Neutral Citation Number: [2021] EWHC 175 (Ch)

Case No: CR-2017-006113

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

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

Date: 12/02/2021

IN THE MATTER OF **KEEPING KIDS COMPANY**
AND IN THE MATTER OF
THE COMPANY DIRECTORS DISQUALIFICATION ACT 1986

Before:

MRS JUSTICE FALK

- -

Between:

THE OFFICIAL RECEIVER	**Claimant**
-and-	
~~**(1) SUNETRA ATKINSON**~~	
(2) CAMILA BATMANGHELIDJH	
(3) ERICA JANE BOLTON	
(4) RICHARD GORDON HANDOVER	
(5) VINCENT O'BRIEN	
(6) FRANCESCA MARY ROBINSON	
(7) JANE TYLER	
(8) ANDREW WEBSTER	
(9) ALAN YENTOB	**Defendants**

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Lesley Anderson QC and Gareth Tilley (instructed by **Womble Bond Dickinson (UK) LLP**) for the **Claimant**
Rupert Butler (of **Leverets) and Natasha Jackson** (instructed by **Leverets**) for the **Second Defendant**
Daniel Margolin QC and Daniel McCarthy (of **Joseph Hage Aaronson LLP**) for the **Third Defendant**
George Bompas QC and Catherine Doran (instructed by **Bates Wells**) for the **Fourth and Sixth to Ninth Defendants**
Andrew Westwood (instructed by **Maurice Turnor Gardner LLP**) for the **Fifth Defendant**

Hearing dates: 19-22 and 26-29 October, 3-6, 9-12, 16-20, 23-26 and 30 November, 1-4, 7-9, 11 and 14-17 December 2020

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mrs Justice Falk

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Mrs Justice Falk:

INTRODUCTION

1. In August 2015 the well known children's charity, Kids Company, entered insolvent liquidation. After a lengthy and extensive investigation, and shortly before the two year time limit for doing so expired, the Official Receiver commenced proceedings against all of the directors who had been in office at or shortly before the date of the charity's collapse (the "Trustees"), together with its Chief Executive Officer ("CEO"). By its claim the Official Receiver seeks to disqualify each of them under s 6 Company Directors Disqualification Act 1986 ("CDDA"). With the exception of one Trustee, all the defendants chose to defend the claim. A 10 week trial followed between October and December 2020. This is my decision on the Official Receiver's claim.

2. The structure of this judgment can be seen from the table of contents. After a brief outline of the background and procedural history, I set out some information about each of the defendants and summarise the issues. I then describe the evidence, including comments on the individual witnesses, and summarise the relevant legal principles. The sections that follow contain my factual findings and conclusions covering the principal areas of factual dispute. (A dramatis personae of key individuals is included as an Appendix to assist the reader.) I then turn to apply the legal principles to the facts, first by determining whether the second defendant, Camila Batmanghelidjh (the CEO), was a de facto director, and then by determining whether the test for disqualification is satisfied. I conclude with some recommendations.

3. The way in which the factual findings have been set out reflects the different issues raised in this case. So whilst the general findings in relation to the charity's financial position from paragraph [199] onwards are chronological, others are dealt with by subject matter or theme. This, and the interconnected nature of the issues more generally, inevitably requires a great deal of cross-referencing. Cross-references are indicated by square bracketed references to paragraph numbers of this judgment.

BACKGROUND: A BRIEF HISTORY

4. Kids Company was founded in 1996 by Ms Batmanghelidjh, originally as a drop-in centre under railway arches in Camberwell. It was incorporated as a company limited by guarantee in September 1997 under the name "Keeping Kids Company", and was registered as a charity in February 1998. I will refer to it throughout as Kids Company, being the name by which it was generally known.

5. Kids Company developed to provide support to disadvantaged and vulnerable young people at a number of centres in London, and latterly Bristol and Liverpool, as well as schools in London and Bristol. The original drop-in centre was replaced by "Arches II", at Kenbury Street in Brixton. I will refer to the children and young people that Kids Company supported as "clients", although I should clarify that Kids Company did not charge them for its services.

6. In common with other incorporated charities, the Trustees were the directors of Kids Company. They were both "charity trustees", being the persons having the general control and management of the administration of the charity (s 177 Charities Act 2011), and company directors, subject to duties as such. The Trustees operated through full Trustee meetings (the "Board") and also through two Board committees, the Finance Committee and Governance Committee, which each comprised certain members of the Board. The Board generally met six times a year. The Governance Committee met with similar regularity, and the Finance Committee met at least nine times a year (in practice monthly by 2014). The Trustees all saw the minutes of meetings of the two Board committees. They also received detailed reports on the finances at each Board meeting, typically with copies of the most recent monthly management accounts considered by the Finance Committee.

7. With limited exceptions, charity trustees may not be remunerated for their role. There is no dispute that the Trustees received no remuneration for their work, and nor is there any dispute that they invested a very significant amount of time in it, both in formal meetings of the Board and its committees and outside them.

8. Kids Company had a significant cohort of employees, together with a number of self-employed staff and volunteers. In addition to staff located at its centres, Kids Company had a head office with sizeable teams devoted to finance and fundraising, as well as staff performing a number of other administrative and managerial functions. Ms Batmanghelidjh had the most senior role as CEO, with other senior members of the executive team reporting to her.

9. In its last published annual report and accounts, for the year ended 31 December 2013, Kids Company described itself as both supplementing parental care and acting as substitute parents when young people did not have functioning parents, and its primary aim as being to help people to discover their resilience and go on to thrive. The report included some details of the scale of the problems that the charity was dealing with, including very significant levels of deprivation, neglect and abuse.

10. There is no doubt that the charity was involved in highly challenging work. A September 2013 report by the LSE (see [568] below) said that Kids Company worked with the "most vulnerable children and youth in the UK" with its clients experiencing "severe developmental adversity, being exposed to food insecurity, poverty, poor housing, violence and social exclusion, abuse and substance misuse, low educational and employment aspirations, domestic maltreatment and unstable home environments".

11. Kids Company supported its clients through a variety of means. In very brief summary, the underlying thinking, as explained in the LSE report just referred to, was that developmental adversity is associated with changes in brain structure and function. Kids Company's model of intervention was intended to provide support that could alter neural pathways and provide the opportunity for positive change, making what the report concluded was a substantial difference to clients' lives.

12. A key hallmark of Kids Company's services was companionship: that is, providing the time of its staff and volunteers. Its aim was to improve emotional health through counselling and support, including at a practical level, for example by providing practical knowledge about dealing with financial issues and gaining access to services. At a more material level, it assisted by providing meals, food vouchers, various types of therapy and educational and other support services. That support routinely included advocating on the young person's behalf to obtain the statutory services to which he or she was entitled, such as housing, education and mental health support. In some cases cash allowances were provided.

13. Kids Company relied on a combination of private donations and central and local government funding.

14. On 11 August 2015 the Board determined that an application should be made to the court for Kids Company's winding up, on the basis that it was unable to pay its debts. A directors' petition was presented the following day, and on 20 August 2015 the court ordered a winding up.

15. On 17 August 2017, after an investigation approaching two years in length, the Official Receiver, Anthony Hannon, issued a Part 8 claim for a disqualification order under s 6 CDDA. As discussed below, the claim makes a single allegation of unfitness, namely that the defendants caused and/or allowed Kids Company to operate an unsustainable business model. There is no allegation of dishonesty, bad faith, inappropriate personal gain or any other want of probity.

16. In May 2018 the Official Receiver filed a notice of discontinuance against the first defendant, Sunetra Atkinson (now known as Sunetra Sastry), on the basis that she had accepted a disqualification undertaking. References in this judgment to the defendants are to defendants other than Ms Atkinson.

17. The trial was conducted during the Covid-19 pandemic, on a "hybrid" basis. The advocates and a limited number of additional members of the five legal teams were present in court, with the parties and their other legal representatives generally participating remotely for the duration of the trial. Most of the witnesses were able to give evidence in person. Press and public were able to view and hear the proceedings via a link to an adjacent court room.

THE DEFENDANTS

18. This section contains a brief description of the background of each defendant. Comments on the defendants' witness evidence are set out separately, in the section dealing with witness evidence (see paragraph [99] onwards). With the exception of Mr O'Brien, who resigned on 31 March 2015, all the Trustees were in office when the company went into liquidation.

Camila Batmanghelidjh

19. As already mentioned, Ms Batmanghelidjh founded Kids Company in 1996, and worked full time for it thereafter. She drew a very modest salary until the final three years of the charity's life, when a philanthropist sponsored an increase in

salary. I should make clear at the outset that her devotion to the interests of the young people whom the charity served was apparent throughout, and was not in doubt.

20. Ms Batmanghelidjh described herself in her second affidavit as having worked for 35 years in the charity and care profession. She is a psychotherapist, and indeed she has taught that subject in the past. There was some challenge to an apparent lack on her part of formal qualifications, which (given the case being brought) appeared at best irrelevant. There is no question that the methodology that Kids Company developed was widely praised, and Ms Batmanghelidjh's work received significant recognition, including for example a lifetime achievement award from the Centre for Social Justice in 2009 and an honorary fellowship at University College London in 2014. She was awarded a CBE in 2013 for services to children and young people.

21. Ms Batmanghelidjh clearly has a striking ability to communicate with troubled young people. Mr Yentob described her as having the gift of reaching the (otherwise) unreachable. But she was also an extraordinarily successful fundraiser for Kids Company, and developed influential relationships with a number of senior politicians as well as philanthropists. Mr Yentob described her particular gift as engendering sympathy for Kids Company's beneficiaries, young people who were often troubled, involved in crime and excluded from school: as he said, not a group of people for whom the public would necessarily have a natural affinity. As Ms Bolton noted in her affidavit, Ms Batmanghelidjh was widely recognised as a compelling advocate for vulnerable young people. Ms Bolton added that Ms Batmanghelidjh was probably the best fundraiser she had ever worked with (Ms Bolton's own expertise in that area is described in the next section).

Erica Bolton

22. Ms Bolton, the third defendant, was the co-founder of Bolton & Quinn, an arts and culture public relations consultancy. The business has been incorporated since 1984 and Ms Bolton remains a director. It is a relatively small business but it has a significant range of clients, including the Tate, Royal Academy of Arts, V&A, Serpentine Galleries and Ashmolean Museum. The business has a full-time financial director and Ms Bolton's co-founder is more involved in its finances than Ms Bolton.

23. Ms Bolton first became aware of Kids Company through her daughter's school, which had a partnership with it. She also volunteered with her children for Kids Company at Christmas before she became a trustee, and in 2004 and 2005 helped the charity to organise an art exhibition at Tate Modern, "Shrinking Childhoods", which generated significant footfall and funds. Ms Bolton developed a good working relationship with Ms Batmanghelidjh through her work on the exhibition, and Ms Batmanghelidjh approached her to see if she was interested in becoming a trustee. Ms Bolton also knew Mr Yentob and had been deeply affected by what the exhibition had revealed about the circumstances in which some London children found themselves. Ms Bolton was appointed as a trustee in April 2005.

24. Ms Bolton explained in her affidavit that when she was appointed it was intended that she would support Kids Company's activities particularly in relation to fundraising, public relations (PR) and access to the art world. This included introductions to individual artists who might, for example, provide works for auction, and to venues that could host exhibitions of art work produced by Kids Company's clients. She said that a number of the charity's most significant funders came from the arts world, and that well-known artists, including Grayson Perry, Tracy Emin, Damien Hirst and Anish Kapoor, had made contributions. Ms Bolton also explained that she understood that being a trustee involved having, with her co-trustees, overall responsibility for the charity's affairs, but that she did not hold herself out as having any particular financial expertise.

25. Ms Bolton did not serve on either the Finance Committee or the Governance Committee. She was a member of the Development Committee (see [38] below) until around 2013.

26. Ms Bolton has had experience of trusteeship in other organisations. She was a trustee of the Mayor of London's Thames Festival Trust between 1998 and 2013, the Architecture Foundation between 2001 and 2013, and a further small arts and educational charity between 2010 and 2017. In addition, many of Bolton & Quinn's own clients are themselves registered charities.

Richard Handover

27. Mr Handover, the fourth defendant, spent his career at WH Smith, starting with delivering newspapers when he was 17. He worked his way up the organisation, becoming CEO of the WH Smith group in 1997 and Chairman in 2003.

28. Mr Handover first became a charity trustee in the late 1980s, for Age Concern. He also volunteered for the charity Business in the Community in the early 1990s, and in that capacity first met Ms Batmanghelidjh in around 2000. He was one of the funders of the exhibition at Tate Modern already referred to, the profound impact of which on his children led to two of them working for the charity.

29. Mr Handover retired from employment in 2005, after which he divided his time between non-executive director roles and volunteering for charities. He became a trustee of Kids Company in April 2005. His paid non-executive director roles included Nationwide Building Society between 1999 and 2008 and Royal Mail between 2000 and 2010. His other roles included chairman of the board of governors of a school and chairman of the strategy board that created OFSTED in its current form. He was awarded a CBE for services to skills and industry in 2008. From 2010 onwards he has devoted his working time entirely to charitable causes.

30. Mr Handover spent a day a week, and sometimes more, working at Kids Company's head office from 2005 onwards. In the course of that he had significant interactions with staff, in particular the Finance team. He acted as Vice Chair of the Board.

31. In late 2013 Mr Handover offered to stand down from the Board because of a new commitment he had taken on as chair of a major charitable trust. He was

persuaded by Mr Yentob and Ms Batmanghelidjh to stay on, and agreed to do so because of the degree of commitment he felt to Kids Company and his belief that by the end of 2014 he would be able to recommit his time at its previously high level. The effect of his new commitment meant that there were a number of meetings that Mr Handover could not attend during 2014, although he continued to read documents and participate in other ways, including through a significant amount of contact with other Trustees outside meetings.

Vincent O'Brien

32. Mr O'Brien, the fifth defendant, is a chartered accountant with over 40 years' experience in the City of London. He qualified at Coopers & Lybrand in 1983 and in 1993 joined Montagu Private Equity, then part of HSBC, as its Finance Director. When Montagu was bought out via a management buyout in 2003 he moved roles to look after fundraising from investors. However, he remained on the investment committee and got involved in looking at potential investments.

33. During his time at Montagu Mr O'Brien served on the board of the British Venture Capital Association, and became its chairman in 2005.

34. Mr O'Brien became a trustee of Kids Company in March 2007. He was particularly drawn to the charity because of his own non-privileged background growing up in London. He was proud to be involved in what he thought was the charity's remarkable work, helping some of the most deprived young people in society.

35. Mr O'Brien retired from Montagu in 2016 and since then has had a number of non-executive director and advisory roles. However, the existence of these proceedings has meant that he has effectively been barred from taking on new roles in the financial services sector, and he has given up charitable work.

Francesca Robinson

36. Ms Robinson, the sixth defendant, has a background in recruitment consultancy. She has worked at PSD Group Limited since 1991, and in 1997 led its flotation on the London Stock Exchange. She ran it as a public company, with a turnover of £150 million per year and 900 staff, for 12 years, until she led a management buyout in 2010. She is now its executive chairman.

37. Ms Robinson became involved with Kids Company in around 2005 when she decided to volunteer for a charity involving young people, and was introduced to Kids Company by a then trustee. She was appointed as a trustee in July 2006 and joined the Finance Committee shortly afterwards, remaining a member of that committee until September 2012 and then rejoining it, and also joining the Governance Committee, in the latter part of 2014.

38. Ms Robinson provided particular assistance with fundraising. She established and initially chaired the charity's Development Committee. This was not a formal Board committee but a group of well-connected supporters. The committee undertook a number of activities but latterly its particular focus was the organisation of the charity's annual gala dinner, the final one of which in October

2014 raised nearly £1 million. Ms Robinson also volunteered as a mentor of one of the charity's clients, and provided additional assistance in helping to professionalise the charity's internal procedures (for example, instigating staff appraisals). She made a point of visiting centres and schools to see the work of the charity first hand, and both donated funds herself (as did PSD) and introduced significant donors.

39. In addition to her work at Kids Company, Ms Robinson was a governor of the Trinity Laban Conservatoire between around 2012 and 2017, and is a volunteer director of another organisation.

Jane Tyler

40. Ms Tyler, the seventh defendant, qualified as a solicitor in 1992 and was made a partner at Macfarlanes LLP in 2001, specialising in anti-trust law. She retired from practice in 2009. She volunteered for many years at a local charity providing respite care for disabled children.

41. Ms Tyler was introduced to Kids Company in around 2003 through a neighbour who worked there, and she arranged for Macfarlanes to provide pro bono advice to the charity. She became a trustee in March 2007 following an approach by Mr Handover, the view having been reached that Kids Company needed a lawyer on the Board. Ms Tyler joined the Finance Committee when she was appointed, and was later appointed to the Governance Committee which she subsequently chaired.

42. As well as attending Board and committee meetings, Ms Tyler was involved at one stage in assisting with drafting and reviewing the charity's internal procedures, and (before a senior HR manager was appointed) she also assisted with a number of staff disputes. In addition Ms Tyler arranged for the charity to obtain legal advice in relation to various matters when required, and she also got involved in fundraising.

43. In early January 2015 Ms Tyler indicated that she wished to resign from the Board. This was for personal reasons and because she felt that she had served for a lengthy period. She was asked by other Trustees to consider postponing her departure given the difficult situation that the charity was then in, and she agreed to remain. The subject came up again on more than one occasion during the following few months, with Ms Tyler deferring her resignation in view of the charity's position at the time.

Mr Webster

44. Mr Webster, the eighth defendant, has worked in human resources ("HR") throughout his career. He worked at House of Fraser and Marks & Spencer before spending 16 years at Astra Zeneca, where he was head of HR at its commercial division. He left Astra Zeneca on 30 June 2015 and is currently Executive Vice President of HR at DFS Group, a travel retailer of luxury products based in Hong Kong.

45. Mr Webster first became aware of Kids Company through one of its supporters who was involved in fundraising for the charity, and was invited to a gala dinner at which he met Ms Batmanghelidjh. He joined the Development Committee (which, contrary to one point put by the Official Receiver, did not give him an insight into the details of the charity's financial position). Through the Development Committee he got to know Ms Robinson, and in that capacity was heavily involved in organising the 2013 and 2014 gala dinners. He was interviewed by Ms Robinson and by Mr Handover before accepting an invitation to join the Board.

46. Mr Webster was appointed as a Trustee on 10 December 2013 but his first Board meeting was on 30 January 2014. It was also proposed that he join the Governance Committee, but this was delayed pending the outcome of a review that Mr Handover was conducting into Board committees (a review referred to further below). Mr Webster's first Governance Committee meeting was on 22 October 2014.

Mr Yentob

47. Mr Yentob, the ninth defendant, is a well-known television broadcaster. He had a long career at the BBC, including as Controller of BBC2 and then Controller of BBC1. He then held various directorship roles, including as Director of Television and, between 2004 and when he left the BBC in December 2015, Creative Director. He is currently a broadcaster, editor and presenter.

48. Mr Yentob first came across Kids Company in the 1990s when, as Controller of BBC1, he decided to visit some of the charities supported by Comic Relief. He met Ms Batmanghelidjh, other staff and young people, was impressed with what the charity was doing and started to get involved through donating and helping with fundraising. He provided particular assistance in 2002 in relation to a PAYE debt of nearly £700,000, where he found a donor to pay off £100,000 and contacted Dawn Primarolo (the then Paymaster General) about the remainder, which was subsequently waived.

49. Ms Batmanghelidjh invited Mr Yentob to become a trustee and Chair of the Board in 2003, to which he agreed. He was appointed in May 2003. From then onwards, in addition to meetings, he devoted around half a day a week to Kids Company. As with other Trustees, the time he spent on the charity's affairs increased substantially from late 2014.

50. Mr Yentob has held other charitable trusteeships in the past, including the Royal Court Theatre, the Southbank Centre, the Institute for Contemporary Arts and the Architecture Foundation.

THE ISSUES IN OUTLINE

51. All the defendants apart from Ms Batmanghelidjh were appointed as directors of Kids Company. In relation to Ms Batmanghelidjh there is a threshold question as to her status. The Official Receiver maintains that, although she was not

appointed as a director, Ms Batmanghelidjh was a de facto director, and on that basis is properly the subject of disqualification proceedings.

52. The Official Receiver makes a single allegation of unfitness against the Trustees, namely that they:

> "…caused and/or allowed Kids Company to operate an unsustainable business model …"

53. The allegation is made in two parts. First, it is alleged that the Trustees "both individually and collectively" caused or allowed the operation of a business model that was unsustainable without material change from no later than 27 September 2013 (being the date on which the Board approved the statutory accounts for the year ended 31 December 2012), or in the case of Mr Webster from the date of his appointment on 10 December 2013, and that they knew or should have known about this and took insufficient action to address it. Secondly, it is alleged that by no later than 30 November 2014 each of them individually and collectively:

> "…knew or ought to have known that failure was inevitable without immediate material change…"

(At some points the report refers to failure being "highly likely" as an alternative to "inevitable". The two are of course not the same.)

54. The allegation as framed against Ms Batmanghelidjh is in the same terms of causing or allowing Kids Company to operate an unsustainable business model from no later than 27 September 2013, and with the same allegation as to what she knew or should have known by 30 November 2014.

55. The allegation of operating an unsustainable business model is elaborated on by lists of matters relied on. Seeking to draw together the strands from different paragraphs in the report and to minimise repetition, the main features are:

    (a) an overarching criticism of the operation of a demand-led model of "self-referral" and a policy of "never turning a child in need away", whilst being dependent on ad hoc grants, donations and loans, without sufficient reserves for the eventuality that they were not made, and a failure by the directors to take adequate action to alter the business model so as to control expenditure in the context of rapid and uncontrolled growth and increasing financial difficulties, or adequately to address the risks that it involved;

    (b) inadequate governance or control by the Trustees of the CEO, Ms Batmanghelidjh, who exercised a dominant role in determining and operating the model (a model which was also dependent on her fundraising activities), was resistant to any change in the model and would always prioritise clients' needs;

    (c) failing to implement adequate procedures or controls to address the increasing risk of failure, including financial controls to control

expenditure, to enable Kids Company to meet its obligations as they fell due and to address anticipated income shortfalls;

(d) trading at an increasing deficiency of income to expenditure, becoming increasingly reliant on short-term loans, bringing funding forwards (meaning asking for donations or grants early), circulation of credit (meaning using loans to pay off other creditors, including other lenders), delaying payments to creditors and year-end accruals, without the Trustees exercising adequate oversight and with Ms Batmanghelidjh resisting it;

(e) relying on overoptimistic statutory funding projections and failing adequately to consider the risk caused by "donor fatigue";

(f) failing to build up reserves;

(g) failing to take adequate action to oversee and scrutinise the propriety of, clinical need for, or level of expenditure on clients, test adherence to policies or consider any need to adjust them, resulting in ever increasing financial demands;

(h) failing to plan for increasing risk as the charity's business and client base continued to grow;

(i) inappropriately treating amounts received in 2014 as accruals in 2013, giving a misleading impression; and

(j) in the case of Ms Batmanghelidjh, failing to adhere to written policies.

56. Specifically in relation to the allegation that by 30 November 2014 the defendants knew or ought to have known that failure was inevitable without immediate material change, the Official Receiver relies on allegations that:

(a) Kids Company had only been meeting payroll for several months by bringing donations forward from 2015 and borrowing money;

(b) the bank had regularly raised concerns and refused to allow payment of payroll without adequate cleared cash;

(c) the November payroll had been a day late and payments to self-employed staff and to HMRC were in arrears;

(d) there was a significant year-to-date deficit and expenditure had increased;

(e) the charity had tripled its reliance on short-term loans over a twelve-month period, with increasing numbers of donors raising concerns;

(f) there was no government funding commitment past the first quarter of 2015; and

(g) from 1 December 2014 the defendants failed to take adequate steps to implement contingency plans or to restructure.

57. An additional point to make at the outset is that the Official Receiver confirmed, in witness evidence produced by his solicitor for the pre-trial review, that he was not challenging any particular spending on any individual client. The question in issue in that respect was "whether the Company's policies and procedures were followed in reaching its clinical decisions, the overall budgeting of kids costs, and so on". ("Kids costs" meant expenditure directly on clients, see further below.)

58. The periods of disqualification sought, which remained unchanged during the trial, were 6 years for Ms Batmanghelidjh, 2.5 years for Ms Bolton, 3 years for Mr O'Brien and 4 years for each of Mr Handover, Ms Robinson, Ms Tyler, Mr Webster and Mr Yentob.

59. All the defendants deny the allegations of unfitness. In outline, they say that Kids Company was not bound to fail. What caused it to fail was unfounded sexual assault allegations alerted to the charity on 30 July 2015, just after it had agreed a restructuring plan with the government and donors which would have allowed it to move forward. The allegations resulted in the withdrawal of financial support for the restructuring, such that Kids Company had to close.

60. At the end of opening submissions I made a ruling ([2020] EWHC 2839 (Ch)) relating to certain allegations that had been raised for the first time in opening submissions. In that ruling I determined that, for reasons of procedural fairness, the Official Receiver should not be permitted to seek certain findings. These were that specified loan repayments were preferences voidable under s 239 Insolvency Act 1986, and that there were breaches of duty under ss 172, 173 and 174 Companies Act 2006, being the duty to promote the success of Kids Company, the duty to exercise independent judgment and the duty to exercise reasonable care, skill and diligence.

THE EVIDENCE

The documentary evidence

61. The Official Receiver's evidence primarily consisted of a report that he had prepared dated 15 August 2017 and a further report prepared by a Deputy Official Receiver, Stuart Tatham, dated 14 August 2017, in each case together with exhibits. Mr Hannon also produced a second report, dated 30 March 2020, in response to the defendants' evidence. In addition, three former employees of Kids Company, Diane Hamilton, Adrian Stones and Mandy Lloyd, produced affidavits. Some specific remarks are made about the reports in the following section dealing with witness evidence. Following that is a further section with some comments about the impact of certain discussions between the former employees and the product of those discussions, in particular what was referred to as the "joint timeline".

62. Each of the defendants produced affidavit evidence. In the case of Ms Batmanghelidjh two affidavits were produced. The first was produced in April 2019 in support of a strike-out application. The second was produced in October 2019 following a change of legal team and is both significantly more detailed and,

as stated in it, sought to state Ms Batmanghelidjh's evidence in more measured terms.

63. Mr Hannon's first report was around 430 pages long, and Mr Tatham's around 170 pages. The exhibits were extremely extensive, comprising over 18,000 pages, typically comprising analyses of the category of document in question as well as the documents themselves. In the case of Mr Tatham, all but one of the exhibits (some 5,400 pages in total) comprised analysis and documentation relating to 39 individual Kids Company clients.

64. As well as the reports and affidavits, my pre-reading included all available minutes and notes of Board and Board committee meetings from March 2012 onwards together with two Kids Company internal procedures manuals, namely its Financial Procedures Manual (two versions of which were produced, dating from December 2013 and February 2014) and its Policy for Distributing Financial Assistance.

The witness evidence

65. Oral evidence for the Official Receiver was provided by Mr Hannon, Mr Tatham and each of the ex-employees referred to above. Evidence was given remotely by Ms Lloyd and by the others in person.

66. Each of the defendants gave oral evidence, in the order in which they are referred to below. Ms Batmanghelidjh and Mr Webster gave evidence remotely (Mr Webster from Hong Kong), and the others in person.

67. The Official Receiver rightly accepted that each of the Trustee defendants sought to be an honest witness. The Official Receiver did not accept this in respect of Ms Batmanghelidjh.

68. There was no material challenge to the honesty of the evidence of Ms Hamilton, Mr Stones or Ms Lloyd, although there were significant challenges to the accuracy of their recollections.

Mr Hannon

69. Mr Hannon is an accountant by background. He has had what he said is approaching 40 years of experience of dealing with insolvent companies, experience that I understand has been gained in the public sector. Mr Hannon is clearly an experienced witness and has dealt with a great number of insolvent companies during his career. Mr Hannon obviously has strong views about the case, and these were not surprisingly reflected in his oral evidence.

70. Mr Hannon was not involved in the case throughout the investigation phase. He joined the relevant team in around May 2016, after the investigation had already been going on for a number of months. He was appointed as an Official Receiver, taking over responsibility for the case, in September 2016.

71. Notwithstanding the extent of Mr Hannon's experience, some points stood out.

72. First, it was apparent that Mr Hannon had never dealt with the failure of a substantial charity. His only experience was of charities where the directors also had significant executive functions. He was evidently not familiar with the concept of a charity board being comprised entirely of non-executives. This was relevant because a key theme in his criticisms of the Trustees was that they should have taken on particular executive functions, and/or should have done so to a greater extent than they in fact did.

73. Secondly, I was left with a strong impression from Mr Hannon's evidence that his report had been produced, and reworked, very much with an eye on the team within the Insolvency Service that would (at the direction of the Secretary of State) authorise him to launch proceedings, and would approve what period of disqualification should be recommended. I was not persuaded that sufficient regard had been paid to the duties not to overstate the case against the defendants, to put it in a balanced way, and not to omit significant evidence in their favour (*Re Finelist* [2004] BCC 877 at [19]). I should emphasise that this is not intended to be a criticism of Mr Hannon as an individual – for example, as mentioned above, the investigation was not all conducted under his leadership – but of what I infer is a broader issue of training and understanding within the Department.

74. Thirdly, despite Mr Hannon's level of experience I am afraid to say that I found some of his evidence rather unrealistic. Most of the issues in question are matters of opinion so they are strictly inadmissible as evidence, but they underpin aspects of the Official Receiver's case and need to be addressed in that context. Again, I deal with these points later but my concerns included views expressed as to how reserves should have been built up, how Ms Batmanghelidjh should have been dealt with by the Trustees, the view that should have been taken about communications from senior members of the government and associated individuals, and the approach that the charity should have taken to the reality of young people's needs.

75. Fourthly, there was a difficulty in Mr Hannon's approach to the directors individually, as opposed to collectively. The court must make an assessment as to the fitness or otherwise of each director individually (see for example *Walters & Davis-White, Directors' Disqualification & Insolvency Restrictions* (3rd ed.), para 5-82, referring to *Re City Investment Centres Ltd* [1992] BCLC 956, 960 and *Re Westmid Packing Services Ltd* [1998] BCC 836, 842). Apart from recognising that Mr Webster joined the Board on 10 December 2013 and that Mr O'Brien resigned on 31 March 2015, and including a table purporting to set out who was on the Board committees, no distinctions were drawn between the Trustees in the report. Mr Hannon was also unable to assist the court in understanding the distinctions drawn between the length of disqualification sought for each defendant. I accept that the length of disqualification is a matter for the court (and therefore for submissions) rather than the Official Receiver's report, but it must be the responsibility of the Official Receiver to adduce evidence on which the court may rely in determining both whether each *individual* director is unfit and the length of disqualification that is appropriate to *that* individual. In any event I would expect the Official Receiver to be able to explain the different lengths of disqualification that he had sought when asked. It is, after all, his case.

Mr Tatham

76. Mr Tatham is significantly less experienced than Mr Hannon, and indeed volunteered that this was the first time he had acted as a deponent. He had had no prior involvement with charity cases. Understandably, he had a much less full grasp of the case than Mr Hannon, his focus having been on one area, Kids Company's clients.

77. Like Mr Hannon, Mr Tatham had not been involved throughout the investigation. He had some involvement in the immediate aftermath of the charity's collapse in inspecting some of the charity's premises, but only became involved in the investigation in around June 2016, taking over from another team member.

78. I got the impression that Mr Tatham was genuinely concerned about gaps in record-keeping, relating not only to cases where client files could not be located, but to cases where they were located but appeared to have missing documents.

79. When challenged about the rationale for much of the content of his report, particularly that in relation to individual clients, Mr Tatham's consistent response was that he had been instructed to investigate whether the charity had adhered to its policy and processes for distributing financial assistance. His report was therefore directed at that issue.

80. In fact, much of the content of Mr Tatham's report, which includes over 100 pages and extensive exhibits relating to specific clients, does not sit comfortably with the single allegation as put to the defendants, and the confirmation at the PTR that individual items of expenditure were not being challenged (see [57] above). The explanation for this appears to relate to the way in which the allegations developed. The allegations as originally put to the defendants, in letters sent in March 2017, included an allegation of causing or allowing Kids Company to incur inappropriate expenditure. That allegation was said to be demonstrated by an analysis of "Top 25" clients between 2013 and 2015 (see [546] below for an explanation of the "Top 25"). The allegation was later dropped, but Mr Tatham's report was already substantially complete by the date that the March letters were sent. All but four of the 39 clients covered were in the "Top 25" category during that period, and the others were either connected to them or there was a link to a member of staff.

81. Mr Tatham also appeared to struggle even more than Mr Hannon with the idea of a wholly non-executive charity board. For example, he suggested in cross-examination that Trustees should have noticed that (as he alleged) client filing was not being done, although on the following day he sought to modify this by suggesting that they should have instructed someone else to check client files. He also suggested that, rather than relying on expectations of or reassurances from staff, the implementation of decisions should have been formally checked by Trustees.

82. Mr Tatham was aware of the requirement for fair presentation of evidence, but appeared not to have a full grasp of what this involved, for example the need to avoid selective quotations which could risk giving the reader a misleading impression. More significantly, the narrow focus on adherence to Kids

Company's policies for distributing financial assistance did not in my view result in a balanced representation in Mr Tatham's report of the findings of various external reports about the charity's operations that had been undertaken during or close to the period in question, and in particular what the Trustees might reasonably have derived from those reports.

Ms Hamilton

83. Ms Hamilton was employed as Director of Finance and Accountability at Kids Company between July 2014 and January 2015, reporting directly to Ms Batmanghelidjh. She was recruited to cover the maternity leave of Ruth Jenkins, who had held the post on a permanent basis since June 2013. Ms Hamilton was appointed for a year, but resigned on 30 January 2015. However, she continued to work at Kids Company on specific tasks until the end of February 2015.

84. Ms Hamilton trained as a Certified Public Accountant at KPMG in Chicago and holds a master's degree in business administration. She had worked both in the commercial sector and in the charitable sector before joining Kids Company, including holding a senior finance role at Cancer Research UK.

85. Ms Hamilton was very softly spoken, and much of her oral evidence was not very clearly articulated. This was somewhat surprising given her qualifications and apparent level of experience. There was a notable tendency to start speaking, stop, restart and then quite often not to complete, or complete clearly, what Ms Hamilton might have intended to say. This might have been in part due to nerves, since Ms Hamilton became somewhat clearer during the second day of her two days in the witness box, although the tendency was still there to a marked extent.

86. While I accept that Ms Hamilton gave her evidence honestly, I did notice what appeared to be some exaggerated caution in confirming some points, relying on failures of recollection. Whilst the lapse of time meant that an inability to recall details was perfectly understandable, in Ms Hamilton's case this appeared to extend to a refusal to confirm a point by reference to how she would have behaved in the situation in question. For example, there was some reticence in confirming that she had reviewed management account documents in advance of Finance Committee meetings even when it was clear from the agenda and minutes that she was responsible for presenting those documents at the relevant meeting. In contrast, certain other points were apparently very clearly recalled, even though they related to a specific event, such as what happened in a particular meeting.

87. Ms Hamilton seems to have retained all, or at least a significant number of, her Kids Company work emails on a laptop after she left the organisation. It appears that this material was used among other things in connection with the creation of the joint timeline discussed further below. Ms Hamilton also confirmed that she had looked through her emails to pick out what she considered to be "relevant", printed them and provided them to the Official Receiver. I infer that Ms Hamilton's approach to relevance was rather different to the approach that might be taken on a disclosure exercise, and was more directed at identifying material that could be used to criticise the charity. That is consistent with her evident views about the charity's failings, and with what appeared to be a rather selective approach in referring to documents in her affidavit.

88. Ms Hamilton also had some handwritten notes which she said had been written in a notebook that she started using at a point when she developed real concerns. There were also typed notes prepared over a later period, around June 2015, which were said to be a typed version of the handwritten notes but in fact included additional material. Ms Hamilton said that she stopped work on the typed version when the joint timeline was developed. Differences between the notes, and between them and other documents including notes of her statement to the Official Receiver under s 132 Insolvency Act 1986, together with an inability clearly to explain the timing or process of creating the handwritten and typed notes, affected the weight that could be placed on the later documents in particular. There were also differences between the tenor of her evidence and some of the documentary evidence, including the content of a contemporaneous email that she wrote about the reasons for her resignation and the work she continued to do for the charity following her resignation.

89. Ms Hamilton clearly had an uncomfortable time in the organisation in the last part of her short time there, from around November 2014. She had a perception of having been bullied by Ms Batmanghelidjh, and obviously found her hard to deal with. She felt increasingly undermined, in particular by direct dealings in relation to contingency planning between Ms Batmanghelidjh and Sachin Mevada, the Head of Finance who reported (or should have reported) to Ms Hamilton. As discussed further below, she also felt that she was being dissuaded from continuing to contact Trustees directly to express her genuinely held concerns.

Mr Stones

90. Mr Stones was employed as Director of Human Resources between April 2013 and January 2015. He had previously worked at a housing association and before that in local government. He was recruited through Ms Robinson's recruitment agency, and like Ms Hamilton reported directly to Ms Batmanghelidjh. The role was a new one and a key objective was to put HR structures in place that had previously been lacking.

91. Mr Stones' oral evidence was clear and direct, and generally given without hesitation. In some respects I conclude that Mr Stones was over confident as to the quality of his recollections. There were a couple of points in his affidavit that he had to correct during cross-examination, and another about an email he claimed to have sent to Mr Webster in January 2015 that could not be located despite what appears to have been a thorough search, which I consider more likely than not reflects an error of recollection as to its existence.

92. It was clear that Mr Stones had developed real concerns about the charity, particularly from November 2014. He said that it was these concerns that led him to make secret recordings of three meetings with Ms Batmanghelidjh, which he used to produce summary notes that were included in his evidence. In the event it has not been necessary to make any specific findings about the content of these notes.

93. Like Ms Hamilton, Mr Stones developed the impression that he was dissuaded from talking directly to Trustees. This is discussed further below, but it is worth

stating at this stage that it is evident that Mr Stones developed a good relationship with Mr Webster, which continued at and following the point of Mr Stones' resignation.

Ms Lloyd

94. Ms Lloyd was employed at Kids Company between June 2013 and early February 2015. Her title was Director of Development. She worked on the fundraising side, reporting directly to Ms Batmanghelidjh. She accompanied Ms Batmanghelidjh to Board meetings and to meetings of the Finance Committee that the latter attended.

95. Kids Company was Ms Lloyd's first experience of the charity sector, having previously worked in commerce (most recently in the telecoms sector). It was apparent from Ms Lloyd's evidence that she has worked in fundraising since she left Kids Company, and that some of her comments, for example about what would and would not be regarded as good practice, were statements of opinion made through the lens of the experience that she has since had.

96. Ms Lloyd's evidence was clear. She was an articulate witness in her descriptions of her experience at Kids Company, notably in relation to Ms Batmanghelidjh. Her direct contacts with Trustees were much more limited and, with the (important) exception of what she observed in formal Board or committee meetings, her evidence in respect of them was not generally based on her direct experience.

97. Like Mr Stones, Ms Lloyd was somewhat overconfident as to the quality of certain recollections. For example, she misplaced the date of an art event (see [398] below: the error was quite material). Excessive reliance on hearsay may also have contributed to elements of Ms Lloyd's affidavit being overstated, for example a bald statement that "Trustees had stopped corresponding in a helpful way" when she had attempted no such correspondence herself.

98. I also treat with some caution Ms Lloyd's evidence that she would not have felt able to speak out in the environment of Board or Board committee meetings even if she knew that what was being said was incorrect, because it would have appeared undermining and not supportive. As Ms Batmanghelidjh said, Ms Lloyd was a senior, highly paid, employee and I do not believe that she would have been readily cowed into silence by Ms Batmanghelidjh. She could have chosen to speak out if she had wished to do so. Instead it appears that she relied on other senior managers raising concerns. However, since the fundamental concerns that she could speak to related to the quality of the fundraising projections, on which she directly worked and which were shown on spreadsheets which the Trustees would have been aware had been produced by her, the effect of not speaking out either within a meeting, or outside its confines, risked Trustees being left with a misleading impression.

Ms Batmanghelidjh

99. My overall impression was of a charismatic, persuasive person with strong views, who is well used to employing advocacy skills. There were strong beliefs in

particular narratives, beliefs which were sometimes maintained in the face of contrary evidence.

100. I consider that Ms Batmanghelidjh's evidence generally reflected her honest beliefs, but it could be selective. This could result in an incorrect impression being given. The most significant example of this related to responsibility for the charity's finances, discussed from [634] below.

101. There were also some examples of Ms Batmanghelidjh having seemingly convinced herself of something which it should have been apparent to her was not the case, albeit that there might have been some possible basis for the view that she had formed. However, the examples of this that I saw related to relatively insignificant matters. One was whether the payment of payroll one day late in November 2014 was due to a "technical" problem as she insisted it was, rather than the reality of funds not being cleared, and another was her insistence that she had Trustee permission to give interviews on the Today programme and Newsnight on 3 July 2015 when in fact she had been given an instruction not to give interviews, albeit that there was a possible basis for her to have misunderstood the position in connection with the Today programme.

102. As a result, I have treated Ms Batmanghelidjh's affidavit and oral evidence with particular care. However, I do not accept the Official Receiver's submission in closing that I should entirely discount her evidence unless corroborated by a document.

103. There was also a significant amount of advocacy by Ms Batmanghelidjh from the witness box. While questions were generally answered eventually, this was often not done directly, because she wished to add her own explanation of the relevant context. This was understandable but did not generally assist the court.

104. Ms Batmanghelidjh referred on a number of occasions to learning difficulties that she has. She explained that she is dyslexic and that she also has difficulties in "tracking" along rows of figures in tables and spreadsheets, and difficulties with the sequence of time (although she can often remember particular dates). She said that her short-term memory is poor (she referred to difficulty in repeating a number back as an example), but that she has a very good long-term memory. Ms Batmanghelidjh also experiences difficulties with technology, and she had an assistant with her while she was providing evidence. Writing is difficult and she cannot type.

105. My impression is that it is correct that Ms Batmanghelidjh experiences some difficulties in, for example, reading lines of figures without assistance, and at least at the time of the events in question she did not use a computer, being reliant on personal assistants (PAs) to do her typing, send emails on her behalf and print emails and other documents for her to read. She was however well supported by PAs while at the charity, including in the evenings and at weekends. It was also apparent from her performance in the witness box that she managed despite her dyslexia not only to read and assimilate text presented to her, but to do so relatively speedily and with good recollection. Recollection was not limited to recalling events at the time in question, but extended for example to recalling contents in a document that she had been shown slightly earlier. I have no doubt

that Ms Batmanghelidjh has significant mental abilities which enable her to mitigate some of the limitations of her learning difficulties.

106. I have made a number of specific findings in respect of Ms Batmanghelidjh at paragraphs [633] to [668] below. As explained there, these should be read as part of my findings of fact as a whole.

Ms Robinson

107. As would be expected from her background in business, Ms Robinson came across as an able individual. It was obvious that she is used to making difficult decisions in a business context, and dealing with such matters as staff-related challenges. Whilst it was clear that she would be able to command authority in a business setting, she did not strike me as at all unapproachable by staff. In particular, I accept her evidence that she developed a close working relationship with Jane Caldwell (another senior manager of Kids Company, referred to further below) and made a point of visiting the charity's centres and talking to staff there.

108. Ms Robinson provided clear evidence, and in my view answered questions directly and as fully as her recollection would allow. Some delays in responding to questions reflected the careful consideration she gave them, rather than an attempt to hide or gloss. Ms Robinson did not shy away from responding on difficult issues, such as aspects of the Board's relationship with Ms Batmanghelidjh and the significant issues that the charity had with creditors.

Ms Tyler

109. As might be expected from someone of her background, Ms Tyler came across as a careful witness, in the sense that if appropriate she would check exactly what was being asked before responding. Her responses were clear and to the point.

110. It is worth noting that Ms Batmanghelidjh did not attend the Governance Committee meetings that Ms Tyler chaired, and Ms Tyler obviously had significant dealings with other staff in that capacity. Whilst I did not get the impression that she had struck up particularly close personal relationships with any of the staff members, I also do not see any reason why staff would not have felt entirely able to communicate any concerns they had to her. They had plenty of opportunity to do so. It is worth bearing in mind that a key function of the Governance Committee was to identify and manage the major risks facing the charity, including through reports from management and the maintenance of a risk register which allocated responsibility for the management of particular risks to staff members.

111. Ms Tyler's responses made clear the tensions the Trustees faced between meeting Kids Company's charitable objects and what were seen as its duties to its clients, and the financial challenges. She was conscious of the legal issues and had obviously studied the relevant Charity Commission guidance carefully. For example, in April 2012, following the Finance Committee meeting referred to at [201] below, she responded to a request from Ms Robinson for guidance by giving accurate advice about wrongful trading and the need to have a clear plan for dealing with a shortfall between income and expenditure, suggesting that a full

Board discussion of the position was essential. There is also an email from Ms Tyler on 25 March 2015 about the importance of pressing ahead with implementing an effective plan to manage the financial situation (see [301] below). It was Ms Tyler who in May 2015 arranged for Hogan Lovells LLP to provide pro bono insolvency advice. Deborah Gregory, a Hogan Lovells partner, was heavily involved from then on, together with Chris Laverty, a partner at KPMG who agreed to give insolvency advice in conjunction with Hogan Lovells.

Ms Bolton

112. Ms Bolton is obviously a highly experienced public relations executive, who has also had significant experience of fundraising. The two areas are closely linked in the arts sector in which Ms Bolton specialises. Her level of experience was evident from a number of her answers in cross-examination.

113. Ms Bolton's main focus at the charity was on the fundraising and networking side. Although she accepted that she had more general responsibility as one of the Trustees she is clearly less confident about financial matters, and relied on other Trustees, taking particular comfort from Mr O'Brien's expertise. However, she was familiar with the key concepts, such as the need to determine whether the charity was a going concern in order to approve its annual accounts.

114. Ms Bolton accepted a comment that Ms Atkinson had made about her in interview with the Official Receiver, to the effect that she was not the most "present" of the Trustees. In particular, the fact that she sat on neither the Finance Committee nor the Governance Committee meant that she had less involvement than some other Trustees with staff members. She was also less involved than some Trustees in the charity's day-to-day operations in other respects. However, she had been a Trustee for a number of years and explained that she had worked quite closely with Ms Caldwell. She also confirmed that she knew Ms Batmanghelidjh pretty well.

115. Ms Bolton's evidence was given clearly and in my view to the best of her ability and recollection. However, her lesser involvement and lack of confidence in financial matters was evident from her oral evidence. I also got the impression that, on occasions, some views she expressed represented views that she had formed after the event, although I did not think that these were in the nature of glosses that were intended to embellish her case. If anything, the contrary was true. For example, she accepted in cross-examination by Mr Butler that her impression that Ms Batmanghelidjh had a hand in the minutes of meetings and amended them to give a more positive impression may have been formed with hindsight.

Mr Handover

116. Mr Handover came across as an extremely courteous individual who, despite the very senior roles he has held in business, has a gentle, and relatively softly spoken, manner. He is clearly thoughtful of others.

117. I accept (as the Official Receiver now does) that Mr Handover's evidence was truthful, and specifically reject an allegation made at one stage in Ms Anderson's

cross-examination (relating to the approval of the 2013 statutory accounts) that it was not. In my view Mr Handover gave evidence to the best of his ability and recollection. Reservations in agreeing with a number of Ms Anderson's points were generally reflective of the way in which they were put and were not unreasonable, subject only to a minor qualification dealt with at [264] below relating to the way in which the going concern statement was expressed in the 2013 accounts.

118. In a number of his responses in oral evidence about the financial challenges that faced the charity, Mr Handover stressed the nature of its activities. As he put it, it was not manufacturing cars. It was dealing with very vulnerable, disadvantaged young people for whom any actions the charity took to cut costs could have a major impact. In his view the Board had to consider its responsibilities to all its stakeholders.

119. Mr Handover also made clear in oral evidence that, whilst he clearly has a great deal of business and indeed broader experience, he has no financial qualifications or background. Whilst he accepted the responsibilities that the Trustees had, he did rely on assistance from those with professional qualifications in respect of financial matters, in particular members of the Finance team and the auditors.

Mr Webster

120. Mr Webster gave his evidence in a straightforward and candid manner. It was clear that he gave his evidence to the best of his recollection. He did not hesitate, for example, in describing Mr Stones as a very professional and competent HR lead.

121. Mr Webster had read the Charity Commission guidance for trustees, as well as other documents, before taking office as a Trustee. He understood the nature of the responsibilities, although he was also clear about what he thought were the responsibilities of the management team at the charity.

122. Mr Webster emphasised more than once that the Trustees' responsibility for assessing risk extended not only to financial risk, but also reputational risk and the need to protect the young people to whom services were provided. In his view the position was challenging and the Trustees did not take decisions lightly. It was also clear that Mr Webster was quite willing to speak out, at least after his first couple of meetings, and he raised issues when he was concerned about them, including about the charity's status as a going concern.

123. Mr Webster's perspective was of particular interest because of the relatively late stage in the charity's life at which he joined the Board. It was no doubt for this reason that he was subject to particularly strong challenge in cross-examination. A key allegation against other Trustees was that for them the charity's cash flow problems had become "normalised" – the point being that, as a newcomer, Mr Webster should have spotted this and challenged it. However, Mr Webster was clear that this was not his perspective. Rather, the Trustees had their "eyes really wide open" and were keen to ensure the appropriate running of the charity in a responsible manner, without a hint of complacency.

Mr Yentob

124. I have no doubts about the candid nature of Mr Yentob's evidence. He clearly cared and still cares extremely deeply, as I am sure did and do the other Trustees, about what the charity was seeking to achieve. He spoke with conviction about his certainty that the charity would have been able to survive and move forward if it had not been for the unfounded sexual assault allegations referred to at [59] above. He spoke candidly about the problems faced by the organisation and about other matters, including his management of the relationship he had as chairman with Ms Batmanghelidjh as CEO.

125. Mr Yentob's responses to questions were very full. This was helpful in many ways, but at times meant that there was some element of being side-tracked from the question put. This was not, however, a matter of avoiding the question and overall I found his evidence very helpful in providing fuller context, and indeed colour, to the relevant events and those participating in them.

126. Mr Yentob's evidence was of particular assistance in achieving a better understanding of some aspects of the course of the Trustees' dealings with the government in late 2014 and 2015, and how that interacted with discussions with the philanthropists, in particular Stuart Roden and John Frieda, who were most involved in the proposed restructuring plan.

Mr O'Brien

127. Mr O'Brien gave full answers to questions. His past experience as a finance director, and his experience of budgeting and financial management more generally, was obvious.

128. The Official Receiver relied on a number of instances where Mr O'Brien had stated financial concerns in stark terms, which the Official Receiver maintained were not followed by appropriate action by the Board. This included reliance on notes prepared by Mr O'Brien as his own speaking notes or aide memoires in advance of meetings (including a manuscript note that he happened to have preserved from 2012). I accept Mr O'Brien's evidence that his approach is always to do private notes in "black and white" terms. As chair of the Finance Committee he saw his role as "Mr Negative", looking at the worst case and pointing out potential risks. As he put it, "it's no good being chairman of a finance committee and turning up saying, 'it's a bit tight but it's all okay'".

129. Mr O'Brien has clearly found the proceedings particularly stressful, and that was apparent at times from his evidence. I do not find this at all surprising, particularly given the potential impact of the proceedings on his career and professional status. I also had sympathy for his comment, on more than one occasion, that he felt that he was being punished for doing his job. Warnings or issues he had raised, and which I have concluded were properly considered by the Board in its collective decision-making process, were picked up by the Official Receiver and presented as part of his case.

130. Overall, and despite the evident stress, I found Mr O'Brien to be an impressive witness.

Contacts between ex-employees: impact on evidence

131. Discussions took place between Ms Hamilton, Mr Stones and Ms Lloyd about their concerns in relation to the charity not only when they were colleagues at Kids Company, in particular from November 2014 onwards, but also after they left. Many of these discussions also involved Jane Caldwell, another ex-employee who left at a similar time and who negotiated a settlement for constructive dismissal. In particular, it seems that Ms Lloyd remains close friends with Ms Caldwell.

132. The discussions resulted among other things in the production of a "joint timeline" by all four of them, which each of Ms Hamilton, Mr Stones and Ms Lloyd exhibited to their affidavits. Ms Hamilton, Mr Stones and Ms Lloyd also jointly approached the Charity Commission in July 2015 following comments made by Ms Batmanghelidjh on the Today programme, and the evidence exhibited to Ms Hamilton's and Mr Stones' affidavits included a note of that meeting, which had evidently been shared with the witnesses to allow them an opportunity to comment. In addition, it appears that Ms Hamilton provided at least some of the documentary evidence that was relied on by Mr Stones in his evidence.

133. There was some doubt at the trial over when the joint timeline was produced. Ms Hamilton's evidence was that it was prepared in July and August 2015, after the meeting with the Charity Commission. Ms Lloyd's affidavit said that it was produced in July 2015. Mr Stones' affidavit said that it was produced between July and September 2015 and was reviewed before being submitted to a Parliamentary committee, whereas he had suggested to the Official Receiver in interview that it was created in March 2015. In oral evidence Mr Stones said that he could not recall the date, but thought that work had started on it before the meeting with the Charity Commission.

134. I think it is reasonably clear that the timeline was at least for the most part the product of discussions and work in the second half of 2015. Further, it became apparent very late in the trial that the version I was shown throughout most of the trial, and which was exhibited to the affidavits, was actually produced in mid-October 2015, so not in fact as stated in any of the affidavits. It emerged that an earlier, rather different, version was circulated in late August 2015.

135. I do not need in this judgment to rehearse the well known passage from Leggatt J's decision in *Gestmin SGPS S.A. v Credit Suisse (UK)* Limited [2013] EWHC 3560 (Comm) at [15] to [22] about the unreliability of memory, or to discuss the Court of Appeal's more recent reminder in *Kogan v Martin* [2019] EWCA Civ 1645 at [88] of the importance nonetheless of making findings by reference to all the evidence, that is both documentary evidence and witness evidence. I would simply make three short points. First, the joint timeline is a long way from being a contemporaneous document. It was an exercise in recollection, performed some time after the events in question. Secondly, it was a combined effort rather than the recollections of a single individual, the precise input by each being unclear, and with one of them not being a witness in the case (for reasons that were never provided). Thirdly, the extent of the discussions that occurred between the relevant individuals in my view enhances further the usual need to be cautious

about the quality of witnesses' individual recollections more generally, including those recollections encapsulated in the timeline. Such discussions might well have inadvertently created or modified beliefs as to what occurred which are different to what the individual's perception might have been in the absence of those discussions. In particular, there is risk of creating a misleading impression of overall consistency and clarity.

Similarities between defendants' affidavits

136. The fourth and sixth to ninth defendants share the same legal team. Their affidavits made clear that they had considered each other's draft evidence. In addition, passages in Mr Handover's affidavit were adopted by the others in theirs.

137. During cross-examination the Official Receiver questioned examples of similarity of wording between these defendants' affidavits. It is true that there was a similarity of wording in a number of areas, which is less than ideal. However, I am satisfied that each of the defendants gave evidence to the best of their own recollection. The evidence they gave in cross-examination was consistent with their affidavits in material respects. Each of them was also interviewed on two occasions by the Official Receiver much closer to the events in question, and there was very little challenge to what was said by them then, and no allegations of material inconsistency.

138. It would be unfair to criticise these particular defendants for something which reflects the choice of the same legal team, the level of input the legal team obviously had into the drafting of the affidavits and to some extent the fact that the defendants were refreshing their memories from the same documents (in particular minutes of meetings). In reality, lawyers would also have had significant input into the drafting of the other affidavits, not only those of other defendants but also for example (and as she accepted) Ms Hamilton's. Further, there is in my view a difference between affidavits prepared by each of the defendants in late 2019 (or in Mr Webster's case 2020), long after the events in question, and the potential impact of the discussions between Ms Hamilton, Mr Stones, Ms Lloyd and Ms Caldwell much closer to the events in question, and in circumstances where the evidence relied on by the Official Receiver includes documentary evidence emanating from those discussions. Witness evidence based on recollection and not supported by documentary evidence will always be treated with some caution.

LEGAL PRINCIPLES

Disqualification

139. The application for disqualification is made under the CDDA as in force prior to the amendments made by the Small Business, Enterprise and Employment Act 2015.[1]

140. Section 6 provided:

> "(1) The court shall make a disqualification order against a person in any case where, on an application under this section, it is satisfied-
>
> (a) that he is or has been a director of a company which has at any time become insolvent (whether while he was a director or subsequently), and
>
> (b) that his conduct as a director of that company (either taken alone or taken together with his conduct as a director of any other company or companies) makes him unfit to be concerned in the management of a company."

141. Under s 6(2) a company becomes insolvent if, relevantly, it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities. Under s 6(4), the minimum period of disqualification is two years and the maximum period is 15 years.

142. Section 9 required the court to "have regard in particular" to the matters mentioned in Schedule 1, which relevantly included at paragraph 6:

> "The extent of the director's responsibility for the causes of the company becoming insolvent."

143. Section 1 sets out what is meant by a disqualification order, stating that it is an order that, for the period specified, the person against whom it is made:

> "…shall not be a director of a company, act as receiver of a company's property or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company unless (in each case) he has the leave of the court."

144. The principles to be applied by the court have been discussed in a number of cases. They were helpfully brought together by Jonathan Parker J in section IIIA of his judgment in *Re Barings plc (No. 5)* [1999] 1 BCLC 433 ("*Re Barings (No. 5)*") at pp.482-486. In summary:

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[1] The effect of The Small Business, Enterprise and Employment Act 2015 (Commencement No. 2 and Transitional Provisions) Regulations 2015 (SI 2015/1689) is that the amendments made by s 106 of the 2015 Act to s 6 and Schedule 1 CDDA do not apply in respect of conduct before 1 October 2015.

(a) Section 6 CDDA imposes a duty on the court to make a disqualification order where the conditions are satisfied, in contrast to the discretion conferred by s 8 (disqualification after investigation) which applies in circumstances where a company may not have become insolvent.

(b) Although on the face of it the expression "unfit to be concerned in the management of a company" would appear to mean unfit to be concerned in the management of *any* company without qualification, the court's ability to grant a respondent leave to be concerned in the management of a company under s 17 CDDA means that s 6 cannot have the wholly unqualified meaning that it appears to have.

(c) The primary purpose of the jurisdiction under s 6 is to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies have shown them to be a danger to others. The fact that s 6 imposes a duty to disqualify, coupled with the fact that any disqualification under that section must last for a minimum of two years, highlights the significance attached by Parliament to the fact that the company in question has become insolvent.

(d) Jonathan Parker J described the test of being "unfit" as follows:

> "'Unfitness' may be shown by conduct which is dishonest (including conduct showing a want of probity or integrity) or by conduct which is merely incompetent. In every case the function of the court in addressing the question of unfitness is to 'decide whether [the conduct of which complaint is made by the Secretary of State], viewed cumulatively and taking into account any extenuating circumstances, has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies' (see *Secretary of State for Trade and Industry v Gray* [1995] 1 BCLC 276 at 284, sub nom *Re Grayan Building Services Ltd (in liq)* [1995] Ch 241 at 253 per Hoffmann LJ). This has been described as 'a jury question' (see *Re Sevenoaks Stationers (Retail) Ltd* [1991] BCLC 325 at 330, [1991] Ch 164 at 176 per Dillon LJ)." (p.483a-c)

(e) The court is required by s 9 CDDA to have regard to the various matters listed in Parts I and II of Schedule 1 to the CDDA. However, the list in Schedule 1 is not exhaustive. In relation to paragraph 6 of Schedule 1, the relevant enquiry is to what extent were the respondent's failings responsible for the causes of the insolvency, rather than applying a test based on legal concepts of causation.

(f) Conduct must be evaluated in its context. It follows that the only extenuating circumstances which may be taken into account in addressing the question of unfitness, as opposed to the length of any disqualification order, are those which accompanied the conduct in question.

(g) Where a case is based solely on allegations of incompetence, the burden is on the Secretary of State to satisfy the court that the conduct complained of

demonstrates "incompetence of a high degree". The burden is a heavy one, as explained by the serious nature of a disqualification order.

(h) The requirement to assess conduct in context (or "in its setting") means that:

> "…the court will assess the competence or otherwise of the respondent in the context of and by reference to the role in the management of the company which was in fact assigned to him or which he in fact assumed, and by reference to his duties and responsibilities in that role. Thus the existence and extent of any particular duty will depend upon how the particular business is organised and upon what part in the management of that business the respondent could reasonably be expected to play (see *Bishopsgate Investment Management Ltd (in liq) v Maxwell (No 2)* [1993] BCLC 1282 at 1285 per Hoffmann LJ). For example, where the respondent was an executive director the court will assess his conduct by reference to his duties and responsibilities in that capacity." (p.484c-d)

(i) It follows that, while the requisite standard of competence does not vary according to the nature of the company's business or the respondent's role in management, and may therefore be said to be a "universal" standard, the standard must be applied to the facts of each particular case.

(j) It is no defence to a charge of unfitness based on incompetence for the respondent to contend that, even if the director was grossly incompetent in discharging the management role in question, he or she has not been shown to be unfit to be concerned in the management of *any* company, that is a "lowest common denominator" approach. The issue is not whether the respondent could have performed in some other management role competently: the court is concerned only with the conduct in respect of which complaint is made, set in the context of the actual management role that the respondent had in the company.

(k) It is not a prerequisite of a finding of unfitness that there has been some misfeasance or breach of duty, and nor does misfeasance or breach of duty necessarily make an individual unfit. In particular, the fact that errors could be characterised as errors of judgment rather than negligent mistakes is not necessarily an answer to a charge of unfitness based on incompetence, because it might be demonstrated that the individual has shown him or herself "so completely lacking in judgment as to justify a finding of unfitness" (p.486f).

145. Jonathan Parker J's analysis in *Re Barings (No.5)* was approved by the Court of Appeal decision in its decision in that case, *Baker v Secretary of State for Trade and Industry* [2001] BCC 273 (CA) ("*Barings CA*"). In a judgment of the court, Morritt LJ said this at [35]:

> "35. In Section IIIA the judge made a number of observations on the proper construction and application of the Act to which we refer, not because we disagree with the judge, but because we wish to

> emphasise the propositions to which he referred. First, the court must consider the question of 'unfitness' by reference to the conduct relied on by the Secretary of State and decide whether 'viewed cumulatively and taking into account any extenuating circumstances, [it] has fallen below the standards of … competence appropriate for persons fit to be directors of companies' ([1999] 1 BCLC 433 at p.483b). Thus it is no answer to the allegations of the Secretary of State that separately and individually none of them is sufficiently serious to demonstrate the requisite unfitness. Secondly, the matter referred to in Sch. 1, para. 6, namely, 'the director's responsibility for the causes of the company becoming insolvent', requires a broad approach and is not to be assessed by reference to nice legal concepts of causation (p.483f-g). Thus it matters not that others may also have been responsible for the causes of the insolvency whether more or less proximately. Thirdly, where the allegation is incompetence without dishonesty it is to be demonstrated to a high degree (pp.483j-484b). This follows from the nature of the penalty. Nevertheless the degree of incompetence should not be exaggerated given the ability of the court to grant leave, as envisaged by the disqualification order as defined in s. 1, notwithstanding the making of such an order. Fourthly, it is not necessary for the Secretary of State to show that the person in question is unfit to be concerned in the management of any company in any role. This test, described by the judge as the lowest common denominator approach, is not what the Act enjoins. As the judge observed, the court is concerned only with the respondent's conduct in respect of which complaint is made set in the context of his actual management role in that company. If his conduct in that role shows incompetence to the requisite degree then a finding of unfitness and a consequential disqualification order should be made (p.485d-h). Fifthly, a finding of breach of duty is neither necessary nor of itself sufficient for a finding of unfitness (p.486d-g). As the judge observed, a person may be unfit even though no breach of duty is proved against him or may remain fit notwithstanding the proof of various breaches of duty."

146. It is also worth setting out the following extract from paragraph [43] about the role of the trial judge:

> "…we would adopt the views of Mr Jules Sher QC in *Re Hitco 2000 Ltd* [1995] BCC 161 at p.163D-H which were approved by this court in *Re Grayan Building Services Ltd* [1995] BCC 554 at p.575; [1995] Ch 241 at p.255 that:
> 'The ultimate determination for the trial judge is whether the proven "charges" render the director unfit to manage a company. That determination is not one of primary fact. It is a determination which involves the evaluation of the seriousness of the "charges" which have been proved and a judgment of the trial judge as to whether, taking all the circumstances into account, including all matters of mitigation and extenuation, the director is or is not unfit. The subjective evaluation of all this material by the trial judge is

> emphasised by the opening words of the section: "The court shall make a disqualification order against a person in any case where … it is satisfied … that his conduct … makes him unfit" (my emphasis). Nonetheless, the ultimate conclusion as to fitness or otherwise is itself a conclusion of fact….'"

147. It is not necessary for the purposes of this judgment to set out an exhaustive review of earlier case law authority on the disqualification legislation, so I will confine myself to a few additional specific comments.

148. In *Re Blackspur Group plc* [1998] 1 WLR 422 Lord Woolf MR said this about the purpose of the legislation at p.426F:

> "The purpose of the Act of 1986 is the protection of the public, by means of prohibitory remedial action, by anticipated deterrent effect on further misconduct and by encouragement of higher standards of honesty and diligence in corporate management, from those who are unfit to be concerned in the management of a company."

149. Lord Woolf MR also emphasised at p.427D that applications under the CDDA are not ordinary private law proceedings. The effect of s 7(1) CDDA is that applications can only be made if it appears to the Secretary of State that it is "expedient in the public interest" that a disqualification order should be made. When made, an order has serious penal consequences.

150. In *Re Living Images Ltd* [1996] 1 BCLC 348 at pp.355-356, Laddie J discussed the fact that the standard of proof that applies is the civil standard, that is a balance of probabilities, and also said this about the risk of using hindsight:

> "I should add that the court must also be alert to the dangers of hindsight. By the time an application comes before the court, the conduct of the directors has to be judged on the basis of statements given to the Official Receiver, no doubt frequently under stress, and a comparatively small collection of documents selected to support the Official Receiver's and the respondents' respective positions. On the basis of this the court has to pass judgment on the way in which the directors conducted the affairs of the company over a period of days, weeks or, as in this case, months. Those statements and documents are analysed in the clinical atmosphere of the courtroom. They are analysed, for example, with the benefit of knowing that the company went into liquidation. It is very easy therefore to look at the signals available to the directors at the time and to assume that they, or any other competent director, would have realised that the end was coming. The court must be careful not to fall into the trap of being too wise after the event."

151. In *Re Continental Assurance Co of London plc, Secretary of State for Trade and Industry v Burrows* [1997] BCLC 48 Chadwick J made some comments about the role of a non-executive director, in that case an investment banker who had joined the board of a client. He made the point at p.58a that those dealing with the client company were entitled to expect that external directors appointed on the basis of

their apparent expertise would exercise the competence required by companies legislation (then the Companies Act 1985), extending in the case of a corporate financier at least to reading and understanding statutory accounts. He also commented on the use of the phrase "cause or allow" in the allegation against the director (a phrase also used in this case), and said at p.58e that a director who failed to appreciate the obvious "allows" the consequences of what he has overlooked just as much as if he appreciated the position and did nothing about it, adding that unfitness includes incompetence in allowing something to happen that the legislation is designed to prevent (in that case a breach of the prohibition on financial assistance being provided for the acquisition of shares in the company).

152. However, as Jonathan Parker J recognised, context is critical, and the competence or otherwise of individuals will be determined by reference to the role they actually played, and the responsibilities they assumed. The fact that directors had non-executive roles is a relevant part of the context. As Hoffmann LJ said in *Bishopsgate Investment Management v Maxwell* [1993] BCC 120 at 139 in the context of the duty to participate in management, the extent of the duty "must depend upon how the particular company's business is organised and the part which the director could reasonably have been expected to play".

De facto director

153. The provisions of the CDDA cover not only de jure directors, meaning those who are validly appointed as directors under the company's constitution, but also individuals who are or were de facto directors. This follows from s 22(4) CDDA, which provides that the term "director" includes "any person occupying the position of a director, by whatever name called" (see for example *Secretary of State for Trade and Industry v Hollier* [2007] Bus LR 352 ("*Hollier*") at [61]).

154. As explained by Lord Collins in *Revenue and Customs Comrs v Holland, In re Paycheck Services 3 Ltd* [2010] 1WLR 2793 ("*Holland*") at [82], the term de facto director was originally used to refer to individuals who had been appointed as a director but whose appointment was in some way invalid, or whose appointment had ceased. However, its use has been extended to cover a person who has never been appointed as a director but, in broad terms, assumes that role.

155. In *Re Lo-Line Electric Motors Ltd* [1988] Ch 477, 490 Sir Nicolas Browne-Wilkinson VC held that the disqualification provisions (then in the Companies Act 1985) applied to a person "assuming to act as a director". The concept of de facto directorship in a disqualification context was discussed further in decisions of Timothy Lloyd QC in *Re Richborough Furniture Ltd* [1996] BCC 155 and of Jacob J in *Secretary of State for Trade and Industry v Tjolle* [1998] BCC 282 ("*Tjolle*"), and by the Court of Appeal in *Re Kaytech International plc* [1999] BCC 390. The principles were then discussed in some detail by Etherton J in *Hollier*. Other more recent cases outside the context of disqualification include in particular the Supreme Court decision in *Holland* and the Court of Appeal decision in *Smithton Ltd v Naggar* [2015] 1 WLR 189. As Arden LJ noted in *Smithton v Naggar* at [20], *Holland* is the leading case.

156. In *Re Richborough Furniture Ltd* Timothy Lloyd QC, sitting as a deputy High Court judge, commented on the difficulty of determining what amounts to assuming to act as a director, particularly in view of three factors present in that case, namely that there were other validly appointed directors who were active in the company's management, the individual's acts could be attributed to a different role (in that case the provision of consultancy services), and the individual in question was acting on behalf of a shareholder. He then said this at p.170:

> "It seems to me that for someone to be made liable to disqualification under s. 6 as a de facto director, the court would have to have clear evidence that he had been either the sole person directing the affairs of the company (or acting with others all equally lacking in a valid appointment, as in *Morris v Kanssen*[2]) or, if there were others who were true directors, that he was acting on an equal footing with the others in directing the affairs of the company. It also seems to me that, if it is unclear whether the acts of the person in question are referable to an assumed directorship, or to some other capacity such as shareholder or, as here, consultant, the person in question must be entitled to the benefit of the doubt."

157. In *Tjolle* at p.290, Jacob J said the following, which was approved by Robert Walker LJ in *Re Kaytech* at p.402 (in a judgment with which other members of the Court of Appeal agreed):

> "… it may be difficult to postulate any one decisive test. I think what is involved is very much a question of degree. The court takes into account all the relevant factors. Those factors include at least whether or not there was a holding out by the company of the individual as a director, whether the individual used the title, whether the individual had proper information (e.g. management accounts) on which to base decisions, and whether the individual has to make major decisions and so on. Taking all these factors into account, one asks "was this individual part of the corporate governing structure?", answering it as a kind of jury question. In deciding this, one bears very much in mind why one is asking the question. That is why I think the passage I quoted from Millett J is important. There would be no justification for the law making a person liable to misfeasance or disqualification proceedings unless they were truly in a position to exercise the powers and discharge the functions of a director. Otherwise they would be made liable for events over which they had no real control, either in fact or law.'

158. The passage of Millett J referred to is from *Re Hydrodan (Corby) Ltd* [1994] BCC 161 at 163, and included the following:

> "To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a

[2] [1946] AC 459

> director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level."

159. In *Re Kaytech* (at p.402), Robert Walker LJ added the following comment to what Jacob J had said in *Tjolle*:

> "I do not understand Jacob J, in the first part of that passage, to be enumerating tests which must all be satisfied if de facto directorship is to be established. He is simply drawing attention to some (but not all) of the relevant factors, recognising that the crucial issue is whether the individual in question has assumed the status and functions of a company director so as to make himself responsible under the 1986 Act as if he were a de jure director."

160. These cases were considered further by Etherton J in *Hollier*. At [72] he agreed with Jacob J that the critical issue is whether the individual is part of the "corporate governing structure", distinguishing:

> "…someone who participates, or has the right to participate, in collective decision-making on corporate policy and strategy and its implementation, on the one hand, and others who may advise or act on behalf of, or otherwise for the benefit of, the company, but do not participate in decision-making as part of the governance of the company."

161. At [77] Etherton J rejected a submission for the Secretary of State that the test was to identify those with "real influence" in the corporate affairs, on the basis that that would not distinguish between those who are part of the corporate governing structure, participating in making decisions, and those who, however influential, give advice to others but do not make or implement decisions as part of the corporate governing structure. As he said at [81], the test is not satisfied by someone who was at all times and in all material decisions subordinate to the de jure directors. This reflected a discussion earlier in the judgment, at [68] to [70], where Etherton J distinguished between directors and others who have an equality of ability to participate in decisions on the one hand, from employees, agents or advisers who are accountable to another person, on the other. He also explained at [78] that the question should be judged objectively, in the light of all relevant facts.

162. *Holland* concerned proceedings under s 212 Insolvency Act 1986. It raised the question whether directors of a corporate director of certain companies were de facto directors of those companies. Lord Hope noted at [39] that in *Tjolle* Jacob J had seen the question very much as one of fact and degree, and agreed that all relevant factors should be taken into account. However, guidance could be obtained by looking at the purpose of the relevant provision (in that case the imposition of liability on those who were in a position to prevent damage to creditors by taking proper steps to protect their interests). Those who assume to act as directors must accept the responsibilities of the office. It is necessary to

look at what the person actually did to see whether he assumed those responsibilities.

163. Lord Collins' judgment in *Holland* contains a detailed discussion of the evolution of the concept of de facto director. He referred at [91] to the "very difficult problem" that emerged of "identifying what functions were in essence the sole responsibility of a director or board of directors", noting the various formulations that had been suggested, including whether the individual was acting on an equal footing with others in directing the company's affairs, whether there was a holding out by the company of the individual as a director, and whether the individual was part of the corporate governing structure. He noted the approval by Robert Walker LJ of the way in which Jacob J had declined to formulate a single test and commented that it was just as difficult to define "corporate governance" as to identify those activities which are the sole responsibility of the board. At [93] he said that it did not follow that the concept of de facto director must be given the same meaning in different contexts, but in that context, namely the fiduciary duty of a director not to dispose wrongfully of a company's assets, the crucial question was whether the person had "assumed the duties of a director": was he "part of the corporate governing structure", and had the claimants proved that he "had assumed a role sufficient" to make him responsible?

164. *Smithton v Naggar* was a case concerning an alleged breach of s 190 Companies Act 2006, which requires shareholder approval of substantial property transactions with directors, by a person who was not a de jure director. In discussing *Holland*, Arden LJ emphasised at [24] the need to examine the governance system of the company to assess whether the relevant individual acted as a director. She also noted at [26] that the judgment of Lord Collins contained the ratio of the decision (because three other judges, Lord Saville, Lord Walker and Lord Clarke agreed with his analysis of the law, albeit that Lord Walker and Lord Clarke came to a different conclusion on the facts), and that in concluding that the individual in that case was not a de facto director no weight was placed by the majority on the fact that he was involved in all the directorial decisions, such that the volume of decisions will not have significance if those decisions were made in some other capacity (in that case as a director of the corporate director). At [28] she said:

> "But another issue that may arise is whether the acts relied on are actually the acts of a director at all. *Holland's case* did not address the question what actions make a person a director, save in so far as the majority clearly make it clear that the court should ask whether the defendant formed part of the corporate governance structure of the company. However, that is merely to restate the question. The real issue in some contexts will be whether the acts demonstrate the assumption of acts as a director."

165. Arden LJ went on to explain that the court needs to make findings about the corporate governance structure, and at [31] provisionally suggested that:

> "… the term is to be tested against the usual split of powers between shareholders and directors under Table A, ie on the basis that the

> powers of management of the company's business are delegated to the directors and the shareholders cannot intervene except by special resolution. On that basis it means a person who either alone or with others has ultimate control of the management of any part of the company's business."

166. Arden LJ's summary of points of general practical importance in determining who is a de facto director is worth setting out in full:

> "34. The concepts of shadow director and de facto are different but there is some overlap.
> 35. A person may be de facto director even if there was no invalid appointment. The question is whether he has assumed responsibility to act as a director.
> 36. To answer that question, the court may have to determine in what capacity the director was acting (as in *Holland's case*).
> 37. The court will in general also have to determine the corporate governance structure of the company so as to decide in relation to the company's business whether the defendant's acts were directorial in nature.
> 38. The court is required to look at what the director actually did and not any job title actually given to him.
> 39. A defendant does not avoid liability if he shows that he in good faith thought he was not acting as a director. The question whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief.
> 40. The court must look at the cumulative effect of the activities relied on. The court should look at all the circumstances "in the round" (per Jonathan Parker J in *Secretary of State for Trade and Industry v Jones* [1999] BCC 336).
> 41. It is also important to look at the acts in their context. A single act might lead to liability in an exceptional case.
> 42. Relevant factors include: (i) whether the company considered him to be a director and held him out as such; (ii) whether third parties considered that he was a director.
> 43. The fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision.
> 44. Acts outside the period when he is said to have been a de facto director may throw light on whether he was a de facto director in the relevant period.
> 45. In my judgment, the question whether a director is a de facto or shadow director is a question of fact and degree…"

167. Attempting to summarise the key points of most relevance to this case:

(a) Guidance should be obtained from looking at the purpose of the provision in question (*Holland* at [39]). The primary purpose of the disqualification legislation is the protection of the public. Those who assume the status and functions of a company director should be held to certain minimum standards in the public interest. The legislation has both a deterrent element

and serves as an encouragement to improve standards of behaviour (see [148] above, referring to the judgment of Lord Woolf MR in *Re Blackspur Group*). I do not think that the purpose of the disqualification legislation is sufficiently different from the purpose of the legislation considered in *Holland* materially to affect the force of the observations in that case in a disqualification context.

(b) There is no single test, but an important starting point is the company's corporate governance structure. The court is seeking to identify functions that were the sole responsibility of a director or board of directors, that is, the highest level of management of the company. Those who assume and exercise powers and functions that can only properly be exercised or discharged at that highest level of management will, consistent with the purpose of the disqualification legislation, be within its scope as de facto directors. Those who are subordinate and accountable to that highest level of management will not be.

(c) The test has been described as whether the individual was participating, or had the ability to participate, in decision-making as part of the corporate governing structure (which I take to mean the highest level of management decision-making). Another way of putting it is to ask whether the individual was on an "equal footing" with others in directing the affairs of the company.

(d) There is a distinction between being consulted about, advising on or otherwise being involved in, decision-making in some other capacity (even in circumstances where real influence is exerted) and actually participating in making a decision as a director.

(e) The question is one of fact and degree. It must be determined objectively, by reference to what the relevant individual actually did (including, for example, whether they were held out as a director and whether they took major decisions), and looking at the cumulative effect of the activities relied on in their overall factual context.

FACTUAL FINDINGS: GENERAL

168. This section of the judgment sets out my factual findings and conclusions in respect of the material areas of factual dispute. Inevitably, in order to keep the judgment to a proportionate length, there are some aspects that I do not cover or cover in less detail. This is because I need to focus on the issues in this case, rather than on providing a full narrative of what occurred. However, I should emphasise that in reaching my overall conclusions I have considered in detail the Official Receiver's reports, the affidavits, what was said in oral evidence and documents to which my attention was drawn.

169. In particular, the length of the discussion of events during the first seven months of 2015 is not in any sense proportionate to the significance of the events that occurred during that period, or to the enormous amount of time and effort that the Trustees devoted to the charity and their attempts to secure its future, documented

towards the end by Ms Tyler's detailed notes of almost daily calls and meetings between late May and July 2015.

170. My findings are set out in the following order:

(a) Kids Company's business model;

(b) Kids Company's financial position from 2012 onwards;

(c) income projections and accruals;

(d) findings relating to the departure of senior managers;

(e) government funding;

(f) support from donors and risk of donor fatigue;

(g) reserves;

(h) client spend;

(i) the allegation of dominance by Ms Batmanghelidjh;

(j) alleged preferences in April 2015;

(k) whether the July 2015 restructuring would have succeeded;

(l) earlier non-implementation of a contingency plan; and

(m) timing of change to Ms Batmanghelidjh's role.

This is followed by a separate section which makes some findings specific to Ms Batmanghelidjh.

171. It will be appreciated that although I have dealt with many of the factual findings thematically, they cannot be considered in isolation from each other. To take a key example, the position in relation to government funding is highly relevant to an assessment of the charity's financial position.

Kids Company's business model

General

172. The Official Receiver criticised what he described as a demand led model of self-referral, with a policy of "never turning a child in need away".

173. The operation of a demand led model is far from unusual and should not itself be criticised. Many charities, and particularly those devoted to the relief of people in need, are pretty much by definition demand led. Similarly, Kids Company was not alone in operating through self-referral. Childline would be another obvious example, and there are plenty of others, including Citizens Advice. Self-referral was key to Kids Company's ethos. It aimed to provide support to young people who for whatever reason were not being assisted, or sufficiently assisted, by local

or other public authorities: the "hard to reach" and the ones who were "falling through the cracks". For example, one of the charity's programmes was entitled "Get Legit", which whilst it extended to criminal justice aspects focused on immigration issues and status, and in particular lack of documentation which prevented access to statutory support. The charity worked with very troubled sections of society, including in areas of gang violence, who were not engaging with public authorities. When asked about the self-referral model, Ms Bolton said that she had never considered the charity operating in a different way. It would be a completely different charity. Mr Yentob gave similar evidence.

174. Kids Company's self-referral model was praised externally. For example, in a foreword to a report produced in April 2008 by Dr Carolyn Gaskell of Queen Mary, University of London, entitled "Kids Company helps with the whole problem", the Chief Psychologist at the National Offender Management Service referred to the acclaim that Kids Company had "rightly" received for its work. He described self-referral as a key strength, contrasted services and organisations "characterised by expensive and often unnecessary professional gate keeping practices", and made a point about the therapeutic advantages of self-referral, with those asking for help more likely to be receptive to what was on offer, and the approach being respectful of the individual's own sense of agency and responsibility.

175. It is worth explaining at this point that the self-referral model is also key to understanding why the charity had particular difficulty in accessing public funds through conventional means, even though Kids Company always maintained that it was in large part doing work that was, or should have been, the responsibility of the State. By definition, local authorities and other budget holders were not referring young people to the charity in any official, or at least funded, manner.

176. The policy of "never turning a child in need away" appears at first sight to be open-ended. However, in reality it was not that simple. A key element of what the charity meant by it was that it did not discriminate against anyone, whatever their behaviour, circumstances or background. As the foreword just referred to also said, "… Kids Company does not exclude. Kids Company sets out to provide parenting through therapeutic engagement grounded in a practical approach to the meeting of individual needs".

177. The policy certainly did not mean that clients received whatever assistance they sought. It was based on need. There was also no open-ended financial or other commitment to individual clients. As discussed further below, needs were assessed and the level of support provided was scrutinised by the Trustees, including through the annual budgeting process and the monthly management accounts. The scrutiny included a focus both on staff costs and expenditure directly on clients ("kids costs").

178. It is worth emphasising the significance of the staff cost element. Staff costs formed by far the greatest element of the charity's overall expenditure. The break down is easiest to see from the management accounts. For example, the management accounts for December 2014 show that of total revenue expenditure for the year of £23.4m, £17m (around 73%) was attributable to staff costs, £2.2m

to running costs (being rent and other overheads, at around 10%) and £4.1m to kids costs (around 17%).

179. The significance of staff costs reflected the charity's focus on spending time with its clients, the amount of time and specialist resources needed to deal with complex problems, and the safeguarding requirements that went with dealing with individuals or groups of troubled young people who had often been exposed to violence.

180. It is also clear that demand for the charity's services increased significantly over the period following the 2007/08 financial crisis and the recession that followed it, particularly as local authority budgets were subject to significant cuts. For example, a contingency plan attached to the going concern paper prepared in September 2013 (see [221] and [222] below) refers to need for services increasing due to an increase in the number of children pushed into poverty. The charity's move into Bristol, discussed below, also coincided with this, with demand being found to be far greater than had been anticipated (see [194] below).

181. The September 2013 LSE report discussed at [568] below refers to Kids Company's services being heavily oversubscribed, with demand outstripping capacity, and states that the charity "struggles to maintain its open-door policy". This reflects other evidence I saw referring to waiting lists of individuals or families for whom there were insufficient resources to provide the desired support.

182. Having said all this, the charity acknowledged to its own auditors that its approach of never turning a child in need away drove growth in charitable spend before growth in charitable income (see [230] below, in connection with audit of the 2012 accounts). In broad terms this was an accurate assessment. The February 2013 Board minutes record that the Trustees had taken a "conscious decision to support what could be considered a financially risky model". As Ms Robinson pointed out, this was an example of the precise wording of the minutes reflecting Ms Batmanghelidjh's influence, but the key point was that the Trustees were aware of the risk, and understood that meeting an increased level of need would have to be achieved using funds that had not yet been raised. As discussed further below, what reassured them was the charity's track record in fundraising, its network of wealthy supporters and the belief that it had support from government at the highest levels.

183. These conclusions about the financial risk involved in the model and the Trustees' awareness of it are also consistent with a comment made by Mr Handover, at a Board meeting on 2 March 2015, that the philosophy of not turning children away meant that it was very difficult to judge expenditure in advance. They also accord with Mr O'Brien's pithy description of what he said was the charity's very simple business model: to look after children and raise money to cover the costs.

184. However, it is also worth emphasising that the defendants' case throughout was that this was not a case of spending money without an expectation of funds coming in which would allow Kids Company's obligations to be discharged. In essence, that case has not been challenged. The Official Receiver is not saying

that what the directors should have done is put the company into liquidation at any earlier stage, and there has been no allegation of wrongful trading.

Seasonality of income

185. Kids Company's income had a strong seasonality, with a significant proportion of it arising in the last quarter of the financial (and calendar) year. The contingency plan document appended to the going concern paper prepared for the 2012 accounts, referred to at [222] below, refers to over 39% of Kids Company's income being received in the last quarter of any given financial year. The summer months were particularly difficult, with major donors often being absent on holiday. In contrast, expenditure accrued throughout the year in a relatively even manner, albeit with some variables such as the cost of summer residential camps and Christmas activities.

Increasing scale: general

186. Kids Company expanded significantly over the period in question. Turnover increased each year: it was around £11m in 2008, £14m in 2010, £20m in 2012 and £23m in 2013. Support from central government was largely static over this period, and the bulk of the increased income came from private donations.

187. There was no dispute that demand for Kids Company's services increased in the aftermath of the 2007/08 financial crisis, as an economic downturn was combined with significant cuts to local authority budgets, particularly from 2012. In addition, Kids Company took steps to start replicating its model outside London, notably in Bristol. The move into Bristol was one of the issues focused on at the trial, and the next section discusses that in more detail.

188. As the charity grew, the need for additional senior management resource increased. During 2013 in particular, a number of well qualified senior staff members were recruited, including Mr Stones as HR Director. Ms Jenkins also joined as Director of Finance and Accountability, replacing Mozhy Chipperfield. Ms Jenkins was a qualified accountant who joined Kids Company from the charity's former auditors, a firm with a strong reputation in charity accounting. Mr Mevada, another qualified accountant, was already in post as Head of Finance and Company Secretary. It is clear that the Trustees were active in seeking to ensure that an appropriate level of senior management was in place.

Increasing scale: Bristol

189. The defendants' consistent evidence was that they had been strongly encouraged by the government to replicate Kids Company's model outside London, and that its expansion to Bristol during 2012 and 2013, which undoubtably involved a significant increase in expenditure, was a major step in that direction.

190. The Official Receiver challenged a number of aspects of the defendants' evidence in respect of Bristol. I should confirm that I accept the evidence of Ms Tyler and Ms Batmanghelidjh in particular that the government went further than offering mere words of encouragement. Kids Company's 2013 Budget records that it was required to bid for services through local authorities under the terms of a capacity

building grant from the Department of Education. This was a £12.7m grant under its Youth Sector Development Fund programme, awarded over a three-year period from 2008 (at around £4.2m per year). The NAO report referred to at [437] below states that the Department for Education "intended this funding to help Kids Company become a centre of excellence" and that it received the largest grant, around 20% of the total funding available. An earlier section of the NAO report explains that the government awarded Kids Company grants "to support the delivery of services to vulnerable young people, replicate its model of service delivery nationally and ensure continuity of support to young people" (emphasis supplied).

191. At the trial the Official Receiver also challenged a number of the defendants on the apparent absence of any formal Board minute approving the decision to open in Bristol. This was unfair because it had not been raised as an issue in advance of the trial. With one exception, minutes for periods before March 2012 were not included in the bundle, and between March and July 2012 only Finance Committee minutes were included (with Bristol replication being mentioned in each of the March, April and May minutes). The first 2012 Board minutes to be included date from 1 August 2012. Those minutes show that the fact that Kids Company was taking part in a tendering process was raised at that meeting. There was also a further discussion at the Board meeting in September 2012.

192. I do not accept the allegation that the move to Bristol was in any sense a fait accompli that Ms Batmanghelidjh presented to the Board. The question of replication had been under discussion for a long time. The 2011 statutory accounts, which were obviously approved by the Trustees, explicitly refer to the charity aiming to replicate in at least one other city in 2012. Both Ms Batmanghelidjh and Mr O'Brien confirmed in cross-examination that the matter was extensively discussed with the Board. Mr O'Brien also referred to being presented with a detailed report from Ms Chipperfield (the then Director of Finance), who was negotiating the contract, and being asked to sign it. His evidence was that the Board did approve the move to Bristol. I accept this, and note that the point was rightly not pursued by the Official Receiver in closing. I also note that the PKF Littlejohn report discussed further below ([502] and following) includes a reference to Trustee approval to proceed with the Bristol proposal (see the extracts set out at [503] below).

193. The contract that Kids Company successfully applied for was the alternative education contract in Bristol, which the 2013 Budget records as being worth £600,000 per annum. The Budget also explains that Kids Company made the strategic decision to fundraise a further £400,000 to cover the balance of the budgeted cost of £1m (see [212] below), in order to "demonstrate the effectiveness of creating value for money where local authorities work with Kids Company". The contract started to operate on 1 January 2013, although obviously costs would have been incurred in 2012 in preparation.

194. The level of need in Bristol was significantly higher than had been anticipated when the contract was negotiated. This was clear from the witness evidence and is also apparent from Board minutes in both July and September 2013, with the latter recording that a staff increase was agreed "when it was discovered that the young people there had been significantly more traumatised than anticipated".

Significant levels of abuse were uncovered. Mr Yentob explained that the level of staffing and their skill set had to be improved for safeguarding reasons.

195. The Official Receiver criticised the drain placed on Kids Company's resources by the move into Bristol, pointing out that based on lists of restricted funds raised the Official Receiver could only identify donations of around £125,000 of the additional £400,000 budgeted for as attributable to Bristol. There is an element of validity in this. It is not apparent that Kids Company had definitely secured the additional funds needed before opening in Bristol, either at the £400,000 level or at the higher amount that it seems was ultimately required.

196. However, that is not the whole picture. Government encouragement to replicate is not irrelevant, given the need to secure future public funds. Identifying references to Bristol on lists of restricted funds does not mean that no other funds were raised for Bristol, or intended for use in Bristol (even if the terms of the donation were not strictly restricted). And although it took some time, the charity did raise significant additional funds for Bristol. In particular, figures for June 2015 include a £500,000 donation from a charitable foundation associated with a Bristol based individual, the terms of which permitted it to be used for general purposes.

197. It is also the case that, once it had opened in Bristol, any increase in staff that was unexpectedly required to meet safeguarding requirements cannot sensibly be criticised. Kids Company had obvious duties to its clients and the staff working with them, which could hardly be ignored.

198. More generally, a key question is whether the Board could reasonably have taken the view that the charity could secure the additional funds as it needed them. In terms of the year as a whole, and focusing for now on 2012 and 2013 (which are most relevant to the decision to move into Bristol) I have concluded that it could, based on its past success in fundraising and the accuracy of previous fundraising projections. As it turned out, this was borne out by events since the charity managed an accounting surplus in each year, which was substantial in 2012. However, timing of cash flows was a general issue, as discussed further below.

Financial position from 2012 onwards

199. This section covers Kids Company's financial position from April 2012 onwards in broadly chronological order, followed by some findings on specific topics, namely the charity's relationships with HMRC and with its bank, and its dependence on loans (including findings in respect of one particular lender, John Spiers).

200. Although the discussion starts with 2012, I should point out that that period was not the focus of the allegations made in Mr Hannon's report. The only 2012 minutes that form part of Mr Hannon's report are from December 2012. All other minutes for that year (which are incomplete: see [191] above) were only included because they were exhibited to Mr Tatham's report or by Mr O'Brien. The events of 2012 can properly be considered as part of the factual context, but it is worth bearing in mind that the specific criticisms made of the defendants at trial about the financial position in 2012 were not reflected in the terms of Mr Hannon's

report. Indeed, in his second report he specifically referred to discussions in August 2012 as events that "pre-date the allegation period".

Warning signs in 2012?

201. At its meeting on 25 April 2012 the Finance Committee discussed a significant increase in costs, particularly staff costs, since the previous year, reflecting the fact that the charity had been increasing staff numbers in anticipation of winning contracts that had not in fact been won. The cash position had also worsened significantly. The Finance Committee formed the view that immediate action should be taken, not only to secure income but also to freeze recruitment and implement a headcount reduction. The minutes refer to debt of £1.7m being accumulated in a very short time, a "short term cash crisis" and running costs being "significantly more than what the charity can afford".

202. Since at the time Ms Batmanghelidjh did not attend Finance Committee meetings, Mr O'Brien and Mr Handover arranged to meet her and Ms Chipperfield separately the following day. Mr O'Brien's email to his fellow Finance Committee members following that further meeting stated that he came away "feeling a lot more reassured". His notes were attached to the email. Among other things the notes record Ms Batmanghelidjh going through income prospects and asking for time to speak to people, discussing the increase in staff and the need to show deliverability to win contracts, but also recording that if the charity did not have "anything firm in place" by the end of July then Ms Batmanghelidjh would start a process of letting people go. The notes record that a freeze on new recruitment was agreed and that it was also agreed that the position should be reviewed again both in a week or so and at the end of July. Mr O'Brien's summary states that overall it was a very positive meeting with Ms Batmanghelidjh "on top form and reassuringly, very close to the numbers". Mr O'Brien explained in cross-examination that the latter reference was intended to relate to headcount (although I would suggest that the way it was most likely to be understood was that she had a good grasp of the financial situation). He also said that there was a very good discussion at the meeting, with Ms Batmanghelidjh listening carefully and recalling in detail whom she was talking about in terms of headcount, where they were and why they were needed. But she accepted the need for a headcount freeze.

203. Mr Handover pointed out that the context for the Finance Committee meeting on 25 April 2012 was the 2012 Budget, which was discussed at that meeting. He said that budgets and income projections were always prepared on a conservative basis. Whilst it was sensible to look at staffing levels, the Finance Committee believed that the income projections would be met. It was also important to bear in mind that the charity was dealing with very vulnerable young people, and the Trustees needed to be mindful that any significant action to cut costs by reducing headcount could have a major impact. In other words, it should not be done unless it was really necessary. I accept Mr Handover's evidence that budgets and income projections were prepared on a conservative basis (evidence which was consistent with that of Mr O'Brien and Ms Robinson), and that, having regard to the further work referred to in the next paragraph, Finance Committee members were able to reassure themselves that the income projections would be able to be met.

204. Ms Anderson suggested that the meeting with Ms Batmanghelidjh following the Finance Committee meeting was an example of her "kicking back" against the Trustees. I agree that she did resist the immediate implementation of a headcount reduction, but not on the basis of a refusal to follow instructions. Rather, she explained her understanding of the position in greater detail, in particular her expectation of additional income, and it was agreed by Mr O'Brien and Mr Handover that in the light of that information further immediate action, beyond a headcount freeze, was not needed. Mr O'Brien was asked about the meeting in cross-examination, and his evidence was entirely consistent with this. He described it as a conversation between adults. He also said, and I accept, that the discussion was followed by Mr Handover spending a lot of time with Ms Batmanghelidjh working on income prospects, and that there was a further detailed discussion of the financial position at the Board meeting on 1 August 2012 referred to below. The headcount freeze also continued until October.

205. Ms Anderson relied on the fact that July came and went, and with the exception of Bristol (as to which see above) none of the contracts were won, and yet a headcount reduction was not implemented. However, it was clear that the charity's financial position was under regular review. The annual accounts for 2011 were discussed at a Finance Committee meeting on 25 July and approved by the Board on 1 August 2012, with specific reference to the need to form a view that the charity was a going concern. At the Board meeting the management accounts for the period up to June 2012 were reviewed, cash flow and the increased headcount were discussed, and Mr O'Brien raised the issue of solvency. The continued headcount freeze was noted.

206. My reading of the minutes of the Board meeting is that, after what is described as an "extended discussion", the Board accepted Ms Batmanghelidjh's advice that the additional staffing was necessary despite not winning contracts, because the number of referrals at centres meant that Kids Company was stretched in its ability to deliver services. The Board took comfort from Ms Batmanghelidjh's confidence that she would be able to raise the full £16.7m income figure that the Board had discussed at the start of the year and from Ms Chipperfield's assurance that she could manage cash flow and would raise any problems at the September Finance Committee meeting. The Board also concluded that a contingency plan should be prepared in light of the fact that the current government grant would cease in March 2013, and that Ms Batmanghelidjh should attend future Finance Committee meetings.

207. The Official Receiver cross-examined Mr O'Brien on a manuscript note he had prepared for his own use prior to the Board meeting, which among other things said "if we paid all we owed we'd be insolvent", queried whether the charity would reach its "massive" income target for the year, stated that (as he said "every year" and had expressed at the Finance Committee) good fundraising work was being offset by growing costs too much, in particular staff costs, with a deficit of £1.9m as compared to £0.5m in the prior year and the headcount freeze coming "too late", and flagged a concern that government funding ran out the following March. The note concluded with a statement that "we must start implementing a contingency plan" (emphasis in the original), with drastic action required and costs needing to be reduced "now".

208. I accept Mr O'Brien's evidence that he was not saying that Kids Company was insolvent at that time, and that he did not believe that it was. The view expressed at the Finance Committee reflected the full and frank discussion he encouraged. His view was that he needed to warn Trustees of the risks. If he really believed that the charity was insolvent then he would be doing a formal note to the Board. Instead, there was a detailed discussion at the Board meeting at which income projections would have been reviewed in some detail, together with the position in relation to creditors and the risk to payroll. Ms Batmanghelidjh was confident that the required income could be raised (as proved to be correct) and Ms Chipperfield assured the Board that cash flow could be managed and any problems would be brought up at the September Finance Committee meeting. Ms Batmanghelidjh went into some detail at the meeting about the need for increased staff levels given the growth in demand. The Board had to weigh up the different elements: this was a professional Board doing its best. By the end of the discussion Mr O'Brien was comfortable. His concerns were not being overruled. Rather, there was a clear appreciation of the risks. His affidavit evidence included a comment that most of the other Trustees were much more positive about the charity's ability to raise funds that year, and they proved to be right.

209. I accept Mr O'Brien's evidence about what happened at the meeting. Although Mr O'Brien said he regretted retaining his manuscript note, I think it is helpful. It is clear that the concerns set out in the note were raised and were properly considered by the Board. Problems were identified and considered, rather than not being picked up or ignored. As regards the specific point that the Board determined only to produce a contingency plan rather than implement it, this obviously reflected the Board's decision to accept the fundraising targets and Ms Chipperfield's assessment that cash flow could be managed in the meantime. The contingency plan was aimed at the risk that further government funding would not be secured, a risk that did not in the event materialise (see [439] below).

210. The management accounts for December 2012 recorded the recruitment freeze but also the fact that staff costs continued to exceed budget. It was noted that part of this was attributable to costs of staff in Bristol which had not been budgeted for, but there were also significant increases in staff costs elsewhere, including at the newly acquired Heart Yard centre (see [537] below). In fact, however, headcount finished the year only moderately above budget (around 14 heads on a full-time equivalent basis).

211. As it turned out, Ms Batmanghelidjh's income projection was very close to the unrestricted income shown in the 2012 statutory accounts, £16.6m. Total income shown in those accounts was £20.3m. The charity also managed to achieve a surplus of around £1m in unrestricted funds, and positive net current assets. (Surpluses had also been achieved in prior years, apart from 2009, despite the charity's significant growth.) Cash did remain difficult, however, and Kids Company had an overdraft position of about £110,000 at the end of the year. The difficult cash flow position was reflected in a Board discussion on 5 December 2012.

Financial position during 2013: general

212. The 2013 Budget was formally approved in May 2013. The contract with Bristol City Council had started operating with effect from 1 January 2013. Income was budgeted to increase from around £18m to £20m, reflecting a broadly similar increase in costs, of which approximately half (around £1m) were Bristol related and the great majority of which comprised staff costs. The remainder of the increase was largely attributable to the recruitment of senior managers and the full year effect of staff taken on in 2012. Kids costs were largely stable, despite a material increase in the number of young people supported. The Budget stated that Kids Company expected the increased number of staff to continue to reduce young people's financial dependence on the charity.

213. Although the budget increase was material, it is important to view it in context. As noted in the going concern paper produced in connection with the 2012 accounts and referred to at [221] below, the context included not only the renewal of the main government grant but the award of the Bristol contract worth £600,000 per year and a lottery grant of £2m over two years.

214. Cash flow continued to be challenging during 2013. For example, minutes of a Board meeting on 25 February 2013 record Mr O'Brien as stating that the charity was "fighting creditors". Minutes of a Board meeting on 25 July 2013 record that as at 30 June 2013 the deficit was at £2.9m and outstanding loans were £800,000, with HMRC owed £1.262m. Ms Batmanghelidjh is recorded as proposing that if necessary Coldplay could be asked for the next instalment of their planned donation early. The position with HMRC is discussed in more detail below.

215. There was a further discussion of the cash position at a Board meeting on 23 September 2013, which also considered the going concern requirement for the purposes of the 2012 statutory accounts (see [220] below). The minutes refer to the deficit being managed through "loans and creditor management" and there is a reference to creditors "being managed through careful prioritisation". The going concern paper circulated following the meeting and referred to below comments that this was the time in the year at which the charity's cash position was at its annual low point.

216. Ms Batmanghelidjh managed to ensure that the £1m government grant payment due in January 2014 was brought forward to December, to assist cash flow.

217. On 18 December 2013 Mr O'Brien sent a very positive email to the other Trustees reporting on the previous day's Finance Committee meeting, stating among other things that the charity looked set to meet its revenue target, that an outline budget for 2014 had been discussed and the Finance Committee was hoping to take a good look at the phasing of costs and income to mitigate the "frightening mid-year squeeze", and that a sensible allowance for staff increases had been agreed.

218. According to its statutory accounts, Kids Company finished 2013 with a small surplus and net current assets, with net cash overall and with a reduced overdraft as compared to 2012 but increased loans (around £750,000 as compared to £350,000 a year earlier). Total income was around £23m.

Approval of the 2012 accounts (September 2013)

219. The statutory accounts for the year ended 31 December 2012 included a confirmation that Kids Company was a going concern, in broadly similar terms to that provided in the 2013 accounts (as to which see [263] below). The sign-off of the accounts on a going concern basis was criticised at the trial, although it did not feature in the Official Receiver's reports.

220. Going concern was discussed at a Board meeting on 23 September 2013, shortly before the end of the filing window for the statutory accounts (30 September). Mr Handover explained the need to look 12 months ahead and determine whether there was a reasonable expectation that Kids Company would still be operating by then. The minutes record an agreement, guided by the budget and prior years' experience, that it was reasonable to view Kids Company as a going concern, despite what was described as a "short-term problem" in terms of funding, such that if any of the charity's large creditors demanded immediate repayment it would not be able to pay.

221. Pursuant to an "action point" agreed by the Board, Ms Jenkins circulated a paper from herself and Mr Mevada on going concern status to all Trustees on 25 September 2013, which already reflected Finance Committee comments (which the evidence indicates were provided at least by Mr O'Brien and Mr Handover). She correctly made it clear that whilst she and Mr Mevada were satisfied that the charity was a going concern (as the paper confirms), the Trustees needed to satisfy themselves of the position. Attached to the paper was an income and expenditure forecast which covered both the remainder of 2013 and the whole of 2014. The cumulative balance was negative for all months except December 2013 and January and December 2014.

222. The paper anticipated the year-end position for 2013 to be balanced (i.e. no excess of expenditure over income) with the authors stating that there was no reason to assume that the last quarter would not live up to expectations, as it had done in previous years. The paper made it clear that the 2014 income forecast was prudent, with general fundraising income being reduced by over £1m on the 2013 forecast. It stated that the forecast reflected "what we feel is an achievable financial result for Kids Company". It referred to an outline contingency plan prepared by Ms Jenkins, Mr Stones and Mr Mevada, and appended to the paper, as something that could be implemented if needed, and described management of seasonal projected income shortfalls through a combination of the bank overdraft, interest-free loans from supporters and negotiation with major creditors to agree staged payments. The paper also referred to managing payments to ensure that essential services and kids costs were paid in a timely fashion, with the remaining costs being "prioritised appropriately".

223. The appended contingency plan noted that Kids Company could potentially afford to reduce staffing by 20%, saving £2.5m over a full year, but would need financing options to fund reductions of 50%, saving £6.4m over a full year. I should note that contingency plans in some form had existed since 2010, when one was first worked up by Ms Chipperfield to address the possibility of a significant downturn in funding. They were not simply produced for the auditors,

as the Official Receiver appeared to suggest. This one, or a version of it, was produced with the 2013 Budget.

224. Ms Anderson pointed to the most recently available management accounts, for July 2013, which showed a cumulative deficit of £3.3m and a debt ratio indicating that 41% of Kids Company's liabilities would be covered by its assets (excluding the Heart Yard asset referred to at [537] below). She also pointed out that by reference to the income and expenditure forecast the position was predicted to remain negative for a 12 month period, only turning positive at the end of 2014.

225. I do not accept Ms Anderson's criticism in cross-examination of some Trustees that the Trustees did not form their own view on the question whether Kids Company was a going concern. They did so, and in reaching that view I consider they were entitled to be informed and guided by advice received from two well qualified professionals, Ms Jenkins and Mr Mevada, and by the fact that the auditors were prepared to sign off the accounts on that basis. (As already indicated, Ms Jenkins and Mr Mevada were both qualified accountants, Ms Jenkins having joined Kids Company from the charity's former auditors. Kingston Smith, the auditors from 2012, were also a well-regarded firm with a specialism in the not-for-profit sector.)

226. The Trustees clearly took comfort from the conservative nature of the income forecast and the experience of prior years. As to Ms Anderson's point about looking 12 months ahead rather than at any longer period, there was no evidence before the court as to the relevant accounting principles. Mr Westwood's closing submissions, to which the Official Receiver did not object on this point, stated that the assessment required is that the organisation will continue in existence for the foreseeable future, which is usually taken to be a period of at least 12 months. That is consistent with my understanding. Whilst the evidence I did have indicated that it is normal to look 12 months ahead, it would be counterintuitive to suggest that that is the maximum period that can be considered. I also note that the forecast Ms Jenkins produced for the purpose covered the whole of 2014, and that Mr Handover observed that that was consistent with his experience in business, which was that forecasts of this nature would adopt a similar approach of covering the entirety of the following accounting period.

227. My conclusions are reinforced by Mr O'Brien's evidence. It was clear that he thought it appropriate to look forward to the position to the end of December 2014. He considered the going concern paper to be a balanced document, which he questioned and tested. Mr O'Brien described himself as a "due diligence accountant" who would never simply accept such a document. The income and expenditure forecast would, as always, have been prepared on a conservative basis. Mr O'Brien took account not only of all the points made in the going concern paper but all the circumstances at the time, including other matters discussed at the Board meeting, for example in relation to discussions with government (see [449] below) and a meeting that Ms Batmanghelidjh had had with the Prince of Wales and Louise Casey, head of the Troubled Families programme. In essence, the Trustees would have been looking at all the information available and making an assessment of whether the charity would still be there in a year's time.

228. The audit of the 2012 accounts was unqualified. The auditors' report to the Trustees, which was finalised on 30 September 2013 but a version of which was circulated to the Finance Committee on 21 August, confirmed that no significant matters arose from the audit, and that no material weaknesses in accounting or internal control systems were identified.

229. An appendix to the auditors' report set out certain matters that the auditors thought should be brought to the Trustees' attention, together with the charity's responses. The Official Receiver focused on the first one, which related to the low level of reserves and the cash flow issues that the charity had suffered throughout the year, which had been managed by delaying payments to suppliers and setting up a payment plan with HMRC. The auditors referred to the concern raised in that connection by a donor in an email of 16 January 2013 (this was Mr Spiers, see [362] below) and to a letter from HMRC in April 2013 highlighting concerns over the continued arrangement for late payments. They recommended continual work to build up reserves and continual monitoring of the cash position, noting that the possible reluctance of HMRC to provide future payment arrangements should be taken into account in cash flow projections to ensure that PAYE liabilities were paid promptly.

230. The charity's responses as shown in the appendix, which would have been prepared by the professional Finance team, are worth setting out in full:

> "We acknowledge the need to build reserves, and this has been the aim of the organisation for a number of years.
> One area we have difficulty with [is] the nature of our funding streams: restricted funds do not allow retention to increase reserves, and contractual funding that is less than full cost recovery leaves no surplus to save for the future.
> From a different perspective, Kids Company also promises never to turn away a child in need. This drives growth in charitable spend before growth in charitable income.
> We acknowledge the risks in this situation, and regularly share these with the government, who are aware of the importance of our work."

231. As Mr O'Brien commented, the Trustees did not need the auditors to tell them about the issues, in particular the desirability of improving cash flow. There had also obviously been transparency with the auditors about issues with HMRC and the concerns raised by Mr Spiers.

232. Mr O'Brien also confirmed that the auditors required a letter of representation, which would have been in similar terms to the letter in respect of the 2013 accounts referred to at [259] below. The letter is referred to in the minutes of the Finance Committee meeting on 21 August, which included an action point for Mr O'Brien and Ms Jenkins to sign it. I infer that Ms Jenkins did indeed sign such a letter, confirming among other things that it was appropriate to prepare the accounts on a going concern basis.

January to September 2014

The 2014 Budget

233. The 2014 Budget was agreed by the Board on 25 March 2014, having been in discussion with the Finance Committee since December 2013. It was a challenging one, budgeting income at £24.4m, a £3m increase on the anticipated actual figure for 2013 of £21.4m (and income of £19.3m in 2012). Costs were also budgeted at £24.4m, compared to an anticipated £21.3m for 2013. Most of this increase was attributable to staff costs, budgeted to increase from £15.3m to £18.3m, around a 20% increase. Staff numbers were budgeted at 520 (full-time equivalent) as compared to 495 in November 2013. The email evidence, as well as the minutes, supports the conclusion that the increase in staff costs and headcount was approved by Finance Committee members in December 2013, following a meeting at which a draft Budget was considered. The increases were also flagged at the Board meeting on 30 January 2014. The increase in staff numbers obviously did not account for the full staff costs increase. Part of the increase, £0.8m, was attributable to new provision for pension contributions and maternity absence, but there were also other factors, in particular the full year effect of staff taken on during 2013, including at senior management level. The Bristol element of the increase was £0.5m. Running costs were actually reduced, with a significant reduction in the research commitment.

234. The Budget document stated that so far Kids Company had secured £7.3m of guaranteed income for 2014. An income schedule projected total income of £21.4m, leaving £3m to find. The document stated:

> "We will only increase expenditure by this amount once the additional £3.0m has been identified."

235. The cash position was dealt with in some detail, emphasising variability and uncertainty of timing. Particular challenges were anticipated in the last four months of the year, with the risk of delayed payments to creditors if income was delayed. The document stated that loans would need to be secured for at least the latter part of 2014, and because of intra-month variability loans might well be needed to cover other parts of the year. There was a reference to the Finance Committee continuing to review liabilities management closely throughout the year.

236. The risk that expenditure would exceed income at the year-end, without a large reserves balance to mitigate it, was also identified. The stated response to this was "to focus efforts on fundraising". There was also a statement that, whilst increases in the volume of young people supported had been budgeted for, the growth was "inherently unpredictable", but the transparency of the cost increase assumptions in the budget would allow Trustees to review growth over the year and assess if action was required. There was also a section on potential savings, noting that closure of centres would be required to achieve significant savings and stating the expected 2014 costs for each centre.

237. This was a detailed budget document that, quite rightly, made no attempt to hide the challenges. It clearly reflected discussion by the Finance Committee in particular. Mr O'Brien had also provided written comments on a draft version.

The Official Receiver challenged certain of those comments, in particular a request to remove a suggested reference to a risk of breach of trust in respect of restricted funds if the cash balance was less than the balance of unrestricted funds and the charity could not continue operating to make good the deficit. Mr O'Brien was also asked why he had disagreed with a proposed statement that including additional staff provision was "on the recommendation" of the Finance Committee, and about a change he had asked for to a reference to "Camila's first draft" income schedule. A further challenge was why the draft Budget had not been amended to reflect actual year-to-date figures to the end of February, which appear to have been less positive than budgeted.

238. Mr O'Brien's responses to these points were robust and clear, and I accept them. He had no difficulty with the reference to breach of trust in principle, but thought it unnecessary to include it in a budget, the function of which is to state what the organisation is doing and how the numbers look. The reference to increased staff provision being on the Finance Committee's "recommendation" was factually incorrect. It had been discussed and agreed by the Finance Committee but the Board needed to have an independent discussion rather than simply follow a recommendation. The change to the income schedule wording was because by this stage the document was much more than a first draft by Ms Batmanghelidjh. It had been reviewed both by the Finance team and Finance Committee. As regards the February year-to-date figures, Mr O'Brien understandably could not respond in detail in cross-examination without being given a proper opportunity to study the figures, but I accept his point that it is not practical to keep redoing a budget. I am also satisfied, however, that the Finance Committee and Board would have had in mind the available financial information in determining whether the Budget as a whole was achievable, and I take account of the fact that the Budget itself emphasises the difficulty of accurately predicting timing of income within the year. In fact, the February year-to-date figures showed expenditure as well as income below budget, the former by around £500,000 and the latter by around £800,000.

239. I also accept Mr O'Brien's response to the challenge that it was not the case that the £3m yet to be found would only be spent if the income was identified. The position was monitored carefully throughout the year and until late November Mr O'Brien thought that the income for the year was on target to achieve budget, as had consistently been the case in previous years. Until that point it was not thought necessary to take remedial action to curtail expenditure.

240. Ms Robinson was also asked about the 2014 Budget. She emphasised that budgeting was carried out by Kids Company on a conservative basis, namely in a way that minimised revenue and maximised cost, and that historically forecasts were broadly accurate. When the 2014 Budget was agreed she thought that the potential deficit was conservative as things then stood, because the charity would have the time either to raise income or reduce costs as the year progressed. She pointed out that, at the time, there had been a very clear message of support from the Prime Minister in his January 2014 letter (see [452] below), and that whilst Ms Batmanghelidjh could not, or would not want to, carry on fundraising as she had been year after year, at the time she was still being incredibly effective as a fundraiser. In any event the Trustees had their "eyes wide open" about the task

ahead. Given the information available to them at the time, including the indications they were getting from the government, what they saw as the necessity of the work being done by the charity, and the difficulty of making material cuts without closing centres (which both the government and philanthropists that supported Kids Company did not want it to do), they decided to proceed without instituting major cost cutting at that time. There were risks but they were believed to be reasonable and manageable in the context of what the charity was doing. I accept this. Mr Yentob's evidence also echoed the point that the Trustees were balancing the risks with the needs that the charity was meeting.

241. Mr Webster was cross-examined at some length about the approval of the 2014 Budget at what was the second Board meeting he attended after becoming a Trustee, and about whether he spoke up. It was not surprising that, given the distance in time, he could not recall the details of the discussion. However, he fairly pointed out the relevance of the context, including what he understood about the discussions with the government, the apparent continued ability of the charity to fundraise and the assurances he understood were being provided by the management team. The view reached was that the Budget was achievable, though not without risk. The headcount increase contemplated by the budget was relatively modest.

242. Again, I accept this. The Budget was not contemplating any material expansion in services. A decision at that stage not to increase expenditure by £3m would in all likelihood have required real cuts to services by closing centres. It was not unreasonable to decide to proceed as the Trustees did.

243. My conclusions on the 2014 Budget are reinforced by a document dated 22 May 2014 by Kids Company's auditors Kingston Smith. This was a going concern review for the year ended 31 December 2013. It was an internal document which was disclosed by the Official Receiver. It records that Kids Company:

> "…were very accurate with budgeting in 2013, which gives us confidence that the figures budgeted for 2014 are also reasonably accurate."

The document goes on to consider the 2014 Budget, noting the continuing rise in staff costs due to expansion of the Bristol operations and continued growth in London. It notes that the Trustees were "paying close attention" to this area of expenditure and working to make sure that it was effectively managed. It states that the increase in staff costs from 2013 reflected increased staffing during 2013, new pension contributions and staff contingency costs. There is reference to the contingency plan, to management of unpredictable income and the impact on creditors. The note states that Kingston Smith had looked at some of the old budgets and observed that "income budgets are generally reasonable and achievable" and that:

> "Overall the income levels for 2014 look healthy and also achievable."

There is also a reference to Kids Company being able to pay off its liabilities to HMRC during 2013 whilst expanding its operations, suggesting that cash was

being better managed than in prior years. It concludes that cost savings could be made if necessary in the event of income falling below expected levels, by closing centres. There is reference to having seen the:

> "…detailed contingency plan to support this, which shows a workable action plan, timescales and cost savings."

March to September 2014

244. The management accounts between May and August 2014 showed, in summary, that the deficit was running at a lower rate than budgeted, with lower income being more than offset by lower costs, in particular staff costs which by August were about £1m lower than budgeted on a year-to-date basis (with a headcount lower than budgeted). A surplus for the year was still anticipated. However, it was clear that cash flow was difficult, with grants being paid later than anticipated and creditors not being paid promptly (see [262] below in respect of aged creditors during this period). As at 31 August the debt ratio, comparing the total debt of the charity to its assets, indicated that only 27% of its liabilities would be covered by its assets, excluding the Heart Yard building (as to which see [537] below). Loans had more than doubled over the previous 12 months. As far as HMRC was concerned, it seems that the position was generally being managed, with the August management accounts summary stating that the charity was up-to-date with payments to HMRC as at 16 September. But issues were still arising. The charity could not make the full payments due to HMRC in June and July 2014 (see [328] and [329] below). Ms Batmanghelidjh contacted Mr O'Brien and Mr Handover on 1 August to ask whether they could assist with a loan to help with a payment due to HMRC on that day, and contacted Mr O'Brien again on 19 September with what he interpreted as a similar request in respect of a payment due then (requests which he did not meet).

245. At its meeting on 26 August 2014 the Board discussed the meeting with Oliver Letwin in July (see [456] and [462] below). In the finance discussion, Mr O'Brien reported that the deficit position was within budget, but this meant having to "stretch creditors to the maximum" and securing loans. Ms Batmanghelidjh is reported as saying that plans were in place to raise additional funding and anticipating that loans would be cleared in October, but also saying that September would be a particularly difficult month.

Approval of the 2013 accounts (September 2014): going concern issue

246. A number of issues were raised in relation to the approval of the statutory accounts for the year ended 31 December 2013, and in particular in relation to the view taken as to the ability of the charity to continue as a going concern.

247. As far as the Trustees were concerned, the process was run uncomfortably late, with the accounts being filed on the last possible day within the filing window, 30 September 2014. This was only shortly after the Sunday Times published an article on 21 September in which Ms Batmanghelidjh was reported as saying that the charity would not survive beyond Christmas unless the government stepped in with significant funding. The article, which Trustees were not asked about in advance, led Mr O'Brien to express concern in an email to other members of the Finance Committee that, because of what he described as Ms Batmanghelidjh

"playing a game with the government", it was going to be very difficult to convince the auditors that the charity was a going concern. He made some specific proposals, including the need for a detailed cash flow forecast. Ms Robinson had previously suggested that it might be helpful to produce a cash flow forecast "through to the end of that year". This was agreed as an action point at the Finance Committee meeting on 23 September. I accept Ms Robinson's evidence that what she meant was a cash flow forecast covering the full 12 months ahead, to the end of September 2015, on the basis that when considering the question of going concern it is normal to look 12 months ahead. The cash flow forecast in the management accounts pack considered at the Finance Committee meeting (which included the management accounts for August 2014) only ran to August 2015.

248. The draft annual report was only circulated by Mr Mevada (and not to all the Trustees) on 29 September. Ms Tyler responded late that evening, after she had spoken to him, stating:

> "I have not gone over all the financial data in detail again as you noted in your email, and when we spoke earlier, that this has not changed from the previous draft."

249. Ms Tyler went on to express concern about the late circulation and to refer to Mr O'Brien having specifically asked whether the auditors had expressed any concerns about going concern, noting that all the Trustees needed to be happy with the going concern wording. Mr O'Brien agreed with this in an email sent early the next morning, asking for a note from Mr Mevada as to "what you have done on going concern" so that the Trustees could be given appropriate reassurance. He added "We need an outline of what you did to get them happy". The reference to "them" is clearly to the auditors. He suggested that it was not going to be possible to file the accounts that day. This prompted a response from Ms Hamilton that that would result in a fine and create "more cause for concern regarding recent press". She added that the accounts had not changed "since previous finance committees", but the text had been delayed, and said that there had been no concerns from the auditors as yet.

250. Ms Tyler sent a further email at 12.17 on 30 September explaining that she had spoken to Mr Handover and Mr O'Brien and asking for a number of things to be done as a matter of urgency, in particular that Mr Mevada confirm in writing:

> "… that you and the Finance Department at Kids Company, have (i) reviewed cash flow, income etc with a view to assessing whether the charity is a going concern; (ii) are of the opinion that the charity is a going concern; (iii) you have discussed this with the auditors and/or written to them to this effect; and (iv) received confirmation from the auditors that they are satisfied that the charity is a going concern."

251. At 12.36 Mr Mevada sent an email to Mr O'Brien, copied to Ms Tyler, Ms Robinson, Mr Yentob, Mr Handover, Ms Batmanghelidjh and Ms Hamilton, which was obviously in response to the queries raised by Ms Tyler and Mr O'Brien (Ms Tyler's email of 12.17 had been sent to the same people). The email explained that he had spoken to the audit manager at Kingston Smith (the charity's auditors) who had confirmed that they were in a position to sign off the

accounts that afternoon, and that they were also happy with the going concern statement on the basis that they had "done extensive work on going concern of the charity". He confirmed that Kingston Smith had reviewed the contingency plan, cash flow forecast up to September 2015, plus management accounts for August 2014, all of which Mr Mevada attached to the email. He added "I went through this cash flow forecast in detail over the phone with the auditor". (The contingency plan envisaged that Kids Company could afford to reduce staffing by 17%, saving £2.5m over a full year, but would need financing options to fund reductions of 41%, saving £6.4m. As with earlier outline plans, it also noted that cuts at the higher level would risk putting funders off, jeopardising going concern status. The same version of the plan was attached to the 2014 Budget.)

252. Later that day the accounts were signed by Mr Yentob and Mr Handover, and were filed by the Finance team. As with the 2012 accounts there was an unqualified audit opinion.

253. Neither Mr Mevada nor Ms Hamilton drew the attention of any of the Trustee recipients to the fact that the cash flow forecast incorporated within the management accounts for August 2014 (which ran through to August 2015) and the separate cash flow forecast up to September 2015, in the versions attached to Mr Mevada's email at 12.36, showed a markedly different picture to the cash flow forecast that had been included in the management accounts pack considered at the last Finance Committee meeting. The forecasts attached to the email were consistent with each other and projected positive cash from October 2014 onwards (with a balance of £2.2m by August 2015 and £2.1m by September 2015). The forecast considered at the Finance Committee meeting projected negative cash throughout the period of varying amounts, being around (minus) £570,000 by August 2015.

254. This point was not picked up in the Official Receiver's report, having apparently not been identified during the course of a very lengthy investigation, but was nonetheless raised in the Official Receiver's opening submissions as part of the criticisms of the defendants. When asked about the difference in oral evidence Ms Hamilton could not explain it, saying she could not recall, even though she had presented the management accounts to the Finance Committee and confirmed that she would have seen the different forecast sent to the auditors (she was copied on the relevant email on 26 September, so well in advance of the last minute circulation of the revised forecast to some of the Trustees by Mr Mevada on 30 September). She said, which I accept, that the figures themselves would have been put together by Mr Mevada.

255. The Official Receiver relied on Ms Hamilton's evidence in re-examination that Mr Mevada "would have" obtained his information from Ms Batmanghelidjh. That of course is not direct evidence of what happened. Further, it directly contradicts Ms Batmanghelidjh's evidence on the topic when asked about it in cross-examination. She explained that Ms Lloyd would have gone through the detailed figures in the income spreadsheets with the Finance team. Ms Batmanghelidjh's evidence is consistent with the conclusions I have drawn about income spreadsheets, which were not produced by Ms Batmanghelidjh herself (see [371] onwards below). In my view it is more likely than not that Ms Lloyd, or if not her Ms Caldwell, provided the figures to Mr Mevada, since it was Ms

Lloyd (or possibly Ms Caldwell) who kept the detailed information on her computer, and Ms Batmanghelidjh's learning difficulties meant that working with spreadsheets and lines of numbers was difficult for her. However, it is the case that Ms Batmanghelidjh's input into the figures would have been reflected in the numbers used by Mr Mevada, and in terms of the most substantial donations that input would have been significant.

256. I agree that the Trustees were entitled to expect that one or both of Mr Mevada or Ms Hamilton would have drawn a radical difference of this nature to their attention. This would have been the case in any circumstances but was particularly so given the very late circulation of the documents. As Ms Tyler said in cross-examination, it was squarely within their remit. Rather, the impression is given that none of the figures have changed. Although the specific confirmation provided on that point related to the figures in the statutory accounts rather than those relevant to cash flow, the point about the impression given still has real force. Both Mr Mevada and Ms Hamilton were qualified accountants with significant experience. The issue of the cash flow forecast was obviously material and something that Mr Mevada had specifically discussed with the auditors. Between them they would also have been responsible for putting the management accounts to the Finance Committee the previous week. I note that Ms Hamilton was listed on the agenda for that meeting as leading the discussion of the management accounts. Mr Mevada's email attaching the revised cash flow was sent at the last minute on 30 September, during a working day.

257. I do not accept that the Trustees should have been expected to look through the papers in detail to check figures, rather than rely on experienced staff who led them to believe that there was nothing to draw to their attention and that the auditors were content. None of the Trustees who were sent the email could recall spotting that the figures were different, and I conclude from the fact that no query was raised that they did not notice. This was hardly surprising given that Mr Mevada circulated the figures discussed with the auditors so late, and without flagging any issue.

258. I also do not accept that there is any sense from the evidence that the Trustees sought to apply any form of pressure to achieve a going concern "sign off" where it would not have been appropriate, either to the Finance team or the auditors. Mr O'Brien's reference to what was done to get the auditors happy carries no such implication, but rather a need to understand what had been said to the auditors. That was obviously necessary in order for the Trustees to form their own view. I note that he was not cross-examined about what he meant by this statement.

259. Ms Hamilton also signed a letter of representation to the auditors on behalf of "Management", alongside Mr Handover on behalf of the Board. This letter was in the Official Receiver's possession but was not initially included in the trial bundle, only being added at the request of Mr O'Brien's advisers when it became clear from the Official Receiver's skeleton argument that the Official Receiver was seeking to argue that staff had not said that they thought the charity was a going concern at the time. Among other things this letter confirmed that it was appropriate to prepare the accounts on a going concern basis, and that it was the signatories' opinion that the company would have adequate cash resources during the following 12 months. Ms Hamilton confirmed in oral evidence that at the time

she had no reason to think that Kids Company was not a going concern. She clearly understood the nature and significance of the document. Although not all the Trustees would have seen this letter at the time, the fact that Ms Hamilton signed it underlines the responsibility she adopted for the process and reinforces my conclusion that it would have been the responsibility of management, and not Trustees, to identify and point out material changes to the figures. Whilst it is not the case that the Trustees were entitled to substitute others' views for their own, I am also satisfied that in signing the accounts and confirming the company's status as a going concern Mr Handover took some comfort from the fact that Ms Hamilton was prepared to sign the letter, and was entitled to do so. Mr O'Brien also referred to the fact that Ms Hamilton had clearly signed off the accounts, and the fact that Mr Mevada was making it clear that he had discussed the position with the auditors.

260. There was a further criticism that not all Trustees appeared to have been involved in the approval process. Neither Ms Bolton nor Mr Webster could recall approving the accounts and there was no documentary evidence that either they or Ms Atkinson had done so. However, one of the emails sent by Mr Mevada on 29 September, in response to a question from Ms Robinson as to whether there was a board minute approving the accounts, specifically stated that once amendments were made he would "ask the trustees to confirm by email that they approve the accounts in the completed form". On 29 September Ms Tyler had also explicitly flagged the fact that not all Trustees had been copied into a particular email chain about the accounts, and in a further email at 12.26 on 30 September specifically asked why the draft accounts had not been circulated to all Trustees, and stated that Ms Bolton, Ms Atkinson and Mr Webster should be included.

261. I am satisfied from the documentary evidence that the Trustees would at least have been entitled to conclude that proper procedures would be, and were, observed by the Finance team, even if they were in fact not observed. Mr Yentob also explained in oral evidence, and I accept, that he and Mr Handover would have sat down with Mr Mevada before signing the accounts, and there was no tendency "just to take it for granted" in such discussions. There is also an email sent a couple of days later from Ms Batmanghelidjh to all the Trustees, thanking them for their assistance in relation to the signing of the annual report. There is no indication that any of Ms Bolton, Mr Webster or Ms Atkinson queried this email at the time.

262. The points already discussed go in part to process rather than substance. A more fundamental question is how, particularly if the most recent financial information that the Trustees had gone through was that contained in the August 2014 management accounts, the Trustees could actually conclude that the charity was a going concern. Those accounts projected negative cash flow for the following 12 months. They also showed creditors of around £1.3m, of which around £600,000 were more than three months old (which I will refer to as "aged creditors"). The extent of aged creditors was not outside the range it had been in the preceding few months, which was of the order of between £300,000 and £700,000. (Obviously the mix of aged creditors altered to some extent from month-to-month, as some were paid off and others fell into that category. For

example, at the Board meeting on 2 June 2014 Trustees were told that there were no aged creditors from 2013, with the exception of research institutions.) The summary report provided with the management accounts also explained that there were loans outstanding of £1.9m, as compared to £850,000 a year earlier.

263. The going concern statement in the 2013 accounts is as follows:

> "As the charity has no endowed funds, the level of activities in the financial year starting 1 January 2014 will depend almost entirely on its ability to secure continuing grant income. Whilst significant grants have been awarded, the organisation continues to grow very fast, and has low reserves relative to its size. The Charity's history of delivering the maximum possible charitable objectives with the resources available has often put a strain on the Charity's cash flow. The Trustees are confident sufficient funding will be secured and are monitoring the situation. The Trustees consider that debts will continue to be paid as they fall due."

264. It is obviously possible, as Ms Anderson did, to criticise the reference to debts *continuing* to be paid as they fall due, since it is clear that not all debts were being paid on time. However, with that caveat, which is offset to some extent by the reference to strains on cash flow, I am not persuaded that the Trustees could not properly have formed the view at the time that the charity could continue as a going concern. The statement carefully reflected the need to secure continuing grant income, the fact that reserves were low (a point discussed further below) and that there were strains on the cash flow. Most importantly, it expressed the Trustees' confidence, which I am satisfied that they had at the time, that sufficient funds would be secured. Specifically in relation to the projections in the management accounts, Mr Handover confirmed (as did Mr O'Brien) that income was always forecast on a conservative basis.

265. Mr O'Brien gave clear evidence that he, like the other Trustees, had not spotted the difference in the figures, but also that he would have been prepared to confirm that Kids Company was a going concern on the basis of the more negative forecast included in the August management accounts. The forecast outturn for 2014 was positive. Cash flow forecasts were prepared on a conservative (worst case) basis to show the maximum scale of the fundraising challenge, and changes in the cost base could have been made during the following year if required to avoid a negative position. The fact that the outturn was forecast to be positive should mean that aged creditors could be paid. It was the job of the Finance team to manage the details of payments to creditors, although Mr O'Brien made clear in his affidavit that he would go through the aged creditor list with them at each Finance Committee meeting (this is supported, in particular, by the detailed information about aged creditors included in management account packs from the January 2014 management accounts onwards, and by a discussion recorded in the minutes of a Finance Committee meeting on 19 March 2014 in which more detail was requested). And whilst the August management accounts pack also included details of outstanding loans, at that stage there were a relatively small number of loans from very supportive donors to the charity. I accept this, and would add that the summary report in the management accounts stated that, although the deficit was larger than the previous year, "we expect to catch up substantially by

October". I infer that Mr O'Brien approved the accounts on the basis of the forecast and other information in the August management accounts, together with his understanding of other relevant circumstances at the time.

266. Mr O'Brien's oral evidence was consistent with his affidavit evidence that (whilst running a seasonal deficit) the charity was a going concern, with good prospects of raising sufficient funds from donors and from government. He pointed out that he would not have made the personal loan to the charity that he did on 3 November 2014 if he had not thought that was the case.

October to December 2014

267. The minutes of a Governance Committee meeting on 22 October refer to distress of self-employed staff about not being paid, and to Ms Hamilton stating that payroll "is a struggle every month, but this is not new". The (very brief) minutes of a Board meeting on 30 October refer to £2m funding being late, Ms Batmanghelidjh asking the Board for help with fundraising and expecting November to be "very tight". During this period Mr Handover also met with the bank (see [336] below).

268. The September management accounts were discussed by the Finance Committee on 10 November. There is a further reference to the anxiety of self-employed staff, with £100,000 being owed to 40 staff for July. It is evident from the minutes of this meeting that the Board had in fact gone through these management accounts in detail at the Board meeting on 30 October, despite the brevity of the minutes of that meeting. Loans were also discussed (see [720] below) and a new procedure for a Trustee to sign off all invoices over £5000 was noted. It was also noted that payments to HMRC were up-to-date. The minutes record the following in relation to Ms Hamilton ("DH"):

> "DH discussed that our assets do not cover our liabilities and that we are not paying debts on time. This indicates insolvency. If we believe income is coming in as expected then trading is possible."

I accept Mr O'Brien's affidavit evidence that he did not demand urgent action at this point because he still had confidence that the charity would generate sufficient income for the year to meet its costs.

269. The management accounts for October 2014 showed a deficit slightly higher than budgeted, at £4.35m rather than the budgeted £4.25m. The summary report prepared by Mr Mevada stated that the charity expected to catch up substantially by December, although cash flow was being "very tightly managed" by increasing creditors and reducing debtors. Staff costs were significantly lower than budgeted because planned staff increases only occurred later in the year: staff numbers were now roughly at the budgeted level.

270. The October management accounts were discussed at a Finance Committee meeting on 21 November, with concern being expressed about cash flow. Mr O'Brien asked Ms Hamilton and Mr Mevada to look at the contingency plan to ensure that it was robust, and also requested a zero-based budget for 2015 to be prepared for January (that is, one in which all expenses were justified, rather than

starting with a previous budget or expenditure). Mr O'Brien explained in his affidavit that he made this request in light of the fact that the charity was behind budget (albeit by a relatively small amount) and the government had still not made a firm commitment to further funding following the end of the current grant programme in March 2015. However, Mr Mevada is recorded as reporting that the charity would "come to a positive cash flow for year end", with a £2000 surplus, if all forecast income came in, and as tabling income projections prepared by Ms Batmanghelidjh and the fundraising team to support this (although the forecast outturn in the management accounts was a loss of around £400,000). Loans were also discussed (see [720] below), as was government funding. The financial position was discussed again at a Governance Committee meeting on the same day, in particular in relation to the position of self-employed staff.

271. The minutes of a further Board meeting on 26 November record Ms Batmanghelidjh as being confident that Kids Company would be £2000 in credit by the end of December, although Mr O'Brien expressed scepticism. Payroll for November had been delayed by one day due to "timing issues", and the overdraft was now at £100,000. Loans were discussed (£2.2m as at 31 October), including that Mr Roden (who had £700,000 outstanding) was aware of the charity's need for money and Harvey McGrath (who had £300,000 outstanding) had not set a date for repayment. The minutes report the Board as being "aware of the current financial situation, and are concerned that the situation is not desirable or sustainable", and that in the absence of new government funding a contingency plan would be put into effect. The final version of the minutes reflected a change from the draft minutes relied on in the Official Receiver's report. The draft minutes stated that the Board was "comfortable with" rather than "aware of" the current financial situation. Mr O'Brien described this as a testing meeting where he was pointing out the dangers, with the minutes not fully reflecting the tough nature of the discussion. Following the meeting, and as agreed at it, Mr O'Brien produced a draft letter for Mr Yentob to send to the Prime Minister. I accept Mr O'Brien's evidence that this was effectively a prompt for action to be taken to press the government, rather than that he expected Mr Yentob to send a letter in those terms. As he said in his affidavit, the charity was in a precarious position, and whilst the Trustees did not think that it was on the verge of imminent collapse there was agreement that it was very important to get a final decision from the government. (As discussed at [472] below Mr Yentob did rather better than sending a letter, by securing a meeting at short notice with Mr Letwin.)

272. On 27 or 28 November (and it seems after the draft letter was written), Ms Hamilton telephoned Mr O'Brien to set out some concerns, in particular that three expected donations, namely from David Kendrick, Comic Relief and the Moshiri family, had not materialised and there was insufficient control of costs (see [394] below). I accept his evidence that he did not consider that this warranted an insolvency process but did feel that urgent action was needed (see further [404] below on that point). From her notes of the call this appeared to be Ms Hamilton's view as well. Her notes of the call record that she, Mr Stones and Ms Caldwell "all believe we can make cuts and still provide a good service".

273. Mr O'Brien reacted promptly by sending an email to the other Trustees on 28 November (shortly after the email exchange with Ms Caldwell also referred to at

[394] below). He reported that the three income sources "discussed at this week's meeting" had not materialised and said he would like to convene a follow-up meeting. This was apparently a reference to the Board meeting on 26 November, the minutes of which make clear that the Moshiris and Comic Relief were discussed. However, since it was clear both to Ms Batmanghelidjh and other staff that Mr Kendrick at least had disappeared as a possibility by then, I think it unlikely that Mr Kendrick's name would have been raised as a donor at that meeting. However, his name might well have come up at the preceding Finance Committee meeting on 21 November, the minutes of which record that income projections were tabled.

274. Mr O'Brien's email referred to the fact that Mr Yentob was working on a letter to the government but in the meantime proposed some immediate controls to be put in place until the end of the year, including no payments or commitments to be made without Trustee approval, all non-essential expenditure to be stopped (with a specific reference to questioning plans for Christmas expenditure), an immediate assessment of headcount, and circulation and discussion of the contingency plan. Mr O'Brien forwarded his email to Ms Batmanghelidjh who responded immediately, stating that she had not been relying on Mr Kendrick, that Comic Relief had been replaced by another donor or donors and that the Moshiri family was still on the cards, but also saying that she would appreciate having a conversation before Mr O'Brien sent such an email, a lot of funding intended for Christmas was restricted, the charity had "very good prospects" and had the same issues last year which were resolved, and that "we can't be micromanaged long-distance". She also emailed Ms Hamilton to say that the information given to Mr O'Brien was not accurate.

275. Mr O'Brien wrote a note to himself on 5 December 2014 setting out current issues affecting Kids Company as he saw them. This was later annotated in manuscript at or prior to the 10 and 15 December meetings referred to below. The note refers to there being nothing forthcoming from the government, a mounting number of loans, some self-employed not having been paid from July, donations not coming in, media related concerns, and some concerns in relation to expenditure, including Christmas costs and leases.

276. The follow-up meeting that Mr O'Brien had requested was held on 10 December 2014 at the BBC. Ms Batmanghelidjh was not invited but found out about it (it seems from a staff member) and turned up for part of the meeting. It is clear that the Trustees thought it would be helpful to have an initial discussion without Ms Batmanghelidjh there. They were obviously concerned about the level of confidence they could place on the income forecasts she had provided and the gravity of the financial situation in the light of that, as reflected in the concerns raised by staff discussed further from [389] below. The Trustees wanted a frank discussion without any of the executive team present before determining the best way forward.

277. There are no minutes of the 10 December meeting, but some key points were picked up in a draft letter to Ms Batmanghelidjh that Mr O'Brien circulated very shortly after the meeting and then updated later in the day having obtained the comments of a number of Trustees. The letter was not sent, because having spoken to Ms Robinson and Ms Bolton Mr Yentob decided that it was best to

speak to Ms Batmanghelidjh rather than send a letter. I do not accept that this was a question of the Trustees backing down from conveying a difficult message out of fearfulness to Ms Batmanghelidjh. It was absolutely clear that none of the defendant Trustees were in any way fearful of Ms Batmanghelidjh or felt unable to speak their minds. Rather, Ms Robinson and Ms Bolton were giving good advice as to how best to convey a difficult message to a CEO whom (as discussed later in this judgment) they did not think the charity could afford to lose at that point.

278. In the form amended to reflect other Trustees' comments, the draft letter refers to the Trustees' commitment to Ms Batmanghelidjh and the organisation, but said there were some "serious areas of concern", including negative feedback from some donors (it seems this refers at least primarily to a discussion Ms Atkinson had had with one donor at the event on 3 December referred to at [398] below) and the "perilous financial position", with Trustees being particularly concerned about having to borrow large amounts from supporters and delaying payments to self-employed staff. The draft letter also refers to the need to be able to show that the charity continued to be financially prudent if it was going to approach the government, and that the Board wanted to meet Ms Batmanghelidjh urgently to explore a number of actions. The list of actions set out included a freeze on recruitment and a rigorous review of headcount "with a view to making real and immediate savings", revisiting the contingency plan to come up with a detailed plan of action, imposing strict control over costs by requiring that any "financial commitments, whether leases or contracts, research or new requests for assistance" should be subject to prior agreement by the Trustees, and addressing outstanding payments to the self-employed. (In addition to the points in the draft letter, Ms Batmanghelidjh's future at the charity was also discussed: see from [625] below.)

279. The Board met with Ms Batmanghelidjh on 15 December 2014. Again there are no minutes but the key actions agreed in that meeting were added on to the minutes of the 26 November Board meeting, using text from an email sent by Mr Yentob on 16 December. The actions were: 1) the existing contingency plan to be reviewed and updated "depending on the level of cuts needed", in response to an "unsatisfactory outcome to government discussions"; 2) all new "leases, financial agreements, loans or contracts" to be signed off by a Trustee; 3) a schedule of loans to be produced (reported in the minutes as already done); 4) headcount to remain within budget, and a headcount reduction to be identified as part of the contingency plan. In parallel, Mr Yentob was pushing the government for confirmation of funding: see in particular [472] below.

280. The Official Receiver's case was that this represented a watering down of what had been discussed by the Trustees five days earlier: effectively that Ms Batmanghelidjh had successfully pushed back. I do not agree that it provides evidence of the Trustees not exerting control. First, as Mr O'Brien pointed out, five days had elapsed between the meetings and there had been a significant amount of discussion, including at what Mr O'Brien described as a long meeting on 15 December, of what could practically be done. Secondly, much of the substance remained the same, in particular the recruitment freeze (headcount was roughly on budget at that point so it was an effective freeze) and controls on new

financial commitments (I do not agree that there is a substantive difference between the draft letter and the agreed action point in this respect, other than sign off by an individual Trustee rather than Trustees as a whole). There remained a requirement to identify a headcount reduction as part of the contingency plan. Mr O'Brien's reference in his email dated 28 November to all "payments" being approved by a Trustee was obviously impractical, as in fact Ms Hamilton pointed out, and was not agreed.

281. At the Finance Committee meeting on 18 December 2014 an approval process was discussed for loans (see [720] below) and it was also agreed that future financial commitments should be subject to Trustee approval. Ms Hamilton reported that self-employed staff had now been paid "up until the 90 day terms", with October payments being made that week to bring payments up-to-date. The management accounts for November which were considered at the meeting showed a cumulative income deficit of £3.79m, down from October but around £0.22m behind budget. Mr O'Brien again asked for a zero-based budget, with a review of staff costs with a view to reducing headcount. Trustees again requested that the contingency plan be revisited in the light of the possibility that government did not provide sufficient funding, and that it be "real and robust". It was reported that a request for the government to bring their January grant payment forward to December was awaiting final approval. (This followed a meeting that Ms Batmanghelidjh had with Nick Hurd, the then Minister for Civil Society, which she reported in an email sent to Trustees on 8 December, saying that he was going to "make sure" that the funding was brought forward. It was: see [443] below.)

The outturn for 2014

282. Statutory accounts for 2014 were never completed, due to the intervening liquidation. However, on 15 January 2015 Ms Hamilton reported by email to Ms Batmanghelidjh on a meeting she and Mr Mevada had had with the auditors. Ms Batmanghelidjh forwarded the email to Ms Robinson and Mr Handover. Among other things the email stated:

> "We are cautiously optimistic about being in the black this year after reviewing accruals."

283. Ms Hamilton confirmed in evidence that she would have not made this statement if she had not thought it was true, but also appeared to suggest that the email had been discussed with Ms Batmanghelidjh and that she may have been told at least some of what to include in it. I accept that the former might well be the case but not the latter, at least if it carries any connotation that she suspected that any of the contents were inaccurate. Ms Hamilton was an experienced professional and in my assessment she would not have made a statement that she did not believe it was appropriate to make.

284. The position was also discussed at a Finance Committee meeting on 28 January 2015. Mr Mevada reported at the meeting that the management accounts were currently showing a £2.96m deficit but there were "potential" accruals of £3.6m, which were discussed. This reflects the summary report from Mr Mevada on the December 2014 management accounts considered at the meeting, which referred

to the £2.96m deficit but also said that "numerous income accruals" had not yet been made owing to time constraints in gathering the evidence, and that "if all the income that is accrued income comes in, the charity will be in a position to break even".

285. At the meeting Mr O'Brien asked it to be noted that the schedule of accruals presented at the meeting had been reviewed by those attending, and that it would be up to Mr Mevada to ensure that the accruals could be achieved, as long as correct evidence was in place to satisfy the auditors' requirements (see also [383] below). Mr O'Brien's evidence in cross-examination was that the Finance Committee had good visibility of the accruals at that stage. He did not think he had seen Ms Hamilton's email of 15 January, but obviously did see the management accounts which were discussed at the meeting. He gained the impression that Ms Hamilton was indicating at the meeting that the charity would end up in the black for 2014.

286. I also note that Mr Mevada sent an email to the bank, copied among others to Mr Handover, on 23 February 2015 stating that Kids Company was "expecting to at least break even for 2014", and that the reason the management accounts showed a deficit was because when they were prepared the evidence for accruals was not all available. Mr Handover also emailed Sian Joseph at the Cabinet Office on 19 March stating that while Kids Company had not finalised its audit "we will end up in the black for 2014". In an interview with the Official Receiver he recalled his understanding that the audited accounts would show a surplus of around £400,000. On 23 March 2015 Mark Fisher of the Cabinet Office asked for contact details of Kids Company's auditors "to get their opinion on your 2014 year end accounts as part of our due diligence process". I infer from this that the auditors were spoken to and sufficient comfort was provided to enable the government's grant to be released a few days later (see [308] below).

287. The Official Receiver exhibited some draft accounts for the year to 31 March 2014 which indicated a deficit of about £3.5m. However, it is not clear when these were produced. The income figure is in fact less than that in the management accounts, suggesting that accruals were not yet reflected. I cannot place weight on these figures, which were not relied on at trial.

288. I conclude from the evidence, including the fact that the Finance Committee went through the accruals at its meeting on 28 January and the likelihood that the auditors were spoken to by the Cabinet Office before the government grant was released, that there was a reasonable expectation that Kids Company would break even, or at least that there would be no material deficit, in its 2014 statutory accounts. However, it is the case that cash flow was difficult, with the summary report for the December management accounts noting that it was being very tightly managed by increasing creditors and reducing debtors.

January to March 2015

289. The financial position continued to be very difficult during the first quarter of 2015. No budget was set because of the funding uncertainty and focus on contingency planning, and the charity operated using a prior year comparison. At a Finance Committee meeting on 28 January 2015 Mr O'Brien asked for an

update on contingency planning (and again for a zero-based budget), and it was recognised that if the government agreed only to a £4.2m grant (as discussed further below) then radical savings would be needed, involving closures of sites. The effect of the headcount freeze was noted and the controls on financial commitments were clarified further.

290. The contingency plan in its revamped, detailed, form was obviously completed during February. Mr Stones was involved in working on the plan before he left. Mr Handover's affidavit evidence was that it was drawn up between December 2014 and February 2015. An email he sent on 4 February refers to it being finalised to take to a meeting with government that week. Mr Handover emailed a draft plan to Mr Yentob, Mr Webster and Ms Robinson on 15 February. Mr Webster's reply dated 17 February refers to it reading very well and making some suggestions to emphasise to government the consequences of closures. Mr Handover circulated a revised two page summary the same day. The full plan was 50 pages long.

291. The summary was clearly intended for government, and I infer that it was discussed at the meeting with the Cabinet Office on 18 February referred to at [488] below. It included the following statements:

> "Every year the demand grows and whilst the trustees have, in previous years, believed it was possible to raise the level of funding needed, they now consider it is a great deal more challenging to keep the sums required coming in. Therefore without a guarantee of additional funds, it will be necessary to cut back the support provided by Kids Company.
> We have already made it clear that to continue operating at the current level of support for all these children and young people, in 2015, we would require an additional £6.5 to £7.0 million. This funding would need to be guaranteed, with further assurances about ongoing funding from 2016/17."

292. The summary went on to explain cuts that could be made, making the point that staff made up the lion's share of the costs and for safety reasons it was not possible to cut back on the staff to client ratio, so the plan would involve closure of one or more facilities, which would be very complex and also had to take account of restricted funds associated with individual facilities. It referred to the possibility of closing the Kenbury centre (Arches II) and the Urban Academy (an education centre in Bermondsey for young people not in mainstream education), and concluded by stating that it was hoped that it would not be necessary to implement these plans, but that the Trustees would have no option if they were not able to secure a "short and long term solution to funding". (The figures referred to broadly correspond to the £6.6m discussed further below, although the particular options for closure were altered.)

293. Following discussions, Mr Webster sent some thoughts on next steps by email on 20 February to Mr Yentob, copied to Ms Robinson and Mr Handover. This followed the first really negative press article, an article published in The Spectator on 12 February (see [522] below). In a section of the email headed "Context" Mr Webster referred among other things to the increasing difficulty of

raising £24m per annum, the failure of attempts to strengthen the management team (a reference to the departure of the senior managers discussed below), the "growing evidence that a very small number of detractors are prepared to go to the press to attempt to discredit the charity and challenge the deployment of funds", the approach to the government for increased funding and the fact that the head office lease was about to expire without an alternative location being confirmed. The suggested actions included putting in place a "comprehensive and actionable" contingency plan to address a shortfall in funding, reviewing the structure, roles and accountabilities of the CEO and management team, an audit to ensure that funds were being used appropriately and with full transparency, and Trustee approval of external communications. Mr Webster confirmed in cross-examination that the reference to an audit did not mean that there was evidence that funds were being used inappropriately, but rather to assurance being obtained that they were not. In the light of the negative press that was emerging this was not surprising.

294. At a meeting on 23 February the Finance Committee disagreed with Ms Batmanghelidjh's optimistic view and discussed implementing the contingency plan. Mr O'Brien's characteristically "black and white" notes prepared for a Board meeting on 2 March 2015 describe the financial situation as "dire", with cash flow being very poor in January and the bank giving the charity two weeks to clear a nearly £1m overdraft. The notes refer to the need to expedite the conversation with the government as quickly as possible, and state that only with government funding could Kids Company provide an assurance that it was solvent. There is also a comment that a statement in the draft minutes of the last meeting (on 26 November 2014) that the Trustees were "comfortable" about the financial situation was not correct; the revised minutes state that they were aware of the financial situation and were concerned that it was neither desirable nor sustainable (see [271] above). A number of immediate actions are suggested, including starting to implement the contingency plan.

295. The minutes of the Board meeting on 2 March make clear the Trustees' concerns about the charity's solvency in the absence of government funding. Mr Handover pointed out the vulnerability of the organisation without senior management (this refers to the departure of the senior managers discussed below). Ms Tyler also noted that, even with the government grant, cuts would be required. The Board expressly agreed that the then promised government grant of £4.265m (see [439] below) was "insufficient to fund us through 2015". The current financial position was discussed in some detail, with the Board agreeing that the organisation was under "extreme financial stress". The position with the bank was discussed, with Ms Batmanghelidjh reporting that she had agreed with the bank that kids related expenditure would be honoured, and Mr Handover commenting that Mr Bufton (a bank employee referred to at [342] below) was making decisions about what payments could be made, and that donations were coming in late. The Board also discussed the potential appointment of a further trustee, whom Mr O'Brien described in cross-examination as a "hard-nosed" turnaround specialist (the Board resolved that this individual should be appointed at its meeting on 31 March, although he did not subsequently take up the role).

296. Ms Robinson sent an email on 6 March which also made clear that changes would be needed to avoid getting back into the same difficult financial position after government funding was received, and suggested budgeting to raise approximately 65% of last year's funds and to plan accordingly, so reducing the "immense pressure" on Ms Batmanghelidjh and giving the charity a twelve-month period to take stock and prepare plans for its long-term future "without the never ending and intolerable pressure of impending insolvency". Mr Handover responded in broad agreement on the figures, pointing out that with the government funding (the £4.265m) there would be a funding gap of around 30%. He referred to the difficulty in shifting Ms Batmanghelidjh's mindset but that "shift it we must". Ms Tyler also responded agreeing the need for a drastic cost reduction programme and stating that an urgent meeting was required to discuss options.

297. On 13 March 2015 Mr O'Brien circulated some notes following a further informal meeting on 12 March, at which there was further discussion of the position with the government and the financial situation. Mr O'Brien pointed out that if there was no sight of income and the contingency plan was not implemented to reduce costs by £6m then his view was that the organisation was insolvent. However, they had agreed that there was a reasonable possibility of avoiding insolvency if actions discussed were taken. He set out options discussed, including closing the Urban Academy and finding a 10% saving across the charity's divisions, and recorded an agreement by Ms Batmanghelidjh to work up a detailed contingency plan to achieve £6.6m of savings (see further [493] and [496] below in relation to the £6.6m figure). The contingency plan was intended to be activated if the desired government funding was not obtained, or was obtained in a lower amount than required. He also expressed disappointment in an earlier email to Ms Batmanghelidjh about a response she had provided following the meeting, and emphasised the need for a plan to achieve £6.6m of savings, and "hard decisions immediately" in relation to the 10% cut. Mr Handover sent an email agreeing with this and referring to putting a plan in place to save £6.5m over the year "starting now".

298. On 24 March (after the government had confirmed that the £4.265m would be paid in a single lump-sum in April: see [495] below) the Finance Committee met by telephone. Ms Batmanghelidjh followed up with an email stating that it had been agreed that the senior team would look at a 10% cut across the organisation, and prepare a detailed plan of closure of the Urban Academy and Bristol, in case they could not be registered as free schools. She referred to a number of other possibilities for funding, including from the mental health budget, and confirmed that she and the team were committed to making cuts but wanted to make them in a "safe and thoughtful way, ensuring that we keep our options open for further potential funding". She also referred to the danger of going to staff with possible closure plans, because it was likely to demoralise them and "the word will spread to the kids, rendering the provision unsafe".

299. Mr O'Brien responded on the same day saying that a 10% cut was not enough. The government funding secured represented about two months' overheads and more needed to be done. He added, "We have talked about £6 million of cost savings and I think the timeframe is two months, not end July". He described the

other funding possibilities referred to as optimistic, and that for financial planning purposes they had to be assumed not to come through quickly, if at all. He added that Ms Batmanghelidjh and Mr Mevada needed some resource to implement a plan.

300. Mr O'Brien's comments were agreed by both Ms Robinson and Ms Tyler in emails sent the following day (25 March). Ms Robinson's email referred to the "perilous" financial situation and to the need for Trustees to face up to their legal responsibilities. The email also referred to an agreement reached two weeks earlier at a meeting at the BBC (the meeting on 12 March) that immediate steps would be taken to reduce expenditure by 10%, adding that nothing appeared to have been done, and that 10% was "not nearly enough if we are to proceed without significant government funding". Nevertheless, it was a start and an "important acknowledgement internally" of the need to control expenditure. Ms Robinson also asked what the evidence was to support Ms Batmanghelidjh's assumptions that there would be further funding available, and stated that unless there was a clear indication that there would be additional funding "we must assume the worst and organise ourselves accordingly". She referred to a need to impose strict controls on all expenditure with immediate effect, as asked for in December (and queried how this could be enforced), and the need to identify someone who could carry out a tough independent review of expenditure and assist in implementing a cost reduction plan. She referred to the pressing problem of head office accommodation, saying she could not see how the Trustees were in a position to sign a lease on County Hall (see [308] below). The email ends with an expression of frustration that "we seem to be going round in circles", with a lack of control over what was going on and "an acute lack of critical resources i.e. money and people", with the "slightest suggestion" from any of the Trustees as to how to proceed being rejected.

301. Ms Tyler's email referred to what she described as a "critical stage" in the life of Kids Company, noting that as a result of a great deal of hard work by Trustees in dealing with the bank, government, media and personnel issues significant progress had been made, but that considerable challenges remained as regards the charity's finances, such that it was essential that the Trustees pressed on with the implementation of cost cuts and the contingency plan. She described the Trustees' obligations in a manner that obviously followed the then Charity Commission guidance, in terms of the Trustees' "ultimate responsibility to manage the charity and to ensure that it is and will remain solvent and that it is well run". She added that this required a clear plan to be produced to reduce expenditure and deal with the cash shortfall, as had already been agreed. She referred to the fact that Mr Handover and others had already spent a lot of time on the figures, and that whilst the process should be collaborative there was likely to come a point when the Trustees "must be prepared to be prescriptive about what money can and cannot be spent on". She closed the email by apologising if she was reiterating what had been discussed already.

302. The Charity Commission guidance quoted by Ms Tyler was taken from a version of a Charity Commission document entitled "The Essential Trustee: What you need to know", which was published in 2012. A later version published in July 2015, also in the trial bundle, contains no reference to solvency, presumably

because the Charity Commission recognised that the law does not require trustees to "ensure" solvency. The Official Receiver cross-examined some of the Trustees over their alleged failure to follow the 2012 version of the guidance. Unfortunately, it only became apparent to the court later in the trial that that guidance had been superseded and another version was available. Insofar as the cross-examination appeared to imply that the guidance accurately represented the Charity Commission's view of the required standard of behaviour (or indeed represented the law), this was not fair.

303. Mr Handover also sent an email on 26 March about the need to act swiftly having secured "phase one" (the short-term government funding), and referring to Mr Yentob planning to talk to Ms Batmanghelidjh about the need to get the contingency plan up and running urgently, with the Board meeting planned for 31 March to be devoted to discussing it and the external resource that might be needed.

304. On 27 March, following confirmation that the government grant would be paid in one lump sum, Mr O'Brien sent an email saying that he thought it was now the right time to step down "on the back of this good news". He confirmed his resignation on 31 March and did not attend the Board meeting on that day. His resignation letter referred to his support for the "much-needed plan to find cost savings of over £6 million" and the need to "make way for some new blood to take charity forward". His affidavit evidence confirmed that his view at the time was that, if the cost cuts were implemented as envisaged, the charity would be on a stable and sustainable financial footing.

305. I am satisfied that Mr O'Brien's resignation was not prompted by a view that the charity was going to fail, and I accept his evidence that at no point while he was a Trustee did he consider that the charity was bound to fail. Rather, he believed it would survive. He had been considering resigning for some time, given his heavy work commitments and the weight of work involved in being a Trustee (in particular, I would add, with the work he did as chair of the Finance Committee). He delayed his resignation until government funding was secured, as he said, "driven by the desire to do the right thing".

306. The minutes of the Board meeting on 31 March are very brief. However, it is clear from the email correspondence that the Trustees were not lulled into a false sense of security by the imminent receipt of the government grant, and recognised that further cost-cutting steps were required, in addition to the (more limited) cuts that had by then already been implemented. The Board minutes refer to a comment by Ms Bolton that it had to be made clearly evident that Kids Company was downsizing, and there is also reference to 90 redundancies already made in the charity's education provision (albeit that it appears that this was independent of the contingency plan).

April to July 2015

307. I do not propose to deal with this period in detail, not because the events were in any way insignificant, but because, with some exceptions, they have limited relevance to the issues that I need to decide. One of those exceptions is the question whether the proposed restructuring would have succeeded, a point

considered later in this judgment. But I must also record here the extremely significant commitment, in terms of time and effort, that the Trustees made to the charity during this period (and indeed had made during the preceding few months). This is evident from, among other things, the very detailed notes that Ms Tyler started to prepare of Trustee discussions from May onwards.

308. In summary, the government grant was paid in one lump sum on 2 April 2015. A plan involving roughly £3m in cuts was discussed at a Finance Committee meeting on 21 April and shared with the government. Given ongoing discussions with the government about alternative funding sources (in particular the free school programme), the upcoming election and a statement by Harriet Harman about funding for Kids Company (see [499] below) it was at that stage still unclear to what extent cuts would actually be needed. But it was also clear that Ms Batmanghelidjh was resisting cuts, and also still hoped to relocate the head office to County Hall, a relatively expensive choice.

309. The general election was held on 7 May, with the Conservatives unexpectedly winning a majority. By 12 May it was apparent to the Trustees that there was going to be a struggle to meet the running costs for that month. I accept Ms Bolton's evidence that the negative press that Kids Company had by then received was a significant contributory factor to the fundraising difficulties experienced at the time (see further below, [516] to [522]). There was a real difference from the position in previous years. Ms Tyler emailed on 14 May, following a Trustee discussion by conference call, with information about the Trustees' legal duties and to confirm that Hogan Lovells had agreed to give Kids Company pro bono advice. The following day KPMG also agreed to give pro bono advice. The difficulty the Trustees had in ensuring that cuts were implemented is evident from a proposal recorded in an email from Ms Tyler on 15 May that Trustees should be present at head office to monitor the implementation of the agreed cost reductions. Both Ms Tyler and Mr Handover attended at head office for this purpose.

310. A letter from Mr Yentob to Philippa Stroud at the Cabinet Office on 19 May attributed the immediate crisis to the delay of two major donations, explained that immediate short-term funding was required and set out consequences of closure. An attachment showed staff savings of around £3.7m (annualised), which appear to relate to cuts already made or that were in the course of being implemented. (The Official Receiver disputed the content of the attachment insofar as it suggested that cuts had already been made, as opposed to being intended or in the course of being made. There is some force in his criticism but I do not need to make detailed findings about it.)

311. From mid-May onwards Hogan Lovells and KPMG were heavily involved in advising the Trustees, in particular as to whether Kids Company could properly be allowed to continue to operate or should enter an insolvency process, with the position being reviewed pretty much continuously. The documentary evidence indicates, among other things, particular concerns among Trustees about forecast funds not coming in as expected. The Official Receiver rightly did not challenge the conduct of the Trustees in this respect at the trial. A closure plan was also developed with the assistance of KPMG, in case it proved necessary to go down that route. Ms Jenkins was also persuaded to return early from maternity leave to

assist with restructuring plan work, and provided what Mr Handover commented was invaluable assistance.

312. Mr Roden and Mr Frieda became heavily involved during this period. For example, by mid-May they were in direct contact with the Cabinet Office about the need for urgent further funding, and met with senior government figures on 20 May to discuss Kids Company's future. Mr Roden donated £1.1m to allow Kids Company to make payroll for May, and produced an outline restructuring plan on 29 May, an amended version of which was being discussed with the government within a few days. On 1 June, based on a request from Mr Roden for seven days to raise £1.8m to keep the charity going until the end of June, the Trustees agreed that there was a reasonable prospect of avoiding insolvency, but that it would be reviewed on a daily basis.

313. The government initially refused a request for further funding, but during June agreed to provide £3m, subject to certain conditions, including Ms Batmanghelidjh assuming an ambassadorial role and a new CEO being appointed, significant changes to the Board and implementation of the restructuring plan. In broad terms the plan was that the government's contribution to the restructuring would be matched by an equivalent contribution from the philanthropists led by Mr Roden: see [604] below. The plan envisaged a significant downsizing of the charity's operations with a workforce reduction of around 50% and turnover reduced to around £10m per annum.

314. Colin Whipp was appointed Chief Restructuring Officer (CRO) on 7 July 2015. The grant agreement was finally signed on 30 July following a formal offer on 29 July, the £3m was paid immediately and around £1m was used to pay staff.

315. However, on the same day Kids Company was notified of a Metropolitan Police investigation into allegations of serious criminal behaviour, including sexual assault and rape. I should clarify that this was reported to the Trustees by Mr Whipp after payroll had been run. Once the Trustees became aware, further payments out of grant money, in particular a payment to HMRC, were stopped. Newsnight publicised the investigation the same evening. Ms Bolton, who met the police to discuss the allegations on 31 July, got the impression that they considered that there was little substance to the allegations but felt compelled to investigate them, particularly in the wake of the Jimmy Savile scandal. Also on 31 July the Trustees provisionally concluded that, with the uncertainty caused by the investigation, its likely impact on donations and on the government grant, the restructuring would not be able to proceed and Kids Company would have to close. (A return of the government grant was in fact sought shortly afterwards, but it is now accepted that the amount not used for payroll is an asset in the liquidation.) Kids Company ceased operations on 5 August 2015, the Trustees resolved to present a winding up petition on 11 August, and a winding up order was made on 20 August.

HMRC

316. Kids Company had monthly liabilities to HMRC in respect of its staff, comprising PAYE income tax, National Insurance and student loan repayments (together "PAYE").

317. The charity's cash flow difficulties resulted in a number of instances where the charity fell into arrears. Up until 2013, HMRC generally dealt with these by agreeing "time to pay" arrangements. HMRC may agree such arrangements where they consider that a business is viable but is suffering from temporary cash flow problems.

318. On 8 March 2013 HMRC issued what is known as a "7 day" letter, warning of a winding up petition if action was not taken in relation to an unpaid amount of £483,786 within seven working days. Information obtained by the Official Receiver from HMRC confirms that this was dealt with by telephone conversations and correspondence with Ms Chipperfield, in which Ms Chipperfield referred to contacts that the charity was having with Iain Duncan Smith and David Cameron. A payment proposal was accepted during April, but Kids Company did not keep up-to-date with its normal monthly payments thereafter. This led to another 7 day letter on 12 August 2013 which HMRC also sent or attempted to send direct to at least some Trustees' personal addresses (presumably taken from Companies House records). This letter referred to an unpaid debt of £726,487, which had accrued between April and July. It cancelled the time to pay arrangements for failure to pay current PAYE on time and refused to accept a revised offer that the charity had put to HMRC to clear the outstanding arrears during August and September, because it did not make any provision to pay the further PAYE that would fall due during those months. The letter states:

> "This company has had arrears with HMRC for many years and despite being offered numerous arrangements, they are still in arrears and do not seem to have made any provision going forward to account for their PAYE, but simply rely on donations coming in and HMRC support.
> HMRC is no longer prepared to support the company in this way and now require payment in full."

319. Mr O'Brien received the letter at his home address and immediately contacted Ms Jenkins, who by then had taken over from Ms Chipperfield, saying that it was very worrying and asking whether the debt had been paid.

320. At this point Ms Batmanghelidjh got directly involved, getting the contact details of HMRC's head of debt operations, Des Dolan, from Nick Hurd. She spoke and wrote to Mr Dolan, providing a proposed payment schedule on 15 August. When chased by Mr O'Brien she accurately reported to the Trustees that Mr Dolan had agreed to take no further action on the letter while HMRC considered the offer, but had earlier also managed to convey an impression that Mr Dolan would accommodate the charity whilst needing "to be seen to be rigorous".

321. Mr Dolan responded in writing on 23 August. He explained that HMRC was unable formally to agree a time to pay arrangement, saying this:

> "Before we can agree a TTP with any organisation or business we have to be sure it is viable. Our view is that 'Keeping Kids Company' is not viable with a business model in its present form. Both the level of your income and its profile clearly does not match the capacity you

> are operating on. The numerous TTP's HMRC has agreed with you over many years illustrates that clearly.
> However, on the basis that you are seeking additional funding – in which connection you advised me you were meeting with a Cabinet Office Minister on 16 September – I agreed not to take enforcement action and to allow some more time for you to address the restructuring of your finances. Alongside this you will pay over to HMRC the first £50k as set out on your proposal."

322. He added that they would speak again on 28 September, at which point Ms Batmanghelidjh would hopefully be able to explain what additional funding arrangements had been made, and that allowing more time was conditional on future monthly returns and payments being made on time. He stressed that this was the "final opportunity".

323. Ms Batmanghelidjh forwarded this letter to Mr O'Brien, saying that it was necessary to read between the lines. To avoid possible difficulties at HMRC's end the charity's proposed payment schedule was not being formally accepted, but Mr Dolan had in fact accepted it, and the rest of the letter had been kept "as strong as he said he would, in part for us to be able to use it with the government". Mr O'Brien's response asked for a follow-up conversation with Ms Batmanghelidjh and Ms Jenkins, commenting that the letter read as a final warning. It was unclear whether Mr Dolan's letter was also sent to other Board members (Ms Bolton and Ms Tyler had differing recollections when asked about it), but I think it is more likely than not that Mr O'Brien sent it on.

324. I accept that there is something in the Official Receiver's criticism that Ms Batmanghelidjh presented a rather more rosy picture of HMRC's position to the Trustees than was justified. This is certainly true by reference to the correspondence. It is also unlikely that Mr Dolan would have included text in a letter that he did not believe was accurate, or that he would include it for the purpose of assisting Ms Batmanghelidjh in discussions with the government.

325. However, this point cannot be taken too far. Ms Batmanghelidjh's overall assessment of the position was correct. HMRC did not carry through any of their threats, and in fact allowed Kids Company to continue trading without at any stage presenting a winding up petition.

326. Ms Batmanghelidjh's assessment also appears to have been shared by Ms Jenkins, for whom Mr O'Brien clearly had high regard, and by Mr Mevada. The going concern paper they circulated in late September 2013 in connection with the 2012 statutory accounts (see [221] above) refers to a revised payment schedule having been agreed with HMRC, following which there is "no current threat from this creditor to the charity's continued existence". It also describes the correspondence with HMRC as unexpected, but as having resulted in a more advantageous repayment plan than was previously in place.

327. Mr O'Brien confirmed in oral evidence that he was reassured by the executive team's assurance that the position was under control. He had been sceptical about Ms Batmanghelidjh's reference to reading between the lines, but the Trustees had to form a view, which was that the position was being managed. His judgment

that Ms Batmanghelidjh had a good relationship with HMRC was based on the practical outcome of her discussions. He added that he was not persuaded that Mr Dolan's assessment of the business model in his letter of 23 August was better than that of the highly qualified Trustees, who were aware of the risks and considered that they were worth taking because of the work the charity did. More generally, he confirmed, and I accept, that he never took demand letters sent by HMRC lightly or treated them as a formality. Rather, his assessment (both at that time and subsequently) was that Ms Batmanghelidjh managed the situation with HMRC very well.

328. It appears that following the discussions with Mr Dolan and until June 2014 Kids Company broadly made payments in accordance with HMRC's expectations and continued to pay further amounts falling due, although interestingly, and rather supportively of Ms Batmanghelidjh's position that HMRC did not always quite do as they said in correspondence, it appears that a further time to pay arrangement was agreed at around the beginning of 2014 (there is reference to it in an HMRC email in mid-2014). During this period HMRC also issued a late payment penalty notice in respect of the 2012/13 tax year, but a further indication of their continued goodwill is that they agreed to suspend it.

329. On 30 July 2014 HMRC wrote to Kids Company in relation to an unpaid debt of £250,830, threatening to petition to wind it up if payment was not made within three days, a letter which the relevant HMRC officer, Mr Cross-Rudkin, had told Ms Batmanghelidjh was being issued "to protect HMRC's position". He referred in that correspondence to HMRC not being contacted in advance about the monthly payment due in July (for month 3 of the tax year) being late, although in fact that conflicts with HMRC's own summary of dealings with Kids Company that it provided to the Official Receiver, which showed that Ms Jenkins had called. It appears that the relevant payment was made shortly afterwards because no further action was taken. The management accounts pack for July 2014, circulated on 21 August, stated that as at 20 August Kids Company was up to date with payments to HMRC.

330. Significant problems accumulated from November 2014. In most months thereafter some payment was made, but not of the full monthly amount (which was in the region of £350,000 a month). The documentary evidence included a number of emails between Ms Batmanghelidjh and Mr Cross-Rudkin (see also [645] below). However, the problems were not continuous: the documentary evidence indicates that Kids Company was up to date with payments as at 10 November (according to a report at the Finance Committee on that date) and again on 8 December (according to an email from Ms Batmanghelidjh).

331. Demand letters were issued on 26 January 2015 (which was fully satisfied on or around 5 February), and again on 18 and 24 March 2015 for increasing amounts, the last of these demands being for £763,784. A substantial payment was made following receipt of the government grant money in early April 2015 which cleared most of the amount due for the 2014/15 tax year. A further demand letter was issued on 26 May 2015 and a further warning letter on 26 June. The amount outstanding at liquidation was about £850,000.

332. Again there is consistency between Ms Batmanghelidjh's assessment of the position and what HMRC actually did. For example, she emailed Mr O'Brien on 21 January 2015 to report on what she said was a "very good conversation" with HMRC who wanted to be as helpful as possible, and were prepared to accept £100,000 of the amount due with the balance being paid when a donation came in at the end of the month. They would time the "7 day letter" that they would issue (threatening a winding up petition if action was not taken within seven working days) to allow time for the donation to be received. The existence of some form of arrangement is supported by an email from Mr Cross- Rudkin dated 2 February, referring to an arrangement that "once again" the charity had failed to keep to.

333. I do not accept Ms Batmanghelidjh's evidence that in relation to HMRC she only managed the "softer side" of the relationship. I accept that she would not have been able to put payment schedules together without assistance from the Finance team, but overall it is clear from the evidence that she, rather than the Finance team or Trustees, took the lead in managing the relationship with HMRC once Ms Chipperfield had left. I also do not accept her evidence that the Finance team dealt directly with Trustees in relation to HMRC outside formal meetings. For example, there is no indication that any Trustees received the letter HMRC sent in March 2013 at the time it was sent or were involved in discussing or agreeing the payment proposal that followed it. (It is possible that members of the Finance Committee saw the letter at a later date because HMRC correspondence was tabled at a Finance Committee meeting on 18 July 2013, following an action point at the previous meeting on 1 July for HMRC correspondence to be sent to Mr O'Brien. The auditors' report referred to at [229] above also referred to HMRC correspondence in April 2013 about time to pay arrangements. This indicates that Trustees were aware of the issues but not that they were themselves dealing with HMRC or directly supervising the Finance team in doing so.)

334. The Official Receiver referred in his report to HMRC's "extraordinary patience". I would not use those words, although I note that they appear to reflect some acceptance that Ms Batmanghelidjh's assessment of HMRC's position was correct. My own assessment is that HMRC were indeed patient, but this would not have been based on simple altruism. Final demands were either met, or where they were not I infer that HMRC took the view that the debt was more likely to be paid by allowing the charity to continue to operate, as indeed proved to be the case in respect of all amounts other than the sum left unpaid at the point of liquidation.

Relationship with the bank

335. Kids Company's main bankers were NatWest, part of the RBS group. Its usual agreed overdraft limit was £200,000, which was a small amount by reference to Kids Company's turnover (under 1% of budgeted expenditure for 2014). Information provided by the bank to the Official Receiver showed that from June 2014 Kids Company exceeded its overdraft limit for between two and five days a month, and for longer periods in July, October and November 2014, and again in March 2015.

336. Up until October 2014 the relationship with the bank was managed entirely by the executive team. On 15 October 2014 Mr Handover met with Richard Stacey and Roger Fenwick of RBS's "Not for Profit" team along with Ms Batmanghelidjh, Ms Hamilton and Mr Mevada. It is clear that the involvement of a Trustee reflected heightened concerns on the part of the bank about Kids Company exceeding its overdraft limit without forewarning (it had risen to a peak of over £900,000 at one point in September), although it is also clear from the email that Mr Stacey sent following the meeting that the bank was seeking to be supportive.

337. Mr Stacey's email referred to the immediate concern of the BACS run for payroll the following week, which he said would require cleared funds and therefore a rescheduling of other payments to what he described, presumably based on what he was told at the meeting, as "friends" of the charity, and requested regular cash flow forecasts. The email made it clear that the bank remained "willing to support short term timing differences at a sensible level, but on a forewarned basis". It also referred to the investigation of possible security that could be offered to the bank, and asked for any updates on the position with government grants.

338. Mr Handover reported on this meeting at the Board meeting on 30 October 2014. Although the minutes are very short, I accept Mr Handover's evidence that there was a detailed discussion of the issues raised. There was a further report on the meeting with the bank at the Finance Committee meeting on 10 November, a meeting from which Mr Handover was absent. The minutes of the 10 November meeting are a bit more detailed. (I note that Ms Hamilton and Mr Mevada, who were both at the meeting with the bank, were present at each of these meetings. Ms Batmanghelidjh was present only at the Board meeting.)

339. It was not entirely clear whether the bank was seeking security in respect of the existing overdraft or, as Mr Handover recalled, in connection with a possible increase in the overdraft limit which was not ultimately pursued (the latter not being mentioned in Mr Stacey's email). The latter is supported by the report of the meeting recorded in the Finance Committee minutes, which refers to a discussion about extending the overdraft facility, so I accept Mr Handover's evidence on that point. However, it is not particularly material: at no stage did the bank in fact withdraw support, and it permitted the charity to exceed its overdraft limit on a material number of occasions.

340. I also accept that Mr Handover saw himself as the Trustee contact for the bank, available if it needed to speak to a Trustee, rather than as taking control of the relationship. On a day-to-day basis, that continued to be run by the Finance team, although it is clear from the email correspondence that Ms Batmanghelidjh was also heavily involved, both as might be expected in relation to income projections but also more generally in direct dealings with the bank.

341. Although cash flows were provided by the Finance team from then on, it was clear that the bank was not always satisfied as to their accuracy or timeliness. There was an immediate problem with payroll for October 2014, due to payments coming in later than anticipated. In the event payroll was met on time, partly through the assistance of Harvey McGrath.

342. There was a further difficulty in November, which resulted in payroll being one day late. On 24 November Mr Stacey asked for a daily cash flow given the "challenges around your cash over the coming weeks", saying that the bank would like to prioritise the wage run and asking that the payment due to HMRC, and payments to self-employed staff, be delayed until cash was available. During November Mr Stacey also started to involve another colleague, Alan Bufton.

343. The payroll delay was reported at the Board meeting on 26 November, which Mr Handover could not attend (see [271] above). I accept his evidence that he would at least have briefed Mr O'Brien in advance, both in relation to the bank generally and payroll specifically.

344. There was a further meeting with the bank on 17 December 2014, with Mr Handover, Ms Batmanghelidjh, Ms Hamilton and Mr Mevada attending. The report of it at the Finance Committee on 18 December 2014 (a meeting which Mr Handover could not attend, but at which Ms Batmanghelidjh, Ms Hamilton and Mr Mevada were all present) described it as a very constructive meeting where the bank was comfortable to wait for the position with the government to be confirmed. There is no suggestion that, for example, Ms Hamilton disagreed with this assessment of the bank's position. At that stage it was agreed that weekly cash flows would be provided, and Mr O'Brien asked for Trustees also to receive copies of these.

345. Difficulties with forecasts continued into 2015, reflecting the challenges the charity had in determining exactly when income would be received. On 13 January Mr Bufton emailed referring to a forecast proving to be "optimistic" with only 19% of it having been achieved. He added that he was prepared to help with wages only, but not other payments, and had obtained agreement for the overdraft to be temporarily increased to £500,000 for that purpose.

346. One issue that arose was whether Mr O'Brien was in some way excluded from dealing with the bank himself. I reject this. Mr Handover and Mr O'Brien kept in frequent contact. Mr Handover was clear in his evidence that Mr O'Brien could get directly involved if and when he wished. Mr O'Brien explained that the point had arisen from a rather off-the-cuff remark in a meeting about the best person to be involved in discussions with the bank, and as soon as it was understood that Mr O'Brien might feel that he was being excluded it was made clear that that was not the case. He was however happy for Mr Handover to lead the relationship, and if he was joining him in a meeting wanted to understand the strategy being adopted.

Dependence on loans

347. The Official Receiver criticised what he said was a significantly increased reliance on loans, particularly during 2014.

348. During 2013, loans outstanding increased from £350,000 to £800,000 at the end of June, and then fluctuated between that figure and around £1m for the rest of the year. For the first half of 2014, apart from a dip in March to £865,000, loans outstanding generally totalled around £1.3m, but they started to increase substantially after June 2014 (and especially after July), peaking at £2.5m during

November. The minutes of the Finance Committee meeting on 10 November 2014 record a total loan figure of £2.5m at that date. The September management accounts, which were the accounts considered at the 10 November meeting, record loans of £1.9m at 30 September. The October 2014 management accounts showed loans of £2.2m.

349. The Official Receiver also criticised an apparent failure to pick up and implement a recommendation from Kingston Smith, the auditors, that all loans should be recorded in writing (a recommendation made in the post audit management report dated 29 September 2014). PKF Littlejohn's report in March 2014 (see [502] below) also recommended that loans should be confirmed in writing, with key terms including the repayment schedule set out. That is obviously sensible, although as far as I could tell from the evidence the amount lent and any expected repayment date of loans were normally reflected in emails.

350. With the exception of one loan, from Mr Spiers, all loans were interest-free. They were all provided by supporters of the charity.

351. Ms Robinson's evidence was that loans were taken to assist with the seasonality of the charity's income flow and that it was not the charity's working practice to take loans in the belief that they would be converted into donations. On the first point, whilst I understand the utility of loans to address seasonality of income flow, the pattern referred to above is not fully consistent with that. In particular, loans did not drop in the first half of 2014 in the way that might be expected by reference to cash receipts attributable to fundraising in the last part of 2013. The increase during the second half of 2014 is more consistent with seasonality, but there was no similar increase a year earlier. (As explained at [185] above, a significant proportion of Kids Company's income arose in the last quarter of each year. However this often did not manifest itself as cash receipts until the first part of the following year, a feature that also resulted in accruals in Kids Company's accounts, as discussed further below.)

352. On the second point (that it was not the charity's working practice to take loans in the belief that they would be converted into donations), I accept this only to an extent. As Ms Robinson explained, many of the loans were, and were regarded as, "soft loans" because there was a good prospect that the lender would either choose to convert the loan to a donation, or that he or she would be prepared to leave the loan outstanding rather than press for repayment. So in such cases there was certainly a hope when the loan was taken out that it might be converted to a donation at a later stage, or if not that the lender would not press for repayment if the charity did not have cash available to pay.

353. Similarly, Ms Batmanghelidjh's evidence in cross-examination was that loans often were converted to donations, but she did not adopt a strategy of obtaining loans with a view to converting them into donations. I do not entirely accept this, particularly as the need for loans increased. There would at least have been a hope of conversion in many cases.

354. The increased controls on loans that the Trustees insisted on in late 2014 are discussed at paragraphs [720] and [721].

355. There is force in the Official Receiver's criticism of increased reliance on loans, especially during 2014, and particularly where sought on an emergency basis. There could be no assurance that a particular loan would be converted to a donation. If it was not, then the loan would need to be repaid from income. However, it is important to take into account the wider context of what was happening at the time, the charity's overall income position, the identity of the lenders and the total size of the loans as compared to turnover.

356. The increase in loans between July and November 2014 occurred while the charity was in active talks with the government about substantial additional funding that would put it on a sustainable basis, and as discussed below in circumstances where the Trustees were not unreasonably optimistic that it could be secured (see in particular [460] to [470] below).

357. Further, the increase occurred during a period when the Trustees still expected that the charity would break even for the year, such that income would at least match expenditure, as it had for 2013. The loans were raised to meet revenue expenditure. In principle, if the charity was at least breaking even then cash reflecting the income should in time be available to pay off the loans. It is worth bearing in mind that the 2014 Budget had specifically contemplated the need for loans: see [235] above.

358. The loans were also all from supporters. In all but one case they were interest free and, generally, lenders did not push for repayment in the way that a commercial lender would. Of the £2.2m in loans outstanding on 31 October 2014, £200,000 was from two Trustees, £700,000 was from Mr Roden (comprising two loans of £50,000 and £650,000), £300,000 from Harvey McGrath, £200,000 from ICAP and £120,000 from James Lupton. Although Mr Roden's assistant enquired about repayment in late October 2014 and Mr Roden raised the topic again in December 2014 it is clear that he was not seriously pressing for repayment, and subsequently extended the loans. Similarly, the Trustees were satisfied that Harvey McGrath was highly supportive and would be very accommodating. Mr Lupton was clearly a supporter (see [465] below) who also told Ms Batmanghelidjh on 29 September not to worry about making repayment and indicated that he might "do a deal" on it, which I read as indicating a willingness to consider conversion. Although ICAP did request repayment, they clearly did not press strongly, and in fact later made a donation (see [597] below).

359. The final point to make relates to the overall scale of loans in the context of the charity's operations. Loans did not at any point exceed around 10% of annual turnover, and were generally lower (for example, around 3% of turnover as at 31 December 2013). The £2.5m figure discussed at the 10 November meeting was the peak. Thereafter, controls were put on further loans.

Mr Spiers' loan

360. As regards Mr Spiers, a loan agreement was entered into on 17 May 2012. This provided for a revolving facility of up to £500,000, with a "normal" rate of interest of 0.5% per month and a default rate of 1% per month, together with a fee of £5000 per annum. Any loan made was repayable nine months after being drawn down. A total of £450,000 was drawn down during 2012.

361. I have concluded that no Trustee was involved in negotiating the terms of this loan. Ms Batmanghelidjh also denies being involved. I agree that she would not have negotiated the detailed terms, which I infer was done by a member of the Finance team, probably Ms Chipperfield (who, despite what the Official Receiver's report indicated, had been working at the charity since 2008), but Ms Batmanghelidjh was clearly responsible for it and should have been aware of the drain it placed on the charity's resources, particularly when it was not repaid promptly. There was no indication that the Trustees were made aware of the onerous terms at the time.

362. On 16 January 2013 Mr Spiers confirmed to Ms Chipperfield and another member of the charity's staff by email that £100,000 of his loan was converted to a donation with effect from December 2012, and that the maximum loan was now capped at £400,000. The email stated that the charity should budget for a nil donation from Mr Spiers, partly because he had supported it for the last three years and wanted to make room for other causes, but that his "main issue" was "the weak financial position" of Kids Company being a "serious impediment to it operating efficiently and potentially dangerous". He added:

> "As you know I've felt this way for several years but now the position seems more acute than ever and I can no longer just accept it. Frankly, I am surprised that the Finance Committee has allowed such a situation to occur, it doesn't strike me as good governance and [I am] perfectly happy for you to report that back. In the event that a viable programme is put in place to build up reserves then I'd be happy to reconsider the issue of donating in 2013."

363. This email was forwarded to Ms Batmanghelidjh but it is not apparent that the points raised were discussed with any Trustees at the time. I do not accept Ms Batmanghelidjh's evidence to the effect that there had been direct communication between Mr Spiers and Trustees, or indeed between Ms Chipperfield and Trustees, in relation to the issues raised by Mr Spiers in this email. The email raised material matters and Ms Batmanghelidjh should have ensured that the Board was alerted, rather than (for example) assuming that Ms Chipperfield might raise the issue at a Finance Committee meeting. However, the letter was picked up by the auditors and addressed in their report to the Trustees on the 2012 accounts, which was sent on 30 September 2013, so Trustees would have picked it up at that stage, if not earlier (see [229] above).

364. £350,000 continued to be outstanding. The evidence included further email correspondence between Ms Chipperfield and Mr Spiers in late June 2013 about a possible repayment plan, when Mr Spiers noted that the reserves position had improved but continued to maintain that the loan was being used to finance budget overspend and said that the repayment proposal put forward relied on significant income events over which the charity had little control.

365. The minutes of a Finance Committee meeting on 1 July 2013 record a discussion of loans, noting that Mr Spiers was receiving 12% interest and that the terms were "particularly egregious", with an action point to repay his loan first.

366. Following a chasing email from Mr Spiers in mid-July a meeting was arranged between Mr Spiers, Ms Batmanghelidjh and Ms Robinson. I accept Ms Robinson's evidence that she had had no prior dealings with Mr Spiers and was simply asked by Ms Batmanghelidjh to attend a meeting, which she agreed to do with a view to trying to address the onerous terms of the loan. I do not accept Ms Batmanghelidjh's evidence that the Trustees were leading on this issue in conjunction with the Finance team and that Ms Batmanghelidjh was not directly involved.

367. The meeting, in August 2013, managed to secure agreement to convert interest payments and fees from April 2013 to date into repayments (so effectively waiving them). A repayment plan was also discussed, and Ms Batmanghelidjh was supposed to follow up with a proposed repayment schedule, but this was not provided. Instead the outstanding principal was only reduced by £50,000, to £300,000, during the remainder of 2013, and by early 2015 £183,000 was still outstanding. It is apparent from the email correspondence that this was not what Mr Spiers had envisaged when he agreed to waive interest.

368. I do not accept Ms Batmanghelidjh's evidence that decisions as to when, and how much, to repay Mr Spiers were made by the Finance team in conjunction with Trustees. Instead, based on the documentary evidence and the Trustees' own evidence, including Ms Robinson's evidence that she only dealt with Mr Spiers on the one occasion, I conclude that the decisions were made by Ms Batmanghelidjh in conjunction with the Finance team.

Income: projections and accruals

Income projections

369. In a statement made to the Official Receiver pursuant to s 132 Insolvency Act 1986 in January 2017, Ms Lloyd made allegations about spreadsheets of income projections that she said Ms Batmanghelidjh kept, in particular that the amount stated to be due from donors "might only be correct 20% of the time" and that the sheet of donors she was working with at the beginning of 2014 was something which she considered "was a work of fiction".

370. The note of the meeting that Ms Lloyd, Mr Stones and Ms Hamilton had with the Charity Commission on 16 July 2015 records a broader allegation that the "cash flows being prepared for trustees were fictional".

371. Allegations about fictional spreadsheets were not repeated in Ms Lloyd's affidavit. That explained that she worked every day with Ms Batmanghelidjh, spending her time working from a "pipeline" spreadsheet that was used to track donations. She would review this spreadsheet each day with Ms Batmanghelidjh and the Finance team, checking both what income was due or received and determining what outstanding bills would be paid, decisions that she said were taken by Ms Batmanghelidjh. While she was at the charity spreadsheets were produced from Ms Lloyd's computer and presented by Ms Batmanghelidjh at meetings at which Ms Lloyd was present. The Trustees would have been aware that Ms Lloyd had produced them. Ms Tyler described the spreadsheets as "incredibly detailed", including names, the percentage likelihood of the donation

coming in and expected dates. I accept that spreadsheets in this format existed, although not included in the trial bundle. However, I did see detailed lists of expected donations (including names and amounts, and split between confirmed and other amounts) in other forms.

372. In oral evidence Ms Lloyd said that "some" spreadsheets were a work of fiction, and specifically that they could include donors whom Ms Batmanghelidjh intended to contact but had not yet contacted. Whilst she accompanied Ms Batmanghelidjh to Board and Finance Committee meetings at which the projections were discussed she had "no real role" in those meetings and did not feel able to raise issues, on the basis that it was not her place to do so and would look potentially undermining of Ms Batmanghelidjh. My views on that point are set out at paragraph [98] above.

373. The relative roles of Ms Caldwell and Ms Lloyd in relation to fundraising were not that clear. Ms Caldwell was clearly senior to Ms Lloyd but moved into fundraising towards the end of her time at the charity. However, she was certainly in that role during 2014, and Mr Mevada referred to her in his Official Receiver interview as the charity's last fundraising director. It is highly likely that she had at least some role in the production of income projections: this is consistent with the fact that it was Ms Caldwell with whom Mr O'Brien chose to check the information he was given by Ms Hamilton on 27 or 28 November 2014 (see [394] below). A number of the Trustees knew Ms Caldwell well and were used to dealing with her. If there had been fundamental concerns before late 2014 they might reasonably have expected her to raise them. For example, she was present at Mr Webster's first two Board meetings in January and March 2014 at which income spreadsheets were discussed, and he did not recall her challenging or contradicting what Ms Batmanghelidjh said.

374. Ms Hamilton was asked in cross-examination about the allegation recorded as made in the meeting with the Charity Commission. She suggested she had not used the word fictional, but that it became apparent that income projections were overly optimistic, and she became concerned following the issue with Mr Kendrick discussed at paragraphs [663] to [668] below. However, beyond the concern she raised with Mr O'Brien in late November 2014 and one email forwarded to him on 3 February 2015 from Mr Bufton at RBS, expressing concern at the proportion of forecast cash that was unconfirmed in a cash flow forecast sent to him by Mr Mevada on 2 February, she was not able to point to any instance of her flagging with Trustees that cash flows that they were being provided with could not be relied on, despite her role as Director of Finance. She also confirmed in cross-examination that Mr O'Brien would ask in Finance Committee meetings whether the Finance team felt comfortable with the income being forecast. Her evidence was that Mr Mevada would provide the confirmation, which she did not contradict. As late as 26 January 2015 Ms Hamilton herself sent a cash flow to Mr Bufton, and she was copied into the one sent by Mr Mevada on 2 February.

375. In an interview with the Official Receiver also in January 2017, Ms Tyler explained how income projections were considered at every Finance Committee meeting and also regularly by the Board, and said that Ms Batmanghelidjh had to justify "pretty much on an income by income basis" exactly how certain she was that the income would come in and when. Ms Batmanghelidjh would be

accompanied by Ms Lloyd who would contribute to the discussion. The level of detailed discussion, including about the probability of individual sums coming in, was consistent with Ms Tyler's affidavit evidence. Ms Tyler also confirmed in oral evidence that so far as she was aware no staff member had raised any concern about forecasting being fictional or overoptimistic, apart from the issue raised by Ms Hamilton with Mr O'Brien in late November 2014 about expected donations not arriving. She would have expected other Trustees to pass on any such concerns if they were raised with them.

376. In her affidavit Ms Bolton confirmed that in Board meetings the Trustees, and particularly those who were members of the Finance Committee, devoted a significant amount of time to scrutinising income projections, asking questions and where appropriate asking for documentary evidence. Mr O'Brien was also clear in his evidence that as far as he was concerned there was no question of income forecasts being fictional. The concerns he had raised at the end of November 2014 related to real prospects that did not materialise.

377. My assessment is that describing income forecasts as a work of fiction was a significant overstatement, and one that disregards Ms Lloyd's and Ms Hamilton's involvement in the process. Up until 2014, Ms Batmanghelidjh's income projections appear to have been generally broadly accurate in terms of the overall amount actually raised for the year. Clearly, serious problems arose in late 2014 which were alerted by Ms Hamilton to Mr O'Brien. But until that occurred the Trustees were justified, based on past experience of Ms Batmanghelidjh's fundraising capabilities, in taking comfort from the sum projected to be raised for the year in question. I also accept that the projections were subject to real scrutiny in Trustee meetings.

378. However, timing was an issue and it was also the case that the identity of the donors, and individual amounts, could change significantly. It was the case that income projections included amounts that Ms Batmanghelidjh hoped to receive but about which there was no confidence. The three projected donations flagged up by Ms Hamilton in late November 2014 appear to be extreme examples of this, namely Mr Kendrick, Comic Relief and the Moshiris. The position of Mr Kendrick is discussed at [663] to [668] below. As regards Comic Relief, Mr Webster attended a meeting with Ms Batmanghelidjh on 20 November 2014 at which an extra £1 million was requested. Mr Webster took away from the meeting that Comic Relief were unlikely to approve that sum but they could donate a lower amount. Nevertheless a figure of £1 million appears to have been included in the income projections discussed the following day, on 21 November. (In fact it seems that the actual figure received was of the order of £200,000, and that represented a bringing forward of an amount that would otherwise have been paid in 2015.) The Moshiris did not materialise as donors.

Accruals

379. Kids Company was required, under applicable accounting principles, to record income in its statutory accounts on an accruals basis. There are some hints in Mr Hannon's first report that the use of an accruals basis was itself misleading because it could "mask" the true financial position. That is obviously incorrect

from an accounting perspective. Accounts that correctly adopt an accruals basis should, by definition, show a true and fair view of the company's financial affairs.

380. Mr Hannon's clarified stance in oral evidence sought to focus on instances in relation to the 2013 accounts where he said that income had been inappropriately accrued, not in accordance with correct accounting principles. There was no expert evidence in support of this, and Mr Hannon's report explicitly stated that he was not holding himself out as being qualified to give expert evidence. Mr O'Brien, the only qualified accountant on the Board, was also not really cross-examined on the topic.

381. I do not need to make factual findings about whether income was incorrectly accrued. What is material is the position of the defendants. I am satisfied that the Trustees were not aware of, and did not have cause to doubt, the correctness of the accruals. They relied, and in my view were entitled to rely, on the expertise of the Finance team and the auditors. (I should add that the same applies to an allegation in the Official Receiver's report that there was an error in the 2013 loans figure due to a loan from Harvey McGrath being recorded as a donation that year, when there is evidence to suggest that the loan was in fact converted the following year.) In relation to Ms Bolton, I also note that the Official Receiver had accepted, in response to Part 18 requests made by her advisers, that it was not his case that she knew or ought to have known about the alleged errors.

382. In particular, I am satisfied from the evidence that the Trustees applied no pressure to accrue any amounts improperly. The "many" accruals the Official Receiver called into question in respect of the 2013 accounts turned out to be a minority of them, comprising five items, one of which Mr Hannon had to accept had not in any event been included in the accruals.

383. Questions were properly asked of the Finance team. For example, at a Finance Committee meeting on 28 January 2015, Mr O'Brien asked whether the auditors were comfortable with the level of accruals for 2014 and Ms Hamilton was asked to circulate guidance on accruals. Mr O'Brien also made it clear that including amounts as accruals was dependent on the correct evidence being in place to satisfy the auditors. A year earlier, the minutes of a Trustee meeting dated 30 January 2014 also referred to £4 million being accrued "with appropriate supporting documentation for audit purposes", and there was a similar reference in the minutes of a Finance Committee meeting on the previous day. In the absence of reason to doubt whether the appropriate evidence was provided, or whether the auditors were in fact doing a competent job, I do not accept the suggestion that the Trustees should have made additional enquiries, for example checking the evidence themselves to determine whether it was sufficient to satisfy the accounting test.

384. There is a separate question as to whether the scale of the accruals provided a warning indicator of the financial health of the organisation. In cash flow terms it may do so if the expected cash inflow corresponding to the accrual cannot be matched with the dates when obligations to creditors should be met. The problem can be exacerbated if accruals are increasing year-on-year as a proportion of turnover and if turnover (and expenditure) is also increasing, as was the case here between 2010 and 2013. (It is worth noting, however, that the picture was not one

of unrelenting increase. The expected accruals for 2014 were in fact over £1m lower than for 2013, at about £3.6m rather than £4.7m.)

385. However, there were plenty of other clear indicators of the cash flow issues to Trustees and others, both in the annual accounts (for example, in details of current assets and liabilities), and more immediately to Trustees in the form of detailed management accounts, including for example the schedules of aged creditors, which were routinely included in the management accounts from January 2014 following a recommendation made by PKF Littlejohn. Trustees were well aware of the cash flow problems and, rightly, it was those problems rather than the details of individual accruals that were their primary focus.

386. Furthermore, to the extent that loans could be procured in the period between the date of accrual of income and its receipt, the cash flow issue would also be alleviated. In principle, there is nothing wrong in obtaining loans to bridge gaps between the date funds are pledged and the date they are received, particularly where it can be done on interest-free terms. Accruals are only part of the picture, and indeed a far from reliable indicator by themselves of the company's solvency in cash flow terms.

387. Slightly different considerations apply in respect of Ms Batmanghelidjh in relation to accruals. The concerns related to whether particular fundraising had in fact been secured. This was something that Ms Batmanghelidjh knew more about than anyone else in the organisation, at least as regards the most substantial amounts. As CEO, she had an executive responsibility for the charity's finances which would in principle have required her to ensure that accurate and complete information was being presented not only to the Board but to the auditors, including making any appropriate enquiries of staff or advisers. As discussed from [634] below I do not accept that it was appropriate simply to leave all matters other than actual fundraising to the Finance team and Finance Committee, and in fact Ms Batmanghelidjh did not do so. Given the increasing significance of accruals, it would have been preferable for Ms Batmanghelidjh to ensure that she had a broad understanding of what the accounting requirements were.

388. Having said that, the Official Receiver has not demonstrated that Ms Batmanghelidjh was aware that any amounts were being inaccurately accrued, and she was not challenged on the topic in cross-examination. Her affidavit evidence indicated that she was not aware of an accounting problem, and there was also no suggestion of that in any of the documentation I saw. Ms Batmanghelidjh clearly had no accountancy training and was entitled to place reliance on well-qualified senior staff, in particular the Director of Finance and Accountability and the Head of Finance.

Findings relating to the departure of senior managers

389. Events leading up to the departure of four of the senior management team at around the same time in early 2015 are relevant for a number of reasons. Three out of the four gave evidence on behalf of the Official Receiver in terms that were critical both of Ms Batmanghelidjh and the Trustees. That evidence included evidence to the effect that the true financial position of the charity was much worse than Ms Batmanghelidjh was portraying, that the Trustees were not taking

the financial position of the charity sufficiently seriously and did not react as they should have done when concerns were raised, and that staff were dissuaded from speaking directly to Trustees. The evidence is therefore potentially relevant to the actual state of the charity's financial position and also to the state of knowledge and behaviour of the defendants.

390. The four senior managers in question were Jane Caldwell, Diane Hamilton, Adrian Stones and Mandy Lloyd. For convenience I will refer to them as the "senior managers", although it is important to note that they did not represent the entire senior management team. It was also relatively clear that Ms Lloyd held a somewhat more junior position in the organisation than the other three, who as I understand it were of broadly equivalent standing.

391. In summary, I have concluded that the Trustees did take the financial problems facing the charity seriously, that they sought to address concerns raised by those senior managers who raised them, and that the Trustees did not take inappropriate steps to prevent or dissuade the departing directors from raising their concerns with them. However, it is the case that Ms Batmanghelidjh at least gave the impression of seeking to dissuade the senior managers from doing so outside formal Board and Board committee meetings. Whilst this could be interpreted as an encouragement to use proper reporting lines so as to ensure that Trustees were fully and correctly briefed, I think it was not unreasonably interpreted by the senior managers as being rather more than that. That interpretation is consistent with Ms Batmanghelidjh's optimistic approach and her strong encouragement of an ethos that focused on the positives. In any event, and not unreasonably, she certainly expected the staff to help in providing solutions to problems rather than simply raising concerns.

392. It was reasonably clear from the evidence that the senior managers developed major concerns about Kids Company's financial position during the second half of November 2014. Before that, there were obviously concerns, in particular about aged creditors, but they were more in the nature of cash flow issues rather than that the charity would not be able to raise sufficient funds to meet its debts. Ms Hamilton raised the question of insolvency at the Finance Committee meeting on 10 November, but the minutes (which were amended to reflect her comments) add: "If we believe income is coming in as expected then trading is possible" (see [268] above). Mr O'Brien confirmed in evidence that he had no difficulty with Ms Hamilton raising warnings of this nature. He would expect a well-paid finance director to point such things out.

393. On 18 November all four senior managers met to discuss the issues and what might be done to restructure the charity. It seems that the discussion went nowhere and at that stage no issues were raised with Trustees (and in particular nothing was said at the Finance or Governance Committee meetings held on 21 November, despite Ms Batmanghelidjh being at neither meeting), although Mr Stones did give some thought to contingency planning. It is reasonably clear that at least from that point onwards the senior managers were in close contact with one another in a way that went beyond normal interactions in the course of their work.

394. On 27 or 28 November Ms Hamilton telephoned Mr O'Brien to raise her concerns. It is relatively clear that a key topic of conversation was that three major items that had been reflected in income projections, namely funding from Mr Kendrick, Comic Relief and the Moshiri family, had not materialised. Ms Hamilton also raised growing concerns on the part of staff about a lack of control of costs, and in particular Ms Batmanghelidjh continuing to enter into contractual commitments despite attempts to put controls in place, and concerns about the self-employed. Mr O'Brien had an email exchange with Ms Caldwell following this call, on 28 November, to check what had happened in relation to Mr Kendrick, Comic Relief and the Moshiris, in which she confirmed that Mr Kendrick had declined, Comic Relief had also declined but would bring forward the grant for next year, and that they were waiting on the Moshiris.

395. At around this time Ms Caldwell also spoke to Mr Handover. I accept his evidence that the essence of what was discussed was that fundraising work was not going well, and that she did not raise the more general concerns senior managers had, including a concern that Ms Batmanghelidjh was not accepting that the financial position was significantly worse than it had been previously.

396. On 1 December Ms Batmanghelidjh held a meeting with Ms Caldwell, Ms Hamilton, Ms Lloyd, Michael Kerman (Kids Company's clinical director) and Laurence Guinness (head of campaigns and research). It is unnecessary to make detailed findings about the content of this meeting, Ms Batmanghelidjh's account of which was not challenged in cross-examination. I accept that Ms Batmanghelidjh wanted to make sure that there was open discussion. However she did give the impression that the staff present should not speak to Trustees without her consent, albeit – and from her perspective – on the basis that Ms Batmanghelidjh had information of which they were not aware (this is consistent with the email that she sent Ms Hamilton referred to at [274] above). She gave the impression that the Trustees understood and accepted the risks, that the charity had been operating in the same way for years and that the staff needed to determine whether they could tolerate the risk. There is no indication that Trustees were informed about this meeting.

397. Shortly afterwards Ms Hamilton had another conversation with Ms Batmanghelidjh in which Ms Hamilton told her that she thought it odd not to have direct contact with Mr O'Brien as head of the Finance Committee. Ms Hamilton's handwritten notes report Ms Batmanghelidjh as having suggested that she should speak to Ms Robinson instead. I note that this is not consistent with being told not to speak to Trustees.

398. On 3 December Mr Yentob spoke to Ms Caldwell at a Kids Company art event sponsored by Coldplay. The October 2015 version of the joint timeline puts an incorrect date on this event (14 November) and also attributes a rather similar conversation to a telephone call on 3 December (mistyped as 3 December 2015). The timeline suggests that Ms Caldwell expressed concern about the finances, Ms Batmanghelidjh's mental and physical health, and (in the call) that she was refusing to discuss issues and was "bullying directors", that she had turned down funding because it was interfering with her plan to get government money, that her spending was out of control and was bypassing Ms Hamilton, with the charity getting closer to bankruptcy "each day they wait", and that trustee support was

needed for proper contingency plans, which would not work unless Ms Batmanghelidjh contributed to them. In contrast, the earlier version of the timeline I saw has entries limited to Ms Caldwell raising the subject of unlawful trading on the call, and financial concerns at the Coldplay event. (The mistake about the date of the event is quite significant. The correct date of 3 December is entirely consistent with the Trustees' case about when they were first alerted to the senior managers' concerns.)

399. Ms Caldwell did not give evidence. In my view the timeline (in whatever form, but certainly the later, embellished, version) represents particularly unreliable hearsay, and I do not accept what it says. I do accept Mr Yentob's evidence that he had a brief discussion with Ms Caldwell at the event in which she said she was worried about the finances and had concerns about Ms Batmanghelidjh. He understood the latter to refer to complacency about the finances, in line with Ms Batmanghelidjh's general tendency to optimism. He was concerned about Ms Caldwell and her health. She had relatively recently been promoted to a fundraising role and Mr Yentob thought she was better suited to the arts-related work that she had been doing previously. He suggested that she speak to Ms Batmanghelidjh, with whom she had been very close. He thought he may also have called Ms Caldwell subsequently to see how she was. As Mr Yentob saw it, the matters raised in the final version of the timeline would have amounted to an allegation of gross misconduct. Bullying was certainly not tolerated in the organisation. I accept that if such matters had been raised he would not have let them rest there.

400. Also on 3 December Mr Stones (who had missed the meeting on 1 December but met Ms Batmanghelidjh the following day) emailed Mr Webster, forwarding some emails from concerned self-employed staff. Mr Webster acknowledged the email from the US, where he was on business, saying that he would try to get back to him later, that Ms Caldwell had kept him informed and that Mr Stones had done the right thing. There is no record of a further follow-up but I do not infer from this that he ignored the issues raised. Mr Stones accepted that it was not in Mr Webster's nature to ignore an email. I think it more likely than not that Mr Webster would at least have attempted to contact him. He was in any event already aware of issues with non-payment of self-employed staff, which had been raised at the Governance Committee meeting he had attended on 21 November (see [637] below). I also accept Mr Webster's evidence that he raised the issue with other Trustees. That is supported by the fact that the topic was clearly covered at the 10 December Board meeting: see [278] above.

401. Mr Stones sent a further email on 9 December which set out his concerns about the charity's financial position more generally. Among other things he noted significant delays in paying self-employed and other creditors, stated that the only way payroll had been made for several months was by "bringing donations forward from 2015 and by borrowing money", that the recent inability to meet payroll on time was a "wake up call to deal with fundamental issues", that issues were being raised by funders and that there would need to be a significant reduction in staff numbers for Kids Company to survive. He also referred to Mr Webster being aware that "raising these issues is difficult", and that to be told that if he could not take the level of risk he should leave was unacceptable. He

mentioned that "potential detrimental treatment of staff" in connection with expressing concerns to Trustees could lead to lengthy litigation.

402. Mr Webster accepted that the 9 December email properly set out Mr Stones' concerns as he saw them. However, the Trustees were already well aware of the acute financial position and were responding to it. The position of the self-employed, for example, was as already mentioned covered at the 10 December meeting. Mr Webster pointed out that he had a coaching relationship with Mr Stones and the emails needed to be seen in that context. I accept that this is relevant. The email states that Mr Stones thought that Mr Webster would already be aware of the issues he was raising, but that he thought it might be helpful to hear the HR perspective, and said "I write from my own perspective and personally to you for your advice". This is also consistent with the email being sent from Mr Stones' private email address rather than his Kids Company one. The email does flag up the point that Mr Stones found it difficult to raise issues with Ms Batmanghelidjh, but Mr Webster already knew that (it was why coaching and mentoring had been arranged: see [430] below). The whistleblowing issue is properly raised as an HR issue, but the email does not suggest that there had been any instance of detrimental treatment. I also accept Mr Webster's evidence that he did not ignore this email, and telephoned Mr Stones in response. Mr Stones did not accept this in cross-examination (having initially appeared to), but given his more general acceptance that Mr Webster would be acting out of character in not responding to emails and the fact that there is no indication of Mr Stones chasing for a response or checking that such an important email had been received, I think it is more likely than not that Mr Stones' recollection is at fault.

403. Whatever was said in the discussions between the senior managers and Ms Batmanghelidjh at the beginning of December did not prevent Ms Hamilton from continuing to contact Mr O'Brien. She sent emails to him on 4 and 5 December about the Christmas budget and issues with leases of property for clients, and about the year-to-date loss and increased income challenge over the prior year. One of these emails pointed out the practical difficulties with a proposal that every invoice be approved by a Trustee and asked for an update of "how things at the trustees end are going".

404. Ms Hamilton sent further emails on 6 and 7 December in which she provided details of an insolvency practitioner (a person whom Mr O'Brien in any event thought he already knew) and a link to Charity Commission guidance on insolvency. I accept Mr O'Brien's evidence that they also spoke on a number of occasions during the few days leading up to the Board meeting that was fixed for 10 December, and that he had reassured Ms Hamilton that he was taking the matter seriously. Mr O'Brien did not consider it necessary to take up her suggestion of contacting an insolvency practitioner because his assessment was that, with the level of support it had, the charity was not in a position of needing to enter into an insolvency process. It was a concern that income was not coming in close to the year end, and it was therefore necessary to take action both in relation to income and costs and do contingency planning work, but it was too early to talk to an insolvency practitioner. He also made the point in his affidavit that his duty as a Trustee was to discuss the concerns raised by Ms Hamilton with the other Trustees and make a (collective) informed decision about how to

respond, and noted that unilateral action by him to call an insolvency practitioner could have been highly damaging to the charity reputationally if it emerged, as well as potentially involving significant cost. This cannot be described as an unreasonable approach. Mr O'Brien is highly experienced, including in relation to companies that are in financial distress. He has a good knowledge of insolvency. He was remaining calm, and acting professionally, in a difficult situation, and also recognising that the Trustees were required to act collectively. I accept his evidence.

405. Ms Hamilton also had telephone conversations with Mr O'Brien on 6 and 9 December. Her handwritten notes of the first call record him asking her what she wanted from the planned Trustee meeting, and her responding with an understanding that the problem was serious and that the cash flow problem would not be solved even if £4 million was obtained from the Moshiris, an appreciation that the cost basis was too high and not all needed, and an understanding of the "legality and risk". These notes support Mr O'Brien's evidence that he was taking the issues raised by her seriously. They also discussed some specific issues such as leases and a cash float the charity held with the Abbey National, and more generally increased cash flow problems. On 9 December they discussed the management accounts, including the level of accruals and cash flow issues.

406. On 8 December 2014, two days before the Board meeting called at Mr O'Brien's request on 10 December, Ms Batmanghelidjh sent an email to the Trustees. It updated them about a conversation she had had with Mr Hurd and about the latest fundraising position, but she also said this:

> "As anxieties rightly get raised, there is a risk that some splitting will ensue. It would be brilliant if you can make sure that discussions about the future of the organisation are had with me directly and that we don't upset the equilibrium that has been achieved so carefully. Once we know what the government plan and fundraising is, then I am happy to get together with you and think about the future.
> You have been an amazing group of Trustees, with extraordinary vision and courage. It is thanks to your moral fibre and sticking by the kids that we have managed together to nurture a committed organisation. I don't want in conditions of stress for the cohesive fibre that has seen us through difficult times to be eroded. So I would appreciate it if you could redirect any concerns you have to me directly and put boundaries around dialogues which might not be constructive. I need all the staff to focus on carrying out their responsibilities, which right now relate to maintaining calm and delivering to our kids.
> I have always been very transparent with you, and if at any time I sense that we are at risk I will let you know. If however, you feel I am not aware of something, please come to me. I have hugely appreciated the unique qualities each of you bring to the table, and I am clear that I could not have asked for a better board of Trustees. I value your counsel and like you as individuals very much. The last thing I would ever want is to put your reputations at risk. I have a deep sense of loyalty to you all."

407. It is clear that these comments were prompted by the fact that staff had been raising concerns directly with Trustees. Ms Tyler, Mr Handover and Mr O'Brien were cross-examined about this email. Ms Tyler confirmed that she did not read it as an attempt to close off staff talking to Trustees, but rather that it was fair for the CEO to be involved in discussions about the future. Mr Handover gave a similar response: Ms Batmanghelidjh was saying that she wanted concerns to be raised with her directly. I accept that this was their understanding of the email. I do not read the email as saying that no concerns could be raised by staff with Trustees, but it is the case that Ms Batmanghelidjh was signalling against direct discussions between staff and Trustees without involving her. This was Ms Bolton's reading of it, which Mr O'Brien broadly agreed in cross-examination. Ms Batmanghelidjh was communicating that she wished to be made aware of any concerns raised by staff and directly involved in discussing them, rather than there being ongoing dialogue about them between Trustees and staff in which she was not involved.

408. On 15 December Ms Hamilton sent a further email to Mr O'Brien expressing concern about prioritising loan repayments to Trustees over others and continuing concern over Christmas costs in the light of the fact that some but not all September amounts had so far been paid to self-employed. She explained that the government had confirmed that the charity could be paid in advance if a reporting condition was met, and that "I am feeling confident" although there was a risk. In context, the expression of confidence related to whether the report deadline could be met.

409. Mr O'Brien responded on the same day as follows:

> "I appreciate your email but the trustees want every communication to be made openly rather than like this. I think this is the right thing to do, so would you be able to raise these points at the Finance Committee this week?"

410. Ms Hamilton interpreted Mr O'Brien's email as an instruction not to raise issues direct with Mr O'Brien. She was sufficiently concerned to interrupt Ms Jenkins' maternity leave by telephoning her, and at her suggestion called Mr Handover. Ms Hamilton's report of that conversation was that Mr Handover said that he and the other Trustees were aware of the issues, that Ms Hamilton should not call him in future but should instead speak to Ms Batmanghelidjh. In cross-examination she repeated that Mr Handover and Mr O'Brien had told her not to contact the Trustees.

411. Mr Handover could not recall the specific conversation but I accept his evidence that he is likely to have suggested that she brought her concerns up through "proper channels", meaning in the first instance Ms Batmanghelidjh, to whom she reported, and then escalating from there if needed, including by raising the matter in a committee meeting. He gave convincing evidence that he would not have simply told her not to call him in future. Mr Handover's evidence about proper channels is consistent with Mr O'Brien's response to Ms Hamilton's email of 15 December just referred to, and with Ms Robinson's evidence that she had expressed the view to Mr O'Brien that the Finance Committee was the proper forum for such issues to be raised. It is also worth bearing in mind that meetings

of the Finance Committee and Governance Committee were due to occur just two days later, on 18 December, at both of which Ms Hamilton would be present and, in the case of the Governance Committee, at which Ms Batmanghelidjh would not be present.

412. Mr O'Brien also gave convincing evidence in his affidavit and in cross-examination that he was uncomfortable with the issues not being "out in the open". He was saying to Ms Hamilton that she should raise her concerns in the Finance Committee, not that she should not voice her concerns. As far as he was concerned she was the finance director and it was part of her job. He thought he was giving the message that she should not be concerned about raising issues openly, and that no one would be stopping her because all the Trustees were aware of the problems. Whilst the 10 December meeting at the BBC had been arranged to occur without Ms Batmanghelidjh present, he had personally been happy that she had turned up because his preference was to address the issues openly straightaway. This evidence was consistent not only with his email of 15 December (above) but with an email he sent to Mr Yentob, Ms Robinson and Mr Handover, forwarding Ms Hamilton's 4 December email and stating that he was uncomfortable receiving emails like that and was keen to "get this out in the open" with Ms Batmanghelidjh in case it turned out to be a "fuss over nothing".

413. The Finance Committee meeting that Mr O'Brien was referring to in his 15 December email took place as planned on 18 December (see [281] above). The issues raised by Ms Hamilton in her email of 15 December were discussed. Ms Batmanghelidjh did not attend most of the meeting, only appearing towards the end. Ms Hamilton's evidence was that she recalled Ms Batmanghelidjh saying that she could not work with the controls agreed at that meeting. There is no record of this in the minutes and I would have fully expected any Trustee who heard such a comment to challenge it. In any event, whatever was or was not said by Ms Batmanghelidjh clearly did not alter the understanding of the Trustees that controls were being put in place.

414. I do not accept a comment in Ms Hamilton's evidence that after the meeting on 18 December the Trustees "were not speaking to me". Ms Hamilton attended the Governance Committee meeting immediately afterwards without Ms Batmanghelidjh. She attended another such meeting in January. Mr O'Brien pointed specifically to her attendance at the Finance Committee meeting on 28 January, at which the minutes record her speaking about the position on accruals and answering Trustees' questions, talking about the need for funds to deal with a redundancy programme and also asking about the position with the government.

415. In mid-January Mr Handover became aware from Alan Hill (Kids Company's director of operations) that Ms Caldwell and Mr Stones were unhappy. Mr Handover telephoned Ms Caldwell to see if she and Mr Stones would meet Mr Handover and Ms Robinson (who had volunteered to participate) off-site. I accept that this was intended by Mr Handover and Ms Robinson as an informal meeting to find out what the concerns of Ms Caldwell and Mr Stones were, and was off-site with a view to allowing them to talk freely. The meeting took place at a hotel on 20 January 2015.

416. There are markedly different accounts of the meeting from Mr Stones on the one hand, and Mr Handover and Ms Robinson on the other. Mr Stones' account is to some extent supported by a short typed note, of uncertain date, covering the meeting and some other points. Mr Stones said in oral evidence that this note was prepared around one week after the date of the meeting, after he had spoken to a solicitor, but in reality its date is unclear and in fact there is some indication in the evidence that the legal advice he took was obtained in mid-March, and not January. There are longer notes of the meeting in the versions I saw of the joint timeline, which were prepared over six months later. Neither Mr Handover nor Ms Robinson took notes of the meeting. The fact that they did not do so was the subject of challenge by Ms Anderson. I do not find the absence of a note surprising. It was an informal meeting, held around a low coffee table in a public area of a hotel, intended to ascertain what the employees' concerns were. It was not a formal meeting dealing, for example, with a complaint or grievance: none had been received. All four had had significant dealings in the past. As I explain below, the points raised by Ms Caldwell and Mr Stones were either known about already or followed up promptly. Mr Handover and Ms Robinson clearly had no idea that the meeting would gain the significance that it appears to have done (as far as the Official Receiver is concerned) in these proceedings.

417. Mr Handover's recollection was that Mr Stones and Ms Caldwell were asked what was concerning them. They raised the charity's financial situation (which the Trustees were already aware of and concerned about), the appropriateness of loan repayments (previously raised by Ms Hamilton in the Finance Committee meeting on December 2014), the employment of a disgraced former headteacher (a matter which was addressed promptly after the meeting by removing the individual), and whether it was appropriate for a client to be moved into a flat of her own (a matter on which Mr Handover could not recall the outcome).

418. Ms Robinson had a clear recollection that neither Ms Caldwell nor Mr Stones seemed to want to be there, and that both were unforthcoming, which in the case of Ms Caldwell she was surprised about because they had worked closely in the past and Ms Caldwell had previously spoken to her when even something relatively minor was troubling her. She thought they spoke about the financial situation, an inappropriate appointment in Bristol (which Ms Robinson said turned out not to be an issue) and the recruitment of the disgraced headteacher.

419. Significant parts of Mr Stones' note differ from the evidence of Ms Robinson and Mr Handover. In particular it reports them saying that there was "splitting in the organisation and that we were on the verge of greatness" and needed to work together, states that Ms Caldwell and Mr Stones expressed concern about abuse of power by the CEO, about inaccurate cash flows being sent to the bank and about other matters, and reports Mr Handover as having said that he had seen the finances and "there wasn't a problem".

420. The October 2015 version of the joint timeline, into which Mr Stones and Ms Caldwell both had input, includes further detail including additional complaints about Ms Batmanghelidjh and an assertion that Mr Handover accused Ms Hamilton of "causing trouble" by asking that Trustees sign a letter to the government, in connection with the early release of the government's grant in December 2014, confirming that the organisation was solvent and that the early

release of funds would not impact its viability in the first quarter of 2015. The earlier version of the timeline that I saw included less detail.

421. Mr Stones' affidavit evidence was that the meeting started with Mr Handover and Ms Robinson stating that Ms Caldwell and he were "causing trouble" and creating divisions, and that Ms Hamilton was also blamed for causing trouble in connection with the government solvency confirmation request when the Trustees should have been taking responsibility for the financial position of the charity. He said that Ms Caldwell and he were "quite forceful" about the financial situation, including that weekly cash flows being sent to the bank were not accurate.

422. In my view Mr Stones' note and the joint timeline both need to be considered with caution, and Mr Stones' recollection of the meeting as reflected in his affidavit also needs to be viewed with caution, taking account of the impact of those earlier documents. Starting the meeting with an accusation that the two staff members were causing trouble would have been quite inconsistent with the aim of the meeting, namely to discover their concerns in an informal setting. If the aim was in some way to discipline staff or "get them into line" then this would be unlikely to have been done in what seems to have been the foyer of a hotel. It would much more naturally have been done at the company's premises, and indeed is something that the Trustees would no doubt have expected Ms Batmanghelidjh to address in the first instance. So I do not accept that allegation. Having heard lengthy oral evidence from Ms Robinson and Mr Handover I also have no doubt that they would not have adopted references to "splitting" or "verge of greatness" (which is terminology that Ms Batmanghelidjh, not they, would have used), and certainly would not have said that there was no problem with the finances. I also accept Ms Robinson's evidence that Ms Caldwell and Mr Stones were neither forceful in their approach, and nor did they say that cash flow documents being sent to the bank were inaccurate.

423. Given Mr Stones' specific recollection about it I do accept that the solvency confirmation request was discussed, but I am not persuaded that Mr Handover would have accused Ms Hamilton of "causing trouble" over it. I accept Mr Handover's evidence that he did not describe her as a trouble maker. The Cabinet Office request that seems to be being referred to was part of a chain of emails forwarded by Ms Hamilton to Mr Stones on 16 December (not obviously for business reasons in connection with his HR role) and appears to have been dealt with by Ms Batmanghelidjh rather than the Trustees. In his affidavit Mr O'Brien recalled Mr Handover being annoyed with Ms Hamilton for unilaterally offering a document confirming that the charity would be solvent over the first quarter of 2015 in a meeting with the Cabinet Office without first consulting the Trustees. Such annoyance would have been justified and would be a rational explanation for Mr Stones' recollection from the meeting, albeit that the cause of the concern would have been different from the one identified by him. However, Mr Handover did not give evidence to that effect and Mr O'Brien's recollection does not obviously fit with the email correspondence. Doing the best I can with the evidence, I think it inherently unlikely that Mr Handover would consider that Ms Hamilton was somehow causing trouble for highlighting, or expecting the Trustees to take responsibility for, issues of solvency. They knew they had responsibility. The more likely issue, if there was one, would have related to

giving any indication to the Cabinet Office that solvency could be confirmed in the absence of confirmation of future grant funding (see in particular [294] above).

424. My conclusions about the meeting are reinforced by the friendly terms of an email that Mr Handover sent to Ms Caldwell the following day, thanking her for the meeting, which was "really, really helpful", saying he had tried to speak to her and asking her to call back. They subsequently spoke. I accept Mr Handover's evidence that he wanted to explain that they had addressed the issue with the former headteacher. He also tried to persuade her not to leave. I do not accept much of what the joint timeline records of this conversation, which includes reference to Mr Handover asking whether Ms Caldwell thought Ms Batmanghelidjh was in "self sabotage" mode. That is not an expression that Mr Handover would use.

425. I am not persuaded that Ms Caldwell or Mr Stones conveyed the full extent of their concerns about Ms Batmanghelidjh, in particular about abuse of power. What was apparent was that there was a serious breakdown in relationships, particularly between Ms Caldwell and Ms Batmanghelidjh, who had previously been close. If Mr Handover or Ms Robinson had understood that there was, in effect, a whistleblowing allegation against Ms Batmanghelidjh then I am satisfied that they would have treated it with the seriousness that it would have deserved.

426. In the case of Ms Caldwell, my conclusion is that the most likely cause of what appears to have been an unusual reticence is that she had already decided to resign and take steps which included bringing a constructive dismissal claim. It is worth noting that Ms Bolton also said in evidence that she thought it extraordinary that Ms Caldwell had not contacted her to express any concerns, given their close working relationship over many years.

427. In reaching these conclusions about the meeting I am well aware that the Trustees kept no notes and that, in contrast, Mr Stones did record his recollections to some extent relatively close to the event (although not, I suspect, as close as he now recalls). Normally that would mean that his record should carry particular weight. However, it is outweighed by the fact that what the Trustees are recorded as saying is simply inconsistent with the purpose of the meeting and its setting, and with my assessment of Ms Robinson and Mr Handover. It is also hard to reconcile with the email from Mr Stones referred to at [429] below.

428. Mr Stones met Mr Webster on 23 January informally to discuss an allegation that Ms Batmanghelidjh had made about Mr Stones, which Mr Webster provided reassurance about. Mr Stones also showed Mr Webster some receipts for expenditure on clients, which Mr Webster subsequently asked Ms Batmanghelidjh to justify (and received an explanation).

429. Mr Stones resigned on 28 January and went on garden leave about a week later. He sent an explanation by email to Ms Batmanghelidjh that contains no hint of the issues subsequently raised, referring to stress and personal matters, stating that he had "nothing but admiration for you and the organisation", and talking about a donation that he was trying to obtain. He was clearly not under pressure to send an email in those terms, and he confirmed in oral evidence that it was a

genuine email. I think it can, and could at the time, reasonably be taken at face value.

430. As already indicated, Mr Stones had developed a good relationship with Mr Webster. That relationship continued at and following the point of Mr Stones' resignation, when Mr Webster assisted Mr Stones by contacting three different recruitment agencies on his behalf. This was confirmed by Mr Webster's evidence that he had had social contact with both Mr Stones and Ms Caldwell, and (because Mr Stones found it difficult to deal with Ms Batmanghelidjh) had provided coaching to him and had also arranged for some external mentoring support. My assessment is that, in fact, Mr Stones was able and felt able to contact Mr Webster freely throughout.

431. In contrast to the tone of Mr Stones' resignation email, there were some strongly worded emails from Ms Caldwell. These included an email to Ms Batmanghelidjh on 28 January stating that the charity could not meet its liabilities and was wrongfully trading, and that Ms Batmanghelidjh expected her to "conceal all this from the Trustees". She also raised other allegations about Ms Batmanghelidjh. This email was seen by at least Mr Handover and Mr Webster, who concluded that there had been an irretrievable breakdown in the personal relationship between Ms Caldwell and Ms Batmanghelidjh, and that the email was written by a lawyer and amounted to a constructive dismissal claim. In the absence of evidence from Ms Caldwell, and bearing in mind that Ms Batmanghelidjh strongly disagreed with the subsequent decision of the Trustees to settle Ms Caldwell's claim, I can place very little weight on the allegations contained in the email, on which Ms Batmanghelidjh was not cross-examined. The view that there had been an irretrievable breakdown is evidenced by an email that Mr Handover sent to inform Board members about the resignations on 30 January, which was drafted for him by Mr Webster. This referred to an irretrievable breakdown in the relationship between Ms Caldwell and Ms Batmanghelidjh.

432. An email Ms Hamilton sent to Mr O'Brien on 5 February 2015 (and originally written to be sent to Ms Batmanghelidjh) attributed her resignation, which she tendered on 30 January, to the "overall risk profile of the charity", and referred to the "combination of the press, the lack of funding, lack of reserves and lack of reduction in spending". She referred to the 2014 accounts showing a large loss, which would not give funders confidence until evidence of accruals was presented. She referred to the need for a robust turnaround plan and stated that she had not been involved in the "recent contingency planning process" so could not comment on future plans. She included a schedule listing a number of suggestions for improvement, which Ms Batmanghelidjh had requested. The email is consistent with Mr Handover's recollection of being told by Ms Hamilton when she saw him at Kids Company's head office that she was resigning because of the pressure and stress of working at the charity.

433. In summary in relation to Ms Hamilton, although she did feel that she was dissuaded from continuing to contact Trustees directly to express her concerns, as already discussed I do not accept that she did not in fact have the opportunity to do so. There is also no indication that she raised any allegation of bullying either with Mr Stones (who could not recall dealing with any bullying allegation during his time at the charity) or any Trustee.

434. The resignations of the senior managers understandably caused real concern among the Trustees, particularly in the continued absence of good news from the government. It did not prove possible to arrange an immediate meeting but there was clearly a significant amount of telephone contact, particularly between Mr Handover, Mr Webster, Mr Yentob and Ms Robinson.

435. On 20 February (a Friday) the Trustees became aware that the Mail on Sunday was intending to publish a story, having apparently been approached by one of the departing staff members. The following day Mr Stones contacted the paper with a statement "on behalf of the exiting directors", which had been discussed by Mr Stones with Mr Webster and Mr Yentob. The statement was supportive. It explained that the directors fully supported the work of the charity and had left due to high levels of stress, referring to the challenging environments in which the charity worked as already placing "enormous stress on the staff without the onerous addition of financial uncertainty". There is no indication of the complaints made to the Charity Commission in July 2015, which were essentially about alleged mismanagement and inappropriate spending.

436. The position in relation to the senior managers was discussed at a Board meeting on 2 March 2015, at which Mr Webster updated the Board. There is no detail in the minutes but there was clearly a proper discussion. Mr O'Brien's note prepared for himself in advance of the meeting sets out a number of questions, including why they left, what had been alleged and whether they should be allowed to air grievances under whistleblowing legislation. His annotations to the note make clear that his staff-related questions were addressed. This also supports the conclusion that the Trustees, having appropriately turned their minds to the matter, did not understand that there was a whistleblowing allegation in relation to Ms Batmanghelidjh that needed to be addressed. I also note that Mr Webster provided a further update on discussions with Ms Caldwell and Mr Stones at the informal Board meeting on 12 March 2015 referred to at [297] above.

Government funding

History: NAO report

437. A National Audit Office ("NAO") report produced in October 2015 provides a summary of the funding that Kids Company received from the government. It records that Kids Company received at least £42 million in central government grants, and at least £4 million from other public sector sources such as local authorities, lottery bodies and schools that commissioned Kids Company to provide services. In addition it received other help, including HMRC writing off nearly £600,000 of tax debts in 2003. At least seven central government departments had contributed to grants between 2000 and 2015. The principal contributor was the Department for Education ("DfE") and its predecessors, which provided £28 million, but other departments, led by the Cabinet Office, made significant contributions between 2013 and 2015.

438. The NAO report further explains that in 2008 and 2011 Kids Company was awarded DfE grants totalling £21.7 million over five years, the largest amount that any charity received under the relevant programmes. In 2013 the DfE rejected a bid for a £9 million grant under a different grant programme, but it prepared a

"Public Interest Case" in February 2013 that recommended a continuation of support. In March 2013 it extended the previous grant for three months to provide continuity of funding while cross-government discussions were held.

439. Following Ministerial approval Kids Company was then awarded cross-government grants of £4.5 million for each of 2013/14 and 2014/15, payable quarterly. (It is worth clarifying that references to years in this format are to the government's financial years, that is 1 April to 31 March, and further that the initial grant awarded was in fact £4 million, but as discussed below this was relatively quickly increased to £4.5 million.) The NAO report comments that Kids Company's bid for another DfE grant for 2015/16 was rejected. It was instead awarded further cross-government funding of £4.265 million for 2015/16, which was confirmed by Ministers in December 2014, formally awarded in March 2015 and paid in full in April. The report states that this was the first grant award to include conditions relating to financial management and governance, including the production of a detailed contingency plan and the creation and implementation of an action plan to better match revenue and expenditure. The final payment of £3 million of emergency funding in July 2015 was made following a Ministerial direction, officials having advised Ministers that a further grant did not represent value for money.

440. The NAO report explains that from July 2013 the Cabinet Office took responsibility for youth policy and adopted a more systematic approach to overseeing Kids Company than had previously been adopted. It supplemented the DfE's award of a contract to Methods Consulting Ltd to monitor and evaluate the grant funding by commissioning an external review of the charity's financial management and governance controls. This was the PKF Littlejohn report discussed below (see [502]).

441. The NAO calculated that, overall, public sector funding accounted for around 30% of Kids Company's total income between 2002 and 2013, with the remainder from private sector donations. For 2013, central government grants accounted for 20% of its income, local government 3% and private donations 77%.

442. The NAO report describes what it refers to as a "consistent pattern of behaviour" as Kids Company approached the end of a grant term, when it would lobby for new funding and write to Ministers expressing fears of redundancies and the impact of service closures, and would also express those concerns in the media. This would result in Ministers asking officials to review options for funding, and officials awarding grants either through a wider grant programme, or from 2013/14 onwards as a direct grant award. Grants were made despite concerns being expressed by officials about the charity's cash flow and financial sustainability, such concerns being expressed as early as 2002. However, the report notes that no Ministerial direction was sought before June 2015, and prior to that officials accepted Kids Company's assertions that it would become insolvent without grant funding. Furthermore, the government agreed that the charity was providing a valuable local service to some of the most disadvantaged and hard to reach young people, and that other organisations could learn lessons from the services it provided and its approach to young people with multiple problems, including mental health issues and the risk of involvement in gun and

gang crime. Funding continued on the basis that it would be a major blow to the young people who benefited from the charity's services if it were to close down.

443. The NAO report records the fact that Kids Company asked for early payment of (quarterly) grants in both December 2013 and December 2014 to help it manage cash flow, and the government agreed to the request in each case. It also notes that the government agreed to pay the whole of the grant for 2015/16 in April 2015 rather than quarterly as in previous years.

444. The NAO report states that central government funded Kids Company in part to keep it afloat financially. Whilst government did not accept the assertion that Kids Company was providing statutory services and should be funded on that basis, the report notes that it did in fact continue to fund Kids Company.

Interactions with Ministers and other senior figures

445. Ms Batmanghelidjh and certain of the Trustees had a number of relevant interactions with Ministers and others close to the centre of government. What follows is a discussion of the most significant ones during the relevant period, in terms of the indications that the defendants obtained, or believed that they obtained, about the government's willingness to provide continued support.

446. A theme of Ms Batmanghelidjh's evidence was that in her experience verbal communications often had a more positive tone than Ministers were prepared to commit to writing. I accept that there was some basis to conclude that assistance could be made available in circumstances where the written communications would suggest otherwise. A good example is the acceleration of the grant payment in December 2014, when Kids Company had been told that the similar acceleration the year before was a one off (see [450] below). Others include the provision of emergency funding in July 2015 despite being told in the formal grant offer on 31 March 2015 that the £4.265 million awarded was "the only funding you will receive from the Cabinet Office in 2015/16", and the clear understanding that the grant for 2015/16 could be spent immediately, despite its apparent purpose.

447. Although it predates the period that is the focus of the Official Receiver's allegations, it is worth starting with a letter sent by the then Prime Minister, David Cameron, to Ms Batmanghelidjh on 10 August 2012, which was discussed at a Board meeting on 26 September 2012. This was written in response to a letter in which Ms Batmanghelidjh asked for different departments to be brought together so that the government could look holistically at the problems faced by Kids Company. The Prime Minister stressed how much the charity's work was valued and explained that he was asking that a senior official from the DfE convene a discussion with senior colleagues from other Departments to explore opportunities to identify possible paths to funding. The Public Interest Case prepared in February 2013 (see [438] above) and the two year grant that followed it were, I infer, linked to this. The formal grant offer was made on 1 July 2013.

448. On 6 September 2013 Ms Robinson and Ms Batmanghelidjh met Laura Trott at 10 Downing Street. At the time Ms Trott was a senior political adviser to Mr Cameron on education and family policy. It was Ms Robinson's first visit to

Downing Street and I accept that for that reason she had a clear recollection of it. Ms Batmanghelidjh was very direct about the scale of the problems that Kids Company was dealing with and its financial needs. They elicited an immediate agreement to the grant of an additional £500,000 in the short term, and discussed the need for long-term government funding. Ms Robinson's impression was that the meeting, with what she understood to be one of Mr Cameron's chief advisers, was a very positive step forward, with Ms Trott making "all the right noises". It was clear from the discussion that there was a lot of interest in what Kids Company was doing, and in the potential for replicating it.

449. Although Ms Robinson could only recall an immediate promise of £500,000, the evidence indicates that either then or shortly afterwards it was made clear that what the government had in mind was an extra £500,000 for each of the current and following financial years. This is recorded in minutes of the Board meeting on 23 September 2013, together with a comment that Nick Hurd was looking at "substantial" additional funding. Mr Hurd's involvement is also reflected in an email that Ms Batmanghelidjh sent to the then trustees (including Ms Robinson) on 8 September in which she reported on the meeting and said that she had since had a communication from Mr Hurd that the £500,000 was "the beginning" and that "after that they want to find us sustainable funding". There was no evidence as to the manner in which Mr Hurd may have communicated that message at that time, no emails having been produced, but I understood from Ms Batmanghelidjh's evidence that she also spoke to him regularly. The email states that the £500,000 would be provided "before December", whereas in fact it was only provided in the New Year, following an audit (the PKF Littlejohn report discussed below). However, the reference to sustainable funding is consistent with a letter that Mr Hurd sent on 9 December 2013 confirming early release of £500,000 of existing funding, referring to the additional £500,000 and stating:

> "I am keen to work with Kids Company to enable you to achieve a sustainable financial footing and I look forward to discussing this in the New Year."

450. Mr Hurd also stated in this letter that the advance payment in that year "should be considered a one-off arrangement" and that it would not be possible to agree similar requests in the future. Despite this the government agreed to make a similar early payment a year later, in December 2014: see [443] above.

451. At a Board meeting on 28 November 2013 Ms Batmanghelidjh referred to approaching the government for £16m. Mr Yentob reported that he had been informally approached by the government to meet Ms Trott. He had also obviously been speaking to Louise Casey (head of the Troubled Families programme, which had a significant budget) since the minutes recalled him mentioning that she had indicated "good news". This is consistent with Mr Yentob's oral evidence that at this stage he thought Ms Casey was very supportive, although not making any definite promise of funding from the programme, which was in its early stages.

452. On 8 January 2014 the Prime Minister wrote to Ms Batmanghelidjh in response to a letter she had sent. Mr Cameron's letter states that he had "always admired the work of Kids Company" and that two reports that Ms Batmanghelidjh had

sent "reinforce my belief in the importance of supporting the most vulnerable children and young people in our country". The letter refers to the grant of £4 million for the current and following financial year, to be supplemented by an additional £0.5 million each year, and states:

> "I have asked Nick Hurd to work with Kids Company to enable you to achieve a sustainable financial footing, and Nick and his team in the Cabinet Office are looking forward to working with you as we pursue our common goals.
> I have asked to be kept informed about how this work progresses.
> Thank you, once again, for writing to me on this important issue.
> Yours
> David"

453. As already noted, this was not the first letter from Mr Cameron about the value he placed on Kids Company's work and his wish to identify funding sources. His letter dated 10 August 2012 also referred to asking senior officials to "identify possible paths to funding".

454. As Ms Bolton commented in oral evidence, the January 2014 letter from the Prime Minister was not the sort of letter one receives every day. The defendants obviously considered that it was significant, and in my view they were justified in doing so. The Prime Minister was strongly signalling his support for government funding for Kids Company, and at a level to make it "sustainable" (as to which, see below).

455. On 23 May 2014 Michael Gove (the then Secretary of State for Education) wrote to Mr Roden. The letter states that Mr Gove was "very glad" that Kids Company had secured further funding. He went on to say:

> "The inspirational work that Kids Company do with young people in our cities is a credit both to them and our country, and I'm sincerely pleased that the recent uncertainty has been laid to rest."

A copy of the letter was forwarded to Ms Batmanghelidjh, whose PA forwarded it to, I infer, the Trustees on 7 June.

456. On or shortly before 14 July 2014 Ms Batmanghelidjh and Ms Robinson met Oliver Letwin, then the Minister of State for Government Policy & Chancellor of the Duchy of Lancaster. Ms Batmanghelidjh followed up the meeting with a letter to Mr Letwin. The letter, dated 14 July, refers to the fact that the government had placed two full-time civil servants with the charity to identify sources of statutory funding, but they had left after a year without being able to do so. The charity had been kept going by fundraising but "this model is no longer tenable as we are past proof of concept, and now the business world expects us to be absorbed by mainstream".

457. The letter goes on to state that Mr Letwin acknowledged that the charity was working with an exceptionally high risk group, and "acknowledged that we should be accessing £20,000,000 of funding a year to make us sustainable". The letter refers to Ms Batmanghelidjh appreciating the need for a process with a

competitive tender, which would take time, and to a suggestion of Mr Letwin's that it could be created either alongside or potentially through the Troubled Families budget. The letter continues by referring to an agreement by Mr Letwin to speak to the team within the Cabinet Office about the then current grant, which was going to run out in March 2015, such that the charity would not need to engage in a redundancy process.

458. Ms Robinson's evidence of the meeting was that she had told Mr Letwin that the charity was growing, could not continue to fundraise in the way it had and needed significant government help. Mr Letwin said that he knew that Kids Company did not want to be fully financed by the government, so retaining its autonomy and flexibility, and understood that it needed approximately £20 million, asking if the remainder could be fundraised by the charity (to which the answer was yes). Mr Letwin also said that he wanted to support the charity, was not a budget holder and would need to speak to other people during the summer recess, looking at central government funds but also at the Troubled Families programme. He commented that the money Kids Company wanted was a drop in the ocean compared to that programme budget. He said that he did not want the charity to close any centres. It would be problematic to create a fund just for Kids Company, so it would be a fund to which the charity could apply. The free schools initiative was also discussed in relation to parts of Kids Company's activities. Ms Robinson described it as being "as positive a meeting as you could expect without him actually promising that he would get us the money". I accept this evidence.

459. Ms Batmanghelidjh's perspective was slightly different. Her evidence was to the effect that, based on her prior knowledge of Mr Letwin and what she said was a similar experience with him in 2011, he was communicating to her that Kids Company would get the money, albeit that due process would need to be seen to be observed. That this was Ms Batmanghelidjh's view broadly accords with the way in which she reported back to the Trustees by email on 19 July, stating Mr Letwin's view that the charity "should" have £20 million, that he was going to "make this happen" from the following April, and that Ms Batmanghelidjh was "pretty sure" they would get the money given the upcoming election.

460. It is clear that the Trustees accepted Ms Robinson's version of the meeting. For example, Mr Yentob fully accepted that Mr Letwin had not promised £20m, and indeed made that clear to a journalist in 2015 when Ms Batmanghelidjh suggested otherwise. Furthermore, it was not assumed that the assistance provided would turn out to be as great as £20m. However, there was a view that there was a strong prospect of material additional help. Ms Bolton, for example, thought that £10m was realistic and a higher number certainly possible. Mr Handover was hopeful of obtaining a large proportion, perhaps as high as £16-18m. Ms Tyler thought that £10m was realistic. Mr O'Brien, whose tendency was to be "healthily sceptical" and focus on the worst case, also thought that £10m might be realistic. My assessment is that, overall, the Trustees' assessments of the position at the time was not unreasonable.

461. It is worth addressing here what was meant by "sustainable", a phrase that cropped up regularly, including in the Prime Minister's letter of 8 January. As can be seen from Ms Batmanghelidjh's letter of 14 July, it is clear that this was understood by the defendants, and in my view not unreasonably so, to mean

funding at a materially higher level than the c£4m per annum level at which the charity was then being funded.

462. The meeting with Mr Letwin was discussed at the Board meeting on 26 August 2014. The minutes state that Ms Batmanghelidjh had since the meeting received further confirmation from Ms Casey and Nigel Crisp that it was the government's intention to set up a fund for Kids Company to apply to, and that she shared email evidence of this at the meeting (emails which were not available in the trial bundle). The minutes also record that the funding would be available from April 2015, but that Ms Batmanghelidjh wanted to push for funding from January.

463. As already indicated, I accept Ms Robinson's account of the meeting with Mr Letwin. I also find that the discussion related to the next grant period, that is from April 2015, as indicated by the minutes of the 26 August Board meeting. (As already mentioned, Kids Company did manage to bring forward the final quarterly grant payment for 2014/15 to December 2014. However, it did not manage to increase the total grant beyond what had already been agreed.)

464. Contacts with central government obviously continued in the following weeks. The comments reported in the Sunday Times article referred to at [247] above were I conclude intended by Ms Batmanghelidjh to assist in discussions with the government. Email correspondence she had with Mr Letwin shortly afterwards included confirmation from him that the government was "trying to solve the problem". She clearly perceived it to be an uphill task however. The minutes of a Finance Committee meeting on 23 September record her saying that the government were trying to find £20m per annum, but adding that she believed "it will be a battle".

465. On 28 September, on the eve of the start of the Conservative party conference, Ms Batmanghelidjh emailed James Lupton, who as well as being a supporter of the charity was a senior figure in the Conservative party. She wrote that the government "keeps saying" they are going to find us money, referred to a meeting that members of government had apparently just had about it, and said that she had communicated with Oliver (presumably Mr Letwin) and told him that she was trying to keep everything calm "even though they didn't keep their promise". Things were clearly not happening as quickly as Ms Batmanghelidjh had hoped. The response from Mr Lupton referred to conversations he had had at the conference and added:

> "Keep the faith. The tone of what I am hearing is positive, but I am well aware that what matters to you is delivery, not mood music. Work in progress, but I am on the case."

466. Ms Batmanghelidjh's concerns at the apparent lack of progress obviously continued to grow. On 24 October Ms Batmanghelidjh wrote to David Cameron and George Osborne (the then Chancellor of the Exchequer), after meeting Mr Osborne at an Evening Standard event. The letter discusses some of the social issues that the charity was dealing with, including drugs, gang-related violence, sexual abuse and radicalisation. It refers to positive outcomes achieved by the charity and to the fact that the government contributed 20% with Ms Batmanghelidjh having to raise 80%. It states "I cannot continue to raise £20

million every year by attending cupcake sales and cocktail parties" and that the most significant philanthropists had donated already. It refers to having spoken to Mr Letwin "who says that he is trying to find us money" but the lack of confirmed funding was leading to media questioning and anxiety by funders not wishing to invest in an organisation "they believe will not last beyond Christmas". The letter refers to the Trustees' legal responsibilities and that they would want to issue redundancy notices, the fact that the charity had been cited as an example of best practice under the umbrella of Big Society, and states the charity's request for £20 million a year, to which the charity could add £5 million by fundraising.

467. Ms Batmanghelidjh followed up this letter with a separate email to Mr Letwin, Philippa Stroud (a special adviser) and Ms Trott on 2 November. This email stated that Ms Batmanghelidjh could not raise more money and was even struggling to make it to the end of the year, with the lack of certainty about government funding making it worse, and reiterated the need for certainty of substantial funding as soon as possible. This email was forwarded by Ms Batmanghelidjh to Chris Grayling, the then Secretary of State for Justice. The forwarding email stated that it seemed that some of the thinking was to provide the current level of funding for a year and then require the charity to come back to the table again. It included a statement that it was Mr Letwin who suggested that the charity should get £20 million, but that Ms Batmanghelidjh was "now being told they're talking about £4 million", which was not sustainable. Mr Grayling responded on 17 November that he would speak to Mr Letwin.

468. It is evident that this was not the first contact with Mr Grayling. Minutes of the Board meeting on 2 June 2014 refer to an update that Ms Batmanghelidjh gave on a meeting she had had with Mr Grayling, "who was shocked by the scale of the problem". Information from Cabinet Office sources also indicates that Ms Batmanghelidjh had had email exchanges with him in June 2014 following a meeting which apparently took place at Kids Company premises. The meeting with Mr Letwin the following month was evidently arranged following a discussion that Mr Grayling had with Mr Letwin.

469. Ms Batmanghelidjh's email to Mr Grayling indicates that by early November she was aware that the government was considering an award in the region of £4m rather than £20m, or at least that the initial grant could be of that order. In the light of the correspondence I do not fully accept her oral evidence that until December 2014 she thought that the charity was on track to receive £20m. The indications she was receiving – albeit indications that she was challenging – were that it might well not be forthcoming for 2015/16, although higher funding might be available subsequently. It is not apparent, however, that the Trustees were told about the £4m figure or saw the correspondence with Mr Grayling at the time. They did see the letter of 24 October after it was sent.

470. At the Board meeting on 26 November 2014 there was a discussion about Mr Yentob approaching Mr Letwin and his team to ask for a grant of £12m. I conclude that at that stage the Trustees were still optimistic that the government would agree to provide a substantially higher level of funding than it had previously, and that based on their understanding of the discussions with government it was not unreasonable to take that view. The precise number was of course unclear, but it was obviously accepted that it would not be as high as

£20m. Following the meeting, Mr O'Brien prepared a draft letter to the Prime Minister to be sent by Mr Yentob. The draft was overtaken by events but is relevant as indicating the Trustees' thinking at the time. It refers to the fundraising challenge, stating that as demands for the charity's services increased "it becomes ever harder to raise the required donations". It states that conversations with Ministers about "getting the charity on a sound financial footing" had resulted in "a number of reassuring statements" but nothing firm being offered, and refers to it being unclear which department or Minister could make a real commitment. This was resulting in a "precarious financial situation". The letter concludes by asking for time for the Trustees to make a presentation of why they believed that a permanent source of funding was critical, and how it would help the government by enabling Kids Company to replicate its successful model.

471. On 8 December Ms Batmanghelidjh emailed the Trustees about a conversation she had had with Mr Hurd, in which they discussed bringing forward the January 2015 grant donation to December. She reported him saying that the strategies they were employing with government were "all the right ones".

472. On 17 December Mr Yentob managed to speak to Craig Oliver (the then Director of Communications at 10 Downing Street) at some length, who promised to set up a meeting. This was arranged for 22 December. It was attended by Mr Handover, Mr Yentob, Mr Letwin and Ms Trott, and possibly by Mr Oliver. I accept Mr Handover's evidence that at that stage they were asking for £11m to £12m a year, which was broadly in line with Mr Yentob's evidence, which referred to £12m a year. Mr Letwin said that the government did not want Kids Company to close, it recognised the great job being done, that the next grant from the Cabinet Office would be the last from that source (because the Prime Minister could not be seen to be favouring Kids Company) but the government would find a way to fund Kids Company going forwards by other means. He suggested the Troubled Families and free schools programmes. He was, according to Mr Yentob, deeply apologetic that the position had not been resolved to date, and made it clear that work would start in earnest early in the new year and that the government did not want Kids Company closing centres without alternatives (such as a free school structure) being found. Mr Handover said that either at this or a meeting in January Mr Letwin described the money needed as equivalent to a rounding error. I accept this evidence.

473. Also on 22 December 2014 Mr Letwin wrote to Ms Batmanghelidjh. He thanked her for the "incredible work" for children in great need, and said:

> "We have all been working to make sure that these children get the support they require on a longer term basis. To this end, following cross departmental discussion, we have agreed to offer Kids Company a single fund of £4.265 million for 2015/16."

474. Mr Letwin explained that this would be made up of contributions from various departments, but would be managed by the Cabinet Office. He then added:

> "However, we all agree that we need to put the services you provide on a more sustainable basis, without the need for ad hoc government assistance. I have asked officials to work collaboratively with you and

> the relevant Departments early in the New Year to develop these plans further."

475. Mr Letwin also added a handwritten postscript as follows:

> "We had a very useful discussion with two of your trustees today, as I'm sure you will be aware. We look forward to working with them and you to establish a more sustainable way forward for 2016/17 and beyond."

476. The Official Receiver sought to dismiss the handwritten postscript to Mr Letwin's letter as "non-committal verbiage" which (presumably) the defendants should have ignored. This was a rather astonishing claim. The letter was written by a politician at the heart of government. It puts the reference in the body of the letter to asking officials to work collaboratively in a context that, overall (and taking account of the discussion at the meeting), sent a signal that the government was seeking to be supportive in establishing a sustainable way forward, rather than simply leaving the charity without support. Whilst a possible reading of "sustainable" meant the charity cutting costs so that it could manage without further public funding, or at least increased funding beyond around £4m a year, that is not the way in which Trustees understood it at that time in the context of the discussions that were ongoing, and I do not think that it was unreasonable of them to take that view. Mr Letwin referred in his letter to the "services you provide". There is no hint there that he meant a radically scaled back operation or, for example, one that provided a very different type of service. Mr Handover explained that he understood "sustainable" to mean sustainable funding on a regular basis, rather than dependence on ad hoc grants.

477. However, it is the case that the postscript specifically refers to 2016/17 onwards, rather than indicating that additional funding could be made available as early as 2015/16. The Official Receiver relied on this in cross-examination, somewhat undermining his own stance that the postscript should effectively be ignored.

478. Mr Yentob explained in his oral evidence that he thought that the events of 22 December were a turning point. Until that point the funding level for 2015/16 was not agreed, and the Trustees had been seeking a substantially higher figure than around £4m for that financial year as well as subsequently. The Prime Minister was also saying that he could not continue to make a special funding arrangement as had been done in the past. However, there was a clear signal of a willingness to work hard to find other means of funding Kids Company, and start proper discussions on that, which so far had been delayed. I accept this and also accept Mr Yentob's evidence that he did not understand Mr Letwin to be saying that what would be found from other sources in 2016/17 and beyond was limited to a grant at a similar level, because Mr Letwin knew that the charity needed more substantial funding. Mr Yentob also clearly hoped that, despite the reference to 2016/17 onwards, some interim funding could be found.

479. The fact that the 22 December letter was a disappointment, at least to Mr Yentob, is supported by a letter that Mr Yentob sent to Mr Oliver on 22 March 2015, in connection with ensuring that the full 2015/16 grant was paid upfront. That refers to the Trustees' disappointment at hearing in December that longer term solutions

were not forthcoming at that stage, and that the next grant would be the last. It explained that the Trustees reluctantly agreed to cooperate with a more intensive review of potential statutory funding "with particular reference to 2016/17", but had stipulated that "in order to stabilise the organisation while making cuts where possible and contingency plans" the £4.265m had to be paid upfront.

480. Mr Handover's interpretation of the position following the 22 December meeting and letter was rather more optimistic as regards the short-term position. He thought that there was a good chance of substantial funds being confirmed during the first quarter of 2015. In any event, like Mr Yentob, he thought that Mr Letwin was indicating that he was genuinely going to find a way to provide more substantial long-term funding.

481. The Official Receiver challenged the evidence of Mr Yentob and Mr Handover, arguing that at most the signals from government could be interpreted as taking steps to find further funds from other existing statutory sources during the course of 2015/16, with any funding actually being put in place only from the following financial year. In particular, Ms Anderson referred Mr Yentob to an email sent by Ms Batmanghelidjh to Mr Roden on 31 December 2014 which referred to the government having come back and said they were going to give £4m this year and "make sure we're properly funded from 2016/2017". (A similar point was made in an email she sent to some of the Trustees on 6 January 2015, discussed at [590] below, chafing at controls on expenditure, which said that her understanding of the meeting that Mr Handover and Mr Yentob had had in December was that the government had requested them not to shut services and that the charity would be able to access "funding that's appropriate from 2016".) Ms Anderson also relied in submissions on the reference to 2016/17 in the letter of 22 March referred to at [479] above.

482. Mr Yentob and Mr Handover strongly refuted this challenge. Mr Yentob's sense was that Mr Letwin was going to find some further means of funding to allow Kids Company time to restructure and transition to its next stage. However, as I understood his evidence, he sought to manage Ms Batmanghelidjh's expectations. That would be understandable, although I note that by 23 January she was referring in an email to additional government funding of £6.75m for 2015, and to the need to close centres if it was not achieved. At the Finance Committee meeting on 28 January she also expressed some confidence, in particular in relation to the ability she thought she would have to obtain government assistance to the costs of a redundancy programme if cuts had to be implemented, given that the lack of notice from the government had impacted on the charity's ability to plan for such a programme.

483. Mr O'Brien was also asked about his reaction to the 22 December letter. He said that his reaction was positive. The letter said that work would start promptly in the new year. Even if more substantial funding was only available in 2016/17, it could still be transformational. He did not read it as limited to funding at around the £4m level. He also said in his affidavit that the £6.75m figure just referred to was at the time thought by the Trustees to be a reasonable figure in light of the reassurances from government. Nevertheless, he preferred to start looking to cut costs at once in the absence of additional confirmed funding for 2015/16. Ms Bolton also clearly did not think that the letter meant that no additional funding

could be procured in 2015/16. In cross-examination she referred to the £4.265m figure as being all that was available from that particular pot of money, rather than from other government sources.

484. I accept that both Mr Yentob and Mr Handover were left with the genuine impression that the government would work hard to put sustainable support in place, and they clearly conveyed that impression to the other Trustees. I also do not think that it would have been unreasonable to conclude that there was a real prospect of further support being found during the transition period if it was necessary. This gains support from Mr Yentob's evidence about the meeting of 18 February 2015 and the draft email that followed it (see [488] and [489] below). There would be no point in putting a longer term package in place if the charity could not survive in the interim. Furthermore, and as discussed at [617] below, in order to make a sensible decision about where any radical cuts should be made the Trustees would first want to understand what the future plan was. As already stated, I also consider that the Trustees could reasonably have taken the view that references to "sustainable" funding meant funding at a materially higher level than previously.

485. Significant contact with representatives of the government continued during the first part of 2015. Mr Handover and Mr Yentob met Ms Stroud on 23 January, at which she reiterated that the next grant would be the last from the Cabinet Office but made it clear again that she did not want centres to be closed. The minutes of the Finance Committee meeting on 28 January 2015 convey the impression that it was at the 23 January meeting that it was spelled out more clearly that there would not be any additional funds for 2015/16 beyond the already agreed grant (albeit that the charity was pushing back on that). It was explained to Ms Stroud that a decision was needed so that the Trustees could decide whether to implement contingency plans, and that there was a gap between the agreed funding of £4.265m and the £11/12m being requested. She was supportive but gave no specifics. Mr Yentob's impression was that the government were focused on the forthcoming general election.

486. Although in December Mr Handover had been hopeful that additional funding could be secured in the first quarter of 2015, by this point, and certainly by early February, the signs were not promising. An email from Mr Handover on 4 February 2015 refers to Mr Yentob and he meeting Ms Stroud twice in the previous two weeks, as well as meeting Mr Letwin, with a further promise of a meeting that week to discuss the gap between the agreed funding level and the "£11 million, minimum that we need to keep operating in 15/16". That email also refers to finalising a contingency plan for Ms Robinson and Mr Handover to take to that meeting, and states that whilst "they have assured us that they do not want us to close any facilities" the rhetoric so far did not match the action. The email also reports that Ms Batmanghelidjh was independently meeting other aides to the Prime Minister and officials.

487. Ms Batmanghelidjh's message that the charity required much more than had been offered continued to be repeated to the government. For example, notes of a Cabinet Office meeting that she and Mr Kerman attended on 17 February 2015 indicate that she made this point, and said that the cost of providing activities that she considered to be statutory responsibilities amounted to approximately £20m

per annum and that it was proving harder and harder to raise the money through donations.

488. There was a further meeting with Mr Letwin, Ms Stroud, Mr Oliver and Mark Fisher of the Cabinet Office at 9 Downing Street on 18 February 2015, attended by Mr Handover, Ms Robinson and Mr Yentob. Mr Fisher was identified as the person who would assist Kids Company in obtaining further funding, and there was a discussion about potential sources. There was also a discussion about payment of the agreed £4.265m grant being made in one lump sum. Mr Yentob's affidavit stated that Mr Letwin and others were still optimistic about additional money being found in that calendar year (which he clarified in oral evidence probably meant the financial year 2015/16) other than by direct grant from the Cabinet Office, and referred to possible access to funding from the mental health budget. Mr Handover recalled Mr Letwin indicating that the amount being asked for was insignificant in the context of the Troubled Families budget. The evidence of Mr Yentob and Mr Handover about this meeting was not successfully challenged, and I accept it. A list of actions sent after the meeting by Mr Letwin's Private Secretary included that the Cabinet Office would provide details of other sources of funding, Kids Company would provide additional information about certain of its activities, and meetings would be arranged in relation to the Troubled Families programme and to discuss the practicalities of moving to free school status. The final point on the list is "ensure a regular series of progress monitoring meetings".

489. The state of play as the Trustees saw it at that point is captured in a draft email to the Trustees that Mr Webster prepared for Mr Yentob on 21 February 2015 in connection with the story that the Mail on Sunday was proposing to run in relation to resignations of senior managers (see [435] above). It states that there had been a constructive conversation with Mr Letwin, and that although the government had not declared its final position the Trustees believed that "some funding for 2015" would be secured, albeit at the "lower end of our expectations". This is clearly a reference to funding in addition to the already agreed £4.265m.

490. Further meetings and communications continued thereafter. My impression is that they became less promising in tone, an impression supported by an email from Ms Robinson on 25 February where she expressed the view that it was now "inevitable that we will be forced to scale back the organisation in some way although the extent and nature of any reduction has yet to be agreed" (see [490618] below). This view is likely to have reflected the lack of progress with government and also the seriously negative press that had by then started, and its impact on donations (see [522] below).

491. A key indication of the less promising tone is provided by an email from Mr Fisher to Mr Yentob on 2 March containing draft text for a formal communication which would refer to "helping an orderly transition for Kids Company from its unusual dependence on public funds, to put the organisation on a more sustainable footing, and to improve the way it interfaces with public bodies in the areas in which it operates". The text refers to dealing with specific cases of children let down by local authorities, assisting conversion of part of the operation to a free school, and discussion to see if any of the children helped by Kids Company could be given assistance through the Troubled Families programme (although, more

positively, it also refers in more general terms to supporting the proposal to "integrate" the charity's activities into the Troubled Families programme). It also refers to assisting with an "end-to-end business review" of the charity's operation and "rebuilding the Kids Co operating model". It refers to confirmation being required that there would be no further request for monies during 2015/16, although it does qualify this by adding that information would be provided on "potential sources of funding from various programmes that might be available". I note that that comment provides some support for the conclusion that the possibility of additional support during 2015/16 had not been ruled out. (It is worth noting that the Board meeting referred to at [295] above was held the same day, after this email was received. It is clear that the negative tone was picked up by the Trustees.)

492. It does not appear that a document in the form of Mr Fisher's draft text was formalised, although a number of the points, including reference to a free school, the more general reference to the Troubled Families programme, the reference to rebuilding the model and the "no further requests" for money point, with the qualification, did reappear in later correspondence.

493. The formal grant offer followed from Mr Fisher on 4 March 2015, subject to some information being received, in particular about forecast income and spend. The covering letter reiterated Mr Fisher's "personal commitment, and that of my team, to you and the Trustees to support the incredible work of Kids Company". Further discussions ensued about ensuring that the full grant was released in April (which Kids Company thought was agreed at a meeting on 17 March), as well as about free schools, Troubled Families and possible funding from the mental health programme. During the discussions, on 11 March, Mr Yentob provided a financial projection showing an estimated £6.6m shortfall for the year. Although Mr Yentob's email refers to this figure as being consistent with the view "we have communicated since the middle of last year" I think there is a more accurate reference to the timing in the email he forwarded which attached the projection. This was an email from Mr Handover which stated that it was the number communicated to government "during the last six months or so", and also stated that there was a contingency plan to address the shortfall. In any event what is clear, and was confirmed by Mr O'Brien in cross-examination, is that (allowing for rounding) £6.6m represents the difference between the agreed grant of £4.265m and the £11m that Kids Company had been saying that it required.

494. Around this time, Mr Yentob also spoke in confidence directly to Ms Casey, following a meeting that Mr Fisher had with her, Mr Letwin and Ms Joseph. Ms Casey indicated to Mr Yentob that it was very unlikely that Kids Company could receive a grant from the Troubled Families programme. This contrasted sharply with the encouragement that Mr Yentob believed he had received from the Cabinet Office.

495. The difficulties at the time are further evidenced by an email from Mr Handover on 21 March stating that they had been talking to the government since July and that "promises have not materialised", and referring to a threat to renege on the commitment to pay the agreed grant upfront. This was followed up by the letter from Mr Yentob to Mr Oliver on 22 March referred to at [479] above, which

produced an almost immediate confirmation that the grant would be paid in one lump sum.

496. The formal offer of a grant of £4.265m, payable as a single amount at the beginning of the financial year, and stated to be the only payment from the Cabinet Office in 2015/16, was confirmed in an email from Mr Fisher on 25 March 2015. The conditions summarised in that email included an end-to-end business review and the following:

> "KC will move to a more sustainable financial footing during the first six months of the year, including the better matching of revenue to expense in cash flow and the up or down scaling of activities to match cash flow."

These conditions were reflected in the formal grant latter dated 31 March, which also refers to production of a detailed contingency plan, including removing 10% from costs, removing services in Bristol and closing the Urban Academy. These cuts would have added up to around £6.6m over a full year.

497. In an email sent the following day (26 March) Mr Yentob described the government's agreement to pay the full grant in early April as obtained at the eleventh hour, and said that Mr Fisher would meet with Mr Handover early the following week to organise "the next steps in relation to statutory funding". This was confirmed by an email from Mr Fisher sent on the same day, suggesting a meeting in a fortnight to discuss next steps. It is clear from this and from the earlier correspondence that the Cabinet Office did not regard its work as complete with payment of the grant. This is also reflected in the minutes of the Board meeting on 31 March, where Mr Oliver is reported as having informed Mr Yentob that a meeting would take place with Kids Company "top of the agenda". However, the Trustees also recognised that they could not sit back: Mr Yentob's email, for example, refers to the need to make as much progress as possible over the following few weeks with the charity's own cost-cutting and contingency plans, whilst simultaneously putting vigorous pressure on the government to address replacement funding.

498. I should clarify that although the Official Receiver criticised Kids Company for spending the entire grant within a month, its financial position and its immediate need for funds was made plain to the government, together with the urgency of the follow up work needed.

499. Brief mention should also be made of the wider political position, given the impending general election in May 2015. I accept that Mr Yentob believed, with some reason, that Labour would ensure proper funding for Kids Company if it won power. This was supported by a statement by Harriet Harman reported on 17 April 2015 that:

> "Kids Company needs to be properly funded and the solution I am proposing is the Chancellor of the Exchequer writes a letter guaranteeing their funding."

500. I do not propose to set out here details of the dealings between the government and Kids Company between April and July 2015, not because they were in any way insignificant, but because they have limited relevance to the issues that I need to decide. In very brief summary, during April there were further discussions with the Cabinet Office about alternative funding, including under the free school programme. During May Mr Roden and Mr Frieda became increasingly involved (see [312] above), and an additional £3m of funding was ultimately procured (see [313] above).

Government commissioned reports: PKF Littlejohn and Methods

501. As noted at [440] above the DfE commissioned an external review of the charity's financial management and governance controls from Methods Consulting Ltd to monitor and evaluate the grant funding. The contract operated from July 2013 to March 2015. The NAO report states that the quarterly reports produced by Methods showed that Kids Company regularly reported surpassing its delivery targets for the relevant period.

502. The PKF Littlejohn ("PKF") report was a report produced in March 2014 of an external review of the charity's financial and governance controls. It was commissioned by the Cabinet Office and conducted in January and February of that year. Among other work performed PKF had a meeting with Mr Handover as Vice Chair, Mr O'Brien as Head of the Finance Committee and Ms Tyler as Head of the Governance Committee to discuss a range of matters relating to the role of the Board and committees. A meeting was also held with Ms Batmanghelidjh to discuss the relationship and interaction with the Board from the perspective of senior management.

503. The conclusions set out in the report included the following:

> Policies and procedures: there were "comprehensive policies and procedures" (minor recommendations for improvement being identified);
> Governance: "the governance system in place at the charity appears to be appropriate for its size and complexity" (with no recommendations for improvements to the governance systems and risk assessment process);
> Management accounting: there was "regular reporting of performance to Trustees through the Board and Finance Committee" (with recommendations being made to "further improve the information provided");
> Financial systems: given the "wide range" of income and expenditure there were "reasonable controls over the systems capturing and reporting income and expenditure" (with recommendations made to strengthen controls); and
> Forecasting: "Both strategy and business planning are appropriately managed, however, this must be considered in light of the serious cash flow position that the Charity often finds itself in."

PKF add:

> "It is clear from our work that the main financial risk to the organisation is cash flow. We understand that a significant amount of management and finance time is spent in assessing and managing the cash position. Without improving the cash position of the Charity it is not possible to build reserves and invest in new activities and locations."

A later section of the report under the heading "Business Planning" reads:

> "Business planning decisions are proposed by the Senior Management Team and approved by the Trustees. Most decisions will form part of the annual strategy process, however, there may be other times when an opportunity arises outside of this. Such an example was the decision to replicate the Charity's delivery model in Bristol. Whilst replication of the model in other cities is part of the longer term aims of the Charity, the opportunity in Bristol only came about due to funding being made available which enabled the Charity to expand.
>
> We understand that following Trustee approval to proceed with a proposal for funding, a formal budget and proposal document was submitted as part of a public tendering process. Having succeeded in winning the tender, the key for the Charity is to ensure that the costs of the Bristol operations remain within budget and do not result in a drain on the cash resources."

504. The report includes a number of detailed recommendations, together with responses from Kids Company as at 19 February 2014. Most of the recommendations are accepted and reported by the charity as already implemented.

505. The minutes of a Governance Committee meeting on 9 March 2014 record Mr Handover describing the report as not being the "ringing endorsement" he would have liked, the tone being "muted and negative", but acknowledging that PKF were under "huge pressure to find problems". In apparent contrast to this, Mr O'Brien stated in his affidavit that he drew a lot of comfort from it, and believed that the other Trustees did too.

506. The Official Receiver challenged reliance placed by the defendants on the report, referring for example to the fact that it stated that PKF did not examine all of the charity's procedures and controls, that nothing was done to build up reserves despite PKF highlighting the issue, and that there was no response to a recommendation about timely payment of PAYE liabilities and the risk that in the event of delays HMRC might seek full payment without offering time to pay. The reference to the process for approval of business planning decisions, and a reference to the annual "Can-do" document being approved by the Board (as to which see [702] below), were also challenged at trial, effectively on the basis that PKF had been given the wrong impression (a point not raised in the Official Receiver's reports). The comments made at the Governance Committee meeting were pointed out.

507. In my view the defendants, and the Trustees in particular, were entitled to obtain some reassurance from the results of PKF's work, and did so. The slightly negative comments recorded at the Governance Committee reflect disappointment that the report was not even more positive than it was, rather than a view that it was a negative report. The main difficulties identified in the report, in particular regarding cash flow, HMRC, the absence of reserves and the Bristol related risk, were well known and the Trustees did not need to be told about them. They knew that improvements were needed, particularly in the charity's funding position and financial management. The report did not identify significant issues that they did not already have well in mind, and I do not consider that it was negative overall. It does not, to me, describe a failing organisation that was poorly run, but rather one with significant cash flow issues that were taking a lot of work to manage. Subject to that point, it is pretty positive, especially about governance, accounting and controls. This is reinforced by a comment made by Alistair Duke of PKF to Ms Jenkins, recorded in an email she sent to some of the Trustees on 11 February 2014, that he was:

> "…pleased to see that Kids Company's processes are better than most organisations I see. I will be using Kids Company as a case study in a presentation I am giving next week…on governance."

508. As to the points about approval of the Can-do document, see in particular [702] below.

Support from donors: risk of donor fatigue?

509. One of the Official Receiver's allegations was that the charity's "high risk" funding model was vulnerable to donor fatigue, and that fundraising became increasingly difficult at least from 2013. He relied among other things on the correspondence from Mr Spiers referred to at [362] above. He claimed that the funding model was ad hoc, often reactive to crises, dependent on Ms Batmanghelidjh's central role and reliant on a small pool of high net worth individuals and connected trusts or foundations.

510. The Trustees did not give evidence in these terms, and overall I prefer their evidence on this issue.

511. Mr Handover's evidence was that it had been clear for some time to both Ms Batmanghelidjh and the Trustees that the proportion of Kids Company's income from the government needed to increase because a year on year increase in the level of private donations could not continue indefinitely, particularly with the ever-increasing demand. When asked whether there was a difficulty in continuing to rely on private donations in March 2014, he said that there was not and pointed out that there was a mix of corporate, government and private funding. Ms Robinson emphasised the context in which Mr Handover made his comment about donations not increasing indefinitely, which was that in 2012 and 2013 the charity was being encouraged by government and local authorities to expand and replicate. Her evidence was that in 2013 the charity was very confident about increasing donations from private individuals, and they in fact continued to increase. For example, the gala dinner in 2014 was the most successful ever.

512. The 2013 statutory accounts support this. Excluding gifts in kind (of £1.3m), donations from individuals increased by around 50% between 2012 and 2013, from about £3.2m to £4.9m. Corporate donations were reasonably stable at around £2m, and donations from trusts and foundations increased from about £5.8m to £6.6m. Total voluntary income was £14.8m as compared to income from central government, local authorities and schools of £6.1m. Ms Robinson estimated that of total revenue high net worth individuals contributed a little less than 30% (this would include some of the gifts categorised as being from trusts and foundations).

513. Mr O'Brien's affidavit referred to analyses of major donors in the 2012 and 2013 accounts. The former listed 187 major donors (of which only 45 were major donors in 2011) and the latter 208, of which only 74 were major donors in 2012. I take the Official Receiver's point that "major donor" is not defined and the individual donations are not set out, but the information in the accounts is neither indicative of donor fatigue nor reliance on a small pool of donors which was not "refreshed". Mr O'Brien also made the point, as did others, that there was a significant fundraising team: by the end of 2013 it comprised around 18 staff on a full-time equivalent basis. The Development Committee also provided well-connected support. However, whilst I accept this, it was undoubtedly the case that the charity was heavily reliant on Ms Batmanghelidjh's phenomenal fundraising ability to fund the services it provided, and in the period under review this included (but was certainly not limited to) fundraising at short notice in response to immediate cash flow difficulties.

514. Mr Yentob gave evidence that it was fully accepted that Kids Company would not simply be able to carry on relying on increases in private donations to meet increased demand, in circumstances where government funding had remained broadly static since around 2008. This was why the charity was pressing the government so hard for a substantial increase in funding, particularly from 2013 onwards. He was clear that this was required in order to allow the charity to continue to meet increasing need and to replicate its model in the way the government wished it to do. By early 2014 it was clear to him that a new way forward would need to be found: there was a serious financial issue and the funding model needed to change. He saw 2014 as the start of a transition. I accept this. He also made the point, which I accept, that Kids Company wanted "an organisation which wasn't spending all its time trying to raise money", with Ms Batmanghelidjh no longer having continually to focus on fundraising and with the government instead accepting responsibility to a greater degree (as the charity saw it) for the young people it served.

515. Mr Yentob and Mr O'Brien were both clear in their evidence that it was not apparent until late November 2014, when Mr O'Brien was contacted by Ms Hamilton, that the income targets for that year would not be met. I accept this, although there were some warning signs earlier. Ms Bolton's evidence was that by around October 2014, and despite the success of the gala dinner, Kids Company was no longer meeting its fundraising targets. Her view was that this was in part a result of the overall financial climate but she also referred to some donor fatigue and to the impact of negative press. I would add to this that, of course, the fundraising target had increased year on year and for 2014 was

noticeably more challenging than the previous year's outcome. However, I accept that the Trustees did not have serious grounds to doubt that the income projection for 2014 would be met until late November.

516. As regards Ms Bolton's comment about negative press, she explained that the charity had not had any negative press coverage before the Sunday Times article published on 21 September 2014 (see [247] above). This contrasted with the previous position where (in the context of a question asked about 2012 and earlier) Ms Bolton said that Kids Company was probably "one of the most admired charities in the country and had incredibly positive press coverage".

517. However, there was uncertainty about the position with government funding after 2014 (with the then current grant expiring in March 2015, and the lack of progress following the apparently very positive July meeting with Mr Letwin), and it was Ms Batmanghelidjh's response to this uncertainty that triggered the initial negative press. I agree with Ms Bolton that negative press is relevant. Whilst it appears that the Sunday Times article published on 21 September did not cause any immediate major issue with donors, over time it became apparent that the uncertainty flagged up by the article was having an impact on some potential funders. I agree with Ms Bolton's comments in cross-examination that the article was unhelpful in terms of public perception and fundraising, on the basis that many funders will not want to donate to what they perceive to be a failing organisation.

518. For example, in his email to Mr Webster on 9 December 2014 (see [401] above) Mr Stones referred to having to argue with Credit Suisse for a continuation of their grant in circumstances where viability appeared to be in issue. Ms Batmanghelidjh also referred in her letter to David Cameron and George Osborne on 24 October 2014 to anxiety by funders "who don't want to invest in an organisation they believe will not last beyond Christmas" (see [466] above), a clear echo of what was reported in that article. And a draft letter to Ms Batmanghelidjh that Mr O'Brien prepared following the meeting at the BBC on 10 December 2014 referred to "negative feedback" received from some donors. However, I also accept Mr Yentob's comments that concerns about the charity's survival made some supporters realise that they had to help.

519. There is also something in the criticism that, after a period, donor fatigue will be a risk. This is particularly so where (although there was a relatively large fundraising team) the major responsibility for fundraising rested with Ms Batmanghelidjh, she relied on a network of contacts and made requests for what was effectively emergency assistance. Although Mr Spiers was an exception and a number of key donors continued to provide support, his comments about his perception of the charity's weak financial position are likely to have been shared by at least some others.

520. The Official Receiver pointed to various expressions used by Ms Batmanghelidjh in her appeals to government, for example the statement in the letter dated 14 July 2014 to Mr Letwin that the "model is no longer tenable" (see [456] above) and the comment in the letter dated 24 October to Mr Cameron and Mr Osborne that "I cannot continue to raise £20 million every year" ([466] above). Ms Bolton said about the first of these statements that Ms Batmanghelidjh would use language

like this to make the case to government, and Mr Yentob added in relation to the same letter that he did not believe that it was as difficult as Ms Batmanghelidjh was suggesting at that time to obtain support from private donors.

521. I agree that, given that she would obviously want to make the strongest case to government, some caution is needed in drawing conclusions from what was said by Ms Batmanghelidjh in her appeals to it. The context included the expiry of the then government grant in March 2015, the harmful uncertainty relating to that and Ms Batmanghelidjh's strong views that the government should be bearing a significantly greater proportion of the burden so that she did not have to focus continually on fundraising. Having said that, in fact what is said in the letter just referred to is broadly consistent with both the Trustees' views and the conclusions I have drawn. There was recognition that the burden of increasing need could not continue to be met entirely from non-statutory sources, and the funding model needed to change. But that does not mean that there was an immediate funding crisis or that it was unreasonable to continue operating without immediate severe cuts, bearing in mind not only the indications from government but also the support that the Trustees believed the charity had from philanthropists (on which see below).

522. Seriously negative press coverage, with criticism extending beyond Kids Company's funding position, started in 2015, with an article published on 12 February in The Spectator ("The Trouble with Kids Company"), followed by an article by the same journalist, Miles Goslett, in the Sunday Times on 8 March. This press coverage must have made the charity's fundraising challenge even harder from that point onwards. (The first threat to publish by Mr Goslett was in November 2014. The article in question was not published but the Cabinet Office and Charity Commission both became aware of the issues raised. The Charity Commission investigated and concluded that no further action was needed. Interestingly, both Ms Caldwell and Ms Hamilton were involved in inputting to the response which satisfied the Charity Commission, dated 8 December 2014.)

523. Nevertheless, support from individual donors did continue and ultimately it was high net worth individuals who stepped in with a view to securing the charity's future. The continued level of goodwill to the charity can be seen not only from that but more broadly from Mr Roden's confidence in the charity's ability to fundraise following the restructuring (see [607] below). The continued level of support for the charity is evident from the management accounts for June 2015, which showed year to date donations from individuals at nearly £1.9m, as compared to around £1m for the prior year, and donations from trusts up by about £750,000 to nearly £3m. I accept Mr. Yentob's explanation that a number of people, including well-known names, stepped in to provide additional support to the charity when they realized the danger it was in. This also helps illustrate why Mr Roden was so confident that the next phase in the charity's existence could be managed.

524. It is also important to note that the strong support from Mr Roden and Mr Frieda in particular was not only expressed in the last few months of the charity's existence.

525. Mr Frieda was already involved in the charity's operations, having set up and funded the "School of Confidence" in around 2012, which provided mentors and workshops to boost young people's self-esteem and employability. On 17 January 2014 Mr Frieda emailed Mr Yentob following a social engagement attended by them and by Peter Wheeler (a former trustee), offering to contact Ms Stroud to arrange a meeting, and asking whether Mr Hurd should also attend. There were then further discussions between Mr Yentob, Mr Frieda, Mr Wheeler and David Gold, a recruitment specialist, following which Mr Wheeler circulated some notes on 14 February. These notes record, among other things, a "broad consensus" of a desire to support Kids Company and for Ms Batmanghelidjh to take the charity to the "next level", stating that it needed to be "built on firmer foundations", in particular requiring a financial reserve so that it "doesn't operate on the edge of the cliff of doom all the time", and that a COO was probably required. The notes also suggest fresh blood on the Board to complement Mr Yentob's skills in "handling talent, connecting with government, the elite and the public etc", and approaching both the government and key private supporters to co-fund the charity. Mr Yentob explained in cross-examination that this was a great vision, and he obviously did not want to discourage support, but how achievable it was and within what timeframe was another matter (see further [629] and [630] below). He also noted that Mr Wheeler was not himself offering the suggested reserves. The notes do however indicate strong support in principle, including the idea of what Mr Wheeler referred to as a public-private partnership with the government.

526. Support from Mr Roden was evident over an extended period. He had lent £700,000 by April 2014. At the gala dinner on 9 October 2014 he and William de Winton expressed a wish to Mr Yentob to provide more financial support. There was an exchange of emails between Ms Batmanghelidjh and Mr Roden on 31 December 2014 (also referred to at [481] above) in which he told her to ask if she wanted specific help from him or Nick Lawson. She responded referring to obtaining his advice about securing additional funding from the government.

527. This correspondence is consistent with Mr Yentob's evidence that by around February 2015 Mr Roden and Mr Frieda were beginning to speak directly to government on Kids Company's behalf. In relation to Mr Frieda, this is supported by an email from Ms Robinson dated 4 February reporting that Ms Batmanghelidjh had asked Mr Frieda to speak to a contact in Downing Street. The minutes of the Board meeting on 2 March 2015 also include a report by Ms Batmanghelidjh of a meeting she had had the previous week with Mr Roden and Mr Frieda, stating that they were putting a fundraising team together which she hoped would bring the overdraft down (then nearly £1m). In addition, both Ms Robinson and Mr Webster recalled a meeting they had in around the first week of March 2015 with Mr Frieda, where Mr Frieda explained that he and Mr Roden wanted to be involved in management of the charity, did not want to close centres and wanted Ms Batmanghelidjh to remain.

Reserves

528. The Financial Procedures Manual (see [690] below onwards) records that the following policy on reserves was agreed at a Finance Committee meeting in October 1997:

> "Whenever cash flow allows, 10% of unrestricted donations will be invested in the CAF Bank account."

The manual goes on to state that the Trustees' aim was to build up reserves equivalent to at least three months of annual expenditure.

529. What these statements clearly refer to is reserves in the form of cash or other liquid resources, rather than reserves in an accounting sense. The discussion in the following paragraphs concerns reserves in the former sense. As far as reserves in the latter sense are concerned, the last set of audited accounts, to 31 December 2013, show free reserves of £434,282, up from £272,547 in 2012 (having shown a deficit in 2011). The accounts also state that the Trustees reviewed the policy for maintaining free reserves each year, taking into account the major risks faced by the charity.

530. Building up reserves in the form of cash or other liquid resources would obviously have been desirable. As well as assisting with temporary cash flow shortages, it might have allowed greater scope to take restructuring action should a contingency plan need to be implemented, for example permitting costs such as salaries to be paid while a redundancy process was undergone. Having reserves was not, however, a legal requirement.

531. The Trustees, and the CEO, were well aware of the desirability of creating reserves. The absence of reserves was highlighted as one of the highest level risks in the charity's risk register and was accordingly regularly considered by Trustees through the Governance Committee, with responsibility to manage the risk allocated to the Finance team. But it was accepted that there was no solid plan in place to create reserves, because the business model was to spend according to identified need, and the Trustees took the view that funds raised should be used for that purpose, in accordance with the charity's objects. Ms Bolton and Ms Robinson both confirmed that they could not recall specifically asking a donor for funds for reserves, although Ms Robinson also explained that the Development Committee's role was not limited to fundraising for the short term.

532. From the perspective of an outsider the failure to build reserves is an obvious criticism, and it is one made by Mr Hannon. It was also raised as an issue during the charity's operation, in particular by Mr Spiers, who included it as a reason why he was not prepared to continue supporting the charity (see [362] above). However, given the position that the charity was actually in the creation of reserves was something that was more easily said than done.

533. One question is whether Ms Batmanghelidjh's control of fundraising, and the way she undertook it, hampered the sort of longer-term planning that is required to build reserves. At least in the period in question there is a sense from the evidence of a focus on fundraising for immediate need, often against the backdrop of an emergency requirement for funds having been identified, and steps frequently having already been taken to meet the need in question. Building reserves would usually require a longer term approach, where donors understand that they are contributing at least in part to the charity's long-term stability, and the fundraising structure includes arrangements to encourage regular giving, legacies and the like.

534. However, as touched on in the preceding section, this does not reflect the full picture. The evidence selected obviously focused on the charity's financial difficulties and its frequent immediate need of cash. In fact Kids Company had a number of long-term supporters, who gave repeatedly. Others committed to give over a period of years. There was a significant staff team involved in fundraising work, including arranging regular fundraising events.

535. I also consider that there is force in the defendants' point that donors wanted their money to be used actively to benefit the charity's beneficiaries rather than being held in reserves. Ms Bolton confirmed, with the benefit of what is obviously considerable experience, the difficulty of persuading trusts and foundations to give towards reserves and endowments. The government was also unwilling to allow its grants to be used to build reserves. Mr Yentob's evidence confirmed the difficulties. In particular, he was asked in cross-examination about the minutes of a Board meeting held on 28 July 2010, at which he "again" proposed using a donation promised by the Sigrid Rausing Trust to create a contingency fund. He explained that the donor was not in fact prepared to agree this. The subject came up again in late 2014. An email from Ms Rausing in November 2014 refers to a telephone conversation with Mr Yentob in which she suggested the creation of an endowment. But the email makes clear that she was not suggesting getting involved in providing an endowment herself. The charity's responses to the reserves related issue raised by the auditors in their report on the 2012 accounts (see [230] above) are also consistent with this.

536. The Official Receiver pointed to the sizeable level of funds raised each year on an unrestricted basis (that is, where the funds were not required to be spent in a particular way as a condition of the donation). In theory of course some of these funds might have been used to set aside as reserves. However, as with many charities unrestricted funds were usually required to be used in full to cover the charity's ongoing expenses, including staff and overhead costs that, as Ms Batmanghelidjh put it, were not sufficiently "glamorous" to fund directly. Furthermore, the theoretical ability to put aside unrestricted funds in this way ignores the fact that what would have driven many unrestricted donations is the fact that the charity obviously needed them for its operations. The unfortunate reality is that a charity with cash set aside for the proverbial rainy day is less obviously in need.

537. In the absence of cash reserves the charity sought to build up its asset base, and in one respect it did so successfully. One of the charity's centres in London, the Heart Yard (a centre at which therapy and complementary treatments were provided, overseen by a clinical psychiatrist), was located at premises donated by Morgan Stanley in 2012. Although the terms of the donation were initially restricted, under its terms the charity would have been free to sell or mortgage the property without Morgan Stanley's consent after seven years (in 2019), which would have potentially allowed a real contribution to reserves, or at least would have provided an asset which could have been used to generate funds. I accept Ms Batmanghelidjh's evidence that she understood, from discussions with Morgan Stanley's board when the grant was awarded, that the property could function as a potential reserve in a crisis, and that Morgan Stanley would be supportive. This is consistent with the permission I understand was in fact

given for the property to be sold following the charity's liquidation, and for the proceeds to be used towards paying creditors.

538. It is also worth noting that the absence of reserves did not prevent the auditors signing the accounts each year on an unqualified basis. Ms Robinson recalled a detailed discussion of the issue when the charity changed auditors, with the new auditors confirming that many charities do not have reserves.

539. The restructuring plan adopted at the end of the charity's life included a more cautious reserves policy. It might be said that this suggests that such a policy could have been implemented earlier. There is something in this, but the circumstances were very different. The need for reserves had by then been clearly demonstrated by the existential crisis that the charity had faced. Further, and importantly, the restructuring plan was backed by philanthropists who had themselves decided to back the charity, and to become trustees, on the basis that part of the funds contributed would be allocated to reserves.

540. In summary, there is some validity in the Official Receiver's criticism of a failure to build up reserves, in the form of liquid resources. The existence of liquidity would obviously have assisted in addressing cash flow issues. However, it would not have been a straightforward exercise, and to the extent that it could have been achieved it would have diverted resources from meeting the needs of the charity's clients, which were increasing year-on-year, particularly (in the period under review) as local authority budgets were cut. This was something that the Trustees were unwilling to do. The decision to prioritise spending on charitable objects rather than to build reserves is one that, in my view, could reasonably be reached.

Client spend (kids costs)

541. I deal in this section with what I see as some fundamental difficulties with the Official Receiver's allegation that the defendants failed to take adequate action to oversee and scrutinise the propriety of, clinical need for, or level of expenditure on clients, test adherence to policies or consider any need to adjust them, resulting in ever increasing financial demands. In summary these relate to (a) the lack of criticism of any item of individual expenditure; (b) the level of scrutiny actually undertaken by the Trustees; (c) the questionable weight that can be attached to the Official Receiver's failure to locate records; and (d) doubt as to the conclusions that can properly be drawn from any absence of records found to exist. These difficulties, together with the questionable relevance to the single allegation of the Official Receiver's concentration on apparent failures to follow policy (see [79] above), were reflected in the notable lack of focus on this issue in the Official Receiver's closing submissions, despite the very significant amount of evidence adduced in respect of it in Mr Tatham's report.

Policies

542. Kids Company had a written policy entitled "Policy for Distributing Financial Assistance". This document stated that the primary strategy was the alleviation of stress and insecurity and the promotion of affiliative relationships, the ultimate goal being economic independence. However, it was recognised that there would

be a period during which financial assistance would be required. The policy document went on to say the following:

> "As much as possible, our policy is not to distribute direct cash payments, but to meet individuals' needs through vouchers (i.e. food or shopping vouchers) and direct payments to third parties. Where direct cash payments are distributed, there need to be clear explanations as to why such steps have been taken. No one person makes the decision, i.e. a group of no less than three workers decide that a young person/family needs financial assistance. The reasons, as well as the amounts, must be clearly documented and decisions subject to regular review."

543. Examples were given of when expenditure might be required, including emergency housing, food poverty alleviation, clothing, travel costs to allow access to education and employment, education expenses where appropriate, birthday and Christmas presents where there was need, and in certain cases access to psychiatric assessments or other medical interventions. The policy document also stated that direct cash payments should on no account be made in specified circumstances, including if there was reason to believe that the recipient was likely to spend the money on drugs or alcohol, and more generally should only be made in "exceptional circumstances" where vouchers could not be used. Decisions in relation to expenditure were required to be made through a clinical discussion involving no fewer than three professionals, and were to be subject to regular review. Further, all clients should complete an initial (clinical) assessment, and where financial support might be necessary a budgetary assessment was also required, which among other things would determine whether needs could be met from other sources, including social services.

544. A more general requirement for documentation to be produced and retained on client files is also reflected in a broader "Policy Handbook" that Kids Company had in place.

Scrutiny

545. Expenditure on clients (so-called kids costs) was not simply overseen by Ms Batmanghelidjh. There was a significant clinical team headed by an experienced clinical director, Mr Kerman. Each centre had its own manager. Only relatively few clients were overseen directly by Ms Batmanghelidjh. Ms Batmanghelidjh was also not cross-examined in relation to client expenditure.

546. I am satisfied that the Trustees exercised regular scrutiny of kids costs. At their request (and initiated in particular by Mr O'Brien), an increasing level of detail was provided about expenditure on the "Top 25" individual clients, being the 25 individuals on whom most was spent in any particular year. I accept that there was frequent questioning about these clients, including discussion not only of the overall expenditure on individual clients but of particular categories of expenditure, particularly in the Finance Committee. That this was the case was also confirmed by Ms Lloyd in oral evidence. The minutes do not reflect the extent of these discussions.

547. For example, I saw schedules produced in November 2014 which analysed expenditure between January and August on the Top 25 by reference to a number of different categories, including allowances, clothing, education, food and housing. Ms Robinson confirmed that the Trustees' discussions about the Top 25 would have been informed by this sort of document, and that it was normal practice to discuss the Top 25 at Finance Committee meetings.

548. Mr Handover confirmed that whilst it was difficult for Trustees to challenge clinical judgements, there was a trusted clinical team that extended beyond Ms Batmanghelidjh and Mr Kerman. This was supported by a paper sent to Mr O'Brien in March 2013 describing expenditure on the Top 25, which as well as giving significant narrative details about the clients (including some horrific life stories) listed a number of professionals involved in making decisions about each client and his or her needs.

549. Mr O'Brien also explained in some detail what would be discussed at Finance Committee meetings, which included regular scrutiny of levels of and reasons for expenditure but also, on occasion, what I understood to be a "deep dive", during which the position of individual clients was discussed in significant detail by reference to the sort of narrative document just referred to. Mr O'Brien also confirmed that the committee's questioning would extend to asking who had made decisions about expenditure and whom had been consulted. He confirmed in his affidavit that he would expect that not to be limited to Ms Batmanghelidjh and Mr Kerman. He was satisfied that the answers given were reasonable.

550. I also accept Ms Tyler's clear evidence that discussion was not limited to the "Top 25". The monthly management account packs provided to the Finance Committee included information about kids costs more generally, broken down by centre and category. Reliance was also not placed simply on what Ms Batmanghelidjh said. Trustees had significant interaction with Mr Kerman, in particular through the Governance Committee, at which the primary oversight of clinical aspects was carried out. Ms Tyler was also clear in cross-examination that there were numerous occasions on which staff, not limited to Ms Batmanghelidjh or Mr Kerman, were asked about policy compliance in relation to distributing financial assistance. This was consistent with her affidavit evidence that she regularly asked for confirmation that all internal procedures had been followed and that the decision process had been documented, and was always assured by Ms Batmanghelidjh and other members of the executive team that this was the case.

551. Ms Robinson confirmed that the Trustees did not simply listen to narratives of the life stories of Top 25 clients, but asked questions and discussed the details of what the charity was doing and what it was spending, not only in Board or Governance Committee meetings but also at away days or site visits where she met other professional staff members. Like Ms Tyler, she confirmed that assurances were obtained from executive staff about policy compliance. Ms Robinson added that her own experience as a mentor for the charity was that she was chased up immediately if she missed any report. I accept her evidence.

552. It is also worth noting that there was evidence that average spend per client reduced whilst the number assisted increased, which provides an indication of restraint being applied (see [212] above).

553. In determining whether adequate scrutiny was exercised, is also important to bear in mind the question of materiality. For the period in question kids costs represented in the region of 16% to 18% of total expenditure. Spending on the Top 25, which was the focus of Mr Tatham's report (see [80] above), represented approximately 16% of total kids costs in 2012 and 10% in 2013 (based on management accounts figures). This represented around 2.7% and 1.6% respectively of the charity's total costs. For 2014, spend on the Top 25 represented about 18% of total kids costs, or about 3.2% of total expenditure, averaging around £30,000 per client. As Ms Robinson pointed out in interview, this is also considerably less than the average cost of keeping a child in care.

Record keeping

554. The Official Receiver placed reliance on an apparent lack of records, in particular budgetary and clinical assessments of clients' needs, in respect of a substantial number of clients considered. However, there were a number of problems with this.

555. Although Mr Kerman was interviewed (on two occasions), other staff who were responsible for collating records or could otherwise speak with authority on the subject appear not to have been. The transcripts of Mr Kerman's interviews do not indicate a major issue with missing records. Rather, he referred to the person in charge of the filing team as "passionate" about maintaining correct records. He also referred both in his interviews and in response to written questions to the assessment process that the charity routinely carried out, and confirmed that there were regular reviews. In his second interview he stated that he had not seen any instance of cash being handed out without an assessment or without looking into the individual's financial circumstances. There is no reason to disbelieve what he said.

556. Mike Gee, the lead safeguarding manager at Arches II, was not interviewed. However, he produced a witness statement in 2016 which was relied on by the defendants. This statement described Kids Company as having a "robust and well-developed" client assessment process. It stated that it was always the case that any individual who was not already registered as a client received an in-depth assessment, and referred to an 11 or 12 page assessment form. Recommendations for long-term support would be screened by team leaders and passed to the safeguarding team for final approval. Financial support requests would be subject to thorough assessment, "always" involving budgeting, and requiring sign-off by two other managers. The process for handing out cash and vouchers was "very tightly managed and monitored". Obviously Mr Gee was not cross-examined and I need to treat his witness statement with caution, but there was no real challenge to it (indeed the statement was relied on in Mr Hannon's first report on another point) and I accept that it indicates a robust assessment process at what was by some distance the charity's most significant centre.

557. Ms Batmanghelidjh was asked questions about client records in an interview with the Official Receiver. She recalled a substantial document that she had asked one of the staff to produce which had a breakdown of all the clients that received financial support and explained why the client was given allowances, a document which it appears that the Official Receiver did not locate. Ms Batmanghelidjh also

referred to regular reviews of everyone on the allowances list by Mr Kerman and another member of staff, and to detailed discussions with Mr O'Brien about individual clients at Trustee meetings. The transcript of the interview records her expressing incredulity and shock at gaps in client records as identified by the Official Receiver, including the absence of complete files. The evidence from this transcript is compelling. The reference to a document with a breakdown of clients supported is also consistent with a reference Ms Batmanghelidjh made to such a document in an email she sent to Helen Tabiner at the Cabinet Office on 10 April 2015, in which she said the document was "too thick" as well as probably inappropriate to send by email, but that it would provide reassurance that there was assessment evidence.

558. Other difficulties relate to the record keeping process. The charity was effectively running a dual system of paper and electronic records. An electronic system, Aurora, had relatively recently been introduced but many existing paper records were not transferred across. It also appears that the Bristol operation may not have been using Aurora. Paper documentation was still being created to a significant extent, and although some scanning occurred, as I understood it this was largely done at head office following a physical transfer of papers from the relevant centre. It appears from the transcript of the interview just referred to that a lot of staff were reluctant to use the Aurora system. A version of the risk register produced in mid-December 2014 raised issues over inaccurate data collection and problems with Aurora. A note produced by Ms Hamilton in relation to Aurora as part of her work in February 2015, following her resignation, referred to gaps in data to which both "behaviours and the system" contributed, indicating that there were some systemic difficulties. She made a number of recommendations, including creating visibility at a senior level about missing assessments and creating a process to sign off "exceptions", which I understood to be cases where support was proposed to be provided without a full assessment being prepared.

559. Given the wide use of paper records and the number of people involved in dealing with clients, and the way in which the charity closed effectively overnight, it would be highly surprising if all assessments that had occurred had been properly recorded and had found their way on to the right file by the time the charity collapsed. In addition it seems likely that some assessments would have occurred without being correctly evidenced in writing. There was also evidence of one clinician complaining that a significant number of assessments that they thought they had loaded onto Aurora had disappeared from the system.

560. Further, although relevant documents should not have been shredded at the time of the company's collapse, there was evidence that a material amount of shredding occurred. I have no reason to doubt that the motivation would have been a well-intentioned aim of avoiding confidential information ending up in the wrong hands, but it was, as Ms Tyler confirmed, contrary to the Trustees' instructions. In addition, and with some justification with particular reference to missing records in respect of multidisciplinary "Right to Health" meetings (a forum for staff to discuss difficult cases), there was a real lack of confidence on the part of the defendants in the Official Receiver's ability to identify documents among the many it took into its control over a very short period. The Official

Receiver also led no evidence about the process by which it took control of the charity's documents.

561. Ms Hamilton's work on Aurora in early 2015 involved looking at a random sample of 32 records, together with another 32 records taken from Top 25 clients for 2013 and 2014. This did indicate gaps, but apparently not on the scale suggested by the Official Receiver. Ms Hamilton made recommendations to the relevant staff members, led by Mr Kerman (with a copy to Ms Batmanghelidjh), but had not it seems discovered anything that she felt necessary to raise with Trustees. The impression given is one of areas for improvement rather than issues of pressing concern. It is worth noting that, as Director of Finance and Accountability, Ms Hamilton had overall responsibility for this area. Her evidence did not address this issue. She had also contributed to the letter to the Charity Commission referred to at [522] above which, among other things, referred to the Aurora system and described the client assessment process and documentation of needs in a way that provided reassurance. It is also worth noting that at the Governance Committee meeting on 18 December 2014, when Ms Hamilton's proposed work to check the robustness of the records on Aurora for the Top 25 was first discussed, Mr Webster is recorded in the minutes as asking about what governance procedure was in place, and being told by Ms Hamilton that each decision needed an appropriate sign off. Mr Kerman is also recorded as saying that each child had their own team and that decisions about care were made collectively, with a "train of evidence" for that. Similarly, at the Finance Committee meeting on the same day (at which Ms Hamilton was also present) clarification was sought about decision-making in respect of kids costs, and the minutes record Mr Mevada confirming that decisions about allowances were made by a team, with summaries for the highest individual kids costs being prepared for discussion by the Governance Committee.

562. Another point to make is that the Official Receiver's work focused almost exclusively on clients who had been in the "Top 25". These tended to be clients dealt with by Ms Batmanghelidjh, who was not cross-examined on the topic and who also relied on her PAs to ensure that appropriate record keeping was maintained (see [576] below). This is supported by an email from a staff member to Mr Whipp dated 22 July 2015 which confirmed that all but two of the highest spend clients at that stage were key-worked from head office. I accept that a focus on those clients does not provide a clear indication of the state of client files more generally, particularly in the light of the comments by Mr Gee. However, given the significance of the Top 25 in terms of levels of expenditure and the appropriate focus on them by the Trustees, it would also be reasonable to expect the exercise of a commensurate level of care in maintenance of their files.

563. I should also mention that Mr Handover occasionally conducted a random review of client files in his role as Trustee in charge of safeguarding. However, I do not place particular reliance on this in relation to the Official Receiver's allegations, since the focus was obviously on safeguarding, and Mr Handover did not provide any detailed evidence about the extent of his review.

Relevance of external reports

564. A number of external reports produced during the charity's life are also relevant. Mr Tatham sought to downplay these on the basis that they did not seek to test adherence to Kids Company's policies, and specifically the Policy for Distributing Financial Assistance, which he said was what his report was directed at. In my view that was far too narrow an approach, both as a general matter and in terms of the comfort that the Trustees (and to some extent Ms Batmanghelidjh) could reasonably have drawn, and in fact did draw, from them. A fair summary is that a number of reports were prepared, including by experts in the field, that looked at how Kids Company worked with clients, and that none identified significant issues that suggested a systemic problem.

565. In particular, Kids Company commissioned a report by Ruth Lesirge (whose roles had included chief executive of the Mental Health Foundation, and founding a charity dedicated to improving governance in the not-for-profit sector) in response to an anonymous letter that made a number of allegations. The report was produced in June 2013. One of the allegations was about the distribution of financial assistance and another was about expensive gifts – in other words, allegations of clear relevance to this issue. In the course of her work Ms Lesirge interviewed 19 people across the organisation. She attended a Board meeting to discuss the findings in September 2013. The notes of her summary to the Board at the meeting describe a "sophisticated process" of electronic logging, and substantial professional expertise of staff, with a constant making of judgments. She concluded that none of the allegations had substance. The full report was sent to the Trustees following the meeting. Its findings included that interviewees repeatedly confirmed that services were provided based on the assessed needs, and that there was a rigorous system for accessing cash. Ms Lesirge commented that there was a "sophisticated system" for recording and monitoring goals and outcomes and that there appeared to be a "good audit trail" in relation to allowances.

566. Mr Tatham's report quotes some of the allegations considered by Ms Lesirge, including the two just mentioned, but not the responses to them, simply stating that the report did not cover whether financial support was given in line with Kids Company's charitable aims. This was not a fair representation. The report had found the allegations to have no substance, and the Trustees were entitled to take comfort from it. The question whether Kids Company was following its charitable aims was also not part of the Official Receiver's case. I also note that Ms Lesirge had specifically stated in response to the Official Receiver's questions to her that the evidence indicated that the Policy for Distributing Financial Assistance was largely adhered to, with key workers and others sometimes using their judgment about how best to interpret guidelines.

567. A number of reports were produced by or involving Professor Stephen Briggs. These included a report by the Tavistock Clinic and Stephen Briggs Consulting in June 2013 which looked at the processes through which Kids Company worked with its clients. Mr Tatham rightly notes in his report that Professor Briggs confirmed to the Official Receiver that there were no concerns with gaps in information provided. It is worth noting that the work undertaken to do this report involved reading the entirety of sample client files. Although Professor Briggs

could not recall whether the Policy for Distributing Financial Assistance had been considered, he stated in response to the Official Receiver's question on that topic that:

> "We were impressed with the holistic approach of Kids Company including the purposeful use of physical and financial resources within an overall plan of work for each young person."

He also confirmed that for the sample seen the assessments were in line with Kids Company's charitable aims, especially with an emphasis on supportive relationships provided by key workers.

568. Professor Sandra Jovchelovitch and Natalia Concha of the London School of Economics and Political Science ("LSE") produced a report in September 2013 entitled "Kids Company: A Diagnosis of Organisation and its Interventions". That report concluded that the organisation had an "established system of ongoing assessment pertaining to each client". The report writers did not review paper files or Aurora, but based on interviews, surveys and observations the LSE was able to confirm to the Official Receiver that there were no concerns about gaps in the information provided.

569. As already mentioned, Methods Consulting Ltd conducted a number of validation reports in connection with government grants (see [501] above). It is evident that the work done involved looking at client files. Whilst scrutiny of adherence to the Policy for Distributing Financial Assistance was not part of the work, the fact that major issues appear not to have been identified with the files is noteworthy.

570. Similarly, Adele Eastman produced a report for the Centre for Social Justice entitled "Enough is Enough: A report on child protection and mental health services for children and young people" in June 2014. The work included a detailed analysis of the cases of 20 high risk and vulnerable children and young people who had been supported by Kids Company, with a "litany of missed opportunities and legal failings" discovered in respect of statutory services. In response to enquiries from the Official Receiver the CSJ confirmed that some gaps had been identified in the information contained in the paper files and on Aurora, but in those cases it "was able to improve its understanding of the chronology and detail by interviewing key individuals who had oversight of or worked on the cases". The Trustees were not told about the existence of gaps, although concerns were reported to Ms Batmanghelidjh.

571. An LSE team led by Professor Martin Knapp also produced a report in connection with a government grant in September 2014 which performed an analysis of the economic impact of support provided. The report includes detail about the extent of the difficulties affecting Kids Company's clients, with notable proportions having experienced traumatic events, being exposed to domestic violence and being involved in criminal activities, and with many suffering severe disadvantages in terms of access to food and housing. In response to the Official Receiver's enquiries, Professor Knapp stated that there were concerns about gaps, in particular missing data, with assessments not having been completed or recorded, but added that "the information available and its quality were fairly typical of what is found in many non-public organisations". Concerns about gaps

in data were reported to the report writers' main contact at the start of the project, Ms Chipperfield, and were mentioned to Ms Batmanghelidjh, but were not apparent as a major issue in the written report, and were not reported direct to Trustees.

572. The work of the charity's own auditors included visits to centres to observe the distribution of financial assistance. Although not seen by Trustees at the time, it is notable that an entry in an internal workbook of Kingston Smith dated 19 May 2014 states that "all large amounts paid out to children are reasonable and have been based on the individual's need for that payment", and that controls on the distribution of cash were adequate and were being adhered to.

573. Finally, and although too late in the charity's life for the Trustees to rely on as regards their understanding of the position in the period the focus of the Official Receiver's allegations (but of potential relevance to the underlying factual position), I should refer to some work done by PricewaterhouseCoopers (PwC) in late July 2015 in response to allegations made to the Charity Commission by Mr Stones, Ms Hamilton and Ms Lloyd in July 2015. This was limited work carried out over a few days looking at specific allegations relating to client expenditure. PwC's draft response states that, with one exception, supporting documentation of varying levels of quality had been provided. However, it is not apparent that it was part of PwC's role to review assessments, and overall I did not gain much assistance from the work that they did.

Lack of records identified: conclusions to be drawn

574. Notwithstanding the points made above, I am prepared to accept Mr Tatham's criticisms to some extent, namely to the extent of concluding that his report demonstrates that there were a material number of cases where the assessments that Kids Company's policies indicate ought to have been included on client files that the Official Receiver did manage to locate were missing from those files when they were reviewed by the Official Receiver. The difficulty is what this proves. Of itself, it simply means that there is an absence of documentation, or documentation in the correct location, demonstrating that a policy-compliant decision-making process had taken place, whether in terms of the appropriate assessment of the client's needs, or the correct authorisation process within the organisation. In many cases this may not prove that the assessment or authorisation did not occur, but simply that there is now no written record of it, or none that the Official Receiver has located. At most that would be a breach of a policy to create and retain records.

575. In other cases, it might be possible to infer that a policy was not followed, for example because expenditure was not authorised by the correct number of staff, or cash was handed to a client known to use drugs. But a conclusion that a policy was not followed does not demonstrate whether or not there was a good reason to depart from the policy, because if there was then the missing element might be limited to a record of the justification for the expenditure as an exception to the policy. In order to answer that question it would be necessary to investigate the individual expenditure in question and the circumstances in which it was incurred. But the Official Receiver has chosen not to criticise any individual item of expenditure.

576. In the case of clients dealt with by Ms Batmanghelidjh (typically members of the Top 25), there was some evidence indicating that she may have authorised expenditure in a way that did not comply with Kids Company's policies. There was also evidence indicating that formal written assessments were not always recorded on client files. However, I also accept Ms Batmanghelidjh's evidence that notes she prepared in relation to clients, and which she believed were stored by her PAs, did exist and appear not to have been located by the Official Receiver. Furthermore, Ms Batmanghelidjh's affidavit evidence in relation to the Top 25 included statements that she did not make decisions about them on her own, that there were robust assessments in respect of each of them if they had mental health difficulties (which most did) and that all decisions were informed and driven by clinical and safety needs. Ms Batmanghelidjh was not cross-examined on the question of expenditure on clients, so this evidence was not challenged. In any event it is again the case that even if it were possible to conclude that there was a failure to adhere to policy that went beyond record keeping, it would not follow that there was no good reason for the departure.

577. From the Trustees' perspective it is clear that they were not aware of any major issue in relation to policy compliance as regards the distribution of financial assistance, or the creation and retention of assessments, and in my view it is not the case that they ought to have been aware of any such issue. They exercised real scrutiny over expenditure and were also entitled to gain comfort from the external reports undertaken. They were entitled to expect that staff would draw their attention to any major concerns, for example with the operation of Aurora or the maintenance of paper records, that were not being appropriately addressed. Data collection and the Aurora system were specifically addressed in the risk register, which was regularly reviewed by the Governance Committee, with named staff being assigned responsibility. I also do not accept that the Trustees needed to commission their own enquiries into whether policies were being adhered to in the absence of cause for concern. Where concerns were raised they reacted appropriately, as evidenced by the commissioning of the Lesirge report.

578. I discuss further below what weight my findings about kids costs can have in relation to the Official Receiver's single allegation.

Allegation of dominance: general

579. As already explained, the Official Receiver alleged that Ms Batmanghelidjh exercised a dominant role in determining and operating the model, was resistant to any change in the model and would always prioritise clients' needs. Factual findings in respect of a number of aspects of this allegation are dealt with elsewhere in this judgment. This section addresses more general aspects of the Trustees' relationship with Ms Batmanghelidjh.

580. In late 2013, at Ms Robinson's suggestion, Mr Handover commenced a Board review which included reconsideration of the committee structure. He invited Board members to complete a self assessment survey form in which various Board responsibilities were listed and Board members were asked to state whether they thought the Board currently did a good job in the area in question or whether it needed to improve its performance. Mr O'Brien responded on 5 December 2013. His responses indicate that in a majority of areas he thought that

the Board was doing well (including in serving its client base and fundraising to provide those services), but in some areas he ticked boxes indicating his view that work was needed. In particular:

(a) in response to the proposition that the Board set clear objectives, Mr O'Brien wrote: "devoted Board but real influence over decision-taking within Kidsco is limited";

(b) under the heading "Relationship with CEO and Executive team", whilst Mr O'Brien thought that the Board's selection, support and evaluation of the CEO and its assistance to the CEO in the appointment of senior members of the team was done well, the Board needed to work on seeking to build strong working relationships with the team and on having an open dialogue with the CEO on future development and direction of the organisation, commenting that: "1. The Board is not exposed enough to the team, CEO is too dominant? 2. We talk a lot but don't seem to impose our views";

(c) under the heading "Financial oversight", whilst doing well on compliance with financial reporting and maintaining accurate financial records and controls, Mr O'Brien thought that work was needed on demonstrating financial sustainability and adopting a financial strategy to meet Kids Company's needs and minimise risk, commenting: "Too tight in cash flow terms and therefore risky. We try but every year it gets tighter";

(d) under the heading "Strategic planning", Mr O'Brien also responded that work was needed on strategy development by the Board and having a business plan that is implemented and reviewed, commenting: "I strongly support a 3 yr plan with full trustee input";

(e) in relation to Board selection, Mr O'Brien commented: "lacking hard-nosed financial and clinical input (independent)";

(f) whilst Mr O'Brien thought the Board was doing well on all aspects of Board/staff relations (including having experienced and qualified staff and offering effective support at committee level) he queried whether the Board was big enough and said: "I don't feel we are briefed enough in advance of meetings";

(g) in relation to Board operations he suggested that the Board could be "more effective if more of Kidsco senior people were involved"; and

(h) under "Any other comments" he added: "Boards tend to be Camila telling us all the answers. I feel there could be a lot more questioning around strategy, clinical and research to establish we are getting most for our money. Seems to be hardly any pre-approval of major decisions i.e. contract commitments etc".

581. An element of caution is needed in interpreting these responses. Mr O'Brien was being asked to suggest areas for improvement, and did so in his normal forthright way. He did not add comments on the majority of areas where he thought the Board was doing well. The specific reference to the CEO being too dominant is

posed as a question for discussion, and in any event seems to me to be a comment made in the context of the Board not being sufficiently exposed to the wider executive team. The issue raised in relation to strategic planning was it seems picked up in the Financial Procedures Manual published later that month (see in particular [700] below), albeit that the uncertainty over funding prevented an effective longer term plan being developed. I also accept Mr O'Brien's evidence that there was an annual "offsite" at which strategy was discussed. Nevertheless, other comments, in particular the references to limited "real influence", the Board not imposing its views and little pre-approval of major decisions, are clearly of some significance.

582. On 7 March 2014 Mr Handover circulated a summary of views expressed by Mr O'Brien, Ms Robinson and Ms Tyler in the Board review (the individual responses of Ms Robinson and Ms Tyler were not in evidence, and it appears that other Trustees had not provided responses). Again, there are a number of very positive aspects, including that the charity had clear objectives. Of most relevance to the Official Receiver's case are the following comments:

(a) relationships with the CEO were very good, but wider relationships with the executive team needed work;

(b) whilst there were discussions with Board members on future development, "the majority of decisions are made by the CEO and are often predetermined"; more earlier discussions could be beneficial;

(c) the nature of the activity was such that "it will always be a financial white knuckle ride, but history demonstrates that the challenge is always met and therefore the Board supports the view that it is sustainable";

(d) there was unanimous agreement that "we have a financial strategy that meets the needs and seeks to minimise risks. However the nature of the business makes this a real challenge for all involved";

(e) in the area of strategic planning, there was a need for "much deeper involvement in the early discussion on future development and Board involvement in final setting of strategy and objectives", with more time being devoted to this and the Chairman taking the leading role; there should also be a three year plan with a rolling review;

(f) action should be taken to strengthen and increase the number of Trustees, specifically to a greater depth in financial and clinical areas; and

(g) in relation to Board operations, there is a reference to greater involvement of the senior management team, including Ms Jenkins, Mr Stones, Mr Hill, Mr Kerman and Ms Caldwell; to a "more rigorous process of challenge at the Board… on major issues of policy and operations"; a desire for stronger direction from the Chair; and a comment that "Board meetings tend to be reporting sessions, rather than a balance between reporting and future facing discussions".

583. I accept Mr Handover's summary as a fair representation of the views of Ms Robinson, Ms Tyler, Mr O'Brien and himself at the time.

584. Ms Robinson and Mr Webster were both cross-examined about the Official Receiver's allegation of dominance, including about Mr O'Brien's comments in the Board review (which they had not seen at the time). The topic came up a number of times during Ms Robinson's cross-examination, and the following comments summarise my understanding of her evidence.

585. Ms Robinson's evidence was that whilst Ms Batmanghelidjh had a strong personality she would not say that she was too dominant, and the Board did impose its views. The level of influence that Ms Batmanghelidjh had depended on the subject matter. Ms Robinson agreed that the Trustees wanted to extend the level of expertise on the Board, and the review was a catalyst for that. Board papers were often provided later than was ideal, but that was often the case in the real world. Ms Batmanghelidjh had a lot of delegated authority and responsibility for day-to-day management, and given she was responsible at an operational level, what she said about those aspects would be taken very seriously. As to pre-approval of major decisions, Ms Robinson thought Mr O'Brien made a good point but pointed to the Trustees' part-time role. Day-to-day matters were delegated, and Ms Batmanghelidjh was supported by a very experienced Finance team. Similarly in relation to Mr Handover's summary, Ms Robinson's response was that the reference to a majority of decisions being predetermined was a statement of fact given the Trustees' part-time role. Ms Robinson also pointed out (in the context of questions about why the charity did not downsize earlier) that Ms Batmanghelidjh was a very effective, proven CEO who had never previously let the charity down on the fundraising side, that the Board would have insisted on downsizing had there been no alternative, but no decision would have been made without listening to Ms Batmanghelidjh and the senior staff about what could reasonably be expected to occur over the following few months.

586. When shown Mr O'Brien's responses and his reference to dominance, Mr Webster commented that Ms Batmanghelidjh was strong but he had not worked with a CEO who was not dominant or strong. Mr Webster said he would not entirely subscribe to the view that Ms Batmanghelidjh was too dominant. Ms Batmanghelidjh had very clear views but Mr Yentob managed her very well. It was not evident to him that Ms Batmanghelidjh tended to provide all the answers. Furthermore, he would expect the Board to be presented with plans developed by Ms Batmanghelidjh and the management team. He did not feel unable to challenge her. As regards the need for clinical expertise, he pointed to what he thought was a very strong and capable clinical team whose professionalism and decision-making he had no grounds to doubt, but agreed with the proposal to add expertise to the Board in that area.

587. Ms Tyler was not asked about the Board review but was asked by Mr Butler to comment about Ms Batmanghelidjh's role. Ms Tyler confirmed that, whilst Ms Batmanghelidjh could be difficult, she was certainly manageable. As the person running the organisation on a day-to-day basis Ms Batmanghelidjh did have considerable authority, but her role was different to that of the Trustees. When it came to Trustee meetings she had a reporting role, although the Trustees accorded

her the same level of respect in which they held each other because they were all there to do the same thing.

588. The evidence relating to the Board review and the other evidence referred to in the paragraphs above does support a conclusion that the executive team, led by Ms Batmanghelidjh, had the most significant role in developing strategy, with the Board being less involved in its formulation than at least some Trustees would have preferred. There was a desire for improvement in the effectiveness of the way the Board operated in this area, and also to allow for a more rigorous process of challenge on major issues. The evidence does not support a conclusion that the Board could not exert control over Ms Batmanghelidjh, but rather that it allowed someone who was regarded as a very effective CEO to operate under a broad level of delegated authority, without significant interference. The effect of doing so was that the CEO was making the "majority of decisions".

589. Specifically in relation to management of Ms Batmanghelidjh, my findings at [627] below about the roles of Mr Yentob and Mr Handover are also relevant.

590. It is also convenient to deal here with an email that Ms Batmanghelidjh sent to Mr Yentob, Mr Handover, Ms Robinson and Mr Webster on 6 January 2015, chafing at the financial controls that had by then been imposed. The email said that she was writing to them in a personal capacity to say that "under no circumstances can I work with a structure that requires me to refer daily clinical and housing expenditure to the finance committee". She said that, as Chief Executive, "you leave me responsible to manage this large organisation and to raise just under £24 million per annum", which she added had just been managed under very difficult circumstances, and within budget. She then said:

> "I'm not against accountability but I'm not prepared to work under conditions where clinical decisions are being micromanaged long distance. There is protocol internally involving senior managers who make clinical decisions. Either these people and their decision-making process needs to be respected or whoever wants to manage things should come and be here daily and take full responsibility for finding the resources and deploying them."

591. The email goes on to refer among other things to "inappropriately controlling behaviours". It refers to her understanding that the government was requesting Kids Company not to shut services and that it would be able to access appropriate funding from 2016, which meant another tough year ahead in terms of fundraising challenge. There was a choice between moving forward accepting the risk or "the trustees decide that this risk is too much", but that Ms Batmanghelidjh could not operate in a climate where there was:

> "…selective choice of what risk to pay attention to and what to leave. Managing daily housing and clinical expenditure choices, in the context of an organisation which has an 85% staff liability in relation to salaries, is hardly an effective way forward.
> I do not want to be the subject of somebody else's need to manage their personal authority or anxiety. If you do want to run the organisation like that, I won't be the person doing it. I'm really sorry

> that I am being very clear about this. I have limited resources and I can't be spending it on, what is to me, disproportionately petty management. I want to be clear that I'm not avoiding accountability but I'm not going to be a puppet Chief Executive whose strings are pulled elsewhere and dependent on other people's emotional states."

592. I do not think that this email bears quite the weight the Official Receiver sought to put on it in cross-examination. The context as presented in the email was day-to-day clinical and housing expenditure. As Ms Batmanghelidjh explained in oral evidence this would cover, for example, emergency accommodation. Her evidence was that she wrote the email because Ms Hamilton explained to her that she needed to seek Trustee approval for all items of expenditure.

593. However, although Ms Batmanghelidjh refers to day-to-day expenditure, the points being made were broader. Ms Batmanghelidjh was concerned about the desirability as well as the practicality of controls, and not just in respect of urgent expenditure. In all likelihood the immediate prompt for Ms Batmanghelidjh's email was an email that Mr O'Brien had sent the previous day (and which was forwarded by Mr Mevada to Ms Batmanghelidjh shortly before she sent her email) querying two apparently non-urgent items of expenditure in respect of medical and college costs, and confirming the need for advance Trustee approval of commitments. Ms Batmanghelidjh was responsible for the day-to-day running of the organisation as CEO and wanted to ensure that it could operate in practice as she thought it should. As Mr Handover said, as the person in charge of running the organisation it was to be expected that she would push back on controls imposed: that is what chief executives do. Mr O'Brien gave similar evidence and added that some of the best CEOs are difficult people who fight back on everything, pointing out that for Ms Batmanghelidjh the young people always came first.

594. Despite this correspondence, there is plenty of evidence that Ms Batmanghelidjh did (reluctantly) accept controls. But it is also the case that the difficulty she had in accepting the seriousness of the charity's financial situation (discussed further below) contributed to the difficulty of implementing cost-cutting and to the need, during the last few months of the charity's life, for Trustees to become directly involved on a day to day basis in ensuring that controls on expenditure were implemented.

Alleged preferences in April 2015

595. One of the Official Receiver's allegations was that in April 2015, following receipt of the government grant, the Trustees (other than Mr O'Brien, who had by then resigned) caused or allowed certain loan repayments to connected and unconnected persons in preference to the general body of unsecured creditors. The loan repayments relied on were £100,000 to Ms Atkinson, £50,000 to Mr O'Brien, £300,000 to Gaby Dellal and £100,000 to ICAP. These were the full amounts owed to Ms Atkinson, Ms Dellal and ICAP. Mr O'Brien was owed a total of £100,000 and the amount paid represented the part of the debt that was overdue.

596. The allegation was not pursued at trial against Ms Bolton in the light of responses to Part 18 requests made by her advisers. As referred to at [60] above, I had already ruled that the Official Receiver should not be permitted to allege that there were preferences voidable under s 239 Insolvency Act 1986 (which, very broadly, requires an element of intention to prefer in the event of an insolvency). This did not, however, prevent the Official Receiver maintaining that certain lenders were preferred as a factual matter.

597. At the Board meeting on 31 March 2015 there was a discussion about repaying loans with the government's grant money. It is clear from the Trustees' evidence that they did not go through the whole list of lenders deciding whom should be repaid. Timing was also left to the executive team. I accept that Mr O'Brien's loan was not discussed, and indeed accept his evidence that he did not request or expect repayment, and was surprised to receive it. It is also clear that Ms Atkinson's loan was discussed, and the Trustees decided to repay her because the loan was well overdue for repayment, she was in difficult financial circumstances at the time and the Trustees did not want to discourage her or her network from lending or donating. (Mr Yentob did subsequently ask her to agree to a delayed repayment. She did not agree and was in fact repaid on 21 April.) As Mr Handover pointed out, it was important for Kids Company to keep well-connected donors, who would also help it to attract new donors, onside. It was also agreed that ICAP should be repaid because it was a condition of it making a donation that the loan was repaid. None of the relevant Trustees could recall discussing Ms Dellal's loan but accepted that they might have done. Ms Robinson made the point that it would have been important to keep Ms Dellal onside because, like Ms Atkinson, she was a well-connected lender. I accept this evidence and conclude that, given her significance, it is more likely than not that the position of Ms Dellal was discussed.

598. There were good reasons for making the payments to Ms Atkinson, Ms Dellal and ICAP. I am satisfied that, when the Trustees discussed the matter, they did not consider that other creditors would go unpaid. If they had thought that was the case then it is highly unlikely that they would have felt able to agree to take the government grant. Rather, the decision to repay certain lenders because they or those associated with them could donate in the future indicates the Trustees' view that the charity had a future, and that their decisions were being driven by a desire to secure that future, rather than by a concern that it would fail.

599. The Trustees also gave evidence, which I accept, that there was no discussion at the Board meeting about paying trade creditors, and that apart from the lenders expressly discussed the decision as to which lenders and creditors to pay once the grant money was received was one for Ms Batmanghelidjh and the Finance team.

600. At the time, £2.1m of loans were outstanding. The loans repaid constituted around one quarter of the total. In comparison, Mr Hannon's report sets out that (leaving to one side HMRC, the bank and payroll) other non-corporate creditors were paid on average 95% of their total debt, and corporate creditors were paid about 56% of the balance outstanding. He does not provide information as to the extent to which these creditors were aged, and instead throughout his report presents all creditors as "aged creditors", including those accrued in the month just ended. However, the management accounts for April 2015 indicate that creditors more

than three months old amounted to around £220,000 at 30 April, as compared to around £550,000 a month earlier.

601. Although the allegation relating to loan repayments was also made against Ms Batmanghelidjh, she was not asked about it in cross-examination. Her affidavit evidence stated that she did not recall making any decisions about whom to repay (see further [776] below about this).

Whether the restructuring would have succeeded

602. The Official Receiver disputes that the charity would have been able to survive if the proposed restructuring had not been prevented from proceeding by the unfounded sexual assault allegations. A particular focus of this challenge at the trial was the contents of a cash forecast sent to Ms Joseph and Ms Tabiner at the Cabinet Office on the evening of 28 July, before the £3m grant funding was released. In summary, this was said to understate creditors and overstate the funds that could be raised during the following month, August. The latter included £400,000 from an art sale and £350,000 from Ms Batmanghelidjh. The creditors were said to be understated by reference to claims lodged in the liquidation.

603. I am not persuaded that the restructuring would have failed, and in fact conclude that absent the unfounded allegations it is more likely than not that it would have succeeded. The defendants certainly all believed that it would, and had reasonable grounds for doing so. My reasons for this are set out in the following paragraphs.

604. In outline, the final version of the detailed restructuring plan agreed with the Cabinet Office and Mr Roden envisaged a restructuring grant of £3m from the government and £3m raised from philanthropists. This would fund an expected peak cash deficit during 2015 of £5.9m (at the point redundancy costs would be incurred), with the cash deficit for the full year projected to be £4.8m. The projected cash surplus of just over £1m would be used as a starting point for building cash reserves. Existing creditors, as well as restructuring and ongoing running costs, were addressed specifically. The plan referred to a schedule of payment being formalised with HMRC, addressed outstanding loans (for example, indicating which loans would be converted to donations and which had been agreed with the lender could remain outstanding), and in relation to other creditors explained that the cash flow provided for them all to be repaid over the remainder of 2015.

605. As I understand it, the final version of the restructuring plan was not reliant on any further fundraising during 2015, and the charity already had in place significant pledges for 2016 and 2017. Nonetheless, the intention was to fundraise intensely during the second half of 2015.

606. The cash forecast relied on by the Official Receiver was not simply, or even primarily, the work of the Trustees or Ms Batmanghelidjh. As I understand it, the document was produced by Ms Jenkins, an experienced accountant, but in addition Mr Whipp, an experienced restructuring professional, was very heavily involved and it was he who was corresponding with the Cabinet Office. Furthermore, Mr Roden was also heavily involved, had clearly looked at the numbers carefully and was also in direct contact with the Cabinet Office. He was

planning to become chair of the trustees. I note that one of the emails that Mr Roden sent earlier in the day, before the cash flow was sent to the Cabinet Office, specifically stated that Mr Whipp needed to be comfortable with the numbers before they were sent. Mr Whipp was to remain in his role as CRO for a period, with responsibility for operational, strategic and financial control, until a new CEO was appointed (with Ms Batmanghelidjh becoming "President", focusing on clinical aspects and fundraising). In addition, the figures were obviously scrutinised closely by the Cabinet Office.

607. The email correspondence supports the defendants' position that, if the Cabinet Office grant was secured, Mr Roden was confident that Kids Company's future could be secured via private donations from himself and others. For example, an email he sent to Mr Yentob on 29 July asked that if Mr Letwin needed any more comfort on funds then Mr Roden should be given a chance to "respond/provide comfort", and went on to say: "This is v conservative plan and assumes we raise no additional monies". A slightly earlier email from him reports that he had lost his temper with Ms Tabiner because she had failed to include in her figures an additional £200,000 that he had secured that morning. Mr Yentob also provided clear oral evidence about Mr Roden's level of confidence at this stage, and his determination to ensure that the charity survived. The latter point is supported by an email that Mr Roden sent to Mr Yentob on 26 May 2015 in which he said "I can't let this charity go down – be a true disgrace", and by a further email he sent on 8 June to a number of recipients, including Mr Yentob, reporting on a meeting with Mr Fisher and Ms Tabiner and stating that he had told them that he would make sure Kids Company "wasn't insolvent by the time they put their money in". The strength of his commitment is further underlined by the fact that (as an email he sent on 6 August 2015 makes plain) he did not withdraw the offer of £3m once the unfounded allegations were made, even though he knew that as a result of the allegations he would struggle to raise any of it from others and would be responsible for the whole amount himself.

608. Ms Bolton confirmed that the £400,000 figure in the cash forecast referred to an art sale that was being planned of works that had been secured from a number of artists. She accepted in cross-examination that it would probably not have occurred during August but she thought it could be achieved during September, by putting the works into an auction house contemporary art sale. Mr Yentob's evidence, based on his knowledge of Mr Roden's position at the time, was that Mr Roden thought the £400,000 was on the low side and that he would have taken the art himself if necessary. However, he wanted to encourage other supporters and demonstrate that well-known artists had pledged works.

609. The £350,000 related to Ms Batmanghelidjh's home, which she had offered as surety if equivalent funds could not be found from elsewhere. It would have been relatively obvious to Mr Whipp and others that her property could not be sold, or probably even mortgaged, within a month. Instead, I conclude that the primary plan was to raise funds from elsewhere. This is supported by a query Mr Roden raised in an email on 28 July as to whether he was expected to step in and take Ms Batmanghelidjh's flat "if Comic Relief doesn't materialise". It was also supported by Mr Yentob's evidence, which was that there was a specific individual who had made it clear that they would not let Ms Batmanghelidjh

mortgage or lose her home and would provide the money instead. However, Ms Batmanghelidjh wanted the reference to her on the list to show the level of commitment that she was prepared to make. Ms Robinson also thought she recalled that a donor had said that he would step in to help Ms Batmanghelidjh out.

610. As regards creditors, caution is needed in comparing claims lodged in the liquidation with the creditors provided for in the forecast. For example, donors who had been expected to convert their loans to donations if the restructuring proceeded would obviously have remained as creditors in the liquidation. The information provided to the Cabinet Office included details of proposed loan conversions. It also appears that a number of individuals who had been treated as self-employed by Kids Company (without there having been any challenge to that during the charity's existence) established that they were employed by the charity following its liquidation, or at least lodged claims on that basis. Creditors in the liquidation would also have included redundancy costs for all staff. Ms Batmanghelidjh also evidently had a firm belief that there were a significant number of creditors on the Official Receiver's list who should not have been there.

611. The position is further complicated by a different document sent by Ms Jenkins to the Cabinet Office on 24 June, which a later email from Ms Laverty at KPMG confirmed was the forecast received the day before the £3m grant was signed off on 25 June. This clearly shows some adjustments made by the Trustees to figures produced by Ms Batmanghelidjh, including more modest projections than previously proposed in respect of the next gala dinner and certain other donations, and also showing the £400,000 artwork sale figure as split over the period from September to December. It was clear that these revised figures were produced following a meeting the Trustees held on 22 June 2015, which was convened after Mr Webster raised specific concerns about figures produced by Ms Batmanghelidjh.

612. In any event the level of determination on the part of Mr Roden is such that the sorts of issues identified by the Official Receiver are in my view unlikely to have derailed the restructuring.

613. I note that the Official Receiver adduced no expert accounting evidence to demonstrate that the restructuring would not have succeeded, or indeed evidence from anyone involved in the negotiations at the time.

614. The Official Receiver relied on Mr de Winton's decision in late July not to join the Board, and referred to emails he sent at that time. On 27 July Mr de Winton sent Ms Batmanghelidjh an email stating that it was not right for Mr Roden to become a "lender of last resort", that there needed to be "fundamental and lasting changes" to how the charity was run, with an "absolute focus" on financial management, in particular building reserves, and that unless there was a real change of heart by her he would not join the Board and would seek to dissuade Mr Roden. He added that without Mr Roden's "backstop" the charity was not a going concern, was insolvent and the Cabinet Office money should not be taken. On 28 July he sent an email to the Trustees following a meeting the previous evening stating that he would not join the Board because he would not be able to

work with Ms Batmanghelidjh and feared a "lengthy and possible unwinnable war of attrition". He thought the change of heart he had referred to was not forthcoming, and that it was wrong to take Cabinet Office money with any doubts either about that or future solvency.

615. Mr de Winton's observations and his decision not to join the Board do not affect my conclusion that, on the balance of probabilities, the restructuring would have succeeded in the absence of the unfounded allegations. He was obviously entitled to reach the view that he did in respect of Ms Batmanghelidjh, but she did ultimately agree to change her role (signing the papers later in the day on 28 July). If anything, his comments as to solvency are supportive of the defendants' position: the obverse of what he was saying is that with Mr Roden's support the charity *was* solvent.

Non-implementation of a contingency plan before the July 2015 restructuring

616. At first sight it appears attractively easy to criticise, particularly with the benefit of hindsight, a failure to implement a radical contingency plan at an earlier stage. That criticism is at the core of the Official Receiver's case, with particular reference to the position no later than 30 November 2014. However, as already discussed at that stage the Trustees were still genuinely, and not unreasonably, hopeful of substantial additional statutory funding being found. The government was still conveying a strong message that it did not want Kids Company to close any of its centres, which is what would be required to make radical cuts (see below). The Trustees also reasonably believed that there was strong support from philanthropists. For example, in cross-examination Ms Bolton stressed the strong support the charity had from key philanthropists and the relevance of that in determining whether a contingency plan should be implemented when it became clear that the government was not going to be forthcoming with the additional funding within the timeframe that Kids Company had hoped.

617. In order to make a sensible plan about what to close, the Trustees would first want to have some understanding of the future funding position. Specifically, the Trustees would want to understand which parts of Kids Company's operations could continue to be funded through other means (such as the free schools programme or mental health budget) and which could not. As Ms Robinson pointed out in cross-examination, no organisation entering a restructuring would wish to make strategic decisions about closure of operations until the full expected future plan was known. I would add that, in particular, it would want to understand the priorities of the proposed funder or funders. Making the wrong cuts could harm future funding prospects. Indications from senior government representatives that the government did not wish Kids Company to close centres are therefore relevant in determining whether the only reasonable course of action was to press ahead with significant cuts. It is also relevant that the charity was getting a similar message from supportive philanthropists: see [527] above in relation to a meeting with Mr Frieda in early March 2015.

618. Ms Robinson's evidence was consistent with an email she sent on 25 February 2015 about a suggestion Mr Frieda had made about an individual who could take on a COO or CEO role. She said this:

> "Before we embark upon any recruitment whether for the executive team or the board, we need greater clarity on our financial viability. I think it is now inevitable that we will be forced to scale back the organisation in some way although the extent and nature of any reduction has yet to be agreed. Once we have a clear idea of the size and structure of the charity going forwards we will be able to address recruitment requirements."

619. Mr O'Brien confirmed that the plan agreed in December 2014 was that Mr Yentob and Mr Handover would concentrate efforts on the government, a contingency plan would be worked on, and once the charity knew what money it was going to get from government it would know what plan needed to be put into action. I accept this. It obviously required a view to be reached that the charity could keep going in the interim.

620. Mr Webster (with the benefit of his HR experience) also gave evidence in cross-examination that a clear business plan was needed before a contingency plan could be implemented, as well as a plan to allow consultation of staff where headcount would be impacted, as it would be. This was consistent with an email he sent on 9 June 2015, stating that appropriate consultation could not commence until there was clarity from the government.

621. The difficulty of making significant cuts should not be underestimated. The high proportion that staff costs represented of overall expenditure meant that any material cost cutting programme would mean significant cuts to staff. However, steep cuts to the numbers of staff at individual centres would have raised safeguarding concerns in respect of clients as well as safety concerns in respect of staff. Any material cuts would require the closure of one or more centres, with the result that support to significant numbers of vulnerable clients – for whom the charity provided a safety net – would be cut off. Implementing steep cuts could itself have an impact on fundraising, because it could put donors off. The choices available were therefore limited, and difficult. The fact that choices are hard does not mean they do not need to be made, but it is a relevant part of the factual context in assessing the defendants' conduct. Ms Robinson's point about any business wanting to understand its funding position before making strategic decisions to close operations would be true for any business, but in this case the need to balance the harm to clients that would be involved in needless closures, and the consequent failure to fulfil Kids Company's charitable objectives, was undoubtedly a legitimate factor for the Trustees to take into account.

622. It is clear that the executive team were given clear instructions on 21 November and again in mid-December 2014 to revisit the existing contingency plan and ensure that it was fit for purpose (see [270] and [279] above). It is also clear from the evidence that, despite pressing from the Trustees, this was not done as promptly as would have been desirable. The reasons for this were not fully explored but I infer that they were at least in part attributable to the events leading up to, and the effect of, the departure of the senior managers, which removed a critical management layer. Ms Batmanghelidjh's reluctance to entertain steep cuts would also have played a part, together with the personal difficulties touched on at [651] below. I accept Ms Robinson's evidence that by February 2015 the Trustees were behind where they wanted to be in terms of contingency planning.

Nevertheless, a plan was ready for discussion with government during February (see [290] above), and on 12 March Ms Batmanghelidjh was instructed to prepare a plan achieving £6.6m of savings (see [297] above). However, as explained in that section of the judgment progress was not as fast as the Trustees wished.

623. The grant offer made in March 2015 included as a condition the production of a detailed contingency plan which included the removal of services from Bristol and closing the Urban Academy (see [496] above). The fact that the condition referred to production rather than implementation reflected the possibility of alternative funding for those services from the free school initiative (see [298] above). Nonetheless, the Trustees sought to push ahead with implementing material cuts: see for example [303] and [306] above.

Timing of change to Ms Batmanghelidjh's role

624. One element of the Official Receiver's case is a criticism of a failure by the Trustees to change Ms Batmanghelidjh's role at an earlier stage. This is an aspect of the allegation that she had a dominant role.

625. Mr Yentob's evidence was that he recalled a recognition by the Trustees at the meeting on 10 December 2014 that there would need to be a change at the CEO level, but at the time it was right for Ms Batmanghelidjh to stay in the role and for the Trustees to exert more control in the way already described. Mr Handover gave similar evidence. Ms Robinson confirmed that all the Trustees agreed that Ms Batmanghelidjh could not stay as CEO permanently, but that she needed to stay in position for the time being given the charity's reliance on her as a fundraiser. Ms Tyler gave similar evidence. Mr Webster's evidence was that the Trustees had lost confidence in Ms Batmanghelidjh as a CEO beyond the immediate future, but that it was not possible to remove her or materially change her functions at the time. Mr O'Brien's evidence was that there was a discussion about her role and how it could be changed but it would have been harmful to the charity to replace Ms Batmanghelidjh at the time. Ms Bolton's recollection was a consensus by the Trustees that, while she was an excellent fundraiser, Ms Batmanghelidjh did not have the requisite management skills to run a charity the size of Kids Company without senior management support, but that it was not in the charity's best interests, or that of the young people it served, to remove her at that stage: she would not at the time have accepted a reduced role, and losing her completely would have been extremely damaging for the charity, which was dependent on her connections and relationships with donors.

626. I broadly accept this. Mr Yentob explained that, at the time, it would have been "reckless and counter-productive" to force her out of post, both from an external perspective (as an ambassador for the charity and brilliant fundraiser) and internally, given her popularity with clients and staff at the centres. She was important to and highly regarded by David Cameron. Ms Batmanghelidjh finally accepted that her role needed to change, but this took time and a lot of work on the part of a number of the Trustees. Mr Handover commented that a change of role was impractical until a specific plan for the future was developed, and that required the government funding position to be resolved. The evidence of Mr Webster, Ms Robinson, Ms Tyler and Ms Bolton was essentially consistent with

that of Mr Handover and Mr Yentob: what was "possible", for example, was clearly, in context, a question of what was realistically possible at the time.

627. This does not indicate dominance by Ms Batmanghelidjh, but reality in dealing with an individual of strong views whom it was not in the charity's interests to alienate. Mr Yentob clearly did have an effective, and what he described as honest, relationship as chair with Ms Batmanghelidjh as CEO. It was also clear that Mr Handover employed his own significant skills in dealing with Ms Batmanghelidjh, and invested a great deal of time in it. As Mr O'Brien said in the slightly different context of challenging Ms Batmanghelidjh in Board and committee discussions, when dealing with a CEO it is important to take care not to throw the baby out with the bathwater. He commented in his affidavit that he thought that both Mr Yentob and Mr Handover were comfortable addressing difficult issues with Ms Batmanghelidjh, and would do so by talking to her rather than in writing. I accept this. How Ms Batmanghelidjh was dealt with involved sensitive, and not straightforward, matters of judgment.

628. There is also evidence that there was recognition at a much earlier stage that Ms Batmanghelidjh should not remain as CEO indefinitely. Her own evidence was that she had wanted to stand down since 2005 but it had not been possible to identify someone willing to take on the role given the lack of consistent funding. I treat this evidence with some caution since it is not supported by documentary evidence, but do not entirely discount it.

629. More concrete are a reference in the December 2012 Board minutes to Ms Batmanghelidjh raising the possibility of recruiting someone who could take over from her in the long run (in the context of a discussion of an "ongoing concern" about her role as chief fundraiser) and, in particular, the notes from Mr Wheeler referred to at [525] above following a meeting in February 2014 with Mr Yentob, Mr Frieda and Mr Gold.

630. Those notes referred to recruiting a COO who could stand up to Ms Batmanghelidjh when necessary but be broadly supportive of her and share her and the supporters' passion to succeed. It is worth noting that Mr Wheeler commented that this was not an easy task, that they would be looking for someone equal in "rock-star status", but also that Ms Batmanghelidjh was "by far the most valuable asset", a point that is consistent with my findings at [627] above. Mr Yentob's evidence that this was a great vision, but how easy it was to achieve (and whether details such as a "rock-star" COO would work) was another matter, is supported by an email he sent to Mr Handover about the discussions on 10 February 2014. That email referred to the meeting as "going over that old issue of who could partner Camila effectively", help with running the organisation and represent Kids Company's case to politicians to allow a move forwards to replication without too great a burden on Ms Batmanghelidjh to do everything, adding that this was "far easier said than done". That strikes me as a realistic assessment.

631. I note that the email Mr Handover sent on 30 January 2015 referred to at [431] above not only referred to the breakdown in the relationship between Ms Batmanghelidjh and Ms Caldwell but also said that Ms Batmanghelidjh had

agreed to the appointment of a COO. This suggests that some progress was being made.

632. At a later date, in Spring 2015, the Cabinet Office started raising the question of whether Ms Batmanghelidjh should remain as CEO, and ultimately required that she should not as a condition of the restructuring grant. Mr Yentob made clear in his evidence, and I accept, that the Trustees had in any event already concluded that change was required to ensure that Kids Company was on a stable financial footing. However, Mr Roden was very clear that he wanted Ms Batmanghelidjh to remain at the charity, albeit in a different role. So obtaining her agreement to the changes was essential. In fact, the correspondence indicates that Mr Roden's preference was to keep her in the role of CEO for a transitional period, and shows him supporting her position against what was by then Cabinet Office insistence that she should not have an executive role.

FACTUAL FINDINGS SPECIFIC TO MS BATMANGHELIDJH

633. This section sets out some factual conclusions specific to Ms Batmanghelidjh and her role at the charity. It should be read as part of my findings of fact as a whole, others of which are also relevant to my overall assessment of the issues that relate to Ms Batmanghelidjh, and in particular the allegation that she was a de facto director. Further factual findings are also included in the following section discussing whether Ms Batmanghelidjh was a de facto director, on the basis that it is most convenient to deal with them as part of the discussion of the Official Receiver's case on that issue. These include findings about the corporate governance structure but also other specific matters relied on, for example in respect of loans and taking on staff.

Role as CEO: financial aspects

634. Ms Batmanghelidjh's own depiction of her role as CEO is worth noting. She accepted that she was shown as the most senior staff member on the organisational charts, with direct reports to her from all areas of the business, both administrative and managerial in nature (for example finance, HR etc) and also from the individual centres where services were provided, although in the latter case she said that centre managers also reported to the Clinical Director. However, in oral evidence she was not really prepared to accept that she was responsible for financial elements, with the exception of fundraising. Crudely, she accepted responsibility for income but not expenditure. Her position was that the Finance team, headed by the Director of Finance and Accountability, were responsible for financial aspects and that, due to her learning difficulties, they dealt directly with Trustees. Ms Batmanghelidjh modified this stance slightly near the end of her oral evidence, when she was being cross-examined on behalf of other defendants and was shown part of a statement she made to the Official Receiver about regularly reviewing expenditure as well as income, but it remained a theme.

635. I accept that Ms Batmanghelidjh was not directly responsible for producing financial information for Trustees. However, the Finance team were heavily dependent on her input, at least indirectly, for projected income. Furthermore, I

do not accept that Ms Batmanghelidjh's learning difficulties prevented her from taking proper responsibility for expenditure. I would add that it might be expected to be a core responsibility of a CEO, as the most senior executive, to ensure that he or she has a proper understanding of and control over key risks, which would include any question about the ability of an organisation to meet its debts as they fell due. Ms Batmanghelidjh's evidence that the Finance team effectively reported to and dealt with Trustees directly was not supported by the Trustees' evidence insofar as it referred to dealings outside Board and Board committee meetings (and related matters such as management account packs). Although she would not have routinely got involved in the details of which creditors were paid and when, I find that Ms Batmanghelidjh did have responsibility for expenditure as well as income, and that the Finance team followed her philosophy in that respect (as to which see [642] below).

636. There were a number of instances during cross-examination where Ms Batmanghelidjh indicated that the matter in question was or would have been left to the Finance team, or on occasion another member of staff, and that she was not aware of or did not recall the details. Given what Ms Batmanghelidjh described as her very good long term memory and her evidently vivid memories of other events, I doubt that the explanation is in all cases a simple failure to recollect. It more likely reflects the adoption of a selective approach, to some extent in recollection but probably more in choosing not to focus on the area in question, or adopting a perspective in relation to it that did not always accord with what others might regard as its significance.

637. I have already referred to Ms Batmanghelidjh's involvement in dealings with HMRC and to the position with Mr Spiers (as to which see my conclusions at [333] and [368] respectively). Another example is that Ms Batmanghelidjh claimed not to have been made aware of very real concerns being expressed by self-employed staff towards the end of 2014 about not being paid for some months, and the difficulties to which that was giving rise. That is inherently unlikely. It is also clear from the minutes of a Governance Committee meeting on 21 November 2014 that Ms Batmanghelidjh was involved in a process of determining which self-employed staff should be paid first (by reference to those she identified as "more dependent"). This appropriately led to challenge by the Trustees present, Mr Webster and Ms Robinson, as to the robustness of the system and the risk of favouritism. Similar comments appear to have been made at the Finance Committee meeting on the same day, with Mr O'Brien requesting a qualitative analysis of self-employed staff and criteria for payment, and Ms Robinson saying that more robust documentation was required to explain the rationale. I accept that Ms Batmanghelidjh did not attend either meeting, but the point is that the discussions related to a system that she was said to be involved in.

638. Ms Batmanghelidjh insisted that it had been made clear to all self-employed staff when they were taken on that they should not rely on Kids Company for their main source of income, because of the fluctuations in income to which it was subject. This is reflected in a report by Ms Hamilton in the same Governance Committee meeting (at which Mr Kerman and Mr Stones were also present), so Ms Batmanghelidjh's understanding was obviously shared by other key senior

staff. It is also supported to some extent by an email from one self-employed individual on 27 November 2014 referring to her contractual terms as contemplating the possibility of not being paid monthly as agreed "owing to funding difficulties". However, it was clearly not understood either by that individual or by others that what was envisaged was delays of the nature then occurring. It also appears to be the case that at least for some there was significant dependence on income from Kids Company.

639. A further example relates to payment for research commissioned by the charity. The evidence included correspondence with the LSE (in respect of the report referred to at [568] above) and the University of Cambridge in respect of unpaid invoices. Late payment for this research was not raised as an issue in the Official Receiver's report, so it is not surprising that when it was raised in cross-examination Ms Batmanghelidjh could not recall the paperwork or that particular concerns had been raised about the impact of non-payment on the position of the relevant academic research group at the University of Cambridge. Although Mr Butler did not challenge the questioning at the time, he did raise it as a fairness issue in closing, not without some justification. I deal with a different point about the commissioning of the research at [724] below, but as regards payment for the research the only finding I need to make is that, in the light of the evidence as a whole, I am not convinced by Ms Batmanghelidjh's suggestion that the relevant member of staff (Mr Guinness) would have agreed the contractual terms with the two institutions in direct discussion with the Trustees without any involvement from her.

640. A similar point applies to some extent in relation to the charity's operations in Bristol. Ms Batmanghelidjh's evidence was that all the negotiation of the terms of the arrangements with the local authority was dealt with by Ms Chipperfield. Whilst that might well have been true in relation to detailed contractual terms, I do not accept that her involvement was as limited as she wished to portray. Ms Batmanghelidjh was clearly heavily involved in the development of the Bristol operations, including the staffing issues dealt with elsewhere in this judgment.

641. Overall, I conclude that, consistently with her role as CEO, Ms Batmanghelidjh did take overall responsibility for expenditure as well as income. Furthermore, there was plenty of evidence that at times she got heavily involved in determining which creditors to pay and how much, for example in relation to HMRC, the self-employed and supporters who provided loans (see further below in relation to loans). Mr O'Brien commented in one of his interviews with the Official Receiver that Ms Batmanghelidjh "prided herself on being close to the finances", including in dealings with the bank and HMRC. He added in that context that there was "no way Camila can claim not to have been CEO".

Ms Batmanghelidjh's approach to creditors and overoptimism

642. The minutes of a Finance Committee meeting on 17 July 2013 record Ms Batmanghelidjh setting out the Kids Company "philosophy" of payment that she expected Ms Jenkins to adopt in the Finance Director role, namely "human beings (children, staff and self-employed individuals) come first, and organisations come second". As a general statement this is a pretty accurate reflection of the way in which creditors were prioritised.

643. More generally, Ms Batmanghelidjh exhibited what I would describe as a somewhat elastic approach to the importance of time when it came to creditors (with the notable exception of payroll), combined with apparent overoptimism about the timing of income receipts and, to some extent, what liabilities those income receipts could be used to meet. Given the difficulties she describes with sequencing of time it occurs to me that Ms Batmanghelidjh's approach may be affected to some extent by her learning difficulties. This was not directly suggested by Ms Batmanghelidjh or on her behalf, but it would be consistent with the view she put forward that her difficulties were such that she could not undertake all the aspects of corporate governance that would be required of a director.

644. When challenged about late payments to creditors during the life of the charity, Ms Batmanghelidjh focused heavily on creditors being paid in the end, explaining that where creditors were not paid on a timely basis that was attributable to the nature of Kids Company's income streams and its inability to force donors to complete the giving process by a particular date. That is no doubt factually accurate, but it does not by itself justify or explain how the situation arose.

645. There were some particular concerns in this regard in respect of the management of creditors' expectations. Self-employed staff and research institutions have already been mentioned, but a significant example is HMRC. The position with HMRC is discussed in more detail in an earlier section of this judgment. As far as Ms Batmanghelidjh is concerned, she had a significant role in managing the relationship, particularly after Ms Chipperfield left. Email correspondence in late 2014 shows the relevant HMRC officer, Mr Cross-Rudkin, commenting (with some justification) that he was getting increasingly concerned that "we are being strung along". HMRC had previously been led to believe that the payment due in November 2014 would be covered by November cash flow, which was evidently not the case, and none of the income sources that Ms Batmanghelidjh then indicated (rather optimistically) would be available came through to meet the extended deadline that the officer had, exceptionally, been prepared to agree.

646. Other examples of optimism as regards funding include funding from the government (dealt with in detail elsewhere) and also the lottery. In relation to the latter, Ms Batmanghelidjh sent an email to Trustees in September 2013 stating that the charity should receive £4 million of lottery money in January, to fund work in Bristol. The money evidently did not come through in January, and although Ms Batmanghelidjh asserted in oral evidence that lottery funding was received, the lottery award of £2 million referred to in the 2012 and 2013 statutory accounts was for another project, and was awarded in November 2012.

647. Although Ms Batmanghelidjh did not take steps to hide cash flow difficulties from Trustees when they occurred, her overoptimism about income and in particular the timing of its receipt did increase the tendency for cash flow problems to become the norm, as expenditure was allowed to be incurred and increase in anticipation of income that had not yet arrived, and creditors were given expectations about when they would be paid which could not always be met.

Failure to accept seriousness of deteriorating financial situation

648. Ms Bolton stated in her affidavit that, by the time of Ms Batmanghelidjh's email on 8 December 2014 (see [406] above), the Trustees were very concerned about Ms Batmanghelidjh's ability and willingness to recognise the gravity of the financial situation and the need for change. Mr O'Brien broadly agreed with this in cross-examination.

649. I accept this. It is clear from the evidence that Ms Batmanghelidjh failed to accept the true seriousness of the charity's financial situation from late 2014 onwards. Although she subsequently did work on contingency planning, my overall impression from the evidence is that she was extremely reluctant to go along with the level of cuts that the Trustees later concluded were essential. She continued to believe that if the Trustees were firm enough the government would provide significant additional funding, possibly through the free schools programme and/or mental health budget. That might have been true in the longer term, but Ms Batmanghelidjh was extremely reluctant to accept that radical action was required to secure the charity's immediate future and enable it to meet its short-term running costs. This, combined with the departure of four senior managers and other events, including a period of illness suffered by Mr Mevada at a critical time, made the Trustees' already difficult task markedly harder.

650. However, I should emphasise that I have no doubt that Ms Batmanghelidjh's reluctance was driven by concerns for the young people that Kids Company served. I accept that Ms Batmanghelidjh was genuinely motivated by strong views about the importance of the work the charity did and the impact of steep cuts on its clients, for whom Kids Company had provided a safety net. She was also concerned that some of the closures proposed could themselves jeopardise future funding applications, for example any free schools application. She would no doubt also have been concerned about the charity's staff. Further, although she was very reluctant to accept the need for major cuts, it should not be forgotten that she had been making her view that the government needed to shoulder a significant element of the financial burden known for some time, and certainly from the autumn of 2013.

651. It should also not be overlooked just how difficult this period must have been for Ms Batmanghelidjh personally. This was a charity that she had founded and built up, and devoted long hours to working for, over many years. She had a strong belief in the importance of its work (a belief shared by others). She was clearly particularly concerned about the effect that cuts could have on vulnerable young people, including the potential for violence. During this period she lost most of her senior management team, including Ms Caldwell with whom she had worked very closely. Having previously been fêted as a visionary, as the public "face" of Kids Company she became the focus of the negative press. She also had to deal with the loss of her mother in early March 2015, at a critical time in the life of the charity. As Ms Robinson said, the pressure at the time may have affected Ms Batmanghelidjh's judgment. In any event it was clearly an extremely stressful period for her. I do not say this to excuse behaviour, but it is relevant context in understanding and assessing what occurred.

652. However, difficult decisions, and significant cuts, were required in the short term, and it is a fact that Ms Batmanghelidjh was not really prepared to accept that until a very late point. Ms Batmanghelidjh was also not prepared to accept that the final award of £3m was emergency funding, when it was clearly required urgently. She sent an email to all staff on 5 July 2015 which in part obviously reflected appropriate legal advice about what could and could not be said about potential redundancies in advance of a formal process, but it included additional wording to the effect that she was hoping not to have to make drastic cuts and was working "behind the scenes" to find potential solutions. I accept that Mr Roden had agreed that she could attempt to find ways to avoid the cuts, but he clearly thought, as did the Trustees, that it was an unrealistic exercise.

Minutes

653. One allegation made against Ms Batmanghelidjh relates to minutes of Board and Board committee meetings. The Official Receiver claimed that Ms Batmanghelidjh exercised editorial control over the minutes, insisting on amendments to reflect the message she wished to convey.

654. Except for the emergency meetings in the last few months, minutes of Board and Finance Committee meetings were taken by a member of staff, who was generally one of Ms Batmanghelidjh's PAs. Ms Batmanghelidjh's evidence was that, with the exception of one instance where she asked for context to be added, she did not exercise editorial control over minutes and they were circulated by staff for approval by Trustees in the ordinary way, with Trustees having the opportunity to comment on them.

655. I do not fully accept either the Official Receiver's allegation or Ms Batmanghelidjh's evidence on this point. Minutes were subject to approval by the Trustees and changes were made when they required them (see for example [271] above). Ms Batmanghelidjh certainly did not have the last word. However, draft minutes of Board and Finance Committee meetings were generally circulated only with the papers for the next meeting, rather than shortly after the meeting in question, so that whilst major points, and in particular key action points, were likely to be picked up, the level of scrutiny of the language used was likely to be somewhat less (as Ms Robinson accepted in cross-examination), and inevitably detail would be lost.

656. Where minutes were prepared by a PA I also think it more likely than not that they tended to be reviewed by Ms Batmanghelidjh in advance of circulation. In any event, it is clear that minutes did tend to reflect Ms Batmanghelidjh's influence. In circumstances where the writer was someone who worked closely with Ms Batmanghelidjh as CEO, it would not be surprising if the minutes tended to reflect some of her phraseology and indeed her overall approach, which clearly included a strongly positive outlook and a reluctance to focus on negative aspects.

657. Having said that, the main criticism that can be made of most of the minutes is that they are too brief, and do not reflect the level of discussion, which Ms Robinson described as "spiky [and] sometimes heated", on financial matters. It is certainly not the case that negative aspects were routinely omitted, and I do not consider that there was any intention to mislead. It is also clear that senior staff

as well as Trustees were able to comment on minutes of meetings at which they were present. For example, there was evidence of Ms Hamilton ensuring that reference to a discussion at the Finance Committee meeting on 10 November 2014 about insolvency (see [392] above) was included in the final version of the minutes. It is also worth noting that the email correspondence relating to this matter indicates that Mr O'Brien was sent a copy of the draft minutes in question at a relatively early stage following the meeting.

658. Ms Batmanghelidjh did not attend Governance Committee meetings and the member of staff who generally took those minutes was closely guided by Ms Tyler as chair. There was one instance of an email where Ms Batmanghelidjh, having read the draft minutes of a Governance Committee meeting (which were circulated to members of the committee at the same time as being sent to Ms Batmanghelidjh), expressed concern to Ms Jenkins that the "tone" of the minutes was somewhat flippant and factually inaccurate, stating that she wanted the minutes modified because they were formal minutes, and that if that was the tone of the meeting it was inappropriate. Ms Jenkins apologised and asked to discuss the changes that Ms Batmanghelidjh would like made. I accept Ms Batmanghelidjh's explanation of this, which broadly accords with the email, namely that formal documents of this nature should not exhibit a disrespectful tone, out of line with the charity's style. It is an example of influence being exercised, but the Trustee members would have seen and had a chance to object to any changes.

659. There was also one instance where minutes of a later meeting record that Ms Batmanghelidjh asked for additional context to be added to a set of Finance Committee minutes. There are two points to make about this. First, the minutes in question had clearly been sent to Trustees in draft before Ms Batmanghelidjh had reviewed them, showing that she did not always review minutes in advance. Secondly, I do not accept the allegation made to the Charity Commission that her actions went beyond this and amounted to editorial control. That allegation does not accord with the documentary evidence, and Ms Lloyd, who was present at the relevant meeting, could not provide support for the allegation in oral evidence, accepting that what was said to the Charity Commission was indicative of the sort of thing that would happen, and was reflective of conversations that had occurred between her and the other senior managers.

Contacts between staff and Trustees: general

660. Throughout her oral evidence Ms Batmanghelidjh insisted that there was regular contact between other members of the management team and Trustees, outside formal Board and Board committee meetings. This point was emphasised most in relation to Finance team members and Trustees on the Finance Committee, for reasons attributed to Ms Batmanghelidjh's learning difficulties (see in particular [634] and [635] above).

661. In relation to discussion and approval of financial matters, and with the particular exception of the Trustee involvement required in signing large cheques, I am not convinced that these contacts occurred to the extent that Ms Batmanghelidjh suggested. She was in no real position to know what level of contact there was. The evidence I saw and heard leads me to conclude that the principal contacts

between other staff and most of the Trustees were through formal Board or Board committee meetings, together with paperwork sent in advance, in particular the detailed monthly management accounts packs. Specifically in relation to payments to HMRC, for most of her oral evidence Ms Batmanghelidjh was under the misapprehension that Trustee approval would have been required for any payment to HMRC because of its size, and therefore that details of each payment must have been discussed. That was not in fact the case under the terms of the Financial Procedures Manual (see [696] below) and I do not accept that Ms Batmanghelidjh was correct in thinking that Trustees were heavily involved.

662. However, it was the case that Mr Handover was very regularly present at Kids Company's head office and would have had significant dealings with staff while he was there, in particular the Finance team (see [30] above). More generally, other Trustees would also have had dealings with staff outside meetings, for example in connection with fundraising and Development Committee work.

Mr Kendrick

663. One of the issues raised by the senior managers was Ms Batmanghelidjh's dealings with a potential donor, David Kendrick, in November 2014.

664. Mr Kendrick was someone whom Mr Stones had got to know through his previous employment. It appears that Ms Batmanghelidjh had been attempting to meet Mr Kendrick for around a year, but meetings had been cancelled or rescheduled. However, he did attend the gala dinner on 9 October 2014. Following this a meeting was arranged and, after some further rescheduling around Mr Kendrick's commitments, took place on 19 November. Ms Batmanghelidjh was present, along with Ms Lloyd and an assistant to Mr Kendrick, Paul Khullar.

665. At the meeting Ms Batmanghelidjh asked Mr Kendrick for an immediate donation of £1m. It appears that she also included a donation of that size from him on an income projection discussed with the Finance Committee on 21 November (see [273] above) and had raised the possibility of a donation from him (and Comic Relief) at the Board meeting on 30 October.

666. Mr Kendrick asked for a day or so to think about it. Ms Batmanghelidjh chased by email on 21 November and on 22 November Mr Khullar responded to say that Mr Kendrick was not in a position to donate the immediate £1m required, which Ms Batmanghelidjh had requested to fund payroll, but made a number of longer term proposals. These proposals involved a form of partnership which included assistance with the website and marketing, developing a strategy for replication globally and exploiting the "commercial potential", including expanding merchandising. These other ideas were rebuffed by Ms Batmanghelidjh in an email which clearly reflected her honest views but which, at least in retrospect, can be criticised as ill-judged in tone. I would not however go so far as to adopt Ms Lloyd's description of the email as "vile". In both that and a further email to Mr Khullar Ms Batmanghelidjh indicated that she had made it clear at the meeting that being able to work together on other projects was dependent on addressing the charity's immediate requirements: "It's important that we are able to survive".

The effect on Mr Kendrick was a negative one and all suggestions of support for the charity disappeared.

667. It is regrettable that the existence of email evidence of Mr Kendrick's decision not to donate the funds requested was not disclosed with the Official Receiver's report, and that the Official Receiver instead relied on Ms Lloyd's evidence that Ms Batmanghelidjh had refused his assistance. Ms Lloyd was not aware of the relevant email until she was shown it in cross-examination. I do not suggest that the omission was intentional, but the effect was that the Official Receiver did not present his case in a balanced way on this point.

668. It is however the case that, when Mr Kendrick refused immediate help, Ms Batmanghelidjh neither alerted the Trustees at the Board meeting on 26 November nor Mr Cross-Rudkin at HMRC, to whom some reference had been made to the prospect of a £1m donation.

WAS MS BATMANGHELIDJH A DE FACTO DIRECTOR?

The Official Receiver's case

The case as put in Mr Hannon's first report

669. The relevant section of Mr Hannon's first report made the initial comment that Ms Batmanghelidjh was precluded from being formally appointed as a director because she received remuneration, but that his case was that she was nevertheless a de facto director throughout Kids Company's period of operation. The report went on to give Mr Hannon's reasons for this in 21 numbered sub-paragraphs. Mr Butler's written opening submissions categorised these as amounting to six classes of activity, which he listed as allegations relating to 1) the CEO "label"; 2) CEO functions; 3) holding out; 4) attendance at Trustee meetings; 5) entitlement to approve spending; and 6) instigation of committee membership (which Mr Butler referred to as the "promotion" allegation). It is convenient to summarise the allegations using this categorisation.

The CEO "label"

670. Mr Hannon relied on Ms Batmanghelidjh's job title, the fact that she was the most senior staff member, with all department heads reporting to her, the fact that she styled herself as Chief Executive (including in the company's annual reports), the Trustees' description of her as having overall responsibility for day-to-day running, her understanding that she was responsible for managing the organisation, and the fact that there was no one else fulfilling the role of chief executive.

CEO functions

671. Mr Hannon relied on a number of Ms Batmanghelidjh's functions or alleged functions as CEO, namely:

    (a) the responsibilities that the Chief Executive was stated to have under the Financial Procedures Manual (see further below);

(b) allegations that Ms Batmanghelidjh was responsible for i) negotiating time to pay arrangements with HMRC (alone from 15 August 2013); ii) negotiating short-term loans and deciding on the priority for their repayment; iii) negotiating with donors as to the use and timing of donations; iv) commissioning academic research at significant expense; and v) responding to concerns expressed by the Charity Commission in April 2015; and

(c) the fact that Ms Batmanghelidjh stated that her responsibilities included safeguarding, clinical matters (alongside the Clinical Director), managing the department responsible for generating data relating to key performance indicators and outcomes (alongside the Financial Director), liaising with the finance and operations team to maintain administrative infrastructure, and going through expenditure and creditors regularly with the Finance team.

Holding out

672. Mr Hannon relied on certain instances where Ms Batmanghelidjh had signed documents as "director" and/or "Chief Executive".

Attendance at meetings

673. Mr Hannon relied on Ms Batmanghelidjh's attendance at 14 out of 16 Board meetings in the period 5 December 2012 to 12 August 2015, providing updates in eight of those meetings until 31 March 2015, and cancelling a meeting due to occur on 2 June 2015. He also relied on the fact that she was expected to attend meetings of the Finance Committee and generally did so.

Approval of spending

674. Mr Hannon relied on the levels of expenditure that Ms Batmanghelidjh was authorised to approve under the Financial Procedures Manual (see [696] below).

Promotion

675. Finally, Mr Hannon relied on an allegation that it was Ms Batmanghelidjh who instigated Ms Robinson rejoining the Finance Committee in September 2014.

The case as developed by Counsel

Opening submissions

676. In the Official Receiver's opening submissions, the key issue was identified as whether Ms Batmanghelidjh was merely carrying out the appropriately delegated day-to-day management of the organisation, or whether her role rose as high as being part of the governing structure. In support of the latter conclusion, Ms Anderson relied on the following:

(a) the fact that Ms Batmanghelidjh had founded the charity and it existed to carry out her "vision", with (so the submission went) the Board taking her lead, deferring key decisions to her and relegating themselves to reading reports, imparting advice and attempting to persuade her to allow the business to change tack;

(b) Ms Batmanghelidjh being the public face of the charity, and it being very visibly associated with her;

(c) Ms Batmanghelidjh being "central to every aspect" of its operation;

(d) the Board being in no position to challenge Ms Batmanghelidjh's clinical judgment;

(e) the Board regarding Ms Batmanghelidjh as indispensable, particularly when it came to restructuring;

(f) Ms Batmanghelidjh committing the company to transactions, particularly loans, for which she had no express authority (any implied authority making the point that she was responsible for overall, and not just day-to-day, running); and

(g) operating policies being "regularly disregarded" by Ms Batmanghelidjh without censure or consequence.

677. Counsel also noted that Ms Gregory of Hogan Lovells had commented that Ms Batmanghelidjh would "probably be treated in a similar way" to the directors in terms of exposure if liabilities were incurred with no prospect of meeting them.

Closing submissions

678. In closing submissions, the case was developed further. Ms Anderson emphasised that *Holland* in particular was not a disqualification case. With reference to the Trustees' claim to have delegated to a very material extent to Ms Batmanghelidjh, Ms Anderson relied on the following comment in the judgment of Hildyard J in *Re UKLI Ltd, Secretary of State for Business, Innovation and Skills v Chohan* [2015] BCC 755 ("*Chohan*") at [24]:

> "24. The paramount purpose of disqualification being the protection of the public from unscrupulous corporate management, it would frustrate a primary objective of the CDDA if a person who actually was responsible, or jointly responsible with others, for such management could escape disqualification by the simple expedient of never formally being appointed as a director…"

679. Ms Anderson also relied on the judgment of Lewison J in *Re Mea Corp Ltd, Secretary of State for Trade and Industry v Aviss* [2007] BCC 288 ("*Re Mea Corp*") (a case not cited in opening), which considered the concept of de facto director in a disqualification context. (I note that this case was decided at around the same time as Etherton J's decision in *Hollier*.) What Ms Anderson mainly relied on it for was two passages Lewison J cited from the judgment in *Tjolle*, set out at [83] and [84] of Lewison J's judgment, which she said were approved in *Holland*. The second of these passages is set out at [157] above. The first, at [83] of *Re Mea Corp*, was a citation from a slightly earlier passage at pp.289-290 of *Tjolle* which itself sets out a passage from the judgment of Judge Cooke in *Secretary of State for Trade and Industry v Elms* (16 January1997, unreported):

> "At the forefront of the test I think I have to go on to consider by way of further analysis both what Millett J meant by 'functions properly discharged only by a director'[3], and Mr Lloyd QC meant by 'on an equal footing'[4]. As to one it seems to me clear that this cannot be limited simply to statutory functions and to my mind it would mean and include any one or more of the following: directing others, putting it very compendiously, committing the company to major obligations, and thirdly (really I think what we are concerned with here) taking part in an equally based collective decision process at board level, i.e. at the level of a director in effect with a foot in the board room. As to Mr Lloyd's test, I think it is very much on the lines of that third test to which I have just referred. It is not, I think, in any way a question of equality of power but equality of ability to participate in the notional board room. Is he somebody who is simply advising and, as it were, withdrawing having advised, or somebody who joins the other directors, de facto or de jure, in decisions which affect the future of the company?"

680. Ms Anderson relied in particular on the references to committing the company to major obligations and equality of participation in the board room. In relation to the former in particular, I remind myself of the comment of Robert Walker LJ in *Re Kaytech*, referred to at [159] above, that the factors listed by Jacob J in *Tjolle*, which included making major decisions, are relevant factors, but the crucial issue is whether the individual had assumed the status and functions of a director. That is a similar approach to the one expressed by Lord Collins in *Holland*, albeit there outside a disqualification context (see [163] above), namely that the crucial question is whether the person "assumed the duties of a director". As to whether paragraphs [83] and [84] of *Re Mea Corp* were approved in *Holland*, paragraph [83] was referred to by Lord Hope at [32] and by Lord Walker in his dissenting judgment at [108] (who also referred to paragraph [84]), but in the context of a comment by Lewison J about the importance of focusing on what the person did. Paragraph [83] was briefly referred to again by Lord Walker at [111] in relation to the requirement that the relevant person undertook functions that could properly be discharged only by a director. There was no specific discussion of the reference to "major decisions".

681. Ms Anderson submitted that the most decisive points on the facts of this case were as follows:

    (a) Ms Batmanghelidjh founded Kids Company, was the genesis of its business model and a member of it; she was historically regarded as a director and was "in charge".

    (b) When the other defendants were appointed as trustees they, as Mr Handover said, "inherited" the business model, with Ms Batmanghelidjh remaining in

[3] *Re Hydrodan (Corby) Ltd* [1994] BCC 161 at 163.

[4] *Re Richborough Furniture Ltd* [1996] BCC 155 at 170.

her existing role and with Board meetings tending to be "Camila telling us all the answers" (see [580(h)] above).

(c) In a commercial context a wholly non-executive Board was unheard of, and if the CEO of a charity was in substance doing what could be characterised as the same job as a CEO of a commercial company then they were likely to be a director (noting that Mr Handover and Mr O'Brien had drawn some analogies between Ms Batmanghelidjh's role and that of a CEO of WH Smith or a bank).

(d) A prime example was the taking of loans, which was simply left to Ms Batmanghelidjh. The Trustees' acquiescence in this put her on an equal footing with them. It was not a day-to-day matter because the loans were high-value, could affect Kids Company's solvency and potentially put it in breach of its Cabinet Office grant. The fact that Mr Yentob said that he did approve loans from Mr Roden and Harvey McGrath simply showed Ms Batmanghelidjh operating alongside him. There was no collective decision-making or delegation and the 2014 Budget should not be construed as conferring authority on Ms Batmanghelidjh to take loans.

(e) A similar point applied in relation to negotiations with HMRC, where all that was delegated was routine payments.

(f) The main manifestation of the business model was the annual budgets. The Financial Procedures Manual (discussed below) contemplated a staged process of approval of an annual plan and then a budget submitted to fulfil it. Mr O'Brien's suggestion of a zero-based budget for 2015 ([270] and [281] above) and Ms Robinson's later suggestion of a reduced 65% budget ([296] above) are examples of how a "top-down" approach could have happened, but instead the 2014 Budget was prepared by Ms Jenkins, under Ms Batmanghelidjh's responsibility and with her involvement, and then approved by the Board with no changes of substance.

(g) Additional staff were taken on in 2013 over budget and, Ms Anderson submitted, only reported to the Finance Committee and the Board after that happened. She said that Mr Yentob accepted that Ms Batmanghelidjh decided to increase headcount in Bristol without advance Board approval. Headcount in 2013 was budgeted at 430 but by the end of the year it was 496, albeit not all attributable to Bristol.

(h) Although the Financial Procedures Manual contained procedures for the payment of debts and financial controls generally, they presupposed Kids Company's solvency and did not deal with the situation where it was insolvent or of doubtful solvency, and decisions needed to be made about priority. Leaving such matters to Ms Batmanghelidjh, as the Trustees said they did in respect of the Board meeting on 31 March 2015 (see from [595] above), was the "clearest example" that she was elevated into the governing structure, and was a reason why she should be held responsible.

(i) Ms Batmanghelidjh had editorial control over the minutes. If she wanted the minutes to say something she could and did make sure that happened,

elevating her input to that of the Trustees rather than the minutes being a true reflection of what the Trustees alone considered, thought and decided.

(j) The Board and committees did not routinely vote on matters. This was relevant to the distinction drawn in *Re Mea Corp* between someone who is simply advising, or someone who joins the other directors in decisions: Ms Batmanghelidjh was just as much a participant as the Trustees. Ms Anderson also put the question the other way, asking what decisions in the period starting September 2013 were *not* initiated by Ms Batmanghelidjh.

(k) The fact that Board was "hamstrung" in effecting change in 2015 suggested a concentration of power at the highest level in Ms Batmanghelidjh.

The corporate governance structure

682. In accordance with Arden LJ's guidance in *Smithton v Naggar* it is appropriate first to consider Kids Company's corporate governance structure.

The Articles of Association

683. Kids Company's Articles of Association provided for a "Management Committee", whose members "are the directors of the Company and as such are charitable trustees". Article 23.1 provided that:

> "The business of the Company is managed by the Management Committee… They may use all powers of the Company which are not, by the Act or by these Articles, required to be used by a general meeting of the Company…"

It was not in dispute that for the purpose of the Articles the Board was the Management Committee.

684. Article 24 conferred certain express powers on the Management Committee, in particular powers of borrowing.

685. Article 38 dealt with meetings of the Management Committee, providing for questions to be decided by a majority of votes, with the chair to have a casting vote if votes were equal. Article 41 set a quorum requirement of at least one third of the membership of the Management Committee, or a minimum of three.

686. Article 45 provided for delegation of any of the Management Committee's powers to committees consisting of one or more of its members, with the ability to co-opt other persons to serve on the relevant sub-committee. Article 47 dealt with meetings of sub-committees, among other things requiring minutes to be provided to all members of the Management Committee.

687. There is no other provision expressly permitting delegation to any director, or indeed to any other person. However, the Memorandum of Association specifically conferred power to employ and pay staff (paragraphs 4.1(c) and (l)). So it was obviously envisaged that the company would have employees. It was also expressly provided that a member of the Management Committee had to cease to be a member if he or she was employed by the company (Article 35.1).

It is clear from these provisions that delegation of management functions by the Board was possible and indeed contemplated.

Ms Batmanghelidjh's employment contract

688. Ms Batmanghelidjh's employment contract, dated 30 March 2010[5], stated that her job title was Chief Executive Officer. It described her responsibilities as follows:

> "Your duties are to provide leadership to the Charity and to take responsibility for its management and administration within the strategic and accountability frameworks established by the Board of Trustees/Directors. Working with the Board you will ensure that Kids Company fulfils its duties and responsibilities for the proper governance of the Charity and to ensure that the Board receives advice and information in a timely, thorough and appropriate manner. To work closely with the Board in ensuring the furtherance of the charitable purposes of the Charity. To ensure that all activities are carried out in accordance with the values of the Charity.
> These are the normal duties required of you. However, the nature of the organisation is such that all staff need to be flexible and all employees may be required from time to time to perform other duties to ensure the efficient running of the Kids Company.
> This post is directly accountable to the Board of Trustees/Directors."

689. It is worth noting that the trial bundle only included a full set of Board minutes from 2013 onwards. It is highly unlikely that Ms Batmanghelidjh's employment contract was entered into without specific Board approval.

The Financial Procedures Manual

690. The Financial Procedures Manual is a document the function of which was to describe "the areas of Kids Company's day-to-day operation that are the subject of special controls". It was available to all staff, who were expected to be aware of the controls. The version referred to below was a version approved at a Finance Committee meeting in December 2013. There was a slightly later version but it was not suggested that the differences were material.

691. In a "Who's who" section, there are clear references to the Trustee Board, comprising all Trustees, the Finance Committee, comprising a chairman and two other delegated members of the Trustee Board, and the "Management Team" comprising specified staff members, being the Chief Executive, the Director of Finance and Accountability, the Head of Finance and Company Secretary, six other "Directors" including directors of HR, Operations and Clinical, and a Head of Research.

692. The Manual states that the Trustee Board has the "overall responsibility" for financial planning and use of resources, responsibility for ensuring that proper

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5 The contract also stated that Ms Batmanghelidjh's period of continuous employment commenced on 1 December 1998.

procedures exist to control their use, responsibility for keeping proper accounting records and responsibility for safeguarding Kids Company's assets. (I note that similar language about "overall responsibility" for controls, accounting records and safeguarding appears in the charity's annual accounts.) The Manual also describes the delegated powers of the Finance Committee to consider audit and accounts, financial plans, management accounts, financial controls and investments.

693. The Manual goes on to state that the Chief Executive was responsible for presenting "strategic analysis, five-year and one-year aims" to the Board, from which an annual plan would be produced to reflect strategic objectives which would be approved by the Finance Committee and ratified by the Board. The plan should reflect the objective of building up reserves and other "fundamental assumptions".

694. The Manual also states that the Chief Executive was responsible for presenting annual budgets to the Finance Committee "that will allow the annual plan to be executed", with the detailed team budgets supporting it being agreed in advance by the Management Team. Budget holders within the executive team were responsible for containing expenditure within their budgets. Although the starting point was that a budget could only be varied with the prior agreement of the Finance Committee, there was a carveout where "unforeseen additional resources" became available. Furthermore, the Manual states:

> "The CEO is able to reallocate up to 10% of the total annual budget between Teams.
> Beyond 10%, or wherever there are policy implications or very significant changes to programmes, changes can only be authorised by the Finance Committee."

The Manual also noted that:

> "Changes to staff complement were agreed by the Finance Committee, normally as a result of the planning and budgeting process."

It is also clear from the Manual that pay rises and bonuses would be approved by the Finance Committee.

695. The controls set out in the Manual include references to responsibilities of other Management Team members, such as a requirement for the Director of Finance and Accountability to review significant grant agreements, and reference to the Head of Finance undertaking reviews of debtors and bad debts, and more generally being responsible for treasury management. The document also lists various other responsibilities of the Finance team, including in respect of monthly management accounts.

696. Under the terms of the Manual the Chief Executive was authorised to approve budgeted expenditure up to £20,000, capital expenditure up to £20,000, lease agreements and commitments (including research commitments) up to £20,000 per annum or £50,000 in total, and cash requests above £200. (The level of

authorisation of other senior staff was significantly lower: senior managers could for example authorise budgeted expenditure up to £1000, capital expenditure up to £1000 and cash up to £200.) Cheques over £5000 generally had to be signed by one Trustee and another specified member of staff, which in relation to one of the two accounts listed included Ms Batmanghelidjh. However, the Head of Finance was authorised to process payroll, payments to self-employed staff and PAYE in excess of these limits.

Discussion

697. It is clear from Article 23.1 that the Board, and no one else, was collectively responsible for management, subject to the express power to delegate to committees. There were two subcommittees, the Finance Committee and Governance Committee. Ms Batmanghelidjh was a member of neither, although from August 2012 she was asked to attend Finance Committee meetings (see [206] above).

698. The description of Ms Batmanghelidjh's role in her employment contract is also clear. It is worth noting the reference in it to the provision of "advice and information" to the Board (as opposed to participating in decisions) and the reference to being "directly accountable" to the Board. There are some references to working "with" the Board but I consider that this is in the context of the Board having ultimate control and responsibility for management. They are not saying that the CEO was on an equal footing to the Board. Rather, to function effectively the Board needed to have the most senior member of the executive team working with it, since that person would lead the team responsible for implementing Board decisions. The Board would also be dependent on information that the CEO was best placed to provide.

699. The Financial Procedures Manual also does not assist the Official Receiver's case. A clear distinction is drawn between the Board and the "Management Team", which includes but is not limited to the CEO. The responsibilities of the Board and Finance Committee are clear, for example the latter's responsibility in relation to budgets and its control over staff costs. The fact that the CEO had responsibility to present strategic analysis and budgets is consistent with the nature of that role. The same applies to the level of expenditure that the CEO could authorise: the existence of those limits is entirely consistent with the role being that of a senior staff member accountable to a Board which had the ultimate responsibility. The fact that the limits were significantly higher than those for other staff members is perfectly explicable by reference to the CEO role, and do not appear to be particularly high in the context of a charity of the size of Kids Company. (I deal separately with whether the Manual was adhered to and whether Ms Batmanghelidjh exceeded her delegated authority under its terms.)

700. As regards the specific requirement in the Manual for the presentation of "strategic analysis, five-year and one-year aims", Mr O'Brien explained in his affidavit that the preparation of a strategic plan was a new feature of the Manual as issued in December 2013, although Ms Batmanghelidjh had always presented plans in Trustee meetings and annual off-site meetings. As regards 2014, because the charity spent much of the year discussing the need for long-term sustainable funding with government, it would have been difficult to prepare a formal

strategic plan. This is consistent with Mr Handover's evidence referred to at [702] below.

701. In the absence of a formal one year or five year plan, what existed by way of annual plan was a so-called "Can-do" document for the year in question. The 2014 version of this document was provided to the Trustees by Ms Caldwell on 14 January 2014 for discussion at the Board meeting on 30 January, but the minutes of the meeting do not indicate that it was discussed or formally approved. It is also not apparent that it was first considered by the Finance Committee as the Manual indicates should have occurred with an annual plan, and it did not contain the required reference to the reserves policy. The Finance Committee had, however, considered the draft 2014 Budget at its meeting a day earlier (29 January) as well as in December 2013.

702. When challenged about this in cross-examination, Ms Bolton suggested that the Can-do document was likely to have been approved by the Board, but she evidently could not recall specifically doing so. That evidence was consistent with the PKF Littlejohn report, which stated that the Can-do document was produced by the senior management team and approved by the Board. I am not persuaded that this was correct at least as a formal matter, but it is more likely than not that the key elements of its content would have been covered in Board discussion. Ms Robinson thought that the document was brought to the Board. An email Ms Jenkins sent in March 2014 described the version of the document circulated in January 2014 as the "closest thing" to an overall development plan. Mr Handover commented with reference to the same document that there was no point setting longer-term objectives until the charity knew what would be forthcoming from government. But more generally I accept Mr Handover's evidence that the Board discussed not only short-term but medium and long-term goals and expectations, including for example in relation to expansion. Performance was assessed in particular through presentation of the monthly management accounts. I also accept Mr O'Brien's evidence that the detailed budget for 2014 took into account what he described as the CEO's one-year aims (a description that was consistent with the terms of the Financial Procedures Manual).

703. As already indicated, the Official Receiver relied in closing on Ms Batmanghelidjh's responsibility for and involvement in budget preparation, and the fact that the 2014 Budget did not appear to have been approved in the staged process anticipated by the Financial Procedures Manual (with an annual plan in the form envisaged by the Manual first being approved) as an indicator that she was a de facto director. I agree that the staged process contemplated by the Manual was not followed. But what is relevant is whether, as a matter of substance, what happened supports the proposition that Ms Batmanghelidjh assumed the status and functions of a director. I certainly do not agree that the fact that what passed for an annual plan, and the 2014 Budget, were put together by the executive team headed by Ms Batmanghelidjh, demonstrates this. It was to be expected that these documents would be developed by the executive team rather than simply being imposed from above. Any other approach would be unrealistic. Indeed, the 2014 Budget document lists 16 senior managers with whom the Finance team had discussed plans and expectations in order to prepare the budget, and who had budgetary responsibilities. If a budget put forward by

the executive team, based on a plan it prepared, is genuinely approved by the Board that does not demonstrate that any member of the executive team is a de facto director, but rather that the Board is prepared to agree to what is proposed. The fact that members of the Board were not willing to agree the same approach in respect of 2015 rather illustrates this.

The CEO role and the role of the Board

704. There was no dispute that it was open to the Trustees to delegate functions, subject to an irreducible obligation to exercise supervision. As Jonathan Parker J explained in *Re Barings (No. 5)* at p.489a-d, in a passage approved on appeal in *Barings CA* at [36]):

> "(i) Directors have, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors.
> (ii) Whilst directors are entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated functions.
> (iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it has been discharged, must depend on the facts of each particular case, including the director's role in the management of the company."

705. It is also worth referring to certain elements of the discussion that preceded this. At p.487 Jonathan Parker J referred to the judgment of Lord Davey in *Dovey v.Cory* [1901] AC 477, including a comment at p.492 about the ability of a director to rely on a manager "as to whose integrity, skill, and competence he had no reason for suspicion" (see further [857] and [858] below on this). He added at pp.487-488 that this did not mean that, having delegated, a director was no longer under any duty, "notwithstanding that the person to whom the function has been delegated may appear both trustworthy and capable of discharging the function" (paragraph B3). Board members "remain responsible for the delegated function or functions and will retain a residual duty of supervision and control", the precise extent of which will depend on the facts (paragraph B4).

706. Neither the label nor functions of a CEO role are, by themselves, indicators that the holder has assumed to act as a director. This is particularly so for incorporated charities, which with narrow exceptions must have Boards comprised entirely of volunteer directors. Whilst many smaller charities will have Board members who take on day-to-day management roles, larger charities, and certainly those on the scale of Kids Company, routinely have full-time paid management teams, and in reality can only function with them. A CEO can properly provide leadership of the management and operations of the charity on a day-to-day basis, and the directors can properly rely on his or her judgment, information and advice, provided that he or she is supervised and (ultimately) controlled by the Board.

707. Where directors do not have an executive role their responsibilities relate to the collective decision-making process of the Board. In order to discharge those responsibilities effectively, they must obtain sufficient knowledge and understanding of the company's operations. They will also require a mechanism to ensure that the decisions they make are implemented. In practice directors will usually be reliant on the executive team for the information they need, as well as for implementation. This will include the formulation of plans and budgets. In the absence of cause for concern they must be entitled to rely on information provided, and in normal circumstances that decisions made will either be implemented as required, or at least that reasons for not implementing them, or for any unexpected delay in doing so, will be reported back as and when appropriate. The expectation that the CEO would attend Board meetings is entirely consistent with this, and it is hardly surprising that Ms Batmanghelidjh was also expected to attend Finance Committee meetings, not least because of the significance of her fundraising work. Attendance of one or more representatives of the executive team at both Board and Board committee meetings was essential for the Board and its committees to operate effectively: their presence was necessary to answer directors' questions and to receive instructions, as well as to provide information and advice.

708. It is worth emphasising that there is nothing inherently "wrong" in a structure which includes a CEO role with the executive functions that Ms Batmanghelidjh had, contrary to the impression given in some parts of Mr Hannon's first report. The case as developed in submissions effectively recognised this, at least in part.

709. It is also worth stating that there was no evidence to support the suggestion in Mr Hannon's first report that Ms Batmanghelidjh would have been appointed as a director but for the fact that she received remuneration.

710. There is no significance in the "label" of CEO. As Arden LJ made clear in *Smithton v Naggar*, what is important is what the individual actually did, not the job title.

711. To take a specific example of Ms Batmanghelidjh's alleged role in relation to Ms Robinson rejoining the Finance Committee, I accept Ms Robinson's evidence that Ms Batmanghelidjh was not involved in it and that it instead followed the Board review already referred to that Ms Robinson had suggested and Mr Handover had led. But even if Ms Batmanghelidjh was involved, it does not necessarily follow that it would demonstrate participation in decision-making. It could be consistent with the function of providing advice to the Board.

The functions relied on by the Official Receiver

712. Turning to specific functions relied on (see [671] above), I do not consider that any of them carry material weight. The Financial Procedures Manual has already been considered. More generally, as CEO Ms Batmanghelidjh would be expected to have responsibilities of the kind listed at [671(c)]. The task of responding to the Charity Commission was also, in principle, one for the executive, and it was clear from the involvement of Mr Handover in the process that the matter was being appropriately supervised. I discuss other specific functions relied on in the following paragraphs.

HMRC

713. As regards negotiating time to pay arrangements with HMRC, this is obviously an executive function which would ordinarily be undertaken by the executive team. The evidence indicates that before she left discussions were principally undertaken by Ms Chipperfield. Thereafter Ms Jenkins was involved as well as Ms Batmanghelidjh, although as discussed at [333] above Ms Batmanghelidjh took the leading role. There is nothing remarkable in this. Dealing with HMRC is an executive function that was properly carried out by staff members. The level of involvement by Trustees once they became aware of material issues was appropriate. For example, Mr O'Brien confirmed that he would have been told about HMRC's letter dated 8 March 2013 (referred to at [318] above). Ms Tyler said that there were regular questions in meetings about the position with HMRC and whether the charity was keeping to time with its payments. I accept this. The position with HMRC, and in particular whether it was up-to-date with payments, was covered in management account information (in particular, in the "Management Accounts Summary Report" referred to below in relation to loans) and minutes indicate discussion in Trustee meetings. To take one example of this, at the Finance Committee meeting on 18 July 2013, Ms Tyler is reported as asking whether the charity was keeping to its deal with HMRC.

714. I do not agree that all that the Financial Procedures Manual delegated was routine payments to HMRC. The specific provision relied on by Ms Anderson simply stated that PAYE could be processed by the Head of Finance in amounts in excess of the authorisation limits. Elsewhere the Manual made it clear that it was the task of the Head of Finance to submit assessments to HMRC and make monthly payments, and more generally that it was the overall responsibility of the Finance team to ensure accurate and timely payment of creditors, including PAYE. My overall assessment is that the Finance team had and sought to discharge this responsibility, that Ms Batmanghelidjh got involved when major issues arose after Ms Chipperfield left, and that the Board was alerted both to major issues and more generally as to the extent to which payments were either up-to-date or overdue. In my view the Board was appropriately exercising a supervisory role.

Loans

715. Loans from supporters are not explicitly addressed in the Financial Procedures Manual. Taking out a loan of course involves taking on a commitment, and on that basis it could be said that loans in excess of £20,000 should have been authorised by the Trustees (see [696] above). It is also an exercise of the power to borrow that was expressly conferred on the Management Committee by the Articles (see [684] above). However, Ms Batmanghelidjh did not understand that the limits imposed by the Financial Procedures Manual applied to loans, and neither did the Trustees. It was also clear from the evidence that it was understood that Ms Batmanghelidjh was taking out loans from supporters, and was permitted to do so. (I also note that the loan from Mr Spiers was negotiated by Ms Chipperfield rather than by Ms Batmanghelidjh (see [361] above), albeit that Ms Batmanghelidjh had responsibility for it.)

716. For example, a minute of a Finance Committee meeting on 19 March 2014 records that Ms Batmanghelidjh "manages loans directly". As Ms Robinson

commented in her evidence, it made sense for Ms Batmanghelidjh to manage loans because they invariably came from close supporters who were already donors. Effectively, it was seen as an aspect of fundraising.

717. As recorded at [235] above, the 2014 Budget recognised that loans would need to be secured for at least the latter part of 2014. It also stated that the Trustees would need to work with Ms Batmanghelidjh to identify appropriate sources and negotiate sufficient facilities. I read this, as did Mr Yentob and Mr O'Brien when asked about it in cross-examination, as a recognition that the Trustees' assistance in identifying philanthropists willing to help with short term loans was of value. The document neither stated that the Trustees had to be involved via an approval process, nor did it confer an authority to take out loans that did not previously exist. It simply recognised that Trustees could assist with their contacts. That interpretation is also consistent with an action point in the "next steps" section of the document which reads "Trustees to identify loan options with Camila". A number of the lenders were known to Trustees, and in some cases were Trustees themselves. As regards the former, Mr Yentob for example spoke to Mr Roden about loans he made, and did in fact approve a £650,000 loan from Mr Roden in April 2014. He also confirmed in cross-examination that he was asked about loans made by Harvey McGrath and by Mr Frieda.

718. The monthly management accounts, many of which were circulated to the whole Board as well as to the Finance Committee, always included the amount of loans outstanding in the balance sheet. Further details, namely the identity of lenders and the amount each had lent, were included in a "Management Accounts Summary Report" produced for Trustees, of which I saw a number of examples. I also accept Ms Batmanghelidjh's evidence that she discussed loans informally with some Trustees, particularly if the lender was known to the Trustee in question, although I do not accept that this would have happened as frequently as she indicated.

719. Loans were also discussed at Board and committee meetings. For example, in the case of the one loan where interest was charged, it was made clear at a Finance Committee meeting (on 1 July 2013) that the loan in question should be paid back as soon as possible.

720. If not spelt out expressly, the fact that authority to take out loans was delegated was certainly implicit until the Finance Committee meetings in November 2014. The minutes of the meeting on 10 November 2014 record that outstanding loans were discussed at great length and that the committee discussed an authorisation process and borrowing limits, with Mr O'Brien asking for a list of loans and the terms to be provided. The minutes of the meeting on 21 November again record that the terms of existing loans should be shared with Trustees and that the committee discussed introducing some level of advance control, and also that Mr O'Brien asked for a draft policy note to be written with authority levels to be further discussed. The topic was also raised in the Finance Committee meeting on 18 December 2014, the minutes of which record Mr O'Brien as requesting that Trustees be made aware in advance of any future loan commitments, with an approval process to be prepared involving two Trustees giving approval by email. This followed the Board meeting on 15 December where the "key actions

agreed", as recorded in an addition to the minutes of the 26 November meeting (see [279] above), included:

> "2. All new leases, financial agreements, loans or contracts will be signed off by a Trustee.
> 3. A schedule of loans will be produced, to include date received date for repayment."
> (A note was added to the effect that this schedule had since been produced by Mr Mevada.)

721. It is the case that Ms Batmanghelidjh obtained a loan of £100,000 from one of the charity's supporters on 26 November, shortly after the two November meetings at which controls had first been proposed. However, she was at neither meeting. I also do not read those minutes as putting in place immediate controls, as opposed to proposing an approval process for further discussion. Further, I do not read the minutes of either the November or December meetings as requiring Trustee approval to the order in which loans were actually repaid, or the dates on which they were repaid. Ms Robinson's oral evidence was that this was her understanding of the position as well, and that as a general matter decisions as to which creditor to pay and when (including lenders) remained with staff, and in particular the Finance team.

722. I deal further below with the Official Receivers' case in relation to loans as developed in submissions (see from [749] below).

Negotiating with donors

723. Negotiating with donors as to the use and timing of payments is clearly an executive function associated with Ms Batmanghelidjh's fundraising role. It involved no breach of procedures. Ms Batmanghelidjh clearly had delegated authority to generate funds from fundraising.

Commissioning research

724. Commissioning research was consistent with the charity's objects and was contemplated by the Financial Procedures Manual. Ms Anderson cross-examined Ms Batmanghelidjh about the commissioning of two pieces of research, from the LSE and the University of Cambridge (discussed at [639] above), as examples of instances where it was said that research was commissioned without evidence of Trustee approval, in breach of the requirement in the Financial Procedures Manual for approval to be obtained for research commitments exceeding £20,000 (see paragraph [696] above, and assuming for these purposes that the same authority limits applied before the December 2013 version of that Manual was adopted). In both cases Ms Batmanghelidjh believed that the research had been discussed with the Trustees, even though this is not evident from the available minutes of meetings. However, the Cambridge contract was originally entered into in 2010, most of the Board minutes for which were not in evidence. The LSE contract was entered into in February 2013 with an initial value of around £43,000 (which was invoiced in July 2013), so it would appear to have required approval.

725. Given that minutes of Board meetings in particular tended to be brief, it is possible that a proposal to commission research was discussed and not minuted. Moreover, I did not read the Financial Procedures Manual as necessarily requiring a collective decision by Trustees, rather than approval from a Trustee. This reading is consistent with the way in which substantial cheques and invoices were dealt with. Cheque requests and invoices in excess of £20,000 were subject to Trustee approval, but this was not taken to mean collective approval in a meeting, at least where the expenditure had been budgeted for. If collective approval was required there would no doubt have been numerous references to such approvals in Board minutes. Rather, my understanding of the evidence is that the approval of an individual Trustee would typically have been sought, and that this was the way in which the controls were understood and operated. This conclusion is consistent with the way in which additional controls were imposed in December 2014: see [279] above. Furthermore, the detail included in monthly management accounts and budgets was such that it is unlikely that the commitments would not have become apparent. There is no evidence of any concern or objection being raised to the commissioning of any research.

726. The 2013 Budget, approved by the Board in May 2013, stated that in 2012 Kids Company spent £333,000 on external research, and that the charity expected the 2013 figure to be in line with that. My overall reading of the Financial Procedures Manual is that expenditure within budget, or which did not vary materially from the budgeted level, did not need the approval of the Finance Committee (or therefore, by extension, the Board): see in particular the passages set out at [694] above. Rather, commitments in excess of the specified limits but within budget required the authorisation of a Trustee.

Holding out

727. I did not find any of the documents shown to me in support of this allegation to carry material weight.

728. The only meaningful example of Ms Batmanghelidjh signing herself solely as director that was at all close in time to the period in dispute was the lease of Arches II, entered into in 2010. This was a document intended to be executed as a deed, and as such it should have been signed by two directors or by a director and secretary (s 44 Companies Act 2006). It was evidently a document drafted by the landlord's solicitors. Ms Batmanghelidjh signed next to the pre-printed word "Director", whereas Mr Mevada (who was in fact the secretary at the time) signed as "Director/Secretary" without deleting the word "Director". Ms Batmanghelidjh should not have signed as she did, but it is an isolated example of something which might have been expected to be picked up by the solicitors, and indeed Mr Mevada (a qualified accountant), as an error. There is no indication that anyone was actually misled.

729. In most of the other documents relied on Ms Batmanghelidjh signed herself as Chief Executive, which was simply an accurate statement of her role. Importantly, it is clear that this was how she described herself in her own letters and emails during the period in dispute. Using that description does not amount to the company holding out Ms Batmanghelidjh as a director.

730. There were a couple of much older letters relating to individual clients where Ms Batmanghelidjh signed herself "Director – Kids Company". However, they date from September 2001 and September 2004. There were also two letters dating from October 2000 and January 2004 in which other staff members referred to Ms Batmanghelidjh as "Director" of Kids Company. These isolated examples, drawn from a very extensive review of client files, are simply too far removed from the period in question, and too limited, to carry weight. At most they indicate that at one stage Ms Batmanghelidjh did describe herself as a director, but by the period in question it is clear that this had been corrected and she was using the job title in her employment contract. I also accept Ms Batmanghelidjh's evidence that when she used the term director she did not understand the legal significance of the word. She thought she was saying that she was an executive officer working under the Trustees.

731. There was one example of acceptance of a government grant offer made in February 2014 where Ms Batmanghelidjh signed next to the pre-printed words "Director/Chief Executive" without deleting the former word. There was a similar unsigned version relating to the grant offered on 31 March 2015. (It is worth noting that Ms Tyler also signed next to the word "Chair", without clarifying that she was not Chair of the Trustees.) In my view the non-deletion of the word "Director" is not material.

The case as developed: Discussion

732. As already indicated, the Official Receiver's case that Ms Batmanghelidjh was a de facto director was developed in written and oral submissions. Mr Butler's primary submission was that the Official Receiver's case should be confined to the case put in his report (to which Mr Butler had addressed his written opening) and not the case as developed.

733. There is validity in Mr Butler's criticisms. A disqualification order involves penal consequences, and the defendant must know and have proper notice of the case they have to meet (*Re Lo-Line Electric Motors Ltd* [1988] (Ch) 477 at pp.486-487 per Sir Nicholas Browne-Wilkinson VC, discussed further by Dillon LJ in *Re Sevenoaks Stationers (Retail) Ltd* [1991] (Ch) 164 at pp.176-177). As Lewison J said in *Secretary of State for Trade and Industry v Goldberg* [2003] EWHC 2843 at [51], the substance of the case that the defendant is required to meet must be set out. The defendant should be able to ascertain with clarity exactly what the allegations are and on what evidence the applicant intends to rely (*Re Finelist* [2004] BCC 877 at [16] to [21]). In principle, I do not see why these comments should not apply to the question of whether an individual is a director for the purposes of the disqualification rules, as they apply to the question of unfitness. Both are essential requirements for a disqualification order.

734. However, as I explained in the ruling referred to at [60] above, the court has a discretion to allow additional allegations or a change in the nature of allegations provided that it can be done without injustice. I have concluded that, given the length of the trial and the opportunity that Ms Batmanghelidjh's legal team have now had to respond, it is not unjust to Ms Batmanghelidjh to take account of the case as developed. This is subject to the caveats discussed below in respect of one particular issue relating to taking on staff, which was raised only in closing.

735. Although in my view it makes no difference to the final result, given Mr Butler's criticisms I have dealt with additional points raised in submissions separately, in the following paragraphs. However, I should note that I accept that the points about negotiating loans and deciding on the priority for their repayment, and the centrality of Ms Batmanghelidjh's role, were raised to some extent in Mr Hannon's first report.

Centrality of role

736. The case as developed relied on the centrality of Ms Batmanghelidjh's role at the charity, with her being the public face and, it was said, the charity existing to carry out her "vision". She was the founder and genesis of the business model.

737. I do not see that the fact that Ms Batmanghelidjh was the public face of the charity is itself either determinative or of significant weight, unless it involved her role being one that was directorial in nature. In order to determine that, it is necessary to investigate what actually happened, rather than what public perceptions might have been.

738. Ms Batmanghelidjh was obviously heavily involved in founding the charity, although I accept her evidence that the "model" adopted, meaning in this context the nature of the services provided and the self-referral element, was the result of a team effort with staff members, and that it evolved with significant input from the young people to whom services were provided. But for similar reasons that does not itself make Ms Batmanghelidjh a de facto director.

739. A key question is whether, as the Official Receiver alleges, these elements in fact led to the Board allowing Ms Batmanghelidjh to take the lead, deferring key decisions to her and relegating themselves to the role of attempting to persuade her rather than exercising control, with her "telling us all the answers". I have already discussed the corporate governance structure in some detail and there is a separate section on the more general allegation of dominance from [579] above (also discussed further below). Having regard to my conclusions on those aspects, and on the basis of my findings of fact overall, I am not satisfied that this allegation is made out.

740. In my assessment Ms Batmanghelidjh accepted throughout that the Trustees were the ultimate decision makers (as to the relevance of this, see [789] below). That did not prevent Ms Batmanghelidjh seeking to persuade them to make, or not to make, particular decisions, or at times (particularly in the final few months) chafing against the exercise of the Board's authority, but she recognised and accepted that, ultimately, she needed to abide by instructions from the Trustees.

741. The Trustees were also clear that it was they, not Ms Batmanghelidjh, who were the ultimate decision makers, and carried responsibility accordingly. This is evident from their actions at the time of the events in question. This is important because Ms Batmanghelidjh could not have unilaterally assumed the role of director: the Trustees would need to have allowed her to do so.

742. The identity and qualities of the individual Trustees are highly relevant. Each of the Trustee defendants has an impressive CV and has held responsible positions,

including some who have held very significant leadership roles in large organisations. It is inherently unlikely that such a group of individuals would place themselves in a position where they were in such thrall to Ms Batmanghelidjh that they did not exercise appropriate supervision and control. That inherent unlikelihood was reinforced by their oral evidence.

743. Trustees had regular meetings at which searching questions were properly asked of the executive team, including in particular Ms Batmanghelidjh. I am satisfied that there was a fuller discussion of matters than most of the minutes indicated. Budgets, which were the main means by which the Trustees exercised control over expenditure, were discussed and approved. The level of written information provided to Trustees, in particular the monthly management accounts packs and also the detailed risk register information (which was considered by the Governance Committee on a regular basis), is notable. There is and can be no suggestion that meetings were too infrequent. Decisions were taken, action points were noted, and there was appropriate follow up. Ms Batmanghelidjh undoubtedly exercised significant influence and was heavily consulted, and for most of the period in question the Trustees were sufficiently content with what she was doing not to require a change of direction, but it does not follow that she was either the ultimate decision maker or that she had parity with the Trustees in that respect.

744. As to Ms Batmanghelidjh having been "central" to the charity's operations, centrality would be typical of an effective and committed CEO. Among other things it ignores the fact that the Trustees were non-executives and that it was Ms Batmanghelidjh who, as the title suggests, was in charge of the charity's executive operations. I do not agree with the suggestion in closing that any CEO of a charity doing a role that can be compared to that of a CEO of a commercial company is likely to be a de facto director. Whilst it is no doubt the case that the CEO of a commercial company would pretty much invariably be on the Board, the roles of CEO and director are distinct. At Board level, directors have the collective role of supervision and control described by Jonathan Parker J in *Re Barings (No. 5)*. When carrying out executive functions as a CEO the individual in question is carrying out functions delegated by the Board, and is subject to supervision and control by the Board as a whole. This is the case even if the extent of delegated authority is significant.

745. It is relevant that Ms Batmanghelidjh did not attend meetings of the Governance Committee and it seems only reluctantly attended meetings of the Finance Committee when requested. At meetings at which she was not present, the executive team was represented by other senior staff, who received instructions directly from Trustees. It was not the case that everything was filtered through Ms Batmanghelidjh.

Clinical judgment

746. The Official Receiver also relied on the Board not being in a position to challenge Ms Batmanghelidjh's clinical judgment. I do not consider this point to carry significant weight. The Board, in particular via the Finance Committee, exercised budgetary control and regularly scrutinised expenditure. Expenditure on clients, in particular the "Top 25", was regularly discussed (see from [546] above). As

already explained, there is no criticism of any individual item of client expenditure. During late 2014 and the first part of 2015 the Trustees were taking active steps to recruit a further trustee with a clinical specialism (as well as another trustee with a background in finance). That reflected a wish to ensure that the Board did the best possible job, and in order to do so could benefit from a range of skills that included clinical expertise, but it did not mean that the absence of a clinical specialist meant that Ms Batmanghelidjh rose up in the hierarchy to fill a gap.

Ms Batmanghelidjh being "indispensable"

747. As to the Official Receiver's reliance on the Board regarding Ms Batmanghelidjh as "indispensable" and the suggestion that the Board was "hamstrung" in effecting change in 2015, it was obviously the case that she was a key member of staff. In particular, she had what Ms Lloyd said was a "phenomenal" fundraising ability. Ms Batmanghelidjh is and was passionate about the young people the charity existed to serve, and has and had strong views about them being let down by society and social services. The departure of such an obviously visible face from the charity would undoubtedly be destabilising both among staff and clients and in terms of external perception.

748. I have discussed at [624] and following the Official Receiver's criticism of the failure to change Ms Batmanghelidjh's role at an earlier stage. The points made there are relevant. There can be no criticism of the Trustees that in the circumstances it was sensible, and indeed essential, to tread very carefully. And it is also important to note that it was not just the Trustees who held this view. Mr Roden regarded Ms Batmanghelidjh's continued involvement as a key element of the restructuring. But it does not follow that she participated in the corporate governance structure on an equal footing with the directors.

Implied authority, in particular for loans, indicating overall responsibility

749. The Official Receiver also claimed that any implied authority that Ms Batmanghelidjh had to commit Kids Company to transactions, in particular loans, made the point that she was responsible for the overall and not just day-to-day running of the charity. Loans are discussed in some detail above. My response to this particular point is that Ms Batmanghelidjh was indeed responsible for the operations of the charity, but this was under the delegated authority of the Board and subject to its supervision. Subject to the requirement for overall supervision, it was up to the Board to determine the extent of delegation. In relation to loans, the Board would in principle have been entitled to permit the executive team to arrange loans from supporters, and supervise this as the Finance Committee did through scrutiny of the management accounts. When the Board became uncomfortable with the level of loans, additional controls were put in place. Those additional controls also applied to other commitments.

750. I do not agree with Ms Anderson's submission in closing that the Trustees' acquiescence in Ms Batmanghelidjh taking loans put her on an equal footing with the Trustees. As the aggregate scale of the loans grew it started to become a major issue, but this was a reflection of the wider cash flow issues affecting the charity. Whether the loans themselves adversely affected solvency as Ms Anderson

suggested is rather questionable, since the loans were invariably taken out to meet other more pressing creditors and were taken from supporters who did not, in fact, take steps to insist on repayment.

751. I am also not convinced by the suggestion made at trial that the loans potentially put Kids Company in breach of its Cabinet Office grants. The Official Receiver relied on a reference in the PKF Littlejohn report to a requirement to obtain the consent of the Secretary of State to taking certain actions, including borrowing, which "relate to any of the conditions of this Grant Funding Agreement, or have any impact on your ability to deliver the funded activities set out in the Grant Funding Agreement". No evidence was adduced to the effect that taking on loans in fact related to any of the conditions or had any impact on delivery, and the defendants had no opportunity to adduce evidence in response to the allegation. If anything, the fact that the loans allowed Kids Company to meet pressing obligations, including payroll, rather indicates that they assisted the charity in delivery of the relevant activities.

752. Overall I am not persuaded that the delegation of power to take loans from supporters indicates that Ms Batmanghelidjh was being placed on an equal footing. The delegation reflected Ms Batmanghelidjh's fundraising role. (In contrast, for example, there was no question that the level of the approved overdraft was a question for the Board.) The level of loans, and the identity of lenders, was subject to regular scrutiny. The delegated power was withdrawn in December 2014 by a decision of the Trustees, demonstrating an exercise of control.

Taking on additional staff

753. In closing submissions the Official Receiver relied on additional staff having been taken on in 2013 without (he said) advance approval as being an indicator of de facto director status. Headcount, including self-employed staff, was 496 by the end of the year, as compared to the budgeted 430.

754. Mr Hannon's first report does refer to increasing headcount during 2013, but in connection with an overall growth in expenditure and not in relation to any allegation that Ms Batmanghelidjh increased staff without Board approval. The allegation also did not feature either in opening submissions or (subject to what is discussed below) in cross-examination. Indeed, when it was raised in closing submissions I had to check that counsel was intending to refer to 2013 rather than (as I assumed) 2012, because the focus during cross-examination had been on increases in staff during 2012: see the findings from [201] above. Mr Butler also failed to pick up that 2013 rather than 2012 was being referred to, and I had to ask for additional submissions from him to address the point after his oral closing submissions. In those additional written submissions he made clear that he considered that it was a new issue which was unfairly raised, pointed out that it was for the Official Receiver to prove it rather than for Ms Batmanghelidjh to disprove it, and that the allegation as put was only by reference to a Finance Committee minute in July 2013 (see below), at which point the management accounts reviewed showed staff costs under budget. He submitted that the point was not put to Ms Batmanghelidjh and that there had been no impediment to

putting the point fairly and squarely to her over the course of a lengthy cross-examination.

755. The 2013 Budget was approved by the Board on 7 May 2013. The management accounts for December 2013 showed actual expenditure on staff costs for the year of around £15.5m, as compared to a budgeted £15m, about a 3% increase. The full year headcount figures as shown in those accounts, which had a per month breakdown, showed full-time equivalent staff numbers increasing as follows: 409 in January, 422 in March, 441 in April, 450 in May, 466 in June, 472 in July and 493 in September. (These are month-end figures, and I have set out a selection rather than the figures for each month. It is also worth noting that incorrect figures are stated in Mr Hannon's first report at paragraph 325: the figures stated are in fact taken from 2012 and are significantly lower. Incomplete but correct figures for part of the year are stated at paragraph 233.)

756. Ms Anderson's written and oral closing submissions, on the basis of which the defendants made their closing submissions, referred in support of the submission about lack of approval to the minutes of a Finance Committee meeting on 1 July 2013 and a comment by Mr Yentob in cross-examination. At that meeting the Finance Committee considered the management accounts for May 2013. Those in fact showed staff costs under budget by around £200,000. However, the summary report provided by Mr Mevada with the management accounts gave the headcount figure at the end of June, that is 466 as against the budgeted 430. At the meeting Mr O'Brien is recorded as voicing a concern that staff numbers were higher than budget, with Ms Batmanghelidjh responding that people were leaving, that she wanted to reduce self-employed numbers, but the charity would have "slightly more staff than expected because the Bristol children are more disturbed than we thought". She is also reported as saying that Bristol would provide more money for this. There are action points asking Mr Mevada to provide a breakdown of the extra people and an analysis of income and expenditure changes at Bristol, and for Mr Stones (who was by then head of HR, having joined in April 2013) to join future Finance Committee meetings. These action points obviously reflect requests from Trustees for additional information to support what Ms Batmanghelidjh was saying.

757. In reply on the final day of the trial Ms Anderson also referred to a number of other sets of minutes of meetings during 2013 at which staff increases were discussed. She submitted that the staff increases in Bristol provided a very clear example of a critical part of the case, namely the demand led model. She submitted that the minutes showed that the Board was kept informed of the increases, but with the exception of a decision to appoint a clinical director in Bristol there was no record that advance approval was given.

758. I will summarise my review of all the evidence relied on in relation to this issue before making comments on the conclusions I draw, including as to fairness.

759. The Board minutes of the 7 May meeting that approved the 2013 Budget state that it was based on actual figures for the first quarter of 2013, but added a comment that staff costs had increased due to the opening of the Bristol sites. The minutes of the Finance Committee meeting on 23 May record Mr O'Brien querying why the charity had gone over budget on staff numbers, and a response

by Ms Batmanghelidjh referring to a recruitment drive in Bristol to meet the huge demand. Ms Tyler commented in her affidavit that she considered the explanation to be reasonable. The subject came up again at the June Governance Committee meeting, with Mr Stones noting the significant increase in staffing and an action point being recorded for Ms Tyler to review the increase at the next Finance Committee meeting. This was the meeting on 1 July to which I have already referred.

760. There was a further Finance Committee meeting on 18 July at which staff costs were again discussed, both as a separate topic and in connection with the income and expenditure forecast. There was an action point for Mr Stones to prepare a paper on the HR position and an "action plan", and a note that he was taking the pressure off Ms Batmanghelidjh because she was content for him to interview staff without her. The Governance Committee meeting on 23 July includes what was clearly a detailed report from Mr Stones covering among other things starters and leavers, with a comment (apparently from him) that recruitment was slowing down but there was a need to make sure that staff costs were in line with budget, which was not yet the case. It is at this meeting that the need for a clinical director at Bristol was discussed, and there is an action point for Mr Kerman to pursue that.

761. The minutes of the Board meeting on 25 July refer to the increase in staff "due to the Bristol replication" and to the level of need having been underplayed by the local authority. At the Board meeting on 23 September Ms Batmanghelidjh is recorded as stating that the charity was only taking on staff where another leaves, except in the case of Bristol "where the staff increase <u>was agreed</u> when it was discovered that the young people there had been significantly more traumatised than anticipated" (emphasis added), adding that the work allowed Kids Company to access a proposed lottery grant and also that "for safety and good outcomes the right staffing levels were needed". There is an action point for Mr Stones and Ms Batmanghelidjh to provide Trustees with a breakdown of staff, highlighting which related to Bristol. There was clearly a discussion of the tension between the Trustees' responsibility for good governance on the financial side, and the issue of clinical safety. Ms Atkinson is noted as saying that Ms Batmanghelidjh had done "an amazing job in a very difficult situation".

762. At the final Board meeting for the year, on 28 November 2013, the overall financial position was discussed and reported to be in line with budget. There is no specific discussion of staff, although at the Finance Committee meeting two days earlier staff costs were reported as over budget by £75,000.

763. Ms Anderson did not refer to the Finance Committee meeting on 17 December 2013, but that is also relevant. The minutes record that Kids Company was targeted to break even, and Mr O'Brien as acknowledging that Ms Batmanghelidjh had "managed to bring in the funding required for Kids Company as well as clearing the deficit for the year 2013". Staff headcount was discussed, noting that there had been no increase in November. It was at this meeting that the Financial Procedures Manual was discussed, with members of the committee agreeing to review and approve it by email. Mr Handover is reported as highlighting the authorisation schedule, noting that Trustees were required to authorise expenditure over £20,000 "and any staffing costs beyond budget". The

draft 2014 Budget was also discussed, including the staffing requirement, and the minutes record the Trustees as having requested that the staff full-time equivalent number be increased in the budget to allow Ms Batmanghelidjh "a degree of flexibility before returning to request authorisation from Trustees for future staff increases".

764. Mr Bompas also referred me to a paper considered by the Governance Committee at its meeting on 19 March 2014, where a specific request was made for permission to recruit for Bristol roles not included in the 2014 Budget. Obviously this paper does not relate to 2013 but it is relevant as evidencing a process that was gone through on that occasion. The paper states that both the HR and Finance Directors had reviewed the proposal and supported the case subject to certain conditions, including fixed term contracts and a review at three and six months. Headcount was considered further at the Finance Committee meeting on the same day and the 2014 Budget was agreed by the Board a few days later.

765. As to whether Mr Yentob accepted in cross-examination that Ms Batmanghelidjh increased headcount in Bristol without advance approval, that is not fully supported by the transcripts. There were two references to the issue of staffing in Bristol, on days 28 and 29. On day 28 the subject came up in connection with the PKF Littlejohn report, which referred to Bristol and also included a statement in the context of budgeting that new appointments were approved in advance. When asked whether the latter statement was correct Mr Yentob confirmed that the matter would have been brought to either the Finance Committee or the Trustees "if they went significantly beyond what was in the budget". He confirmed that he thought that any significant increase would have been approved, adding that he knew there were issues in 2014 because of requirements in Bristol and elsewhere, but was not quite sure whether there was approval in advance in respect of that. He commented that safeguarding was a critical issue, and referred to issues of child abuse in Bristol. He then made what appeared to be more general comments, not necessarily limited to 2014, about staffing issues and not being sure whether in certain cases the Board was informed about problems immediately. He also pointed out that it was the job of the executive team to bring matters to the Board's attention, and as soon as Trustees were alerted they would try to address the issue. When pressed about what the PKF Littlejohn report said he stated that "by and large" he thought the Board did control new appointments, but would need clarification of exactly how the executive team and the Trustees interacted on the issue.

766. On day 29, with reference to a passage in Mr Yentob's affidavit referring to the report at the Board meeting on 25 July 2013 that the level of need in Bristol was underplayed, he was asked whether he accepted that the level of statutory funding for Bristol was only £600,000, and responded as follows:

> "A. It's true at that stage. Well, if I may just, again, provide some context here. Bristol were in need of our coming. What we discovered, or what Camila discovered, as she was there, that one of the reasons for their problems was the skill set of the staff and that they were understaffed. That safeguarding issue for Kids Company has been absolutely crucial, so having got there and found that out, she was concerned. And there was, during this

> year, a case of sexual abuse of children, which Kids Company was very much involved in disclosing, and this wouldn't have been done if we didn't have enough staff to talk to the children privately, to go into their family homes. So the Bristol work was very crucial, but I do accept that it did mean more staffing and that the question of what timing it was in which we had this conversation with Camila and whether she had committed in advance is an issue which is fairly made.
> Q. All right. I think you accept therefore that ––
> A. Yes.
> Q. –– what happened, and I think you accept that this wasn't necessarily something that the board approved in advance, was that Ms Batmanghelidjh assessed the need to be greater than what you had –– the 600 ––
> A. Correct, that's it.
> Q. And decided to take on more people to fulfil that need?
> A. Correct."

767. I do not read this as Mr Yentob accepting that the Board did not approve the appointments in advance. He did confirm that the financial commitment was greater than £600,000 and accepted that the Board did not *necessarily* agree staff increases in advance. This was consistent with the evidence he gave the day before.

768. Ms Robinson was asked some questions about increased staffing, but was not specifically asked whether Board approval was given in advance of staff increases in 2013. She was asked about the continued impact of staff taken on in 2012 and not got rid of. She also referred to the level of need found in Bristol and, when challenged about it as an example of the charity being demand led, she accepted that the charity was demand led in the sense that if there was not a need for what it was doing then it would not have existed, but said that it was an example of the charity taking responsible action to ensure that the Bristol contract was correctly resourced.

769. Ms Batmanghelidjh was also asked about Bristol. However, she was not asked about Board approval of staff increases in 2013. She was asked more generally on day 14 about the 2013 Budget and the financial burden of the additional £400,000 that needed to be raised (see [193] above). This moved on to a more general discussion about the financial burden of increased staff in which she stated "we couldn't recruit staff unless the trustees approved", noting that the Finance Committee was given a very detailed breakdown.

770. I have set out the evidence given at trial that might be regarded as relevant to this issue in detail because of the way in which the allegation about failure to approve staff increases in 2013 was put for the first time in closing. I have to say that I do not think that it was fair to raise it in that way as an issue relevant to whether Ms Batmanghelidjh was a de facto director. The allegation was not put to her, nor was it clearly put to any of the Trustees, and it seems to have derived from a candid volunteering by Mr Yentob that he was unsure whether headcount increases were always agreed in advance. I also have to take account of the fact that Mr Yentob was neither on the Finance Committee nor the Governance

Committee, at which staffing matters and the financial commitment that increased staffing entailed were discussed in most detail. In that context, I note that in an email sent by Mr O'Brien on 8 March 2015, in connection with the Sunday Times article published on that day, he referred to the growth in staff costs from 2013 to 2014 as being largely down to the Bristol contract, stated "we have always monitored and discussed the growth in staff costs and discussed it frequently, and occasionally heatedly, in trustee meetings", and suggested making the point in any rebuttal that any growth in staff costs had been directed at dealing with growing demand.

771. The Official Receiver made no reference to the comment in the minutes of the 23 September Board meeting that the staff increase "was agreed". That is near contemporaneous evidence that contradicts his case on this point, in minutes that would have been approved by the Trustees. I have also referred above to a comment by Ms Batmanghelidjh in cross-examination that staff increases needed to be approved.

772. Also relevant is the fact that the Financial Procedures Manual in the form available at trial was only approved in December 2013, and the fact that Mr Handover specifically flagged at the meeting that discussed it that staffing increases beyond budget needed to be approved. If that had not been the case before, the paper presented to the Governance Committee in March 2014 provides clear evidence that it was the case afterwards. There was no evidence as to what any earlier version of the Financial Procedures Manual required, and for example whether approval for any staff increase beyond budget was needed or whether there was some different provision, such as approval for material increases above budget. (Compare for example the reference to 10% variance at [694] above, noting that overall staff costs for 2013 were around 3% over budget whilst overall staff numbers ended up by about 15% on a full-time equivalent basis, but this included self-employed staff who would generally be regarded as easier to get rid of.)

773. A further highly relevant point is the role of Mr Stones. He clearly had some budgetary responsibilities in respect of staff as head of HR, was reporting on the matter to the Governance Committee, and was himself interviewing potential recruits. He provided no evidence on the issue and, because it was raised so late, there was no opportunity for any of the defendants to cross-examine him on the question. Ms Chipperfield, who was clearly heavily involved with the Bristol project until she left in July 2013, was also not interviewed and obviously gave no evidence.

774. Safeguarding requirements in Bristol, and elsewhere, were an operational matter which the executive team had to address. Mr Stones as well as Ms Batmanghelidjh (and Ms Chipperfield until she left) were clearly heavily involved. The minutes of Board and committee meetings, together with the content of the management account packs, show that the Trustees were at least kept informed throughout and, I conclude, performed a supervisory role.

775. Overall, and taking account of the fact that the issue was not flagged to the defendants, addressed in the Official Receiver's own evidence or squarely put in cross-examination, and taking account of the content of the Board minute of the

meeting on 23 September 2013, I conclude that the Official Receiver has not discharged the burden of demonstrating either that staff increases in 2013 were not approved in advance, or indeed that at the time they were required to be so approved. Even if that burden had been discharged, I am not persuaded that it would be a clear indicator that Ms Batmanghelidjh was operating on an equal footing with the Board, rather than simply that she and other members of the executive team wrongly exceeded the delegated authority they had been given on this particular occasion for what they obviously viewed as strong operational reasons.

Deciding priority of payment

776. My findings in respect of the loans repaid in April 2015 are set out from [595] above. I conclude that the Trustees took what they regarded as the most significant decisions about repayment of loans, but left other decisions, including as to timing, to the executive team, and not specifically to Ms Batmanghelidjh. Ms Batmanghelidjh was not asked about this in cross-examination, despite a statement in her second affidavit that she could not recall making, and had not made, any decisions about whom to repay. I did see email evidence of Ms Batmanghelidjh's involvement in relation to two of the repayments, relating to Ms Dellal and ICAP, both of which repayments I have concluded were discussed by the Trustees. An email Ms Batmanghelidjh sent to Ms Dellal on 6 April 2015 refers to receipt of funds enabling her to be repaid in full, and the way the email is expressed indicates that it was Ms Batmanghelidjh's wish to repay her. In relation to ICAP there was an email from Ms Hamilton to Mr Mevada on 23 January 2015 in which Ms Hamilton stated "We clearly have to pay the loan back". A similar message was reflected in an email from Mr Mevada to Mr Handover on 6 April 2015, reporting a conversation between Ms Batmanghelidjh and Mr Yentob in which she confirmed that ICAP needed to be repaid because they were chasing and would be donating the same amount.

777. In the circumstances, whilst given the charity's very difficult financial situation it would have been preferable for the Trustees to have discussed the priority of repayment of loans and payment of other creditors in more detail than appears to have been the case, I do not agree that it is an example, let alone the clearest example, of elevating Ms Batmanghelidjh to the level of the Trustees. The Trustees took responsibility for determining that some lenders regarded as significant to the charity's future should be repaid, and it was they who were also responsible for leaving other decisions in relation to creditors to the executive team, and not specifically to Ms Batmanghelidjh.

Minutes

778. The Official Receiver relied on what he said was Ms Batmanghelidjh's editorial control of the minutes, such that if she wanted them to say something she could make sure that happened, rather than them simply being a reflection of what the Trustees considered, thought and decided. I disagree.

779. My detailed findings about Ms Batmanghelidjh's role in relation to minutes are set out from [653] above. As I conclude there, although Board minutes in particular tended to reflect Ms Batmanghelidjh's influence, they were subject to

approval by the Trustees, and changes were made when they required them. It would also be unrealistic for the minutes of meetings which Ms Batmanghelidjh attended and reported not to reflect key elements of what she said.

Operating policies being disregarded

780. The Official Receiver relied on operating policies being "regularly disregarded" by Ms Batmanghelidjh without censure. Overall, I do not think that this is a fair description. There were clearly instances where Ms Batmanghelidjh was insubordinate, but there were also plenty of examples of Trustees questioning Ms Batmanghelidjh's actions and seeking to ensure that controls were adhered to. The Trustees did not simply acquiesce. They obviously recognised that care and some sensitivity was required in dealing with Ms Batmanghelidjh, but that is far from atypical in relation to key members of an organisation. It did not prevent robust challenge, and the imposition of controls, when they considered it to be necessary.

781. Examples of controls insisted on included recruitment freezes, controls over loans, controls over expenditure, insistence that the charity's headquarters was not moved to Ms Batmanghelidjh's preferred location of County Hall, and ultimately Ms Batmanghelidjh's agreement to a significant restructuring under which she stood down as CEO. Ms Batmanghelidjh was resistant but the Board did exert its authority, effectively stripping her of the delegated authority previously entrusted.

Did Ms Batmanghelidjh join in decisions?

782. As already mentioned, the Official Receiver relied in closing on *Re Mea Corp* and the distinction between simply advising, and withdrawing having done so, and joining in decisions. It is convenient to consider with this the impact of my general findings on the question of dominance, at [579] to [594] above.

783. I agree that the minutes of meetings do not indicate that the Board or committees routinely voted in a formal sense. That does not of itself demonstrate that Ms Batmanghelidjh joined in decisions, as opposed to reporting and then allowing the Trustees to reach decisions. Furthermore, the fact that in many cases the Trustees appear to have accepted what Ms Batmanghelidjh said, or not insisted on a change of tack, does not by itself determine that she was joining in decisions. For example, if staff numbers had been increased without advance approval, there would have been at least two decisions open to the Board, namely either to note the reasons for the increase, accept it and monitor it, or alternatively to reach a conclusion that it was not acceptable and that further steps needed to be taken, such as a recruitment freeze or headcount reduction. The latter is a clear indicator of an exercise of control and would provide some positive support for the proposition that Ms Batmanghelidjh was not participating in decisions (although even that is subject to the possibility that she was taking part but was outvoted), but the former does not itself demonstrate that Ms Batmanghelidjh was operating on an equal footing by joining in decisions. It is consistent with the Trustees exercising a supervisory role and concluding that they were content with what the executive team was doing. I note that Trustees were not asked exactly how decisions were reached at meetings.

784. My findings on the question of dominance do demonstrate that Ms Batmanghelidjh was making the majority of the decisions (see [588] above), but that this reflected the significant level of delegated authority she had. There was a desire for the Board to get more involved in the development of future strategy rather than the focus being on reporting, although as Mr Webster rightly commented it would be expected that plans would first be developed by the executive team ([586] above). However, it is also clear that from December 2014 the Board regularly asserted its authority and clearly overrode Ms Batmanghelidjh's wishes on a number of occasions. It was not easy and Ms Batmanghelidjh often pushed back (as illustrated for example from the frustration evident in Ms Robinson's email of 25 March, referred to at [300] above), but the Trustees persisted. Examples already touched on include insisting on curbs in expenditure and not taking on additional loans, rejecting Ms Batmanghelidjh's recommendation that the location of the company's headquarters be moved to her preferred location at County Hall, and ultimately insisting on a significant restructuring plan and a radical change of role for Ms Batmanghelidjh. Other more minor examples would include the settlement reached with Ms Caldwell (to which Ms Batmanghelidjh was strongly opposed), refusal of a requested salary increase for a senior staff member, and insistence on removal of a former headteacher following the meeting with staff on 20 January 2015. Before December 2014 there are also indications of the exercise of control, most significantly in the annual budgeting process, which was the main control on the company's level of activity, but also other matters. A few examples would be the approval of the expansion to Bristol (to which I would add other expansions to different centres in London and elsewhere, there being no suggestion that these strategic decisions were not approved at Board level), the strengthening of the senior management team (a process in which the Trustees were heavily involved), an insistence on headcount freezes, decisions about pay rises and a decision not to renew Ms Chipperfield's fixed term contract in 2013, despite Ms Batmanghelidjh's preference for her to stay.

Conclusions on the de facto director allegation

785. Overall, I am not persuaded that the Official Receiver has established that Ms Batmanghelidjh was a de facto director of Kids Company. I am confident that this is the case by reference to the case as put in the Official Receiver's reports. The case as developed at trial was stronger. However, taking full account of the case as now put, I remain of the view that the case is not made out. In reaching this conclusion I have borne in mind the need, when determining whether someone is a de facto director, to take into account all relevant factors and look at the matter in the round (*Smithton v Naggar* at [40]). There is a critical difference between an approach which looks at each element individually and determines that that element does not prove the Official Receiver's case, and standing back to look at the position overall. I have considered the individual elements but, having done so, reach my overall conclusion in the round, focusing on what Ms Batmanghelidjh actually did and how that related to the role of the Board.

786. I appreciate that, to someone whose familiarity with Kids Company might have been gleaned from press reports, the conclusion that I have reached might appear

to be a surprising one. However, I make my findings based on all the evidence I have read and heard over the course of a lengthy trial.

787. The primary purpose of the disqualification legislation is the protection of the public (see [167(a)] above). I agree with Hildyard J's comments in *Chohan* referred to at [678] above that it would frustrate a primary objective of the disqualification regime if a person who was responsible, or jointly responsible with others, for management could escape disqualification by not being formally appointed. Ms Anderson submitted that this was of particular relevance where the Trustees' response to a number of the allegations referred to their reliance on the executive team led by Ms Batmanghelidjh. However, what was said in *Chohan* on this point does not displace the need to demonstrate that the relevant individual was, in fact, occupying the position of a director. Further, the Trustees accepted that they had ultimate responsibility for the way in which the charity was run. Fundamentally, reliance on the executive team in relation to such matters as arranging loans and managing creditors does not affect the key elements of the way in which the business was run, in particular operating a model which allowed expenditure to be incurred without necessarily having secured the corresponding income. The Trustees, to their credit, were not seeking to deflect responsibility for that by blaming Ms Batmanghelidjh.

788. My overall conclusion is that Ms Batmanghelidjh had significant influence but was not part of the ultimate decision-making structure. She was not on an equal footing with the Trustees and did not have the same, or equivalent, status or functions. On the contrary, each of Ms Batmanghelidjh and the Board had a distinctive status and functions. In short, Ms Batmanghelidjh did not have an equality of ability to participate in decision making at the highest level. She was accountable to the Trustees and subject to their supervision and direction.

789. It was clear from the evidence as a whole that the Trustees did not treat Ms Batmanghelidjh as one of their number, and neither did Ms Batmanghelidjh act as if she was. I bear in mind that, as Arden LJ explained in *Smithton v Naggar* at [36], the matter needs to be determined objectively and irrespective of the putative de facto director's motivation or belief, but I am making a comment here about the way in which the Trustees and Ms Batmanghelidjh actually acted. Arden LJ added at [42] that whether the company considered the individual to be a de facto director is relevant, so the Trustees' view of the position must be relevant. This makes sense. Ms Batmanghelidjh could only be a de facto director if they allowed her status to be elevated. The corporate governance structure (see the discussion section at [697] to [703] in particular) was clear and in my view was understood by all of them. For most of the charity's life Ms Batmanghelidjh was accorded a significant degree of delegated authority, which she used to the full and on occasion may have exceeded. Her views were also accorded significant respect. But neither of those points put her on an equal footing with the Trustees. She was at all times subject to the Board's supervision.

790. In *Tjolle*, Jacob J referred to whether the individual in question "has to make major decisions" (or commits to "major obligations") as a relevant factor in determining whether the individual was part of the corporate governing structure (see [157] above and the discussion at [680] above). But in principle there is a distinction between decision-making at the level of a director, and making

decisions under delegated authority, subject to supervision. A person engaged to perform delegated functions, who is subject to supervision and control by the directors, cannot properly be said to have assumed the duties of a director simply because of some indeterminate dividing line between what might be regarded as an appropriate or inappropriate level of delegation. The extent and nature of the decision making is relevant, but it is not determinative. (I would add that, if the position were otherwise, it would be impossible to determine what the criteria would be for determining when someone acting under delegated authority should be treated as a de facto director, and it would throw into doubt the status not only of many individuals with executive functions who work in the charitable sector, but that of many in the commercial world as well.)

791. The fact that the Board chose to treat Ms Batmanghelidjh with care reflects the balancing exercise they carried out in their decision-making process. It neither involved abdication of the Trustees' responsibilities nor an acceptance that Ms Batmanghelidjh had equal status.

792. Ms Batmanghelidjh's absence from the Governance Committee and her non-membership of, and only somewhat reluctant attendance at, the Finance Committee also speak volumes as to the recognition by all involved that it was the Trustees, and not Ms Batmanghelidjh, that were ultimately responsible for the governance of the organisation, including its finances and the broader risks considered by the Governance Committee in the course of its work.

793. I have concluded that the capacity in which Ms Batmanghelidjh acted was as CEO, operating under the delegated authority of the Board and subject to its supervision and control. At times she did not comply with the limits and instructions laid down. She denied that any non-compliance was intentional, but whether it was or not I do not consider that, overall, the level of non-compliance was sufficient to make her acts that of a director. Her views were accorded significant respect, and for most of the charity's life the Board's supervision and control was exercised in a "light touch" manner, but supervision was exercised and, where the Board considered it necessary, controls were imposed.

794. In the light of my conclusion the next section of the judgment primarily considers the position of the Trustees. However, in case I am wrong about Ms Batmanghelidjh's status I have included some comments about her position at the end of my analysis.

THE "SINGLE" ALLEGATION: DISCUSSION

Preliminary observations

795. The Official Receiver made clear in submissions that his case rests on a "single allegation" of unfitness, namely that the defendants individually and collectively caused and/or allowed Kids Company to operate an unsustainable business model. The matters relied on in support of that, summarised at [55] and [56] above, were not intended to be separate allegations but rather "component parts" of the single allegation.

796. I have to confess that I do not feel much closer to a really clear understanding of the "single allegation" than I did at the start of the trial. The difficulties include exactly what is meant by the charity's "business model", how that changed to make it unsustainable when it was not previously so (as the way the allegation is elaborated on appears to imply), and how some of the so-called component parts actually relate to the single allegation. The difficulties are compounded by the way in which the case was developed at trial, with a significant focus on aspects that were either not dealt with in the Official Receiver's report or at least not clearly framed as parts of the "single allegation".

797. I wish to make clear that I have reached my conclusion that the claim fails as a matter of substance, and in whatever manner the Official Receiver's allegation – or I think more accurately allegations – are put or developed. I appreciate that the defendants' Counsel raised a number of issues of fairness as to the way in which the case was developed, but ultimately I considered it preferable, and appropriate, to reach my decision taking full account of all the allegations as originally put or developed (indeed, including some that appear to have been dropped or at least played down in closing submissions). The qualifications to this are (1) the ruling I made referred to at [60] above, and (2) the fact that in certain areas I have borne in mind that the defendants did not have a proper opportunity to address a matter raised at or close to the trial in the evidence. This does not mean that fairness points were improperly raised, but because it is better for all concerned to understand that the claim fails as a matter of substance.

798. Notwithstanding the approach that I have taken, I must reiterate the points made at [733] above. A disqualification order involves penal consequences, and a defendant to disqualification proceedings must know and have proper notice of the case they have to meet. The substance of the case that the defendant is required to meet must be set out (*Re Lo-Line Electric Motors Ltd* [1988] (Ch) 477 at pp.486-487 per Sir Nicholas Browne-Wilkinson VC; *Re Sevenoaks Stationers (Retail) Ltd* [1991] (Ch) 164 at pp.176-177 per Dillon LJ; *Secretary of State for Trade and Industry v Goldberg* [2003] EWHC 2843 at [51] per Lewison J). The defendant should be able to ascertain with clarity exactly what the allegations are and on what evidence the applicant intends to rely, and there is a duty not to overstate the case against the defendant, to put it in a balanced way, and not to omit significant evidence in their favour (*Re Finelist* [2004] BCC 877 at [16] to [21]).

799. The diffuse, and somewhat shifting, way in which the case was put raised real issues of fairness, and although some attempts were made to present a balanced view in the Official Receiver's reports, in my view they did not go far enough. Mr Bompas fairly made the point that it is not the case that the Official Receiver should be seeking a win at all costs. I am not going to attempt to list all the concerns raised, but there are two instances that were raised by Mr Westwood in closing which I think are worth highlighting as particular examples, one in relation to the reports and one in relation to the development of the case at trial:

    (a) Mr Tatham's report set out some highly prejudicial allegations that were the subject of investigation by Ruth Lesirge, without making it clear that they were found to have no substance. Further, Mr Tatham's report did not refer to the confirmation Ms Lesirge gave in response to questions from the

Official Receiver that the Policy for Distributing Financial Assistance – which is what was said to be the focus of Mr Tatham's report – was largely adhered to. (See [566] above.)

(b) The second example relates to the audit of the 2013 accounts, and in particular the criticism levied of the Trustees in respect of the more positive cash flow sent to the auditors as compared to the cash flow accompanying the August 2014 management accounts (see from [253] above). I would add to this the related point discussed in the same section about the letter of representation to the auditors which Ms Hamilton signed, and which had not been included in the trial bundle. The difference between the cash flows was not raised as an issue in Mr Hannon's report, so it had clearly not been picked up during the course of a long and intensive investigation. It was raised for the first time in the Official Receiver's skeleton argument, not leaving a proper opportunity for the defendants to investigate the matter and respond, and in particular not affording them a proper opportunity to make enquiries of Mr Mevada or the auditors. The point was obviously not put to Mr Mevada in interview or in follow-up questions. This example is noteworthy not only from a procedural perspective, but because it was thought appropriate to criticise Trustees for not picking up something at extremely short notice that the Official Receiver's team had failed to pick up during their lengthy investigation. The letter of representation is also important because the Official Receiver sought to allege that staff had not said that they thought the charity was a going concern, despite having possession of what is on any basis a significant letter in which Ms Hamilton did provide such a confirmation.

The model

800. The Official Receiver described the model as:

> "… a demand-led model of 'self-referral' by clients and a policy of 'never turning a child in need away' … dependent on large *ad hoc* grants, donations and loans to meet the expenditure occasioned by the same, without any or any sufficient reserves being maintained or other provision made for the eventuality that grants, donations or loans sufficient to meet [Kids Company's] expenditure would not be made."

801. By 27 September 2013, the first of the dates relied on by the Official Receiver, Kids Company had been running its "model" for around 17 years, without a material change in its nature. That does not suggest inherent unsustainability.

802. I discuss the Kids Company model from [172] above. In summary, neither the fact that it was demand-led nor that clients self-referred should be criticised. The "never turning a child in need away" mantra was an aspiration that Kids Company could not always meet. Furthermore, support provided was based on need, there was no open-ended commitment, and costs were scrutinised.

803. It is true that clients' needs drove a growth in charitable spend in circumstances where income had not yet been secured. Mr O'Brien's description of the model

as "look after children and raise money to cover the costs" was apt. But the defendants were well aware of the risks and the need to ensure that funds were raised. As discussed earlier in this judgment, until late November 2014 the Trustees were satisfied that sufficient funds could be raised. It is worth recalling that this was not based on groundless optimism: see [243] above for the auditors' comments in May 2014 that "income levels for 2014 look healthy and also achievable". The Trustees' views were also based on the experience of prior years, where the charity had consistently raised additional funds to meet increased need.

804. The issue of reserves is discussed from [528] above. In summary, reserves in the form of liquid resources would have been desirable, and there is some validity in a criticism of their absence, but creating them was much easier said than done. It is also important to note that there is no legal requirement for reserves, and their absence did not prevent unqualified audit opinions being provided. Creating reserves would have involved diverting resources from meeting the increasing level of need that the charity existed to serve. The decision to prioritise spending on charitable objects is one that, in my view, the Trustees could reasonably reach. Further, whilst not having reserves might increase the risk of failure (albeit that reserves would not necessarily ensure survival where income fell away: see [822] below), their absence during the charity's life self evidently did not make its model "unsustainable".

805. Kids Company's dependence on donations is discussed in some detail from [509] above. Charities are, of course, commonly dependent on donations. Donations are, by their nature, difficult to predict with confidence, both as to amount and timing of receipt. Kids Company cannot be criticised for that. The combination of this, the lack of reserves and the nature of Kids Company's charitable activities, with the bulk of its costs being staff costs that were not straightforward to cut, made for a potentially high risk enterprise. But, without more, that does not mean that the model was "unsustainable".

806. It is also the case that the charity expanded significantly over the period in question, whilst the level of central government support remained largely static. This was in response to cuts following the financial crisis and also reflected the replication of Kids Company's activities, particularly in Bristol. But expansion would not make the charity's "model" unsustainable if adequate funds could be raised to meet expenditure. It would become unsustainable if and when that was no longer the case, either because circumstances changed such that it was no longer possible to fundraise as before, or the charity was allowed to expand beyond its capacity to fundraise.

807. A key point to recognise is that the defendants were well aware that there were limits on Kids Company's continued ability to fundraise from private sources to meet increasing need. In that sense, there is no dispute about unsustainability. This was precisely why Kids Company was lobbying government for a material increase in statutory funding from the autumn of 2013 onwards, as discussed in detail above. It is also important to note that the increased costs reflected in the 2014 Budget did not reflect further material expansion of the charity but rather, for example, the full year effect of increases the previous year (see [233] above).

808. The Official Receiver specifically criticised dependence on Ms Batmanghelidjh's fund-raising abilities. That is rather unreal. This was someone who, even on Ms Lloyd's evidence, was a phenomenal fundraiser. It was fully recognised both by Ms Batmanghelidjh and by the Trustees that she could not carry on fundraising as she had indefinitely, but the charity can hardly be criticised for making full use of her fundraising skills while they were available, at least provided appropriate consideration was given to plans for the future (as I conclude that the Trustees were attempting to do). She was also not alone: the fundraising team numbered around 18 staff on a full time basis ([513] above). Trustees also played an active role in fundraising.

809. I have also concluded that it was not until late 2014 that the Trustees had serious reason to think that fundraising targets would not be met (see [515] above). It is not the case that fundraising became increasingly difficult by 2013, as the Official Receiver alleged. The charity was also not simply dependent on a "small pool" of donors and "ad hoc" donations as he suggested. As explained at [521] above, there was recognition that the burden of increasing need could not continue to be met entirely from non-statutory sources, but it does not follow that it was unreasonable to continue operating without immediate severe cuts, bearing in mind not only the indications from government but also the support the Trustees believed that the charity had from philanthropists.

810. Fundamentally, the Official Receiver's case is, or is more appropriately expressed, as being rather less about the "model" itself (a model which had not changed in its essentials), and more about the way in which it was operated by September 2013, and in particular whether the Trustees did "too little too late" to address the risks associated with the model, particularly in terms of controlling expenditure and cutting costs.

"Unsustainable" and paragraph 6 Schedule 1 CDDA

811. The Official Receiver alleged that the model was "unsustainable" and that the defendants knew or ought to have known this. Sensibly construed, unsustainable means bound to fail. This was recognised in the Official Receiver's formulation of failure being "inevitable" without immediate material change after 30 November 2014 (albeit less obviously consistent with the alternative references to "highly likely" that appear elsewhere in the report). Clearly, the charity did not fail until nearly two years after the first date relied on, 27 September 2013, and some eight months after the second date, 30 November 2014, despite there not being what the Official Receiver would accept as "material change", let alone "immediate material change", after either date.

812. The Official Receiver has not demonstrated that any of the defendants were aware, or ought reasonably to have been aware, that the model was bound to fail as at either of the dates specified.

813. The Official Receiver's case as articulated in Mr Hannon's second report was that Kids Company would have failed even without the unfounded sexual assault allegations. In closing Ms Anderson submitted that it was not necessary to prove that point, because causation of insolvency is not a jurisdictional threshold. The court is simply required to consider, as one of the factors that informs the question

of unfitness as a whole, the "extent of the director's responsibility for the causes of the company becoming insolvent" (paragraph 6 of Schedule 1 to the CDDA). The reference to "becoming insolvent" is to the balance sheet test of assets being insufficient to pay the company's debts (s 6(2) CDDA). Ms Anderson submitted that what therefore needs to be considered is the director's responsibility for the company being in a position where its liabilities exceeded its assets, rather than for the causes of its being wound up.

814. As discussed from [602] above, I am not persuaded that the restructuring would have failed, and have in fact concluded that absent the unfounded allegations it is more likely than not that it would have succeeded.

815. I do not agree with Ms Anderson that this makes no difference. First, it does not take proper account of the nature of the allegation. The allegation made was that the business model was "unsustainable", that is bound to fail. It was no doubt for this reason that it was part of the Official Receiver's case that the restructuring would *not* have succeeded, and why there was much effort at trial to discredit the cash forecast produced on 28 July, which I have addressed in some detail. The restructured charity would have retained the essence of Kids Company's model, albeit on a scaled back basis. It would have involved material change, but this was not the "immediate" material change after 30 November 2014 referred to in the allegation.

816. Secondly, I do not fully agree with Ms Anderson's legal submission as to the effect of s 6(2) and paragraph 6 of Schedule 1 CDDA. To recap, under s 6(2) a company:

> "becomes insolvent if … it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up".

Under the version of the legislation in force at the relevant time s 9 required the court to "have regard in particular" to the matters mentioned in Schedule 1, which relevantly included at paragraph 6:

> "The extent of the director's responsibility for the causes of the company becoming insolvent."

817. I agree with Ms Anderson that causation of insolvency is not a jurisdictional threshold. I also agree that the extent of the director's responsibility for the causes of the company becoming insolvent is only one factor for the court to consider, albeit, I would add, one to which it should have "particular" regard. Where I depart from her analysis is the submission that all that needs to be considered is the director's responsibility for liabilities exceeding assets, rather than the causes of the company being wound up. A natural reading of the words provides a strong indication that the concept of "becomes insolvent" or "becoming insolvent" encompasses not only the existence of balance sheet insolvency (assets being less than liabilities) but also the fact of going into liquidation. That interpretation would also seem to me to accord best with the aims of the legislation. What is encapsulated by the definition in s 6(2) has two limbs, namely (a) going into liquidation, and (b) doing so at a time when liabilities (and expenses of winding

up) exceed assets. I note that this interpretation is also supported by the other limbs in s 6(2), which at the time provided that a company alternatively "becomes insolvent" if an administration order was made or an administrative receiver was appointed. The focus there was (and indeed remains under the current version of the legislation) entirely on the relevant insolvency process.

818. Having said that, however, I remind myself that the application of paragraph 6 does not depend on legal concepts of causation, and in particular does not depend on whether persons other than the defendants may also have been responsible for the causes of insolvency (*Barings CA* at [35], see [145] above). Paragraph 6 is not irrelevant because the company was brought down by the unfounded allegations, but I am entitled to take the effect of those allegations into account in determining the extent of the defendants' responsibility for the causes of insolvency. Put another way, those causes include the effect of the unfounded allegations.

819. Thirdly, Ms Anderson placed significant reliance on debts said to exist at the point of liquidation which were pre-existing debts that arose from the company's "structural problems", including hiring too many staff and failing to build reserves, and pointed to debts said to be still outstanding from March 2015.

820. There were significant difficulties with this submission. A schedule was produced comparing creditors as at 9 March 2015 (as provided to the bank on that date) and what was said to be a list of creditors at the date of liquidation. That list dated from 2017, is clearly an estimate of individual amounts owed, and did not include a total figure. Although an updated list was produced during the trial the comparison provided to the court was not done by reference to the updated list, and moreover it appears that there is a significant discrepancy between the Official Receiver's updated estimate of total liabilities (£10.38m) and the actual claims received (£7.6m).

821. The comparison provided to the court highlighted creditors in respect of which the amount owed was the same or higher than on 9 March 2015. I was not provided with an aggregate figure, but by my rough calculations these amounts total around £175,000. In the context of this charity and the allegations made, this is relatively modest. It also of course takes no account of the fact that, for a number of these creditors, debts may have been repaid and replaced by others. I note that, as stated at [600] above, the management accounts for April 2015 indicate that creditors more than three months old amounted to around £220,000 at 30 April, as compared to around £550,000 a month earlier. The management accounts for June 2015, the last set produced, show creditors more than three months old amounting to around £212,000. This strongly indicates that the great majority of the company's debts at the point of liquidation were relatively recently accrued. This does not support a case that the scale of the insolvency should properly be attributed to long term failures to pay creditors.

822. Finally on this issue, I should record that I do not agree with the suggestion that, if it had had appropriate reserves, Kids Company would have been able to survive notwithstanding the unfounded allegations. That is not demonstrated by the evidence. It is worth recalling that the allegations came in the aftermath of the Jimmy Savile abuse scandal (see [315] above). The police felt obliged to

investigate them in detail. Their investigation completed only in January 2016 (when they not only dropped the investigation but reported that they had not identified any failings by the charity in its safeguarding duties). If the charity had built up reserves equivalent to three months of operating expenditure (see [528] above – what I understood to be an uncontroversial aspiration) that would have been well short of what was required. Mr Roden's view, as reported by Mr Handover during a telephone conference on 31 July 2015, was that "his ability to raise funds while [the allegations were] unresolved was almost impossible". Ms Batmanghelidjh's affidavit evidence also pointed out that she thought it would have taken at least six months to regain donor confidence after the police investigation completed. There is no reason to doubt this.

The real issue in this case

823. As already indicated, what this case is, or should properly be, about is whether the Trustees did "too little too late" to address the financial risks associated with the model, particularly in terms of controlling expenditure and cutting costs. This features in various forms in the Official Receiver's case, in particular allegations of failure by the Trustees to take adequate action to control expenditure in the context of rapid growth and increasing financial difficulties, inadequate control of the CEO (who always prioritised clients' needs), inadequate financial controls, trading at an increasing deficiency of income to expenditure (with increasing reliance on short-term loans, bringing funding forwards, circulation of credit, delaying payments to creditors and year-end accruals), relying on overoptimistic statutory funding projections and failing adequately to consider the risk of donor fatigue (see [55] above).

824. By the stage of closing submissions, the focus was on the charity's financial, and in particular on its cash flow, position. The Official Receiver relied on Kids Company's monthly management accounts to assert that Kids Company was "cash flow insolvent at all material times and balance sheet insolvent the vast majority of the time". Ms Anderson pointed to the extent of aged creditors shown in the management accounts as demonstrating that creditors could not be paid on time (details of creditors more than three months old were included from January 2014 onwards: see [265] above). She referred to the problems that arose in 2012, with an increase in staff and a cash deficit remaining at the end of the year. She referred to a significant increase in spending during 2013 and material cash flow difficulties, as shown by the problems with HMRC in that year, which involved what Ms Anderson submitted was an unacceptable use of statutory debt monies as working capital. By the year end accruals had materially increased and the surplus was, she said, on a balance sheet basis only. Ms Anderson submitted that the pattern continued in 2014, with a substantial value of aged creditors every month (averaging in the region of £500,000 of creditors over three months old), an increase in the budget despite structural problems not being resolved, the 2013 accounts being signed off despite a negative cash flow statement for the following 12 months, and no real progress with the government. She argued that the only real change at the end of 2014 was a recruitment freeze. In 2015, she said that there were further unsuccessful attempts to secure funding from government, and the grant for 2015/16 was spent in a month, showing that the model was unsustainable.

825. There is validity in the criticism that expenditure was allowed to be incurred, and increase, without income having been secured to allow prompt payment of creditors, particularly in circumstances where the charity did not have available reserves to tide it over. However, I would make the following points:

(a) The Official Receiver's focus was on Kids Company's monthly management accounts. Its statutory accounts were ignored or sought to be discounted. There are significant differences between the two sets of accounts. The statutory accounts were produced under accounting principles the overriding requirement of which is that the accounts show a true and fair view. Unqualified audit opinions were provided in respect of them. In the absence of a successful challenge to those audited accounts, they must in my view be treated as a more accurate reflection of the overall financial position of the charity. For example, the 2012 and 2013 statutory accounts both show positive net current assets (see [211] and [218] above). These facts cannot be dismissed simply because audited accounts reflect accruals that were not included in the management accounts. I have discussed the Official Receiver's criticisms in relation to accruals in the audited accounts from [379] above. In summary, the charity accounted for accruals as it was required to do under accounting principles. The Trustees had no cause to doubt the correctness of the accruals, and they are in any event not by themselves a reliable indicator of cash flow difficulties. The scale of accruals did increase, but the evidence in relation to the position in 2014 indicates that the increase was not unrelenting.

(b) The Official Receiver's first choice of date, 27 September 2013, is the date on which the Board approved the 2012 statutory accounts. As discussed from [219] above, I do not accept the Official Receiver's criticisms about those accounts being signed off on a going concern basis. Accounts signed off on that basis, with the benefit of an unqualified audit opinion which confirmed that there were no significant matters arising from the audit, are not consistent with the company's business model being "unsustainable". This is highly relevant to the Official Receiver's allegation that the defendants knew or should have known by (or indeed in the period after) 27 September 2013 that Kids Company had an unsustainable business model.

(c) I have discussed the sign off of the 2013 accounts on 30 September 2014 on a going concern basis, and the negative cash flow included in the August 2014 management accounts, in detail from [246] above. In summary, I am not persuaded that the Trustees could not properly have formed the view at the time that the charity could continue as a going concern. The fact that the 2013 accounts were signed off on a going concern basis in the circumstances described is highly relevant to the allegation that the defendants knew or ought to have known that "failure was inevitable without immediate material change" at a date shortly afterwards. If it was, and the Trustees were aware or ought to have been aware of that, then it is very hard to see how the accounts could have been approved on a going concern basis. Not only were the auditors prepared to give an unqualified opinion, which again confirmed that there were no significant matters

arising from the audit, but Ms Hamilton, who had clearly seen both versions of the cash flow, was content to confirm that it was appropriate to prepare the accounts on the basis that Kids Company was a going concern. This is not indicative of an unsustainable model at that time.

(d) Specifically in relation to Ms Hamilton and the Official Receiver's second chosen date of 30 November 2014 I would also add that, even when she was raising the alarm in late November, her own notes state "all believe we can make cuts and still provide a good service", see [272] above. Once again, this is not obviously consistent with an unsustainable model.

(e) I also reject without hesitation the Official Receiver's attempt to suggest that it was inappropriate to place any weight on Ms Hamilton's views because she had only been at the charity a few months. She was a full time, well qualified, senior executive with overall responsibility for the charity's finances. She would not have signed the letter of representation had she not felt sufficiently informed to do so. The attempts to downplay her understanding of the position contrasted sharply, and unattractively, with the criticisms of Mr Webster, who was accused of failing to "call out" the financial problems by the time of his second Board meeting.

(f) The increasing deficits relied on by the Official Receiver are by reference to cumulative monthly income deficits in the management accounts. These reflect the seasonal nature of the charity's income, with a significant proportion of its income arising in the latter part of the year whilst expenditure was incurred relatively evenly across the year (see [185] above). The figures for 2013 and 2014 show, as might be expected, deficits increasing over the first part of the year and then reducing later in the year. Clearly, for months in which the deficit reduces there is no "increasing deficiency". Both 2012 and 2013 finished with surpluses (in the latter case I note by reference to the management as well as audited accounts), and in relation to 2014 I have concluded that, at the least, it was not expected that there would be a material deficit, and that the Trustees were expecting the charity to break even (see from [282] above).

(g) This point is key: whilst cash flow was difficult, until late November 2014 the Trustees were expecting (as in previous years) that income for the year would exceed expenditure, such that creditors could be paid out of the income received.

(h) As far as cash is concerned, Mr Westwood pointed out that the management account figures relied on by the Official Receiver show that Kids Company was within its overdraft limit for all but one month in 2013 and for most months in 2014 (9 out of 12). (This was obviously the month end position in each case: see also [335] above.)

(i) Reliance on loans is discussed from [347] above. In summary, whilst there is force in the Official Receiver's criticism of increased reliance on loans, particularly where sought on an emergency basis, it is important to take account of the wider context of what was happening at the time, the charity's overall income position, the identity of the lenders and the total

size of the loans as compared to turnover, as discussed there. In particular, the significant increase in loans during 2014 needs to be considered in the context of the ongoing dialogue with government during that period. And I would again note the additional controls on loans insisted upon by the Trustees after November 2014.

(j) Donors, including the government, were on a number of occasions asked to bring donations forward, and loans were sought to repay other loans and make payments to other creditors (including payroll). Where the Trustees reasonably expected that income would arise to repay loans, or to replace the income brought forward, this is not necessarily problematic. As already discussed, it was only in late 2014 that the Trustees had serious reason to think that fundraising targets would not be met (see [809] above, and more generally the section on donors from [509]).

(k) The position of HMRC is discussed from [316] above. In summary, despite a number of difficulties HMRC allowed the company to continue to operate, never presenting a winding up petition. It is also not the case that Kids Company was continually overdue in its payments to HMRC. There were particular difficulties in 2013 but the charity made the required payments throughout most of 2014, and in 2015 substantially caught up following the government's grant payment.

(l) More generally in relation to aged creditors, I discuss at [819] to [821] above the likely make up of creditors at the point of liquidation, concluding that the great majority of the company's debts at the point of liquidation were relatively recently accrued, rather than the scale of the insolvency being properly attributable to long term failures to pay creditors. Rather, the evidence indicates that during its life the vast majority of creditors were paid, albeit that for many creditors significant advantage was taken of their goodwill, or at least their failure to take legal action.

(m) As for the Official Receiver's criticism that difficulties with creditors became "normalised" as far as the Trustees were concerned, it is clearly the case that the charity had regular cash flow problems, and in that sense the Trustees became used to experiencing them. However, I accept Mr Webster's evidence that there was no complacency (see [123] above).

826. Mr Margolin fairly made the point that some of the Official Receiver's criticisms were put in closing in terms redolent of a want of probity, notwithstanding that any such allegation had been disavowed. In particular, the position with HMRC was described as completely or wholly unacceptable. The position in respect of HMRC was not presented in that way in the Official Receiver's reports, and it does not fit well with an allegation framed as one of incompetence. I would also point out that the charitable context is relevant (see further below on this). This was not a company squeezing creditors to maximise returns for shareholders or for the personal gain of the directors. In addition, I note that there has at no stage been an allegation of wrongful trading. The Official Receiver has not said that what the directors should have done is put the company into liquidation at any earlier stage.

The significance of discussions with government (and donors)

827. Kids Company's interactions with the government, discussed in detail from [445] above, are highly significant and key to understanding the full factual context. As explained at [807] above, it was well recognised that the charity could not continue as it had done, which is why it lobbied the government for a material increase in statutory funding. At the heart of the case is whether the Trustees waited too long for the government to make a decision about the extent to which it was prepared to fund Kids Company, and whether they should have scaled back expenditure at an earlier stage.

828. It is notable that the Official Receiver's reports include limited detail about Kids Company's discussions with the government, and what is included mainly addresses the 2015 restructuring. Limited information is provided about the grants made for 2014 and 2015 as part of sections dealing with Kids Company's sources of income. This is in stark contrast to the parts of the reports, and accompanying documentation, devoted to allegations relating to kids costs, which have at most very peripheral relevance (see below). The documentation that was exhibited to the reports evidencing dealings with the government was also incomplete, and was expanded during the trial as further relevant documentation was produced. This included the correspondence with Mr Grayling in June 2014 referred to at [468] above and the financial projection sent by Mr Yentob on 11 March referred to at [493]. Both would have been available in Ms Batmanghelidjh's Kids Company email records held by the Official Receiver. Limited enquiries also appear to have been made of the government. Importantly, no factual evidence was adduced to challenge the defendants' accounts of their dealings with the government, or the reasonableness or otherwise of their understanding of the oral and written communications.

829. It should in my view have been apparent to the Official Receiver that the position with the government was an important issue. Not only did the topic come up in interviews, but the NAO report referred to at [437] above clearly flags how Kids Company had successfully lobbied Ministers for funds over a number of years.

830. I am not going to repeat in any detail the findings I have already made about the discussions with the government (from [445] above) or the section of the judgment dealing with the non-implementation of a contingency plan before the July restructuring (from [616] above). However, I would emphasise the relevance of the timing of discussions with the government in relation to the dates selected by the Official Receiver as dates by which the defendants should have appreciated that the business model was unsustainable, 27 September 2013 and 30 November 2014. If funding had come through as the Trustees reasonably believed was in prospect at those dates, then it is unlikely that material change (assuming that to mean significant cuts) would have been needed.

831. In very brief summary, there was a significant amount of contact between Kids Company and senior members of the government. It is worth noting that the first date selected by the Official Receiver, 27 September 2013, falls shortly after the charity had elicited an additional £500,000 on top of the grant that had been agreed only a short time earlier. Further and importantly, there were discussions from September 2013 onwards about the provision by the government of

"sustainable" funding (meaning funding at a materially higher level than previously), as evidenced in writing by Mr Hurd on 9 December ([449] above). In addition, there was a very supportive letter from the Prime Minister on 8 January 2014 ([452] above).

832. Kids Company's pressure on the government increased during the second half of 2014. There were further positive indications about substantial additional funding, and indications that the government did not want Kids Company to close centres, but no actual promise of additional funds. A meeting with and letter from Mr Letwin on 22 December 2014 appeared to leave a promising prospect of additional funding for 2016/17, with the position for 2015/16 less promising, albeit that in my view it was not unreasonable to conclude that there was a real prospect of further support being found during that period if it was necessary. Discussions continued, and even in late February 2015 Mr Yentob (who thought the events of 22 December disappointing) still believed that some additional funding could be obtained for 2015/16. Thereafter, the position became more difficult, although Kids Company managed to secure an immediate payment of its 2015/16 grant in one lump sum in early April, together with a promise of immediate further talks, and ultimately secured a restructuring grant in July 2015.

833. I have also explained at [617] above that, in order to know how expenditure should be scaled back (which would require the closure of one or more centres to achieve material savings), it would be necessary to understand what could be funded in the future. That would in turn require an understanding of the priorities of the proposed funders, whether in the government or private sector. The grant offer for 2015/16, finalised during March 2015, contemplated the closure of the Urban Academy and Kids Company's operations in Bristol if alternative funding could not be secured. Prior to March 2015 the options were unclear: see for example the summary of the contingency plan intended for discussion at the meeting on 18 February discussed at [291] and [292] above, which referred to a possible closure of Arches II. When, during March 2015, the position became clearer the Trustees pushed for the plan to be implemented (see in particular [297] to [306] above). However, even after March there was some uncertainty, given the upcoming general election and Harriet Harman's statement ([499] above), together with the possibility of alternative funding, in particular under the free school programme (see also [623] above). After the election in early May, the combination of significant cash flow problems due to expected donations not arriving and the continued lack of committed additional funding from the government – together with the indication from Ms Casey that funding from the Troubled Families programme was unlikely – led to the Trustees' focus turning to the restructuring plan developed with Mr Roden (see [312] above) and procuring government support for that.

834. It is also relevant that the Trustees were aware of the availability of support from philanthropists, and in particular from Mr Roden, significantly earlier than May 2015: see in particular [526] above. The Trustees were entitled to take account of that, as well as a reasonable expectation of support from the government. This is of particular relevance to the second of the Official Receiver's dates, 30 November 2014.

835. In summary, I have concluded that in all the circumstances the Trustees did not act unreasonably in taking account of an expectation of support from the government. In particular, as at 30 November 2014 the Trustees were still genuinely, and not unreasonably, hopeful of substantial additional statutory funding being found. Nonetheless a detailed contingency plan was prepared, albeit that it took longer than the Trustees wished: see [622] above. Once it became clearer what cuts were likely to be required the Trustees pushed for them to be implemented during March 2015. A combination of a worsened financial position and a continued lack of additional committed statutory funding then led to the focus turning to a more radical restructuring plan.

Allegations of inadequate control, dominance and resistance to change

836. I have discussed these allegations in some detail earlier in this judgment, in particular in the general section addressing the question of dominance (from [579] above), and the section considering whether Ms Batmanghelidjh was a de facto director (see in particular from [736], dealing with the centrality of her role). In summary, Ms Batmanghelidjh did have a central role, including in developing strategy, but she was subject to supervision and control by the Trustees. They were the ultimate decision makers: see [588], [741] and [744] above in particular. It is true that Ms Batmanghelidjh was resistant to change, which contributed to the difficulties of implementing cuts (see for example [622] above), but for the reasons given in the section discussing the timing of change to her role (see from [624] above), the Trustees had good reason to tread carefully.

837. The link between the significance of Ms Batmanghelidjh's role and the "single" allegation of an unsustainable business model is by no means clear. For some 18 years her skills, including her fundraising ability, made a very material – and by most standards pretty extraordinary – contribution to the charity, enabling it not only to survive but to grow very significantly. That is an indication of a successful model, not an unsustainable one. In financial terms it could remain so for so long as Kids Company could raise the funds required to meet its expenditure.

838. The Trustees recognised the significance of the role that Ms Batmanghelidjh played, but obviously knew that it could not remain unaltered indefinitely. See the discussion from [624] above, including the reference at [630] to an email from Mr Yentob to Mr Handover on 10 February 2014, where he talked about "going over that old issue of who could partner Camila effectively".

839. By early December 2014 the Trustees had (reasonably) reached the conclusion that Ms Batmanghelidjh's role needed to change. However, her value to the charity was still very significant, as evidenced by Mr Roden's insistence on her continued involvement, and indeed his desire for her to retain the CEO role for a transitional period ([632] above).

840. Ms Anderson submitted that if Ms Batmanghelidjh had been subjected to appropriate governance and control earlier on it was unlikely that she would have refused to co-operate in 2015, and that a restructuring in, say, early 2014 could have been approached in a more reasonable and rational way than the rushed events of May to July 2015. I would make two comments. First, I think it extremely unlikely that Ms Batmanghelidjh's resistance to change would have

been less at an earlier stage, and in fact consider that she would have had reason to, and would, have resisted it even more strongly, given her own confidence about fundraising at least during 2014, and given the Prime Minister's support among others (see [452] above). Secondly, as discussed further below, the question is not whether it would have been *a* reasonable course of action to restructure earlier, but whether the Trustees' conduct amounts to incompetence of a high degree. Self-evidently, the two are not the same. For the reasons discussed in the next section, the latter would involve concluding that the *only* reasonable course of action that a competent director would have considered open to them at that earlier time was to embark on a restructuring.

Kids costs

841. The Official Receiver's allegation in respect of kids costs (namely a failure to take adequate action to oversee and scrutinise the propriety of, clinical need for, or level of expenditure on clients, test adherence to policies or consider any need to adjust them, resulting in ever increasing financial demands) is discussed in detail from [541] above. As summarised at [577], the Trustees were not aware, nor ought they to have been aware, of any major issue in respect of policy compliance. They exercised real scrutiny over expenditure and were entitled to gain comfort from external reports. They were entitled to expect staff to draw any major concerns to their attention.

842. Although the Official Receiver strongly disputed that this was the case, it is frankly very hard to resist the conclusion that the conduct of this part of the case was oppressive. The Official Receiver confirmed in witness evidence for the pre-trial review that he was not challenging the appropriateness of any particular spending on any individual client. Even if he was it would be pretty hard to see how the allegation properly fits with the so-called single allegation. Whether a model is sustainable or not does not straightforwardly turn on whether spending that was on any basis in accordance with Kids Company's charitable objectives was (by some unspecified standard) excessive or inappropriate, or indeed on whether particular policies were adhered to. But in any event it does not really fit with the case as presented in closing, which appeared to recognise the reality that the costs the focus of Mr Tatham's report, which the defendants were said not properly to oversee and scrutinise, were pretty immaterial in the context of the financial challenges facing the charity: see [553] above. I reject the suggestion that it is possible to extrapolate from the alleged failures in respect of kids costs to a lack of control of staff and other costs. There is no real basis for that, and any weight that might be put on it is weakened by Mr Tatham's focus on the Top 25 rather than the position of the vast majority of clients dealt with at the centres (see for example [556] above).

843. Over 100 pages of Mr Tatham's report, accompanied by some 5,400 pages of exhibits, related to the position of individual clients. This was not required to support the case actually put against the Trustees in respect of kids costs. That case goes to what the Trustees did or did not do in terms of scrutiny, testing adherence to policies and considering whether to adjust them. It was always unrealistic to put a case that asserted that volunteer Trustees were expected to have discovered alleged issues with individual client records that Mr Tatham and two other staff seem to have spent most of a year working on.

844. The reality is that the bulk of the work on Mr Tatham's report was done, utilising significant resource, to seek to support a case alleging inappropriate expenditure, a case that was initially raised in correspondence but which was not ultimately put (see [80] above). Whilst the work might have been used for a different allegation against Ms Batmanghelidjh, the allegation made against her was the same as against the Trustees, and she was not cross-examined on the topic. But the net effect of including Mr Tatham's work was to make the task of managing the defence of an already diffuse case, with significant documentation, even harder, and to increase costs significantly (including, for example, costs incurred in redacting confidential client information). It also led to understandable concerns on the part of certain of the charity's former clients, which the court was required to address both at the pre-trial review and at the trial.

Allegations in respect of senior management

845. My detailed findings in respect of the events surrounding the departure of the senior managers are set out from [389] above. As I said there, the evidence is relevant to the financial position of the charity at the time, what the Trustees knew about it and whether they reacted appropriately. My conclusion is that the Trustees did take the financial problems facing the charity seriously and that they sought to address concerns raised by those senior managers who raised them. I also do not accept that the Trustees took inappropriate steps to prevent or dissuade the departing directors from raising their concerns with them, although I would comment that the link between that allegation and the allegation or allegations as framed in the Official Receiver's report is not clear.

WHETHER THE DEFENDANTS WERE UNFIT

846. This section of the judgment considers whether, on the basis of my findings of fact and my conclusions in respect of the allegations made about the defendants' conduct, they must be disqualified under s 6 CDDA. I deal first with some points that are relevant to the court's approach to the question of unfitness in this case.

The relevance of Kids Company being a charity

847. The Official Receiver's case was that Kids Company's status as a charity was ultimately irrelevant. It operated as a company and was therefore required to comply with company law. There is no express dilution of the usual duties of directors or the manner in which the directors' disqualification legislation applies to directors of charitable companies. A charity is not obliged to operate as a company, but if it does (with the attendant benefit of limited liability) then those dealing with it are entitled to expect its operators to be held to the same standard as those operating non-charitable companies.

848. As Mr Westwood pointed out, the courts have long taken a benevolent approach towards charity trustees in circumstances where (as here) no dishonesty or wilful misconduct is alleged. There are good reasons of public policy for this approach. It reflects the real risk that any other approach would deter individuals who would otherwise be well suited to becoming charity trustees from doing so. It also reflects the court's recognition of the public service that charity trustees provide.

849. The classic statement of the court's approach to charity trustees was provided by Lord Eldon LC in *A-G v Exeter Corpn.* (1826) 2 Russ 45 at 54, 38 E.R. 252, as follows:

> "With respect to the general principle on which the Court deals with the trustees of a charity, though it holds a strict hand on them when there is wilful misapplication, it will not press severely upon them when it sees nothing but mistake. It often happens, from the nature of the instruments creating the trust, that there is great difficulty in determining how the funds of the charity ought to be administered. If the administration of the funds, though mistaken, has been honest, and unconnected with any corrupt purpose, the Court, while it directs for the future refuses to visit with punishment what has been done in the past. To act on any other principle would be to deter all prudent persons from becoming trustees of charities."

850. In *Stanway v Attorney General* (unreported) 5 April 2000, Sir Richard Scott V-C said the following at p.8 (in the context of whether or not proceedings should be brought against charity trustees under s 32 Charities Act 1993):

> "I do think that individuals who have given long periods of their time to unpaid public service – and that is what becoming a trustee of a charity involves – do deserve to have their efforts recognised by not being sued for mismanagement unless the proposed action against them is one which anyone can see cannot be resisted."

851. The court's approach has recently been reaffirmed by the Supreme Court in *Lehtimäki v Cooper* (also known as *Children's Investment Fund Foundation (UK) v Attorney General*) [2020] UKSC 33, [2020] 3 WLR 461, which concerned a charitable company limited by guarantee, like Kids Company. In a section dealing with companies as charities (starting at [52]), Lady Arden described the "liberal interpretation taken to charities by the courts", noting how charitable companies were recognised by Parliament and how provisions of the Companies Act 2006 apply to charitable companies, subject to further or different provision made by the Charities Act 2011, such that charitable companies may be subject to two levels of regulation (paragraph [58]). At [188] Lady Arden set out the passage just cited from Lord Eldon's judgment in *A-G v Exeter Corpn.* and said:

> "…the law looks benevolently on charity trustees even where there is evidence of actual or potential breach of duty."

852. I agree with Ms Anderson that trustee directors of charities incorporated under the Companies Act are subject to the same duties as directors of other companies, and that the test or standard for disqualification under the CDDA, described earlier in this judgment, is the same. But I also agree with Mr Westwood and with Mr Margolin, who made similar submissions on this point, that this does not mean that the fact that Kids Company was a charity should be ignored. This is because, in determining whether someone is unfit to be concerned in the management of a company, the test of unfitness must be applied to the facts of the case. What must be assessed is the individual's conduct, and that must be evaluated in its context. That context, or setting, must include the nature of the company and its activities,

as well as (for example) the role played by the individual director. The fact that the company was a charitable company is a relevant part of the context. It could mean, for example, that incompetent conduct which might merit a finding of unfitness in a director of a commercial company would not *necessarily* lead to the same conclusion in a different, charitable, context. In principle the same would apply as between different commercial companies, because in each case conduct must be assessed in its factual setting. It is one of all the circumstances to take into account. Its materiality or otherwise will depend on the facts of the case.

853. In my view this approach is consistent with the approach of the Supreme Court in *Lehtimäki v Cooper*. The effect of the decision was not to disregard or override provisions of the Companies Act or the company's constitution, but to ensure that the regime worked so far as possible in a cohesive manner that did not result in inappropriate distinctions between charities that happened to be incorporated under the Companies Act and those that are not (see, for example, Lady Arden's judgment at [72]).

854. The policy reasons for the court's benevolent approach to charity trustees apply with the same force whether the charity is incorporated or not. Contrary to the Official Receiver's suggestion, they are also not restricted to cases where the court is concerned with potential personal liability of a charity trustee to account for losses of the charity. *Lehtimäki v Cooper* was not such a case and *A-G v Exeter Corpn.* (albeit dealing with possible misapplication of assets) appears not to have been either. Exposure to disqualification proceedings could, at least for some individuals, be as significant or even more significant than a risk of financial exposure for a charity's losses. The same policy considerations apply.

855. Mr Westwood identified a further example of a case which clearly involved no financial claim against a trustee but where the same benevolent approach can be seen. This was *Scargill v Charity Commissioners*, unreported, 4 September 1998, where Neuberger J said at pp.98-99 (in the context of an appeal under s 18 Charities Act 1993 against an order removing the appellants as trustees):

> "…I think it is legitimate for the court should bear in mind that making or upholding an order removing a person as charitable trustee could, at least in some circumstances, discourage people who might otherwise be prepared to do that which is self-evident in the public interest, namely to act as charity trustees. It would be wrong to require unrealistically high standards of legal skill, financial analysis, or detailed factual knowledge, from charitable trustees. The court should, in principle, not be anxious to find fault with charitable trustees who, while doing their best, make honest, even stupid mistakes."

The comments are obiter but clearly carry some weight.

The role of the Board, delegation and non-executive directors

856. I have already referred to the proper role of directors, with reference to a passage from Jonathan Parker J's judgment in *Re Barings (No. 5)* (see in particular [704]

to [707] above). Directors must, on a continuing basis, ensure that they have a sufficient knowledge and understanding of the company's affairs to enable them to discharge their duties.

857. As Jonathan Parker J recognised, directors are entitled to delegate, and to trust the competence and integrity of staff to a reasonable extent. Directors without an executive role will in addition generally be reliant, and properly so, on the executive team to gain the knowledge and understanding they require, and to ensure that decisions they make are implemented. As Lord Davey said in *Dovey v Cory* [1901] AC 477 at 492:

> "I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended … But I think he was entitled to rely upon the judgment, information and advice, of the chairman and general manager as to whose integrity, skill and competence he had no reason for suspicion."

This passage was adopted by Romer J in *Re City Equitable Fire Insurance Co. Ltd* [1925] Ch 407 at 430 and by Norris J in *Sharp v Blank* [2019] EWHC 3096 (Ch) at [628].

858. However, the directors' ability to delegate, and more generally to rely on staff members, is subject to qualification. Norris J referred to this in *Sharp v Blank* at [628] by adding the following two glosses to what Lord Davey said:

> "...(i) that today there is a recognised duty to monitor employees upon whom significant reliance is placed and to ensure that there are in place appropriate supervisory and review systems; and (ii) that the reliance must in the particular circumstances be consistent with the discharge of the duty of reasonable skill and care by the director..."

859. Proper delegation does not involve abdication. There is always an overall duty to supervise. An important aspect of the role is to ensure that material risks are identified and managed, including financial risks. In addition, the extent of delegation that can properly be made to, and reliance that can be placed on, staff members will depend on the circumstances. In particular it will depend on whether the directors have reason to be concerned about the competence or integrity of the relevant staff member or members, the quality of information being provided, or their willingness to carry out the Board's instructions. Where issues of that nature arise and cannot be dealt with by a director with executive responsibility, non-executive directors would need to consider what should be done to address the issues that have arisen, for example by replacing staff or recruiting additional staff.

860. Directors' obligations to ensure that they have a sufficient knowledge and understanding on an ongoing basis would include, where appropriate, following up on matters previously discussed. When that would be required would depend on the subject matter and the degree of trust that could reasonably be placed in the staff member or members concerned. It is obviously good practice to follow up on important "action points" agreed at a previous meeting. Beyond that, the

extent of follow-up would depend on the significance of the issue and whether there was any cause for concern, for example a doubt arising as to whether an agreed action has been implemented. Material risks, including in relation to the company's financial position, should be assessed on an ongoing basis.

861. Ms Anderson submitted that the Trustees were inappropriately trying to excuse themselves on the basis that they were volunteer non-executives, pointing out that "non-executive" is not a legal concept, but rather a conclusion based on whether functions that directors would otherwise have had have been properly delegated. To the extent that aspects of management are not delegated, the directors remain responsible, and to the extent they are delegated there is a duty of supervision. She maintained that whilst day-to-day management had been delegated to Ms Batmanghelidjh, together with authority to carry out certain transactions under the terms of the Financial Procedures Manual, strategic decisions, substantial borrowings, entry into agreements with HMRC and large research projects had not been.

862. I have already dealt in detail with the position in respect of loans, arrangements with HMRC and research projects in the context of the de facto director allegation (see from [713] above in respect of HMRC, [715] in respect of loans and [724] in respect of research, and also see [749] more generally about the extent of delegation). I have not accepted the Official Receiver's case in respect of these matters. There was a general delegation of management and administration to Ms Batmanghelidjh under her employment contract (see [688] above). The Financial Procedures Manual made clear that the Board retained overall responsibility (see [692] above). The duty of supervision was clearly recognised.

863. The fact that the Trustees were non-executive directors is a relevant part of the factual context. The relevance of the role assigned to or assumed by the individual in question, and his duties and responsibilities in that role, was specifically recognised by Jonathan Parker J in *Re Barings (No.5)* at p.484c-d, and see Hoffmann LJ comment's in *Bishopsgate Investment Management v Maxwell* [1993] BCC 120 at 139 set out at [152] above. Similarly, in determining the nature and attendant responsibilities of that role the fact that the Trustees were volunteers should not be ignored: see *Re Barings (No.5)* at p.488d, where the level of reward to which a director was entitled was regarded as a potentially relevant factor in determining the extent of a director's duties and responsibilities. In principle, the fact that a director is an unpaid volunteer, in circumstances where there is a paid executive team with responsibility for day to day management, must affect the part that the director could reasonably be expected to play.

Section 174 Companies Act 2006

864. One of the effects of the earlier ruling referred to at [60] above is that the question whether there was a breach of the duty to exercise reasonable care, skill and diligence under s 174 Companies Act 2006 is not in issue. However, given that the allegation or allegations are based on incompetence it seems to me that s 174, and the case law relating to it, cannot be entirely irrelevant. Whether a director was incompetent or not cannot be decided in a vacuum, but at least to some extent in the context of standards expected of directors more generally. This is so even though it is not a necessary ingredient of a finding of unfitness that there has been

a breach of any duty, and nor is it the case that a breach of duty is sufficient to demonstrate unfitness.

865. Section 174 requires consideration both of an objective standard, being the general knowledge, skill and experience that might reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and the particular knowledge, skill and experience that the particular director has.

866. Case law makes clear that, in determining whether there is a breach of duty under s 174, the court does not simply substitute its own view of a reasonable course of action. Sir Alistair Norris said this in *Sharp v Blank* at [631]:

> "…in testing whether a director has been negligent the question is not simply what the Court thinks it would be reasonable for the director to have done; rather it is what the evidence before the Court establishes were the courses open to reasonably competent directors (the burden lying on a complainant to establish that the course of which complaint is made is not amongst them)."

867. Further, as he explained at [627], "mere errors of judgment" are not enough to amount to a breach of s 174, meaning that in circumstances where the opinions of reasonably informed and competent directors might differ, a director is not liable simply for making what proves to be the wrong choice among those opinions. He added:

> "When embarking upon a transaction a director does not guarantee or warrant the success of the venture. Risk is an inherent part of any venture (whether it is called 'entrepreneurial' or not). A director is called upon (in the light of the material and the time available) to assess and make a judgment upon that risk in determining the future course of the company. Where a director honestly holds the belief that a particular course is in the best interests of the company then a complainant must show that the director's belief is one which no reasonable director in the same circumstances could have entertained."

868. Put another way, the case law recognises that there may be a range of decisions reasonably available to a director in the particular circumstances. Action (or indeed inaction) within that range of reasonable decision-making does not amount to a breach of s 174, even if – particularly with the luxury of hindsight – the court might think that the decision taken was the wrong one.

869. By analogy, this approach must be relevant in determining whether the conduct of the defendants amounted to incompetence of a high degree. As Lewison J said in a slightly different context in *Secretary of State for Trade and Industry v Goldberg* at [42], "the question of unfitness to do something can...only be judged against an expectation of what is required of a person doing, or attempting to do, that thing". In principle it is hard to see how conduct which was honest (and not otherwise lacking in probity or integrity) could give rise to a finding of unfitness if it fell within a range of reasonable decision-making in the circumstances. In

contrast, if the conduct was "so completely lacking in judgment as to justify a finding of unfitness" (*Re Barings (No.5)* at p.468f) it might be expected to have fallen clearly outside such a range. In any event, making what turns out to be the wrong judgment call, having weighed up relevant considerations, is not sufficient.

Trading at risk of creditors and unfitness

870. Trading at the risk of creditors can found a finding of unfitness even if it does not amount to wrongful trading: *Re Barings (No. 5)* at p.486e. For example, in *Re Grayan Building Services Ltd* [1995] Ch 241 at pp.256-257, one of the points that Hoffmann LJ took into account in deciding to allow an appeal against a refusal of a disqualification order was that the trial judge had taken too lenient an approach in relation to the defendants' approach to creditors, in circumstances where the defendants were pursuing a policy of deliberately delaying payments to creditors and must have known that there was a high risk of being forced into insolvent liquidation as a result (added to which, in that case, the directors had inadequate information about the company's true financial position). Hoffmann LJ referred to the fact that, in *Re Sevenoaks Stationers (Retail) Ltd* [1991] (Ch) 164 at 183, Dillon LJ had stated that the fact that the director in question had made a deliberate decision to pay only creditors who pressed for payment, at the expense of those who did not, could be relied on as a ground of establishing unfitness.

871. It is worth bearing in mind, however, that there is no straightforward duty to ensure solvency. For example, in *Secretary of State for Trade and Industry v Taylor* [1997] 1 WLR 407 (also reported as *Re C S Holidays* [1997] BCC 172) ("*Taylor*") Chadwick J said this at p.414:

> "The companies legislation does not impose on directors a statutory duty to ensure that their company does not trade while insolvent; nor does that legislation impose an obligation to ensure that the company does not trade at a loss. Those propositions need only to be stated to be recognised as self-evident. Directors may properly well take the view that it is in the interests of the company and of its creditors that, although insolvent, the company should continue to trade out of its difficulties. They may properly take the view that it is in the interests of the company and its creditors that some loss-making trade should be accepted in anticipation of future profitability. They are not to be criticised if they give effect to such views, properly held."

Chadwick J went on to explain that, in contrast, if a director knew or ought to have known that there was no reasonable prospect of avoiding insolvent liquidation, then they might well be held to be unfit.

872. In *Re Uno plc, Secretary of State for Trade and Industry v Gill* [2006] BCC 725, Blackburne J adopted Chadwick J's observations in *Taylor*, saying this at [144]:

> "Chadwick J.'s observations… mean that, ordinarily, a director will not be at risk of a finding of unfitness, such as to lead automatically to disqualification, merely because he knowingly allows the company to trade while insolvent, i.e. he allows the company to incur credit …

> even though, at the time and as he knows, the company is insolvent and later goes into liquidation... If the director is to be found unfit there must ordinarily be an additional ingredient. Normally that ingredient is that, at the time that the credit is taken…, the director knows or should know that there is no reasonable prospect of his company avoiding insolvency. The point was put with succinctness in *Secretary of State for Trade and Industry v Creegan* [2001] EWCA Civ 1742; [2004] B.C.C. 835 where the relevant ground of unfitness alleged was that the defendants caused the company to trade while it was insolvent without a reasonable prospect of meeting creditors' claims. In the course of his judgment, Sir Martin Nourse (with whom the two other members of the court agreed) stated (at p.101; 837):
>
> 'It is well established on the authorities that causing a company to trade, first, while it is insolvent and, secondly, without a reasonable prospect of meeting creditors' claims is likely to constitute incompetence of sufficient seriousness to ground a disqualification order. But it is important to emphasise that it will usually be necessary for both elements of that test to be satisfied. In general, it is not enough for the company to have been insolvent and for the director to have known it. It must also be shown that he knew or ought to have known that there was no reasonable prospect of meeting creditors' claims.'"

873. Blackburne J rightly then qualified this in the following paragraphs by making it clear that in some cases trading at the risk of creditors may found a finding of unfitness even if it does not amount to wrongful trading. Whether it does or not will depend on all the circumstances of the case.

Application of the legal test

874. In order for the Official Receiver's case to succeed, he must satisfy the court that the conduct complained of demonstrates unfitness. There are two stages to this. First, an allegation or allegations about the defendant's conduct must be proved. Secondly, the court must be satisfied that the conduct complained of, insofar as it has been proved, justifies a finding of unfitness. In the context of a case based on allegations of incompetence, this means demonstrating incompetence of a "high degree".

875. My findings about the allegation (or allegations) are set out in the previous section of this judgment, which should be read in the context of my full findings of fact. In summary, I am not persuaded that the so-called single allegation is made out. There is validity in the criticisms of the charity's significant cash flow issues, with expenditure being incurred without necessarily having secured income, but this is subject to the caveats set out at [825] above and to the important factual context of Kids Company being a charity dependent on donations. The expectation of support from government in particular, together with the difficulties of making significant cuts before the government's position was clarified, are also highly relevant.

876. As to whether such part of the conduct alleged that has been proved (being either conduct reflected in a "component part" of the single allegation or as developed at trial) demonstrates unfitness such as to require a disqualification order against the Trustees, I am wholly satisfied that it does not.

877. I remind myself that the primary purpose of the jurisdiction under s 6 CDDA is to protect the public. The public need no protection from these Trustees. On the contrary, this is a group of highly impressive and dedicated individuals who selflessly gave enormous amounts of their time to what was clearly a highly challenging trusteeship. I have a great deal of respect for the care and commitment they showed, and the fact that they did not take the much easier path of not getting involved in the first place or walking away when things got difficult.

878. In their roles as directors of Kids Company the Trustees were required to, and did, balance a range of factors. They were seeking to meet Kids Company's charitable objectives, and in doing so not only to address the significant needs of the charity's vulnerable clients for whom the charity provided a very real safety net, but to have proper regard to safety and safeguarding issues (which included ensuring that the work was properly staffed). They were required continually to assess whether sufficient funding could be obtained, both from the government and private sources, and whether the position with creditors could be appropriately managed. The decisions they made were matters of honest judgment, made in difficult circumstances in what they thought were the best interests of the charity. The Official Receiver has not demonstrated that decisions that the Trustees took, or failed to take, in the factual context were outside a range of reasonable decision-making, and in my view the Trustees' conduct does not amount to incompetence of a high degree.

879. The effect of my earlier ruling is that it is no part of the Official Receiver's case that there was a breach of duty, including in particular under s 172 Companies Act 2006 (the duty to promote the success of the company). According to the current state of the law, directors must have regard to the interests of creditors when the directors know or should know that the company is or is likely to become insolvent: *BTI 2014 LLC v Sequana SA* [2019] BCC 631 at [220] (the case is under appeal to the Supreme Court). However, the law is still developing on the question of exactly how creditors' interests should be taken into account where a company is or is likely to become insolvent (*Sequana* at [222]). And there is an added question of whether it makes a difference that Kids Company was a charitable company, where the focus would ordinarily be on its charitable objects rather than on the interests of its members (s 172(2)).

880. In the factual context, and against the backdrop of some uncertainty in the law and the reasonable belief of the Trustees (until the unfounded allegations were made) that Kids Company could continue to operate and in doing so meet its obligations to creditors, any failure to prioritise creditors over the charity's vulnerable clients could at most be described as an error of judgment, but not as conduct amounting to incompetence of a high degree. In the words of Jonathan Parker LJ in *Re Barings (No. 5)* at p.486f, the Trustees have not been shown to be "so completely lacking in judgment" as to justify a finding of unfitness.

881. The Trustees' expectation of support from government, and philanthropists, was not unreasonable, and certainly not outside the range of views that could reasonably be reached. The Trustees were entitled to take account of the impact that potentially unnecessary cuts would have on Kids Company's vulnerable clients, and the difficulty of making cuts (see [621] above). They had recognised a need to change Ms Batmanghelidjh's role but also the difficulty in achieving that in the short term without further endangering the charity. They properly considered questions of solvency. In short, their decisions were not outside a reasonable range, and do not justify a finding of unfitness based on incompetence.

The individual Trustees

882. In view of my overall conclusions I am not going to make detailed findings about the individual Trustees, and will confine myself to some brief comments. In doing so I bear in mind that, in assessing unfitness, the only extenuating circumstances that may be taken into account are those accompanying the conduct in question. For example, the conduct of the defendants as directors of other companies not the subject of the allegations is not relevant.

883. I have explained at [75] above the requirement for the court to make an assessment as to the fitness or otherwise of each director individually. In order for the court to be able to do this, and for each defendant properly to understand the case against them, the claimant must specify the acts and omissions of the individual defendants which are said to establish unfitness. This reflects the requirement of reg. 3(3) Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987. In my view, more should have been done to assist the court as well as the defendants in understanding the case against each defendant individually, by reference to the duties and responsibilities each had or assumed, the part that they played in the alleged conduct, and the degree to which they are said to be responsible for it.

884. I understand that the nature of the Official Receiver's allegation was one of collective failure, but as explained in *Walters & Davis-White, Directors' Disqualification & Insolvency Restrictions* (3rd ed.), para. 5-82, there is no concept of collective responsibility as a basis for disqualification. Where the accusation is one of collective failure, the court must consider the extent of each individual director's personal responsibility for that failure. In *Re Polly Peck International plc (in administration) (No. 3)* [1993] BCC 890 at 907, Lindsay J criticised allegations based on collective failures on the basis that they "confuse what is the duty of the board as a whole with what are the duties falling to each individual respondent director". He referred to the example of an alleged failure to institute adequate financial controls. For a director not actually charged with instituting them that might amount to a breach of a duty to use best endeavours to procure their institution, but the mere absence of controls would not, without more, constitute a breach (the director in question might, for example, have done his best to introduce them, or I would add might have reasonable grounds to believe that they existed).

885. My comments in respect of the individual Trustees are as follows.

886. Ms Bolton, as already noted, is a highly experienced PR executive with significant experience of fundraising. She accepted the overall level of responsibility that being a director of Kids Company involved, but her particular focus was on fundraising and networking, notably her contacts with the arts world where she had a lot to offer. The lower period of disqualification sought in respect of Ms Bolton reflects some recognition of the role she played, but (as with the other Trustees) the Official Receiver did not go far enough to specify exactly what the case was against Ms Bolton. In particular, she was clearly less confident on the financial side than a number of the other Trustees, and it was certainly not unreasonable for her to place reliance on the views of Trustees with more financial experience, including Mr O'Brien, as well as on the views of professional members of the Finance team and the auditors.

887. Mr Handover had had a distinguished career in business and had much to offer the charitable sector. His commitment to voluntary causes following his retirement, and specifically Kids Company, is laudable. He invested a very significant amount of time in his role as Vice Chair. He offered to resign in late 2013 because of a new commitment he had taken on which conflicted with attendance at a number of Kids Company Board and committee meetings but was persuaded to stay on, and despite the pressure on his time continued to show a very significant degree of commitment to the charity. In the circumstances I am satisfied that there was absolutely no basis to criticise him for non-attendance at meetings as was at one stage suggested. He was and remained heavily engaged in the charity's affairs.

888. In respect of Mr O'Brien, the Official Receiver's allegation in closing that he acted merely as a "reporter" to the Board and never initiated change is an inapt description. He was assiduous in his work as Chair of the Finance Committee, frequently challenged Ms Batmanghelidjh and pointed out financial risks in the clearest terms. But he appropriately recognised that decision making was a collective process, in which the Trustees were balancing different risks. He fully participated in that process and did not distance himself from responsibility for it. For example, he would personally have preferred to reduce the charity's cost base at an earlier stage, but he accepted the majority view. The Official Receiver also accepted that Mr O'Brien's resignation was reasonable. It is unfortunate that these proceedings have not only deprived other charities of his significant skills and experience, but that he has also been prevented from taking on new roles in the financial services sector. I can only hope that the conclusions that I have reached will remedy that.

889. Ms Robinson is another clearly impressive and capable individual, who not only brought her evident business skills to bear with the charity but also assisted with fundraising through her work in founding and initially chairing the Development Committee (as well as taking time to mentor a client). She engaged in the detail of the charity's financial situation and the issues to which that gave rise (see for example [247] and [296] above), and showed significant commitment in her membership of both the Finance Committee and Governance Committee despite the commitments of her busy career.

890. Similarly, Ms Tyler should be commended for her commitment. She was a member of both Board committees at all material times, and chaired the

Governance Committee with evident thoroughness. She was quite obviously careful and extremely conscientious. She properly pointed out the Trustees' legal obligations (by reference to Charity Commission guidance) when that was appropriate, and arranged professional advice when it was needed. As Mr Hannon accepted in cross-examination, it was to her credit that she did not resign when she wanted to, staying on out of a sense of commitment – although what credit she was actually given for this in the length of disqualification sought against her escapes me.

891. Mr Webster is another impressive professional, who brought his significant HR expertise to bear. He engaged to a significant extent with, and supported, Mr Stones in particular. He spoke out when appropriate and raised issues of concern (see [611] above for one example). He was, perhaps understandably from the Official Receiver's perspective but unfairly from Mr Webster's perspective, singled out for a particularly hard cross-examination for his alleged failure as a newcomer to appreciate and challenge the charity's financial difficulties. I have already noted the stark contrast between this and the way the Official Receiver sought to play down Ms Hamilton's failure to raise concerns until late November 2014 on the basis that she was a newcomer and could not be expected fully to appreciate the position. There was no good explanation for why the length of disqualification sought against Mr Webster was the same as for Mr Handover, Ms Robinson, Ms Tyler and Mr Yentob, and longer than for Ms Bolton and Mr O'Brien, despite his relatively short time at the charity.

892. Mr Yentob was clearly heavily committed to the charity, devoting a significant amount of time to it despite his other commitments. He was the principal contact with Ms Batmanghelidjh outside meetings and, with Mr Handover, handled what was not a straightforward relationship with care and effectiveness (see [627] above). His links to philanthropists, and government, were of particular assistance in the work done to secure the charity's future. As Chair, he was appropriately thinking ahead, and strategically, about the charity's future (see in particular [514] above).

Ms Batmanghelidjh

893. Since I have concluded that Ms Batmanghelidjh was not a de facto director it is not necessary for me to making a finding as to whether or not her conduct amounts to unfitness. The following brief comments are made in case I am wrong in that conclusion.

894. The "single allegation" was framed against Ms Batmanghelidjh in almost exactly the same terms as against the Trustees. Since I am not persuaded that the allegation is made out it should follow that the case would fail against Ms Batmanghelidjh as it fails against the Trustees.

895. I am conscious that there are real differences between the position of Ms Batmanghelidjh and the Trustees in a number of respects, most obviously in relation to her role in the organisation as a full time executive, her over-optimism (which increased the tendency for cash flow problems to become the norm, see [647] above), her failure to accept the seriousness of the deteriorating financial situation and her unwillingness to control expenditure and get on with

implementing cuts. To this list might be added allegations in relation to the treatment of senior managers, insofar as they bear on the issues in this case and are reflected in my detailed factual findings. However, the sharpest differences between the position of Ms Batmanghelidjh and the Trustees arose in the period after 30 November 2014, the later of the dates relied on by the Official Receiver. Those differences are not clearly relevant to the question of whether the allegation or allegations actually put are made out. In particular, any failure to implement a contingency plan or restructuring immediately after 30 November reflected the decision making of the Trustees rather than action or inaction by Ms Batmanghelidjh.

896. Further, whilst it is necessary to determine unfitness by reference to the conduct complained of, it would be wrong to do so with blinkers on, having no regard to earlier or later events. The factual context would include Ms Batmanghelidjh's actions in successfully building Kids Company from its foundation in 1996 to what, by 2013, was a very significant and in many ways highly regarded operation. It would also include the fact that, throughout, Ms Batmanghelidjh was driven by a strong desire to protect the charity's vulnerable beneficiaries, and that she did ultimately agree to a significant change to her role. Further, she had been making it clear to government and others that the funding model needed to change. The factors referred to at [651] above would in addition need to be considered as potential extenuating circumstances.

897. Taking all these circumstances into account, and on the basis of the allegation(s) made against her, the Official Receiver would not have satisfied me that a disqualification order should be made against Ms Batmanghelidjh.

RECOMMENDATIONS

898. I have concluded that it is appropriate to make some observations that I hope will be of assistance in relation to future investigations and disqualification proceedings.

The allegation or allegations put

899. I will not reiterate the difficulties with the way in which the allegation, or more properly allegations, were framed and then developed in this case. The allegation(s) made are of central importance, and great care should be taken to ensure that they are clearly framed, both so that the defendants can fairly understand and prepare for the case they have to meet, and so that the court can properly address it. Once the allegation(s) are framed and the proceedings have commenced, the claimant should not assume that the court will be prepared to allow the case as put to be altered or added to. Central, and real, difficulties with this case have been a lack of clarity about exactly what the allegation or allegations meant, and a tendency for criticisms made of the defendants to expand and alter.

Balance

900. My perception is that more emphasis needs to be placed on the requirements of balance and fairness in assembling reports and other evidence. This affects the investigation process – for example the choice of whom to interview and the questions asked – as well as the content of the documentary evidence. For example, Mr Tatham's key criticisms about missing records in relation to clients appear to have been made without the benefit of interviews with staff members who might have been best able to assist in relation to that topic, and with what seems to have been insufficient weight placed on Mr Kerman's views. Ms Jenkins was also not interviewed, which given her role during key periods and in respect of key events (including the 2012 statutory accounts, the 2014 Budget and the cash forecast produced for the July 2015 restructuring) appears to be a surprising omission.

901. Generally, I was concerned that both Mr Hannon and Mr Tatham appeared to have had insufficient appreciation of the importance of the duty to present the case in a balanced way. There is no reason to doubt that this reflects a wider issue within the Department, rather than individual failings. This point is not simply a matter for the court. The content of the Official Receiver's reports determined the decision by the relevant team to permit the proceedings to be brought, and the decision about the period of disqualification to seek. It must be borne in mind that, for proceedings of this nature with potentially penal consequences, the existence of the proceedings themselves can have extremely significant consequences for defendants. In many cases there will also be no review by the court, because the defendant chooses to accept a disqualification undertaking. The decision whether to bring disqualification proceedings should be reached with real care, with proper regard to all relevant issues. The information presented to enable that decision to be made should be presented "warts and all" to ensure that the decision to proceed, which requires a conclusion that a disqualification order is "expedient in the public interest" (s 7(1) CDDA), is fully informed.

902. The requirement for the Official Receiver to present a balanced case extends to submissions on his behalf. Whilst this group of defendants were fortunate enough to be well advised, I think it would have been difficult for many defendants to ensure that sufficient context was provided in connection with individual criticisms, and to ensure that other relevant documents were identified which could cast a different light on documents on which the Official Receiver placed particular emphasis. Even with assistance from the defendants' advisers, it was frequently a challenge for the court to seek to ensure that, overall, it had a balanced and fair understanding of the overall position in this case.

Length and content of reports

903. Mr Hannon's first report and Mr Tatham's report ran to over 600 pages in total, with over 18,000 pages of exhibits. There is a risk that the overall length and structure of reports and exhibits, and thus the presentation and conduct of the case overall, can amount to oppression. Real care is needed to minimise the risk of that occurring. An obvious example in this case is the significant proportion of Mr Tatham's report dealing with individual clients, in a way that was at best disproportionate to the very limited role that that evidence properly played in the

single allegation, and as already discussed was in reality not required to support the case that was put.

904. The reports also included a significant number of quotations, which contributed to length. Two difficulties with these were, first, that they showed a tendency to be selective, such that a reader who did not consult the underlying document could well be left with the wrong impression, and secondly that it was often not possible for the reader (including in particular the defendants) to determine without further enquiry whether the Official Receiver was asserting the truth of the content of all or part of the quotation. Both aspects are unsatisfactory. On the whole I think it would have been better to direct the reader to consider specified documents in full, rather than set out lengthy quotations, and make clear what it is said that the particular document demonstrates. Simply appending full versions of documents does not, without more, address concerns about unbalanced statements or quotations, because unless asked to do so it is unlikely that most readers, including I suspect those charged with deciding whether to authorise the proceedings to be brought, will read much of the exhibits to a report where the total exhibits are extremely lengthy, as they were in this case.

905. More broadly, the overall context needs to be borne in mind. This was not a case alleging dishonesty or want of probity, but an allegation of incompetence against the directors and a manager of a charitable company, who had made no personal gain from any of the alleged conduct, and who with one exception were all unpaid. The periods of disqualification being sought against the Trustees were in the lowest of the three brackets referred to by Dillon LJ in *Re Sevenoaks Stationers (Retail) Ltd* [1991] (Ch) 164 at 174 (being "relatively, not very serious"). The resources involved in bringing the proceedings (not only those of the Insolvency Service, but court resources as well), and the scale and nature of the case that the defendants had to defend, need to be carefully considered against this backdrop.

Individual defendants/length of disqualification sought

906. As already indicated, it is the responsibility of the Official Receiver to adduce evidence on which the court may rely in determining both whether each *individual* director is unfit and the length of disqualification that is appropriate to *that* individual. More should have been done to reflect the requirement for the court to consider the position of each director individually and determine whether the conduct of that person makes him or her unfit, and the length of any disqualification order that is appropriate for that individual. (See in particular [75], [883] and [884] above.)

907. For example, the case against Mr Webster effectively assumed that he was unfit from the date of his appointment, simply by being on the Board, and that despite his short period in office he was as blameworthy as most of the other Trustees, and indeed more so than two of them. Conversely, the Official Receiver's approach appeared to imply that more criticism should be levelled against Ms Tyler than Mr O'Brien because she remained in post in the last few months of the charity's life out of a sense of duty, even though she had wanted to stand down.

908. More generally, it was unsatisfactory that Mr Hannon was unable to give a proper explanation in oral evidence of the basis on which different periods of disqualification were being sought for the Trustee defendants (2.5 years for Ms Bolton, 3 years for Mr O'Brien and 4 years for the others). On the face of it, the different periods sought sat uneasily with the insistence that the allegation was one of collective failure, and that more did not need to be done to specify the acts or omissions of each individual which were alleged to amount to unfitness. Apart from the periods in office, which has already been touched on, other possibilities that I speculate might have been used as distinguishing factors included the individual skills and experience of the directors (in relation to which there was really no information in the reports), or the extent of their roles on Board committees. The fact that Ms Bolton was on neither the Finance Committee or the Governance Committee might have been the reason for the lower period sought in relation to her. But the overall impression given by Mr Hannon's first report is that it may have been a lower level of engagement and attendance at meetings (rather than non-membership of committees) that was the relevant mitigating factor. Whilst differences in duties and responsibilities are relevant, to treat or to appear to treat non-engagement or non-attendance at meetings more leniently risks sending a dangerous signal.

Charities

909. I was struck by the lack of experience that the Official Receiver had had in relation to charities, in particular the failure to give full recognition to the fact that it is common for charities to be heavily dependent on donations, and the apparent difficulties that both Mr Hannon and Mr Tatham had with the concept of wholly non-executive boards of directors. I think this affected their approach and, for example, contributed to some inappropriate assumptions being made as to what should have been done by the Trustees. Although Mr Hannon had obviously attempted to gain some familiarity by speaking to the Charity Commission and going on a training course, this was not able to make up for the lack of experience.

910. Whilst it is obviously the case that directors of incorporated charities are subject to the Companies Act and related legislation, including the CDDA, it might be thought that the primary means of regulating trustees' behaviour, at least in practice, is and should be via the standards set by, and the enforcement powers of, the Charity Commission, being the regulator that has the most appropriate expertise. At the least, this might in practice reduce the risk of charity trustees being held to inappropriately different standards depending on whether the charity in question happens to be incorporated.

CONCLUSIONS

911. The charity sector depends on there being capable individuals with a range of different skills who are prepared to take on trusteeship roles. Most charities would, I would think, be delighted to have available to them individuals with the abilities and experience that the Trustees in this case possess. It is vital that the actions of public bodies do not have the effect of dissuading able and experienced individuals from becoming or remaining charity trustees. Disqualification proceedings, or the perceived risk of them, based on wide ranging but unclear

allegations of incompetence rather than any want of probity, carry a high risk of having just that effect, and great caution is therefore required. This is particularly so for individuals otherwise involved in the management of businesses, and professionals for whom additional regulatory issues may arise: in fact, the sorts of individuals whose experience is often most needed. The result of proceedings being brought in other than the clearest of cases is likely to be to deter many talented individuals who take the trouble to understand and appreciate the risks either from charitable trusteeship at all, or at least from all but the most wealthy, well endowed, charities which are likely to have least need of their skills.

912. I am wholly satisfied that a disqualification order is not warranted against any of the Trustees. As I said at [877] above, the public need no protection from them. On the contrary, I have a great deal of respect for the care and commitment they showed in highly challenging circumstances.

913. I have concluded that Ms Batmanghelidjh was not a de facto director. If I am wrong about that then I would still not have made a disqualification order against her, taking all the circumstances into account and on the basis of the allegation or allegations made against her. Although there are differences between Ms Batmanghelidjh's position and that of the Trustees they are not clearly relevant to the case as put. I would also point out the enormous dedication she showed to vulnerable young people over many years and what she managed to achieve in building a charity which, until 2014, was widely regarded as a highly successful one doing what senior members of the government rightly described as incredible work. It would be unfortunate if the events the focus of this decision were allowed to eclipse those achievements.

914. Finally, I would like to record my thanks to Counsel and the parties' wider legal teams for their assistance throughout a long trial, and to court staff (in particular, my clerk and the ushers) for their help in ensuring that the trial was able to run smoothly in difficult circumstances. I would also like to thank the technical team, whose assistance in particular with electronic document support allowed the trial to proceed as it did.

APPENDIX: DRAMATIS PERSONAE

OFFICIAL RECEIVER'S OFFICE	
Anthony Hannon	Official Receiver
William (Stuart) Tatham	Senior Examiner and Deputy Official Receiver
WITNESSES FOR THE CLAIMANT	
Diane Hamilton	Finance Director / Director of Finance and Accountability, Kids Company, 7 July 2014 to 30 January 2015 (but undertook some tasks during February 2015)
Adrian Stones	Director of Human Resources, Kids Company from 8 April 2013, resigned 28 January 2015 and left shortly thereafter
Mandy Lloyd	Director of Development, Kids Company from 3 June 2013, resigned 2 February 2015 and left then or shortly thereafter; fundraising role
DEFENDANTS	
Sunetra Atkinson (now known as Sunetra Sastry)	Trustee, appointed 31 October 2006
Camila Batmanghelidjh	Chief Executive of Kids Company
Erica Bolton	Trustee, appointed 19 April 2005
Richard Handover	Trustee, appointed 19 April 2005. Deputy Chair of Board of Trustees, Interim Chair of Finance Committee from April 2015, Governance Committee member
Vincent O'Brien	Trustee, appointed 20 March 2007, resigned 31 March 2015. Chair of Finance Committee
Francesca Robinson	Trustee, appointed 25 July 2006. Finance Committee member until September 2012; Finance Committee and Governance Committee member from Autumn 2014
Jane Tyler	Trustee, appointed 20 March 2007. Chair of Governance Committee, Finance Committee member
Andrew Webster	Trustee, appointed 10 December 2013. Governance Committee member from October 2014
Alan Yentob	Trustee, appointed 28 May 2003. Chair of Board of Trustees
OTHERS	
Professor Stephen Briggs	University of East London, worked with Tavistock Clinic. Author of several reports into Kids Company
Alan Bufton	Director, Corporate & Commercial Customer & Transaction Management, Commercial and Private Banking, NatWest
Jane Caldwell	Head of Arts, Kids Company. Training and Work Experience Manager from 15 September 2008, also described as Director of Public Engagement. Latterly had a fundraising role, treated as claiming constructive dismissal on 28 January 2015
David Cameron	Prime Minister (2010-2016)

Louise Casey	Director General of the Troubled Families Team, Department for Communities and Local Government
Mozhy Chipperfield	Director of Finance and Development, Kids Company, 2008 to July 2013
Nigel (Lord) Crisp	Former NHS Chief Executive and then former Permanent Secretary to the Department of Health
Phil Cross-Rudkin	Deputy Head, Debt Management & Banking, HMRC
Gaby Dellal	Donor. Actor and film director
Alastair Duke	Partner, PKF Littlejohn
Mark Fisher	Director of Government Innovation Group and Office for Civil Society (Cabinet Office)
John Frieda	Celebrity hairdresser. Funded Kids Company's 'School of Confidence'. Planned member of new 2015 Kids Company Board of Trustees
Mike Gee	Lead Safeguarding Manager at the 'Arches II' centre, Kids Company
Miles Goslett	Journalist
Chris Grayling	Secretary of State for Justice (2012-2015)
Deborah Gregory	Partner, Hogan Lovells, provided pro bono insolvency related advice
Laurence Guinness	Head of Campaigns and Research, Kids Company
Harriet Harman	Deputy Leader of the Labour Party (2007-2015)
Alan Hill	Operations and Resource Director, Kids Company
Nick Hurd	Minister for Civil Society (2010-2014)
Ruth Jenkins	Finance Director, Kids Company, from June 2013. On maternity leave from 7 July 2014 to 26 May 2015
Sian Joseph	Senior Policy Adviser, Cabinet Office
Professor Sandra Jovchelovitch	Professor at LSE
David Kendrick	Potential donor
Michael Kerman	Clinical Director, Kids Company
Chris Laverty	Insolvency Practitioner, KPMG, provided pro bono advice
Nick Lawson	A managing director at Deutsche Bank at the relevant time
Oliver Letwin	Minister of State for Government Policy and Chancellor of the Duchy of Lancaster (2014-2016)
James Lupton	The then Chairman of Greenhill Europe. Donor. Conservative Party Co-Treasurer
Sir Harvey McGrath	Business and philanthropy executive, Chairman of Big Society Capital, former Chairman of Prudential
Sachin Mevada	Head of Finance and Company Secretary, Kids Company, from 3 August 2009
Craig Oliver	Director of Communications, 10 Downing Street
Stuart Roden	Hedge fund manager, Lansdowne Partners (UK) LLP. Donor and planned Chair of new 2015 Kids Company Board of Trustees
Richard Stacey	Senior Relationship Manager, Not for Profit & Education Sector – Commercial Banking, NatWest

Philippa Stroud	Special Adviser to Iain Duncan Smith at the Department for Work and Pensions
John Spiers	Donor. Director of the Spiers Family Foundation
Helen Tabiner	Deputy Director of Youth Policy, Cabinet Office
Laura Trott	Political Adviser at No 10, Education and Family Policy
Peter Wheeler	Former managing director at Goldman Sachs and former trustee
Colin Whipp	Interim CRO/COO, Kids Company, appointed 7 July 2015
William de Winton	Hedge fund manager, Landsdowne Partners (UK) LLP. Planned member of new 2015 Kids Company Board of Trustees