Neutral Citation Number: [2023] EWHC 3181 (Ch)

Case No: CR-2021-MAN-000695

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

IN THE MATTER OF DROP THE HAMMER LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Date: 14/12/23

Before:

HHJ CAWSON KC
SITTING AS A JUDGE OF THE HIGH COURT

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Between:

NEIL WORSLEY	**Petitioner**
- and -	
(1) BENJAMIN GOULD	
(2) GAS MONKEY LIMITED	
(3) DROP THE HAMMER LIMITED	
(4) LAURA GOULD	**Respondents**

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Elisabeth Tythcott (instructed by **Primus Law Ltd**) for the **Petitioner**
Greg Plunkett (instructed by **JMW Solicitors LLP**) for the **First and Fourth Respondents**

Hearing dates: 10-13, and 16-18 October 2023

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.30 am on Thursday 14 December 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

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HHJ CAWSON KC

HIS HONOUR JUDGE CAWSON KC:

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Introduction

1. By a petition ("**the Petition**") presented on 29 November 2021 under s. 994 of the Companies Act 2006 ("**CA 2006**"), the Petitioner, Neil William Worsley ("**Mr Worsley**"), alleges that the affairs of Drop The Hammer Limited ("**the Company**") have been conducted in a manner unfairly prejudicial to him as a member of the Company.

2. The Respondents to the Petition are: firstly, Benjamin Mark Gould ("**Mr Gould**"), secondly, Gas Monkeys Ltd ("**GML**"), thirdly, the Company, and fourthly, Laura Jane Gould ("**Mrs Gould**"). GML entered into creditors' voluntary liquidation ("**CVL**") on 13 April 2022 and has played no active part in the proceedings.

3. The Company was incorporated as a joint venture between Mr Worsley and Mr Gould on 23 January 2020. At all relevant times from its incorporation on 23 January 2020 until it entered into administration on 26 January 2022, Mr Worsley and Mr Gould each held one of the two issued £1 shares in the share capital of the Company and each held office as a director of the Company.

4. Having entered into administration on 26 January 2022, the Company moved from administration to CVL on 16 January 2023.

5. The business of the Company, from when it commenced to carry on business in May 2021 until it entered into administration, was the sale of recreational and other extreme sport accessories and products.

6. At all relevant times prior to it entering into CVL on 13 April 2022, Mr Gould was the sole director of GML, and its issued share capital of £100 was held as to 50 shares by each of Mr Gould and Mrs Gould, who are husband and wife. GML traded under the name Derbyshire Off Road Centre ("**DORC**").

7. It is Mr Worsley's case that the agreed basis or understanding underlying the joint venture between himself and Mr Gould was that Mr Gould would cause the business and assets of GML, including its stock, to be transferred to the Company with effect from when the Company commenced to trade on 10 May 2021, whereafter GML would cease to trade.

8. The basis for the Petition is, in short, that contrary to this agreement or understanding, and in breach of his duties as a director of the Company, Mr Gould failed to cause the whole of the business and assets of GML to be transferred to the Company, but rather, caused GML to continue to trade in competition to the Company, and caused stock and cash belonging to the Company, and/or that ought to have been transferred to the Company, to be misapplied for the benefit of GML and/or himself.

9. The case against Mrs Gould is that she knowingly assisted Mr Gould in this conduct, and/or knowingly received monies that ought to have been accounted for to the Company. This is said to warrant the grant of relief pursuant to s. 994 CA 2006 against her, in addition to Mr Gould.

10. Mr and Mrs Gould vehemently deny the allegations against them. In particular, Mr Gould challenges the contention that there was an agreement of understanding that the

whole of GML's business and assets would be transferred to the Company, and that GML would cease to trade immediately upon the Company commencing to carry on business. Further, it is denied that stock, monies or other assets have been misapplied.

11. The Petition was presented simultaneously with the making by Mr Worsley of an application for interlocutory injunctive relief against Mr Gould. At that stage, Mr Worsley sought an order providing for him to buy out Mr Gould's shares in the Company at a valuation. This was prior to the subsequent failure of the Company in January 2022, and its entry into administration.

12. Although the Company is now in insolvent liquidation, it is Mr Worsley's case that he is entitled to continue to seek relief in his capacity as a member because, on his case, his shares would have had a value but for the conduct complained of, alternatively because he has an interest as a member who is a substantial, if not the biggest creditor in the liquidation of the Company, and therefore has a tangible interest in the CVL. Mr Worsley alleges that Mr Gould's conduct caused the failure of the Company, and that if the Court finds that he has been unfairly prejudiced, then the Court ought to grant him the following relief pursuant to s. 994 CA 2006, namely, that:

    i) Mr and/or Mrs Gould be ordered to purchase his shares at a price reflecting the value that the shares would have had had Mr Gould not acted in the manner complained;

    ii) Alternatively, Mr and/or Mrs Gould be ordered to contribute to the assets of the Company in liquidation by way of damages for breach of fiduciary duty and/or by way of equitable compensation;

    iii) Alternatively, that Mr and/or Mrs Gould ought to be ordered to pay compensation directly to him.

13. At the Pre-Trial Review on 8 September 2023 ("**the PTR**"), I directed that the present trial should deal solely with liability, i.e., to determine whether the allegations that were said to give rise to the unfairly prejudicial conduct complained of have been made out. It was, at the PTR, the common position of the parties that the trial should be split, with question of what remedy (if any) might be appropriate in the light of my findings in relation to the matters said to constitute unfairly prejudicial conduct being dealt with at a subsequent trial. However, it is to be noted that, in anticipation of all matters, including remedy, being dealt with at the current trial, the parties had exchanged expert evidence relating to the value of Mr Worsley's shares in the Company, albeit with the respective experts adopting a fundamentally different approach to this question.

14. It will be necessary in this judgment to determine the fundamental issue between the parties as to the basis upon which they caused the Company to carry on business as a joint venture, and in particular as to whether it was, as contended by Mr Worsley, agreed that all the business and assets of GML would be transferred to the Company, and that GML would cease to trade immediately on the Company commencing to trade, with there being no real scope for GML to carry on trading on its own account thereafter. Dependent upon my findings in relation thereto, it will then be necessary to consider whether the allegations said to amount to unfairly prejudicial conduct are made out against Mr Gould and/or Mrs Gould. The remedy (if any) to be granted in consequence thereof would be a matter for a further trial.

15. This is, on any view, an unfortunate case in that the consequence of the events that have occurred is Mr Worsley has lost a very significant amount of money advanced to fund the joint venture, and Mr and Mrs Gould have lost their company, GML, and what had been an essentially successful business.

16. Mr Worsley was represented by Ms Elisabeth Tythcott of Counsel. Mr and Mrs Gould were represented by Mr Greg Plunkett of Counsel. I am grateful to them for their written and oral submissions.

The witnesses and the correct approach to the evidence

The Witnesses

17. I heard from the following witnesses of fact:

    i) For Mr Worsley:

        a) Mr Worsley himself;

        b) Catherine Pearson ("**Mrs Pearson**"), Mr Worsley's mother;

        c) Marc Alan Carter ("**Mr Carter**"). A business consultant who, at the relevant time, was employed by Cloak Capital Limited ("**Cloak**"), a management consultancy business of which Mr Worsley is the founder and a director. Mr Carter was engaged by Mr Worsley to carry out, amongst other things, a stock audit at the Company in October 2021;

        d) Chelsea Darlington ("**Ms Darlington**"). A Chartered Accountant who was, at the relevant time, employed by Cloak to head up the finance function for two new businesses that Mr Worsley was involved in setting up, namely the Company and Charles & Ivy Ltd;

        e) Danielle Grimshaw ("**Ms Grimshaw**"), a management accountant employed by the Company from September 2021; and

        f) Claudia Dickens ("**Ms Dickens**"), employed by Cloak as Mr Worsley's Executive Assistant from April 2021;

    ii) For Mr and Mrs Gould:

        a) Mr Gould;

        b) Mrs Gould;

        c) Molly Smith ("**Ms Smith**"), Mr Gould's sister who was employed by the Company in a sales role; and

        d) Charlie Smith ("**Mr Smith**"), Mr Gould's younger brother, employed by the Company as workshop manager from May 2021, having previously been employed by GML as workshop manager.

18. In addition, Mr Worsley relies upon the evidence contained in the following witness statements which were admitted in evidence, namely:

    i) The witness statement of Kim Wathall ("**Ms Wathall**"). Ms Wathall was a friend of Mrs Gould, who had worked with Mrs Gould in the marketing department at the University of Derby. With Mrs Gould's encouragement, she took the job of Head of Marketing at the Company. She was not required to attend for cross examination.

    ii) The witness statement of Christopher Bexton ("**Mr Bexton**"). Mr Bexton was previously employed by KTM AG ("**KTM**"), an Austrian motorcycle, bicycle and sports car manufacturer with which GML had held a franchise that was terminated upon a new franchise being entered into with the Company prior to it commencing to carry on business. Having left his employment with KTM in June 2021, Mr Bexton was engaged on behalf of the Company by Mr Gould as General Manager. He also was not required to attend for cross examination.

19. Mr and Mrs Gould also rely upon the witness statement of Tim Hales ("**Mr Hales**"), another brother of Mr Gould. Mr Hales was employed by GML as shop manager before moving to the Company in the same capacity in May 2021. Although he was due to give evidence, he was not tendered for cross examination. Ms Tythcott did not object to his statement being adduced in evidence, but submitted, in my view correctly, that this statement should be given very limited weight given that she was not able to cross-examine Mr Hales upon it.

20. As I have mentioned, experts' reports had been exchanged in relation to the value of Mr Worsley's shares in the Company prior to the PTR. Mr Worsley relies upon the report of Greg Lacey ("**Mr Lacey**") dated 27 July 2023. This is a detailed and lengthy report that considers the effect on the value of Mr Worsley's shares of the various allegations that are made against Mr Gould regarding as his conduct of the affairs of the Company and that are said to have been unfairly prejudicial. On this basis, Mr Lacey places a value of some £2.789m on Mr Worsley's shares. In order to arrive at this valuation, Mr Lacey's report includes a detailed analysis of a number of books and records of both the Company and GML, and a number of such documents are attached as appendices and exhibits to Mr Lacey's report.

21. Mr and Mrs Gould rely upon the report of Sally Longworth ("**Ms Longworth**") dated 25 July 2023. Ms Longworth has not taken into account the alleged unfairly prejudicial conduct in reaching the opinion that Mr Worsley's shares have a negative value of £896,000, against Mr Lacey's valuation of at least £2.789 million.

22. It was in the light of concerns as to whether the trial could be completed within its allotted time if expert evidence were to be relied upon, coupled with the fact that the experts had each taken a different approach to valuation, that led me (with the concurrence of the parties) to conclude that there ought to be a split trial.

23. There was some limited cross examination of other witnesses in relation to some of the documentation attached to Mr Lacey's report. However, Mr Lacey's and Ms Longworth's reports were not formally in evidence before me at the present liability trial, and neither Mr Lacey nor Ms Longworth therefore attended for cross-examination. Save for some reliance thereupon in Ms Tythcott's Skeleton Argument to certain

passages of Mr Lacey's report, the contents of these reports were not addressed in submissions. In the circumstances, I am of the firm view that I must, for present purposes, essentially disregard the contents of these reports, and confine any reference to documents therein referred to to those that were put to witnesses in evidence or that are uncontroversial.

24. There is also expert handwriting evidence before the Court. The relevant reports go to the issue as to authenticity of Mr Gould's signature on a guarantee dated 23 February 2021 ("**the Close Guarantee**"), given in respect of the liabilities of the Company to Close Bros Limited ("**Close**") in respect of a CBILS loan of £400,000 ("**the Close CBILS Loan**") advanced contemporaneously with the Close Guarantee. I do not consider that I need to say any more about this expert evidence save that it is the agreed position that the net effect thereof is that the experts conclude that, on balance, the relevant signature is that of Mr Gould. However, the signature was added electronically to the Close Guarantee, and from a forensic perspective the possibility remains that a copy of Mr Gould's signature taken from elsewhere has been transposed onto the Close Guarantee as executed electronically.

Correct approach to the evidence

25. There are significant disputes of fact between the parties, the principal dispute being between Mr Worsley and Mr Gould as the basis of their joint venture and as to whether all of the business and assets of GML were to be transferred to the Company, and GML was to cease trading on the Company commencing to trade.

26. As to the correct approach to the evidence, Ms Tythcott draws my attention to observations made by Arden LJ (as she then was) in *Re Mumtaz Properties Ltd [2012] 2 BCLC 109* at [12] and [14], and to the much repeated observations of Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit Suisse Limited* [2013] EWHC 3560 (Comm) at [15] – [22].

27. In *Re Mumtaz Properties Ltd* (supra) at [12] and [14], Arden LJ said this:

> "12. There are many situations in which the court is asked to assess the credibility from their oral evidence, that is to say, to weigh up their evidence to see whether it is reliable. Witness choice is an essential part of the function of a trial judge and he or she has to decide whose evidence, and how much evidence, to accept. This task is not to be carried out merely by the impression that a witness made giving evidence in the witness box. It is not solely a matter of body language or the tone of voice or other factors that might generally be called the 'demeanour' of a witness. The judge should consider what other independent evidence would be available to support the witness. Such evidence would generally be documentary but it could be other oral evidence, for example, if the issue was whether a defendant was an employee, the judge would naturally consider whether there were any PAYE records or evidence, such evidence in texts or e-mails, in which the defendant seeks or is given instruction as to how he should carry out the work….

> 14. In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence."

28. These observations highlight that it is necessary for a fact-finding judge to act with caution before attaching undue weight to the impression that a witness might give in the witness box, or his or her *"demeanour"*, and that what is said in the witness box requires to be tested against other evidence, and in particular contemporaneous documentary evidence. However, this does not, in my view, mean that the demeanour of a witness is, at least in most cases, of no importance, so long as properly tested against other evidence.

29. The concern of Leggatt J in *Gestmin SGPS S.A. v Credit Suisse Limited* (supra) at [15] – [22] was as to the unreliability of memory, in particular with the passage of time. He considered that limited, if any, weight ought to be placed on witnesses' recollections of what was said in meetings and conversations, and that factual findings ought to be based upon inferences drawn from the documentary evidence and known or probable facts.

30. The particular concern identified by Leggatt J was the ability of a witness, in seeking to recall events, to falsely do so, but with genuine conviction and belief that their recollection is accurate. Thus, as Leggatt J cautioned in *Gestmin* at [22]: *"… it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."* He identified that a witness seeking to recall events is liable, in reconstructing those events in his or her own mind, to do so in a way that inaccurately recalls the same in his or her favour, and to exaggerate perceived advantages to his or her own case, and to do so without deliberately giving false evidence. Leggatt J's observations were primarily directed at witnesses seeking to recall events over a significant period of time, but they are, potentially at least, relevant to other circumstances.

31. I note, in this context, the guidance provided by paragraph 1.3 of the Statement of Best Practice accompanying CPR Practice Direction 57AC:

> "1.3 Witnesses of fact and those assisting them to provide a trial witness statement should understand that when assessing witness evidence the approach of the court is that human memory:
>
> (1) is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but
>
> (2) is a fluid and malleable state of perception concerning an individual's past experiences, and therefore

(3) is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration."

32. The Court of Appeal in *Kogan v Martin* [2019] EWCA Civ 1645 at [88] stressed the importance of making findings by reference to all the evidence, which is both documentary evidence and witness evidence, placing such weight as the circumstances require on each. In considering what weight ought to be attached to the witness evidence in the present case, I must necessarily take into account the considerations highlighted in *Re Mumtaz Properties Ltd* (supra) and *Gestmin* (supra).

33. In addition to documentary evidence, it is plainly appropriate to test the witness evidence against the inherent probabilities of the relevant situation, and considerations such as the consistency (or otherwise) of a particular witness' evidence with other evidence, the internal consistency of that evidence, and the consistency of that evidence with what the witness might have said on other occasions – see *Kimathi v The FCO* [2018] EWHC 2066 (QB), at [98].

34. As I see it, the above considerations lead to the conclusion that in most cases the party required to prove their case will need to do so by using reliable contemporaneous documentary evidence as a platform, to which are added known, established or agreed facts, and probable facts (both inherently probable and by inferences properly drawn from known, established or agreed facts), which the Court will then consider by reference to witness testimony which is consistent or compatible with that underlying body of reliable documentary evidence and is not tainted or flawed by other indicators of unreliability – see in *Re Parsonage (deceased)* [2019] EWHC 2362 (Ch), per HHJ Simon Barker QC at [32]-[37].

35. It is common ground that the burden of proof is on Mr Worsley to prove his case, and to do so in respect of relevant issues on the balance of probabilities. However, Mr Worsley makes serious allegations against Mr Gould, including allegations of theft and dishonesty regarding the Company's stock, and cash said to belong to the Company. This does not alter the burden or standard of proof, but, if a serious allegations of this kind are made in civil litigation, then more cogent evidence may be required to overcome the unlikelihood of what is alleged, at least to the extent that it is incumbent on the party making the serious allegation to prove it. This is on the basis that the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence before the Court can properly conclude that the allegation is established on the balance of probability – see Phipson on Evidence, 20th edition, at 6-57 and *H (Minors)* [1996] AC 563 at 586D-F, per Lord Nicholls. On this point, Mr Plunkett referred me to the restatement of the relevant principles in *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408, [2020] 4 WLR 55, per Sir Geoffrey Vos C at [43]-[47].

Basis of the agreement or understanding between Mr Worsley and Mr Gould

Background

36. GML was incorporated on 15 October 2012 and also carried on business selling recreational off-road vehicles and other extreme sports accessories and products, doing so from premises in Buxton, Derbyshire, under the name *"Derbyshire Off Road*

Centre". In the years ended 31 March 2019 and 31 March 2020, the turnover of GML was approximately £4m and £3.3m respectively.

37. At one point the share capital of GML was held as to 50% each by Mr Gould and Mrs Gould's father. However, Mrs Gould acquired her father's shares on 15 October 2017. In her witness statement, Ms Wathall says that, at some point, she was informed by Mrs Gould that Mr Gould had fallen out with her father because her father had accused Mr Gould of stealing from GML. Mrs Gould, in evidence, denied that this was the case.

38. Whilst Mr Gould was, at all relevant times, a director of GML, Mrs Gould was never appointed as a director thereof, and it is her case that she played no active part in the affairs thereof. Mrs Gould has, at all relevant times, had her own career in marketing, having been Head of Brand Marketing at the University of Derby, and now performing a similar role at Manchester Metropolitan University.

39. Mr Worsley qualified as a Chartered Accountant and is an experienced businessman, albeit not having practised as a Chartered Accountant for some years. Apart from his involvement in Cloak referred to above, in 2010 Mr Worsley established Convex Capital ("**Convex**") following a management buyout of a boutique corporate finance partnership. Convex, in which Mr Worsley was involved together with a business partner, Mike Driver, operated as an investment bank specialising in the sale of entrepreneurially owned businesses valued between £10 million and £150 million. Mr Worsley's role was that of Managing Partner. In 2019, Mr Worsley and Mike Driver sold Convex for approximately £25 million. Although the intention was that, following this sale, Mr Worsley should remain as Chief Operating Officer, matters did not work out as intended, and Mr Worsley left Convex in November 2020.

40. At the time of the incorporation of the Company, Mr Gould's business experience was, essentially, limited to the operation of the business of GML in Buxton. On the other hand, Mr Worsley, apart from being qualified as a Chartered Accountant, was at all relevant times an experienced businessman who had had considerable experience of and involvement in substantial business transactions.

41. As referred to above, GML had been a franchisee of KTM. At some stage in 2019, Mr Gould was informed by Mr Bexton, who then worked for KTM, about a franchise opportunity being offered by KTM in Manchester. Mr Gould, whilst interested in this prospect, did not consider that this was something that he could undertake on his own, through GML, based in Buxton. By this stage, Mr Gould had become friendly with Mr Worsley through a mutual contact, and, at some stage after Mr Bexton's approach, Mr Gould and Mr Worsley began to discuss the prospect of establishing a new company to exploit the KTM franchise opportunity in Manchester as a joint venture, to which such new company the business and assets of GML would ultimately be transferred.

42. There is something of an issue between Mr Worsley and Mr Gould as to when they first began to discuss this prospect, and as to how it was initiated. It is Mr Gould's evidence that the first conversations were in mid-2019, although Mr Worsley's evidence is that they were later that year in December 2019. However, nothing really turns on this because in January 2020 a business plan was prepared, and the Company was incorporated on 23 January 2020. Further, following a meeting in late January 2020 between Mr Worsley, Mr Gould and KTM at Convex's offices, a franchise agreement

between the Company and KTM was entered into between KTM and the Company in February 2020 ("**the KTM Franchise Agreement**").

43. The business plan that I have referred to was sent to under cover of an email dated 14 January 2020 from Mr Worsley to Mr Gould. It predicted a turnover of £9.5 million in year one, and a turnover of £12.75 million in year two. A flavour of the discussions at the time is provided by what Mr Worsley said in an email sent to amongst others, Jones Lang Lasalle ("**JJL**"), and copied into Mr Gould, dated 30 January 2020. In the context of enquiring with regard to premises for the Company, Mr Worsley said this:

> "Ben has been trading Derbyshire OffRoad for the past 7 years and has built a great business, generating c.£200,000 net profit per annum, after paying rent of c.£30,000.
>
> The new venture will involve us forming a NewCo (Drop The Hammer Limited). DTH will acquire the trade and assets of Derbyshire OffRoad at the same time that it moves to new premises.
>
> I will come on board as a 50% shareholder alongside Ben, and at the same time, I will invest £750,000 into the business.
>
> The investment will cover the fit-out, additional stock and provide significant working capital for the business."

44. Although some early documentation envisaged the respective contributions of Mr Worsley and Mr Gould being recognised as share capital, ultimately the common understanding was that contributions made would be credited to directors' loan accounts, with Mr Worsley and Mr Gould each being allotted one £1 share in the share capital of the Company.

45. Matters were delayed somewhat by the Covid 19 pandemic which took hold with lockdowns from March 2020 onwards. However, by then, the Company had, on 15 February 2020, entered into an agreement with DF Capital Limited ("**DFC**") in respect of stocking facilities on terms that provided for DFC to fund or assist in the purchase of stock on terms that required DFC to be repaid promptly upon the sale of the stock. DFC was introduced to Mr Worsley by Mr Gould, GML having had the benefit of an agreement with DFC in similar terms. Further, in April 2020, the Company entered into a franchise agreement with Bombardier Recreational Products Ltd ("**BRP**"), another supplier of product to GML, and subsequently to the Company.

46. After some delay, by September 2020, showroom premises had been identified for the Company to trade from at 1 Fosse Drive, Carrington, Manchester M31 4RN ("**the Showroom**"). The Showroom was subsequently fitted out using monies advanced by Mr Worsley, and also the Close CBILS Loan of £400,000. It is common ground between the parties that the actual cost was significantly in excess of that which had been anticipated. Mr Gould complains that Mr Worsley was over extravagant in his specifications for the fitting out of the Showroom, and that the excessive amount spent on the Showroom is one of the reasons behind the subsequent failure of the Company. This is disputed by Mr Worsley, who says that the Company was well able, principally with the monies that he had introduced, to fund the fitting out works. As at the time of the Company entering into administration, the outstanding liability under Mr Worsley's

directors' loan account was £1.284 million, although a not insignificant amount of this represented further monies advanced by Mr Worsley after the Company had begun to trade and in order to provide it with the liquidity to enable it to continue doing so.

47. As identified above, there are issues between the parties as to the circumstances in which the guarantees provided for the Close CBILS Loan were executed by Mr Worsley and Mr Gould, including as to the authenticity of Mr Gould's signature on his guarantee, and the circumstances in which Mr Worsley's and Mr Gould's signatures were witnessed, purportedly by Mrs Pearson. Further, there is an issue as to whether Mr Gould authorised Mr Worsley to repay to himself £254,669 following the advance of the Close CBILS Loan and out of the proceeds thereof. These are issues to which I will return.

48. There is also an issue between the parties as to when, exactly, the Showroom was ready for the Company to begin to trade, Mr Worsley suggesting that the fitting out works had been completed by February 2021, Mr Gould suggesting that it was somewhat later. However, it is common ground between the parties that the Company did not begin to trade from the Showroom until May 2021, Mr Gould alleging that this was on 10 May 2021, Mr Gould suggesting, at least in his Defence, that this was at the end of May 2021. It is also common ground that prior to the Company beginning to trade, GML's franchises with KTM and BRP had been determined, and that the only franchise agreements in place as from then were those as between the Company and KTM and BRP respectively. Further, it is common ground that all of GML's employees, apart from one engineer who remained employed in Buxton, were transferred by way of TUPE transfer to the Company between 12 May 2021 and 27 May 2021.

49. There was a complication so far as the BRP franchise was concerned in that BRP already had a franchise agreement in place in the Manchester area with a dealer in Rochdale, and therefore it would not have been permissible for BRP to allow a competing franchisee to retail personal watercraft products in the Manchester area. For this reason, this particular line of products (which included principally SeaDoo jet skis ("**SeaDoos**") required to continue to be sold from GML's premises in Buxton until the prior franchise agreement came to an end in 2022. GML's lease of its Buxton premises was due to expire in April 2022, but the rent would require to be paid until then. There was evidence to the effect that Mrs Gould's father continued to have some interest in this lease, and that there were thus family reasons for ensuring that the rent continued to be paid.

50. It is Mr Worsley's case that, in these circumstances, it was agreed that the Company would indemnify GML in respect of the rent on GML's Buxton premises until April 2022, on the basis that those premises would continue to be used to fulfil the personal watercraft element of the BRP franchise that could not be carried on from Manchester, as well as providing additional storage facilities for the Company. On the other hand, it is Mr Gould's case that the continuing liability for rent in respect of the premises in Buxton, and the existence of other liabilities of GML, provided a reason why it was agreed and understood that GML would continue to trade after the Company had begun to trade, albeit on a more limited basis.

Issue between the parties on the statements of case

51. The parties' respective pleaded cases as to the basis of the agreement or understanding under which they agreed to establish the Company can be summarised as follows.

52. Mr Worsley's case, as articulated in paragraphs 10 to 18 of the Amended Points of Claim, is that it was agreed follows:

    i) Mr Gould would cause the transfer of the stock, goodwill (including social media accounts) and other assets of GML to the Company. These were valued by Mr Gould at £600,000. Mr Worsley would introduce the corresponding cash sum up to £600,000. Mr Gould's and Mr Worley's directors' loan accounts with the Company would be credited accordingly with the value of the money or assets (as appropriate) introduced;

    ii) The Company would enter into franchise agreements with, amongst others, KTM, Honda and BRP to stock recreational off-road vehicles and personal watercraft such as jet skis, and GML would correspondingly terminate its existing franchise agreements with the same companies;

    iii) Appropriate premises would be sourced from which the Company would trade with a provisional opening date of July 2020;

    iv) GML would cease to trade once the Company opened for business;

    v) Four employees who currently worked for GML would be employed by the Company and cease to work for GML;

    vi) GML would retain the services of one mechanic at its premises in Buxton, together with storage facilities for the use of the Company, for which the Company would pay (by covering this employee cost and the rent) until March/April 2022. This was in order to meet BRP's requirement that the Company should retail BRP's personal watercraft products from GML's Buxton premises in order to avoid a territorial conflict with the BRP franchisee in Rochdale. March/April 2022 would coincide with the end of the lease of pursuant to which GML had occupied its Buxton premises as well as the end of the franchise agreement with the other BRP franchisee based in Rochdale;

    vii) Neither Mr Worsley nor Mr Gould would take drawings or expenses from the Company and no dividends would be declared for at least the first year that the Company traded;

    viii) Although Mr Worsley and Mr Gould were directors of and equal shareholders in the Company, Mr Gould would have day to day responsibility for the Company's operations and would be its Managing Director;

    ix) The Company would actively seek finance for the purchase of stock and accessories, most probably from DFC.

53. On the other hand, Mr Gould's *pleaded* case, as articulated in paragraphs 13 to 21 of the Points of Defence, can be summarised as follows:

i) There was never any binding agreement that GML would transfer its assets, goodwill and stock to the Company. Mr Gould's pleaded case is that he could not and did not make any such agreement because GML was a company in which his wife, Mrs Gould, was an equal shareholder and he could not conclude such an agreement without her agreement and consent;

ii) Accordingly, there was no agreement that Mr Gould would contribute stock and assets to the value of £600,000 and that Mr Worsley would make a like contribution in cash. Instead, Mr Worsley would make cash contributions up front as and when required and Mr Gould would match those contributions in time, in the form of stock, franchise agreements and cash provided through GML;

iii) There was never any agreement that once the Company was open for business, GML would cease to trade. Mr Gould alleges that, at all material times, Mr Worsley knew and consented to the continued operation and trade of GML, even once the Company was operational;

iv) There was never any agreement that Mr Gould would be managing director of the Company. Rather, his responsibilities would relate to his expertise in the field of off-road vehicles and know-how and would mostly relate to dealings with manufacturers, orders of stock and staff training;

v) There was never any agreement that Mr Worsley and Mr Gould would not take drawings or expenses from the Company or that dividends would not be declared for at least a year.

Mr Worsley's case

54. Mr Worsley articulated his case in his first witness statement dated 26 November 2021 made in support of his application for interlocutory injunctive relief. Having referred to the initial discussions between himself and Mr Gould, at paragraph 9 he said:

> "It was therefore agreed that the stock, goodwill and assets of [GML] would be transferred to [the Company] and that I would put up to £600,000 into the business. As it happens, the value of assets that would be transferred from [GML] to the new business was also in the region of £600,000, based on Ben's estimations at the time. … Further, it was agreed that, following such transfer, [GML] would cease trading."

55. At paragraph 17 of this first witness statement, Mr Worsley said as follows:

> "[The Company] opened its showroom on or around 10 May 2021 and 4 of the employees that were employed by [GML] were transferred over to [the Company]. … As far as I understood the position, [GML] effectively ceased trading at that point although it retained one service mechanic and the old premises and additional storage, for which it was agreed that [the Company] would pay. In accordance with my agreement with Ben, there should have been no ability for [GML] to sell once the transfer had taken place."

56. What was agreed concerning the transfer of the business and assets of GML was dealt with in rather more detail in Mr Worsley's fourth (trial) witness statement dated 17 March 2023. I would refer, in particular, to paragraphs 22, 24, and 58 thereof.

57. Under cross examination, Mr Worsley was adamant that *"all"* the business and assets of GML were to be transferred to the Company when the latter began to trade.

58. It is Mr Worsley's case that the contemporaneous documentation supports his case and undermines that of Mr Gould. In particular, Mr Worsley relies upon the following:

    i) The email to JJL dated 3 January 2020 referred to in paragraph 43 above, which was copied into Mr Gould, and referred to the Company acquiring the trade and assets of GML at the same time that it moved to new premises.

    ii) The contents of an email dated 17 September 2020 sent by Mr Worsley to Rachel Berry ("**Ms Berry**") of Bathgate Business Finance ("**Bathgate**"), a finance broker, again copied into Mr Gould. In this email, Mr Worsley, perhaps in anticipation of a rather earlier opening of the Showroom, said:

> "[On] 1st November, [the Company] will acquire the trade and assets of Derbyshire OffRoad Centre, which as you know has a 9 year trading history. So, whilst [the Company] is a new company, it will be inheriting all of the business (currently £4m revenue), staff, brands, stock and know how, so that [the Company] hits the ground running."

    iii) An exchange of emails between Mr Worsley and Mr Gould between 2 and 4 November 2020 concerning a business plan that was to be sent to Ms Berry in support of an application to Bathgate for funding. The business plan referred to the fact that: *"The founders are investing £1m of their personal capital, as well as acquiring the trade and assets of Derbyshire Off Road Centre, a business which has traded for eight years and has generated £4m of revenue in 2020 through the sale of powersports vehicles"*. Mr Gould raised no contemporaneous objection to this, and, indeed, in an email dated 4 November 2020, apart from commenting that the wrong logo had been used, Mr Gould said: *"Apart from that it says everything we need it to say, gets the message across of who we are and what we do. Awesome job mate."*

    iv) On 4 February 2021, Mr Gould signed an Anti-Money Laundering information document that had been required by DFC as *"MD"* of the Company, contrary to his pleaded case that it was not agreed that he would act in this capacity.

    v) An email from Mr Gould to Mr Worsley dated 4 February 2021 in which Mr Gould stated: *"Here is my position as it stands today if the business came across now…"*. The email continued:

> "Not my money
>
> £250,000 loan to DTH CBILS LOAN
> £150,000 LOAN - CBILS LOAN

> Money spent on drop so far from me £104,239
> Vehicle stock £270,000
> Cash in the bank as of today £240,000 Cash £200,000 (approx)
> Parts stock £400,000 Other £77,000
> + The business
>
> and if we came across today with what we have pre sold we would be around £144k profit".

vi) An email dated 3 May 2021 from Mr Worsley to Mr Gould asking, amongst other things: *"How are you getting on with getting everything straight to bring across to [the Company] …"*. In a response thereto sent the same day, Mr Gould said that: *"Stuff is starting to come across as you have seen … will get <u>everything</u> across ASAP"* [emphasis added].

vii) The documentation recording the transfer of the four employees of GML to the Company between 12 and 27 May 2021.

viii) An email dated 1 June 2021 from Mr Worsley to Total Processing, a company that provided PDQ machines, copying in Mr Gould. This email referred to the fact that: *"Derbyshire Off Road Centre, a business that [the Company] has acquired has an 8 year trading history of operating this way, and no issues with their payment provider."*

ix) GML having closed its social media accounts in June 2021, and having posted to its followers to say that they should now follow the Company. In relation to this, on 15 June 2021, Mr Gould emailed Ms Wathall, by then the Company's Head of Marketing, copying in Mr Worsley, saying:

> "Derbyshire [i.e., GML] followers are over 7k but we have only just advised followers that we have opened up [the Company]/moved and asked people to switch and follow [the Company] - some have started and I expect that to grow over the next few days/week."

x) On 18 June 2021, Mr Worsley sent a WhatsApp message to Mr Gould to ask him how the stock list was progressing in respect of stock brought over to the Company from GML. On 20 June 2021, Mr Gould emailed a stock list to Mr Worsley.

xi) An email dated 21 June 2021 from Mr Gould to Simon Riches at Kawasaki in response to a request for a corporate Cross-Guarantee. In this email, Mr Gould said: *"myself and Neil are a little confused – there should be no connection from Derbyshire to DTH essentially derbyshire (sic) is closing so something in place therefore is basically useless…please can you use ben@dth.co.Uk as I do not use that email address [ben@derbyshireoffroadcentre.co.uk] anymore"*.

xii) GML ceased to make VAT returns after the Company commenced to trade.

59. In addition, Mr Worsley relies upon the following further witness evidence as supporting his case, namely:

i) The evidence of Mr Bexton in paragraph 7 of his witness statement to the effect that KTM made clear that GML's franchise agreement would have to cease and that a new one would have to be set up for the Company, and that that is what happened.

ii) The evidence of Ms Wathall in paragraph 8 of her witness statement that Mrs Gould had explained to her that Mr Gould was closing GML and moving existing franchises *"to the new business"*.

60. A further matter relied upon by Mr Worsley is that after the Company had begun to trade, GML invoiced the Company in order to recover the rent payable in respect of GML's premises in Buxton and in respect of the wages of the one employee retained in Buxton. It is said that this is consistent only with the business and assets being transferred to the Company and with any business that continued to be carried on in Buxton being carried on by or on behalf of the Company, rather than by GML on its own account. On behalf of Mr Worsley, it is submitted that this ties in with GML's existing franchise agreement with BRP having been replaced by the new franchise agreement with the Company.

61. In addition, Mr Worsley relies upon the fact that a number of the business plans and projections produced in respect of the Company's first and subsequent years were prepared on the premise that the whole of GML's turnover would be taken over by the Company from when the latter began to carry on business.

62. On the basis of the above, it is submitted on behalf of Mr Worsley that it is simply not credible to suggest that anything other was agreed or understood than that the entire business and assets (including stock) of GML would be transferred to the Company upon the latter commencing to trade from the Showroom in May 2021.

63. Ms Tythcott explained that it was Mr Worsley's case that the agreement or understanding was that the value of the assets transferred from GML to the Company would, on transfer, be credited to Mr Gould's directors' loan account with the Company. Although a value of £600,000 had, at one stage in the process leading to the Company beginning to trade, been placed upon the amount that Mr Worsley was to contribute, and the value of the assets of GML that were to be transferred to the Company, matters moved on. In particular, as it became clear that Mr Worsley would have to contribute more than £600,000, the agreement and understanding was such that Mr Worsley would have credited to his directors' loan account the sums that he actually advanced, and Mr Gould would have credited to his loan account the value of the assets actually transferred from GML, which were to comprise the whole of its business and assets.

Mr Gould's case

64. Mr Gould first set out his version of events, and his case as to any agreement or understanding between himself and Mr Worsley, in a witness statement dated 6 December 2021 made in response to Mr Worsley's application for interlocutory injunctive relief.

65. I refer to what Mr Gould said in the following paragraphs thereof:

i) Paragraph 10:

> "There has never been a formal agreement between us (either written or oral) as to how Drop the Hammer would be set up, funded or run. Our relationship was very informal and there were plenty of ideas being thrown around (mostly from Neil) but we never sat down to agree any specific terms. I trusted him completely and whole-heartedly and was sure he would look after both our interests and that we would iron out the details as we went along."

ii) Paragraph 12:

> "It was definitely not the case that I agreed to transfer all stock, goodwill and assets of GM to Drop the Hammer. GM was my separate business and it was always the case that I would continue to trade from Buxton, at least for the short term future. It was agreed that used stock was to remain with GM and any vehicles that were largely paid for before Drop the Hammer started trading would stay with GM."

iii) Paragraph 15:

> "What was discussed and agreed (albeit loosely) was that each of us would contribute to Drop the Hammer. It was agreed that the early stages of Drop the Hammer would be funded more heavily by Neil, as he had the cash. I said I would put into the business what I could afford in the form of some stock and custom from GM, and, more importantly, by transferring franchise agreements from manufacturers that had these agreements with GM. These franchise agreements were the most valuable assets for Drop the Hammer, much more valuable than the cash from Neil."

iv) Paragraph 17:

> "I think I did put some £600,000 worth of stock from GM into Drop the Hammer as my initial contribution to the latter (although by now my contribution has increased much beyond that). But this was not all of GMs' stock or assets (not even half of it), and it continued to trade in parallel, as was clearly envisaged between us."

v) Paragraph 18:

> "There are significant amounts of stock that are still owned by GM. Neil and I have never reached an agreement for the trading assets of GM to be transferred to Drop the Hammer, nor a specific timeline to do so. There is no written Shareholders' Agreement between us and the shareholders of GM have not agreed to any such transfer (which anyway is not recorded anywhere and in particular not with Companies House)."

vi) Paragraph 19:

> "It is correct that assets owned by GM were sold and/or transferred to Drop the Hammer. These were not part of a whole transfer of business but represented part of my financial contribution to Drop the Hammer and I was content for the sale proceeds of those items to remain with Drop the Hammer on that basis."

vii) Paragraph 20:

> "Neil was aware at all times that I continued trading from GMs. In fact, GM issued invoices to Drop the Hammer, which Neil himself agreed to pay. … GM is still going, its lease has a good six months left on it and I have also mentioned extending it to Neil. GM also has plenty of liabilities it needs to satisfy. For example, I took out two Coronavirus Business Interruption Loans ("CBILs") in GMs' name, one of £250,000 and the other of £150,000, the first which was transferred to Drop the Hammer at Neil's request and the second which ended up being used to purchase stock for Drop the Hammer."

66. In terms of reliability, this witness statement has the advantage of having been made very much more contemporaneously to the events in question than Mr Gould's trial witness statement. On the other hand, it is likely to have been prepared in somewhat rushed circumstances in order to respond to Mr Worsley's application for interlocutory relief, and Mr Worsley's witness statement dated 26 November 2021 in support thereof.

67. The issue as to what had been agreed so far as the transfer of the assets and business of GML to the Company is concerned, was dealt with in paragraph 47 of Mr Gould's trial witness statement dated 5 April 2023 where he said:

> "Another central allegation made against me is that [GML] continued to trade in circumstances where I had agreed with Neil that it would cease to trade. I have set out my position in a previous witness statement dated 3 (sic) December 2021. What I agreed was that the franchise agreements would be transferred over from [GML] to [the Company], not with immediate effect but gradually over a period of time and in accordance with the continuing obligations to contribute to [the Company] and for my directors' loan account in [the Company] to be credited accordingly. Stock that had been paid for by [GML] before [the Company] started trading would remain with [GML] and Mr Worsley was aware of that. I made it clear to Mr Worsley that [GML's] lease did not run out until April 2022 and accordingly it would therefore continue to trade and Mr Worsley agreed to this and approved invoices from [GML] to [the Company] in respect of services and stock. There were business opportunities for [GML] that fell outside of the franchise agreements and which [GML] was always going to continue to pursue, such as the sale of Seadoo jet ski's which were stored at [GML's] offices."

68. Mr Worsley sought further particulars in relation to the final sentence of paragraph 47 of Mr Gould's trial witness statement:

i) In response to an enquiry as to what was meant by business opportunities that fell outside the franchise agreements, Mr Gould responded: *"Services, repairs and modifications of vehicles within DORC workshop"*; and

ii) In response to an enquiry in relation to the SeaDoos as to which company was discharging the invoices for the purchase of those stock products, Mr Gould responded:

> "The First Respondent's reply depends entirely on when the vehicle was sold, who it belonged to, and which customer ordered the vehicle and the amount paid for it. Some of the vehicles belonged to GML and some belonged to [the Company]. The date that the vehicles were purchased from the manufacturer will evidence whether the vehicle in question belonged to GML or [the Company]. [Mr Gould] does not have the relevant disclosure before him to enable him to answer this question with further particularity."

69. In the course of cross-examination, Mr Gould accepted that the aim was that the whole of the business and assets of GML should ultimately be transferred to the Company, and he described the dispute between the parties in relation to this issue as being one as to one of timing on the basis of it being envisaged that the transfer of the business and assets of GML to the Company would be completed when GML's lease of its premises in Buxton expired in April 2022.

70. In the course of cross-examination, Mr Gould suggested that some 85% of the business of GML had been, as he put it *"moved to Manchester"*. So far as the SeaDoos were concerned, he explained that those in GML's possession when the Company began to trade had been 70-90% prepaid and he described them as being a *"grey area"*, saying that Mr Worsley had said that GML could sell them *"where appropriate"*.

71. As to the correspondence with funders and others that Mr Gould had been copied in on, where reference had been made to the business and assets of GML being transferred to the Company, and to the fact that GML would, without qualification, cease to trade, Mr Gould sought to explain this on the basis of timing, and the need to impress upon the funders that the new Company was *"piggybacking"* upon the success and track record of GML, even if this might involve an element of misleading. It was his evidence that Mr Worsley was responsible for the relevant correspondence, although he accepted that he was aware of it, and went along with it.

72. As to the transfer of the social media accounts, his response in respect thereof was that this was entirely consistent with his case that the ultimate intention was that the business and assets of GML would be transferred to the Company, and that any trading by GML until that process was complete would be limited in the way that he sought to suggest under cross examination.

73. When I pressed Mr Plunkett in closing as to what determined which assets Mr Gould ought to have caused GML to transfer to the Company, Mr Plunkett submitted that it was, essentially, open to Mr Gould to choose which assets (including stock) were to be transferred, on the basis that the value of that which was transferred would be credited to his directors' loan account with the Company.

Discussion

74. I consider that a number of important points and considerations arise from the circumstances in which Mr Worsley and Mr Gould pursued their joint venture, and the way in which the parties put their respective cases.

75. It is a striking feature of the case that there was no shareholders agreement in place between the parties, perhaps the more so given Mr Worsley's past involvement, through Connex, in the sale of businesses, which might have been expected to have been dealt with on a formal written basis, and his qualification as a chartered accountant. This is a matter that Mr Worsley says that he now much regrets, but it does leave considerable scope for ambiguity and confusion as to what was agreed against the background of something of a moving feast and might be suggested to indicate that nothing formal was intended.

76. Further, there are, as I see it, a number of fundamental difficulties in a company transferring all its assets to another company, without provision being made for all its liabilities to be met, in particular where the value of the assets is to be recognised in the transferee company by way of a directors' loan account in favour of the director/shareholder of the transferring company, rather than being recognised as a liability owed to the latter such that the transferring company, on the face of it, receives no consideration for the transfer of its assets.

77. I raised this issue with Ms Tythcott in closing, and she confirmed that it is, indeed, Mr Worsley's case that the liabilities of GML were to remain with GML, although it was, as I understand it, accepted that liability in respect of one at least of the CBILS loans taken out by GML was to be assumed by the Company. However, this left, at least, a loan that had been taken out by GML to cover the payments that GML was required to make in respect of an outstanding historic VAT liability. I note that this VAT liability is referred to by Mr Worsley in paragraph 18 of his trial witness statement. Having referred to this liability, Mr Worsley went on in paragraph 19 of his witness statement to say that he *"embraced"* Mr Gould's suggestion that a new company be formed for the purposes of the joint venture, observing that he had advised on countless mergers and acquisitions, including a number of transactions whereby: *"a transfer of trade and assets was used to provide the buyer of business with a "clean history" such that any ramifications from the way that Ben had operated the business remained with him as the owner and Director of [GML]".*

78. I also note that in respect of this VAT loan, Mr Gould subsequently added payments due in respect thereof to invoices for expenses submitted to the Company by GML. The entitlement to do so was challenged by Mr Worsley, and the adding of this particular item of expense to the expense claims submitted to the Company on behalf of GML forms part of Mr Worsley's case of unfairly prejudicial conduct alleged against Mr Gould.

79. When challenged under cross examination about including payments in respect of the VAT loan in claims for expenses, Mr Gould queried how it could work with *"the two companies becoming one"* if this liability was not assumed by the Company, saying that the relevant loans had been raised with Mr Worsley who had said to *"put them into DTH"*. This was not, however, an issue that was raised with Mr Worsley in cross examination. I note that in his email dated 3 May 2021 to Mr Worsley referred to above

in which he wrote about getting *"everything across ASAP"*, Mr Gould went on to say : *"CBILS - Just need to have a discussion with you, also want to discuss VAT loan and the £150 k loan along with wages."* Again, unfortunately perhaps, this is not something that was explored in the evidence.

80. On basis of Mr Worsley's case that the relevant liabilities were not to be assumed by the Company, the assumption must, as I see it, either have been that Mr Gould had the resources to discharge the liabilities of GML following the transfer of its business and assets to the Company, or alternatively that GML would go into some form of insolvency process, with its assets and liabilities having been transferred to a company (the Company") with a *"clean history"*, as Mr Worsley had put it. However, it is difficult to see how, in the latter case, the transfer of assets to the Company would not have be susceptible to challenge as a transaction at an undervalue within the meaning of s. 238 of the Insolvency Act 1986.

Credibility of the witnesses

81. There is clearly a significant dispute of fact between Mr Worsley on the one hand, and Mr Gould on the other hand, as to what was agreed between them. However, before considering which of them is to be regarded as the more reliable witness, it is necessary to say something about the other witnesses in the case.

82. The evidence of most of the other witnesses is more directed to the events after the Company had started to carry on business in May 2020, but certain aspects of this evidence do touch upon what may or may not have been agreed between Mr Worsley and Mr Gould, and what a number of these witnesses have to say does go to credibility insofar as it is inconsistent with evidence given by or on behalf of Mr Gould.

83. So far as Mr Worsley's other witnesses who gave evidence are concerned, I am satisfied that they were honest witnesses, doing their best to assist the Court. However, I do have to bear in mind that Ms Dickinson and Ms Darlington did have an allegiance to Mr Worsley through their engagement as employees of Cloak, and that allegiance is capable at least of having influenced how they perceived matters. Although Mr Carter was engaged by Mr Worsley, he said in evidence, and I accept, that he had subsequently fallen out with him. Nevertheless, contemporaneously at least, he is liable at least to have perceived matters from Mr Worsley's point of view.

84. I shall return to consider the position of Mrs Pearson in more detail shortly, but I found her evidence to be honest and plainly true.

85. Neither Ms Wathall nor Mr Bexton were required to attend for cross examination, and their evidence was therefore not challenged. As to their evidence:

    i) On the issue as to the basis of the agreement between Mr Worsley and Mr Gould, Mr Bexton's evidence does provide some assistance in confirming that KTM would not countenance two franchise agreements, hence a new sole franchise agreement in the name of the Company, and the determination of the existing franchise agreement that GML had enjoyed.

    ii) So far as Ms Wathall is concerned, on this issue, the key paragraph is paragraph 20 of her witness statement, and in particular where she says therein that Mrs

> Gould had explained to her that Mr Gould was closing the DORC business of GML and moving his existing franchises to the new business. Whilst this is supportive of Mr Worsley's case, it is not necessarily inconsistent with Mr Gould's case to the extent that it is Mr Gould's case that GML's business would indeed cease, but only when the lease of the Buxton premises expired in April 2022, and that there was to be a process of moving the business over to the Company over a period of time between May 2021 and April 2022. However, paragraph 11 of Ms Wathall's witness statement is also of some importance, in that in that paragraph she refers to Mrs Gould having informed her that Mr Gould and her father had fallen out over the running of GML, and that her father had accused Mr Gould of stealing money. In her evidence, Mrs Gould denied that she had said any such thing, and described Ms Wathall's evidence as a *"gross exaggeration"*. What is plain from Ms Wathall's witness statement is that she has fallen out with Mrs Gould over having been encouraged to take up the role that she did with the Company and having given up a good job to do so, feels aggrieved.

86. I consider the credibility of Mrs Gould as a witness in more detail when dealing with the case against her. However, notwithstanding the apparent conflict of evidence with Ms Wathall, I found Mrs Gould to be an honest witness doing her best to assist the Court, and very much a woman of her own mind. As to what may or may not have been agreed between Mr Worsley and Mr Gould, I am satisfied that there was only limited discussion between herself and Mr Gould in respect thereof. She cogently explained that both she and Mr Gould, at all relevant times, led busy lives with their own jobs, and children to look after, such that it was not their habit to discuss their respective jobs with one another in any detail. The most significant paragraph in Mrs Gould's witness statement is paragraph 9 thereof, where she refers to her concern that GLM should have continued to fulfil its obligations to her father in respect of the lease of its premises in Buxton. She says that Mr Gould was aware of this: *"... and confirmed that the lease would be effective until it expired in April 2022 and that DORC would comply with any obligations that it had under it."* However, this is not, on proper analysis, inconsistent with either party's case in that on Mr Worsley's case the Company was to indemnify GLM in respect of its liability under the relevant lease because the Company was making use of the premises for the purposes of the BRP franchise and for storage, and therefore GLM should have been able to comply with its obligations under the relevant lease even if not trading on its own account.

87. I was rather less impressed by the evidence of Mr Smith and Ms Smith which did strike me, in a number of respects, as being somewhat contrived to assist Mr Gould. Paragraph 4 of Mr Smith's witness statement and paragraphs 4 and 7 of Ms Smith's witness statement are relied upon by Mr Gould in support of his case that the agreement or understanding with Mr Worsley was that GML would continue to trade. Thus, Mr Smith refers to Mr Gould having explained that the majority of the franchises would be transferred to the Company when it opened, but with the exception of SeaDoos, and that GML would *"remain open"* until April 2022 when the lease came to an end. Mr Smith also says that Mr Gould explained that service, repairs and parts sales would also remain *"at DORC in Buxton"* along with used vehicle sales. However, this is in the context of all the franchises (including the BRP franchise under which the SeaDoos fell) having been transferred to the Company, the inability of the Company to sell SeaDoos out of Manchester for the reasons explained above, and documentary evidence

that GML invoiced the Company in respect of the rent paid on its Buxton premises. In these circumstances, I do not consider that Mr Smith's or Ms Smith's evidence significantly assists Mr Gould's case on the basis that it is explicable, consistent with Mr Worsley's case, on the basis that the activities referred to were to continue to be carried on from GML premises rather than, necessarily, by GML itself rather than the Company.

88. So far as the main protagonists are concerned, Mr Worsley came across as a calm measured witness who presented essentially consistent evidence as to his case. The principal attack on his credibility related to the circumstances in which the personal guarantee purportedly provided by Mr Gould on 23 February 2021 in respect of the Close CBILS Loan came to be executed. It was alleged that Mr Worsley had forged or otherwise falsely created Mr Gould's signature thereon, and that he had also forged his mother's signature as a witness to both Mr Worsley's signature and Mr Gould's signatures on the relevant guarantees. As I have already mentioned, in the light of expert handwriting evidence, the point is not pressed that the signature is not that Mr Gould, but it is said that the possibility remains that a signature obtained from elsewhere has been falsely applied electronically to the personal guarantee.

89. So far as Mr Worsley is concerned, he says that the document was signed by Mr Gould in his presence at the Showroom. Whilst one of the workmen then at the premises might have been available to act as witness, it was not wanted to disclose a document such as this to a workmen, and so Mr Worsley says that he phoned his mother and asked her if she would agree to be a witness, albeit not present, on the basis that Mr Worsley would then apply what purported to be his mother's signature to the document as witness. Mrs Pearson was then communicated with, either by mobile phone, or by FaceTime through a mobile phone, and she agreed to lend her name in this way. Mr Gould maintains that he did not sign the personal guarantee and denies being party to any such conversation with Mrs Pearson.

90. As already mentioned, I found Mrs Pearson to be an honest and truthful witness. She was able, very convincingly, to recall Mr Gould referring to her as *"Neil's mum"*, and to having been at Mr Worsley's house on an occasion when Mr Gould called in on the way to the Lake District, which he was visiting together with Mr Worsley. Mrs Pearson recalled Mr Gould wearing flip-flops and shorts. Mr Gould, on the other hand, denies this evidence.

91. In further in support of Mr Worsley's version of events are, I consider, the following matters:

    i) Later the same day, Mr Worsley, by WhatsApp message, asked Mr Gould for a copy of his driving licence. Mr Gould provided this without enquiring what it was for, in circumstances where it was plainly required in connection with the obtaining of the Close CBILS Loan. If Mr Gould had not known the purpose, one might have expected him to have enquired.

    ii) On 8 November 2021, after matters had become contentious, Mr Gould sent a WhatsApp message to Mr Worsley asking for *"a copy of the cbils contract and anything else we have personal guarantees against please."* In response, Mr Worsley sent Mr Gould all the relevant documentation, including the personal guarantee dated 23 February 2021. Although the WhatsApp chain continued

after this exchange, Mr Gould did not seek to question or challenge that he had provided the relevant personal guarantee.

92. In the circumstances, I reject the allegation that Mr Worsley forged Mr Gould's signature on the relevant personal guarantee, or added electronically and without authority, a genuine signature taken from elsewhere. He did, on his own admission, forge his mother's signature as a witness. However, I accept Mr Worsley's evidence that Mr Gould was present when Mr Worsley telephoned his mother to ask her to lend her name as a witness in circumstances where Mr Worsley went on to falsify his mother's signature as a witness to the guarantee. This is less than satisfactory and does indicate a willingness on the part of Mr Worsley to bend the rules. However, it is a mitigating factor that the events occurred during the course of the Covid 19 pandemic when obtaining Mrs Pearson's actual signature may have been problematic. Mr Gould suggests that it would have been possible to get a workman on site to witness the signature, but I accept Mr Worsley's explanation that he did not consider it appropriate to share a document such as a guarantee for a financial liability with a workman.

93. In short, I do not consider that the events concerning the execution of the personal guarantee materially undermine the credibility of Mr Worsley's evidence. To the contrary, I consider that they can only but undermine the credibility of Mr Gould's evidence given the stark conflict between his own evidence and that of Mrs Pearson.

94. Another matter relied upon by Mr Gould is that Mr Worsley repaid himself £254,669 shortly after the receipt by the Company of the Close CBILS Loan of £400,000. Mr Gould says that he did not agree to this, and Mr Gould takes the point that such repayment was inconsistent with the terms of the loan, which was to fund the works being carried out to the Showroom. I consider it quite possible that Mr Gould, notwithstanding what he now says, did cause this sum of £254,669 to be repaid without actually seeking Mr Gould's consent to do so. However, what is clear is it that relatively shortly thereafter, Mr Worsley advanced to the Company further funds which significantly exceeded the amount repaid. In the circumstances, whatever the correct position in relation to the repayment of the £254,669, I am not satisfied that it significantly affects my approach to Mr Worsley's credibility.

95. So far as Mr Gould is concerned, Ms Tythcott submitted that he was belligerent and combative in the way that he gave his evidence, and that that detracts from the veracity thereof. It is certainly true that, on occasion, Mr Gould was belligerent and combative and gave the impression of seeking to evade questions put to him. On the other hand, there were other occasions when Mr Gould gave fairly passionate evidence on contentious issues that had a ring of truth about them. Further, there were a number of occasions when Mr Gould frankly admitted that he had no answer to certain propositions that were put to him by Ms Tythcott in circumstances in which a dishonest witness might well have sought to concoct a false answer.

96. However, apart from the evidence relating to the personal guarantee given to Close, there are a significant number of factors that lead me to the conclusion that I should regard Mr Gould as a significantly less credible witness than Mr Worsley, and a witness whose evidence I should be slow to accept unless supported by the documentation, or the inherent probabilities of the situation.

97. The key factors that have led me to this conclusion are the following:

i) Mr Gould's case as to what was agreed has vacillated between what was said in his first witness statement dated 6 December 2021, and his evidence at trial. For example, as referred to above, in paragraph 17 of his first witness statement he said that not even half of GML's stock and assets had been transferred over to the Company, and that it was envisaged that GML would continue to trade *"in parallel"* with the Company, having in paragraph 15 of the same witness statement said that it was only envisaged that GML would transfer over to the Company such stock as it could afford. In paragraph 47 of his trial witness statement, Mr Gould confirmed that he had set out his position in this previous witness statement, and he did so without qualifying in any way what he had earlier said. However, at trial, Mr Gould suggested that some 85% of the business of GML had gone over to the Company, and he gave the impression that GML's continued trading had been very much more limited than the impression previously given in his witness statements.

ii) I agree that the documentation referred to in sub-paragraphs 58(i) to (xi) above does point not only to agreement, or at least an understanding, that all the business and assets of GML should be transferred to the Company, but that this was something that was intended to occur when the Company began to carry on business and not at some later date. Particularly striking are Mr Gould's own emails dated 4 February 2021, 3 May 2021, and 21 June 2021. I do not consider that Mr Gould's suggestion that it was really just a question of timing is credible in the light of, for example, the email dated 17 September 2020 from Mr Worsley to Ms Berry where reference is made to the Company inheriting *"all the business (currently £4 million revenue), staff, brands, stock and know-how [of GML] so that [the Company] hits the ground running"*. Mr Plunkett suggests that much of documentation emanating from Mr Worsley said to be supportive of his case is inadmissible, at least without the permission of the Court, in accordance with the principal that previous consistent statements of witnesses are treated by courts with great care and caution, in part because of a perceived danger arising from the fact that they are self-serving and may have been made simply to bolster evidence to be given later – see e.g. Phipson on Evidence, 20th edn at 12-08, and the cases therein referred to. However, I do not consider that this principle is engaged in the present instant because, on proper analysis, what we are concerned with are not previous statements, but reliance being placed on contemporaneous documents in order to ascertain the parties' understandings and intentions at the relevant time, and before any issue or dispute arose between them.

iii) The agreement that the Company should meet the liability for the rent payable in respect of GML's premises in Buxton as from the time that the Company commenced to carry on business, as reflected in invoices sent by GML to the Company, is, as I see it, consistent with the business carried on from GML's premises being carried on on the Company's account, and inconsistent with any agreement or understanding that GML should continue to be free to carry on business in parallel to the Company as contended by Mr Gould.

iv) Apart from the conflict of evidence between Mr Gould and Mrs Pearson that I have already addressed, there are other conflicts on which I prefer the evidence of Mr Worsley's witnesses. Thus, for example:

a) I prefer the evidence of Ms Darlington with regard to the question as to whether Mr Gould had access to the Company's bank accounts. As to this, Mr Gould disputed that he had access to the Company's bank account and alleged that Mr Worsley had deliberately excluded him from it. Ms Darlington's evidence was that this was not the case.

b) I prefer the evidence of Ms Dickenson and others as to Mr Gould's resistance to improvements to the Company's systems. There is little doubt, and I do not understand it to be in dispute but that the Company commenced trading without any proper sales recognition system in place and with no systems in place for recording stock. It was the evidence of Ms Dickenson in particular that she tried to encourage Mr Gould to adopt proper up to date electronic processes rather than relying on paper files, but that he was reluctant to do so. Mr Gould challenged that he was resistant to such innovations, but I prefer the evidence of Ms Dickenson and others, and I can see no good reason why they would have created a false narrative or misremembered this issue. Mr Worsley maintains that this resistance on the part of Mr Gould was used as a ploy to cover up the activities on his part that Mr Worsley complains about.

c) Further, I prefer the evidence of Mr Carter with regard to the circumstances in which GML invoiced the Company in respect of a Volkswagen van, an issue to which I will return.

v) There is an issue between Mr Worsley on the one hand, Mr Gould on the other hand, as to whether in agreeing a new joint facility on behalf of GML and the Company with DFC on 28 July 2021, and executing a cross-guarantee on behalf of the Company in respect thereof under which the Company guaranteed the liabilities of GML and vice-a-versa ("**the DFC Cross-Guarantee**"), Mr Gould did so with the knowledge and approval of Mr Worsley. It is Mr Worsley's case that he knew nothing about this, or about any board meeting approving the above. On the other hand, it was Mr Gould's case that he informed Mr Worsley about these matters and that Mr Worsley was on board with them. One particularly compelling piece of evidence that, in my view, supports Mr Worsley's version of events is that in paragraphs 39 and 43 of his witness statement, Mr Carter refers to access being gained to Mr Gould's email account, and to finding a copy of the DFC Cross-Guarantee. In respect thereof, Mr Carter comments that: *"This was done without Neil's knowledge and he was shocked when I showed him the papers."* Mr Carter does not identify the grounds for his belief that this was done without Mr Worsley's knowledge, but I consider it significant that Mr Carter is able to comment that Mr Worsley was shocked when shown the relevant documentation. This leads me to conclude that, more likely than not, Mr Worsley was contemporaneously unaware about the execution of the DFC Cross-Guarantee, hence being shocked when informed about it.

98. I should add that I have not taken into account when considering the credibility of Mr Gould that his Points of Defence denied the receipt of an email dated 14 June 2021 referred to in paragraph 47 of the Amended Points of Claim relating to how invoices concerning Oset bikes were dealt with. The email in question was included in a supplemental bundle prepared during the course of the trial, and it was put to Mr Gould

in cross examination. Under cross-examination Mr Gould was constrained to accept that he had received it, and he then sought to provide an explanation in respect of it. The point thus arises as to why the email was denied in the Points of Defence. However, it emerged that the email in question had not been disclosed until very recently, and that Mr Gould probably did not have a copy thereof at the time that his Points of Defence was settled. In the circumstances, I do not consider that any significant weight ought to be attached to the denial in the Defence.

99. Further, I consider that I need to be mindful of the fact that Mr Worsley is a businessman of some considerable sophistication with knowledge and experience of corporate transactions, in a way that Mr Gould is not and was not. It is apparent from the evidence that Mr Gould may have been able to effectively manage and run GML, with its smaller turnover, but that he was very much out of his depth in managing the Company and trying to keep on top of its affairs.

Finding as to the basis of the agreement or understanding

100. On the evidence before me, I have concluded that the broad understanding between Mr Worsley and Mr Gould was that the business and assets of GML should be transferred to the Company at the time that the Company started to trade from the Showroom, with this being done on the basis that the value of the tangible assets transferred, such as stock, would be credited to a directors' loan account in favour of Mr Gould, and that GML would, save as referred to below, cease to trade.

101. I consider that this is most clearly demonstrated by:

i) The emails referred to above from Mr Gould himself referring to a transfer of assets, including his email dated 3 May 2023;

ii) What others, including funders, Kawasaki and social media users, were told in correspondence to which Mr Gould was a party;

iii) The transfer of all the franchises to the Company, with all the franchises in favour of GML being terminated, including the BRP franchise;

iv) It being common ground that the Company would indemnify GML in respect of the rent on the latter's Buxton premises until April 2022, and Mr Gould causing GML to invoice the Company on this basis.

102. I reject the contention advanced on behalf of Mr Gould in closing submissions, consistent with what Mr Gould had said in his first witness statement, that the understanding or agreement between the parties was that Mr Gould could essentially choose what stock he wished to introduce into the Company, with his directors' loan account being credited in respect of the same as and when transferred. I also reject any contention, if indeed it remains Mr Gould's case, that the understanding or agreement was that GML could operate a parallel business from Buxton and do so in such a way as to allow itself to retain over half of the stock as suggested in paragraph 17 of Mr Gould's witness statement dated 6 December 2021.

103. On the other hand, I can see that the position was complicated by the fact that certain of the stock held by GML, including a significant number of SeaDoos, had been

substantially paid for before the Company began to trade, as well as by obligations arising from the fact that stock had been purchased using GML's facility with DFC where there was, as I understand it, an obligation on GML, rather the Company, to account to DFC.

104. Further, I consider the position to have been further complicated by the fact that GML, notwithstanding that it was to transfer all its business and assets to the Company, still had liabilities to meet. Whilst this is in part answered by the agreement to meet certain expenses, such as the rent and that of the employee retained in Buxton, there were plenty other liabilities such as the VAT loan, which on Mr Worsley's case, the Company had no responsibility for. I have commented upon the potential significance of this above.

105. In these circumstances, I do not consider that the agreement or understanding between Mr Worsley and Mr Gould can be regarded as being quite as binary as Mr Worsley contends, with there being, in the absence of a formal written shareholders' agreement, scope for real ambiguity as to how the above practical issues were to be addressed.

106. As referred to above, Mr Gould raised the question of liabilities of GML in his email dated 3 May 2021, including in relation to the VAT loan. Under cross-examination, he said in respect of this loan, that as part of the process of "*bringing the two companies together"*, Mr Worsley had accepted that this was something that the joint venture would have to bear. Given the consequences of GML failing having transferred its assets to the Company, but not its liabilities, I consider it more likely than not that Mr Worsley did, give some form of assurance to Mr Gould in respect thereof, and also potentially in respect of other liabilities of GML, as to how they might be met out of GML's assets.

107. With regard to the complications concerning customers having paid up front for SeaDoos, and complications concerning DFC's funding of stock purchased by GML, I am persuaded that it is more likely than not that some understanding was reached, as contended for by Mr Gould, that GML could sell the same in its own name and receive any balance of the purchase price. As Mr Gould pointed out, from an accounting as opposed to a cash flow perspective, this ought not to have made any difference to the Company as if the relevant stock had been transferred to the Company, either Mr Gould or GML would have been entitled to credit for it.

108. However, apart from limited dealings of this nature, I do not find that the agreement or understanding between Mr Worsley and Mr Gould was such as to permit Mr Gould to simply be able to choose to transfer such stock of GML as he wished to the Company, or to cause GML to trade in parallel with the Company if, in fact, that is what he did. This agreement or understanding was of importance to Mr Worsley because, on his case, it was on the basis thereof that he contributed significantly more cash that it had originally been anticipated that he would do, and on the basis thereof that he continued to contribute more cash after the Company commenced to trade in May 2021.

109. Having determined the basis of the understanding or agreement between Mr Worsley and Mr Gould with regard to the transfer of the business of GML to the Company, I turn to consider the allegations of unfairly prejudicial conduct that are advanced by Mr Worsley against Mr Gould.

The allegations alleged to amount to unfairly prejudicial conduct

Introduction

110. The matters said to amount to unfairly prejudicial conduct on the part of Mr Gould set out in paragraph 32 et seq of the Points of Claim. In essence, it is alleged that Mr Gould acted in breach of his statutory fiduciary duties as a director of the Company in his conduct of the affairs thereof, that a number of allegations amounted to a breach of the agreement or understanding that formed the basis of the joint venture between Mr Worsley and Mr Gould, and that in acting as he did, Mr Gould caused the affairs of the Company to be conducted in a manner unfairly prejudicial to Mr Worsley as a member thereof.

111. The relevant allegations are set out in paragraphs 32-50 of the Points of Claim. I will consider the allegations made by Mr Gould in turn, and whether they amounted to a breach by Mr Gould of his statutory fiduciary duties as a director and/or a breach of the agreement or understanding between Mr Worsley and Mr Gould that formed the basis of their joint venture. However, whether, if any of the allegations are established, the Court ought to make an order pursuant to s. 994 CA 2006 and, if so, in what terms, would be a matter for a further trial as to relief and remedy.

Fraudulent activity

112. These allegations are contained in paragraphs 32 to 39 of the Points of Claim. The gist thereof is that a good relationship with DFC was of key importance to the Company, and that Mr Gould prejudiced that relationship by causing false documentation to be produced to DFC to cover up delays in accounting to it out of the proceeds of sale of stock in respect of monies advanced to fund the purchase of the stock. It is also alleged that Mr Gould caused false documentation to be produced in order to assist in recovering bonuses from franchisors, including BRP.

113. The allegations focus on a number of emails dated 23 June 2021, and a number of emails dated between 13 October 2021 and 15 October 2021.

114. As to the emails dated 23 of June 2021:

    i) In the first email, Mr Gould asked Karl Dawson ("**Mr Dawson**"), the Company's sales administrator, to *"do me invoices for the below"*, referring to 6 SeaDoos with prices for each.

    ii) In response, Mr Dawson queried that there were no customer details, to which Mr Gould replied: *"Please just make an address/name up for me. The date on the invoice needs to be either 17th or 18th June."* Mr Gould then referred to the postcode-finder website as a way for Mr Dawson to find addresses.

    iii) Mr Dawson then, as asked to do so, produced what purported to be six invoices for the SeaDoos in question.

115. In her trial Skeleton Argument, Ms Tythcott asserts that the false invoices were then sent to BRP, the franchisor in respect of SeaDoos, in order to obtain bonus payments. However, I have seen no evidence for this. I was not taken to any documentation that

showed this to have been the case. Paragraph 37 of the Points of Claim asserts that Mr Worsley discovered that Mr Gould frequently directed staff to create false invoices and documents which contained incorrect information. Further, paragraph 38 of the Points of Claim alleges that Mr Gould directed the Company's staff to fabricate invoices which were submitted to KTM and BRP in order to obtain bonus payments. However, the only specific allegations identified in the evidence relate to the emails dated 23 June 2021, and the emails dated between 13 and 15 October 2021 referred to above and below - see paragraphs 81 and 82 of Mr Worsley's trial witness statement.

116. As to the purpose of the 23 June 2021 emails, and the invoices produced by Mr Dawson in consequence thereof, Mr Worsley simply says that Mr Gould did what he did because he had sold the *"vehicles"* (an expression which extends, in the trade, to jet skis) out of Buxton and he needed to make up postal addresses in Manchester so: *"(1) we would get sales commission from the franchisor and (2) so we did not get an additional payment charge from[DFC]"*. However, there is no further evidence as to whether or how this was achieved.

117. Mr Gould's evidence is that the invoices were created by Mr Dawson at his direction because GML had paid DFC off otherwise than within 2-3 days of sale of the relevant items as required by DFC's terms and conditions, and at a time when new facilities were being sought from DFC and it was not wished to prejudice the obtaining of the latter. Thus, invoices representing that the sales had concluded at a later date than that on which they had, in fact, been concluded were produced using fictitious details. It is Mr Gould's case that the idea for doing this came from Mr Worsley, something that Mr Worsley strenuously denies.

118. It might be said that avoiding an additional payment charge from DFC and/or prejudicing any discussions in relation to new facilities did not require the use of fabricated details on invoices, apart from the date, thus lending some credence to Mr Worsley's suggestion that Manchester addresses were used on the invoices produced on 23 June 2021 in order to obtain commission. However, it has not been explained how this might have led to any party receiving commission that it would not otherwise have been entitled to bearing in mind that, as understood, the SeaDoos in question had, in fact, been sold thus, prima facie, generating an entitlement to commission. Further, prima facie, the use of Manchester addresses ought to have led to objection from BRP because of the existence of the franchisee in Oldham covering the Manchester area, it being common ground that the continued role of the Buxton premises for selling SeaDoos was to avoid difficulties in this respect. In the circumstances, I am unable to conclude that Mr Gould caused false invoices to be produced in order to obtain commission that any party might not otherwise have been entitled to.

119. However, it is common ground that the relevant invoices were created in order to give a false impression to DFC that the relevant stock had been sold. Clearly, if Mr Worsley suggested this course of action, he can hardly complain of it, but if he did not, then the allegation in question is in part at least made out. I shall return to who is to be believed on this issue below.

120. So far as the email correspondence between 13 and 15 October 2021 is concerned, Mr Worsley's case is that after he had begun to look into matters in more detail, he discovered that Mr Gould had been contacted by DFC regarding the sale of four vehicles in August and September 2021 where payment had not been promptly made

after sale, and it is alleged that Mr Gould caused four petty cash vouchers to be produced so as to falsely represent that the sales had taken place at a later date than the actual sales. It is alleged that this prompted DFC to request bank statements evidencing payments. Mr Gould then, by his email dated 15 October 2021, told Ms Darlington not to share anything with DFC, Mr Worsley in fact being copied in on this latter email.

121. Mr Gould denies any contemporaneous knowledge of petty cash vouchers, and he suggests that Mr Worsley was behind their creation in an attempt to discredit him. I have to say that I find this latter suggestion that Mr Worsley was behind the creation of false petty cash vouchers in an attempt to discredit Mr Gould to be far-fetched and illogical, and I reject this explanation for the creation of the same. Amongst other things, I can see no reason why Mr Worsley would have wanted to *"discredit"* at Mr Gould at the relevant time, as distinct from later when things began to go seriously wrong.

122. I consider the more likely explanation to be that Mr Gould was behind the creation of the petty cash vouchers, and thus that Mr Gould was aware of them, and of the purpose for them, at the relevant time. I am led to this conclusion by my overall assessment that Mr Worsley is the more reliable witness, and my rejection of Mr Gould's explanation in respect of the creation of the petty cash vouchers as far-fetched. These considerations have also led me to conclude that it was Mr Gould, rather than Mr Worsley, who was ultimately behind the creation of the six false invoices on 23 June 2023, and that I should accept Mr Worsley's evidence that he was not contemporaneously aware of the same.

123. I accept Mr Worsley's case that the creation of false documents covering up the failure of the Company to promptly account to DFC on the sale of stock was liable to seriously prejudice the important relationship between the Company and DFC. I appreciate that Mr Gould says, in effect, that this was a risk worth taking in order to avoid the detrimental consequences should DFC have become aware of the late failure to account. However, I do not consider that the creation of false documentation, falsely portraying when sales took place, can have been justified bearing in mind the infinitely more serious consequences should DFC have found out that it was being misled in the way that it was. I consider that in acting in the way that he did, without Mr Worsley's knowledge and approval, Mr Gould did act in breach of his fiduciary duties as a director of the Company pursuant to s. 172 CA 2006 to act in the way that he considered, in good faith, would be most likely to promote the success of the Company.

124. The duty under s. 172 CA 2006 is, essentially, a subjective one to act in a way that *the director* considers, in good faith, would be most likely to promote the success the company. However, such subjective approach will only apply where there is evidence of actual consideration of the best interests of the company, including the matters set out in s.172(1)(a) to (f). Where there is no such evidence, the proper test is an objective one, namely, whether an intelligent and honest person in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the relevant action was for the benefit of the company – see e.g., *Re HLC Environmental Projects Ltd* [2013] EWHC 2876 (Ch), [2014] B.C.C. 337, at [92]. In the present case, whilst Mr Gould may have thought there was advantage in misrepresenting the position to DFC, there is no evidence that he gave actual consideration to the best interests of the Company in the way contemplated by s.172, including, in particular, the likely consequences of the production of false documentation in the long term. In the

circumstances, it is necessary to adopt an objective approach, and I do not consider that an intelligent and honest person in the position of Mr Gould could, in the circumstances, reasonably have believed that the creation of the false invoices and petty cash vouchers were for the benefit of the Company.

125. Further, I consider that Mr Gould's actions amounted to a breach of his statutory fiduciary duty under s. 171 CA 2006 to only exercise his powers for a purpose for which they were conferred. This cannot, as I see it, have extended to causing false documents to be created in an attempt to mislead a funder such as DFC.

126. Nevertheless, the fact is that there is no evidence that what was done, although liable to cause real harm with regard to the relationship with DFC, did in fact do so. Although not a matter for this trial, I would observe that if this were the only allegation to be made out, would have thought that it would be insufficient in itself to require the Court to exercise its discretion to make an order pursuant to s. 994 CA 2006, even apart from Mr Plunkett's argument that I will return to below, that this is an example of wrongdoing rather than mismanagement, and thus inapt as the basis for seeking relief pursuant to s. 994.

Conflict of interest and diversion of corporate opportunities

Mr Worsley's case

127. The principal allegation in paragraph 40 of the Points of Claim is that Mr Gould caused GML to continue to trade in competition with the Company notwithstanding the agreement or understanding that the business and assets of GML should be transferred to the Company, and that GML should cease to trade as soon as the Company began to trade in May 2021. As Ms Tythcott put it, it is alleged that Mr Gould rode two horses at the same time, namely GML and the Company, when he ought to have been riding only one horse, the Company. As the case was advanced at trial, it was said that the effect of this was that the Company did not get in the income or turnover that it would otherwise have achieved, and that the effect of thereof was so significant as to be causative of the failure of the Company.

128. In support of his case, Mr Worsley essentially relies upon Mr Gould's own admission, in particular as contained in his first witness statement and in paragraph 47 of his trial witness statement, that GML did continue to trade, as Mr Gould put it in paragraph 17 of his first witness statement, *"in parallel"* to the Company in circumstances in which *"not even half of GML's stock was transferred to the Company"*.

129. The further allegations in paragraphs 42 and 43 of the Points of Claim are that:

    i) As referred to in paragraph 97(v) above, Mr Gould caused the Company to enter into the DFC Cross-Guarantee without the consent, knowledge or authority of Mr Worsley in circumstances in which this could only have been done for the benefit of GML, which was supposed to have stopped trading;

    ii) Mr Gould caused an invoice to be raised from GML to the Company in respect of a Volkswagen van ("**the VW Van**") in an amount of £27,500 plus VAT, when the true value of the VW Van was only £5,505 plus VAT.

130. It is thus alleged that by these actions:

i) Mr Gould acted in breach of the agreement or understanding between Mr Worsley and Mr Gould as to the basis upon which the Company was to be established to take over the business and assets of GML; and

ii) Mr Gould acted in breach of his statutory fiduciary duties under ss. 171(2), 172, and 175 CA 2006.

Mr Gould's case

131. Mr Gould's pleaded case is, in short, that there was no agreement or understanding that GML would cease to trade, and that in any event GML did not trade in competition with the Company, but *"only continued to trade in respect of franchise agreements and stock that had not been transferred (or fully transferred) to the Company"* - see paragraph 43(3) of the Points of Defence. *"Further or alternatively"*, it is alleged that it had been expressly agreed between Mr Gould and Mr Worsley that GML could *"continue to trade, as it did, until April 2022"* - see paragraph 43(4) of the Points of Defence.

132. As to the allegation that Mr Gould caused the Company to enter into the DFC Cross-Guarantee, it is Mr Gould's case that this was done with Mr Worsley's knowledge and approval, and was done for the benefit of the Company because it resulted in the obtaining of an increased facility for the Company and GML collectively, in circumstances in which it was agreed that GML would continue to trade in a limited way, and where GML required to complete a number of run-off sales of stock that had been purchased with funding from DFC (where DFC required GML to sell the stock itself, rather than transfer it to the Company).

133. So far as the sale of the VW Van is concerned, it is Mr Gould's case that the value put on the transfer thereof to the Company of £27,500 plus VAT was a perfectly proper price, and that Mr Worsley has come up with the figure of £5,505 plus VAT because a registration number with one wrong digit was used by Mr Worsley and Mr Carter in arriving at a value of only £5,505 plus VAT for the VW Van.

Conclusions

134. As I have found, the general basis of the agreement or understanding between Mr Worsley and Mr Gould was that the business and assets of GML should be transferred to the Company, but that this was subject to some qualification concerning the need of GML to meet liabilities, and special circumstances surrounding stock belonging to GML which had been largely paid for in advance, or funded by DFC, where DFC required the stock to be sold by GML. The question, to my mind, is whether Mr Gould went further than envisaged, thereby, effectively, exploiting his relationship with Mr Worsley.

135. I consider it helpful to first consider the complaints made in respect of the DFC Cross-Guarantee and the VW Van.

136. So far as the DFC Cross-Guarantee is concerned, I have already found that Mr Gould made the necessary arrangements with DFC, with whom he had had a good relationship,

without discussion with Mr Worsley, and without Mr Worsley's knowledge and approval. I can see that there might have been some potential advantage for the Company in obtaining a larger joint facility together with GML. However, the effect of the DFC Cross-Guarantee was to require the Company to guarantee GML's liabilities to DFC in circumstances in which the overall agreement or understanding between Mr Worsley and Mr Gould was that, with limited exceptions for a limited period of time, GML would cease to trade on its own account. Further, Mr Worsley had made clear in relation to other circumstances where the question of the Company cross-guaranteeing the liabilities of GML had arisen, that he was strongly opposed thereto, no doubt going back to his concern to have a *"clean company"*.

137. In the circumstances, I consider that the inescapable conclusion must be that Mr Gould did act in breach of his statutory fiduciary duties as a director of the Company in causing it to enter into the DFC Cross-Guarantee without the knowledge and consent of Mr Worsley, not least his duty under s. 171 CA 2006 to exercise his powers for proper purposes, and his duty under s. 175 CA 2006 to avoid conflicts of interest, if not also his duty under s. 172 CA 2006.

138. Further acting without the knowledge and consent of Mr Worsley does beg the question as to why he did so act but should now seek to deny doing so if what he did was above board. I can only but conclude that he did so act in order to facilitate continued trading by GML in a way not envisaged by his agreement or understanding with Mr Worsley, for his own benefit and not that of the Company.

139. So far as the VW Van is concerned, as I have identified, the allegation is that Mr Gould caused GML to invoice the Company for the VW Van in an amount of £27,500 plus VAT, when the true value was only approximately £5,505 plus VAT, with the intent that his director's loan account with the Company should be credited with more than he was entitled to based upon the true value of the VW Van. It is Mr Worsley's case that he ascertained that the true value of the Van was only about £5,505 plus VAT from a price comparison website.

140. Mr Gould's defence is that the sale cost to the Company reflected the correct value of the VW Van, which had primarily been used for the benefit of the Company, that the incorrect registration number appeared on the relevant invoice, and so when Mr Worsley looked up the value on the price comparison website, it came up with the wrong value – see paragraph 46 of Mr Gould's Defence and paragraph 49 of his trial witness statement.

141. This is an issue that was touched upon by Mr Carter in paragraph 30 of his witness statement where he refers to Mr Gould wanting to offset a VW Van with a value of £6,000 against his directors' loan account for around £20,000. He was cross examined about this, and he referred to having been party to the process by which the price comparison exercise was carried out, and to himself having taken the registration number of the VW Van.

142. I accept this explanation provided by Mr Carter, who, as I have said, I regard as a reliable witness. In the light thereof, I consider myself bound to reject Mr Gould's explanation that the difference in values is down to the price comparison exercise carried out by Mr Worsley having used the incorrect registration number appearing on the relevant invoice. I conclude, therefore, that Mr Gould did deliberately seek to inflate

the value of the VW Van with a view to having his directors' loan account credited with more than it ought to have been credited with.

143. I ask myself why Mr Gould should have done this, and I consider that I am bound to conclude that Mr Gould did so in order to benefit himself at the expense of the Company, and therefore at the expense of Mr Worsley.

144. I consider that my findings in relation to these initial allegations concerning the DFC Cross-Guarantee and the VW Van must necessarily inform the approach that I take to the more general complaint that is made with regard to the allegation of conflict of interest and diversion of opportunities, and what is alleged in respect of Mr Gould's conduct so far as GML continuing to trade is concerned.

145. Some reliance is sought to be placed by Mr Worsley on GML's accounting records, and in particular SAGE records that have been included as appendices to Mr Lacey's report. In particular, it is said that these records show significant sales of new bikes by GML running through to October 2021, and the purchase by GML of significant quantities of used bikes. However, given that Mr Lacey did not give evidence, and given that Mr Gould was not cross-examined on the detail of these documents, I do not consider that I can place reliance upon them for present purposes irrespective of the fact that these documents, in themselves, show a number of contradictions (e.g. purchase of used bikes but sale of new bikes). If anything, what they do show is that whilst there may have been significant sales in May and June 2021, sales decreased thereafter.

146. Further, whilst reference has been made to bank statements in respect of GML's account with Santander, I was not actually taken to the same during the course of the trial, and Mr Gould was not cross-examined upon them. A consideration of these bank statements does show considerable activity continuing after mid-May 2021, with significant cash and other receipts. However, there are also significant payments out. Thus, on 15 June 2021, £27,201.17 was paid by direct debit to DFC. This would tie in with GML continuing to sell stock purchased by GML with funding from DFC, and the repayment of DFC on sale by GML. On the same day, there is one of a number of direct debit payments made also on other dates to *"Gas Monkey Ltd Ref 90254409679025440 Mandate No 0023"*. This may have been significant but was not something explored in the evidence. In short, because the contents of the bank statements were not considered at trial, I do not consider that I can place any reliance thereupon one way or the other.

147. I consider it necessary for Mr Worsley to show that what Mr Gould did, and caused GML to do, was to cause GML to continue to trade in a way not comprehended by the agreement or understanding between Mr Worsley that I have described above, and to do so in circumstances where he was, in essence, trying to ride two horses and putting the interests of GML ahead of those of the Company.

148. Thus, had it been Mr Gould's case that GML was not in a position to transfer over certain assets, or cause certain business that ought otherwise to have been conducted through the Company to be so conducted, because of the existence of particular liabilities that required to be met, then I consider that it is likely to have been difficult for Mr Worsley to make out his case. Likewise, if the complaints only related to, for example, SeaDoos that had been substantially paid for upfront, or stock substantially funded by DFC. However, the complaint is wider than that, and the principal difficulty that I have with Mr Gould's case is the disconnect between what I have found to be the

agreement or understanding between him and Mr Worsley on the one hand, and what Mr Gould accepted that he was doing, and sought to contend that he was entitled to do, when first challenged when interlocutory injunctive relief was sought in November 2021, and Mr Gould made his first witness statement in response thereto.

149. I take into account that Mr Gould's first witness statement might have been made in something of a rush in the face of the application for interlocutory injunctive relief, but it was the first time, shortly after the events in question, when Mr Gould set out his stall. Further, Mr Gould did not seek to portray any different picture in his trial witness statement, with the contents of his first witness statement being specifically adopted in paragraph 47 of the latter. Whilst Mr Gould, in the face of the evidence, may have sought to rein back on the contents of his first witness statement in the witness box, when he spoke in terms of some 85% of the business of GML having been transferred to the Company, and to the question of SeaDoos being a *"grey area"*, that was not his initial stand.

150. As we have seen, in his first witness statement, Mr Gould, referred to GML having traded *"in parallel"* with the Company *"as was clearly envisaged between us"*, and to GML not having put even half of its stock to the Company, albeit having put in some £600,000 worth of stock into the Company – see paragraph 17. Further, in paragraph 18 Mr Gould referred to never having reached agreement for the trading assets of GML to be transferred to the Company, nor a specific timeline to do so, as a justification for what had occurred. However, I have found that this was contrary to what had actually been agreed or understood between Mr Worsley and Mr Gould.

151. I consider myself bound by the evidence to conclude that Mr Gould has advanced a false case as to the agreement or understanding between himself and Mr Worsley in order to seek to justify continued trading on the part of GML that he must have known fell outside the scope of what had been agreed with Mr Worsley. I further consider that in doing so, Mr Gould placed himself in a position of conflict in furthering the interests of GML at the expense of the Company and thereby acted in breach of his statutory fiduciary duties under s. 175 CA 2006. I have given careful consideration to whether the matters complained of could be down to the clearly chaotic way that the business and affairs of the Company were dealt with after it commenced to trade, but I do not consider that GML continuing to carry on business in the way that it did can be explained away on this basis. If that had been the case, then one might have expected Mr Gould to have termed his first witness statement rather differently.

152. Mr Gould's conduct in respect of the VW Van demonstrates to me that he was prepared to push the boundaries, and I consider that that is what he did in fact seek to do, i.e. push the boundaries, in seeking to keep business within GML to such extent as he considered that he could get away with, albeit not intending necessarily to harm the Company and in all probably hoping that it would be a success, but no doubt believing Mr Worsley would continue to provide financial support as required.

153. To the extent indicated above, I consider that this particular conflict of interest and diversion of corporate opportunities head of alleged unfairly prejudicial conduct to have been made out by Mr Worsley.

154. However, the evidence before me at this liability trial, in contrast to what may be available at a remedies/quantum trial as foreshadowed by Mr Lacey's report, does not

enable me to reach any conclusion as to the impact or seriousness in effect of the conduct on the part of Mr Gould in question. In particular the evidence before me does not go so far as to demonstrate that this conduct was the cause of the failure of the Company as contended by Mr Worsley, and nor does the evidence establish what the effect thereof (if any) was on the value of Mr Worley's shareholding. These are likely to be highly significant considerations in determining whether the conduct is such as warrant the exercise by the Court of its jurisdiction under s. 994-996.

155. As to the reasons for the failure of the Company, I note for present purposes that Mr Gould contends that this was down to a number of considerations, including overspend on fitting out the Showroom, Covid and post-Covid effect, lack of sales, too much stock and/or too much of the wrong stock, and administrative failings due to lack of experience and staff leading to administrative chaos.

Diversion of the Company's assets

Missing stock

156. The principal allegation is that contained in paragraph 45 of the Points of Claim. It is there alleged that during the course of what is described as an *"audit"* that Mr Worsley commissioned Mr Carter and Ms Dickens to carry out, which was more in the nature of a stock-take, the latter identified approximately 40 items as set out in Annex A to the Points of Claim ("**Annex A**") that it is alleged had been acquired by the Company for a sum of approximately £182,762.30 plus VAT and which were recorded in the Company's stock records, but which were not located at the Showroom or GML's Buxton premises, or the subject of sales invoices issued by the Company. It is asserted that Mr Worsley has *"grounds to believe"* that Mr Gould has caused the items in question to be sold by GML without accounting to the Company for the proceeds.

157. In her Skeleton Argument for trial, Ms Tythcott relies upon the matters contained in Annex A having been *"verified"* by Mr Lacey, Mr Worsley's expert, who is said to have quantified the missing stock as being valued at £174,848.47. It is further alleged that Mr Lacey has managed to trace 11 of the missing vehicle unique VIN numbers with a total sale value of £126,889 in the sales records held by GML, although it is said that Mr Lacey could not progress further with verification exercise in respect of other missing items because the recorded information held by GML was *"vague and opaque"*. It is further submitted by reference to paragraph 3.9 of Mr Lacey's report and Appendix 3D thereto that GML's total sales reported by GML up to 31 March 2022 were £493,963. It is submitted that such a level of sales is *"inexplicable"* when GML was not supposed to be trading, unless Mr Gould had diverted assets to it.

158. For reasons that I have already given, as Mr Lacey's report was not formally in evidence, and as Mr Lacey has not been cross examined on his report for that reason, I do not consider that I can place any significant weight thereupon, including anything said to have been *"verified"* by Mr Lacey therein, or any conclusions that he might have reached as set out therein. Further, I consider that I must adopt a similar approach to the appendices and exhibits to Mr Lacey's report, at least unless containing information that is otherwise evidenced or verified.

159. As to the relevant *"audit"* or stock-take that was undertaken by Mr Carter and Ms Dickens, this is referred to in paragraph 78 of Mr Worsley's trial witness statement where he refers to the latter having produced a stock list:

> "… which demonstrates all the vehicles that have been purchased through or by [the Company] which were not present at either Buxton or the Showroom and had no sales invoice. It left around £180,000 of missing vehicles, around £25,000 of sales that had been recorded as paid to [GML] that had not been paid into [the Company] and takings in excess of £60,000 cash which had not made its way into the bank."

160. Whilst Mr Carter and Ms Dickens do, in their witness statements, refer to the *"audit"*, they do not in terms set out what was established thereby as referred to by Mr Worsley in paragraph 78 of his witness statement, as they might, perhaps, have been expected to do.

161. As the case progressed, the list of some 40 items in Annex A has been whittled down to a list of some 20 items the particulars of which are set out in a table in Ms Tythcott's Closing Note.

162. Item 6 in Ms Tythcott's table relates to some five Oset MX 10 electric bikes (**"the 5 Osets"**) that are said to have been purchased by the Company, but which were missing. These form the subject matter of a further allegation in paragraph 47 of the Points of Claim. In paragraph 47 of the Points of Claim, it is alleged that the 5 Osets were originally invoiced and delivered to GML on or about 31 March 2021, but that, by email dated 14 June 2021, Mr Gould asked Oset to provide one replacement invoice for the 5 Osets saying, in one email: *"I need the delivery address changing to Drop the hammer and are you able to do the date from today pease (sic) ?"*. A subsequent email suggests that payment was to be made by the Company *"straightaway"*.

163. The relevant email was found by Mr Worsley or Mr Carter in Mr Gould's deleted sent items in his ben@dth.co.uk email account. However, it was not disclosed by Mr Worsley, or at least was not disclosed until shortly prior to trial, and was not included in the trial bundles (despite the latter exceeding some 6,000 pages). In his Points of Defence and in his trial witness statement, Mr Gould had denied the allegations contained in paragraph 47 of the Points of Claim, including the relevant email dated 14 June 2021 – see paragraph 50 of the Points of Defence and paragraph 52 of Mr Gould's trial witness statement. However, the relevant email chain was produced in a supplemental bundle produced by Mr Worsley during the course of the trial. With some reluctance, I allowed this correspondence to be put to Mr Gould in cross examination. He realistically accepted that he must have written the email in question, and said that the denials had been honest because, at the relevant times, he had forgotten the relevant email. As referred to in paragraph 98 above, given the circumstances in which the relevant email chain emerged during the course of the trial, I have not held this denial against Mr Gould as to credibility. Once constrained to admit the same, Mr Gould explained the relevant email as being part of the process of getting the 5 Osets, *"to go through the books of"* the Company. For present purposes, I accept that explanation, in which event I must proceed on the basis that the Company paid for the 5 Osets, a matter further proved by a debit of £10,536.08 from the Company's bank account on 16 June 2021. However, this does still leave the question as to what became of the 5 Osets, an

issue to which I will return. In the circumstances, it is not necessary for me to consider further the separate allegation in paragraph 47 of the Points of Claim.

164. A further document that only emerged during the course of the cross examination of Mr Gould was an email dated 7 July 2021 sent by Mr Gould to Ashleigh Melvin at DFC in which Mr Gould asked to settle in respect of a number of items by asking that they be put on the Company's credit line by way of contra-settlement against items on GML's credit line. The items in question were described as the following:

> "JBVXAV76MK000759. - mav xrs £19315
> 3JBLWAX73MJ000182. - Outlander £8551
> 3JBVVAV77LK001200. Mav x3 £10601
> 3JBVXAV75MK001112. Maverick £20700
> 3JBUWAX79MK000072. Traxter £12669
> YDV29272L021. Gtx 300 £12900
> YDV36698L021. Wake 230. £9400
> YDV29391L021. Fish pro £10400"

165. Five of these items appear in Annex A and are shown as having been acquired by the Company on 9 July 2021, i.e.., two days after Mr Gould asked by his email dated 7 July 2021 that they were put on the Company's credit line with DFC by way of contra settlement.

166. In paragraph 48 of the Points of Defence, Mr Gould requires Mr Worsley to prove that the Company had acquired and paid for each of the items listed in Annex A, that they were recorded in the stock records of the Company and when they had been so recorded. Further, it is asserted in paragraph 48 that in his first witness statement, Mr Gould had already explained: *"… where the items were located insofar as he could ascertain what the items were (as some have insufficient particulars)".* Mr Gould goes on to assert that GML retained monies only for items belonging to GML, and that everything due to the Company was accounted for.

167. In paragraph 60 of his first witness statement, Mr Gould said that he had been through the list of alleged *"missing items"*, and he asserted that they were not missing. He referred to having set out his response at pages 112-131 of the exhibit to his first witness statement saying that this was as far as he had managed to trace them: *"… with the information I had and within the very limited time available hearing."* Responses in respect of a number of the allegedly missing items are provided on the pages of his exhibit that he refers to. In paragraph 50 of his trial witness statement, Mr Gould adopts these comments without further elaboration.

168. It would have assisted if the allegations in relation to the alleged missing items in Annex A had been advanced by reference to some form of Scott Schedule, and the process has not been assisted by the late introduction of documentation in the supplementary bundle that I allowed, in part, to be put in during the course of Mr Gould's cross examination. The fact that such documentation was only introduced during the course of Mr Gould's cross examination is something that I need to take into account in considering the weight to be attached to this documentation, and to Mr Gould's responses to questions touching thereupon, giving the appropriate benefit of the doubt to Mr Gould.

169. I consider that I have little option but to work through the detail of the evidence in respect of these 20 outstanding items in Appendix A in the order identified in Ms

Tythcott's Closing Note in order to consider whether, in respect of these items, Mr Worsley has proved his case, the onus being upon him to do so.

170. My findings in respect of these 20 outstanding items are as follows:

i) 1. Cam-Am X3 XRC – VIN 3JBVVAV77LK001200 - This is one of the items referred to in Mr Gould's email to DFC dated 7 July 2021. It is on the basis thereof that it is contended that the item was paid for, or is to be treated as paid for, by the Company.

Mr Gould's response on page 112 of the exhibit to his first witness statement was that GML had sold this item on 31 May 2020 well prior to the Company commencing to trade, as said to be evidenced by an entry of that date on *"the warranty registration system"*. On that basis, it was maintained that the item belonged to GML, and so there can be no question of Mr Gould/GML having wrongly diverted this item or the proceeds of sale thereof.

This does raise the question as to why Mr Gould should have included this item to be contra-settled in his email to DFC dated 7 July 2021, if indeed it had been sold some 18 months prior thereto. I appreciate that Mr Gould may have been taken by surprise in cross examination by the reference to the email dated 7 July 2021, and I take that into account. However, Mr Gould, as Ms Tythcott points out, had no explanation as to why he had asked DFC to use the Company's credit line to settle debts of GML, the debt in respect of this particular item being specifically identified in the email dated 7 July 2021. Notwithstanding, perhaps, being taken by surprise, I consider that he might reasonably have been able to provide an explanation of some kind if there was a cogent one.

In these circumstances, and in the absence of what I consider to be a cogent explanation from Mr Gould, I am bound to conclude, on balance, that Mr Worsley has proved that the Company paid by contra for this particular item, in circumstances where it never received the item in question to sell. The latter is implicit from Mr Gould's own case that the item belonged to GML and had been sold, and therefore never came into the Company's possession to sell. The allegation is therefore made out in respect of this particular item. I regard it as another example of Mr Gould pushing the boundaries.

ii) 2. BRB SSV MAV MAX Turbo – VIN 3JBVNA73MK000448 - Mr Gould does not, as I understand it, contest the contention that this was an item purchased by the Company. In any event, despite the paucity of the evidence of Mr Carter and Ms Dickens on the point, I consider that the evidence of Mr Worsley in paragraph 78 of his witness statement is just about sufficient for this purpose. The issue is whether or not it was in the Company's possession at the relevant time. As to this, neither Mr Carter nor Ms Dickens refer to any specific documentation as demonstrating the process by which the conclusion was come to that there were items that the Company had purchased that were not accounted for either by being in the possession of the Company, or as being covered by sales invoices. All one has is paragraph 78 of Mr Worsley's own witness statement which refers to a stock list, without identifying what exactly is being referred to, which, is said to demonstrate all the vehicles which had been purchased but were not present and had no sales invoice. The tabulation of the

stock lists in Ms Tythcott's Closing Note provides no assistance on the point, and for the reasons referred to above I have not sought to go to Mr Lacey's report for assistance on this point.

On the other hand, it is Mr Gould's contention that the item in question was, on 30 November 2021, in stock in Manchester as demonstrated by a photograph of what is said to be the part of the item in question showing the VIN number corresponding with the above, with an open notebook in front of it identifying the Showroom as the location and giving the date 30 November 2021, i.e., shortly prior to the making of the witness statement to which the photograph was exhibited. It was suggested on behalf of Mr Worsley, during the course of the hearing, that what Mr Gould had done was to trace the customer to whom GML had sold the item and photographed the item at the customer's premises. This was rejected by Mr Gould as absurd. I note that there is no evidence that following the service of Mr Gould's witness statement exhibiting this and a number of other photographs of stock, a further search was made in respect of the items in question that yielded the same result.

In the light of the above, I feel bound to conclude that the suggestion that Mr Gould photographed or caused to be photographed this and other items of stock that had been sold by GML at the relevant customers' premises to be somewhat far-fetched. I find that Mr Gould probably did photograph or cause to be photographed this and others of the items of stock that he maintains were contemporaneously photographed as proof of their presence. On this basis, I am unable to accept, on the balance of probabilities, that this item of stock was purchased by the Company, but sold by Mr Gould/GML, without accounting for the proceeds, or was otherwise misapplied by Mr Gould.

iii) 3. SEADOO JET SKI – VIN YDV56011B121 – On page 121 of the exhibit to his first witness statement, Mr Gould says that this item has been located, and he provides a photograph of a box with a label on it showing the relevant VIN number. The photograph appears to be an outside photograph, but does not otherwise identify the location, and the photograph does not show the jet ski itself. There is a piece of paper showing the date 1 December 2021. This is not entirely satisfactory, given the absence of the identity of the location, and any specific evidence from Mr Gould to the effect that the item had not been sold by GML, and ruling out the possibility that all the photograph represented was an empty box as suggested by Ms Tythcott. However, bearing in mind that the overall burden is on Mr Worsley, and that there is no further evidence from him specifically dealing with this item, on balance, I accept Mr Gould's case that this is not an item purchased by the Company, but the sold by GML.

iv) 4. SINNIS 21 MY DSR EU ZF – VIN 538SDJZ63MCG156832 – This is dealt with on page 122 of the exhibit to Mr Gould's first witness statement, which he maintains was in stock at the Showroom. He provides a photograph of what appears to be a vehicle with a note showing the location to be the Showroom, and the date as 2 December 2021. This photograph does not show the VIN number, so that one cannot tell from the photograph what the item is, although somebody in the know would no doubt be able to tell whether it is a photograph of the correct vehicle. I have seen no evidence suggesting that the photograph is not of the type of vehicle that it purports to be a photograph of. Further, there is

no evidence of any further search being carried out in respect of this item after the service of Mr Gould's first witness statement. On balance, and again having regard to where the ultimate burden proof lies, I accept Mr Gould's evidence that this is a genuine photograph showing the particular item in situ at the Showroom on the relevant date. This would discount the possibility of the item having been wrongly sold by GML, or otherwise misapplied by Mr Gould.

v) 5. QUADZILLA C FORCE 520 T3 EPS RED QUAD BIKE – No VIN has been provided by Mr Worsley for this item. This is dealt with on page 125 of the exhibit to Mr Gould's first witness statement. Mr Gould's simple point is that not having listed a VIN number, Mr Worsley cannot know that it is missing. I consider that this is a fair point. It would, for example, have been open to Mr Worsley to say that the Company only purchased one such quad bike, and that there is no record of it having been sold or of it being in the Company's possession. However, we have no such evidence, and as I have said, none of the witnesses have verified by reference to any documentation the actual stock-take taken that is relied upon for present purposes. In the circumstances, I do not consider that it has been established on the balance of probabilities that this is an item of stock that was purchased by the Company, but wrongly sold by GML without accounting to the Company.

vi) 6. OSET MX 10 ELECTRIC BIKES – These are the 5 Osets referred to in paragraphs 162-163 above. Although originally ordered by GML, and indeed delivered to GML, in the circumstances therein referred to, they were ultimately invoiced to the Company, and paid for by the Company. The question is what then happened to them, and in particular whether they were wrongly sold or retained by GML. Mr Gould deals with them on page 125 of the exhibit to his first witness statement. Again, he makes the point that whilst all Oset bikes have identification numbers, without the same it is not possible to say where they are or whether they are missing or in stock.

Ms Tythcott, in her tabulated analysis of the documents in her Closing Note draws my attention to stock lists dated 26 July 2021 which certainly appear to include the 5 Osets. By reference to the same document, she also suggests that the transactions are to be found in GML's sales ledger, reference being made to figures extrapolated in Exhibit 3B to Mr Lacey's report. Even apart from my reluctance to delve into matters dealt with by Mr Lacey for the reasons explained above, all that I can see in the relevant list of items is reference to 2 Oset MX10's that appear to have been sold by GML on 13 April 2021. This was, of course, prior to the Company commencing to trade, and prior to 14 June 2021. I cannot see that this assists in any event. In the circumstances, and absent evidence in response to Mr Gould's assertion that without identification numbers it is not possible to say whether or not the 5 Osets were missing or not, I do not consider that Mr Worsley has proved that they were missing at the relevant time. The position might be different if, for example, it had been said in response to Mr Gould's evidence that there were no other Oset MX 10s held by the Company in stock or sold by the Company, then the position might be different. However, absent evidence of this kind, I do not find this particular allegation to be proved.

vii) 7. TRAXTER XMR – VIN 3JBUWAX79MK000072 – Mr Gould's contention is that this vehicle belonged to GML, GML having purchased the same in March

2021 at a price of £14,266.15, and that on this basis the Company can have had no claim over it. Mr Gould includes a copy of the relevant invoice on page 126 of the exhibit to his first witness statement.

However, this is one of the vehicles referred to in Mr Gould's email to DFC dated 7 July 2021 in which he asks for the Company's credit line to be used to settle the relevant invoice. To my mind, notwithstanding the late introduction of the email dated 7 July 2021, the inability of Mr Gould to explain this transaction leads to the conclusion that this was an item paid for by the Company, or treated as paid for by the Company, but applied for the benefit of GML, and that Mr Worsley has proved his case in respect of it for essentially the same reasons as in respect of Item 1 above.

viii) 8. CAN-AM OUTLANDER XMR 1000 - VIN 3JBLWAX73MJ000182 – Mr Gould's position in respect of this vehicle is that it was purchased by GML on 21 June 2021, and that a copy of the warranty registration confirmation produced shows that the vehicle was sold on 31 January 2021, well prior to the Company commencing to trade. On this basis, it is Mr Gould's case that it is a vehicle over which the Company can have no claim, and that cannot be said to have been purchased by the Company. However, again, it is one of the vehicles identified by Mr Gould in his email to DFC dated 7 July 2021 in which he was asking that it be put on the Company's credit line. An additional observation is that according to Mr Lacey's Exhibit 3B, it appears in GML's sales Ledger as a sale on 22 April 2021. For the reasons already explained, I do not attach significant weight to Mr Lacey's Exhibit 3B, save that it does appear to confirm Mr Gould's case that it was sold by GML prior to the Company commencing to trade, albeit on a different date. However, the significant point is that it was added to the Company's credit line with DFC in circumstances in which it can never have come into the possession of the Company for sale. In these circumstances, I consider this allegation is proved for the same reason as Items 1 and 7 above.

ix) 9. KAVINCI MOTORS RTP FOOTROCKET YR 21 – In respect of this item, Mr Gould makes the point that all Kavinci machines have identification numbers, and without the same it is not possible to say whether or not the item is missing or in stock. On page 129 of the exhibit to his first witness statement, Mr Gould included a photograph of a Kavinci jet ski, with a note showing the location as being the Showroom and the date as being 2 December 2021. For the same reasons as set out above in respect of other items, and in the absence of evidence in response to Mr Gould's evidence explaining why this photograph cannot be showing the alleged missing Kavinci, I am unable to find this allegation proved.

x) 10. HONDA – VIN CRF450RJH2PE07A3MK402384 – Mr Gould has on page 130 of the exhibit to his first witness statement provided a screenshot of the Honda UK dealer system, appearing to show that the particular VIN number could not be traced on its system. It is stated that no matching records could be found, suggesting, amongst other things, that this could be a grey or parallel import. I am not referred by Mr Worsley to any evidence or documents apart from the list of items identified as not verified during the stock count comprising Annex A. In particular, there is no evidence from Mr Worsley in response to that of Mr Gould explaining how this particular item came to be included in

Annex A, and showing how it can be excluded as having been subsequently sold by the Company, and also showing how it can be excluded from being one of the Hondas that may have been included in the *"audit"* carried out by Mr Carter and Ms Dickens if any were included (which we do not know).

Two further relevant points are that this particular item is shown in Annex A with the date 28 April 2021, i.e., prior to the Company commencing to trade, albeit that it is shown to have been paid for on 29 September 2021. Further, and perhaps more significantly, the stock list dated 26 July 2021 includes a number of Hondas, some of which are shown as having VIN numbers, albeit non-corresponding with this item, and others of which are shown without a VIN number.

In the circumstances, I simply cannot be satisfied on the balance of probabilities that this allegation is proved.

xi) 11. HONDA – VIN CRF450RJH2PE07A4MK402426, and HONDA VIN – LALAE046H3202332CRF50F – Mr Gould provided a somewhat odd response in respect of this item on page 131 of the exhibit to his first witness statement, where he said:

> "I can make investigations as to where the vehicles have gone, if they have even gone at all. But I can to do that (sic) without putting staff in an awkward position which currently I do not want to do. But due to the fact that they have been told not to communicate with me anymore and certainly my enquiries would then get back to Neil I am limited as to what I can do regarding this at this stage."

Mr Gould has not subsequently sought to add to this as he might have done.

Again, the Hondas in question are shown in Annex A as dated 28 April 2021, prior to the Company commencing to trade, albeit shown as having been paid for on 20 May 2021 and 29 September 2021 respectively. Further, these particular Hondas, at least with their VIN numbers identified, do not appear in the stock-take dated 26 July 2021 albeit that the relevant records include a significant number of Hondas, both with other VIN numbers and no VIN numbers as referred to above.

Notwithstanding Mr Gould's somewhat unsatisfactory response in respect of this allegation, in the above circumstances, I am simply unable to conclude, on the evidence, that it has been proved on balance that these items were items paid for by the Company that have gone missing without the proceeds of sale being accounted for by Mr Gould. There is, as I see it, simply insufficient evidence showing this to be the case for similar reasons as in the case of Item 10 above.

xii) 12. SEGWAY – VIN A0SAAPX5EM8000073 – Mr Gould's response in respect of this particular item is to produce a photograph showing the serial number with a note showing the location as the Showroom, and the date as to December 2021. For the same reasons as in respect of Item 2 above, on balance I accept Mr Gould's evidence that he was able to locate this particular item at

the Showroom on 2 December 2021, and therefore consider that I should reject this particular allegation.

I would add that the evidence adduced by Mr Worsley is that this was initially sold by GML to Andy Rowe, albeit that it was the subject matter of a subsequent invoice from Dualways Ltd to the Company dated 5 March 2021, which is somewhat odd given that the Company had not then commenced to trade. However, given that Mr Gould does not contest that it belonged to the Company, but rather has provided an alternative explanation, nothing turns on this.

xiii) 13. OSET BIKE 16.0 RACING 36V 800w BIKE – The position in respect of Items 13 to 19 in Ms Tythcott's schedule is that Mr Gould does not offer any comment thereon in the exhibit to his first witness statement in the way that he does in relation to Items 1 to 12, and Item 20. I have considered whether this is because they were not sufficiently identified in Mr Worsley's first witness statement. However, from what I can see, Mr Worsley exhibited at page 40 of the exhibit to that witness statement a copy of a list essentially in the form of Annex A. Therefore, there is no apparent explanation as to why Mr Gould has not commented thereon. Nevertheless, although he has not commented on Item 13, namely the Oset bike referred to, I consider that Mr Gould's same observations as applied to the 5 Osets are relevant thereto, and in the absence of some identifying feature, such as a serial number in respect thereof, I consider that I am unable to find that the allegation has been proved.

xiv) 14-19. These Items are the following: CA AMM X3 XRS – VIN 3JBVXAV76MK001135; CAN AMM OUTLANDER 450 – VIN 3JBLBGAR79MJ000083; BRP – PW SPARK2UP 900h – VIN YDV64777C121; BRP – PW SPARK UP 900h – VIN DV74826D121; FISH PRO YDV293911L021 – As I have said, Mr Gould has provided no specific evidence in response to the allegation concerning these particular items. All he has subsequently done in his Defence, and in his trial witness statement, has been to adopt the observations on the other items within the exhibit to his first witness statement. I consider that I am entitled to draw inferences from this. I have considered whether there is sufficient evidence that these particular items were not sold by the Company. Whilst the particular items are not expressly dealt with in evidence by reference to sales documentation, it is the evidence of Mr Worsley in his first and second witness statements that the items in Annex A do not appear in the Company's sales records. Further, unlike other items referred to above, which have not been identified by reference to VIN number, Mr Worsley's evidence on this point must, as I see it, be regarded as more reliable given that in respect of these items one does have the VIN numbers.

In the circumstances, I am persuaded, on balance, that these are items that were paid for by the Company, but which Mr Gould must have caused to be sold through GML, or otherwise failed to have properly accounted in respect of.

There is the further point in relation to Item 19, Fish Pro YDV293911L021, namely that this is one of the items referred to in Mr Gould's email to DFC dated 7 July 2021.

I therefore consider that the allegation is made out in relation to these Items 14 to 19.

xv) 20. SEA-DOO WAKE PRO E-D – VIN YDV3698L021 – Mr Gould does comment on this item on page 113 of the exhibit to his first witness statement, where he states that the Vin number provided is unknown, and so the vehicle does not exist, and therefore cannot be missing stock. However, it is apparent that there is a digit missing from the Vin number, which should read YDV36698L021. A *"Wake 320"* with this latter Vin number appears in the list in Mr Gould's email to DFC dated 7 July 2021. I consider that I must draw the same conclusions in relation thereto, as I have in relation to the other items that appeared in this list, and thus find that it is an item that the Company paid for, or is to be treated as having paid for, but did not get the benefit of. Although nothing turns upon this, I note that it is recorded in Mr Lacey's Exhibit 3B as having been sold by GML on 28 May 2021.

171. In conclusion, it follows from my analysis above that I consider that Mr Worsley's case in respect of paragraph 45 of the Points of Claim and the various items in Annex A is proved in respect of Items 1, 7, 8, 11 and 14-20, but is otherwise not made out. I consider that the conduct in question amounted to a breach on the part of Mr Gould of his statutory fiduciary duties under s. 171 CA 2006 (Failure to exercise powers for proper purpose) and s. 175 CA 2006 (failure to avoid a situation in which Mr Gould's personal interests conflicted with those of the Company), and that is was a facet of way that Mr Gould continued to operate GML in away contrary to the agreement or understanding between himself and Mr Worsley.

Diversion of invoice payments

172. The next allegation under this head is in paragraph 46 of the Points of Claim. It is alleged that although the invoices referred to in Annex B to the Points of Claim were issued by the Company, GML's point of sale cash machine records, and GML's bank statements show the monies received in payment of these invoices to have been paid into GML's bank account. The allegation is most fully dealt with in paragraph 48 of Mr Worsley's first witness statement. The total sum in question is £26,337. It is alleged that GML/Mr Gould failed to account to the Company in respect of these monies.

173. GML's bank statements do, in fact, show a number of the sums in question to have been received into GML's bank account. In paragraph 49 of the Defence, it is pleaded that Mr Gould is of the belief that the payments in question were made to GML in respect of vehicles collected by customers from the Buxton premises. It is pleaded that Mr Gould was aware that the Company was owed sums by GML in respect thereof, that Mr Gould had a conversation with Ms Darlington relating thereto and the question of contra settlement, and that he was expecting, but did not receive an invoice in relation thereto. Mr Gould verifies these allegations in paragraph 51 of his trial witness statement. Ms Darlington's witness statement does not deal with the alleged conversation, although it was not specifically put to her on behalf of Mr Gould in cross examination. In the circumstances, on balance, I do not consider that I should reject Mr Gould's explanation. One can see the logic in the invoices in question being paid in Buxton by the customer picking up the relevant vehicle, and there being an intention at least that the sums in question should be accounted for in due course.

Diversion of the Company's funds to Mr Gould personally

Cash payments

174. As pleaded in paragraph 50 of the Points of Claim, the allegation is that cash payments received by the Company in the sum of £59,725 remain unaccounted for on the basis that they were not deposited in the Company's bank account. It is pleaded that Mr Worsley *"reasonably apprehends"* that Mr Gould has personally retained these sums. The only particulars provided under paragraph 50 are that: *"The Company's staff have orally confirmed to Mr Worsley that all and any cash payments made by customers were handed to Mr Gould"*.

175. In paragraph 53 of the Points of Defence, the point is taken that no proper particulars are provided in respect of the cash payments that are alleged to have been unaccounted for. It is alleged that Mr Gould has sought particulars, but that they have not been provided. Paragraph 53 of the Points of Defence goes on to plead that whilst Mr Gould was occasionally handed cash by staff members to give to *"the Accounts team"*, more often than not staff would take cash themselves directly to *"the Accounts team"*.

176. In her in her Skeleton Argument, Ms Tythcott refers to these cash payments of £59,725 as having been considered by Mr Lacey in paragraph 3.44 of his report. Paragraph 3.44 of Mr Lacey's report provides particulars as to how the sum of £59,725 is arrived at by reference to specific invoices. He says that he has traced the invoices, and not found any evidence of payment in respect thereof being made into the Company's bank account. However, as already dealt with above, the difficulty with this is that Mr Lacey's report was not formally in evidence, and, consequently, he did not give evidence at this liability trial in order to be cross examined.

177. A further consideration is that although there is evidence that at least £223,155 was credited to GML's bank account after the Company commenced to trade, it is clear from a cursory consideration of GML's bank statements that it was also making payments out in payment of stock acquired, specifically, it would seem, where the stock had been funded by DFC. Having not been taken to the bank statements during the course of the trial, and there having been no detailed analysis of the debits and credits to GML's bank account, it is difficult for me to draw any conclusions with regard to this £223,155.

178. Consequently, I do not consider this allegation to have been proved on the evidence, save in respect of one discrete payment, namely an invoice dated 9 July 2021 in an amount of £18,779, in respect of the customer *"John Smith Liverpool"*. The allegation in respect of this sum was dealt with in some considerable detail in evidence. Further, Mr Gould was made well aware of the allegation, and has had a fair opportunity to deal with it.

179. On 25 October 2021, Ms Grimshaw emailed Mr Gould's sister, Ms Smith, to enquire about two payments, including the receipt of £18,779 in cash on 9 July 2021 from *"John Smith (Liverpool) as per the sales invoice"*. By an email sent the same day, Ms Smith responded: *"John Liverpool paid the cash here, it was given straight to Ben."* The Company's invoice that Ms Grimshaw was referring to was dated 22 September 2021 and related to a SeaDoo jet ski with VIN number YDV59362C121. The invoice recorded: *"FULL BALANCE PAID IN CASH 09/07/2021"*, referring to the amount of

£18,779. The evidence is to the effect that commission was paid to Ms Smith in relation to this jet ski consistent with a sale as recorded by the invoice.

180. In paragraph 59 of his first witness statement, under the heading *"Molly's commission"*, Mr Gould referred to the fact that one of Mr Worsley's allegations concerned the SeaDoo jet ski with VIN number YDV59362C121. He went on to allege that the customer actually paid for this stock in late 2020/early 2021. He then continued: *"The stock was owned by [GML] and belonged to that company. [The Company] had not even started trading, on any account. Therefore, the sale did not go through [the Company] as there was no overlap (not even on Neil's case) between [the Company] and [GML] at that point. The commission paid to Molly Smith was paid in error, as I have previously explained. This is the reason for which I instructed the accounts team to remove it from her monthly salary."* Mr Gould then exhibited a GML invoice dated 9 December 2020 addressed to *"Mr John S McCormick"* in an amount of £18,779, but the invoice stating the balance to pay was nil on the basis that the price had been settled by three earlier cash deposits totalling £9,000, and a part exchange for the balance of the purchase price. This invoice refers to the same type of jet ski, but it does not identify the VIN number. Mr Gould also exhibited to his first witness statement what purports to be an email from John McCormick confirming the purchase in accordance with this invoice.

181. Ms Smith did not deal with this issue in her witness statement.

182. In cross examination, it was put to Mr Gould that the SeaDoo jet ski with the above VIN number was shown on a stock sheet in respect of the Company's vehicles sent by Mr Gould to Mr Worsley on 9 July 2021. It was put to him that he was thereby saying that this was a vehicle that belonged to the Company at that time. Unpersuasively in my judgment, Mr Gould sought to deny that that was the case. When shown documentation relating to Ms Smith's claim for commission from the Company in respect of the sale of this jet ski, he sought to suggest that Ms Smith should not have sought to claim commission in respect of the sale of this jet ski, and that that is why he had intervened to direct that it should not be paid.

183. There is evidence that GML had had a number of prior dealings with *"John Liverpool"*, and I do not accept that the documentation produced in relation to an alleged to a sale in December 2020 related to the SeaDoo jet ski with VIN number YDV59362C121. No cogent explanation has been provided as to why the Company produced an invoice in respect of the sale thereof recording receipt of the purchase price on 9 July 2021 if, in fact, a sale did not take place as recorded by the invoice. There is contemporaneous evidence from Ms Smith's email of 25 October 2021 that the £18,779 cash paid was, on the face of the invoice on 9 July 2021, paid to Mr Gould. I consider that I am bound to conclude on the evidence that Mr Gould received this sum without accounting to the Company for the same.

184. I consider that in acting as he did, Mr Gould acted in breach of his statutory fiduciary duties under s. 171(2) CA 2006 (failure to exercise powers for proper purpose), and s 175 CA 2006 (failing to avoid a situation in which his own interests conflicted with those of the Company).

Expenses

185. In paragraph 51 of the Points of Claim, it is alleged that in breach of his agreement with Mr Worsley, and without Mr Worsley's knowledge or consent, Mr Gould continued to take personal drawings and expenses from the Company. It is then particularised that Mr Gould took drawings of £25,403.49 for the period May 2021 to 2 November 2021 inclusive, and personal expenses in the sum of £9511.25 in four separate payments between the period 28 September 2021 and 12 November 2021.

186. In paragraph 41 of her Skeleton Argument, Ms Tythcott identified that Mr Lacey has calculated this element of the claim as: *"unjustified management charges credited to Mr Gould's director's loan account (DLA) in [the Company] in the sum of £56,717 and unauthorised expenses claims of £2,161.96 also credited to his DLA in [the Company] (see paragraphs 3.53 to 3.59 of Mr Lacey's report."*

187. In paragraph 54 of his Points of Defence, Mr Gould pleads that, without particulars, he cannot respond to the allegation concerning drawings. In respect of expenses, he puts Mr Worsley to strict proof, but goes on to say, in essence, that all he has sought to do is to recover legitimate expenses.

188. For the reasons that I have already identified, I do not consider that it would be appropriate for me to place any reliance upon the analysis contained in Mr Lacey's report as to drawings and expenses. Further, given the lack of particularity in relation to the amounts in question, in the absence of documentary evidence that supports a particularised case, I am unable to conclude that this allegation is made out.

189. I would further add that, as explained above, I consider that the agreement or understanding concluded between Mr Gould and Mr Worsley was somewhat more nuanced than Mr Worsley suggests, in particular as to how liabilities of GML might be dealt with. This provides an additional difficulty in finding that Mr Gould has sought to claim for matters that he is not entitled to.

190. A further consideration is that one is not concerned here with sums that Mr Gould has actually received, but rather with credits to a loan account that can either be accepted or rejected by the liquidator of the Company in due course.

Conclusion in respect of allegations against Mr Gould

191. I have found certain of the allegations of breach on the part of Mr Gould of the agreement or understanding between himself and Mr Worsley, and of breach of statutory fiduciary duty, made out but to a somewhat more limited extent than as claimed by Mr Worsley. I summarise my findings in the final section of this judgment below where I consider the consequence of these findings against Mr Gould so far as the further conduct of the present proceedings is concerned.

Mrs Gould

Allegations

192. Mrs Gould was neither a shareholder in, nor director of the Company. However, in paragraph 53 of the Points of Claim, Mr Worsley alleges that Mrs Gould dishonestly

assisted Mr Gould to breach his statutory fiduciary duties, and that Mrs Gould has received payments that were properly due to the Company into a joint bank account held with Mr Gould. By way of particulars, four payments are referred to, but only two were relied upon at trial, namely a payment on 21 May 2021 by Aldmore Bank Plc ("**Aldmore**") of the sum of £43,500, and the payment on 27 September 2021 by Castle Motors of the sum of £65,000.

193. So far as this latter allegation is concerned, although pleaded in somewhat simple terms, the case as advanced on the evidence at trial was that these two sums represented, respectively, the sale of a Dodge Ram motor vehicle and a Mercedes motor vehicle. An invoice has been produced dated 17 May 2021 from GML to Aldermore in an amount of £43,500, referring also to ARH Group Ltd for delivery purposes, suggesting that Aldermore was funding the purchase for the latter. Mr Worsley's case is that the two vehicles belonged to GML and that, under the terms of the agreement or understanding between himself and Mr Gould, ought to have been transferred to the Company. Instead, the vehicles were sold, and the invoice produced in respect of the Dodge Ram shows the purchase price to have been payable into Mr and Mrs Gould's joint bank account. Further, Mr and Mrs Gould's personal bank statements show the purchase price of both of the vehicles being paid into their joint bank account. On this basis, it is said that Mrs Gould has received into the joint account (in which she had an interest) proceeds of monies properly due to the Company.

194. In response to this allegation, it is the case of both Mr and Mrs Gould that the Dodge Ram and the Mercedes belong to Mr Gould, and that he was entitled to sell the same, and that there was no obligation for it to be transferred to the Company. Further, it is Mrs Gould's case that, in any event, she genuinely believed that the vehicles belong to Mr Gould, that he was entitled to sell the same, and that to the extent that the proceeds of sale were received into the joint account, she had no knowledge of any claim thereupon by the Company.

195. In paragraph 54 of the Points of Claim, it is further alleged that in permitting stock owned by the Company to be sold by GML and in allowing or permitting the retaining of the proceeds of sale thereof in either GML's bank account, or by permitting the same to be transferred to and retained in the joint bank account held with Mr Gould or her own personal bank account, Mrs Gould assisted Mr Gould in acting in breach of his fiduciary duties and dishonestly assisted Mr Gould to retain trust property, namely money and stock properly belonging to the Company. It is alleged that Mrs Gould did so either in the full knowledge of what Mr Gould was doing, or, in the alternative, by turning a blind eye to his activities.

196. Mr Worsley alleges that he only subsequently became aware that Mrs Gould owned 50% of the share capital of GML sometime after his agreement or understanding with Mr Gould regarding the incorporation of the Company, and that this was not disclosed at that time. Mr Worsley alleges that Mrs Gould knew about and was fully aware of Mr Gould's discussions with Mr Worsley and the terms of the agreement or understanding relating to the transfer of the business of GML to the Company. This is said to be the case because Mrs Gould was party to discussions with Mr Gould and Mr Worsley in relation to the Company's marketing strategy and branding. Further, it is alleged that Mrs Gould participated in strategic planning discussions with Mr Gould and Mr Worsley, and assisted Mr Gould with GML's social media posts, as well as witnessing Mr Gould's signature on the DFC Cross-Guarantee.

197. It is further alleged that Mrs Gould was fully involved in the decision to incorporate the Company and knew that it was agreed that the trade and assets of GML were to be transferred to the Company. It is said that Mrs Gould at least impliedly consented to this transfer by reason of the fact that she was fully aware of Mr Gould's intention to transfer GML's trade and assets, did not object to that decision and provided direction to Mr Gould and Mr Worsley in respect of the marketing and advertising campaigns carried out by the Company which expressly referred to the transfer of GML's trade and assets to the Company.

198. So far as witnessing Mr Gould's signature on the DFC Cross-Guarantee is concerned, reliance is placed by Mr Worsley on the fact that the documentation appears to show that Mrs Gould witnessed the signature electronically from IP address 217.155.52.20, an IP address said to be associated with the Company. It is said that this shows that Mrs Gould must have attended at the Showroom for that purpose, having said in evidence that her only attendance at the Showroom was for the purposes of an opening party.

199. Other points relied upon by Mr Worsley so far as Mrs Gould's credibility is concerned, are the following:

    i) Ms Wathall said in her witness statement, which was not challenged under cross examination, that she had known Mrs Gould for many years working together with her at the University of Derby in the marketing department, and that, at some point, Mrs Gould had explained that Mr Gould and her father had fallen out over running a business together, and that Mrs Gould's father had accused Mr Gould of stealing money, in consequence of which Mrs Gould had had to buy her father out of the business. Under cross examination, Mrs Gould was insistent that this was not true and a *"complete exaggeration"*. Further, it was Mrs Gould's evidence that her father had gifted to her her 50% shareholding in GML.

    ii) In her witness statement, Mrs Gould refers to having attended two Zoom meetings of approximately 30-45 minutes each *"to listen to what was being discussed"*. However, she accepted under cross examination that she had produced a marketing strategy document for the Company dealing with the absorption of the business of GML into the Company and had also assisted with the transfer of GML's social media accounts to the Company.

    iii) Further, Mrs Gould said under cross examination that Mr Gould had said to her that GML would continue to trade until April 2022 so that it could fulfil its obligations under the lease of the Buxton premises in respect of which there was, as I understand it, a family liability. This is said to be inconsistent with what Mrs Gould actually knew about the arrangements between Mr Gould and Mr Worsley concerning the transfer of the business of GML to the Company, as reflected in the marketing documentation that she had produced.

Mrs Gould's case

200. It is Mrs Gould's case in respect of the allegation that she assisted Mr Gould to breach his duties as a director of the Company, and knowingly or fraudulently received monies belonging to the Company, that she had no real involvement in the business of GML, which was very much Mr Gould's business. She explained that she is not somebody

who is motivated by money, and with working full-time in a marketing role at the University of Derby, as well as family responsibilities with young children, she simply did not have the time, or indeed inclination, to involve herself in the affairs of GML, or the detail of any discussions that Mr Gould might have had with Mr Worsley. She says that her role in producing a marketing strategy essentially involved using her expertise in marketing to produce, one late-night, a marketing strategy for the benefit of the Company.

201. So far as witnessing Mr Gould's signature on the DFC Cross-Guarantee is concerned, Mrs Gould explained that she had signed, or witnessed, a number of formal documents for Mr Gould over the years and had witnessed Mr Gould's signature on the DFC Cross-Guarantee in order to assist him, without being too concerned about what it was all about. She remained adamant that she had only visited the Company's premises on one occasion, and Mr Plunkett, on her behalf, pointed out that there was no evidence before the court dealing with the significance of the IP address, and how what appeared to be the reference to the Company's IP address came to feature on the relevant electronic document. In the circumstances, it was submitted on behalf of Mrs Gould that nothing was to be read into it.

Conclusions regarding Mrs Gould

202. Mrs Gould came across to me as a good and persuasive witness who knew her own mind. I am mindful of the warning in *Re Mumtaz Properties Ltd*, per Arden LJ at [12] and [14], referred to in paragraph 26 above, as to the need for a judge to be careful in attaching too much weight to demeanour of a witness. However, I am not satisfied that there is anything in the documents, or the various points relied upon by Mr Worsley in respect of Mrs Gould's credibility that fundamentally undermines her evidence that she had no real role in the running of GML or the Company, and that consistent with not being a director of GML, she left it to Mr Gould to run that company, and to give effect to such arrangements as he might have come to with Mr Worsley so far as the Company is concerned.

203. I gain little if any assistance from the reference to what appears to be the Company's IP address on the electronic document recording Mrs Gould having witnessed Mr Gould's signature on the DFC Cross-Guarantee. One would, as I see it, need to know a lot more about the process for the production of this electronic document, for example as to how it might have been communicated by DFC to Mr Gould, before being able to place any significance on the reference to the IP address. I therefore do not consider that it undermines Mrs Gould's evidence with regard to her visiting the Showroom.

204. As to Ms Wathall, she and Mrs Gould clearly fell out in a big way after Mrs Gould had encouraged her to join the Company in a marketing role and as a result of the subsequent failure of the Company. At the time of Ms Wathall losing her job, Mr Worsley was effectively accusing Mr Gould of stealing from the Company. It may be that Mrs Gould did mention to Ms Wathall a past disagreement between Mr Gould and Mrs Gould's father with regard to the running of GML, but it is quite possible that this had become exaggerated in Ms Wathall's mind given the events that subsequently occurred and with the passage of time. Notwithstanding that Ms Wathall was not cross-examined, I am not satisfied that her evidence significantly undermines that of Mrs Gould.

205. It may be that Mrs Gould did play down her involvement in assisting the Company with its marketing strategy by what she said in her witness statement with regard to her attendance on the two Zoom meetings. However, she did not seek to completely deny her involvement in her witness statement, and to my mind, in giving evidence, credibly explained by reference to the relevant documentation setting out the marketing strategy that her role really was limited to a number of discussions with Mr Worsley and Mr Gould with regard to marketing and little if anything more than that, and to then having spent a late night putting together a marketing strategy. This does not, in my judgment, demonstrate Mrs Gould having any further or wider role. Likewise, any assistance that she might have provided with regard to the transfer of GML's social media accounts when she was applying her marketing expertise.

206. So far as Mrs Gould's evidence under cross examination that Mr Gould told her that GML would continue to trade until April 2022, when that was not consistent with the documentation including the marketing strategy that she had worked upon, I consider that there is scope for confusion between having been told that GML would continue to trade, and the continued use of the premises in Buxton until April 2022 for the purposes of the Company (incorporating the business of GML). This, as I see it, raises a similar point to that addressed in paragraph 85(ii) above concerning Mrs Wathall's evidence that Mrs Gould told her that Mr Gould was closing the DORC business of GML and moving his existing franchises to the new business. I note that in paragraph 9 of her witness statement, Mrs Gould's focus is very much more upon assurances being given in respect of the rent being met in relation to the lease of the Buxton premises. Of course, it was always going to be the case that the Company would cover the rent until April 2022 given the use that it was going to make of the Buxton premises as referred to above.

207. Further, in respect of the statutory fiduciary duties that I have found above that Mr Gould breached, I can find no credible evidence that Mrs Gould assisted Mr Gould in respect thereof as alleged, fraudulently or otherwise. The breaches essentially relate to discrete findings in relation to particular items of stock or cash, and the more general findings with regard to the extent to which Mr Gould caused GML to continue to carry on business after the Company had commenced to trade. So far as the latter is concerned, as referred to above, I consider that the agreement or understanding between Mr Worsley and Mr Gould was somewhat more nuanced than Mr Worsley contends, and therefore that any continued trading by GML that Mrs Gould might have been aware of was not as black-and-white as Mr Worsley's case might suggest. In any event, there is no real evidence as the extent to which, if at all, Mrs Gould knew and appreciated that trading activity was being carried out by GML as opposed to the Company.

208. In the circumstances, I do not consider the allegation that Mrs Gould assisted Mr Gould, fraudulently or otherwise, to act in breach of his statutory fiduciary duties, or in breach of the agreement or understanding with Mr Worsley is made out.

209. So far as the proceeds of sale of the Dodge Ram and the Mercedes are concerned, I accept Mrs Gould's evidence that she believed that these vehicles belonged to Mr Gould personally, and therefore were not assets of GML which ought to have been transferred to the Company. In any event, I am not satisfied that Mrs Gould knew sufficient about the agreement or understanding between Mr Worsley and Mr Gould to know that the effect thereof might be to encompass these vehicles even if they did belong to GML.

210. Further, on balance, I consider that the evidence falls short of demonstrating that these vehicles belonged to GML, as opposed to Mr Gould personally. I appreciate that Mr Gould has provided no disclosure in respect of these vehicles, which might have demonstrated his ownership, although I understand this is likely to be because Mr Gould and Mrs Gould represented themselves at the time that disclosure took place in the present case and disclosed very little documentation without Mr Worsley pressing the issue. For what it is worth, the accounts of GML as at 31 March 2020, being its last accounts, are not consistent with GML owning vehicles with a value as high as the value of these vehicles (as reflected by the purchase price thereof). The fact that Aldermore was invoiced by GML was explained on the basis that Aldermore required a formal invoice from a business. A further consideration is, perhaps, that even if the vehicles did belong to GML, the obligation was to transfer them to the Company, in which event Mr Gould's director's loan account ought to have been credited accordingly.

211. The circumstances in which a Court might grant relief pursuant to s. 994 CA 2006 against a party who is not a director or shareholder of the subject company are necessarily limited. One can perhaps see that where some such third party has so interfered with the management of the company that it can be said that its affairs have been conducted in a manner unfairly prejudicial to the petitioner as a result of that conduct, then it might be open to the court to grant relief against that party. However, I consider that the circumstances of the present case fall well short of being such a case, and that it cannot properly be said, on the evidence, that Mrs Gould has significantly contributed to the affairs of the Company being conducted in a manner unfairly prejudicial to Mr Worsley.

212. Consequently, I consider that the petition as against Mrs Gould must fail, and that the petition should be dismissed as against her.

Remedy against Mr Gould?

213. Although the case against Mrs Gould will be dismissed, in the light of my findings against Mr Gould, it will be necessary for me to consider what remedy (if any) ought to be granted against Mr Gould. Although this is, as discussed above, to be considered at a subsequent trial based upon my findings at this trial, it may be helpful to rehearse some of the issues that are likely to arise, and for me to address one line of argument raised by Mr Plunkett on behalf of Mr Gould, namely that Mr Worsley's own conduct disentitles him to relief.

214. In summary, I have found the following allegations said to amount to unfairly prejudicial conduct on the part of Mr Gould to have been established, namely:

    i) I have found the *"fraudulent activity"* allegations made out to the extent that I have found that Mr Gould acted in breach of his statutory fiduciary duties as a director of the Company under ss.171 and 172 CA 2006 in causing false documentation to be prepared in order to misrepresent to DFC when payment has been received on the sale of stock funded by the latter. However, I have expressed the view that I consider it unlikely that this allegation, taken on its own, would be sufficient to warrant relief pursuant to s. 994 given the absence of evidence that it actually caused any harm. (See paragraphs 112-126 above).

ii) So far as the conflict of interest and diversion of corporate opportunities allegations are concerned, I have found that Mr Gould caused GML to continue to carry on business after the Company had commenced to carry on business in May 2021 to an extent exceeding the very limited trading anticipated by the agreement or understanding between himself and Mr Worsley in furtherance of his own interests, thereby acting contrary to that agreement or understanding, and in breach of his statutory fiduciary duties as a director of the Company pursuant s. 175 CA 2006. Further, I found that Mr Gould acted in breach of his statutory fiduciary duties as a director of the Company pursuant to ss. 171, 172 and 175 CA 2006 in causing GML to transfer the VW Van to the Company with an inflated value (to be credited to his loan account), and in causing the Company to enter into the DFC Cross-Guarantee. However, on the evidence presently before the Court, I was unable to conclude, as contended by Mr Worsley, that the effect of these matters was to cause the failure of the Company. In addition, on the evidence before the Court, it is impossible to say what the effect thereof was on the value of Mr Worsley's shareholding. These are likely to be important considerations on the question as to whether it is appropriate to grant relief pursuant to s. 994-996 CA 2006 and, if so, what relief. (See paragraphs 127-155 above).

iii) So far as diversion of the Company's assets allegation is concerned, I have found that Mr Gould did, in respect of some (namely Items 1, 7, 8, 14-19), but not all, of the 20 items identified in Ms Tythcott's Closing Note, cause GML to sell stock paid for by the Company, or which is to be treated as having been paid for by the Company, without accounting to the Company for the proceeds. Further, I found that in doing so, Mr Gould acted in breach of his statutory fiduciary duties as a director of the Company under ss. 171 and 175 CA 2006. Again, the evidence before me does not assist as to the overall effect of these breaches on the ability of the Company to carry on business, or on the value of Mr Worsley's shares. These are, again, relevant considerations on the question as to whether it is appropriate to grant relief pursuant to s. 994 CA 2006 and, if so, what relief. On the other hand, I consider that Mr Worsley has failed to prove his case regarding the receipt into GML's bank account of monies received from the sale of items invoiced by the Company. (See paragraphs 156-173 above).

iv) So far as the alleged diversion of the Company's funds to Mr Gould in person is concerned, I consider Mr Worsley's case to be established in respect of the £18,779 paid to *"John Liverpool"*, but not otherwise. To this extent, I have found that Mr Gould acted in breach of his statutory fiduciary duties under ss. 171-175 CA 2006 in failing to account for this sum of £18,779. However, again, the evidence before me does not assist as to the overall effect of these breaches on the ability of the Company to carry on business, or the value of Mr Worsley's shares. On the other hand, I do not consider the case in respect of personal drawings and expenses to be made out on the evidence. (See paragraphs 174-191 above).

215. S. 994 CA 2006 requires a petitioner to establish that:

i) The acts or omissions of which he complains consists of the management of the affairs of the company;

ii) The conduct of those affairs has caused prejudice to his interests as a member of the company; and

iii) The prejudice is unfair.

See e.g., *Re Neath Rugby Ltd, Hawkes v Cuddy (No 2)* [2008] BCC 390 at [202], per Lewison J.

216. As to the relevant principles so far as the application of s 994 CA 2006 is concerned, Ms Tythcott refers to the comprehensive analysis thereof set out in the judgment of David Richards J in *Re Coroin Ltd* [2013] 2 BCLC 583 at [624]-[633]. At [633], David Richards J said this:

> "633. To similar effect is the judgment of Hoffmann LJ in *In re Saul D Harrison & Sons Plc* [[1995] 1 B.C.L.C. 14],where he makes clear that the starting point in any case under section 994 is to ask whether the conduct complained of was in accordance with the basis upon which the petitioner agreed that the affairs of the company would be conducted and that, in most cases, this basis is adequately and exhaustively laid down in the articles of association, the material statutory provisions and sometimes in collateral agreements between the shareholders. It is equally well established that it is not every breach of the articles or shareholders agreement which will constitute unfair prejudice."

217. So far as the fact of the Company being in liquidation is concerned, Ms Tythcott submits that this is no bar to the grant of relief pursuant to s 994 CA 2006. She refers to the helpful summary of the relevant principles by ICCJ Greenwood in the recent case of *Seneschall v Trisant Food Limited (In Liquidation)* [2023] EWHC 1029 (Ch) at [141] where ICCJ Greenwood said this:

> "141. Arising out of the prejudice requirement, was the Respondents' argument that the unfair prejudice claim failed *in limine* because the Company was at all times insolvent and valueless (subject to it being shown that Mr Seneschall's shares would have had a value but for the Respondents' wrongdoing, which was also denied): *Re Tobian Properties Ltd, Maidment v Attwood* [2013] 2 BCLC 567 at [11]. Whilst in principle, broadly, I accept that legal submission, I do so subject to the following:
>
> i) in a given case, the outcome may depend on the character of the petitioner's (protected) interests as a member, and the nature of the prejudice suffered; as explained above, those interests may go beyond his strictly defined interests as a shareholder, as in *Gamlestaden Fastigeheter*, where the petitioner's interests as a creditor were treated as being, in principle, capable of comprising interests as a member; such interests might conceivably be harmed even where the company itself is insolvent, and its shares valueless.
>
> ii) in any event, I agree with Mr Northall, that (i) the court has a discretion, if it orders a share purchase, to order a date of valuation which precedes insolvency (assuming that the Company was not insolvent and valueless at all times) if that best remedies the unfair prejudice: see for example *Re*

> *Abbington Hotel Ltd* [2012] 1 BCLC 410 at [123]; and (ii) further, that in the present case, it would be unsafe to find or assume, at this stage of the litigation, that the Company was at all times, for all purposes valueless, given that Market Fresh invested in it some £1.8 million (paid over a significant period) in return for its shareholding.

218. The reference to *Gamlestaden Fastigeheter* is a reference to the decision of the Privy Council in *Gamlestaden Fastigeheter AB v Baltic Partners Limited and others* [2008] 1 BCLC 468. In this case, the Privy Council (Lord Scott of Foscote) at [36]-[37] rejected the suggestion that relief cannot be granted under s. 994 CA 2006 if the relief sought cannot be shown to be of some benefit to the petitioning shareholder in his capacity as a member. The shareholder's interests capable of protection were held to extend to the shareholder's interests as creditor or provider of loan capital to the company.

219. I have not heard argument on the above authorities or indeed any of the other authorities referred to in this section of my judgment, and I merely highlight that Mr Worsley seeks to argue that his interests as a member have been prejudiced because his shareholding would have had a value but for the conduct on the part of Mr Gould complained of and, further or in the alternative, because his position as a member who has lent money to the Company has been prejudiced relying *Gamlestaden Fastigeheter*. This ought to serve to inform, in part at least, the scope of the enquiry at the further trial as to remedy (if any).

220. Mr Plunkett, on behalf of Mr Gould, sets out an argument in his Skeleton Argument to the effect that even if the misconduct on the part of Mr Gould that is alleged is established, this is not a proper case to seek relief pursuant to ss. 994-996 CA 2006 because what is complained of is, in essence, misconduct rather than mismanagement which, on proper analysis of the authorities, ought to be pursued by way of a derivative claim on behalf of the company, if the latter solvent, alternatively by the relevant office holder if the company is in liquidation or some other insolvency process. Thus, he submits that any claim, certainly for compensation to be paid to the Company, ought to be left to the liquidator of the Company, and not pursued by Mr Worsley.

221. As there has been no argument in relation to the relevant authorities at this stage, I only briefly mentioned that the authorities relied upon by Mr Plunkett are *Re Chime Corp Ltd* [2004] HKCFA 73, per Lord Scott of Foscote at [47]-[48] and [61]-[62], and *Waddington Ltd v Thomas* [2009] 2 BCLC 82, per Lord Millett at [77]. Further, Mr Plunkett, in his Skeleton Argument, referred to the more recent decision of the Court of Appeal in *Taylor Goodchild v Taylor* [2022] BCC 1155, and in particular what was said by Newey LJ at [37]-[47], and by Sir Nigel Davis at [51]-[52]. In short, it is submitted that the authorities are against the propriety of seeking an order in favour of the company on an unfair prejudice conduct petition where the essence of the complaint is the misconduct of a director, and the person seeking the relief is not the company itself. It is Mr Plunkett's case that this argument has particular force if the company is in liquidation or other insolvency process, in particular if one is concerned with misconduct rather than anything else.

222. It is right for me to observe that following the circulation of the draft of this judgment, the Court of Appeal handed down judgment in *Ntzegkoutanis v Kimionis* [2023] EWCA Civ 1480. In the lead judgment, Newey LJ reviewed the *Re Chime Corp Ltd* (supra)

line of authorities, summarising at [55] what he considered the relevant legal principles to be. He ultimately concluded at [55(vi)] that he did not consider that what the Judge below had called *"the Chime approach"* represents the law in this jurisdiction. In particular, he did not think that it was only in a *"rare and exceptional case"* that the Court *"will permit to proceed by way of an unfair prejudice petition when it would otherwise be brought by way of a derivative claim"*. Subject to one point of difference identified by Snowden LJ, the other members of the Court agreed with Newey LJ's approach. It is likely to be necessary to look at this case in some detail at the next trial.

223. Finally, I deal with Mr Plunkett's argument that Mr Worsley's own conduct was such as to disentitle him to relief. This was only touched upon briefly in paragraph 89 of Mr Plunkett's Skeleton Argument, where he refers to paragraphs 54-59 (I believe that this should in fact be a reference to paragraphs 57-59) of Mr Gould's Points of Defence, and the arguments were not developed in submissions.

224. The matters identified in paragraph 58 of the Points of Defence can be summarised as follows:

i) Mr Worsley excluding Mr Gould from the management of the Company by, amongst other things, almost single-handedly setting its strategies and goals;

ii) Mr Worsley taking decisions unilaterally, and notwithstanding opposition from Mr Gould, including incurring additional expenditure that the Company could not afford;

iii) From around 19 November 2021, Mr Gould attempting to exclude Mr Gould as a director altogether by sending him a letter purporting to suspend him with immediate effect, excluding him from the Company's premises, and forbidding him from communicating with employees, contractors or customers;

iv) From around November 2021, blocking Mr Gould from accessing the security and CCTV systems of the Company;

v) Throughout the existence of the Company, taking control of the Company's finances and failing to provide proper financial information to Mr Gould;

vi) Failing to permit Mr Gould *"direct"* access to the Company's bank account and other financial information;

vii) Falsely signing and certifying the Company's filed accounts without reference to Mr Gould on or about 22 October 2021;

viii) Causing a charge dated 15 May 2020 to be registered against the Company by NatWest without reference to Mr Gould;

ix) Forging Mr Gould's signature on the guarantee relating to the Close CIBILS Loan; and

x) Forging Mr Gould's signature or causing Mr Gould's signature to be forged in respect of the loan relating to the Company's printer.

225. I have already dealt with the question of Mr Gould's signature on the guarantee relating to the CBILS loan. The allegation concerning the NatWest charge fell away during the course of cross examination and was ultimately not pursued. I could find nothing in the evidence concerning the allegation that Mr Gould's signature was forged on documentation relating to a printer. So far as access to the Company's bank account is concerned, it is unclear what Mr Gould means by *"direct"* access thereto. As referred to in paragraph 97(4)(a) above, I prefer the evidence of Ms Darlington on the question as to whether Mr Gould had access to the Company's bank account.

226. As to the other matters relied upon, I consider that they essentially reflect the fact that the division of responsibilities between Mr Worsley and Mr Gould was agreed to be that Mr Worsley would be responsible for financial matters, given his experience in business and as an accountant, and that Mr Gould's responsibility would be for the day-to-day running of the business of the Company. Hence, Mr Worsley taking responsibility for making financial decisions. I consider it quite likely that Mr Worsley did, for example, sign off on the Company's accounts without reference to Mr Gould, but in the circumstances, I do not consider this to be a matter that ought to disentitle Mr Worsley to relief. So far as exclusion proper is concerned, this came at a time that Mr Worsley had developed concerns as to Mr Gould's conduct, in respect of which Mr Worsley's case has, to a significant degree, been made out. In these circumstances, I do not consider that this exclusion, at the stage that it occurred, is something that would disentitle Mr Worsley to relief.

227. The key question is whether, notwithstanding any conduct on the part of the petitioner himself, it can properly be said, looking at the matter objectively, that the petitioner has been unfairly prejudiced– see e.g. *Re London School of Electronics Ltd* [1985] BCLC 273 at 279e-f per Nourse J. In light of the above considerations, I am not satisfied that there is sufficient in Mr Worsley's own conduct to lead to the conclusion that if a case of unfair prejudice with an entitlement to relief is otherwise made out by Mr Worsley, his own conduct ought to disentitle him to that relief.

228. However, as identified above, there are other considerations that will come into play at the further trial to consider and determine whether, on the basis of the case as established, Mr Worsley is entitled to relief pursuant to ss. 994-996 CA 2006 and, if so, to what relief.

Overall Conclusion

229. For the reasons set out above, I do not consider the case against Mrs Gould to be made out, and I consider that the petition should be dismissed as against her.

230. So far as Mr Gould is concerned, I consider that a number of the allegations said to amount to unfairly prejudicial conduct on his part have been established on the evidence. It will be a matter for a subsequent trial on the question as to remedy (if any) to determine whether the allegations that have been made are such as to warrant the making of an order pursuant to ss. 994-996 CA 2006 and, if so, what order ought to be made, such as ordering that Mr Gould purchase Mr Worsley's shares at a price reflecting the value that they would have had but for Mr Gould's conduct, or ordering Mr Gould pay compensation either to the Company or to Mr Worsley.

231. I would expect the Court at the further trial to be able, on the evidence before it, to deal with issues such as whether Mr Gould's conduct did cause the Company to fail, whether Mr Gould's conduct had any material effect on the value of Mr Worsley's shares, and if the Court grants relief, to deal with issues such as the value that Mr Worsley's shares would have had but for Mr Gould's conduct, and/or the amount of equitable or other compensation (if any) that Mr Gould ought to be ordered to pay.

232. No attendance is required at the hand down of this judgment.

233. If required, a consequentials hearing should take place within 42 days (allowing for the Christmas holiday break). The parties should seek to agree prior to hand down an order dealing with the dismissal of the petition against Mrs Gould, further directions in respect of the trial as to remedy (if any) against Mr Gould, and other consequential matters. If an order cannot be agreed, then the parties should each file a note on any disputed matters and a draft order in order that the court can consider whether a consequentials hearing is required, or whether outstanding issues can be dealt with on paper.

234. If it is indicated prior to hand down that a party wishes to seek permission to appeal, then I will adjourn the question as to whether I should grant permission to appeal to deal with the same either on paper or at a consequentials hearing, and I will extend the time for lodging an appellant's notice with the Court of Appeal to 21 days after I have determine this permission question.