest on a compound basis. In my judgment based on the flagrant breaches set out above whereby significant sums were used by Mr Varma for his own benefit as well as transferred over by him to GCFZE, being a company on his own admission he was the director of and owned by him. Although later Mr Varma sought to assert there were other shareholders in GCFZE, there is no evidence in support of this assertion. I am satisfied that this is a case appropriate for interest to be ordered on the sums which I have determined are to be paid by way of equitable compensation on the compound basis.

125. In relation to the liability in the sum of £3,122,841.75 of GCFZE, this liability arises in two ways. In relation to the claim that GCFZE was in knowing receipt of those sums (the shorthand I have used above in relation to well established principles) the liability arises by reason of a determination that GCFZE received the sums from the company in breach of the fiduciary duty owed by Mr Varma to the Company. As I have determined above, the requisite element of knowledge in the case of GCFZE existed at the time of the receipts by GCFZE of the sums from the Company. Also, on the evidence before GCFZE was owned and controlled by Mr Varma. Accordingly, in

my judgment GCFZE should also pay compound interest on the sum of £3,122,841.75. There is no need to consider or deal with the second claim relating to transaction at an undervalue.

Costs

126. The JLs have filed a series of schedules relating to their costs. Whilst I am prepared to make an order for costs in their favour, I have already expressed my concern relating to the failure by the JLs to list this matter for a proper hearing time. Additionally, expenses were incurred by reason of this failure. There are other factors relating to costs which are also of concern. In those circumstances, I will hear any submissions relating to costs and their level at the time that this judgment is handed down.

Dated