Neutral Citation Number: [2024] EWHC 2367 (Ch)

Case No: BL-2023-BHM-000066

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

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 17 September 2024

Before :

HHJ RICHARD WILLIAMS
(sitting as a judge of the High Court)

- -

Between :

OMNIMAX INTERNATIONAL LLC

Claimant

- and –

(1) SIMON CULLEN
(2) ALUINOX LIMITED
(3) ELAINE CULLEN

Defendants

- -

JACK WATSON and SAMUEL CATHRO (instructed by Wright Hassall LLP) for the **Claimant**
MUHAMMAD UL-HAQ (instructed by Davisons Law) for the **Defendants**

Hearing date: 11 July 2024
(draft judgment circulated to the parties by email dated 11 September 2024)

JUDGEMENT

HHJ Richard Williams:

Introduction and background

1. This is my judgment following the hearing of an application for summary judgment/strike out made by the claimant ("***C***"), OmniMax International LLC.

2. By way of background, I largely adopt the parties' helpful and agreed case summary prepared for the purposes of the hearing.

3. C is a North American building products manufacturer, which produces aluminium products.

4. Alumill Limited ("***Alumill***") and Rolmet Alloys Limited ("***Rolmet***") (together "***the Companies***") are companies, now in liquidation, of which the First Defendant ("***D1***"), Mr Simon Cullen, was the sole director and shareholder at all material times. D1 is the sole director and shareholder of the Second Defendant ("***D2***"), Aluinox Limited. The Third Defendant ("***D3***"), Mrs Elaine Cullen, is D1's wife.

5. By deed of assignment dated 21 September 2023, the liquidators of the Companies assigned to C the claims they have against the Defendants.

6. On 15 December 2023, C commenced proceedings against the Defendants. C's claims against D1 are summarised as follows:

    i) Direct claims that D1 represented to C that he had procured mills to produce aluminium which would shortly be delivered to C. C asserts it paid over USD5,000,000 for approximately 7,000,000 lbs of aluminium, but only 400,000 lbs of aluminium was supplied (which was the subject of a separate purchase to the ones forming the basis of C's claim). The payments by C were asserted to have been made in reliance upon a number of representations which it claims were false ("***the Deceit Claim***").

    ii) Assigned claims that D1 caused the Companies to make significant payments to himself and D2, in breach of the fiduciary duty he owed as director to each of the Companies ("***the Breach of Duty Claim***"). He then used some of those payments to purchase together with D3 a property at 29 Dodford Road, Bournheath, Bromsgrove ("***the Property***"). C also pursues proprietary claims to the misappropriated funds and in particular the Property.[1]

7. C issued an application for Proprietary and Freezing injunctions against the Defendants on 15 December 2023, which was heard by me on 26 January 2024. An order was made dated 26 January 2024 ("***the Freezing Order***").

8. Pursuant to the terms of the Freezing Order, D1 provided an affidavit on 27 February 2024 setting out financial information ("***the Freezing Order Affidavit***").

9. The Defence was served on 14 March 2024. The Defence denies that D1 made a number of representations to C which were false. The Defence further denies any

[1] It is not disputed that D3 was a volunteer, since the Defence (at para [91]) "admits she contributed nothing financially towards the purchase of the Property."

liability to C for damages whether in its personal capacity for deceit or for breach of fiduciary duty and proprietary remedies. The Defence also asserts that:

i) C is the incorrect contractual party;

ii) C's terms and conditions were not incorporated into the contractual relationship between the relevant parties and instead each of the Companies' terms and conditions applied;

iii) There were a significant number of purchase orders placed with the Companies by C (if it is the correct contracting party) and that payments were not made in accordance with the Companies' terms and conditions to procure the purchase orders;

iv) Alumill had placed orders based on the substantial purchase orders and paid deposits to their supplier in Dubai (SAS Aluminium Foils FZE) ("***SAS***") for the aluminium to be manufactured and shipped to C (if the correct contracting party);

v) C (if the correct contracting party) failed to make payment of the invoices for the balance of the charges for the goods to be shipped by SAS to them and was in breach of the agreements with the Companies; and

vi) Rolmet settled liabilities to a creditor known as Azer Aluminium LLC ("***Azer***") by way of making a payment in the sum of US$1,000,000 and also assigning its customer list to Azer to the personal detriment of D1.

10. A Part 18 request for further information was made by C under cover of letter dated 17 April 2024 ("***the Part 18 Request***"). Replies to the Part 18 Request were provided on 23 April 2024 ("***the Part 18 Replies***"). D1 also provided a second affidavit dated 8th April 2024. Further information and Initial Disclosure were provided by D1 on 26th April 2024.

11. There has been no pre-action conduct or compliance with the Practice Direction for Civil disputes.

12. On 2 May 2024, C issued this application for summary judgment/strike out of various aspects of the Defence but limited to the Breach of Duty Claim. A witness statement in response to the application ("***D1's Witness Statement***") was served on 27 June 2024.

Applicable legal framework summary judgment

13. The Civil Procedure Rules ("***CPR***") provide:

> "[24.3] The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—
>
> (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

14. The principles governing summary judgment were summarised by Lewison J (as he then was) in ***Easyair Ltd v Opal Telecom Ltd*** [2009] EWHC 339 (Ch) Lewison J (and approved by the Court of Appeal in ***AC Ward & Sons Ltd v Catlin (Five) Ltd*** [2009] EWCA Civ 1098):

> "[15.] As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
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> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: ***Swain v Hillman*** [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ***ED & F Man Liquid Products v Patel*** [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": ***Swain v Hillman***;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ***ED & F Man Liquid Products v Patel*** at [10];
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: ***Royal Brompton Hospital NHS Trust v Hammond*** (No 5) [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: ***Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd*** [2007] FSR 63;
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> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim

against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction***: ICI Chemicals & Polymers Ltd v TTE Training Ltd*** [2007] EWCA Civ 725."

Judgment sought only on parts of the claim

15. It is argued on behalf of the Defendants that:

i) C is attempting to obtain summary judgment on parts of the claim and not the whole.

ii) This is a complex case, which needs to be resolved at trial.

iii) The claim includes allegations of dishonesty, fraud and deceit. In particular, it is alleged that D1 made representations that were false or he knew not to be true and in reliance upon which C placed orders with the Companies. C's allegations of fraudulent misrepresentation are heavily dependent on inferences.

iv) Whilst allegations of dishonesty, fraud and deceit are not an absolute bar they are nevertheless relevant factors in refusing summary judgment. This is not a case where the Defence is preposterous and defies commercial, or indeed any, common sense.

v) Whilst it is not disputed that D1, as director, owed statutory fiduciary duties to the Companies, his state of mind and intention are relevant to whether or not there was a breach of those duties. Likewise, dishonesty, fraud and deceit all go to the state of mind and intention of D1, who needs to be cross-examined. It will then be for the trial judge to decide if they accept D1's justification for his actions.

vi) The Defendants have raised in their Defence issues that require adjudication before the issues raised within the present application can be considered including –

a) the entity the Companies contracted with. There is litigation in the USA involving C, in which one of the issues the US courts have had to determine is the status of C and the correct entity in the litigation based upon assessment of the evidence;

b) the determination of the contractual terms;

c) the impact of the assignment of the existing purchase orders from Rolmet to Alumill; and

d) the impact of C's failure to make payment of the invoices for the balance of the purchase orders when goods were ready to be shipped.

vii) There is significant overlap between the nature of the causes of action subject to and not subject to this application and the evidence required in respect of both, including oral evidence from D1 as to his mindset and intentions.

16. CPR r.1.4(1) imposes an obligation upon the court to further the overriding objective of dealing with a case justly and at proportionate cost by actively managing the case.

17. CPR r.1.4(2) provides that active case management includes:

> "(b) identifying the issues at an early stage;
>
> (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of others;"

18. For the following reasons, I consider that the issues subject to the present application are entirely discrete and properly to be considered by way of summary disposal:

i) As already noted there are two distinct aspects of C's claim against D1 –

a) in its personal capacity for deceit; and

b) as assignee of claims belonging to the Companies against D1 for breach of his duties as a director of the Companies.

ii) On 24 February 2022, C obtained judgment in default in the sums of US$3,122,760 against Rolmet and Alumill jointly and a further sum of US$1,496,451.88 against Alumill, together with interest and costs. D1 in his capacity as director of Rolmet and Alumill chose not to defend those proceedings despite now claiming that C was never the contracting party.

iii) On 7 March 2022, Alumill and Rolmet were wound up on the basis of the unpaid judgment debts, and joint liquidators were appointed ("***the Liquidators***"), who subsequently assigned the Breach of Duty Claim to C.

iv) In his Freezing Order Affidavit, D1 admits that:

a) From 13 January 2021, he caused Alumill and Rolmet to make substantial payments to his personal bank account ("***the Payments***")[2]; and

b) A proportion of the Payments (£932,248.80) was used, in April 2021, to purchase jointly with his wife the Property.

[2] In his affidavit, D1 admits a total figure for the Payments of £1,666,968.17 by reference to his disclosed bank statements. C claims that the true figure is £1,962,196. By letter dated 13 March 2024, C's solicitors wrote to the Defendants' solicitors seeking an explanation for the discrepancies, but no response has been received. For the purposes of the present application, and mindful of the need not to conduct a mini-trial, I proceed on the basis of D1's admitted figure.

v) The Breach of Duty Claim is that the Payments were made in breach of D1's statutory fiduciary duties owed to the Companies, which included –

a) a duty to act within powers – s.171 of the of the Companies Act 2006 ("***the 2006 Act***");

b) a duty to promote the success of the Companies – s.172 of the 2006 Act; and

c) a duty to avoid conflicts of interest – s. 175 of the 2006 Act.

vi) It is not disputed that D1 owed a fiduciary duty to the Companies to apply their assets only for the proper purposes of the Companies.

vii) In ***Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*** [2011] EWCA Civ 347, Lord Neuberger MR (with whom Richards and Hughes LJJ agreed) said

> [34.] Although company directors are not strictly speaking trustees, they are in a closely analogous position because of the fiduciary duties which they owe to the company: ***Bairstow v Queens Moat Houses plc*** [2001] 2 BCLC 531, 548. In particular they are treated as trustees as respects the assets of the company which come into their hands or under their control: per Nourse LJ in ***Re Duckwari plc*** (No 2) [1999] Ch 253, 262. Similarly, a person entrusted with another person's money for a specific purpose has fiduciary duties to the other person in respect of the use to which those monies are put."

viii) Therefore, once it is shown that a company director has received company money, it is for him to show that the payment was proper - ***Gillman & Soame Ltd v Young*** [2007] EWHC 1245 (Ch), and ***GHLM Trading Ltd v Maroo*** [2012] EWHC 61 (Ch).

ix) In summary –

a) D1 does not dispute receiving the Payments;

b) Therefore, the straightforward, narrow and self-contained issue to be considered on the present application is: Does D1 have a realistic prospect of discharging the burden placed upon him to establish at trial that the Payments were for a proper purpose; and

c) In determining that discrete issue, which is essentially a reconciliation exercise, D1's honesty, motivation and intentions are irrelevant.

Prospects of establishing at trial that the Payments were properly made

19. In the Defence, it is alleged that D1 was entitled to the Payments, which related to his Director's Loan Account ("***the DLA***") being;

i) Repayment of monies directly advanced to the Companies; and

ii) Payments representing the assessed value (US$1,065,417.84 being the equivalent of £838,179.54) of a customer list transferred to Azer to D1's personal detriment and in part settlement of Rolmet's liabilities to Azer ("***the Indirect Payments***").

20. For the purposes of this application only, and without any admissions being made, C assumes that there was a DLA. There are two grounds of C's application:

i) The first ground relates to the final credit/debit balance of the DLA and after giving D1 credit for the Indirect Payments; and

ii) The second ground relates to the Indirect Payments themselves.

Ground 1

21. By way of the Part 18 Request, C questioned:

> "Is it the Defendants' case that any such loan account was in the First Defendant's credit at the time of each of the relevant payment(s)? If so, what was the balance of the account on each occasion?"

22. In the Part 18 Replies, it was asserted that:

> "Yes, the First Defendant's Loan Account was in credit at the time of each of the payments. The Defendants are unable to confirm the balance of the account from [sic]
>
> The Defendants confirm the balance of the Director's Loan Account at the time of the payments made, as referred to in the paragraphs within the Defence towards the purchase of the Property, was in the sum of £997,703."

23. As is self-evident from the Part 18 Replies, D1 failed to clarify as requested the balance of the DLA at the times the Payments were made. This failure no doubt reflects the fact that D1 admittedly did not maintain an individual general ledger account recording by way of debits/credits the financial transactions between him and the Companies falling outside salary, dividends or expenses.

24. In response to C's criticism of the absence of any supporting contemporaneous documents disclosed by D1, it was argued on behalf of D1 that it is for C to prove the Defence has no real prospect of succeeding and not for D1 to prove he has. However, D1 admits to having received Payments from the Companies totalling £1,666,968. Therefore, and as already noted, the burden at trial would then be upon D1 to establish that the Payments were properly made.

25. In addition, D1 cannot properly rely in his defence on the absence of the very financial records that he was responsible for maintaining:

i) ***Re Mumtaz Properties Ltd, Wetton v Ahmed*** [2011] EWCA 610, was an appeal against declarations obtained by the liquidator that the appellants were liable to repay amounts owing on directors' loan accounts. Arden LJ held that the trial judge had been entitled to draw an adverse inference against the

appellants as a result of their failure to deliver up the company's books and records. In doing so, Arden LJ said:

> "[17.] Put another way, it was not open to the respondents to the proceedings in the circumstances of this case to escape liability by asserting that, if the books and papers or other evidence had been available, they would have shown that they were not liable in the amount claimed by the liquidator. Moreover, persons who have conducted the affairs of limited companies with a high degree of informality, as in this case, cannot seek to avoid liability or to be judged by some lower standard than that which applies to other directors, simply because the necessary documentation is not available."

ii) In ***GHLM Trading Ltd***, between 1 May 2005 and 31 December 2007, debit entries totalling £1,347,795 were made to the DLA representing cash withdrawn from the company by its former directors, Mr and Mrs Maroo. Newey J (as he then was) described the "battleground between the parties relates to the other side of the account. The DLA had a brought forward credit balance of £51,892 as at 1 May 2005, and between that date and 31 December 2007 credit entries amounting to £1,295,903 were made to the account. GHLM challenges many of the credit entries. With one or two exceptions, the Maroos contend that they were justified." Newey J then noted that "At points, Mr Maroo was inclined to blame the absence of evidence to support his case that documentation which existed is missing." So far as the burden of proof, Newey J concluded that:

> "In the circumstances,…..once it is shown that a company director has received company money, it is for him to show that the payment was proper. In a similar way, it seems to me that, where debit entries have correctly been made to a director's loan account, it must be incumbent on the director to justify credit entries on the account. That conclusion makes the more sense when it is remembered that the director (a) will have been (one of those) responsible for the management of the company's business and (b) will have had a responsibility for ensuring that proper accounting records were kept (see e.g. sections 386 – 389 of the Companies Act 2006)."

26. As already noted, D1 admits receiving Payments totalling £1,666,968.17. Like in ***GHLM Trading Ltd***, the battleground between the parties on ground 1 of the application largely relates to the credit side of the DLA. For present purposes only, C gives D1 the following credits:

i) £33,000 being the alleged salary payments from Rolmet;

ii) The Indirect Payments of £838,179.54 (which is the subject of separate challenge under ground 2 of the application). However, it strikes me that to avoid double counting the correct amount of the credit to be given for the Indirect Payments ought to be the sum of £932,248.80 being the monies admittedly used by D1 to purchase the Property, which is the ultimate target of ground 2 of the application;

iii) C's lawyers have undertaken a careful and detailed analysis of the Companies' bank statements, which demonstrate that, from January 2021, D1 paid the Companies the total sum of £353,325.76;[3] and

leaving D1 as the net recipient of funds totalling £348,393.61.

27. In his written evidence in response to the application, D1 fails to engage properly or at all with C's analysis. In his witness statement dated 27 June 2024, D1 states –

> "[35.] The figures asserted by the Claimant in the Application are not accepted.
>
> [36.] It is not accepted that there was any shortfall as alleged in the DLA…
>
> ….
>
> [40.] I am unable to verify or accept any figures asserted by the Claimant as this would require advice from an accountant or accounting expert and a review of all relevant accounts…."

28. D1's evidence amounts to no more than a bare denial pending expert review of the relevant accounts. However, D1 failed in breach of his director duties to ensure that proper accounting records were kept such that the only accounts to be reviewed relevant to the DLA are the Companies' and D1's banks statements. D1 is clearly in possession of his own bank statements and admitted during the course of the hearing that he has also been in possession of copies of the Companies' bank statements. Expert accountancy opinion is not reasonably required to undertake what is essentially a factual analysis of cash transfers made between those bank accounts.

29. In conclusion:

i) D1 admits receiving Payments (net of claimed salary and the Indirect Payments credited at the higher figure) of £701,719.37.

ii) The burden would be upon D1 to establish at trial that these net Payments were for a proper purpose.

iii) In his Defence, D1 asserts that these net Payments were properly made in settlement of the credit balances from time to time arising under the DLA. However, D1 failed in breach of his director duties to ensure that proper accounting records were kept such that he has been, and will remain, unable to disclose any contemporary financial ledgers recording the alleged credit entries to the DLA. D1 cannot properly rely in his defence upon the absence of financial records he was responsible for maintaining.

iv) The only reliable and contemporaneous documentary evidence of the credits to the DLA is what is recorded in the Companies' bank statements. By reference to those bank statements, C has identified cash payments made by D1 to the Companies totalling £353,325.76. D1 has not properly challenged that figure,

[3] Prior to January 2021, Alumill did not operate and (as recorded in the company bank statements) D1 was a net recipient of funds from Rolmet in the amount of £121,662.71. D1 does not and nor could he realistically claim that any credit balances on the DLA need to be brought forward to January 2021.

nor the analysis underlying it, despite being in possession of copies of the Companies' bank statements as well as his own bank statements.

v) Therefore, on D1's best case, he is the net recipient of funds under the DLA, which overdrawn sum he is liable to repay as money owed to the Companies.

vi) C is entitled to summary judgment in the amount of £348,393.61, since I am satisfied that (a) D1 has no real prospect of discharging the burden that would be upon him at trial to establish that he was properly entitled to this sum under the DLA, and (b) there is no other compelling reason why this issue should be disposed of at a trial.

Indirect Payments

Critical examination

30. In ***Calland v Financial Conduct Authority*** [2015] EWCA Civ 192, Lewison LJ re-emphasised the need, when evaluating the prospects of success, of critically examining what has been stated so far to the court:

> "[28.] What is conspicuous by its absence from the deputy district judge's judgment is any critical examination of the raw material……..The fact that some factual or legal questions may be disputed does not absolve the judge from her duty to make an assessment of the claimant's prospects of success. As Lord Hobhouse put in ***Three Rivers District Council v Governor and Company of the Bank of England (No 3)*** [2003] 2 AC 1 at [158]:
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> > "The important words are "no real prospect of succeeding". It *requires* the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a "discretionary" power, i.e. one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he *must* carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is "no real prospect", he may decide the case accordingly. …Whilst it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the assessment of the whole that is called for. A measure of analysis may be necessary but the "bottom line" is what ultimately matters." (Emphasis added)
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> [29.] In evaluating the prospects of success of a claim or defence the judge is not required to abandon her critical faculties. As Potter LJ put it in ***E D & F Man Liquid Products Ltd v Patel*** [2003] EWCA Civ 472, [2003] CP Rep 51 at [10]:
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> > "It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a

> mini-trial: see per Lord Woolf MR in ***Swain v Hillman*** [2001] 1 All ER 91 at 95 in relation to CPR 24. However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable: see the note at 24.2.3 in Civil Procedure (Autumn 2002) Vol 1 p.467 and **Three Rivers DC v Bank of England (No.3)** [2001] UKHL/16, [2001] 2 All ER 513 per Lord Hope of Craighead at paragraph [95]."

What has D1 stated so far?

31. D1 disclosed to the Liquidators copy personal bank statements ("***Barclays Bank Statements***"), which recorded that during the period 20 April 2021 to 22 D1:

    i) received payments from the Companies totalling £986,500; and

    ii) made payments to Azer totalling £932,248.80.

32. D1's explanation to the Liquidators for these payments was:

> "$1,267,083.99 - Payment made to Azer Aluminium to clear ledger balance of Rolmet Alloys Ltd - Paid through the directors personal account as it was very difficult with banking regulations to pay a government owned establishment using another companies bank account (Alumill). Rolmet Alloys Limited who were the invoice party and Simon Cullen were known by the Azerbaijan insurance /Azerbaijan Government and therefore we chose to pay the balance monies owed by transferring the fund into the personal account and then paying Azer as we knew this would not then cause any issues as the relationship was very volatile due to the breakdown in relations between the parties as detailed in the statement of affairs……."

33. D1 exhibited to the Freezing Order Affidavit further copies of the Barclays Bank Statements, which recorded that the relevant payments out were made, not to Azer, but to David Bunn & Co. D1 explained in his affidavit that:

> "The Barclays Bank account statements show where and how the money received was spent. The primary expense was towards the purchase of [the Property], including stamp duty and conveyancing costs, all of which was paid to David Bunn & Co Solicitors during the period 20 April - 22 April 2021 inclusive in the total sum of £932,248.80."

34. The Defence states:

> [89] ……
>
> …….

d. It is admitted that the First Defendant made transfers out of his Barclays account in the sum of £932,248.80 and that the sums were used to purchase the Property.

e. It is accepted that the payment out from the Barclays account to Azer was wrong, but it is denied that this was fraudulent or misleading. The First Defendant avers that due to a dispute with Azer, the mill who supplied aluminium to Rolmet, and following threats received towards him and his family from or on behalf of Azer, he felt compelled to settle the debt owed to them by Rolmet. The payment owed by Rolmet to Azer for materials manufactured and suppled was in the total sum of US$2,065,417.84. As such, a payment of US$1,000,000 was made from the Rolmet bank account. The balance was discharged by way of settlement agreed with Azer to the First Defendant's personal detriment equating to the sum of US1,065,417.84 on terms where he agreed for Azer to take the entire customer list from Rolmet who began to supply directly to the customers through a company in Dubai called Alumico LLC. Thereby the balance of the Debt was settled indirectly by Rolmet to Azer, being a liability payable by Rolmet. To reflect the fact payment was indirectly made to Azer, the entry showing the payment from the First Defendant's personal bank account was changed by the First Defendant on his Barclays account. The First Defendant accepts that he was wrong in making said amendment, but this was not with any fraudulent intent as he avers, he had done so to show said payment was made on Rolmet's behalf as was the case.

35. The Part 18 Replies provided the following further information:

"……..

Question 7: Is the reference to a settlement agreement a reference to the Assignment Agreement between Alumill, Rolmet and Azer dated 8 April 2021?

Reply: Yes

Question 8: Are there any other agreements (whether following the Assignment Agreement or otherwise) which form part of or relate to the purported settlement? .....

Question 9: What were the terms of the settlement agreement? In particular please set out:

……

Question 9:4 Whether the agreement was in writing or recorded in writing and, if not, the individuals who negotiated and concluded the agreement including the contractual words used by whom, when and where they were spoken.

Replies to Questions 8 and 9:

> There were no other agreements in relation to the settlement agreed. The settlement was verbally agreed, on the basis of the payment made in the sum of $1,000,000 plus assignment of the business of both Rolmet and Alumill to Azer, as per the Assignment Agreement dated 8 April 2021. Following said assignment, Azer confirmed by letter dated 16 April 2021, a copy of which is attached…, that the Assignment had been completed and no further claims would be made against Rolmet or Alumill. Subsequently Azer were not named as a Creditor in the liquidation of Rolmet and Alumill.

Question 10: On what basis was Rolmet's customer list valued at $US1,065,417.84? ….

Reply: The First Defendant has been a sole trader with over 25 years experience in the metal industry. Numerous contacts had been established over many years by the First Defendant in his capacity as Director and Sole Shareholder of Companies. The active clients as evidenced by deliveries and payments made were customers of Rolmet and Alumill in Liquidation. Additional contacts had been shared regarding the North American market whereby Azer and the company set up by them, namely Alumico LLC now sell directly, based upon material manufactured by Azer. The valuation by the First Defendant based upon the customer list is based upon said experience acquired and assessment of the valuation being a nominal consideration by way of potential return of profit.

Question 11: On what basis is the settlement agreement said to have been "to the First Defendant's personal detriment", in circumstances where the customer list belonged to Rolmet, rather than the First Defendant?

Reply: Any profit acquired by Rolmet through the customer list was for the benefit of the sole Director and Shareholder, being the First Defendant. As such, it was to his personal detriment that the Companies were no longer able to acquire said profit, which he would have then been entitled to take personally as dividends from the company."

36. Exhibited to the Part 18 Replies are:

i) A spreadsheet listing the invoices raised by Azer (with copies attached), the payments made by Rolmet and the balance of the debt;

ii) A copy letter from Azer addressed to Rolmet dated 16 April 2021 confirming that "the terms of the assignment agreement entered into between the parties has now completed and no further claims will be made against Rolmet….or Alumill."

37. Notwithstanding that the debt was purportedly settled by 16 April 2021, the spreadsheet exhibited to the Part 18 Replies records continuing payments being made by Rolmet to Azer towards the debt:

i) US$110,000 paid on 19 April 2021;

ii) US$130,000 paid on 16 June 2021; and

iii) US$12,573.28 paid on 30 July 2021.

38. D1's Witness Statement states:

"……..

The Defence

…….

[14.] A brief overview of the Defence is that:

….

(j) A substantial liability owed by Alumill to Azer …. was the subject of a settlement agreed with them based on assignment of the business and clients of the Companies to Azer in accordance with an Assignment Agreement dated 8 April 2021 ("Assignment") …. plus payment of US $1,000,000.

…….

Defendants' initial disclosure

……

[23.] As stated above and in the Defendants' Replies to the Claimant's Part 18 Request…… The sum of US $2,065,417.84 was owed by the Companies to Azer. To settle the debt, the sum of US $1,000,000 was paid from the Rolmet bank account to Azer on 12th April 2021, as shown in the Barclays Bank Account Statement for Rolmet (page 161-162).

[24.] In addition to the US $1,000,000 paid by Rolmet, the entirety of the customer list from the Companies was supplied to Azer, with an Assignment of the whole of the businesses to Azer, as referred to in paragraph 89(e) of the Defence. The Assignment Agreement is at pages [163-166] with a letter from Azer of 16thApril 2021 [pages167-168] confirming that following the Assignment, all matters and claims between the parties had now been completed.

[25.] As the liabilities with Azer had been settled, they were no longer a creditor of either of the Companies. As such they were not referred to in the liquidation of the Companies, but all relevant information concerning the

circumstances in which liabilities with them had been settled were supplied to the Liquidator.

…….

Ground 1 – monies paid to the First Defendant in respect of 'Director's Loan Account(s)'

…….

[28.] …… based upon a total liability payable by the Companies to Azer of US$2,065,417.84, Azer had confirmed acceptance of the Assignment of the business and the customer list to them with the $1,000,000 payment as being in full and final settlement of any liabilities and claims by them.

[29.] Based upon the Agreement with Azer and my experience over 25 years in the metal industry, the value of the business and customer list assigned to Azer is representative of the balance of the liability payable to them settled in the sum of US$1,065,417.84.

[30.] As confirmed in my Reply to Question 5 of the Defendant's Replies to the Part 18 Request…. a Director's Loan Account includes any entitlement to capital or any credit owed based upon liabilities discharged by the Director, not just entitlement to profits accrued and not taken as dividends.

[31.] The customer list was personal to me based on the contacts, knowledge, and experience of dealing in the metal industry for many years. The businesses assigned to Azer amounted to goodwill of the Companies…….

……

Ground 2 — payments in relation to the Dodford property

49. Payment for the Dodford property was made from monies to which I was entitled from the Director's Loan Accounts.

50. Notification was provided to Omni Max in March 2021 of the termination of the Contract with Rolmet and the assignment of all the existing purchase orders to Alumill. This was on the basis that Alumill would then raise new orders in their name. Subsequently, Alumill received more than $43 million of new purchase orders from Omni Max, which were subject to the terms agreed requiring payment of 30% in advance with the balance to be paid prior to shipping when invoices would be raised when notification had been received that the goods were ready to be shipped.

51. The claims of Azer had been settled following the payment of $1 million plus the Assignment agreement dated 8 April 2021, at which time the businesses and the customer lists were supplied to them.

52. Money used to pay for the Dodford property was after the settlement with Azer had been finalized."

Analysis of what D1 has stated so far

39. Initially D1 told the Liquidators that the Indirect Payments were made:

    i) by Alumill to Azer to clear the balance ledger of Rolmet in the sum of US$1,267,083.99; and

    ii) via D1's personal bank account because of local banking regulations.

40. D1 did not inform the Liquidators about (i) any settlement agreement (whether made in writing or verbally), (ii) any further amount owed by Rolmet to Azer, or (iii) the transfer of any customer list or business in settlement of the balance of the debt owed by Rolmet to Azer. D1 did, however, provide doctored copies of his personal bank statements to conceal the fact that the Indirect Payments were not made to Azer but rather to fund the purchase of the Property.

41. In the Defence, it was for the first time:

    i) accepted that the Indirect Payments were not made to Azer but rather to fund the purchase of the Property;

    ii) claimed that Rolmet owed Azer the total sum of US$2,065,417.84, which pursuant to a settlement agreement was discharged by way of:

        a) Rolmet paying Azer the sum of US$1,000,00; and

        b) Azer taking "the entire customer list from Rolmet".

42. In the Part 18 Replies, it was claimed that:

    i) The reference to a settlement agreement in the Defence was reference to an assignment agreement made between Alumill and Azer dated 8 April 2021 ("***the Assignment Agreement***");

    ii) There were no other agreements in relation to the settlement;

    iii) It was verbally agreed that the debt be settled by way of payment of US$1,000,000 "plus assignment of the business of both Rolmet and Alumill to Azer";

    iv) Rolmet's customer list was valued conservatively by D1 at $US1,065,417.84; and

    v) The debt was settled by 16 April 2021.

43. In D1's Witness Statement it was claimed that:

    i) Alumill owed a "substantial liability" to Azer, which was settled by (a) a payment of US$1,000,000, and (b) an assignment of the business and clients of the Companies to Azer.

ii) The sum of US$2,065,417.84 was owed by the Companies to Azer, which was settled by (a) a payment of US$1,000,000, and (b) an assignment of the entirety of the customer list of the Companies and the whole of the businesses of the Companies to Azer.

44. The shifting nature of D1's narrative when combined with the admitted doctoring of bank statements, self-contradictions and internal inconsistencies seriously undermines the reliability of that narrative. At best the narrative is utterly confused and confusing:

i) Was the amount of the debt owed to Azer US$1,267,083.99 or US$2,065,417.84?

ii) Was the debt owed by Rolmet, Alumill or both Companies?

iii) Was the debt settled by –

a) The payment of the sum of US$1,276,083.99;

b) The payment of the sum of US$1,000,000 plus an assignment of a customer list; or

c) The payment of the sum of US$1,000,000 plus an assignment of a customer list and the businesses of both Companies notwithstanding that Alumill continued to trade?

iv) Was the customer list owned by Rolmet, both Companies or D1 personally?

v) If the customer list was such a valuable commercial asset, why was it not retained and instead the sum of £932,248.80 used to pay the balance of the debt rather than to buy a residential property?

vi) If the debt was settled by 16 April 2021, why thereafter did Rolmet make 3 further payments, totalling US$252,573.28, to Azer towards the debt?

Contemporary documentary evidence

45. In ***Gestmin SGPS SA v Credit Suisse (UK) Limited*** [2013] EWHC 3560 (Comm), Leggatt J (as he then was), and having commented upon the unreliability of human memory, emphasised the importance of documentary evidence when making findings of fact in commercial disputes:

> "[22.] In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to

avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

46. D1 places particular reliance upon the Assignment Agreement in support of his Defence. The Assignment Agreement records as follows:

ASSIGNMENT AGREEMENT

THIS ASSIGNMENT AGREEMENT is made as of April 8th, 2021

AMONG:

ROLMET ALLOYS LIMITED

with its legal address:

Izabella House Regent Place Birmingham B1 3NJ

(hereinafter collectively referred to as the "**ASSIGNOR**")

AND:

ALUMILL LIMITED

with its legal address:

20 – 22 Wenlock Street London N1 7GU

(hereinafter referred to as the "**ASSIGNEE**")

AND:

AZERALUMINIUM LLC

with its legal address:

Izmir street, 14, Baku, Azerbaijan, AZ 1065

(hereinafter referred to as "**SELLER**")

WHEREAS:

WHEREAS, **ASSIGNOR** entered into the Contract № S 363/20 dated on 29 October 2020 (hereinafter referred to as "**CONTRACT** ") with **SELLER**, and

WHEREAS, the debt amount due from the **ASSIGNOR to SELLER** under the **CONTRACT** is confirmed as **USD 2,065,417.84 (United State Dollars two million sixty five thousand four hundred seventeen and eighty for cents)** (hereinafter referred to as "**DEBT AMOUNT**"), and

WHEREAS, **ASSIGNOR** signed the SUPPLEMENTARY AGREEMENT TO CONTRACT № 01 on 22 February 2021 (hereinafter referred to as "**SUPPLEMENTARY AGREEMENT**") with **SELLER**, and

WHEREAS, **ASSIGNOR** wishes to assign all of its rights and obligations under the **SUPPLEMENTARY AGREEMENT** to **ASSIGNEE**

NOW THEREFORE, **ASSIGNOR, ASSIGNEE and SELLER** (collectively referred to hereinafter as "**Parties**" and separately as a "**Party**"), intending to be bound thereby, hereby agree as follows:

1. **ASSIGNOR** and **ASSIGNEE** hereby agree that the **ASSIGNOR** shall assign and delegate all its rights and obligations in and to the **SUPPLEMENTARY AGREEMENT** to **ASSIGNEE.**

AZƏRBAYCAN RESPUBLİKASI Məhdud Məsuliyyətli Cəmiyyəti azeralüminium Limited Liability Company AZERBAIJAN REPUBLIC

2. **ASSIGNEE** hereby accept the assignment of all of **ASSIGNOR**'s rights and obligations in and to the **SUPPLEMENTARY AGREEMENT**.

3. **ASSIGNOR** shall pay to **SELLER** part of the **DEBT** in the amount of **USD 1,000,000.00 (the United State Dollars one million sat)** within 1(one) working day following the signature of this **AGREEMENT** by all **Parties.**

4. This **AGREEMENT** shall be considered void if **ASSIGNOR** does not fulfills its obligations described in the Clause 3 hereabove.

5. Upon payment of the **USD $1,000,000** dollars from the **ASSIGNOR** to the **SELLER**, the **SELLER** will sign and stamp the purchase order from the **ASSIGNEE** duly confirming the 4000 tons of materials for shipment between April and December 2021. The supplier will also amend the **SUPPLEMENTARY AGREEMENT** into the name of the **ASSIGNEE** clearly showing the payment terms of 5 days from the onboard bill of lading date at Poti seaport. It is a condition that the **SUPPLIER** must fully adhere to this and any cancellation or refusal to supply the 4000 tons within the agreed period stated will be a breach of contract by the **SELLER.**

6. The remaining part of the DEBT in the amount of **USD 1,065,417.84 (United State Dollars one million sixty five thousand four hundred seventeen and eighty for cents)** shall be paid by **ASSIGNOR** to **SELLER by** 18th of April 2021 and following the terms of clause 5 being met and full verification of the **DEBT AMOUNT** balance being correct against a full debit and credit statement agreed between the **SELLER** and the **ASSIGNOR** within 48 hours of entering into this agreement.

7. Any dispute arising out of or in connection with this **AGREEMENT**, including any question regarding its existence, validity or termination, shall be referred to and finally resolved in the Commercial Court of the Republic of Azerbaijan; the **AGREEMENT** shall be governed by and construed in accordance with the law of the Republic of Azerbaijan.

8. The terms and conditions of this **AGREEMENT** are confidential and shall not be disclosed to anyone else, except as shall be necessary to effectuate its terms. Any disclosure in violation of this section shall be deemed a material breach of this **AGREEMENT**.

9. This **AGREEMENT** is executed in English and in three copies, one copy remaining with the **ASSIGNOR,** one with the **ASSIGNEE** and one with the **SELLER** each having equal legal force.

IN WITNESS WHEREOF, the Parties have executed this Agreement the date set forth above and is executed by way of email exchange.

SIGNATURES OF THE PARTIES

On behalf of

ROLMET ALLOYS LIMITED

On behalf of

ALUMILL LIMITED

AZERLUMINIUM LLC

Rolmet Alloys Ltd
Izabella House
Regent Place
Birmingham B1 3NJ
Reg No. 11504528

8 April 2021

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47. Rather than supporting D1's Defence, the terms of the Assignment Agreement are entirely inconsistent with D1's Defence. In particular, there is absolutely no mention anywhere in the Assignment Agreement of any businesses of the Companies or any customer list being assigned to Azer. The Assignment Agreement records:

i) Rolmet is the Assignor;

ii) Alumill is the Assignee;

iii) The subject of the assignment is Rolmet's rights and obligations arising under the Supplementary Agreement To Contract No1 made between Rolmet and Azer on 22 February 2021[4].

iv) Rolmet owes US$2,065,417.84 to Azer;

v) Rolmet is to pay Azer the sum of US$1,000,000 within 1 day of the agreement; and

vi) Rolmet is to pay to Azer the balance of the debt (being US$1,065,417.84) by 18 April 2021.

48. It is also striking that D1 has failed to disclose a copy of the customer list that was allegedly assigned to Azer. In ***Re: Mumtaz Properties Ltd*** [2011] EWCA Civ 610, Arden LJ said this in relation to the drawing of adverse inferences from the absence of contemporaneous documents:

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

49. At the hearing before me, D1 sought to explain away his failure to disclose a copy of the customer list, which it was repeatedly alleged (at least during the course of these proceedings) had been assigned to Azer, by claiming for the first time that there was in fact no documented customer list, but rather D1 had merely agreed with Azer to facilitate introductions to his industry contacts.

Need for a fuller investigation into the facts?

50. D1's Witness Statement complains that:

> "[9.] Disclosure of all the documents obtained by the Claimant from the Liquidator has not been provided.. to me…..I was informed by my solicitor that both parties would be obliged to provide disclosure of documents as part of the litigation in accordance with directions to be provided in due course."

51. In ***Doncaster Pharmaceuticals Group Ltd v The Bolton Pharmaceutical Co 100 Ltd*** [2006] EWCA Civ 661, Mummery LJ warned against the over-ready use of summary judgment when there ought to be a fuller investigation into the facts. As he explained:

> "[18.] In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of

[4] D1 has not disclosed a copy of the Supplementary Agreement either to the Liquidators or in the course of these proceedings.

fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."

52. In ***Amersi v Leslie*** [2023] EWHC 1368, Nicklin J made the following observations upon assessing the likelihood of any further material evidence becoming available at trial:

> "[142.] …….
>
> (4) …. in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: ***Royal Brompton Hospital NHS Trust -v- Hammond (No.5)*** [2001] EWCA Civ 550; ***Doncaster Pharmaceuticals Group Ltd -v- Bolton Pharmaceutical Co 100 Ltd*** [2007] FSR 63.
>
> (5) Nevertheless, to satisfy the requirement that further evidence "can reasonably be expected" to be available at trial, there needs to be some reason for expecting that evidence in support of the relevant case will, or at least reasonably might, be available at trial. It is not enough simply to argue that the case should be allowed to go to trial because something may "turn up". A party resisting an application for summary judgment must put forward sufficient evidence to satisfy the court that s/he has a real prospect of succeeding at trial (especially if that evidence is, or can be expected to be, already within his/her possession). If the party wishes to rely on the likelihood that further evidence will be available at that stage, s/he must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court. The court may then be able to see that there is some substance in the point and that the party in question is not simply playing for time in the hope that something will turn up: ***ICI Chemicals & Polymers Ltd -v- TTE Training Ltd*** [2007] EWCA Civ 725 [14] per Moore-Bick LJ; ***Korea National Insurance Corporation -v- Allianz Global Corporate & Speciality AG*** [2008] Lloyd's Rep IR 413 [14] per Moore-Bick LJ; and ***Ashraf -v- Lester Dominic Solicitors & Ors*** [2023] EWCA Civ 4 [40] per Nugee LJ. Fundamentally, the question is whether there are reasonable grounds for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success: ***Okpabi -v- Royal Dutch Shell Plc*** [2021] 1 WLR 1294 [128] per Lord Hamblen.
>
> (6) Lord Briggs explained the nature of the dilemma in ***Lungowe -v- Vedanta Resources plc*** [2020] AC 1045 [45]:
>
> > "… On the one hand, the claimant cannot simply say, like Mr Micawber, that some gaping hole in its case may be remedied by something which may turn up on disclosure. The claimant must demonstrate that it has a case which is unsuitable to be

determined adversely to it without a trial. On the other, the court cannot ignore reasonable grounds which may be disclosed at the summary judgment stage for believing that a fuller investigation of the facts may add to or alter the evidence relevant to the issue…"

(7) The Court may, after taking into account the possibility of further evidence being available at trial, and without conducting a 'mini-trial', still evaluate the evidence before it and, in an appropriate case, conclude that it should "draw a line" and bring an end to the action: ***King -v- Stiefel*** [2021] EWHC 1045 (Comm) [21] per Cockerill J.

53. D1 has failed to identify any or any reasonable grounds for believing that further disclosure may materially add to or alter the evidence available at trial on this issue. D1 complains that C has not yet disclosed all the documents obtained from the Liquidators but, as already noted, D1 failed even to mention any settlement agreement to the Liquidators. Indeed, in the Part 18 Replies, D1 admitted that, apart from the Assignment Agreement, there are no other written agreements in relation to the alleged settlement terms.

Taking the Defence at face value

54. In the Defence, it is asserted that D1 felt compelled to settle the debt owed by Rolmet to Azer by way of:

i) Rolmet making a payment in the sum of US$1,000,000; and

ii) Azer agreeing to take Rolmet's entire customer list.

55. Even taking D1's Defence at face value, settlement of a debt owed by Rolmet by (in part) the assignment of a customer list owned by Rolmet could not realistically give rise to a debt owed to D1.

Conclusion

56. I am satisfied that (a) D1 has no real prospect of discharging the burden that would be upon him at trial to establish that the Indirect Payments were properly made, and (b) there is no other compelling reason why this issue should be disposed of at a trial.

Overall Conclusion

57. In his Freezing Order Affidavit, D1 admits:

i) receiving funds totalling £1,666,968.17 from the Companies;

ii) of which £932,248.80 was used to purchase the Property mortgage free.

58. The Defence further admits that D2 made no financial contribution towards the purchase of the jointly owned Property.

59. C concedes for the purposes of this application only that there was a DLA and that D1 is entitled to the following credits:

i) £33,000 by way of salary; and

ii) £353,325.76 by way of recorded payments made by D1 to Rolmet.

60. As a director of the Companies, D1 owed fiduciary duties to use the Companies' money for the proper purposes of the Companies. I do not consider that D1 has any real prospect of discharging the burden that would be upon him at trial to establish that:

i) The total sum of £932,248.80 received from the Companies and used by D1 to purchase the Property was applied for the proper purposes of the Companies; and

ii) Any further credits ought properly to be applied to any DLA such that the overdrawn sum he is liable to repay is £348,393.61 –

£1,666,968.17 (admitted funds received from the Companies)

Less

£932,248.80 (used to purchase the Property)

£33,000 (credit to the DLA by way of salary)

£353,325.76 (credit to the DLA by way of recorded payments by D1 to Rolmet)

61. There be summary judgment

i) against D1 in the sum of £932,248.80 as he has no real prospect of successfully defending C's claim that D1, in breach of his fiduciary duties, used the assets of the Companies to purchase the Property. I will determine the scope of the relief to be granted in relation to the Property at the hearing listed for the formal handing down of this judgment.

ii) against D1 in the sum of £348,393.61 as he has no real prospect of successfully defending C's claim that this is the minimum amount of the debit balance arising under any alleged DLA.