Neutral Citation Number: [2021] EWHC 3460 (Ch)

Case No: CR-2014-002944

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

IN THE MATTER OF AFM (1932) LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Remote Hearing Trial
Date: 21/12/2021

Before :

INSOLVENCY AND COMPANIES COURT JUDGE JONES

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Between :

(1) AFM (1932) LIMITED (IN LIQUIDATION)

(2) NINOS KOUMETTOU AND YIANNIS KOUMETTOU

AS JOINT LIQUIDATORS OF AFM (1932) LIMITED

Applicants

and

(1) BELISCO ESTATES LIMITED

~~**(2) IAIN ROBERT DOCKERILL**~~

Respondents

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Mr Darragh Connell (instructed by **Howes Percival LLP**) for the **Applicants**
Mr Timothy J. Walker (instructed by **RIAA Barker Gillette**) for the **First Respondent**

Hearing dates: 6-8 December 2021

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Approved Judgment

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

.....CHJ 21/12/21.....
INSOLVENCY AND COMPANIES COURT JUDGE JONES

I.C.C. Judge Jones:

A) Introduction

1. Mr Connell, counsel instructed on behalf of the Applicants (to be individually referred to as "AFM" and "the Liquidators"), opened this case with reference to "The Great Gatsby". Whilst he had in mind Gatsby's mansion, one of its themes is that nothing is as it seems. It is a theme which applies to this case. Mr Connell identified a key point for the claim as the fact that at no stage had the First Respondent ("BEL"), a BVI registered company and the owner of "Greenacres", a property in Essex ("the Property"), paid AFM for or in connection with the building works carried out there during 2013 and 2014. Yet despite that apparently simple point, this claim is not for payment of sums contractually due. It seeks relief under ***s.238 of the Insolvency Act 1986*** ("***s.238***") alleging a transaction at an undervalue and/or pursues an action for "knowing receipt".

2. Adding further to the "things are not what they seem" theme, although the relief relates to building works at the Property, the issue of their payment is interlinked with agreements concerning loans to and investments in AFM. The agreements involved entities other than BEL. It never had an interest in AFM. One entity, Aspen Property Services Limited ("Aspen"), owned by Mr Phippen, became a shareholder of AFM in May 2013 pursuant to an investment/loan facility agreement. Mr Phippen's evidence is that he had no knowledge of the works at the Property or of BEL not paying for them.

3. The other entity, Woodbridge Limited ("Woodbridge"), a Dubai registered company, in March 2013 agreed with AFM to Aspen's future involvement. BEL asserts that Woodbridge did so having entered into a £100,000 loan agreement with AFM in 2010. Its terms included Woodbridge being granted by AFM's director, Mr Allen, for £1.00, an option to purchase his 80% AFM shareholding. The consideration for the exercise of the option would be waiver of the £100,000 loan to AFM. The anticipated allotment of shares to Aspen, which occurred in May 2013, would mean that the option shares would be diluted to 44.5% of the issued share capital. The agreed consideration for this dilution was a payment of £250,000 by AFM or the carrying out by it of works and services to that value for Woodbridge, excluding VAT. On its face, a surprising consequence also suggesting things are not what they seem.

4. BEL's case is that Woodbridge was a connected company because they had the same beneficial owner, Mr Sean Heales ("Mr Heales"), a now retired commodity broker. The Liquidators do not accept this because of a perceived lack of evidence and because Mr Phippen's evidence is that he thought Mr Allen was in charge of Woodbridge. There is no documentary evidence of ownership or, indeed, of any identification of the officers of Woodbridge. The Liquidators also rely upon there being no evidence of who BEL's officers were before August 2014. It is BEL's case that Mr Heales gave instructions to the Second Respondent ("Mr Dockerill"), against whom the claim has recently been settled by "Tomlin Order", upon which both companies acted, although he was never an officer or employee of either. The theme is sustained.

5. Mr Dockerill, a commodity broker, supervised the works at the Property before and from the time AFM became involved. He lived at the Property once it became habitable, in or around the beginning of 2013. He continues to do so, now paying a rent of £8,000 a month to BEL. He was the main witness for BEL. Despite Mr Heales's position as the asserted owner of BEL and Woodbridge at the material times and the person who gave Mr Dockerill his instructions, he did not give evidence. Nor did Mr Allen, who plainly was also a "key player" within the spectacle. Mr Allen was made bankrupt on 21 June 2016, which will explain his omission as a respondent.

6. BEL was sold by Mr Heales to Mr Kappen, a commodity broker, on 29 March 2016. He remains its owner. Whilst he gave evidence, his ownership fell outside the material 2013/2014 period and he distanced himself from any knowledge relevant to the claim. That was despite the fact that he had been appointed a director of BEL from 1 August 2014, a fact missing from his witness statement. He did inform the Court that Mr Heales used company administrators to manage BEL in the United Arab Emirates where *"companies are not required to pay tax or file annual financial statements … and the same stringent requirements to maintain financial records [does not exist] as exists in the UK"*.

7. Nor is it only this whisper of shadows misting the facts that continues "The Great Gatsby" theme. Mr Walker, counsel instructed on behalf of BEL, submitted that the case as presented at trial is very different to the one set out in the Application Notice and in the Points of Claim which accompanied it. He referred to (amongst other matters) the fact that Mr Dockerill is identified in the statements of case as the beneficial owner of the Property not BEL. Also to their claim that the challenged payments were made by AFM to contractors and suppliers at the Property to repay a debt owed by Mr Allen to Mr Dockerill. He observed in contrast that the claim now relies upon BEL as beneficial owner and does not touch upon any liability Mr Allen owed Mr Dockerill or, indeed, BEL. Mr Walker in his closing submissions made clear that BEL does not accept that such changes can be relied upon without amendment and that BEL would oppose any application to amend if one was made at this very late stage.

8. It is necessary, therefore, to start with a careful analysis of the Applicants' statements of case, with or without owl rimmed spectacles. I should make clear, however, that whilst in places this might appear to adopt too strict an analytical method, that will be driven by the drafting and my conclusions will be subject to a just approach applying a realistic and fair contextual overview taking account of the purpose of statements of case (see generally para.16.0.1 of the White Book 2021).

B) The Statements of Case and Case at Trial

B1) The Claim

9. The Application Notice does indeed claim (albeit set out as declarations) that Mr Dockerill is the beneficial owner of the Property, solely or jointly with others. There is now no dispute it was and is BEL and the trial proceeded accordingly. The Application asserts that BEL and Mr Dockerill *"knowingly received the benefit of payments made by [AFM] to contractors and/or suppliers for work carried out at*

and/or goods and/or services supplied and/or delivered to the Property". Also that the payments had been made at the direction of Mr Allen in breach of his fiduciary duties as a director. At the end of the sentence making those assertions is the definition *"the Payments"*.

10. In the light of Mr Walker's above-mentioned submission it is important to understand its meaning. Plainly it refers to "*the benefit of [AFM's] payments*" not to the payments themselves, which were to third parties to pay liabilities AFM had accepted it owed them. Whilst potentially opaque, that benefit must refer to the benefit of having AFM pay for the work or supplies for the Property instead of BEL and Mr Dockerill.

11. The Application then asserts that BEL and Mr Dockerill knew: (i) AFM did not raise invoices or seek payment from either of them to recover "the Payments" and (ii) that "the Payments" were made at the direction of Mr Allen in breach of his fiduciary duties. Whilst use of the defined term suggests further ambiguity, it is apparent from the context that the defined term of "the Payments" should not have been used in this context when referring to the payments themselves or to the benefit received from them.

12. It is then asserted, further or in the alternative, that ***s.238*** applies to "the Payments", which must mean the transaction by which "*the benefit of [AFM's] payments*" was achieved. The form of the transaction would be a matter for further pleading within Points of Claim. The relief sought is for payment of £401,077.78 as a joint and several liability plus interest. There is also a prayer for an account of any increase in value of the Property *"subsequent and attributable to the Payments"* and for all necessary accounts and enquiries.

13. For convenience this judgment will now use the following two defined terms: (i) "the Payments" meaning the monies paid to third parties by AFM; and (ii) "the Benefit of the Payments" meaning the benefit of having AFM pay for the work or supplies for the Property instead of BEL.

14. The Points of Claim are framed within the context of BEL being the legal owner and Mr Dockerill the beneficial owner of the Property. They have not been amended but both sides came to this trial prepared to address the case on the correct basis of BEL having been the legal and beneficial owner. The Points of Claim refer in respect of part of the Payments to invoices from Taylor Developments Limited ("TDL") totalling £171,341 (including VAT) expressed to be for works, goods and/or services provided at a site in Warwick Road, Peterborough ("the Peterborough Project"). It is pleaded (in summary) that TDL's director, Mr Taylor, has accepted that the invoices were for work carried out at the Property. That he has explained that he was instructed by Mr Dockerill, who occupied the Property and issued instructions for the works and their payment, to invoice AFM. The explanation given to Mr Taylor, as pleaded, is that Mr Allen owed Mr Dockerill money and they had agreed the debt should be settled by AFM making the Payments. AFM posted the invoices to a ledger account for the Peterborough project which was a distinct project being carried out for Alysia Care Limited ("ACL") under a JCT Design and Build Contract dated 20 May 2013. The Applicants did not pursue their claims at trial upon the premise that the Payments to TDL were made by AFM to achieve repayment of a debt Mr Allen owed Mr Dockerill.

15. As to the balance of the Payments, in part the claim relies upon invoices from third party contractors and/or suppliers referring to the Property. It also relies upon invoices claiming payment for work at an unspecified address in Benfleet. It is claimed that those invoices either in truth related to the Property or related to property and/or land in Benfleet ("the Benfleet Site") owned by Mr Stephen MacVicar and Docnor Developments Limited of which Mr Dockerill was a 50% shareholder and between 11 September 2003 and 2 July 2006 one of its directors. AFM had no connection with the Benfleet Site. It may be noted that there was a conjoined application against Docnor Developments Limited and Mr McVicar but that has been settled by a Tomlin Order.

16. The Applicants have not sought to resolve whether the works were carried out at the Property or the Benfleet Site at the trial. Their approach is to have this matter determined on an account. As a result it is a matter which has not been addressed by either side for the purpose of final determination by this judgment.

17. The Points of Claim also reserve the right to claim any additional payments made for no consideration including further costs of £20,223.70 relating to the Benfleet Property. This was not pursued.

18. The first cause of action pleaded from those facts and matters is the claim under **s.238**. It is the receipt of the Benefit of the Payments and the asserted fact that AFM has received nothing in return for the Payments that constitute the ***s.238*** transaction. That appears from paragraph 12 of the Points of Claim. The resulting restitutionary claim is quantified at £401,077.78 and **s.238's** requirements of undervalue and relevant time, including of insolvency, are then referred to.

19. The second cause of action is "knowing receipt". This relies upon breach of fiduciary duty by Mr Allen causing the Payments and thereby misapplying and/or misappropriating AFM's money when acting as a director. Knowledge of breach is attributed to BEL and Mr Dockerill because they had agreed *"to an arrangement which appears to have been engineered to ensure the repayment of the outstanding debt due to [Mr Dockerill] by [Mr Allen] for [Mr Dockerill's] personal benefit"* making it unconscionable for BEL and Mr Dockerill to retain the Benefit of the Payments.

20. Whilst this cause of action will need to be considered further in the context of the law of "knowing receipt" and in the manner the claim was presented at trial, the pleaded case against BEL has been abandoned. As stated, there is no longer any case that Mr Dockerill received the Benefit of the Payments or that there was a debt owed to him by Mr Allen which is relevant to the claim. Instead a different, unpleaded case was advanced at trial. In order to identify and explain this new case, it is necessary first to consider the Points of Defence in order to be able to appreciate the differences. That is because some of the changes are inextricably entwined with the Applicants' responses to the defence, although it is noted that the Reply to the Points of Defence is really a general traverse.

B2) The Points of Defence

21. The Points of Defence on behalf of both BEL and Mr Dockerill assert that BEL was always and remains the legal and beneficial owner of the Property. Until 29 March 2016 this BVI company was owned by Mr Heales. Mr Heales's direct connection to AFM was through another of his companies, Woodbridge Limited. It became a 44.5% shareholder of AFM on 8 May 2013 having held an option to purchase 80% of AFM's shares from Mr Allen pursuant to an agreement dated 16 September 2010 ("the 2010 Agreement").

22. Although the details are more complicated, the facts relied upon as a defence are, in a nutshell:

    a) As to the £171,341 paid to TDL: It is not admitted that this sum was paid to TDL for works or services at the Property. However, to the extent it was, the payments were properly made by AFM for works invoiced to it by TDL, albeit purportedly for the Peterborough Project. That is because:

        i) From about January 2011 TDL had been the main contractor at the Property engaged by BEL. Mr Dockerill, who would and did occupy the Property, agreed, supervised and managed the TDL works on behalf of BEL.

        ii) From about mid-2013 Mr Dockerill, as agent for BEL, wanted AFM to replace TDL. AFM did not have the resources to do so because of its commitments at other sites. Therefore, Mr Dockerill and Mr Allen agreed that whilst AFM would become the main contractor, TDL would continue on site as AFM's sub-contractor. From about July 2013 TDL invoiced AFM accordingly. This continued until about November 2013 when TDL's engagement was terminated.

    b) As to the balance of the Payments: No admissions are made concerning the invoices relied upon and their payment (including the above-mentioned £45,304.93). However, assuming the balance relates to works and services for the Property, AFM was liable to pay them because from about December 2013 it had undertaken the work at the Property as the main contractor without involvement from TDL. It was responsible, therefore, for paying its subcontractors and its suppliers.

    c) AFM did not invoice or receive payment from BEL for any of the works whether during the TDL period or after. That was because although those works were attributable to its role as main contractor at the Property, BEL was entitled to set off their value against the £250,000 liability owed by AFM to Woodbridge.

    d) This resulted from an agreement evidenced in writing by a letter from AFM to Woodbridge dated 17 April 2013 ("the 2013 Agreement"). It varied the 2010 Agreement and resulted in Woodbridge's original option to purchase all of Mr Allen's shares (80 out of 100 issued shares) being an option to purchase 80 out of 180 issued shares. That was to enable Aspen to be allotted 80 shares from a new share issue in return for it providing AFM with (in summary): £100,000 for the shares; £200,000 of short-term funding; and future introductions to construction

projects . Woodbridge's agreement to the future dilution of Mr Allen's shares over which it had an option, from 80% to 45% of the issued share capital, was on terms that AFM would pay Woodbridge £250,000 or undertake work and/or supply goods to Woodbridge to that value, excluding VAT. The Payments attributable to the Property were for that work and/or supply (by implication) at the direction of Woodbridge.

e) Further or in the alternative, that arrangement was superseded by AFM's inability to pay its debts as they fell due requiring payments of its liabilities by BEL and by third parties on BEL's behalf. This establishes an alternative set off totalling £363,338.77. In particular:

i) From an unknown date AFM had relied upon a cashflow funding agreement with Watergates Construction Ltd ("Watergates") and no longer paid its suppliers and contractors directly. Watergates therefore made payments required from AFM for the works at the Property and should have been repaid monthly by AFM. It was not connected to anyone else referred to in the proceedings.

ii) From about "*early 2014, [AFM] was failing to pay Watergates*". To keep supplies being delivered to the Property and sub-contractors on site, Mr Dockerill arranged for Watergates to be paid directly by and on behalf of BEL. £200,000 was paid in total.

iii) For the same reason, Mr Dockerill also arranged for payment by or on behalf of BEL of invoices rendered by Unidig Limited ("Unidig"), an AFM subcontractor, totalling £163,338.77. This was AFM's liability as the main contractor.

23. It is pleaded that the matters above mean there can be no transaction at an undervalue or knowing receipt claim. As to the former, it is in addition denied that AFM was insolvent at the relevant times. As to knowing receipt, the claim of money being misapplied or misappropriated for the personal benefit of Mr Allen, including the existence of the debt owed by him to Mr Dockerill, is denied both as to fact and knowledge.

B3) The Claim At Trial

24. The claim at trial altered in a number of ways. In no particular order: First, following receipt of an analysis of invoices from Mr Walker, the Applicants accepted that the Payments should total £361,528.95. Second, as previously stated, the claim now only concerns BEL. It is accepted that BEL was the beneficial owner of the Property and that it and not Mr Dockerill received the Benefit of the Payments. Third, as also previously mentioned, the pleaded knowing receipt claim was not pursued. There was no reference to Mr Allen owing a debt to Mr Dockerill.

25. Fourth, Mr Connell's overview of the claim at paragraph 8 of his trial, skeleton argument is that there had been a *"wholescale and unjustifiable diversion of substantial sums from the Company to pay for works done and services rendered"*. He

summarised the ***s.238*** claim (see paragraph 6 and also paragraphs 11-13 of his skeleton argument) on the straightforward basis that the Payments were made by AFM for the benefit of BEL. No consideration was received by AFM or alternatively, any value received in money or money's worth was significantly less than the payments it made. I consider this reflects the pleaded ***s.238*** claim and that is on this basis that both sides addressed the trial.

26. Mr Connell in paragraph 6 of his skeleton argument also summarised the knowing receipt claim. At paragraphs 11-13 of his skeleton argument it is made clear that the allegation that the Payments were made in breach of fiduciary duty to the knowledge of BEL is now based not upon any debt owed to Mr Dockerill by Mr Allen but upon the retention by BEL of the benefit of the works for which the Payments were made.

27. Overall this presents the same case in the sense that it identifies the Benefit of the Payments as the property received by BEL in which AFM had a subsisting equitable interest. However, the requirement of fault (knowledge of sufficient facts concerning the misappropriation of AFM's funds to make it unconscionable to retain the benefit) has significantly altered. It is now directed at BEL not Mr Dockerill. It now has no reference to Mr Allen's debt to Mr Dockerill. The test of unconscionability will have to be applied to a scenario which not only has not been pleaded but is very different to the one which remains pleaded. It is plain this is a different case to the one pleaded and there is no application to amend.

28. Fifth, the approach taken to BEL's reliance upon the 2013 Agreement is new but that is because it only arose within the Points of Defence. The unpleaded response can be summarised as a dispute that there was any valid agreement entitling BEL to have works to the value of £250,000 carried out at the Property. The grounds for this are numerous. They range from: the absence of BEL as a party to any such agreement; to disputing that the 2013 Agreement could have been a variation of the 2010 Agreement when the option granted had expired; to the absence of any evidence from anyone with authority to substantiate the defence. A point is made by Mr Connell that neither the 2010 or 2013 Agreement were provided to the Liquidators until they were exhibited to the Respondents' evidence. Whilst a better drafted Reply would have been preferable, these are not points which in themselves are objected to by Mr Walker as a change of case at trial (and correctly so).

29. Sixth, the approach to the payments of AFM's liabilities said to have been made by and on behalf of BEL can be found at paragraphs 96-99 of Mr Connell's skeleton argument. Underlying the opposition to a defence of set off is a requirement to prove the payments and the purposes for which they were made. Subject to that, there is a requirement to justify BEL's entitlement to claim set off for payments made by third parties. This too is not the subject of objection.

C) The Trial and Submissions

30. The trial was directed to be heard remotely subject to further order. Shortly before the trial the Court proposed that it be heard in the Rolls Building. Ultimately, however, the Court was willing to hear the trial remotely subject to the parties being able to ask for the hearing to be "moved" to a court room at the Rolls Building if at any time that

was required (as expressed in paragraph 9 of the Trial Guidance Notes). It is noted that this approach potentially provided equality amongst witnesses, in the circumstances of Mr Dockerill and Mr Kappen intending to give evidence from abroad and a witness having to give evidence remotely because of Covid. As matters transpired, Mr Dockerill returned to this jurisdiction because of concerns that the laws of the Principality of Monaco may not permit his involvement in the trial. As to Mr Kappen, he was not permitted to attend the trial other than to give his evidence by video to ensure the proceedings were not "broadcast" to Dubai.

31. At the beginning of the trial late evidence from both sides was permitted for reasons given at the time. The further evidence of Mr Dockerill is intended to address documents found pursuant to the continuing duty to give disclosure and the further evidence of Mr Gray for the Applicants was intended as evidence in response. The permission was subject to the reservation that any assessment of the weight of the further evidence would bear in mind any prejudice (if any) found to result from its late production. The reality, however, is that issues of dispute about whether payments were made or repaid and their purpose (including whether they are attributable to the Property) were either agreed to the extent of the above-mentioned reduction of the Payments' sum or will have to be addressed upon an account should the parties not be able to agree matters further in the context of additional time to consider the further evidence.

32. I will proceed (unless I otherwise state in context) from the basis that both sides can prove the payments they each rely upon. I will then address the question whether that assumption should be reviewed in the light of the decision reached.

33. During the course of the trial Mr Gray made reference to draft 2013 accounts for AFM. I decided that the draft could only be admitted if an application was made with appropriate evidence explaining (amongst other matters) its source. No application was made.

34. Both counsel very helpfully provided speaking notes for their closing submissions. As a result it is unnecessary to detail them and further reference will made to them only to the extent necessary within the course of the judgment. I have borne their content in mind throughout this judgment and wish to emphasise my appreciation of the skill applied and hard work undertaken by both counsel.

D) The Witnesses

35. The Applicants' first witness was Mr Gray, a Senior Insolvency Manager employed by Begbies Traynor (Central) LLP. He is the case manager for AFM's liquidation. He provided evidence from his investigations and I am more than satisfied from hearing him during cross-examination that he has adopted a fair approach and given evidence in accordance with his duties acting on behalf of an office holder. He was ready to acknowledge points that could be made against the case, whilst responding with answers to those points when appropriate.

36. It is clear that the Liquidators' concerns arose (at least in part) when they heard from a director of TDL in interview, Mr Taylor. His disclosure, as summarised within the

Points of Claim and by Mr Gray, led to further investigations centering upon invoices received by AFM and also its accounting books and records. No documents have been found relating to AFM contracting with Woodbridge and/or BEL to carry out work at the Property. On the other hand, the sums paid to TDL are evidenced by bank statements and they correlate with the invoices for work at Warwick Road, as recorded in AFM's accounts, and which TDL accepts relate to its work at the Property. The payments by AFM to Watergates between January and March 2014 and to Undig for January and March 2-14 have also been established by the bank statements and records.

37. The second witness was Mr Phippen. He gave evidence in chief concerning the dealings Aspen had had with AFM. It became a member of AFM and Mr Phippen a director in May 2013 as a result of an investment agreement. He referred to his subsequent concerns in respect of AFM's failure to update its accounts and over certain transactions which are not directly related to this case but which suggest (at best) a lack of documentation and (at worst) potential misfeasance. However, none of that can be proved or be accepted for the purposes of this decision.

38. A main feature of his evidence in chief for the claim was to make clear that he was at all times unaware of any of the contracts or arrangements relied upon by BEL for the purposes of its defence. Although not positive evidence to overcome that defence, it avoids the possibility of an assertion of an inference of knowledge had he not given evidence. He also gave evidence relevant to AFM's financial circumstances which will be referred to in the findings of fact below.

39. BEL did not require Ms Nigh, the solicitor for AFM, to attend for cross-examination. Her statement consists of hearsay evidence concerning the information provided in writing by Mr Blackmore, a director of AFM until July 2014, which is exhibited. I have not found her evidence of assistance and Mr Blackmore's information has not been tested under cross-examination. I have decided not to take it into consideration.

40. Moving to BEL's witnesses, Mr Kappen is the current owner and director of BEL. He is a commodity trader, which is how he came to know Mr Heales. They have known each other for many years having originally been introduced by Mr Dockerill. He had also worked with Mr Heales in the past. His evidence is that in 2016 he purchased BEL from Mr Heales and there is no evidence to gainsay that Mr Heales was the vendor, the previous owner. At the time of buying BEL, he also purchased Mr Heales's commodity trading business. I have the clear impression from the evidence that they know quite a lot about each other and their respective business dealings.

41. In any event Mr Kappen provided BEL's evidence and was the person who will have decided whether BEL should defend this Application or not. No doubt he will have had discussions with Mr Heales, and potentially Mr Dockerill, when deciding what to do. Nevertheless, he was (at best) reticent to discuss this possibility. He has made clear that he has no knowledge of the relevant events whether directly or through discussions. He relies upon the fact that he purchased the company in 2016 and the absence in Dubai of the requirement to keep records as previously mentioned in the introduction above to sustain his lack of knowledge.

42. That evidence based upon timing was given in his witness statement without referring to the fact that he had been appointed a director from 1 August 2014. He did not

properly explain the circumstances in which or why that occurred. His evidence concerning what he knew at the time and following his appointment was devoid not only of fact but also of generality. It was completely unsatisfactory. During cross-examination he stated that as a director he did not approve any expenditure by BEL concerning the Property but was extremely vague about what he did nor did not otherwise do. He either has no knowledge despite his appointment and relationship with Mr Heales or has sought to distance himself from any involvement in the case by avoiding providing evidence of facts and matters relevant to him. I conclude from hearing from him the latter and also do not accept that he would not have discussed facts and matters with Mr Heales both at the time of the purchase of BEL and/or for the purposes of this litigation. However, the reality in any event is that, for whatever reason, he has chosen to try to avoid providing any information to the Court. His approach has made him an unreliable witness.

43. Mr Dockerill was undoubtedly at the centre of events concerning both the Property, its works and all payments for the works and supplies, and the 2010 and 2013 Agreements. He has accepted this but made clear he at all times acted on the instructions of Mr Heales. Plainly that would have been right and proper on the basis that Mr Heales owned BEL, subject to any involvement of an officer of the company of which there is no evidence.

44. Mr Dockerill was a commodity broker and had worked on the floor of the London Metal Exchange between about 1988 and 1992. He and Mr Heales had met as trading assistants on the floor in 1988. They obviously became close friends and Mr Heales was the best man at his wedding. My understanding is that Mr Dockerill continued metal trading but moved to Dubai for a few years. Between 2007 and 2019 he was engaged as a consultant for Mr Heales's commodity trading the business, the one sold to Mr Kappen. He returned to live in the UK by 2010 and was effectively the project manager for the works at the Property. He moved into the Property when it became habitable in 2013 and continues to live there.

45. Mr Dockerill appeared willing to answer questions and gave his evidence in a relaxed and apparently helpful manner. I have accepted some of his evidence but the problem is that important parts of it are unreliable. This will be seen and explained within the findings of fact. It is clear that much more was happening than has been disclosed.

46. BEL has chosen not to call Mr Heales and it appears from Mr Dockerill's understanding that Mr Heales has chosen not to give evidence. This has caused Mr Connell to submit that adverse inferences should be drawn and he has referred to the relevant authorities in support of that submission. I am satisfied that Mr Heales has relevant information, no less than because his instructions were sought by Mr Dockerill. However, as will be seen, it has been unnecessary to decide this case in reliance upon adverse inferences. Even taking the more favourable view that Mr Heales's absence is attributable to a conclusion that his evidence would be the same as Mr Dockerill's, that does not assist BEL. Not only does it leave matters opaque because there has not been disclosure of everything which was going on but it means that it too would have been unreliable if he had given the same evidence.

47. Neither side decided to call Mr Allen and no adverse inference will be drawn from that fact.

E) Facts

48. The Company was incorporated on 14 May 2010 and carried on business as a construction company. Its first director was Paul Blackmore, who resigned on 24 July 2014. Mr Allen became a director on 3 January 2013 and Mr Phippen on 13 May 2013. Mr Phippen resigned on 24 July 2014. Initially the Company's 100 issued shares were held by Mr Allen (80) and Mr Blackmore (20). The last filed annual return records Mr Blackmore (20), Woodbridge (80) and Aspen (80) as the members. Mr Allen had transferred his shares to Woodbridge on 8 May 2013 and Aspen's shares were allotted on 10 May 2013. AFM's compulsory liquidation commenced on 17 June 2014 as a result of an order made on 9 September 2014 on a subcontractor's petition and after Mr Allen's application, as a director, for an administration order had been dismissed. The Liquidators were appointed on 3 October 2014.

49. Investigations by the Liquidators have established that between September and November 2013 TDL sought payment from AFM of £142,784 plus VAT, totalling £171,341. Bank records for the period September and October 2013 record that AFM paid TDL £150,277 and this is also recorded in AFM's supplier activity ledger summary. As explained above, it will be assumed (unless stated otherwise and subject to the conclusion) that the £171,341 was paid by AFM and that each payment related to work carried out by TDL at the Property.

50. The equivalent assumption is made for the balance of the Payments made by AFM for work and supplies at the Property totalling £190,187.95 (i.e. the reduced sum of £361,528.95 - £171,341). Mr Gray has identified from bank statements payments made to Watergates between 2 January and 28 March 2014 totalling £571,139.60. In addition, payments to Unigate in January and March 2014 totalling £29,828. Whilst the latter would have been solely for work at the Property, plainly, based on the total, the former will have included payments for other projects. Any disputes concerning the assumptions can be addressed in an account, if necessary and unless otherwise stated.

51. Applying those assumptions there is/was a sum of £361,528.95 due and owing by BEL to AFM for the Payments (subject to any set off or counterclaim that BEL may raise) whether AFM made the Payments as the main contractor or there was a contract or other arrangement between BEL and AFM for AFM to pay BEL's liabilities for the works and services for the Property. In either case the contract/arrangement would have required repayment from BEL and, indeed, one would have expected additional payment to AFM for the services it rendered whether as main contractor and/or as BEL's payor.

52. BEL first asserts by way of set off that the Payments were made pursuant to AFM's obligations to Woodbridge under the terms of the 2013 Agreement, which varied the 2010 Agreement, namely to undertake work for and/or supply goods to a value of £250,000. The Liquidators do not challenge the authenticity of the 2010 Agreement or of the letter evidencing the 2013 Agreement.

53. The 2010 Agreement is not best drafted and contains ambiguities. However, it provides that Woodbridge will lend £100,000 to AFM by providing £10,000 on

drawdown and £10,000 monthly thereafter. The Liquidators accept £100,000 was paid subject to a minor and immaterial discrepancy. There is no provision for its repayment. AFM was obliged to deliver to Woodbridge on completion, a board minute evidencing the grant of a lien by Mr Allen over his 80 AFM shares and of the fact that this had been noted in AFM's members' register together with a note of the option granted by him over those shares.

54. The option over Mr Allen's shares was granted to Woodbridge pursuant to clause 5 for a consideration of £1.00. There is an issue of construction because clause 2.1 of the 2010 Agreement provides on its face that the loan would be forgiven when the option was granted, which would be immediately after the 2010 Agreement was executed when the above-mentioned board minute would be delivered. In other words it would be forgiven before the option was exercised.

55. However, that would be inconsistent with the terms of the option in clause 5. The option had to be exercised by irrevocable notice in writing at latest by midnight on 15 September 2011. If that notice was given, clause 5 provides that before the option shares would be transferred, the call option price would be paid by cancellation of "[Woodbridge's] debt to AFM", which must mean the £100,000 loan. In other words, the loan would not be forgiven until then. I am satisfied that is the objective meaning of the 2010 Agreement applying the approach to construction identified by counsel from the authorities referred to.

56. It is also important for future reference to note that the 2010 Agreement contained an entire agreement clause and provided that variation would only be effective if made in writing and signed by all the parties.

57. The Liquidators have pointed to the fact that there is no evidence to establish the directors and shareholders of Woodbridge. The evidence of Mr Dockerill is that he gave instructions to administrators to draft the agreement whilst acting upon the instructions of Mr Heales. However, he provides no direct evidence of Mr Heales' ownership or of other capacity in which he gave those instructions. There is also no evidence from Mr Heales to establish his authority, whether as an officer, owner or otherwise. The absence of evidence from Mr Allen also means that another potential source of assistance is unavailable. The concept of Mr Allen agreeing to grant an option for £1.00 and to receive no further consideration himself upon its exercise is a strange one. There is nothing in the evidence before me to suggest he would benefit from the waiver of the £100,000 loan to AFM or from any other part of the transaction once no longer a shareholder. It raises a question over his relationship with Woodbridge and whether he had some interest in or involvement with that company. It strongly suggests that there is more to this scenario than has been disclosed by the evidence before me.

58. However, there is no evidence to establish that Mr Allen was an officer or the owner of or otherwise had an interest in Woodbridge other than Mr Phippen's reference to his understanding that he thought Mr Allen was in charge. This arose in the context of Mr Allen informing him that he would be transferring his shares to Woodbridge, which by implication gave the impression he was "simply" transferring them off-shore. However, this evidence is too vague for a conclusion that Mr Allen was an officer or beneficial owner or had some other form of interest in Woodbridge (and I

do not intend criticism of Mr Phippen for this, he doing no more than relating his understanding at the time).

59. Whilst the vagaries of BEL's evidence has not helped BEL on this point, this part of Mr Dockerill's evidence, namely that he acted on Mr Heales's instructions, is to be preferred on the balance of probability. I conclude from the evidence before me on the balance of probability that Mr Dockerill stood in for Mr Heales and, therefore, for Woodbridge for the purposes of the 2010 and 2013 Agreements being negotiated and concluded. It is to be implied from this that Mr Heales was the owner as Mr Dockerill asserted. It is true that there is no evidence of its officers approving those instructions but the agreement was executed and the money lent with the result that approval or subsequent ratification should be implied. The same approach will apply to the 2013 Agreement.

60. There is no dispute that the option was not exercised before midnight on 15 September 2011. Mr Dockerill said he believed it was extended and probably by the administrators of Woodbridge in Dubai. However, there is no evidence of this. Further, Mr Dockerill could provide no fact or matter to form a foundation of any solidity for his belief. The vagueness of his evidence was apparent. My assessment of Mr Dockerill's evidence is that this was assumption or speculation. He had no knowledge of such an extension and it is to be borne in mind that this would be a variation which pursuant to the terms of the 2010 Agreement had to be made in writing and signed by all the parties. There is no such evidence. I find as a fact that the option expired subject to next considering the terms of the letter evidencing the 2013 Agreement.

61. The letter records that it confirms changes, apparently agreed orally by telephone, to the *"Woodbridge/AFM loan/share option agreement dated 10th September 2010 [sic]"*. It is signed by Mr Allen on behalf of AFM and is written to Woodbridge Limited in Dubai without identifying the person acting for Woodbridge to whom it was sent. There is no suggestion that the 2010 Agreement had been previously varied whether by a signed document or otherwise. It is apparent that the agreement was recent. In those circumstances it refers to an option agreement which had expired.

62. Reading it as a new agreement, therefore, there were three terms. First, Woodbridge would ultimately receive 44.5% not 80% of AFM's issued share capital if it purchased Mr Allen's 80 shares, whether by exercise of an option or otherwise. Second, Mr Phippen would become a director and equal shareholder with Woodbridge. Third, AFM would pay Woodbridge £250,000 or supply works or materials to the equivalent amount net of VAT by midnight on 16 April 2014.

63. The reference to the 2010 Agreement indicates that the transfer of Mr Allen's shares would be in consideration for Woodbridge waiving the £100,000 loan to AFM even if the option agreement had expired. However, the concept of AFM paying £250,000 (whether in money or value) to gain waiver of the repayment of a loan of £100,000 is bizarre. So too, the concept that AMT should make any payment to Woodbridge for its purchase of Mr Allen's shares. So too, the concept that Mr Allen would sell his shares for nothing.

64. Mr Dockerill sought to explain the position from Woodbridge's perspective. The context for that explanation is that there is no dispute that the dilution of the

percentage Mr Allen's shares bore to the issued share capital would result from the fact that Aspen would be: (i) injecting £100,000; (ii) providing £200,000 short-term funding facilities to AFM; and (iii) identifying future business projects for which AFM might tender and, as a result potentially, significantly increase AFM's turnover and ultimately its net profit.

65. Mr Dockerill's evidence during cross-examination was that the 2013 Agreement arose in April 2013 in the context of AFM potentially being able to enter into this agreement with Aspen. Revised cash flows sent to him by Mr Allen by email on 26 March 2013 revealed a rosy future for AFM should this occur. So rosy (a profit of between £1.65m and £1.94m by May 2014), that a dividend of £1million could be expected for the 2014 year end. The dilution would mean, therefore, that Woodbridge would lose 35.5% of what it would otherwise have received from a £1million dividend. The £250,000 was the compensation for this. Woodbridge had bargaining power to require compensation because it could prevent this happening should it exercise the option over Mr Allen's shares conferred by the 2010 Agreement.

66. Plainly that last contention was wrong in itself because the option had expired. Mr Dockerill can have had no belief at the time that it existed because he had no knowledge of any extension of the option agreement. He did not assert that he had forgotten there was a one year time period which had expired.

67. In any event his explanation is flawed and it is to be borne in mind when considering his explanation of events at the time that Mr Dockerill is a commodity dealer who understands business. The fact that it was he who put forward the concepts of dividend distribution and bargaining power supports that conclusion. The reason why that explanation cannot be accepted as his belief at the time is that his evidence has no basis of business reality:

    a) The starting point for that conclusion is the fact that these were forecasts without any apparent basis for the figures except the fact that Aspen would provide funding and future business leads for AFM to be able to tender for new construction work should it be in a position to do so. Mr Dockerill would not have relied upon such figures and have concluded that Woodbridge would be giving up 35.5% of a £1 million dividend.

    b) Even if the prospect of AFM declaring dividends of £1million was being taken as a serious proposition, the unrealistic proposition is that Woodbridge would persuade Mr Allen to grant a new option or to otherwise agree to sell his shares on terms that he would receive nothing for his shares despite the future £1million anticipated dividends. That Mr Allen would agree instead that the only party to receive consideration would be Woodbridge. It would receive the shares not only without payment to Mr Allen but with AFM's obligation to pay it £250,000 or its value from AFM. It is a proposition which has no commercial reality.

    c) Third, the concept of being entitled to compensation by reference to "lost" dividend is nonsensical. That is because the dividend of £1million depended upon Aspen becoming a shareholder, providing short-term lending and introducing the opportunities which would enable AFM to tender for new

work to create that net profit. Woodbridge would only "lose" 35.5% if it agreed to the Aspen transaction not if it opposed it.

68. Therefore, I reject Mr Dockerill's evidence. That leaves an inexplicable agreement requiring AFM to pay £250,000 to waive a £100,000 loan and Mr Allen receiving nothing for his shares. I find as a matter of fact that the true bases for this new agreement has not been disclosed within the evidence before the Court relied upon by BEL, who presents the 2013 Agreement as a part of its defence.

69. Whatever the true basis, Woodbridge and Mr Allen entered into this new agreement and purported to make AFM liable to Woodbridge for £250,000 as a result. The Aspen investment proceeded. By 10 May 2013 Woodbridge and Aspen each held 44.5% of AFM's shares. Mr Allen was no longer a shareholder.

70. The evidence from Mr Dockerill concerning AFM's engagement at the Property essentially breaks down into two propositions. First, that from about July 2013 AFM became the main contractor but because it could not perform those obligations due to other commitments, the work continued to be carried out by TDL as its subcontractor. Second, that in November 2013 TDL left site and by December 2013 AFM was the main contractor responsible for carrying out the work then required but still using subcontractors. Both periods resulted in AFM being liable to pay its own costs and sub-contractors, first TDL and then others including Unidig. For both periods BEL relied upon the 2013 Agreement and the obligation of AFM to supply works or materials to a value of £250,000 net of VAT by midnight on 16 April 2014.

71. The existence of agreements whereby BEL engaged AFM as its main contractor depends upon the oral evidence of Mr Dockerill. The absence of any documentation is said in submissions to be consistent with the absence of a contract between BEL and TDL when TDL was acting as main contractor and providing work valued at over £3 million, perhaps £5 million. However, that is not entirely accurate. Whilst there is no underlying main contract, there are hundreds of pages of Mr Dockerill's handwritten notes detailing the TDL works and prices. There are also invoices from TDL to BEL and presumably recorded BEL payments. There is nothing between BEL and AFM. There is no evidence of any discussions concerning the terms of AFM's engagement. No evidence of any discussions concerning the sums AFM would charge for the works as main contractor even if those prices were "only" to be set off against a £250,000 credit. There is no evidence of any work required of AFM which AFM would then engage TDL to carry out, as opposed to TDL being directly instructed to carry out work by Mr Dockerill. Mr Dockerill could give no evidence as to any of those matters. Similarly there is no documentation between AFM and TDL as its subcontractor, except for the invoices which TDL was told (for whatever reason) to render to AFM.

72. The evidence of Mr Dockerill referred to Mr Allen attending site every couple of weeks from November 2013 but he could provide no information concerning what was said or done. He suggested that he dealt with a foreman of AFM after TDL had left only for it to be found by reference to invoices that this was an independent contractor. His inability to identify any contract or to demonstrate any real involvement by AFM other than payment of invoices led him to suggest that he acted as agent for AFM. There is no doubt that he appreciated that was untenable when he said it.

73. It is clear to me from the evidence that Mr Dockerill remained in charge of instructing and supervising the work on behalf of BEL and dealt himself with TDL and with any other contractors required on site. I find as a fact that the sole or main purpose of AFM's involvement was to pay the invoices of those contractors and as a result supposedly to reduce the £250,000 credit to which Woodbridge was entitled.

74. Those events gave rise to the Payments but, as Mr Dockerill described the position, after a short time it became apparent that AFM was not paying its contractors and suppliers. He could not recall precisely how he found out about the problems but it was probably because contractors (I assume he meant to say subcontractors) were waiting for materials and payment. This evidence is given in circumstances of BEL having admitted in its defence that AFM was failing to pay Watergates from about early 2014.

75. Mr Dockerill's evidence is that Mr Allen assured him everything was okay when questioned but plainly it was not. Funds were not being provided by Watergates pursuant to AFM's lending agreement and, as Mr Dockerill said, someone needed to pay the subcontractors and suppliers to keep the project at the Property on track. This resulted in the payments BEL relies upon as a set off, namely £200,000 to Watergates and £174,388.77 to Unidig. The latter payments are identified in an email from Unidigs sent to Mr Dockerill on 6 October 2014 and are described as payments made by "Ian". BEL accepts within Mr Walker's closing note that corroborative evidence only exists for payments totalling £100,000.

76. The equivalent assumptions made in this judgment for the Payments will apply to these payments and any issues can be resolved upon the taking of an account, if necessary and unless stated otherwise.

77. BEL did not make all those payments but contends those it did not make were paid on its behalf. The payments to Watergates were made by BEL (£90,000), Stealth Limited (£30,000) and Blyth Workcats Limited (£80,000). The payments to Unidig, to the extent corroborated, were from BEL (£40,000), Stealth Limited (£20,000) and Mr Dockerill (£40,000). Stealth Limited and Blyth Workcats Limited were described by Mr Dockerill as "related companies" and he states that they were reimbursed by BEL. They are in fact his companies and there is no evidence of them being related to BEL.

78. Mr Dockerill did not explain why BEL did not make the payments itself other than by a vague reference to *"urgency"*. Nor did he refer to any terms between BEL and his companies or himself regarding their payments other than to describe them as being made on behalf of BEL. There is no evidence from BEL concerning those matters or even of the actions of Mr Dockerill and his companies being authorised or approved except by the assumed fact of repayment. Mr Kappen's evidcnce was that he did not know the payments were being made and did not authorise them whilst apparently the sole director from 1 August 2014.

79. It is clear from the circumstances in which the payments were made that this occurred at a time when AFM was unable to pay its debts as they fell due. This accords with the evidence of Mr Gray. He does not identify any evidence within his first witness statement to address the issue of insolvency until dealing with the period of those payments, which he describes as a time when AFM was cash flow insolvent. The payments by BEL and others did not start until April 2014.

80. The evidence of Mr Phippen refers to a number of financial concerns following Aspen's investment and his appointment as a director. There is reference to an existing agreement between Mr Allen and ACL. Sums to be paid by it to AFM for the Peterborough Project would be reduced by about £80,000 each month to repay a personal loan of Mr Allen made to him by the director and owner of that company for the purchase of Mr Allen's house. Whilst Mr Phippen was informed in due course that Mr Allen was arranging a mortgage to end that arrangement, this did not occur. Nothing turns upon that for the purposes of these proceedings except for its possible relevance to AFM's financial position.

81. As to that position, very little further information has been presented in evidence at the trial. The Court was not taken to any accounting records except for forecasts for March 2013 to May 2014. They do not establish insolvency. It was suggested by Mr Connell that the figures for March 2013 may be results but even if so, they are not relied upon by Mr Gray in his evidence to establish insolvency. That is understandable. Whilst they indicate cash flow shortfall, they only address turnover and expenditure and do not consider whether there were any borrowing facilities for the month. Nor is there evidence referred to by Mr Gray of or concerning arrangements with unpaid creditors at the end of the month. Even if there was a problem for that month, it would then have been necessary to consider the impact of the investment and lending of Aspen from May 2013. That was not done.

82. It is also to be added, bearing in mind submissions relevant to the ***s238*** claim, that there is no evidence of Woodbridge having called in its £100,000 loan or of Aspen having demanded repayment of the £200,000 facility. Mr Phippen's emails of 11 June and 23 September 2014 raise concerns over the effect of Mr Allen's £750,000 loan and the former refers to interest charges, loans and invoices having been outstanding for over six months. However, it is not sufficiently detailed to establish insolvency before June 2014 and his evidence at trial did not take the position further. The winding up petition relies upon unpaid invoices from April 2014.

83. Clearly AFM was unable to pay its debts as they fell due from the time contractors and suppliers were not being paid. The first payments to Watergates and to Unidig by or on behalf of BEL were on 9 April 2014. That might suggest the inability to pay occurred during February/March because there will on the balance of probability have been some time lag between the first failure to pay and the need for BEL/others to make their first payments. BEL has admitted the problem started earlier than that. As mentioned, its defence admits that AFM was failing to pay Watergates from about early 2014. That is potentially earlier than Mr Gray has suggested but early 2014 could be from about February/March and his list of AFM's payments to Watergates show considerably fewer £25,000 payments in February (5) than in January 2014 (13). February appears to be the probable date.

84. As a finding of fact, it is obvious that AFM was cash flow insolvent by the beginning of April 2014 when payments were being made for it. Taking into consideration all the matters above and bearing in mind that the cash-flow test will consider debts falling due time to time in the reasonably near future (applying ***BYN Corporate Trustees Services Ltd v Eurosail*** [2013] UKSC 28, [2013] 1 W.L.R. 1408), on the balance of probability the evidence establishes that it was from February 2014 that AFM was insolvent as a result of being unable to pay its debts as they fell due.

F) Decision

85. The starting point for the decision, subject to pleading issues and to the assumptions made in respect of the Payments (see paragraphs 48-49 above), is that AFM made payments to third parties for their work, goods and services for the Property, which was owned by BEL. Plainly AFM should be repaid for the sums proved to have been paid. It matters not, looking at AFM's claim on its own, whether those payments were made because it was the main contractor paying its bills or whether it was acting as middleperson between the contractors and BEL to pay BEL's bills. In either case it would be entitled to invoice BEL for repayment and, no doubt, claim further sums for its services whether as main contractor or middleperson.

86. The question, therefore, subject to pleading issues, is whether BEL can set off either a £250,000 liability owed to Woodbridge pursuant to the 2013 Agreement and/or the sums paid in 2014 to Watergates and Unidig by BEL and/or others. The Court when addressing set off in the context of a liquidation must apply ***Rule 14.25 of the Insolvency Rules 1986*** ("***Rule 14.25***") and the account required is deemed to have occurred at the date of the winding up subject to having regard to events occurring since that date (see ***B.C.C.I. (Overseas) Ltd v Habib Bank*** [1998] 2 BCLC 459).

87. Mr Connell submits that a £250,000 liability owed to Woodbridge could not be relied upon by BEL because they are not connected companies and the 2010 Agreement, to the extent that it should be read into the 2013 Agreement, prohibits non-parties from having rights under the ***Contracts (Rights of Third Parties) Act 1999***. In addition, the evidence has not revealed who the officers of Woodbridge were or any authorisation by them for BEL to rely on the 2013 Agreement.

88. Those points are correct but it is plain from the findings of fact that Mr Dockerill acted for Woodbridge and for BEL and that the 2013 Agreement was not a variation but a new agreement because the 2010 Agreement's option had expired. Looking at it as a new agreement, there is no requirement in the 2013 Agreement that works/materials to the value of £250,000 (net of VAT) had to be provided for the direct benefit of Woodbridge. To the extent that the 2013 Agreement was enforceable against AFM, Woodbridge could direct it to provide such work/materials to the Property for the benefit of BEL and realistically that is what occurred.

89. The £250,000 set off arises, therefore, from facts which establish: (i) the 2013 Agreement could not have varied the option granted by the 2010 Agreement because it had expired; (ii) by the date of the 2013 Agreement AFM had received a loan of £100,000 from AFM and whilst the 2010 Agreement provided no terms for its repayment, as a matter of law it would be implied that it was repayable on demand; (iii) the consideration to which the £250,000 payment referred was the reduction in the percentage holding of the shares to be purchased by Woodbridge from Mr Allen; (iv) AFM received nothing under the terms of the 2013 Agreement but instead had to repay not £100,000 but £250,000, whether by money or value.

90. It follows that there was no consideration for AFM's obligation to pay £250,000. Insofar as it is submitted that the £100,000 loan was included in that amount to

provide consideration, that liability to repay already existed. The 2013 Agreement is not binding upon AFM as a result.

91. That means BEL must rely upon a set off resulting from the assumed (see paragraph 75 above) payments to Watergates and Unidig by BEL itself and by Mr Dockerill and his companies.

92. Under ***Rule 14.25*** there must be an account of what is due to AFM and what is due to BEL in respect of their "mutual dealings" and the sums due from one must be set off against the sums due from the other. If there is a balance due to AFM, that must be paid to the Liquidators as part of AFM's assets. Subject to exceptions specified in ***Rule 14.25***, which have not been relied upon and which do not apply based on the evidence before me, the term "mutual dealings" means "mutual credits, mutual debts, or other mutual dealings". Claims are only mutual if they are due between the same parties and in the same rights and there must have been dealings between them.

93. The set off is based upon the assumed fact that BEL (by itself and through others) has paid debts: (i) AFM owed to its financier and (ii) it owed a subcontractor for works etcetera for the Property which BEL asserts should have been paid by AFM. The proposition is that BEL is owed £373,388.77 as a result and on the taking of the account can extinguish the £361,528.95 it owed AFM by set off.

94. It is plain this misses a step in the account resulting from the fact that if AFM had paid the £373,388.77 for the works etcetera for the Property, it would have been entitled to reimbursement of that sum by BEL. The extra step requires that reimbursement to be added to the credit of AFM. Otherwise AFM would have paid for works at the Property as a gift to BEL. Put more simply, all that has happened is that BEL has paid what are ultimately its own liabilities. It follows that the ***Rule 14.25*** account produces a debt owed to AFM of £361,528.95 because the £373,388.77 set off is cancelled out by AFM's entitlement to its reimbursement.

95. That means it is unnecessary to distinguish between the payments BEL made and the payments by Mr Dockerill and his companies. AFM would have the same answer to the proposed set off even if they "lost" their additional case that third party payments could not be set off by BEL.

96. I point out that there would have been difficulty for BEL's case even if AFM had not been entitled to reimbursement. BEL by paying a third party's claim against AFM would stand in the shoes of that third party when seeking to raise a set off. There would be no mutual dealings arising from payment of liabilities created by the contract between AFM and that third party. BEL would not be claiming in the same right and there would not have been mutual dealings. BEL has to rely upon AFM's obligation to make the payment in the first place. That obligation, however, brings the matter back full circle; to the consequential right to reimbursement. This analysis would equally arise for the sums paid by Mr Dockerill and his companies subject to adding the further step that BEL would be standing in their shoes, which would be the shoes of the third party creditor.

97. The problem the absence of a set off still leaves, however, is that AFM's claim in debt has not been pleaded unless, as Mr Connell submits, AFM can rely upon the prayer in the Application for an order that BEL is liable to repay the £401,077.78. The problem

for that submission is that prayers result from the pleaded cause of action and the cause in action has not been pleaded. The only causes of action pleaded rely upon a ***s.238*** transaction at an undervalue and/or knowing receipt. As I stated at the end of submissions, I will give the parties opportunity to make further submissions upon this pleading issue having received the draft judgment should they decide to do so. It is to be noted for the purpose of such decision that statute requires ***Rule 14.25*** to be applied.

98. Whether those submissions will be made will presumably depend (at least in part) upon whether either of the pleaded claims succeed in any event. A matter I must now address.

99. As previously explained (see paragraph 10 above), the ***s238*** claim refers to the benefit gained by BEL of having AFM by the Payments pay for the work and supplies for the Property without reimbursement. Therefore, the transaction identifiable from the Application and Points of Claim (with some flexibility but reflecting how the parties approached the trial) is the arrangement by which: (i) BEL received the benefit of the works etcetera; (ii) AFM was obliged to pay for them (whether as main contractor or not); and (iii) BEL paid them instead without reimbursing AFM.

100. In my judgment that arrangement falls within the statutory definition of "transaction" in ***s.436(1) of the Insolvency Act 1986*** ("***the Act***"). It includes arrangements and is a term capable of embracing a continuing event made up of a series of individual components (see ***Feakins v Department for Environment Food and Rural Affairs*** [2005] EWCA Civ 1513, [2007] B.C.C. 54 and its application when addressing ***s.423 of the Insolvency Act 1986*** of the Court of Appeal's ***s.238*** decision in ***Phillips (Liquidator of A J Bekhor & Co) v Brewin Dolphin Bell Lawrie Ltd*** [1999] 1 W.L.R. 2052, a case which went to the House of Lords but was decided on a different ground without demuring from the Court of Appeal's approach [2001] 1 W.L.R. 143).

101. The transaction was at an undervalue if AFM was not to be reimbursed for the Payments. The problem for the claim is that it was entitled to be reimbursed. If it had been, there would be no transaction at an undervalue. The real problem is BEL's breach of its obligation to reimburse rather than the arrangement being a transaction at an undervalue.

102. If, nevertheless, the arrangement is addressed from the perspective that AFM received nothing in return for the Payments, each of the Payments was made within the required 2 year period before the commencement of the liquidation. ***Section 240(2) of the Act*** also requires AFM to establish on the balance of probability for each transaction (i.e. Payment) that at the time of payment AFM was unable to pay its debts as they fell due within the meaning of ***s.123 of the Act*** or became so in consequence of the transaction. There is no dispute that each of the Payments must be looked at as a separate transaction.

103. BEL was not a connected person because neither it or Mr Heales (with or without associates of his or as part of a group of other persons) controlled AFM (applying ***ss.249, 435 of the Act***). Therefore, the Liquidators cannot rely upon a presumption of insolvency. Nor could they do so if they widened the scope of the pleaded transaction to include the 2013 Agreement and, therefore, Woodbridge for the same reasons (subject to the necessary changes).

104. The facts have established (and would have rebutted any presumption) that AFM became unable to pay its debts as they fell due in February 2014 (see paragraph 83 above). It follows that the Payments to TDL were not made at the relevant time (the last being in November 2013) but the Payments to Watergates from 3 February 2014 and to Unidig in March 2014 were. The ***s238*** claim would succeed to that extent subject to addressing ***s.238(5)*** (which applies when deciding whether to make an order) but for the fact that BEL is obliged to reimburse AFM for all the Payments and reimbursement with interest will mean there was no transaction at an undervalue.

105. The knowing receipt claim as pleaded was abandoned (see paragraph 20 above). Its replacement (see paragraphs 26-27 above) has not been pleaded. It contains entirely new elements and an application to amend would have to been made for it to be pursued. No amendment has been presented and any such application would have faced obvious difficulties because of its lateness and the fact that evidence had been prepared without knowing of the amended case. The case of knowing receipt, which had numerous inherent difficulties within its original and new forms in any event, fails.

G) Conclusion

106. As set out within the decision in the sub-section above, the evidence before me has established a debt owed by BEL to AFM in the sum of £361,528.95 based upon the assumptions of proof identified in paragraphs 48-49 above. Those assumptions may yet be challenged within the context of an account, as previously explained. There is, however, no set off in reliance upon the 2013 Agreement. The £250,000 set off raised by BEL must fail for want of consideration. Subject to the assumptions summarised at paragraph 93 above being challenged upon an account, the set off claimed as a result of the payments to Watergates and Unidig by BEL itself and by Mr Dockerill and his companies also fails because all that has happened is that BEL has paid what are ultimately its own liabilities.

107. Although the ability to challenge the assumptions applicable to these conclusion by an account remains, the parties should be able to resolve any issues still outstanding in the light of this judgment as a result of having more time to consider the documentation served late in the day as additional evidence. To the extent that dispute remains, subject to any further directions there can be an account.

108. However, the conclusion above flows inexorably from the evidence and the mandatory, statutory requirements of ***Rule 14.25*** not from the pleadings. The case has been pleaded (or at least pursued) in reliance only upon ***s.238*** and the action of knowing receipt. That leaves a pleading point. It is for the Applicants and BEL to decide whether to make further submissions concerning the Applicants' entitlement to relief based upon debt with or without an application to amend. No doubt for the purpose of such a decision consideration will be given to ***Rule 14.25*** and to the part of this judgment addressing the ***s.238*** application. The Applicants will also need to consider whether a fee for a Part 7 C.P.R. claim should be paid.

109. Those are matters which would have had to have been addressed at the hearing for the hand-down of this judgment to identify the relief to be granted. Absent any

application to amend to add a cause of action in debt or successful submission that amendment was not required, judgment would have been given on the terms of the claim as pleaded and not for payment of a debt.

110. However, having received the draft judgment, the parties are able to resolve matters and a Tomlin Order has been submitted for approval. The Court has a discretion whether still to hand-down this judgment because the settlement was reached after the draft judgment had been received (see ***Prudential Assurance Co Ltd v McBains Cooper (a firm)*** [2000] 1 W.L.R. 2000, CA). I consider it right to exercise that discretion. There has been a trial in open court, the decision has been notified to the parties subject to typographical corrections and the settlement will inevitably have flowed from its content. It is right for this judgment to be a matter of public record. It is also appropriate for there to be a record of the findings of fact for creditors of AFM to be able to read. In addition it is right for those facts to be a matter of record in case other problems arise from the scenario of events where things were not what they seemed.

111. I do not accept, as submitted by Mr Walker, that the draft was an interim judgment which could not have been handed down in any event. It plainly could with or without further adjournment of the hearing to finally determine the relief to which the Applicants were entitled.

112. For completeness, I should deal with the question of payment of a Part 7 C.P.R. claim fee. This claim remains an Application under the Insolvency Act 1986, there has been no amendment, the terms of settlement are confidential and I do not consider a Part 7 fee should be paid.

Order Accordingly