Neutral Citation Number: [2020] EWHC 2536 (Ch)

Case No: BL-2018-002028

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 September 2020

Before :

Tom Leech QC (sitting as a Judge of the Chancery Division)

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Between :

BARROWFEN PROPERTIES **Claimant**

-- and –

(1) GIRISH DAHYABHAI PATEL
(2) STEVENS & BOLTON LLP
(3) BARROWFEN PROPERTIES II LIMITED **Defendants**

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Ms Lexa Hilliard QC and **Mr Tim Matthewson** (instructed by **Withers LLP**) for the **Claimant**
Ms Angharad Start (instructed by **Reynolds Porter Chamberlain LLP**) for the **Second Defendant**

Hearing dates: 15 and 16 September 2020

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APPROVED JUDGMENT

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment is handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30 am on 24th September 2020.

Tom Leech QC :

Introduction

1. By Application Notice dated 5 August 2020 the Claimant, Barrowfen Properties Ltd ("**Barrowfen**"), applied to challenge the Defendants' right to withhold disclosure of documents containing legal advice given by the Second Defendant, Stevens & Bolton LLP ("**S&B**"), to the First Defendant, Mr Girish Patel, and the Third Defendant, Barrowfen Properties II Limited ("**Barrowfen II"**). For convenience and ease of reference I will refer to Mr Patel as "**Girish**" and to other members of his family by their given names. By doing so I mean no disrespect either to him or to them.

2. Barrowfen's challenge to the Defendants' right to withhold disclosure of documents attracting legal professional privilege ("**LPP**") was made under Practice Direction 51U ("**PD51U**"), paragraph 14.2 on two grounds: first, under the "iniquity exception" and, secondly, on the basis that the documents were created by S&B in the course of a joint retainer from Girish and Barrowfen and that neither party was entitled to assert LPP against the other. Barrowfen also challenged the redactions made by the Defendants to jointly privileged documents under PD51U, paragraph 16.2.

3. It is well-established that a client may not continue to assert LPP in relation to documents which were brought into existence for the purpose of furthering a criminal or fraudulent purpose. It is often called the "iniquity exception": see, e.g., *Barclays Bank plc v Eustice* [1995] 1 WLR 1238 at 1248B to 1249D (where Schiemann LJ adopted the word "iniquity" from Bingham LJ's judgment in *Ventouris v Mountain* [1991] 1 WLR 607 at 611). It is sometimes called the "fraud exception": see *Kuwait Airways Corpn v Iraqi Airways Co (No 6)* [2005] 1 WLR 2734 at [14] (Longmore LJ). I will have to examine briefly the limits of the principle but on this application the parties used the description the "**iniquity exception**" and I am content to adopt it. The parties also described this part of Barrowfen's disclosure application as the "**Iniquity Application**" and I will also use that expression.

4. In the Application Notice Barrowfen also applied for orders that the Defendants undertake a further search and serve revised Disclosure Certificates and Extended Disclosure Lists. In Girish's case this order was intended to extend not only to documents which he was required to disclose on the Iniquity Application but also his disclosure obligations more generally. Barrowfen also sought an order requiring Girish to file and serve a witness statement setting out the scope of the searches which he had undertaken under PD51U, paragraph 17.1 and applied for an unless order against him. The parties described this application as the "**Compliance Application**" and I will also use that expression.

5. Finally, by Application Notice dated 7 September 2020 (the "**Part 18 Application**") S&B sought an order requiring Barrowfen to answer a request for further information under CPR Part 18. By the time of the hearing Barrowfen had complied with this request and served a response (and, indeed, a revised response during the hearing). Subject to four points on the contents of the response S&B did not pursue the Part 18 Application.

6. Ms Lexa Hilliard QC and Mr Tim Matthewson appeared for Barrowfen at the remote hearing of the applications and Ms Angharad Start appeared for S&B. Girish did not appear and I turn to the reasons for his non-appearance and the consequences shortly (below). In the course of argument, Ms Hilliard addressed the four outstanding points on S&B's application and it was unnecessary for me to make any order on the Part 18 Application.

7. On Tuesday 15 September 2020 the first day of the hearing took place. Girish did not appear. He had made no application to the Court for an adjournment but I was told that he had provided a letter to the parties showing that he had a hospital appointment for a medical procedure on 14 September 2020. I was also told that he had been on the call at which the hearing had been fixed and that he had not filed any evidence in answer. I was referred to an Application Notice dated 4 September 2020 and to his second and third witness statements dated 4 September 2020 and 8 September 2020.

8. In the event I decided to proceed with the applications under CPR Part 23.11 and I heard the Iniquity Application. At the end of the hearing, I indicated that I was provisionally prepared to make the order and I asked Ms Hilliard to ask Withers LLP ("**Withers**"), Barrowfen's solicitors, to write to Girish (whose evidence was that he had no access to the internet or email) informing him that if he appeared at the resumed hearing on 16 September 2020 I would reconsider the position in the light of any submissions which he might have to make.

9. On Wednesday 16 September 2020 Girish did not appear again. I was informed by Chancery Listing that he had called them by telephone and said that he was unable to attend the remote hearing because he had a fever after his medical procedure on 14 September 2020. Chancery Listing asked him to write to the Court setting out his position or to ring in to the hearing. (I add that Withers had provided him with the telephone number on the previous evening.) But Girish did not contact the Court or attend the hearing or ask for an adjournment.

10. Again, I decided to proceed with the Compliance Application under CPR Part 23.11. I heard the application and delivered a short judgment identifying a number of breaches by Girish of his disclosure obligations. However, in his absence I was not prepared to order that he should provide a witness statement under PD51U, paragraph 17.1 or to make an unless order. I set an extended date for Girish and S&B to serve revised Disclosure Certificates and Extended Disclosure Lists dealing with privileged documents. I also made it clear in my judgment that I expected Girish to comply fully with the existing Extended Disclosure order by that date. In this judgment, therefore, I set out my reasons for granting the Iniquity Application.

Background

11. Girish is one of four brothers. The others are Mr Suresh Patel ("**Suresh**"), Mr Rajnikant Patel ("**Rajnikant**") and Mr Yashwant Patel ("**Yashwant**"). They and Rajnikant's son, Mr Prashant Patel ("**Prashant**"), are businessmen who operate in various jurisdictions, including Malaysia, Singapore and the United

Kingdom. In 1984 Barrowfen was incorporated in England and Wales and acquired its principal asset, commercial premises at 180 to 216 Upper Tooting Road London SW17 7EW (the "**Tooting Property**").

12. The shareholders of Barrowfen had originally included a number of different families. But by 2006 the Patel family had acquired 100% of the shares. From 2006 onwards its share capital of 180,000 ordinary shares were held as follows:

    i) Bedford Development Ltd ("**Bedford**") (a BVI company) held 60,000 shares for Rajnikant's branch of the family and Prashant was a director of Bedford.

    ii) The Mrs PD Patel Discretionary Settlement (the "**Mrs PD Trust**") held 60,000 shares on trust for Girish's children and the trustees were Suresh and Yashwant;

    iii) The Mr DP Patel Discretionary Settlement (the "**Mr DP Trust**") held 60,000 shares on trust for Suresh's children and the trustees were Yashwant and Girish.

13. It was of some importance to appreciate that the trustees of the Mrs PD Trust were Suresh and Yashwant although it was a trust for the benefit of Girish's children and the trustees of the Mr DP Trust were Yashwant and Girish although the beneficiaries were Suresh's children. This was obviously a family policy to ensure oversight of the trusts' investments.

14. On 20 January 1994 the directors of Barrowfen passed a resolution delegating the powers of the board to Girish and from at that time at least he acted as the de facto managing director of Barrowfen. On 26 July 2002 Suresh was appointed to be a director and by 20 December 2004 Girish and Suresh had become the only directors of the company.

15. In 1990 Allied Dunbar Assurance plc ("**Allied Dunbar**") provided a loan to Barrowfen which was secured by a charge over the Tooting Property. In 1998 Zurich Assurance Ltd ("**Zurich**") acquired Allied Dunbar and by October

2015 the amount of the loan outstanding was approximately £850,000. I will refer to the loan made by Allied Dunbar as the "**Loan**" and the charge over the Tooting Property as the "**Charge**".

16. Between 2010 and 2013 relations between the various branches of the family broke down. It is unnecessary for me to give any detail about those disputes except to say that by letter dated 26 November 2013 Suresh wrote to Girish proposing that Prashant should be made a director of Barrowfen to resolve the perceived deadlock.

17. The subsequent events form the subject matter of the present action. But the position now is that Girish is no longer a director of Barrowfen and its current directors allege that in breach of his duties as a director Girish sought to maintain sole personal control over the company by:

    i) improperly removing Bedford from the register of members and denying that Bedford was a shareholder (the "**Bedford Rectification Claim**");

    ii) forging a letter of resignation by Suresh as a director and resisting his attempts to reinstate himself (the "**Suresh Resignation Claim**");

    iii) forging a letter of resignation and resolution by Suresh and Yashwant as trustees of the Mrs PD Trust (the "**Trustee Resignation Claim**");

    iv) improperly writing up Barrowfen's register of members in a manner which allowed him to vote on behalf of both the Mr DP Trust and the Mrs PD Trust at shareholder meetings (the "**Trusts Registration Claim**"); and

    v) designing and implementing a plan to place Barrowfen into administration in order to enable him to purchase the Tooting Property (the "**Administration Claim**").

18. Barrowfen also claims that S&B acted in breach of its fiduciary duties and its common law duty of care in the course of acting for Barrowfen, Girish and Barrowfen II and dishonestly assisted Girish to commit breaches of his

fiduciary duties. Barrowfen also claims damages for deceit and unlawful means conspiracy.

19. The claims against S&B were the subject matter of an application to strike out which was determined by Mr Justice Birss on 14 May 2020: see *Barrowfen Properties Ltd v Patel* [2020] EWHC 1145 (Ch). Mr Justice Birss did not strike out the claims and since his judgment Barrowfen has made a number of amendments to the Particulars of Claim.

The Independent Review

20. On 2 December 2015 S&B ceased to act for Barrowfen. In December 2016 S&B agreed to a review of the documents which they held pursuant to their joint retainer from Girish and Barrowfen by independent counsel, Mr Nik Yeo. By July 2017 he had completed that review although I should state that Withers, who were by now acting on behalf of Barrowfen, agreed to the review without waiving any of Barrowfen's rights to apply to the Court for full disclosure. I was taken to a number of documents which I was told had been disclosed after the independent review. Those documents contained a number of redactions (which were often substantial).

21. In the event, it was not necessary for me to determine whether S&B were entitled to redact individual documents because it was agreed that if I made an order for disclosure on the Iniquity Application and S&B continued to redact any individual documents, they would provide an explanation for the redaction under PD51U, paragraph 16.2. If, therefore, Barrowfen's legal team does not accept that explanation, it will be open to them to apply to Court again for full disclosure.

S&B's Position

22. Before I set out the relevant principles and apply them, I should record S&B's position. In both her Skeleton Argument and her oral submissions Ms Start stated that S&B's position was neutral. She stated that they were under a duty to preserve the privilege of their clients until the Court ordered otherwise. She also made it clear that S&B vigorously defended the claims against them and

were confident that if all of the relevant documents were put before the Court, they would absolve the firm from liability.

23. I accept that it was S&B's duty to assert LPP over documents which were privileged (or arguably privileged) as against Barrowfen and to refuse to produce them until the Court made an order to that effect: see *Addlesee v Dentons Europe LLP* [2020] Ch 243 at [59] and [60] (Lewison LJ). But S&B also asserted that the documents would vindicate them and show that they had a good defence to the claims. This might have provided a real difficulty for the Court if the allegations against Girish had been so closely related to the allegations against S&B that it was impossible to form a view about the strength of the case against Girish without forming a view about the strength of the case against S&B.

24. Again, it is well-established that the iniquity exception applies whether or not the solicitor is aware of the wrongful purpose or is unwittingly used as an instrument of fraud: see *Kuwait Airways Corpn v Iraqi Airways Co (No 6)* (above) at [14] (Longmore LJ) and *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 (Comm) at [99] (Popplewell J). Ms Hilliard submitted, therefore, that it was possible for the Court to determine the Iniquity Application by considering the allegations against Girish alone and ignoring the allegations against S&B. Ms Start made a similar submission.

25. I accepted that submission and I have decided the application without having regard to the claims against S&B. I stress that I formed no view about the strength of any of the allegations against them and the views which I express below must be read in that context. In practice, this meant that Ms Hilliard had to persuade the Court to make an order for disclosure without taking into account the allegations of deceit and unlawful means conspiracy against both Girish and S&B in relation to the Administration Claim.

The Private Prosecution

26. Prashant has brought a private prosecution (the "**Private Prosecution**") against Girish in respect of 13 offences of forgery, fraud, using a false instrument and perverting the course of justice. In their Defence, S&B plead

that the trial was due to take place on 3 September 2018 but was adjourned because there was a question whether Girish had capacity. In his own Defence, Girish relies extensively on the Private Prosecution as a reason not to plead to or answer the allegations made against him.

27. In *Akcine Bendrove Bankas Snoras (In Bankruptcy) v Antonov* [2013] EWHC 131 (Comm) Gloster J (as she then was) made it clear that there is no right to invoke the privilege against self-incrimination in civil proceedings: see [18]. In that case she set out nine principles applicable to the grant of a stay of civil proceedings. But principles iv) and vi) are also relevant to the present application where Girish has chosen not to advance a positive defence:

> "The fact that a defendant has a right to remain silent in criminal proceedings, and would, by serving a defence in civil proceedings, be giving advance notice of his defence, carries little weight in the context of an application for a stay of civil proceedings. There is no right to invoke the privilege against self-incrimination in relation to putting in a defence, as compared with the right in civil proceedings to invoke the privilege where a defendant is being interrogated, being compelled to produce documents or cross-examined; see per Waller LJ in *V v C [2002] C.P. Rep. 8*, at paragraphs 37 and 38. In a civil trial there is no immunity against adverse comment or adverse inference from a failure to provide answers for the trial or to give evidence at the trial; a defendant does not have to put in a defence or give evidence at a civil trial but, if he does not, the court can draw an inference because in a civil trial it is not his "right" not to do so; that is important in the summary judgment context, because, if the claimant can establish his claim (for example on a summary judgment application) without interrogatories or disclosure, then a privilege against self-incrimination is not in fact relevant; see *ibid* at paragraph 37…
>
> vi) It is also legitimate, when balancing the competing considerations between the parties, to take into account that a positive defence is likely to exculpate, rather than incriminate, a defendant; as Waller LJ said at *ibid* paragraph 39:
>
> "Third, it is legitimate to start from the position that a positive defence is likely to exculpate rather than incriminate. It is legitimate to expect an explanation on oath as to the nature of the defence that the defendant has so that a court can see (a) whether there is a reason for a trial on the merits; and (b) whether the way in which having to fight the summary judgment application or the trial may impinge on the fair trial

> of the defendant in a criminal court. In this context, if it is obvious that a full trial must proceed and that an order for production of documents, for example, is going to be met [by] a claim of privilege against self-incrimination, postponement of the civil trial may be appropriate. But if a claimant can establish his case without compelling information or evidence from a defendant, the only relevant impact on the criminal trial to be considered is what the effect of entering a summary judgment will be. The onus is on the defendant at all stages to demonstrate that the civil process should not proceed, and the stronger the case against the defendant in the civil context the higher the onus on the defendant should be."

28. In the present case, therefore, it is permissible for the Court to make adverse comment or draw adverse inferences from the fact that Girish has chosen not to advance a positive defence or to provide explanations which would exculpate him whether or not he is the subject of a private prosecution.

Legal Principles

Joint Retainer

29. Where a firm of solicitors is retained under a joint retainer, neither client may assert LPP as against the other in relation to any documents passing between themselves and the solicitor: see *The Sagheera* [1997] 1 Lloyd's Rep 160 at 165-66. In *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners* [2011] Ch 296 Norris J also stated as follows (at [51]):

> "I consider that the authorities establish that where a solicitor accepts a joint retainer from parties with potentially conflicting interests one client cannot insist as against the other that legal professional privilege attaches to any of what passes between the solicitor and that client during the currency and in the course of the retainer:…"

30. The default position should be, therefore, that Barrowfen ought to be entitled to disclosure and production of all privileged documents created by S&B in the course any joint retainer from Barrowfen and Girish and S&B are not entitled to withhold or redact those documents on grounds of privilege. If S&B redact individual documents, they will have to provide an explanation under PD51U, paragraph 16.2 for departing from the general rule.

31. Moreover, even if S&B have currently withheld or redacted documents on the grounds that there was a separate or dual retainer from Girish alone in relation to the matters which fall within my order, the iniquity exception will apply to those documents (if it is engaged).

The Iniquity Exception

32. As I have stated the iniquity exception is well established. For the purposes of this application it was only necessary for me to consider two aspects of the exception: first, its scope and whether it extends to breaches of the statutory duties of a director; and, secondly, the standard of proof to which the Court must be satisfied before it will order disclosure.

Scope

33. It is well-established that the exception is not confined to crime or fraudulent misrepresentation but extends to fraud "in a relatively wide sense": see *Barclays Bank plc v Eustice* (above) at 1249D (Schiemann LJ). In that case the Court of Appeal held that advice given in the course of transactions at an undervalue for the purpose of prejudicing the interests of a creditor fell within the exception. In *BBGP* (above) Norris J stated that the iniquity exception applied in cases where:

> "…the wrongdoer has gone beyond conduct which merely amounts to a civil wrong; he has indulged in sharp practice, something of an underhand nature where the circumstances required good faith, something which commercial men would say was a fraud or which the law treats as entirely contrary to public policy."

34. The facts are complex but relevant to the present application. In that case it was alleged that the director and agents of the claimant company (which was the general partner of a limited partnership) had failed to disclose certain information to the board of directors. Norris J described the allegations as follows at [63] and his conclusion at [64]:

> "63. The wrongdoer here is Mr Hanson (and also to some extent the other members of the FMT). What is said is that they acted in breach of their duty of fidelity to General (arising from

> Mr Hanson's being a director and all of the FMT being agents). The breaches were: (a) that they failed to disclose to the board of General a plan to remove General "for cause" (and so to deprive it of compensation on termination of its role as managing partner) and they themselves assisted in the formulation and implementation of that plan; (b) that they failed to disclose to the board of General a plan to put entirely beyond the control of General a cash fund over which General had rights as partner (and themselves assisted in the formulation and implementation of the plan); (c) that they helped to plan and prepare a case about the internal claims against General without disclosing to the board that they were doing so; (d) that they failed to disclose to the board of General a proposal that they should as consultants take over the role of General once it was removed as managing partner on terms which rewarded them the more highly the more badly General came out of any resolution of the claims against it; (e) that they failed to disclose to the board of General a proposal that they should as consultants take over the role of General once it was removed as managing partner on terms which rewarded them the more highly the more badly General came out of any resolution of the claims against it; and (f) that they generally preferred the interests of the limited partners over the interests of General and did so under a cloak of secrecy. 64. In my judgment conduct of that character is sufficient to engage the iniquity principle."

35. By analogy with *BBGP* I consider that the iniquity exception is engaged where breaches of sections 172 to 175 and 177 of the Companies Act 2006 are alleged against a director and the allegations involve fraud, dishonesty, bad faith or sharp practice or where the director consciously or deliberately prefers his or her own interests over the interests of the company and does so "under a cloak of secrecy".

Standard of Proof

36. In *Addlesee v Dentons Europe LLP* (above) the Court of Appeal had to determine whether documents held by a solicitor who had formerly acted for a dissolved company continued to attract LPP. Having decided that it did, they remitted it to the Chancery Division for determination of an iniquity application: see [2020] Ch 238. In deciding that the iniquity exception applied, Master Clark received detailed submissions on the standard of proof. She

considered that the appropriate standard to apply was "a strong prima facie case" and put the following gloss on that test at [44]:

> "The test sets a lower threshold than balance of probabilities; and, of course, lower than the summary judgment test of showing that the defendant has no real prospect of success – no significance therefore can be attached to the fact (even if it could be inferred from the claimants not having made a summary judgment application) that the claimants' case would not justify summary judgment."

37. I adopt that standard and the guidance given by Master Clark. Ms Hilliard also helpfully referred me to *Derby & Co Ltd v Weldon (No 7)* [1990] 1 WLR 1156 where Vinelott J gave the following additional guidance at 1173D-E:

> "There is a continuous spectrum and it is impossible to, as it were, calibrate or express in any simple formula the strength of the case that the plaintiff must show in each of these categories. An order to disclose documents for which legal professional privilege is claimed lies at the extreme end of the spectrum. Such an order will only be made in very exceptional circumstances but it is, I think, too restrictive to say that the plaintiff's case must always be founded on an admission or supported by affidavit evidence or that the court must carry out the preliminary exercise of deciding on the material before it whether the plaintiff's case will probably succeed, a task which may well present insurmountable difficulties in a case where fraud is alleged and the court has no more than affidavit evidence."

38. In the present case, however, the application of this standard is complicated by the fact that the LPP in question includes documents protected both by legal advice privilege and litigation privilege. In *Kuwait Airways Corpn v Iraqi Airways Co (No 6)* [2005] 1 WLR 2734 (above) at [42] Longmore LJ suggested that a higher standard of proof was required to compel disclosure of documents protected by litigation privilege (in some circumstances):

> "I would therefore summarise the position thus: (1) the fraud exception can apply where there is a claim to litigation privilege as much as where there is a claim to legal advice privilege; (2) nevertheless it can only be used in cases in which the issue of fraud is one of the issues in the action where there is a strong (I would myself use the words "very strong") prima facie case of fraud, as there was in *Dubai Aluminium Co Ltd v*

> *Al-Alawi* [1999] 1 WLR 1964 and there was not in *Chandler v Church* 137 NLJ 451; (3) where the issue of fraud is not one of the issues in the action, a prima facie case of fraud may be enough as in the *Hallinan* case [2005] 1 WLR 766."

39. In the present case two of the claims may involve documents which would otherwise be subject to litigation privilege: the Bedford Rectification Claim and the Suresh Resignation Claim. Girish's conduct of certain legal proceedings is an issue in relation to both claims. A third claim, the Trustee Resignation Claim, involves litigation in Guernsey. However, I do not understand Barrowfen to be applying for disclosure of any documents held by Girish's Guernsey lawyers.

40. In deciding whether there is a "very strong prima facie case" of fraud or some other iniquity, I bear in mind the guidance of Master Clark in *Addlesee* and Vinelott J in *A Derby v Weldon (No 7).* A prima facie case (however strong) does not require Barrowfen to satisfy me that Girish was guilty of fraud or other misconduct on the balance of probabilities. But a very strong prima facie case requires me to be satisfied that the threshold is comfortably exceeded and that the case is one which falls at the very end of the continuous spectrum.

Application

(i) *The Bedford Rectification Claim*

41. *The Particulars of Claim:* Barrowfen's case is that Girish designed and implemented a plan to maintain his sole control of the company in order to exploit the Tooting Property for his benefit. The first allegation which Barrowfen makes is that Girish removed Bedford from the company's register of members and prevented Barrowfen from rectifying the register to reflect Bedford's shareholding even though he knew it was a 33.3% shareholder.

42. The detailed facts upon which Barrowfen relies on in support of this claim are set out in the Particulars of Claim, paragraphs 9.1 and paragraphs 32 to 55 and I summarise them as follows:

    i) From 2006 onwards 60,000 shares were held by Bedford, which was in investment vehicle owned by Prashant.

ii) By letter dated 17 February 2014 Bedford wrote to Barrowfen requisitioning a general meeting to consider whether to appoint Prashant as a director.

iii) By letter dated 3 April 2014 S&B wrote to Withers (who were then acting for Bedford) stating that Bedford was not a member of Barrowfen and had no standing to requisition a meeting.

iv) On 11 April 2014 Bedford sent a notice under section 305 of the Companies Act 2006 requisitioning a meeting of the members to consider whether to appoint Prashant as a director.

v) On 16 April 2014 Girish sent Mr Richard King of S&B a copy of Barrowfen's register of members which recorded that the only shareholders were the Mrs PD Trust and the Mr DP Trust. Under cover of the same letter, he also provided Mr King with what purported to be a letter of resignation from Suresh resigning as a director of Barrowfen (defined below as the "**Resignation Letter**").

vi) By letter dated 7 May 2014 S&B wrote to Withers stating that Bedford was not recorded in the register of members and had no right to requisition a meeting.

vii) By letter dated 23 May 2014 Withers wrote to S&B enclosing a note providing evidence of Bedford's shareholding. In particular, it addressed the share capital history recorded at Companies House, provided evidence of a share buyback of Bedford's shares in 2006 and highlighted pages in the register of members which referred to shares being transferred to Bedford.

viii) After further correspondence, on 24 November 2014 Bedford issued a Claim Form under CPR Part 8 for rectification of the register to reflect the fact that Bedford the legal owner of 60,000 shares (the "**Bedford Rectification Proceedings**").

ix) On 10 December 2014 Barrowfen filed acknowledgements of service confirming that they did not contest the claim (except that Girish disputed whether he should pay the costs of the proceedings personally).

x) On 3 February 2015 the terms of Consent Order were agreed under which Barrowfen paid the costs of the claim.

43. Barrowfen's case is that it is an inescapable inference that on or around 16 April 2014 Girish removed Bedford from the register of members and thereafter sought to prevent or delay Bedford's reinstatement of the register of members. Ms Hilliard told me on instructions that the register of members was a paper register kept in a book rather than a loose leaf or electronic register.

44. *The Defence:* In his Defence dated 21 February 2019 Girish did not plead to the allegation that he had removed Bedford from the register of members of Barrowfen because it was the subject matter of the Private Prosecution and he filed no evidence in answer to rebut the claim. He did not deny that Bedford was a shareholder and held 60,000 shares in Barrowfen. Nor did he deny that he was in possession of the register of members and first supplied a copy to S&B on 16 April 2014. He did, however, plead that Barrowen's inescapable inference did not arise. He also denied that Barrowfen was the proper Claimant.

45. *The evidence:* In support of Barrowfen's case, Ms Hilliard took me to two pages of the share register showing that on 23 July 2002 Bedford acquired 1,000 shares in Barrowfen from two of the former shareholders. She also took me to a page showing that it also acquired a further 30,000 shares. Ms Hilliard also told me that the annual returns had recorded that Bedford was a member of Barrowfen since 2002. I also note that on 9 December 2013 Girish was sending copies of the accounts to Rajnikant on behalf of Bedford in Sydney.

46. Ms Hilliard also took me to the instructions sent by S&B to Mr Jonathan Russen QC dated 22 December 2014. S&B stated that in 2002 Bedford owned 66,000 shares and that in 2004 it owned 60,000: see paragraphs 66 to 69. It also enclosed what was stated to be a "complete copy of the Register of

Allotments, Transfers and Members". In paragraph 71 of their instructions S&B stated:

> "Historically, Rajnikant had not wished to be recorded as a shareholder in a UK company. Accordingly, Girish did not record Bedford (his corporate vehicle) into the Register of Members. Bedford has, however, been included in annual returns. For many of the reasons set out in the witness statement of Prashant Patel it was felt that the Rectification Proceedings could not be contested as Bedford (or at least Rajnikant) does at least have a beneficial interest in Barrowfen."

47. Paragraphs 83 and 84 of those instructions set out why it was so important to Girish to try and resist rectification of the register:

> "From the recent correspondence it is clear that Suresh and Rajnikant are intent on having an additional director appointed to the board – that was the reason Bedford requisitioned a general meeting which was then delayed due to the rectification issue. A further general meeting is expected to be sought immediately after an order for rectification.
>
> The importance of the votes attaching to the shareholders' shares is therefore critical and is at the heart of the issues connected with the 2 Claim Letters….The position regarding voting appears to be as follows:
>
> (a) unless Girish can control the vote of the 2 trusts (or at least one trust and then block the other trust from voting on the basis that the trustees cannot agree how to vote), Bedford will have a majority at any shareholders' meeting; and
>
> (b) if Suresh remains a director he will be able to outvote Girish on the board and halt the redevelopment with potentially disastrous consequences for Barrowfen and Girish personally."

48. In the attendance note of the conference with Mr Russen QC which took place on 12 January 2015 and at which both Girish and Mr King were present, counsel contrasted the "prudent" approach with the "self-help" approach. S&B recorded as follows in relation to the "self-help approach":

> "2.10 Counsel explained that such an approach would be based on Girish using his current control of Barrowfen to rectify the company books himself (as would be consistent with his role as a director).

> 2.11 In addition to writing up Bedford, Girish could also correct the entries representing the trusts' shareholdings (*i.e.* write up himself and Yashwant in their capacity as trustees of the DP Patel Trust, and himself in his capacity as trustee of the PD Patel Trust). Of course, this would be challenged, but until the Court orders otherwise, Girish would at least have preserved his position as director."

49. *Determination:* I am satisfied that there is a very strong prima facie case that Girish removed the relevant pages or records showing that Bedford was the registered holder of 60,000 shares in Barrowfen before he sent the register to S&B on 14 April 2014 and that he then took steps to prevent or delay the register being rectified. The copy of the register in evidence shows that Bedford had been registered as a shareholder and S&B admitted in counsel's instructions that it was beneficially entitled to 60,000 shares. Moreover, in the Bedford Rectification Proceedings Girish did not deny that Bedford was a shareholder and consented to an order that the share register be rectified.

50. It is also clear from the extracts from counsel's instructions and the attendance note of his advice that Girish was in possession of the share register as at 22 December 2014. It follows that if anyone removed the relevant page or pages from the register of members recording that Bedford was a shareholder, it is very likely to have been him. Finally, the explanation which he gave to S&B and they gave to counsel, namely, that he was never asked to record Bedford as a member is inconsistent with the pages of the register to which I was taken in evidence. It is clear that substantial numbers of shares were transferred to Bedford as part of the re-allocation in 2002 and in the normal course it should have been registered as the holder of those shares in the share register.

51. Barrowfen's case is that it was a breach of Girish's duties under sections 171 to 175 and 177 of the Companies Act 2006 to remove Bedford from the register of members, to deny that it was a member, to delay the resolution of the issue and to require Barrowfen to pay the costs of the Bedford Rectification Proceedings: see the Particulars of Claim, paragraphs 107a to 107d. I am satisfied that Barrowfen has a very strong prima facie case that those actions amounted to a breach of Girish's statutory duties.

52. In particular, I am satisfied that Barrowfen has a very strong prima facie case that in breach of section 171(1)(b) Girish did not exercise his power to control and write up the register of members for the purpose for which it was conferred but for the improper purpose of maintaining sole control over Barrowfen. I am also satisfied that Barrowfen has a very strong prima facie case that in breach of section 172 Girish did not act in a way he considered in good faith would be most likely to promote the success of the company for the benefit of its members as a whole.

53. S&B's instructions to counsel provide clear evidence that Girish's purpose in delaying or preventing Bedford from being registered as a member of Barrowfen was to prevent it from having a majority at shareholders' meetings and from the directors halting the redevelopment of the Tooting Property with potentially disastrous consequences for him personally. It is also a striking fact, as Ms Hilliard pointed out, that Girish was never a shareholder of Barrowfen himself.

54. I am also satisfied that Barrowfen is the proper Claimant and has a valid claim against Girish for breach of his duties as a director. He owed those duties to the company rather than to the individual shareholders and if Barrowfen's case is made out, then the company itself suffered loss as a consequence of those breaches of duty. In particular, it is Barrowfen's case that it suffered losses caused by the delay in developing the Tooting Property and incurred legal fees which it would not have incurred if Bedford had not been removed from the register of members.

55. Finally, I am satisfied that the iniquity exception is engaged in relation to these breaches of duty. For a director to destroy part of a share register and to deny that a registered shareholder is a member of the company amounts without question to fraud (in the wide sense), dishonesty or bad faith. Put another way, there is a very strong prima facie case that Girish consciously or deliberately preferred his own interests over the interests of Barrowfen "under a cloak of secrecy".

(ii) *The Suresh Resignation Claim*

56. *The Particulars of Claim:* The second allegation which Barrowfen makes is that Girish forged a letter of resignation from Suresh dated 11 November 2013 (the "**Resignation Letter**") and caused Barrowfen to exclude Suresh from the management of the company. Ms Hilliard dealt with this claim first in her oral submission on the basis that it provided a very strong prima facie case of misconduct.

57. The detailed facts upon which Barrowfen relies on in support of this claim are set out in the Particulars of Claim paragraphs 68 to 80 and I summarise them as follows:

i) On or around 11 December 2013 Girish filed form TM01 at Companies House giving notice that Suresh had resigned as a director of Barrowfen and relying on the Resignation Letter.

ii) On or about 20 December 2013 Suresh filed form RP02A to rectify the register. There was no objection and by letter dated 7 February 2014 Companies House informed Suresh that the TM01 notice had been removed.

iii) On 17 June 2014 Girish filed a second TM01 relying on the Resignation Letter and on 20 June 2014 Suresh filed a second RP02A. This time Barrowfen objected to the rectification of the register.

iv) On 13 February 2015 Suresh commenced proceedings seeking a declaration that he had not resigned and on 16 April 2015 Girish was joined as a party (the "**Suresh Resignation Proceedings**").

v) The parties exchanged experts reports and in their joint report the experts concluded that there was strong evidence that the Resignation Letter had not been created in 2013 but rather had been derived from a number of sheets of paper signed by Suresh in the 1990s in blank and which had had the header and footer removed and text added.

vi) The Suresh Resignation Proceedings were settled and by order dated 29 June 2015 Proudman J declared that the Resignation Letter was not

authentic and that Suresh had not resigned as a director. She also ordered any material suggesting that Suresh had resigned to be removed from the register and ordered Girish to pay the costs.

vii) It is Barrowfen's case that it is an inescapable inference that Girish forged the Resignation Letter in order to prolong his sole control of Barrowfen.

58. *The Defence*: In his Defence Girish did not plead to the allegation that he forged the Resignation Letter (or that it was an inescapable inference that he must have done so) because it was the subject matter of the Private Prosecution. He also filed no evidence in answer to rebut the claim. However, he did not admit that Suresh had not resigned as a director and advanced a positive case that: "Girish understood that Suresh had resigned as a director of Barrowfen upon receiving the Resignation Letter." Girish also denied that Barrowfen was the proper Claimant.

59. *The Evidence*: Ms Hilliard took me first to Suresh's letter dated 26 November 2013 in which he proposed that Prashant should be appointed a director and requisitioned a directors' meeting to consider the appointment. Suresh also enclosed a letter of consent to act signed by Prashant and dated 20 November 2013. She then took me to the Resignation Letter itself which bore the date 11 November 2013 and submitted that it was wholly implausible that Suresh would have resigned and then less than two weeks later requisition a directors' meeting to consider Prashant's appointment (which he would no longer be entitled to attend).

60. Ms Hilliard also took me to the experts' joint report dated 8 June 2015 prepared by Mr Robert Radley and Dr Audrey Giles. She pointed out that they agreed on every point (apart from one minor one). They also set out the following conclusion:

> "In summary, we are agreed that, from a consideration of the combination of the above factors, there is strong evidence to support the proposition the document in question was not created in 2013. The evidence is wholly consistent with, and is regarded as strong, in support of the proposition that the

> document in question has been derived from one of a number of sheets of paper signed by in the 1990s in blank which has subsequently had a header and footer section removed and the current text added."

61. Finally, Ms Hilliard took me to the order made by Proudman J in which Girish consented to an order declaring that the Resignation Letter was not authentic and that Suresh had not resigned. She submitted that Girish's case that he understood that Suresh had resigned when he received the Resignation Letter was wholly implausible given that he consented to the order.

62. *Determination:* I am satisfied that Barrowfen has a very strong prima facie case that Girish forged the Resignation Letter. On 29 June 2015 he accepted that the letter was not authentic and that Suresh had not resigned. Moreover, his own expert agreed that the text of the letter had been added to a blank sheet of paper signed in the 1990s and the letterhead and footer removed. Finally, his present defence that he received the Resignation Letter and understood that Suresh had resigned (shortly before he received Suresh's letter dated 26 November 2013) is wholly implausible.

63. Barrowfen's case is that Girish forged the Resignation Letter and wrongfully caused Barrowfen to defend the Suresh Resignation Proceedings in breach of his duties under the Companies Act 2006: see the Particulars of Claim, paragraphs 107f and 107g. Again, I am satisfied that Barrowfen has a very strong prima facie case that those actions amounted to a breach of Girish's statutory duties.

64. In particular, I am satisfied that Barrowfen has a very strong prima facie case that in breach of section 172 Girish did not act in a way which he considered in good faith would be most likely to promote the success of the company for the benefit of its members as a whole. In my judgment, it must be a breach of that duty for a director to frustrate or prevent the other directors from exercising their powers under the Articles or to frustrate or prevent the shareholders from appointing new directors.

65. I am also satisfied that Barrowfen rather than Suresh is the proper Claimant and has a valid claim against Girish for breach of his duties as a director.

Again, he owed those duties to the company rather than to the other directors or to the shareholders and if Barrowfen's case is made out, then the company itself suffered loss as a consequence of those breaches of duty.

66. Finally, I am satisfied that the iniquity exception is engaged in relation to these breaches of duty. For one director to try and remove another and prevent the appointment of a third for his own ends by forging a letter amounts without question to fraud (in the wide sense), dishonesty or bad faith. Put another way, Barrowfen has a very strong prima facie case that Girish consciously or deliberately preferred his or her own interests over the interests of Barrowfen "under a cloak of secrecy".

(iii) *The Trustee Resignation Claim*

67. *The Particulars of Claim:* The third allegation which Barrowfen makes is that Girish forged a letter of resignation and resolution both dated 2 December 2013 (the "**Trustee Resignation Documents**") purporting to show that Suresh and Yashwant had resigned as trustees of the Mrs PD Trust and appointed him in their place.

68. The detailed facts upon which Barrowfen relies on in support of this claim are set out in the Particulars of Claim paragraphs 81 to 88 and I summarise them as follows:

i) On 16 April 2014 Girish instructed S&B that Yashwant and Suresh and resigned and in around May 2014 he sent them the Trustee Resignation Documents.

ii) By letters dated 18 June 2014 and 5 August 2014 Fox Williams LLP ("**Fox Williams**"), who were acting for Suresh and Yashwant in their capacity as trustees, denied the authenticity of the Trustee Resignation Documents.

iii) Fox Williams relied on the expert opinion of Mr Maurice Rodé who had concluded that the production of the paper used for the Trustee Resignation Documents had ceased in 2001, the documents were

composite productions on two different printers, Suresh's signature was consistent with his signature in the 1990s and the indentations were consistent with the signing of other documents in a pile.

iv) The authenticity of the documents was the subject of litigation in Guernsey, where the Mrs PD Trust was domiciled, and on or about 31 July 2015 Girish admitted that the Trustee Resignation Documents were ineffective because Guernsey law required a minimum of two trustees.

v) Barrowfen's case is that it is an inescapable inference that Girish forged the Trustee Resignation Documents.

vi) In support of this contention Barrowfen relied upon an email dated 27 March 2014 from Mr King to Girish about the appointment of Prashant stating: "I understand from one of our recent conversations that it is likely that the other shareholder would vote with [Bedford]."

vii) Barrowfen's case is that it is to be inferred that as at the date of that email, 27 March 2014, Girish's own position was that he could not control the vote of the Mrs PD Trust as he was not a trustee.

69. *The Defence:* Again, in his Defence Girish did not plead to the allegation that he forged the Trustee Resignation Documents (or that it is an inescapable inference that he must have done so) because it was the subject matter of the Private Prosecution. Again, he filed no evidence in answer to rebut the claim. However, he denied that Barrowfen was the proper Claimant.

70. *The Evidence*: Ms Hilliard took me to the Trustee Resignation Documents and the expert report of Mr Rodé. She also took me to S&B's Defence in which S&B admitted that on 16 April 2014 Girish instructed them that Suresh and Yashwant had resigned and that in May 2014 he also provided them with the Trustee Resignation Documents. S&B also admitted the email dated 27 March 2014 although they did not admit the inference that at that date Girish's position was that he was not a trustee. Ms Hilliard also submitted that Suresh and Yashwant were international businessmen living in Singapore and New

York and that it was wholly improbable that they would not have taken legal advice on Guernsey law if they had intended to resign.

71. *Determination*: I am satisfied that there is a strong prima facie case that Girish forged the Trustee Resignation Documents. On 16 April 2014 Girish instructed S&B that Suresh and Yashwant had resigned and he then produced the Trustee Resignation Documents. The expert evidence provides a clear prima facie case that the documents were forged (which Girish has not answered) and the clear inference from the email dated 27 March 2014 is that the Trustee Resignation Documents were not in existence at that date. Neither Girish nor S&B has provided an alternative explanation for that email.

72. Barrowfen's case is that it was a breach of Girish's duties under sections 171 to 175 and 177 of the Companies Act 2006 to forge the Trustee Resignation Documents: see the Particulars of Claim, paragraph 107h. I am satisfied that Barrowfen has a strong prima facie case that this action amounted to a breach of Girish's statutory duties and that Barrowfen is the proper Claimant for the same reasons which I have set out in relation to the Bedford Rectification Claim.

73. Finally, I am satisfied that the iniquity exception is engaged in relation to these breaches of duty. For a director to forge documents to prevent trustees from exercising their powers as shareholders amounts to fraud (in the wide sense), dishonesty or bad faith. Again, there is a strong prima facie case that Girish consciously or deliberately preferred his or her own interests over the interests of Barrowfen "under a cloak of secrecy".

(iv) *The Trusts Registration Claim*

74. The fourth allegation which Barrowfen makes is that Girish improperly wrote up Barrowfen's register of members in a manner which allowed him to vote on behalf of the Mr DP Trust and the Mrs PD Trust at shareholder meetings. The detailed facts upon which Barrowfen relies are set out in the Particulars of Claim at paragraphs 56 to 67 and I summarise them as follows:

i) The register of members which Girish sent to S&B on 16 April 2014 recorded the Mr DP Trust and the Mrs PD Trust as shareholders in contravention of section 126 of the Companies Act 2006 (which provides that no notice of any trust shall be entered on the register).

ii) The way in which the register was to be written up would affect Girish's ability to vote as a shareholder. In particular, Table A, regulation 63 required that Yashwant should have been registered as the holder of the shares of the Mr DP Trust because he was the first-named trustee. There was also a dispute about the Trustee Resignation Documents and whether Suresh and Yashwant were trustees of the Mrs PD Trust.

iii) Barrowfen was advised by Mr Matthew Parfitt of counsel to apply to Court. Barrowfen and Girish were also advised by Mr Jonathan Russen QC that if Girish amended the register to record himself as the holder of the shares in both trusts, this would almost certainly be challenged.

iv) On 5 February 2015 Girish convened a board meeting of Barrowfen at which he was the only attendee. At that meeting he resolved to write up the register showing himself as trustee for the Mrs PD Trust and naming himself and Yashwant as the trustees of the Mr DP Trust (in that order).

v) On 17 April 2015 Girish convened a further board meeting of Barrowfen and resolved to issue share certificates to himself as trustee of the Mrs PD Trust and himself as Yashwant as trustees of the Mr DP Trust.

vi) It is Barrowfen's case that it is to be inferred that Girish caused Barrowfen to write up its register without a Court order and irrespective of how it should have been written up in order to maintain his personal control over Barrowfen.

75. *The Defence*: In his Defence Girish denied that he took any of these steps to prolong his control over Barrowfen and relied on the advice which he received

from S&B and counsel. He did not suggest that this claim was the subject matter of the Private Prosecution or that Barrowfen was not the proper Claimant.

76. *The Evidence*: Ms Hilliard took me to the instructions to Mr Russen QC again and drew my attention to paragraph 126(d) in which he was asked to give advice on "what, if anything, Girish might do in relation to maintaining operational control of Barrowfen". She submitted that this was Girish's purpose in seeking advice not to act in the best interests of the company. Further, in his "Outline Points" dated 8 January 2014 Mr Russen stated as follows:

> "Girish is himself vulnerable to the internal management rule if and when the other side get into a position to pass an ordinary resolution to remove him under section 168 CA 2006. The options available to Girish to frustrate this are (1) to cross-apply in the rectification proceedings in relation to the trusts' shareholdings; or (2) to amend the Register (in respect of all 3 shareholdings) without a court order. As to these:
>
> Option (1) *may* use up some valuable time – though presumably not really enough time given the nature of s. 125 proceedings – but carries the risk that the relief granted, in the not too distant future – will probably see Yashwant registered with Regulation 63 priority (by happenstance) alongside BDL – a two-thirds hostile vote (with Girish's claim to vote for the P.D. Settlement being held up by full-blown proceedings over the identity of the trustees).
>
> Option (2) has the attraction that Girish might, for the moment, therefore pre-judge (i) the resignation of Suresh and Yashwant from the P.D. Patel settlement and (ii) the Regulation 63 priority point in relation to the D.P. Settlement but him doing so will almost certainly to [sic] be the subject matter of challenge in legal proceedings. Those proceedings – in relation to (i) – are likely to take considerably longer than an uncontroversial s. 125 application and there is a risk that, pending their determination, Girish will be injuncted from casting any trust vote (so that BDL wields the shareholder power). In that scenario, we would have to consider whether the balance of convenience would support more general injunctive relief to restrain a change of control (from that which it has been – *de facto* – for many years past) even though the court will not generally restrain shareholders from removing a director from office (and, ultimately, the problem lies in the fact that Girish's family interest only extends to one-third of

> Barrowfen whether or not the development of the Tooting site may, commercially, be the best thing for the company and its shareholders)."

77. I am satisfied that there is a strong prima facie case that Girish wrote up the entries in the register without a Court order and irrespective of how they should have been written up in order to maintain his personal control over Barrowfen. He was advised by Mr Russen QC that if he took option (2) and amended the register himself his actions would almost certainly be the subject matter of challenge in legal proceedings. He was also advised that if he took those steps, those proceedings might take a long time (although there was a risk that Bedford or Suresh and Yashwant might apply for an injunction). Nevertheless, Girish wrote up the register himself in a way which enabled him to vote the shares of both trusts.

78. Barrowfen's case is that it was a breach of Girish's duties under sections 171 to 175 and 177 of the Companies Act 2006 to write up the register in this way: see the Particulars of Claim, paragraph 107e. I am satisfied that Barrowfen has a strong prima facie case that this action amounted to a breach of Girish's statutory duties for the same reasons which I have set out in relation to the Bedford Rectification Claim.

79. Finally, I am satisfied that the iniquity exception is engaged in relation to this breach of duty. There is also a strong prima facie case that after taking legal advice Girish consciously or deliberately preferred his or own interests over the interests of Barrowfen. I am satisfied that this falls within the scope of the exception as, at the very least, conduct which is "sharp practice, something of an underhand nature where the circumstances required good faith".

(v) *The Administration Claim*

80. Barrowfen's fifth and final allegation is that Girish designed and implemented a plan to place Barrowfen into administration when it was balance sheet solvent and this was not in the company's interests. The detailed facts upon which Barrowfen relies are set out in the Particulars of Claim at paragraphs 94 to 104 and I summarise them as follows:

i) On 26 October 2015 a meeting took place between Girish, S&B and Mr Dermot Coakley, an insolvency practitioner, at S&B's offices.

ii) On or around 28 October 2015 Girish informed Mr William Radmore and his son, Kiraj, that Barrowfen II would take an assignment of the Loan and the Charge.

iii) On 2 November 2015 Barrowfen II was incorporated. The shareholders were Girish's children, Kiraj and Vanisha, and the statutory directors were Kiraj and Mr Radmore. At all material times Girish was a shadow director of the company.

iv) On 30 November 2015 S&B informed Kiraj and Mr Radmore that Girish wanted the assignment of the Loan and the Charge to be completed the following day.

v) On 2 December 2015 the Loan and the Charge were assigned to Barrowfen II. On 4 December 2015 S&B wrote to Kingsley Napley LLP ("**Kingsley Napley**"), who were acting for Suresh and Prashant, giving notice of the assignment.

vi) On 9 December 2015 a meeting took place between Girish and Prashant at which Mr King and Mr Daniel Baker of S&B were present and Ms Sophie Le Breton of Withers (who was present solely for taking notes).

vii) On 12 February 2016 Girish instructed Barrowfen II to appoint administrators over Barrowfen.

viii) Also on 12 February 2016 Girish wrote to Rajnikant, Prashant and Suresh stating that unless he had a response to a proposal to purchase shares in Barrowfen by 10 am on Monday 15 February 2015 he would take steps to protect his position as a creditor of the company.

ix) By letter dated 16 February 2016 S&B, acting on behalf of Barrowfen II, wrote to Kingsley Napley demanding the immediate repayment of

£853,300.88. Mr Radmore also sent a letter to Suresh and Prashant to the same effect.

x) By letter also dated 16 February 2016 S&B wrote to Kingsley Napley enclosing a letter from Girish to Barrowfen resigning as a director.

xi) On 17 February 2016 a notice of appointment of administrators was filed in the High Court on behalf of Barrowfen II.

xii) By letter dated 19 February 2016 Kingsley Napley, acting for Bedford, Suresh and Prashant wrote to the administrators indicating that their clients had sufficient funds to pay the debts of Barrowfen.

xiii) On 15 April 2016 they made a formal offer to the administrators and on 14 September 2016 a loan agreement was finalised and on 16 September 2016 Barrowfen exited from administration.

81. Barrowfen's case is that Girish and Barrowfen II intended to enable Girish, or an entity under his control, to purchase the Tooting Property from the administrators, thereby achieving Girish's aim of maintaining control over Barrowfen's business and assets without the need for the consent of the majority of its directors and shareholders: see the Particulars of Claim, paragraphs 94, 94.1 and 98A.

82. *The Defence*: In his Defence, Girish admitted that Barrowfen II was incorporated to enable him to take an assignment of the Charge. But he denied that there was any suspicious or unlawful purpose or plan. He also denied that there was any understanding that the administrators would sell the Tooting Property to Barrowfen II or "a nominated party". His case was that Zurich had called in the Loan and that it was necessary for him to refinance. It was also his case that the majority shareholders wished to put Barrowfen into members' voluntary liquidation. Finally, he denied that Barrowfen was the proper Claimant.

83. *The Evidence*: Ms Hilliard took me first to an email dated 28 October 2015 and timed at 10.16 from Girish to Mr Radmore in which Girish stated as follows:

> "This has reference to our telephone conversation on the subject of setting up a UK company with view of taking a registered fixed and floating charge of Allied Dunbar Bank by way of assignment of the existing Allied Dunbar charge on the property 184-214 Upper Tooting Road, London SW17 and paying the bank off their loan.
>
> In this respect as discussed of my request of your assistance in becoming a Director of the Company along with my son Kiraj Patel as myself as per advise [sic] of Stevens & Bolton will have conflict of interest being a Director of Barrowfen and to be Director of the new vehicle that will take over the charge."

84. By email also dated 28 October 2015 and timed at 11.51 Mr Radmore replied asking a series of questions. Question 1 asked whether the directorship was intended for the short term until Barrowfen was dissolved. Question 2 asked who would run the company on a day to day basis and Question 5 was whether the company intended to progress the development of the Tooting Property. By email also dated 28 October 2015 and timed at 12.49 Girish answered those questions as follows:

> "1. At the moment the company will hold the assignment of the charge from Allied Dunbar. After which to appoint a special receiver who will undertake a valuation under instruction from the company Directors and arrange a sale of the Property. It is my intention to have you as an officer of the company which will undertake the development once I am free from my family grip.
>
> 2. The day to day affairs will be managed by myself and the registered office will be at Stevens & Bolton or an accountant firm. The duties of Director is at some stage appoint a receiver under the terms of the charge and value the property and sell the same to nominated party…..
>
> 5. The nominated party will progress the development. At the moment the idea is to get control of the property."

85. Ms Hilliard also took me to a witness statement dated 3 June 2016 in which Mr Coakley confirmed that he met Girish on 26 October 2015. She also took me to an email dated 30 November 2015 in which Mr Andrew Dodds of S&B

wrote to Kiraj and Mr Radmore asking them to complete the assignment of the Loan and the Charge on the following day.

86. Ms Hilliard also took me to S&B's attendance note of the meeting on 9 December 2015. This meeting and the attendance note are important documents in the context of Barrowfen's claim against S&B and I stress that I make no comment about S&B's role at that meeting. It is clear from the attendance note, however, that Girish did not inform Prashant, who was his fellow director, that he was proposing to put Barrowfen into administration or to resign as a director or to purchase the Tooting Property through Barrowfen II.

87. Finally, Ms Hilliard took me to an email dated 15 April 2016 from Girish to Mr Michael Bowell, one of the joint administrators in which Girish stated as follows:

> "Myself and other creditors are extremely concern [sic] at the tone of your email and the agreement reached with Dermot in conjunction with Stevens & Bolton last year in relation to your appointment as administrator. I had specifically agreed with Dermot on the exercise that Barrowfen was entering into and the role MBI Coakley will provide. Dermot had agree to this."

88. *Determination*: I am satisfied that Barrowfen has a strong prima facie case that Girish designed and implemented a plan to place Barrowfen into administration and that he intended to take control of the Tooting Property by purchasing it from the administrators. Girish's emails dated 28 October 2015 to Mr Radmore provide direct evidence of this plan and these intentions (although at that stage he may have been contemplating the appointment of a receiver rather than administration). Girish's email to Mr Bowell also shows that he believed that he had reached agreement with Mr Coakley to appoint him at their meeting on 28 October 2015.

89. It is also clear that Girish gave almost no notice to Prashant or the majority shareholders of his intention to call in the Loan and put the company into administration. Ms Hilliard submitted that if Girish had been acting honestly and in the best interests of Barrowfen he would have revealed this information

at the meeting on 9 December 2015. But as it was, he gave them virtually no time to pay off the Loan and redeem the Charge before putting Barrowfen into administration.

90. I am also satisfied that there is a strong prima facie case that Girish was a shadow director of Barrowfen II and its directing mind and that his intention can be attributed to the company. In his Defence he admitted that the company was incorporated to enable him to take an assignment of the Charge and told Mr Radmore that he could not be a director of Barrowfen II because of the conflict between its interests and Barrowfen itself. However, he also told Mr Radmore that he would be responsible for the day to day management of the company and instructed S&B to give directions to the statutory directors to complete the assignment.

91. It is Barrowfen's case that Girish wrongfully withheld from Suresh and Prashant the fact that he was taking steps and intended to place Barrowfen in administration thereby depriving the company of the opportunity to discharge the Loan and the Charge. It is also Barrowfen's case that he wrongfully disclosed to Barrowfen II the existence of the Loan and the Charge and acted as a shadow director and also that he attempted to bring about a situation whereby he or an entity controlled by him would be able to acquire the Tooting Property at below market value: see the Particulars of Claim, paragraphs 107o to 107r. For present purposes, I ignore the claims for conspiracy and deceit pleaded at paragraphs 107n and 107s.

92. I am satisfied that Barrowfen has a strong prima facie case that those actions amounted to a breach of Girish's statutory duties. In particular, I am satisfied that Barrowfen has a strong prima facie case that in breach of section 175 Girish placed himself in a position in which he had a direct or indirect interest which conflicted with the interests of Barrowfen and in breach of section 172 he deliberately tried to exploit that position for his own interests rather than to promote the success of the company.

93. I am also satisfied that Barrowfen rather than its shareholders is the proper Claimant and has a valid claim against Girish for breach of his duties as a

director. Again, he owed those duties to the company rather than to the individual shareholders and if Barrowfen's case is made out, then the company has suffered loss as a consequence of those breaches of duty.

94. Finally, I am satisfied that the iniquity exception is engaged in relation to these breaches of duty. In my judgment, a director of a company who deliberately attempts to exploit a corporate opportunity by implementing a secret plan to put it into administration and acquire its principal asset is not acting honestly or in good faith. Put another way, Barrowfen has a strong prima facie case that Girish consciously or deliberately preferred his or her own interests over the interests of Barrowfen "under a cloak of secrecy".

(5) Other Findings

95. Barrowfen also relied upon other findings against Girish to support the Iniquity Application. In particular, there were probate proceedings in England between Girish and Yashwant, in which Girish asked the Court to grant probate of what he claimed was the last will of his mother. In his judgment dated 10 February 2017 Andrew Simmonds QC found that Girish had forged his mother's will. In his judgment dated 7 December 2017 Mr Justice Marcus Smith also committed Girish to prison for one year for knowingly giving false evidence to the Court.

96. In relation to both the Bedford Rectification Claim and the Suresh Resignation Claim I had to be satisfied that there was a very strong prima facie case of iniquity and in relation to the other three claims I had to be satisfied that there was a strong prima facie case. If I had not been satisfied that the relevant standard had been met in relation to all of the claims, I might have placed some weight on these additional findings. But I was satisfied on the statements of case and the evidence that the relevant standard is met.

Disposal

97. For these reasons I was satisfied that I should grant the Iniquity Application and on 22 September 2020 I made an order that the Defendants should give disclosure to Barrowfen of all matter files or documents created for the

purposes of giving or receiving legal advice or containing legal advice provided by S&B to Girish or Barrowfen II in relation to the five claims (as more particularly defined in the order).