Neutral Citation Number: [2023] EWHC 28 (Comm)

Case No: CL-2020-000113

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT

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

Date: 12/01/2023

Before :

PATRICIA ROBERTSON KC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between :

ASPREY CAPITAL LIMITED	**Claimants**
- and -	
REDIRESI LIMITED	**Defendant**
-and-	
Mr Anuuj Gupta	**Respondent**

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Daniel Hubbard (instructed by **Scott + Scott UK LLP**) for the **Claimants**
Roger Mallalieu KC (instructed by **Trowers & Hamlins LLP**) for the **Respondent**

Hearing dates: 1 December 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 12th January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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PATRICIA ROBERTSON KC

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Introduction and preliminary matters

1. The issue before me is whether to make a Non-Party Costs Order ("NPCO") against the Respondent ("Mr Gupta").

2. In October 2021, following a 9-day trial, Sir Michael Burton GBE found for the Claimant ("Asprey") on both of the issues before him: a point of contractual construction and the Defendant's fallback argument, based on estoppel. In a further judgment dealing with consequential matters, he ordered the Defendant ("RR") to pay Asprey £2,503,776 (the full extent of its claim) as a debt, its costs of the proceedings, £525k on account of those costs, and interest. Costs were awarded on an indemnity basis from the latest date for acceptance of a Part 36 offer and interest was awarded at a rate of 8% over base rate.

3. This judgment should be read in conjunction with Sir Michael Burton GBE's trial judgment ([2021] EWHC 2662 (Comm)) ("the Trial Judgment") and the transcript of his judgment on the consequential matters on 25 October 2021 ("the Consequentials Judgment", the material part of which I have set out below) (collectively "the Judgments"). I will not repeat his account of the nature of the dispute or the basis on which that was resolved in favour of Asprey. I shall come in more detail, below, to some criticisms the Judge made in the Judgments of aspects of RR's defence to the claim and of Mr Gupta's evidence.

4. By the time that Sir Michael Burton was dealing with his consequential order, it was evident from RR's accounts, which were in evidence before him, that during the period of the litigation RR "has at all times been in a negative asset position". RR has so far paid Asprey nothing in respect of its judgment debt or costs and interest. RR was wound up by Order of the Court on 12 January 2022 and Finbarr O'Connell was appointed liquidator on 9 March 2022 (the "Liquidator").

5. By application notice dated 29 June 2022, Asprey applied for an NPCO against Mr Gupta. The matter comes before me, rather than the trial judge, because Sir Michael Burton GBE has retired and is now past the age at which he would be able to sit.

Relevant legal principles

6. The power to make an NPCO arises under s.51 of the Senior Courts Act 1981, which provides that the costs of all proceedings in the High Court shall be in the discretion of the Court and that it "shall have full power to determine by whom and to what extent the costs are to be paid".

7. Fundamentally, the question is whether in all the circumstances it would be just to make an NPCO against Mr Gupta. The decided cases have provided helpful guidance as to factors to consider in making that assessment and, also, as to the approach to be taken to this summary procedure.

8. In particular, a number of cases have dealt with situations where, as here, the issue is whether to make an NPCO against the director of an insolvent company in relation to

litigation pursued or defended by the company. In such cases, the principle of limited liability would be undermined if a director were to be made personally liable for costs in a situation where, albeit he is controlling and/or funding the litigation, he is nevertheless properly to be regarded as discharging his duty to act in the interests of the company (or, where the company is insolvent, the interests of its creditors) by causing the company to pursue or defend the litigation in question.

9. The relevant guidance has been usefully summarised by the Court of Appeal, after a comprehensive survey of the relevant cases, in *Goknur v Aytacli* [2021] EWCA Civ 1037 (Lord Justice Coulson, with whom the rest of the Court agreed, at [40]). I have substituted into the citation below the full references for the cases there referred to:

> "a) An order against a non-party is exceptional and it will only be made if it is just to do so in all the circumstances of the case (*Gardiner v FX Music Limited* (2000) WL 33116500 (27 March 2000, unreported), *Dymocks Franchise Systems (NSW) Pty Limited v Todd and others* [2004] UKPC 39, [2004] WLR 2807, *Threlfall v ECD Insight Limited and Anr.* [2015] EWCA Civ 144; [2014] 2 Costs LO 129).
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> b) The touchstone is whether, despite not being a party to the litigation, the director can fairly be described as "the real party to the litigation" (*Dymocks*, *Goodwood Recoveries v Breen* [2005] EWCA Civ 414, *Threlfall*).
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> c) In the case of an insolvent company involved in litigation which has resulted in a costs liability that the company cannot pay, a director of that company may be made the subject of such an order. Although such instances will necessarily be rare (*Taylor v Pace Developments Ltd* [1991] BCLC 406), s.51 orders may be made to avoid the injustice of an individual director hiding behind a corporate identity, so as to engage in risk-free litigation for his own purposes (*North West Holdings Plc (In Liquidation (Costs)* [2001] EWCA CIV 67). Such an order does not impinge on the principle of limited liability (*Dymocks, Goodwood, Threlfall*).
>
> d) In order to assess whether the director was the real party to the litigation, the court may look to see if the director controlled or funded the company's pursuit or defence of the litigation. But what will probably matter most in such a situation is whether it can be said that the individual director was seeking to benefit personally from the litigation. If the proceedings were pursued for the benefit of the company, then usually the company is the real party (*Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 W.L.R. 1613). But if the company's stance was dictated by the real or perceived benefit to the individual director (whether financial, reputational or otherwise), then it might be said that the director, not the company, was the "real party", and could justly be made the subject of a s.51 order (*North West Holdings, Dymocks, Goodwood*).
>
> e) In this way, matters such as the control and/or funding of the litigation, and particularly the alleged personal benefit to the director of so doing, are helpful indicia as to whether or not a s.51 order would be just. But they remain merely elements of the guidance given by the authorities, not a checklist that needs to be completed in every case (*Systemcare (UK) Limited v Services Design Technology* [2011] EWCA Civ 546).

f) If the litigation was pursued or maintained for the benefit of the company, then common sense dictates that a party seeking a non-party costs order against the director will need to show some other reason why it is just to make such an order. That will commonly be some form of impropriety or bad faith on the part of the director in connection with the litigation (*Symphony Group plc v Hodgson* [1994] QB 179, *Gardiner, Goodwood, Threlfall*).

g) Such impropriety or bad faith will need to be of a serious nature (*Gardiner, Threlfall*) and, I would suggest, would ordinarily have to be causatively linked to the applicant unnecessarily incurring costs in the litigation."

10. Useful as this guidance is, this is, in the end, a highly fact-specific jurisdiction. As Lord Justice Moses has pithily observed, "there is now an abundance of authority on the absence of any need for abundant authority on the principles which should guide a judge as to whether to make a third party order for costs." (*Alan Phillips Associates Ltd v Terence Edward Dowling t/a The Joseph Dowling Partnership & Ors* [2007] EWCA Civ 64, at [31].)

11. "Exceptional" simply means "outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense" *Dymocks* at [25]. In the particular context where the order is sought to be made against the director or shareholder of an insolvent company, there must be some factor that makes it just to make the order, notwithstanding the principle of limited liability. The decided cases offer examples but are not exhaustive of the factors that might be relevant, or the ways in which these might combine in a given case to tip the balance. As the Court of Appeal stated in *Deutsche Bank v Sebastian Holdings* [2016] EWCA Civ 23 at [62]: "…the only immutable principle is that the discretion must be exercised justly."

12. Funding, by itself, may be consistent with the director pursuing the proceedings for the benefit of the company. Equally, however, the absence of funding will not preclude the making of an order if the proceedings were being run for the personal benefit of the director, rather than in the interests of the company. Impropriety in the conduct of the proceedings, where serious, may justify an order even where the element of personal benefit is lacking. However, it does not follow that some lesser degree of impropriety is irrelevant in a case where there are also other factors in favour of making an order. Ultimately, it is not a matter of operating a "checklist" but an exercise of a broad discretion. Something that would not be sufficient by itself may be the feather that tips the scale when it is viewed cumulatively with other features of the case.

13. Whilst this is a "summary jurisdiction", it does not follow that it will only be exercised (a) where the Court can deal with the matter shortly and (b) without determining any disputed issues of fact.

14. Whereas the trial judge may be able to deal with a s51 application very swiftly, that may not be as true where (as here) the application has to be dealt with by a judge other than the trial judge. It does not follow, however, that the application must proceed as if it were a mini-trial. The Court can in principle limit the length of the hearing, limit (or indeed not permit) cross examination, limit the parties to the "big

points" and, where appropriate, decide the matter on the basis of witness statements alone, so as "to ensure that the application is dealt with as speedily and inexpensively as is consistent with fairness to both sides": *Robertson Research International Limited v ABG Exploration BV and Others* at [16] and [40] (13 October 1999, Unreported, Mr Justice Laddie).

15. When deciding whether to make an order in circumstances where some of the relevant facts are disputed, the Court does not approach the matter as if it were an application for summary judgment: *Greco Air Inc v Tokoph* [2009] EWHC 115 (QB) [45] per Burton J. Rather, the Court must balance considerations of proportionality and justice, bearing in mind that this is a form of satellite litigation which should not be allowed to expand beyond reasonable bounds.

16. In most cases, justice is adequately served by the Court doing the best it can to resolve disputed matters on the documents, which it does on a balance of probability (*Centrehigh Ltd v Amen* [2013] EWHC 625 (Ch) at [41]-[42]; *Greco Air* at [45]). Whilst the Court has power to allow cross examination on disputed issues relating to a s51 application where it considers this to be both proportionate and fair, this will be exceptional (*Greco Air* at [47]). There are also cases where the Court has declined to make an NPCO on the basis that it could not fairly resolve the disputed issues on which the exercise of discretion would turn without more of an enquiry than it was feasible to undertake, in the given case, within the bounds of a summary jurisdiction (see, for example, *Deepchand v Sooben* [2020] EWCA Civ 1409 at [35] and *Barndeal Ltd & Others v The London Borough of Richmond-Upon-Thames* [2005] EWHC 1377 (QB) at [18]-[22], cited in *Greco* Air at [32]).

17. The absence of a warning that a party intended to seek an NPCO, given whilst the litigation was still in progress, is capable of being a relevant factor pointing against making an order, if an earlier warning might have altered the way the non-party conducted themselves in ways relevant to the exercise of discretion. If, however, the non-party is, objectively, "the real party" to the litigation, "the absence of a warning may be of little consequence" *Deutsche Bank v Sebastian Holdings* [2016] EWCA Civ 23 at [32] and [37].

<u>Relevant procedural matters</u>

18. The application here was made on the basis that, for the reasons set out in Ms Winstanley's witness statement in support, Mr Gupta was to be regarded as "the real party" behind RR's defence of the claim and that his conduct had been unsatisfactory in a number of respects. Heavy reliance was placed on certain submissions made on RR's behalf (addressed below) which had described Mr Gupta as "(in practice) the party to the proceedings".

19. Mr Gupta's witness statement in response sought to distance himself from those submissions and took issue with Ms Winstanley's factual evidence in various respects. An order for cross-examination was sought by an application dated 11 November 2022, Mr Gupta's witness statement in response having been filed on 13 October 2022. The Court declined to expedite the determination of that application, observing that it would be open to the parties to make submissions about the significance, if any, to be attached to the fact that Mr Gupta had been offered the opportunity to have his evidence tested by cross examination but had declined. In any

event, with only a day listed for the hearing, cross examination could not have been accommodated without an adjournment, which in the event neither party sought. Asprey instead sought to rebut Mr Gupta's evidence by filing (two weeks before the hearing) reply evidence, not only from Ms Winstanley but also from the Liquidator of RR.

20. Objection was taken in the Skeleton Argument filed on behalf of Mr Gupta to some parts of that evidence, on the basis that it went beyond the bounds of reply evidence and/or on grounds of relevance, and redacted forms of both witness statements were included in my bundle, illustrating the parts to which objection was and was not taken. However, given that (as was common ground) I had had to read the two witness statements in question in their entirety in preparing for the hearing, as well as reading the redacted versions, I indicated that the practical means of dealing with any objections would be to flag these points as and when the relevant material came up in the course of submissions, rather than taking up time at the start of an already over-loaded day with a preliminary point on admissibility. Mr Mallalieu KC, to his credit, was willing to take this pragmatic course.

21. In the event, little reference was made by Mr Hubbard in his oral submissions to any of the evidence whose status was disputed and Mr Mallalieu KC made clear that he did not maintain his objection to the very few documents falling into that category that I was taken to during oral submissions. As a result, I did not rule on the objection.

22. As a result of the exchanges of evidence referred to above, what had started out as an application on relatively simple grounds had morphed by the time of the hearing into nine lever arch files, raising a host of factual issues and sub-issues. Some of these, on any view, went beyond what could practicably be dealt with in a one-day hearing, or indeed within this summary procedure at all. Even proceeding at pace and sitting for rather longer than a usual court day, Counsel were not able to cover anything like all of the points that had been raised in the evidence and written submissions on either side.

23. Necessarily, I have focussed on a number of key points I consider capable of resolution on the documents. As it happens, I do not consider that any of the evidence on which I have relied in reaching my conclusions, set out below, went beyond the proper bounds of reply evidence, considering that Mr Gupta had offered certain explanations of certain key matters for the first time, which Asprey was entitled to seek to rebut. To the extent that the reply evidence in some respects did go beyond those bounds (for example, in adducing additional examples said to show personal expenses being met from company funds, which might in principle have been adduced in Asprey's initial witness statement in support) I have not considered it necessary to place any reliance on that material.

<u>The factual background in respect of the litigation</u>

24. It is common ground that Mr Gupta owns, directly or indirectly, 100% of the shares in RR and that he is the only executive director (his wife being the other director), as well as being the person who was responsible for giving instructions to RR's legal team in respect of the litigation and RR's only witness at trial.

25. The proceedings related to a joint venture between RR and Asprey under which they acquired and sold social housing for profit. The dispute turned on the proper construction of a single clause in the joint venture agreement, clause 5.1, which stated that: "Rediresi and Asprey will share all proceeds of the properties above a 6% cap rate on a 50-50 basis". Asprey's case was that the clause was to be interpreted as meaning that Rediresi and Asprey would share all proceeds of the properties above what would have been realised if they had been bought and sold at a cap rate of 6%. Mr Gupta's case was that it meant Rediresi and Asprey would share all proceeds of the properties (in the sense of benefit or savings) resulting from a purchase price above a cap rate of 6% (Trial Judgment at [20]).

26. However, the dispute was very heated and the parties did not limit themselves to the point of construction and evidence as to the factual matrix as at the time of the agreement (Trial Judgment at [8] and [27]-[32]). Asprey contended that RR (through Mr Gupta) had concealed a resale from it, in order to hide the fact that sums had become due to Asprey on its interpretation of clause 5.1. RR's pleaded case (on which Mr Gupta had signed the statement of truth) characterised Asprey's claim as "fraudulent", an accusation which was repeated in its opening submissions. In addition, RR ran a fallback argument based on estoppel by convention, to the effect there was a shared understanding about the calculation of the sums due to Asprey, as demonstrated by the fact they were in fact calculated by reference to a 6% cap rate, to which Asprey responded that this was because RR (through Mr Gupta) had misled it as to the factual position. As a result of these allegations and counter-allegations, events subsequent to the making of the agreement were explored at trial. Had the dispute been limited to the point of construction on clause 5.1 and evidence strictly relevant to the factual matrix it could hardly have occupied 9 days.

27. Shortly before trial, RR sought an adjournment on the grounds that Mr Gupta was ill with Covid-19. It was in that context that the submission was made by Counsel for RR, in his Skeleton Argument, that:

> "The Appellant is essentially an investment vehicle for Mr Gupta and has only ever had one other (executive) employee (who has now left). Mr Gupta is, therefore, simultaneously: (a) the individual who was most directly involved in the events in question (and the only current employee who was involved at all); (b) the owner and the decision-maker at the Appellant and the individual who gives instructions to the Appellant's legal team; and (c) the Appellant's sole witness. **Mr Gupta is, therefore, (in practice) the party to the proceedings**, the only person able to provide factual instructions and the sole witness." (Emphasis supplied.)

28. In the event, an adjournment was refused and Mr Gupta recovered in time to participate in the trial. Whilst Asprey sought to suggest that this timely recovery gave grounds for suspicion that his illness was tactical rather than real, I understand that the adjournment application was supported by medical evidence and I do not consider that I can or should seek to go behind that now. (Nor am I in a position to tell whether Sir Michael Burton GBE was intending to express a view, <u>specifically</u>, on this particular matter, when he expressed the view that there was "considerable justification" in the submissions Asprey made in closing, which had included this as one of 18 examples bearing adversely on credibility, as further discussed below.) I therefore assume, for the purposes of this application, that the basis for the

adjournment application was genuine illness. Its relevance to the s51 application is limited to whether the submissions that were made in support of it bear meaningfully on the question of who is the "real party" for the purposes of the s51 application before me.

29. Mr Gupta's witness statement made the point that he was ill at the time these submissions were lodged and does not recall having seen or approved the statement that he was "the party" to the proceedings, which he does not accept is correct. Importantly, however, Mr Mallalieu KC made clear that no criticism was made of Mr Gupta's former Counsel and that Mr Gupta did not take issue with the remainder of the paragraph I have quoted, which is factual in nature. That includes the statement that RR "is essentially an investment vehicle for Mr Gupta". Whether Mr Gupta was "the real party" in the sense in which that term is used in the context of the NPCO jurisdiction is an evaluative question and a matter for me. His former Counsel's choice of language in characterising the facts listed in the paragraph is not determinative. He was addressing the different question of whether the trial could in practical terms go ahead without Mr Gupta. What I take from that submission are the undisputed facts there set out.

30. Sir Michael Burton GBE characterised the main issue of construction in these terms (Trial Judgment at [2]):

> "My task is to construe what the proper contractual interpretation is of those words [i.e. clause 5.1], which are on any basis unclear, and which each side interprets differently, so that from the Defendant's point of view it justifies the payment that it made to the Claimant under it and from the Claimant's point of view there is a substantial further sum due."

31. Having reviewed over some seven and a half pages of the Judgment the factual matrix and the submissions on either side as to the issue of construction, he concluded the central issue in favour of Asprey as follows (Trial Judgment at [26]):

> "I am convinced that the Claimant's interpretation gives much more meaning, and is much closer, to the wording of clause 5.1. I accept the arguments for the Claimant as much more persuasive than those of the Defendant in respect of both the factual matrix and construction. I find the provision for the sharing of the costs on sale persuasive. But, more significantly, I conclude that there are two factors in clause 5.1 of importance: (i) "proceeds" and (ii) "6% cap rate". "Proceeds" are what result after a sale not a purchase, and the 6% cap rate fell to be calculated at both purchase and sale, in order to calculate the yield compression which the parties expected or aimed for. It was the 6% cap rate which was key, not simply a reduction in the purchase price. I prefer the Claimant's interpretation, that the Claimant would share in the proceeds if they were more than ("above") that achieved by a 6% cap rate on acquisition and resale, as reflecting the parties' agreement, and in the circumstances the properties were bought at 6% (on later tranches 6.25% and 6.5%), less deductions, and sold at 4.75%. The yield compression foreseen by the interposition of Rediresi thus results in a sum to be shared equally, taking account of what has already been shared."

32. Plainly, given those conclusions, the allegation that Asprey's claim was fraudulent was wholly without foundation and should not have been made by RR. Asprey's stance on the meaning of clause 5.1 was not only reasonable but vindicated. That said, it also seems clear to me from the way in which the Judge dealt with the point of construction that he accepted there was a genuine lack of clarity which needed to be resolved. There is no sense here that the Judge regarded RR's position on the point of construction as one that was unarguable or wholly lacking in merit, albeit it was ultimately unsuccessful.

33. The Judge did, however, have criticisms to make about other aspects of the dispute. He noted (Trial Judgment at [8]) that:

> "There was much evidence given before me relating to events after June 2007, and in particular relating to what occurred when the Claimant discovered in December 2018 the fact of the resale and confronted the Defendant, which would not be admissible in relation to construction but only at best to **credibility**, and of course in particular in relation to the estoppel claim." (Emphasis supplied.)

34. Mr Cox, the individual who was principally responsible for negotiating the agreement, had sadly died before he had made a witness statement. The Judge heard evidence from three witnesses, Mr Downing and Mr Kingsnorth, for Asprey, and Mr Gupta, for RR. Of them he said:

> "I did not find the evidence of either Mr Downing or Mr Gupta impressive, and counsel on both sides, Mr Hubbard for the Claimant and Mr Cook QC for the Defendant, did not place much if any reliance on the evidence of either of them (much of which was in any event subjective) in closing submissions. Mr Hubbard submitted 18 examples as to which he had considerable justification in asking me to reject the evidence of Mr Gupta, in particular in relation to his evidence in paragraph 26 of his witness statement which he was compelled to abandon in the light of recent disclosure: his explanation of the role of Duet, to which I shall refer insofar as relevant below: and his account of the events (insofar as relevant) when the Claimant discovered the fact of the sub sale and confronted him with it in December 2018, which I do not accept. Mr Cook described Mr Downing's evidence as "highly unsatisfactory", and it is right to say that I am satisfied, by reference to the measured evidence of Mr Kingsnorth, that he exaggerated and embellished his evidence in certain respects. Both witnesses were in my judgment going over the top in order to seek to establish their respective cases, Mr Gupta in resisting what he considers to be an unjustifiable claim and Mr Downing in pursuing a claim to which he believes the Claimant is entitled and which he believes the Defendant concealed. However, I found the evidence of Mr Kingsnorth persuasive and reliable, and he was what I called in the course of the hearing my lodestar in respect of the matters of which he gave evidence. I reach my conclusions as to the factual matrix without any or any material reliance on the evidence of Mr Downing or Mr Gupta, and have done so by reference to the contemporaneous documents and, where necessary and admissible, the evidence of Mr Kingsnorth…"

35. The 18 examples referred to in that passage of the Judgment, and the unfounded assertion that Asprey was bringing a fraudulent claim, are amongst the matters relied on in Ms Winstanley's first witness statement in support of the application (referred to

at paragraphs 26.2-3 of her evidence). The closing submissions themselves were introduced into the hearing bundle late, after evidence had closed, but as these were matters Ms Winstanley had identified as relevant at the outset, and which RR (through Mr Gupta) had had the opportunity to address at trial, I do not consider that that prejudiced Mr Gupta.

36. The 18 examples that Asprey relied upon before Sir Michael Burton GBE were set out across some ten pages of Asprey's closing submissions. Those closing submissions made clear that the conclusion that the Judge was invited to draw from the examples was that Mr Gupta had given dishonest evidence in a number of respects. The submission was that this array of examples showed Mr Gupta to be a witness who was "able to fabricate evidence naturally and with ease" but who could not keep track of his own story and contradicted himself. This, it was submitted, then led to the conclusion that his evidence should not be accepted when in conflict with that of Mr Downing and Mr Kingsnorth on the central disputed issues of fact.

37. I note that the examples relied upon included, amongst many other matters, Mr Gupta's failure to provide an explanation as to why a loan of £1.3m to a company called Hill Street Advisory Limited ("HSAL") did not appear in RR's accounts. The particular issue as to the status of that loan was raised directly before me, as I shall come on to explain, and I reach my own conclusions about it. I deal below with the explanation that Mr Gupta put forward in his evidence on this application.

38. The remainder of the 18 examples (some of which appear on the face of it to relate to matters that did not bear on the main issues before the Judge, including various allegations Mr Gupta had made about Mr Downing's conduct on unrelated transactions) are not matters I can directly re-evaluate myself, as to do so would be impossible without being in the position of the trial judge. Nor do I need to do so. What I can and do take into account is that Sir Michael Burton's view, as the trial judge, was that there was "considerable justification" in these criticisms.

39. Furthermore, the Judge went on (at [10]) to expressly reject other parts of Mr Gupta's evidence, which appear to be unrelated to the 18 examples themselves, namely a part of his witness statement which he was compelled to abandon in the light of recent disclosure (also referred to at Trial Judgment [27]), his explanation of the role of Duet Asset Management Ltd (further referred to at Trial Judgment [11(ii)]), and his account of the events when there was a confrontation about the sub sale in December 2018 (also referred to at Trial Judgment [8] and [27]). The Judge had, as I have noted above, described the latter point, in particular, as bearing on credibility. As I shall come to in a moment, the Judge returned to the question of Mr Gupta's credibility as a witness, when he came to give his judgment on consequential matters - and made his views very clear.

40. As regards the estoppel argument, RR's contention was that the fact Asprey had calculated the sums due to it in an amount which would be correct on RR's interpretation of the clause, showed that that was how both parties had understood their agreement was intended to operate and founded an estoppel by convention. This was initially pleaded on behalf of RR as a shared understanding as to the meaning of clause 5.1. That was modified to a submission that there had been a shared assumption that the sums paid were those due under that clause and the payments

having been made and accepted in that belief that could not be revisited (Trial Judgment [30]).

41. Dealing with that reformulation of the estoppel argument, Sir Michael Burton noted that he agreed with Asprey's submissions that, as a matter of law, what was needed to found an estoppel by convention was a common understanding as to "the factual or legal basis on which a current transaction is proceeding" and, moreover, that there was a distinction between a common assumption as to a result (in this case, the amount to be paid) and a common assumption as to the legal or factual basis for that result (in this case, the meaning of clause 5.1 and the underlying facts dictating what figures should be used in the calculation, on the basis of that interpretation). The Judge concluded that, in making its calculation, Asprey had been under a mistaken belief as to the facts (and hence what figures to use in the calculation) which, had that been the true factual position, would have been consistent with Asprey's case as to the meaning of the clause, and inconsistent with RR's. On that basis there was no common assumption (whether as to the facts or as to the interpretation of the clause) and the claim of estoppel by convention failed (Trial Judgment [31]-[32]).

42. In dealing with the estoppel point, the Judge observed that he could not interpret the cryptic WhatsApp exchange between Mr Cox and Mr Gupta on which Asprey had relied for an argument that Asprey had been misled by Mr Gupta into calculating the sums due in the way that they did and hence that RR could not rely on those calculations as the foundation for an estoppel by convention (Trial Judgment [9] and [28]). In the event, Asprey did not need to rely on that argument, given the conclusions I have summarised above. However, it is right for me to note that the Judge rejected the allegation that Asprey's mistaken belief was induced by a misrepresentation by Mr Gupta and noted that Asprey's misrepresentation argument had not been supported by Mr Kingsnorth.

43. That said, the Trial Judgment had made significant criticisms of Mr Gupta's evidence on other aspects of the case, as I have already explained above. Furthermore, in dealing with the question of what interest rate should be applied, the Judge spelt out in terms that he considered some of Mr Gupta's evidence to have been dishonest and he was also critical of other aspects of Mr Gupta's conduct of the litigation on behalf of RR. He said this (Consequentials Judgment at [1]-[4]):

> "<u>Judgment on Rate of Interest</u>
>
> 1. Plainly, as both sides have accepted, 10% over Base Rate is not automatic but is a maximum, rather as in a contempt case, where two years is the maximum sentence for imprisonment however egregious the contempt may be.
> 2. As both sides have accepted, this is a matter for my discretion. I do conclude that the Defendant's case was based upon evidence from Mr Gupta **which was in substantial respects dishonest, but this was certainly not "a case built on lies"**, as in *OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195; it was a question of construction of a contract, as Mr Cook QC has said, although I do think **the estoppel case was hopeless**.
> 3. But the real point is that there was an **egregious failure** by the Defendant by ignoring the offer and resisting all possible further attempts at settlement negotiations, even though, as I said at the time, there was a pool of profit which

> they could perfectly well have shared but for their deliberate refusal to recognise any possibility of settlement.
>
> 4. I do not consider that this is a maximum case, but equally I do not think that it is anywhere near the 4% either, and I propose to award 8% over Base Rate as the rate of interest." (Emphasis supplied.)

44. Mr Hubbard emphasised the description of Mr Gupta's evidence as "in substantial respects dishonest", whereas Mr Mallalieu QC relied on the caveat that this was not "a case built on lies".

45. I think it is clear what the Judge had in mind in saying what he did, when one considers his judgments as a whole and the contrast he draws with *OMV Petrom*.

46. In *OMV Petrom* the unsuccessful defendant, Glencore, had not only unreasonably rejected a Part 36 offer but had, as the Master of the Rolls noted, acted "unreasonably in advancing a dishonest and unreasonable defence" (*OMV Petrom* at [44]). The claim against Glencore was that it had supplied a blend of various crude oils misleadingly described as "Gulf of Suez Crude Oil Blend" and the trial judge, Flaux J, had held that "the representations made by Glencore in the bills of lading and other shipping documents [describing the cargo]… were false representations and Glencore knew those representations were false" (*OMV Petrom* at [9]).

47. In that case, the fact that Glencore had told outright lies was the very foundation of the claim against Glencore, in deceit, which was made good at trial and furthermore Glencore's attempt to argue, in its defence, that it had not intended the representee to rely on its deceitful representations was dismissed as based on "mendacious and unbelievable" evidence (at [156]).

48. I take Sir Michael Burton to be making the point that RR's defence of the construction point was not "built on lies" in the same sense, as in *OMV Petrom*, of being necessarily and inherently dependent on dishonest evidence. On the contrary, the relevant contractual clause lacked clarity, such that more than one interpretation was possible, and the Judge resolved the question of which interpretation was correct "without any, or any material reliance" on the evidence of either Mr Downing or Mr Gupta. In other words, there was a legitimate difference between the parties on a question of construction of a contract, albeit one which the Court ultimately resolved in favour of Asprey. That is significant when one comes to ask whether it was in principle in the interests of RR to defend the claim (further discussed below).

49. However, as the remainder of this passage makes clear, the Judge had concluded that the Defendant's case "was based upon evidence from Mr Gupta which was in substantial respects dishonest". "Substantial" must mean that the Judge accepted that Mr Gupta's evidence had been dishonest in more than some minor or incidental respect. Thus, whilst RR's defence on the construction issue was not inherently dishonest (unlike the position in *OMV Petrom*), Mr Gupta had sought to bolster RR's position by giving dishonest evidence which the Judge had specifically rejected (as he had identified inter alia at Trial Judgment [10]).

50. Reading this passage together with the comment in the Trial Judgment about there being "considerable justification" in the submissions Asprey made about the 18 examples, it is clear that the Judge intended to be seriously critical of Mr Gupta's

evidence, even if I cannot be certain that he accepted Asprey's submissions on each one of those 18 examples.

51. Mr Mallalieu KC emphasised that the Judge had also made criticisms of Mr Downing's evidence, saying in the same passage of the judgment (Trial Judgment [10]):

> "Mr Cook [RR's Counsel at trial] described Mr Downing's evidence as "highly unsatisfactory", and it is right to say that I am satisfied, by reference to the measured evidence of Mr Kingsnorth, that he exaggerated and embellished his evidence in certain respects. Both witnesses were in my judgment going over the top in order to seek to establish their respective cases, Mr Gupta in resisting what he considers to be an unjustifiable claim and Mr Downing in pursuing a claim to which he believes the Claimant is entitled and which he believes the Defendant concealed."

52. In my view that criticism cannot fairly be equated with the conclusion that Mr Gupta's evidence was in substantial respects "dishonest". The Judge does not make a finding of dishonesty in respect of Mr Downing and I do not consider that that inference can be drawn from what he does say. Witnesses may exaggerate and embellish in support of a case they believe to be well-founded, without having the state of mind that would amount to dishonesty (i.e. actually knowing, or suspecting, or simply not caring, that what they say is factually untrue).

53. In any event, I do not consider that these criticisms of Mr Downing's evidence really take one anywhere, given that Asprey's case was also supported by evidence from Mr Kingsnorth which the Judge described as "persuasive and reliable" and which he took into account in reaching his conclusions in favour of Asprey on the factual matrix (Trial Judgment [10]). Had the Judge thought that Mr Downing's conduct merited depriving Asprey of some part of its costs, that would have been a matter for him to reflect in his costs order as between Asprey and RR. That is now water under the bridge. I do not consider that this should realistically bear on the issue with which I am concerned, namely whether Mr Gupta should now pay the costs that were so ordered.

54. As to other aspects of the manner in which the litigation was conducted on behalf of RR, on Mr Gupta's instructions:

    i) The Judge, in the passage I have cited from the Judgment on consequential matters, also described the estoppel case as "hopeless". However, it is not at all obvious to me that he meant it was always hopeless, as opposed to becoming so in light of the findings of fact he made at the conclusion of the trial as to the state of Asprey's beliefs (as to which see paragraph 41 above). I return to this topic below.

    ii) The Judge uses notably strong language when describing RR's failure to engage constructively with settlement as an "egregious failure". As further explained below, it seems to me fair to treat that as a criticism levelled at Mr Gupta himself, who on his own case was the source of RR's instructions in that regard.

55. Whilst not taking the interest award to the maximum of 10% over Base Rate, these criticisms taken together resulted in an award of 8% over Base Rate, which denotes significant judicial disapproval of the manner in which RR's defence had been conducted. I address below the relevance of these criticisms to the decision I have to make.

56. In the context of RR's submissions on consequential matters, RR had sought a stay of execution of the judgment pending an appeal:

  i) Mr Gupta's evidence in support of that application included that (notwithstanding the profits that it had made from the joint venture) RR was in a negative net asset position as at 17 October 2021. Moreover, he produced accounts purporting to show that its balance sheet was also negative as at 31 May 2020 and he said that "The accounts also confirm that the Claimant has had no employees since at least 2019. This is an indication that it is no longer trading and that its financial position is unlikely to improve."

  ii) The oral submissions made by RR's Counsel, in support of the proposition that RR's appeal would be stifled due to its inability to raise funds to meet the judgment, including saying:

    "...this is not a company, my Lord, RediResi, which has some substantial business which is so hugely valuable that it's worth investing £3 million for the sake of saving a business…. As you see from these transactions, is these are essentially vehicles… the reality is it's the individuals who are doing these deals and the corporate entity is a matter of essentially some convenience. So there is no sort of long-standing business that we need this entity to pursue. It doesn't have factories, employees, staff or anything like that, my Lord."

  iii) By the time of the hearing before me, Asprey relied on the submissions made at the time of the stay application, as well as those made when seeking an adjournment. Whilst I accept that Mr Gupta did not attend the consequentials hearing, which was held remotely, that description of RR must have been made on instructions from him as to the factual position (as I understood Mr Mallalieu to accept).

57. Sir Michael Burton's Order for payment of the judgment debt, costs and interest was sealed on 28 October 2021. Payment was due within 28 days, i.e. by 25 November 2021. As I have said, nothing has been paid in respect of it.

58. Asprey gave notice by letter dated 5 November 2021, within days of the Order, that it was contemplating a s51 application. That application was not in fact made until 29 June 2022. In the meantime, however, Asprey had applied to wind up RR, that order was made on 12 January 2022 and Joint liquidators were appointed on 9 March 2022.

<u>The issues in respect of the application</u>

59. The issues as they emerged from Ms Winstanley's evidence in support of the application were:

i) Whether Mr Gupta was "the real party" to the litigation. In that respect she relied at that stage on:

   a) The submissions made on RR's behalf at the time of the adjournment application;

   b) The fact that as the majority shareholder (owning "75% or more" of the shares in RR) Mr Gupta stood to benefit personally from the defence of the claim;

   c) Evidence which was said to demonstrate that Mr Gupta used RR as a personal bank account. By reference to bank statements obtained in RR's liquidation, Ms Winstanley identified various payments from RR which on the face of it did not appear to be legitimate business expenses (including a payment of £20,000 to a wedding caterer, a payment to a wedding photographer, and payments referenced as being for his daughter's hair and makeup, all made in the same month that Mr Gupta's daughter had an engagement party, in March 2018) and certain other payments to Mr Gupta and other family members the justification for which was not clear on the face of the accounts;

   d) In the same category and by way of further evidencing Mr Gupta's control over RR and its finances, she pointed to evidence of unexplained "loans" amounting to £1.4m by RR to HSAL, which were subsequently written off and which Asprey suspected had been for the purpose of putting assets beyond its reach. This was a matter that had featured during cross examination and was one of the 18 examples (referred to above) on which Asprey relied in closing, pointing to the fact Mr Gupta had failed to provide any explanation of the transaction, having said he would do so. As I shall come to, Mr Gupta did provide an explanation, for the first time, in his evidence on this application;

   e) Whilst Ms Winstanley did not attempt to argue the application in her witness statement, the evidence she set out in respect of these last two mentioned topics squarely raised the issue (and Mr Gupta's response addressed it in these terms) as to whether Mr Gupta was treating RR's funds as his own;

ii) Whether Mr Gupta had funded the litigation. In that respect:

   a) RR was on its case insolvent throughout its conduct of the litigation, and RR's solicitors had confirmed that neither they nor Counsel had entered into a CFA or alternative funding arrangement.

   b) Ms Winstanley drew attention among other things to the fact that RR's accounts for the year ending 31 October 2019 referred to the business receiving support from a "family member" via a business they own.

   c) However, Mr Gupta's solicitors stated in correspondence that they understood from Mr Gupta that the funds paid to them came from "RR's own funds that it held from its business activities." It was said

that the planned financial support from a family member was never in fact supplied.

iii) Whether Mr Gupta's conduct during the litigation was such as to justify an order: Ms Winstanley described Mr Gupta's conduct in relation to the litigation as "unsatisfactory" in various respects (some of which were not pursued before me) and did not, in her first witness statement, use the word "dishonest" in respect of his evidence. However, she relied amongst other matters on the 18 examples and Mr Gupta cannot realistically have been in any doubt that it would be levelled against him that he had given dishonest evidence, given the terms of Asprey's closing submissions and the Judgments.

60. Mr Gupta's evidence in response was served on 13 October 2022:

i) Mr Gupta denied he was "the real party":

a) He stated that he had taken and followed the advice of his legal team as to the merits of RR's defence, and on that basis he believed that it was in RR's interests to defend the claim.

b) He took issue with the submission on the adjournment application that he was "the real party", emphasising the context of those submissions. As I have made clear, I agree that that description is not determinative of this application. The facts referred to in that paragraph of the submissions, as opposed to that description, are undisputed.

c) He effected what was on the face of it a rather dramatic u-turn in the way that RR's business was described, as compared with the picture that had been presented to Sir Michael Burton of what was (by then, at least) an essentially dormant company. Over some 12 pages he elaborated on reasons why RR's interests were properly to be regarded as distinct from his own.

i) He described it as having a long list of projects it had lost the opportunity to pursue because of losing the case and falling into liquidation.

ii) He referred to it as having "many outstanding creditors which had accumulated whilst the business was growing", although on his own evidence there were in fact only two substantial creditors, apart from RR's solicitors (in respect of their fees for the litigation). These were HMRC (in relation to repaying "Research & Development" tax relief to which RR was not in fact entitled) and an item described as "ASB asset loan" and interest on that loan. I address in more detail, below, the evidence about these creditors and how that bears on the decision I have to make.

iii) Mr Gupta presented RR as having a number of employees and consultants whose remuneration and employment depended on successful defence of the claim. A number of these, but not

all, were members of his close family (accounting for around 38% of the salaries and placement fees). He said that all of the employees were made redundant as a result of losing the proceedings.

iv) He took issue with the suggestion "that I used [RR] as a personal bank account". The payment to the caterers was asserted to have been not for the engagement party but for a corporate event, of which no detail or supporting evidence was, however, supplied. Mr Gupta said that he was sure that he would have repaid the evidently personal expenses, such as for his daughter's hairdressing, through the director's loan account, which has since been repaid in full, but he said those repayments could not now be evidenced. Some supporting evidence was, however, supplied in respect of others of the payments questioned by Asprey, relating to medical expenses.

v) Mr Gupta went into considerable detail about a lengthy series of transactions involving HSAL. The legitimacy or otherwise of these transactions became a key focus in the hearing before me.

ii) As regards funding, Mr Gupta denied having funded the litigation and stated that (as his solicitors had also confirmed) all payments of legal fees had been made by RR out of the cashflow from its business and that RR's solicitors had not sought to pursue him personally in respect of the unpaid portion of their fees but were creditors in RR's liquidation in respect of those.

iii) In respect of the criticisms of his conduct, Mr Gupta pointed to the fact that some criticisms had also been made of Mr Downing's evidence and that Asprey's misrepresentation case had been rejected.

61. Asprey served reply evidence both from Ms Winstanley and from the Liquidator of RR going (broadly) to what salaries RR had paid and to whom, the transactions between RR and HSAL, what creditors RR has, the funding of RR's defence of Asprey's claim, whether certain expenses unrelated to the company have been met from its funds, and what information the liquidator has and has not yet been provided with by the law firms who have at various times acted for RR. So far as relevant to my analysis, in particular in respect of HSAL, this material is addressed below. To the extent that I have not summarised all of the matters to which reply evidence was directed, that is because, as noted above, I consider that it went in some respects beyond what I can from the point of view of either practicability or fairness take into account or sensibly resolve within the bounds of this application.

Analysis

62. Mr Gupta accepted that he "controlled" the litigation and was the majority shareholder but denied that he funded the litigation and maintained that it had been defended in the interests of RR. It was submitted on his behalf that such criticisms as had been made in the Judgments were not such as to warrant my making an NPCO.

63. In reaching my conclusions, I have considered carefully how far I should go in resolving disputed issues of fact. As Mr Justice Morgan put it in *Centrehigh Limited v Karen Amen & Ors* [2013] EWHC 625 (Ch) (at [41]-[42]):

> "Normally, the court attempts to do justice by having regard to the material before it, having regard to the documents which have been made available, and having regard to witness statements which, in some cases, will be in conflict. The court does the best it can in an attempt to be fair to both parties and achieve a just result.
>
> It must be recognised that an attempt to do justice in that way will often fall short of the very high standards which are conventionally applied where there is a full trial preceded by pre-trial procedures, and involving cross-examination of witnesses."

64. The Court has to do the best it can, given the policy is to keep s.51 applications within proper bounds. I have limited myself to those matters I consider both capable of resolution within this summary procedure and necessary to the decision I have to make.

Funding

65. As to whether Mr Gupta funded RR's defence:

    i) Ms Winstanley invited the Court to draw the inference that, since RR was insolvent throughout and yet its lawyers have been paid substantial fees (even if not everything that is due to them) a third party must have funded its defence, either directly or indirectly through RR and that third party was Mr Gupta.

    ii) However, the lawyers who represented RR at trial stated in clear terms that so far as their fees had been paid (a substantial amount is still outstanding) they were paid by RR, and that is also consistent with the Liquidator's analysis.

    iii) Before me, Asprey did not in fact contend that Mr Gupta had paid the legal fees himself, but rather that, to the extent that RR had done so, this was to be treated as Mr Gupta funding the litigation, applying the same reasoning as in *Petromec v Petrobras* [2006] EWCA Civ 1038 (namely that Mr Gupta's actions in leaving money in RR which he could have taken out, even though he was not the source of the money, counted as funding the proceedings).

    iv) It seems to me that, on the facts of this particular case at least, that argument stands or falls with the wider argument as to whether Mr Gupta is or is not "the real party" behind the litigation. If he is, then one manifestation of that would be that he has chosen to leave the necessary funds in RR to meet those legal fees and that in causing those fees to be paid from RR's funds he is in substance pursuing his own interests rather than RR's. But supposing, on the contrary, that the conclusion, on viewing the wider picture, was that he was a director who was realistically to be regarded as discharging his duty to protect the interests of all relevant stakeholders in the company, rather than his own, then the fact that he causes funds held by the company to be used to pay legal

fees, rather than withdrawing them for his own purposes, would be no more than was consistent with the proper discharge of that duty.

v) On that basis, I focus on that wider picture, and I do not consider that the issue of funding adds any independent weight to the scales, in either direction.

Was Mr Gupta "the real party"?

66. In evaluating whether Mr Gupta was "the real party", relevant considerations include the degree of benefit to him, the reasonableness of defending the claim and the extent to which it is realistic to regard the claim as having been defended in the interests of RR's creditors (*Dymocks* at [25]). The interests of creditors are particularly pertinent given it seems RR was in a financially parlous situation throughout the litigation (as its accounts to year end 31 October 2018 and 31 October 2019 made clear).

67. Clearly, successful defence of the claim, such that RR was then able to apply the funds thereby saved towards a project with the view to profit, would be in the financial interests of Mr Gupta as a director and majority shareholder, who would then, in principle, be in a position to extract that profit as salary and/or dividends. RR's Counsel, in submissions which must have been based on instructions from Mr Gupta, described RR as "essentially an investment vehicle for Mr Gupta" and submitted that "the reality is it's the individuals who are doing these deals and the corporate entity is a matter of essentially some convenience". RR's ultimate raison d'être was not to be a charitable body but to carry on business with a view to generating profits for Mr Gupta (similarly to the business that was under consideration in *Chantrey Vellacott v Convergence Group* [2007] EWHC 1774 (Ch) at [320]). Whilst that is a significant factor, and does weigh in the scales, it would not by itself be a sufficient reason to displace the protection that limited liability affords those who are financially interested in a company.

68. Next, I consider whether it is realistic to view Mr Gupta as protecting the interests of creditors by causing RR to defend the claim. In that respect I do not place any weight on the sums owed to the lawyers who acted for RR in defending the claim. The fact that legal fees were incurred in defending the claim does not help me determine whether the claim was defended, in substance, to advance Mr Gupta's own interests, or those of RR. It could not have been in RR's interests to defend the claim and thereby incur legal fees solely in order that RR could pay those very legal fees. Rather, I am looking for evidence of substantial creditors related to RR's business, the business which Mr Gupta says it was his purpose to protect and develop through successful defence of the claim.

69. There are only two other substantial creditors. One is HMRC, which is owed £282,000 (as well as various other smaller sums). The facts relating to the debt of £282,000 were not disputed, namely that it relates to a liability to repay Research & Development tax relief for which RR was not in fact entitled. How RR came to claim such relief in the first place is not a matter for me, although that is certainly not at all easy to understand in circumstances where RR is (according to Mr Gupta's evidence) a specialist provider of social and affordable housing and HMRC guidance suggests the relief is for work on innovative projects in science and technology. What is significant for present purposes is that it was only on 23 September 2021, after the hearing of the trial in this matter had concluded, that RR accepted that it was liable to

repay HMRC that amount. It therefore seems to me it would be highly artificial to treat RR as having had regard to the interests of HMRC, as its creditor, at the time when it was defending the litigation. (Mr Gupta, to be fair, made no such claim in his evidence.)

70. The other ostensibly substantial creditor is ASB Assets Ltd ("ASB"), to which RR is said to owe principal of around £873,000 and interest of around £326,000. The ASB loan, and the transactions between RR and HSAL further discussed below, were the two key factual disputes that were extensively debated before me at the hearing.

71. The evidence about the ASB loan is contradictory and unsatisfactory, to the point that for the purposes of this application I cannot safely conclude, on a balance of probability, that such a liability even exists:

i) Two agreements were exhibited, each stated to have been made on 3 October 2019 between ASB as lender, RR as borrower and a 100% subsidiary of RR (Rediresi Ire Limited ("RR Ire")) which was described as carrying on certain business in Ireland involving long term Irish government leases. Although supposedly entered into on the same day, between the same parties and both in identical terms, the two agreements specify different principal amounts (one relating to a sum of £240,000 and interest and the other £360,000 and interest). That is the first oddity, since if the intention was that ASB was to make a loan of £600,000, why split that across two identical agreements?

ii) The next oddity, and rather more than an oddity, is that although expressed to be "executed and delivered as a deed" neither agreement is signed or witnessed on behalf of ASB at all. Mr Gupta's signature for RR and RR Ire is witnessed by Mr Sutaria, who was RR's Group Controller from April 2019, but the date on which that was done is not stated. Mr Sutaria provided a witness statement on behalf of Mr Gupta, which addresses the other controversy, relating to HSAL, but is completely silent about ASB. Given the absence of any evidence that ASB actually agreed to enter into this loan, still less by executing it as a deed, these documents go no further than indicating, at best, an intention on RR's part to enter into this agreement.

iii) The terms for repayment are very unusual, in that, rather than specify a rate of interest and a repayment date (there being no clause defining the former and the latter being left blank), the agreements provide that:

a) if the loan of £240,000 is repaid any time from 3 October 2019 to 2 October 2020, the amount to be repaid will be £360,000, rising to £480,000 if repaid from 3 October 2020 to 2 October 2021, and from 3 October 2021 to 2 October 2022 "Lender has the right to request repayment of the loan from [RR Ire] at the first request";

b) if the loan of £360,000 is repaid any time from 3 October 2019 to 2 October 2020, the amount to be repaid will be £540,000, rising to £720,000 if repaid from 3 October 2020 to 2 October 2021, and from 3 October 2021 to 2 October 2022 "Lender has the right to request repayment of the loan from [RR Ire] at the first request".

iv) Quite what sum becomes payable by RR Ire in the event of repayment after 3 October 2021 is unclear to me. What is however clear is that, in theory, these two agreements make RR immediately liable for a repayment amount of £900,000, in return for borrowing a sum of £600,000, even if RR were to repay the loan the very same day it was drawn down. By 3 October 2020, that liability would have soared to £1.2m, double the principal sum borrowed. That would be a fairly extraordinary deal for RR to have done – but as I have said the evidence that a deal in these terms was actually entered into is missing.

v) The debt to ASB as stated in the extract from RR's (unaudited) management accounts, which Mr Gupta quotes in his witness statement, is (to give the precise figures) a principal sum of £873,391.57 and interest of £326,608.09, which adds up to £1,199,999.66. So, the figure in the management accounts comes, within a matter of pennies, to a total of £1.2m, hence matching the total repayable under the two agreements, but it is presented in completely different terms as a split between supposedly very precise figures for principal and interest that bear no relation at all to the repayment terms in the two agreements. If agreements were indeed entered into in terms of the two documents produced by Mr Gupta, it makes no sense to me that the management accounts would present the figures in this way. What, admittedly, this presentation does do is obscure the extraordinarily high interest rate posited in the agreements, by describing some £873k as being principal, when according to the two agreements only £600k of principal was supplied by the lender.

vi) Furthermore, according to RR's liquidator, there is no trace of any principal sum being received from ASB at all. Rather, he has identified that a sum of £600,000 was received, not from ASB, but from an individual who is a director in ASB, named Anshu Bahanda. That may or may not correlate with a loan of £617,581 referred to in RR's accounts for the year ended 31 October 2019 (at Note 9). If so, however, I have no other evidence about that loan, its terms, how it was used, or whether or when any such loan may have been repaid.

vii) What I do note is that those same accounts state, under "going concern", that "the directors have received confirmation from a family member that via the business that they own, they will support the company, and not demand repayment of a £600,000 loan made to the company, for at least 12 months from the date these financial statements are approved". On the face of it therefore, the loan referred to in the audited accounts is from a family member.

viii) Plainly, the liability of some £617k per the audited accounts as at year end 31 October 2019 does not on any view tally with the liability of £900,000 that would be due to ASB as from 3 October 2019 if these two agreements had been entered into.

ix) None of these anomalies are addressed in Mr Gupta's evidence, which sets out the extract from the management accounts and exhibits the two agreements with no further explanation.

x) It is also notable that each of the two agreements included a personal guarantee by Mr Gupta of the debts in question. Yet, there was no suggestion from Mr Gupta that that guarantee had been called upon, in respect of the liability of £1.2m supposedly due as from 3 October 2020, or that the lender had exercised its right to require payment by RR Ire in place of payment by RR, as from 3 October 2021.

72. In reaching my conclusions on this particular matter, I also take into account the wider picture, based on the other issues dealt with in this judgment, as that bears on Mr Gupta's credibility. I do not consider that I can rely on the unaudited management accounts, given the contradictions outlined above. I conclude that there is no evidence that the two agreements were ever executed by ASB and no basis for concluding that RR had any such liability to ASB as is therein described. If there is indeed a debt of some kind that is (and was through the period of the claim) still owed to an individual who paid RR £600,000, I have no evidence about that (the last audited accounts being for the year ended 31 October 2019), and it is unclear whether those funds came from a source independent of Mr Gupta (given the reference to a loan "from a family member"), or how that payment related to the business carried on by RR, and in particular whether it relates to the sum of £671,986 which is said to have been loaned by RR to its 100% subsidiary RR Ire (which according to the Liquidator's evidence has not been repaid).

73. If Mr Gupta has overplayed his hand and has sought to present to the Court as genuine a far larger debt than RR in truth owes, when that is a fiction, then he has only himself to blame for the fact that he has thereby deprived me of the evidence that might (perhaps) have demonstrated the existence of a smaller debt owed to at least one substantial trade creditor. The true picture, in this regard, I must leave to the Liquidator to establish. What is clear is that the evidence as to the purported ASB loan, relied upon by Mr Gupta, does not demonstrate the existence of a substantial creditor in whose interests Mr Gupta can be regarded as having caused RR to defend the claim.

HSAL

74. Mr Mallalieu KC had to admit that the ASB agreements were such as to raise an eyebrow. This was not, however, the only aspect of RR's business activities that was apt to raise eyebrows. Asprey mounted a sustained attack on a whole series of transactions between RR and HSAL, as demonstrating that Mr Gupta was managing the affairs of RR in ways that were not in the interests of RR but amounted to using RR's money as his own. This topic needs treatment at some length, so I give it its own sub-heading, for ease of navigating this judgment. However, in terms of the analysis, it forms part of the wider enquiry as to whether Mr Gupta is to be regarded as "the real party".

75. Mr Gupta was one of the directors of HSAL as, too, was Mr O'Sullivan. Mr O'Sullivan was also between June 2018 and June 2019 employed as Group Controller of RR. According to the Liquidator's evidence, RR paid HSAL over £1.9m between 19 December 2017 and 12 July 2021, £380,000 of which was repaid by HSAL and £1.3m of which was written off by RR. I will not attempt to resolve, by any means, all of the issues that were raised about the funds that flowed from RR to HSAL and

vice versa and Mr Gupta's explanation as to the "four phases" of the relationship between RR and HSAL.

76. I restrict myself to making findings about what, in Mr Gupta's terminology, was the first phase of the relationship between HSAL and RR. I consider that to be a matter which is sufficiently clear cut, on the documentary evidence, that I can draw conclusions, even within the limits of this summary procedure, and I am also of the view that I do not need to go any deeper into the thickets of the subsequent stages of the HSAL story for the purposes of resolving this application.

77. It seems to me that the detailed investigation of the rest of that convoluted story, including the justification for writing off the £1.3 million owed, will be a matter for the Liquidator to pursue, since on any view RR has at least one major creditor wholly unconnected with this litigation (namely HMRC) and, of course both Asprey (in respect of the judgment debt) and RR's former lawyers (in respect of legal fees) are also owed substantial sums in respect of which the outcome of this application offers no solution to RR's lack of the means to pay that debt.

78. In that respect, it is a noteworthy feature of RR's situation that the profit it derived from its agreement with Asprey, the subject of the dispute, has disappeared. Of the £1.3m which Mr Gupta says RR "invested in projects", a significant portion appears to have flowed from RR to HSAL and to RR Ire. RR Ire had a 51% shareholding in a company known as Rediresi Icorp Limited ("Icorp"), which Mr Gupta described in his witness statement in the action as "the only subsidiary [of RR] that is not a dormant company and which has at least some assets". On 11 October 2021, 4 days after judgment was handed down, RR's indirect shareholding, through RR Ire, in Icorp was diluted by the issuance by RR Ire of 110 shares at £1 each, reducing RR's interest from 51% to 24.3%.

79. That is a matter for the Liquidator to investigate, as too are the series of payments that were made out of RR post judgment and prior to liquidation. However, this wider context raises a legitimate concern that RR may have been deliberately stripped of its assets. I cannot reach a view about that; but the existence of the concern causes me to scrutinise the explanation given about the "phase 1" HSAL transactions with particular care.

80. In "phase 1", RR made payments totalling over £1.6m to HSAL, between 19 December 2017 and 29 March 2019, in amounts and on dates that do not appear to adhere to any consistent pattern. A number of payments went from HSAL to RR in September 2018, January 2019 and March 2019, totalling £167,000, again without any obvious pattern, such that the balance that moved from RR to HSAL in that first period from December 2017 to March 2019 was £1,486,497.

81. Mr Gupta's evidence on this application was that these payments related to an MoU between RR, HSAL and another company of which he was also a director, named South Asian Asset Management (SAAM). That MoU, dated 2 January 2017, was exhibited to his witness statement (and had been executed by all three parties). SAAM, a Mauritian company, is stated in the MoU to be an asset manager for an Indian housing development group and to own HSAL.

82. Asprey does not accept that the MoU is genuine and asked for the metadata for that document, which was refused. However, for the purpose of this application I assume the MoU was indeed entered into and was not a sham but was intended by the parties to operate in accordance with its terms.

83. The MoU provides that SAAM was to provide RR with physical office space and other infrastructure through HSAL and was to "support the [RR] start up initiative on a risk basis" in return for payments of £100,000 a month from January 2017 to March 2019 and a 50% profit share of the net revenue generated for that period of 27 months, the sum due to SAAM for fees and profit share to be paid only at the end of that period.

84. I note that it is, for a start, very difficult to see the rationale for committing RR to accrue very substantial liabilities starting in January 2017 for office space and so forth, in circumstances where, according to Mr Gupta's own evidence in the action, RR remained dormant until late 2017. Moreover, this level of expense makes no sense at all viewed as payment for such limited office space and ancillary support as RR required (as comparison with the costs subsequently incurred for rent and ancillary services elsewhere makes very clear). To the extent that the original intention was that SAAM was to provide RR with working capital ("all operating costs") in return for its fee and 50% profit share, quite what that obligation was actually supposed to involve is defined only in the vaguest terms. However, as matters developed, the MoU was never in fact implemented in accordance with its terms.

85. Mr Gupta says in his witness statement that due to a legal dispute SAAM "could no longer support HSAL with its necessary working capital requirement". A letter dated 7 November 2022 from Mr Gupta's solicitors, Mishcon de Reya, to the Liquidator's solicitors ("the Mishcon's letter") gives an account in similar terms to Mr Gupta's witness statement, doubtless based on his instructions, and dates this development to late 2017. Mr Gupta says that, given that "at that time" RR could not function without HSAL, and given RR was generating its own revenue, RR decided to make payments to HSAL totalling £1,307,848 during RR's financial year ending 31 October 2018 "on account of the SAAM administration fees, so that [RR's] business could continue".

86. This sum was in fact rather less than the £2,200,000 that would have been due to SAAM for administration fees alone, had SAAM been able to perform its role under the MoU, including that of providing working capital, as intended. However, on Mr Gupta's own evidence that was no longer the case and SAAM could not perform the intended role. Moreover, the terms of the MoU did not require RR to make any payments at all before the end of the 27-month period. In essence, therefore, these payments were not being made under the terms of the MoU at all. The decision that RR would voluntarily make these payments can only have been that of Mr Gupta himself. The Mishcon's letter explains that because payments to HSAL were being made ahead of the date when payment to SAAM would have been due under the MoU they were categorised as a loan. No documentation as to the terms of any such "loan" has been produced.

87. The Mishcon's letter elaborates on the justification for making these payments to HSAL saying: "Had [RR] not made those payments then HSAL would have quickly

become insolvent and would not have been in a position to provide the Administrative Support Functions which [RR] required." Those functions are said in the Mishcon's letter to have been the provision of staff, office, furniture and equipment, and travel costs, for a range of business functions, namely: deal valuation; underwriting; financial modelling; KYC; due diligence; engagement with third party advisors legal, quantity surveyors, valuations, financials, insurance; capital raising/funding; tax advice; deal execution; and exits through sales and refinancing.

88. The notion that HSAL needed to do all of that for RR makes no sense. For a start, that is the very same list of functions that in the MoU are described as being the responsibility of RR, in contradistinction to the role of SAAM which was to provide "physical office infrastructure… staff, office, furniture and equipment and travel costs". In essence, the list of functions for which RR was stated to be responsible covers pretty much everything one might reasonably expect to be involved in carrying on RR's type of business. Whatever SAAM was originally supposed to supply under the MoU, it makes little sense that that was, quite literally, everything necessary for RR to operate as a business – if that were really intended, why settle for 50% of the profit? At all events, what was originally intended is no longer the question. On Mr Gupta's own evidence, SAAM was no longer in a position to provide anything. The question is what, if anything, HSAL was actually doing to justify these payments.

89. If it was really the case that HSAL was performing all of these functions for RR, on an outsourced basis, in return for a fee, RR could have had no justification for a salary bill of its own, which in 2018 (for example) came to £413,377. According to Mr Gupta's witness statement for this application, RR's employees had included among others a Chief Investment officer, two individuals whose role was marketing (one of whom was his daughter), as well as others with administrative and secretarial roles. (The evidence is that salaries for most of these positions, other than those who were family members, ceased to be paid as from mid-2019. That is after the last of the "Phase 1" payments to HSAL, so there can be no suggestion that HSAL took over the provision of staff for RR after that point. The justification advanced for payments to HSAL thereafter is completely different and not a matter I need go into.)

90. Mr Gupta also states that RR "regularly employed consultants to the company who were brought in to work on specific projects and workstreams" and he mentioned one example of this which he said had typically cost around £75,000 per year. (The Liquidator has also identified various other payments to consultants, accountants, and law firms.)

91. The detail as to exactly what salaries and other costs were incurred by RR, and their business justification, is still being investigated by the Liquidator and nothing I say is intended to prejudge the outcome of those investigations. The Liquidator will reach his own conclusions on those matters in due course. However, unless Mr Gupta's evidence as to RR's own staff and consultancy costs is a complete fiction from start to finish, the justification advanced for having made payments to HSAL simply cannot be true. Even supposing (contrary to my reading of it) that the original intention under the MoU had been that SAAM would shoulder all of these costs, it is clear that as matters in fact developed, RR had its own staff and paid its own external consultants and other professionals.

92. There is no evidence to corroborate HSAL actually having provided any support services at all in return for these very substantial payments. So far as one of the services for which HSAL was supposedly being paid was that of providing physical office space, the evidence before me directly contradicts that.

93. It is necessary at this point to introduce another player in the story: Duet Asset Management Ltd ("Duet"), a company which Mr Gupta had co-founded together with others and through which he initially explored investments in social housing projects. Mr Gupta explained in his evidence in the action that, when Duet decided not to pursue such projects, he decided to pursue those opportunities himself, outside Duet, and set up RR for that specific purpose.

94. As I have said, Mr Gupta's evidence in the action was that RR remained dormant until late 2017. He described the fact that at an early stage of his discussions with Mr Cox of Asprey about the possibility of acquiring social housing (discussions which began in the first quarter of 2017 and ultimately led to the agreement with Asprey), he told Mr Cox that he would be leaving Duet. He said that setting up RR's infrastructure took some time as, amongst other things, he had to find new office premises: "During the transition period, Duet tried to be as helpful as possible and kindly allowed me and my [RR] team […] to continue working from Duet's offices and to use Duet's infrastructure." He said that it was only "some months later" that RR moved to new premises.

95. Duet's offices were at 27 Hill Street, which is also where HSAL had its offices. However, HSAL has no proprietary interest in those premises, which are leased by Duet on a long lease. (In this respect, I rely on the register of title exhibited to Ms Winstanley's reply evidence, in rebuttal of Mr Gupta's explanation of the HSAL phase 1 payments.) So, HSAL had no interest of its own in the premises, so as to be in a position to provide them to RR in return for payment, and, on Mr Gupta's own case, RR was in fact allowed to use those premises through the kindness of his former partners at Duet.

96. Moreover, by the time RR ceased to be dormant and commenced operations in late 2017 it appears it had found and moved to premises of its own. In response to questions in correspondence from the Liquidator, the Mishcon's letter provided documents evidencing the fact that RR rented office space in Knightsbridge and made payments to a company called Bourne Office Space Ltd for the rent of those premises and ancillary services. The Liquidator in his witness statement states that he has identified from bank statements that a total of £181,499 was paid to that company from 15 December 2017 to 20 December 2021. Thus, RR began making the Phase 1 payments to HSAL in December 2017, at the very time when it no longer needed the 27 Hill Street premises in any event.

97. The fact the payments to HSAL began at that point in time, despite the absence of any apparent business justification, is potentially significant because those first payments in December 2017 took place immediately after the first of the property transactions in respect of which Asprey subsequently made its claim.

98. That said, whether the motivation was to move profits out of RR and shelter them against future claims, I cannot tell and need not determine. It is sufficient for the purposes of this application that, on the evidence before me, making the Phase 1

payments to HSAL was plainly not in the interests of RR and must have been undertaken to serve some other interest of Mr Gupta's. The justification that has been put forward for making the Phase 1 payments to HSAL simply cannot be true. RR had its own staff and premises and needed (and as far as the evidence goes, received) nothing at all from HSAL in return for making these payments. The fact that Mr Gupta chose to cause RR to make these payments in these circumstances (for it must necessarily have been his decision) is not explicable by reference to any interest of RRs. It may indeed be the case that SAAM's difficulties created a threat to HSAL's solvency and that was a concern to Mr Gupta as a director of HSAL but that of course cannot justify using RR's funds to support HSAL for no return.

99. Mr Gupta's explanation in his witness statement, in respect of the Phase 1 payments, then continues the story by saying that by the time RR came to prepare its accounts for the year ending 31 October 2018, the guidance from its accountants, PwC was that the "loan" (the quotation marks are Mr Gupta's) to HSAL should be written off "on the basis that the RR/SAAM MOU did not allow SAAM or [HSAL] to charge [RR] £100,000 per month in administrative costs and also that there did not appear to be any prospect of recovering the HS 2018 payments from either SAAM or [HSAL] (because SAAM was on the verge of bankruptcy and [HSAL] was dormant at this time)."

100. Against the backdrop I have outlined above, it would not be at all surprising if PwC advised there was no basis for RR to be paying HSAL £100,000 a month and, indeed, I cannot see how they could have given any other advice. That seems to be, more or less, what Mr Gupta is saying, in somewhat garbled form, in reporting PwC's view as being that the MoU "did not allow" the payments to be made. If that is indeed what PwC advised, then that coincides with the view I have formed, for the reasons set out above.

101. That being the case, it is something of a mystery to me as to why the right course of action was not then to reflect the sums paid to HSAL as having been paid without consideration and as a debt owed from HSAL in RR's accounts. Instead, the sum in question (which RR had treated as a "loan") was written off. Mr Gupta's evidence was that this was on PwC's advice.

102. Mr Gupta further relied on witness statements from Mr O'Sullivan and Mr Sutaria, who succeeded one another as the Group Controller of RR, as to the fact that it had indeed been PwC's advice that the loan needed to be written off. A contemporaneous email from Mr O'Sullivan was exhibited which referred to the decision having been taken following a meeting with PwC that, among other things, "The loan to [HSAL] is to be written off and the interest receivable accrual is to be cancelled".

103. I do not consider that I need to reach a concluded view on the write off of the loan, which can be left as a matter for the Liquidator to explore. It is sufficient for my purposes that the payments should not have been made in the first place.

104. Moreover, supposing the view at the time of the decision to write off the debt in February 2019 was that there was no prospect of HSAL repaying, it is to say the least strange that RR then proceeded to make a further three Phase 1 payments to HSAL (on his evidence, dormant at the time) which Mr Gupta described as being for the SAAM administration fees. Again, whatever the justification for the write off,

making those additional payments in those circumstances cannot possibly have been in the interests of RR.

105. It is even stranger that within a month of writing off the debt, RR launched into a series of further transactions involving HSAL, which by then had supposedly been taken over by a company based in Cyprus and the UAE with a view to being used as a vehicle for an energy infrastructure and advisory business. This was what Mr Gupta described as Phase 2. I am going to draw a line at this point, however, and will not even outline how Phase 2 morphed successively into Phases 3 and 4 of RR's dealings with HSAL. Suffice to say that there is a great deal in that story that on the face of it would require a great deal more explanation and corroborating evidence than has to date been supplied. That, again, however, is a matter for the Liquidator to get to the bottom of, using such tools as the insolvency regime affords him.

106. I do note that in Phases 2, 3 and 4 of the relationship between HSAL and RR some funds did come back to RR from HSAL (£213,610 in all). All however I need conclude is that, on any view, that still leaves a very substantial sum that was paid out by RR in the Phase 1 payments that it was not in the interests of RR to pay away. The effect of that (whether or not it was also the intention) was to strip RR of profits which, had those funds remained within RR, might well have been available to meet its liabilities to Asprey.

Further evidence bearing on whether Mr Gupta was "the real party"

107. There appeared to be little evidence before me that RR in fact succeeded in carrying out any substantial business, other than the business transactions that were directly related to the agreement with Asprey that was the subject of the dispute. The list of projects that Mr Gupta exhibited appeared at best aspirational and the supposedly supporting documentation largely comprised agreements to which RR is not a party or material that amounted to nothing more than an agreement to agree and not a binding commitment on the part of RR to invest.

108. As from mid-2019, some 6 months before Asprey issued its claim, RR ceased paying salaries to its employees, apart from payments to various Gupta family members and an administrator. That might (perhaps) explain why the submission that was made to the Court of Appeal on the adjournment application was that RR had "only ever had one other (executive) employee who has now left" (although that still remains rather difficult to reconcile with the picture that is now sought to be painted of RR as a business with a substantial payroll of employees, at least prior to mid-2019).

109. Asprey also relied on other evidence which was said to show that Mr Gupta treated RR as his "piggy bank", using its funds to meet his and family members' personal expenses. I do not need to rule on all of the instances that were said to illustrate this (and in particular, I take no account of the reply evidence on this particular topic). It is sufficient that there do appear to be more than a minimal number of clear examples, which Mr Gupta had an opportunity to address in his evidence:

i) These included a series of payments from RR's bank account in March 2018 that appeared from the description in the bank statements to relate to Mr Gupta's daughter and which coincided in time with an engagement party held for his daughter. He accepted that payments to a hairdresser, photographer,

and make-up artist (all of which it was clear from the description in the bank statements related to his daughter) were indeed personal expenses related to the engagement party.

ii) He said of these (as he likewise said of other patently, and indeed admittedly, personal expenses, such as an entry labelled "Reimb Chelsea cake") that he was sure they would have been repaid via the director's loan account. However, he provided no evidence at all of that having been the case. The balance due on the director's loan account as at the time of the liquidation (whatever items that may by then have comprised) was only settled following service of a statutory demand.

iii) In any event, this pattern of paying out relatively modest amounts for personal expenses directly from a company bank account is redolent of using the company as if it was a personal bank account, rather than the type of use one would ordinarily expect to see of a director's loan account, showing periodic borrowings and repayments in either direction.

iv) However, the more significant point is the £20k paid in the same month (i.e. March 2018) to a company which Ms Winstanley in her evidence identified as being a wedding caterer. It was not Mr Gupta's evidence that this had been a personal expense which was reimbursed. Rather, he claimed that this had related to a corporate event for RR.

v) Not a shred of evidence was produced to corroborate that, whether from Mr Gupta in his evidence or from the catering company, in response to questions posed by the Liquidator in correspondence. If that explanation were genuine then in my view Mr Gupta, who was put on notice by Ms Winstanley's first witness statement that it was specifically challenged, would have been able to produce at least something to corroborate it. Nor is it at all obvious why a company engaged in the business of providing social and affordable housing would be hosting corporate events on anything like the scale suggested by that fee. The obvious and, I find, the true explanation, is that this was exactly what the surrounding payments for admittedly personal expenses strongly suggest, namely a use of RR's company funds to pay for Mr Gupta's daughter's engagement party.

110. In the same category, it seems to me, was a payment of £65,000 to Mr Gupta's daughter purportedly for a "placement fee agreement":

i) That agreement, supposedly entered into on 5 April 2017 (some two months before the agreement between RR and Asprey) was stated on its face to be in consideration of the service of introducing RR to a housing association, Places for People, as a potential acquiror of portfolios of social housing. It is common ground that this was the same portfolio that became the subject of the dispute between RR and Asprey.

ii) Mr Gupta's own evidence in the action was that he had a long history of doing business with Places for People which is why they approached him in relation to the purchase of the portfolio in question. He said he had incorporated RR in December 2016 (albeit it remained dormant until late 2017) specifically with

the intention of pursuing, through RR, opportunities to provide social and affordable housing through the relationship he had developed with Places for People. He described Places for People as having contacted him in early summer of 2017 to say they were looking for portfolios of housing to purchase, by which time he had previously done business with them and knew them well.

iii) That is flatly inconsistent with Places for People having been introduced to RR by his daughter as a potential purchaser of the property portfolio which was the subject of the agreement with Asprey. I do not have to disbelieve the CVs of Mr Gupta's daughter or son, whose educational attainments may well fit them to provide services of genuine business value, to conclude that this particular supposed service is a fiction concocted to justify a transfer of company funds to a family member.

iv) That potentially does cast a longer shadow, in calling in question whether other payments to family members, including Mr Gupta's son, were, or were not, for genuine services but that wider exploration is a matter for the Liquidator and is not something on which I can form a view.

Mr Gupta's Conduct

111. Neither side suggested that I was not permitted to take into account the views expressed by the trial judge about Mr Gupta's evidence and conduct. The argument before me was directed to how I should interpret those views, and what weight to put upon them, rather than whether they should be set to one side as being merely views expressed about a witness who was not himself a party to the litigation and not bound by the Judge's findings of fact. For the avoidance of doubt, I consider that Mr Gupta was sufficiently closely connected to the proceedings for it to be just to treat him as a privy and as being bound by the findings of fact made by Sir Michael Burton GBE in his Judgments as against RR.

112. As I have made clear, the criticisms the Judge made of Mr Gupta's evidence and conduct were serious. They cannot be dismissed as a "makeweight".

113. Whilst impropriety can be a separate and independent basis for making an NPCO, on the facts of this case the issues relating to Mr Gupta's conduct overlap to a significant degree with the question of whether he was "the real party". That is because a relevant factor is the reasonableness of defending the claim and whether in controlling the conduct of that defence in the way that he did Mr Gupta is to be taken to have been discharging his duties as director, rather than pursuing his own interests.

114. In support of the proposition that he conducted RR's defence in good faith and to defend RR's interests, Mr Gupta's witness statement makes a number of references to his reliance on legal advice:

i) "The estoppel case was not considered hopeless prior to trial – quite the opposite – and of course RediResi was entirely reliant on its legal advisors as to the merits of such a technical point."

ii) "RediResi trusted and relied upon the advice from its legal team. There is no basis for any contention that RediResi proceeded with this claim in any way other than in a reasonable belief that there were good prospects of successfully defending Asprey's claim or that I acted otherwise than in the best interests of the company in the instructions I provided for the defence of the claim."

iii) "Having taking the appropriate professional advice at all times, as a company director I believed that it was reasonable and commercially acceptable for RediResi to defend the Asprey claim in the manner that it did, not least because the claim was genuinely disputed for the reasons set out in RediResi's defence and evidence, but also because the money which I believed Asprey was wrongly claiming as its own had been, and was going to be, invested into a number of projects which RediResi was already involved in and had committed to in the future, as I refer to further below."

115. There was some discussion before me as to the fact that, in contrast to the position in some of the other decided cases on the s.51 jurisdiction (such as *Chantrey Vellacott v Convergence Group* [2007] EWHC 1774 (Ch)), I do not have before me the privileged advice RR received at the time. Mr Gupta himself is no longer entitled to waive privilege on behalf of RR. It is however a concern, in that regard, that by the time of the hearing before me the Liquidator had still not received the files of all of the various firms of solicitors who had acted for RR, despite requests made several months ago. (I was told that a USB stick had been delivered only very shortly before the hearing by one of the firms concerned but the Liquidator had not, for technical reasons, yet been able to access its contents to see whether it contained the files in question.) The Liquidator is entitled to call for those files and there was no explanation as to why they had not been more promptly supplied. As a result, unlike the position in *Chantrey Vellacott,* the Liquidator would simply not have been in a position to determine whether or not to waive RR's privilege and make any relevant privileged material available to Asprey and the Court.

116. All that said, it seems to me that Mr Gupta's evidence as to what advice was received is (as far as that evidence goes) consistent with the probabilities. However, what is most significant are the aspects on which his evidence is silent:

i) It seems to me clear that the Judge regarded RR's case on the point of construction as properly arguable. It seems to me fair to assume that would also have been the tenor of the advice at the time.

ii) Moreover, it does not follow from the Judge's dismissal of the estoppel case as "hopeless" that Mr Gupta acted unreasonably or contrary to advice in causing RR to advance that estoppel argument. As I have set out above, in the end that was determined by the Judge's acceptance of Mr Kingsnorth's evidence as to his beliefs. I also take into account in that respect Counsel's duty not to advance any contention which Counsel does not consider to be properly arguable. Against that backdrop, there are not sufficient grounds to contradict Mr Gupta's evidence that that part of the case was pursued on advice.

iii) To that extent, therefore, I accept Mr Gupta's evidence on this aspect.

iv) Conspicuously, however, Mr Gupta's evidence does not anywhere address, specifically, the stance taken in respect of settlement of which the Judge was so critical. The Part 36 offer was open for acceptance until 26 February 2020. The Judge himself (as appears from the transcript) urged the parties to consider settlement when the trial adjourned part heard over the summer vacation in July 2021. In his judgment on the rate of interest he said (at [3]): "as I said at the time, there was a pool of profit which they [i.e. RR] could perfectly well have shared but for their deliberate refusal to recognise any possibility of settlement". It is inconceivable that competent legal advisers (and there is no suggestion that they were otherwise than competent) would have advised simply ignoring any attempt at settlement, faced with a contractual clause that was on any view ambiguous. I consider it fair to draw the inference that the responsibility for the "egregious" failure to engage lies squarely with Mr Gupta, as the person giving the legal team instructions on behalf of RR.

v) Equally, Mr Gupta does not claim that the allegation that Asprey's claim was fraudulent, or the various allegations about Mr Downing's conduct in unrelated matters, were pursued on the basis of advice from the legal team. The legal team must have considered they could properly be put, but that is not the same thing as advising that advancing the allegations was reasonably necessary for the purpose of defending the defence of the claim or that they were meritorious. I am not prepared to infer from Mr Gupta's silence that these matters were pursued, in the manner that they were, because the lawyers advised that it was necessary and in the best interests of RR to pursue them, as opposed to that occurring because those were Mr Gupta's instructions.

vi) Finally, responsibility for having given dishonest evidence in support of RR's case on any view lies with Mr Gupta and cannot be excused by reference to any reliance on legal advice.

117. As I have just made clear, I do accept for the purpose of this application that Mr Gupta's stance in the litigation is indeed likely to have been founded on legal advice to the effect that RR's position on the construction of the clause was defensible and that there was at least an arguable case on estoppel, depending on how the evidence came out at trial. I also accept that, that being so, it was reasonable to consider it in RR's interests to seek to defend a claim that would see it have to part with a significant sum of money if it lost. However, it does not follow from that that it was in RR's interests to defend the claim in the manner that Mr Gupta chose to defend it, which included ignoring any possibility of settlement and giving dishonest evidence at trial in support of what had become a highly charged, personalised, and costly grudge match, rather than a limited dispute about a point of construction.

118. On my analysis, Mr Gupta's conduct largely comes into account in determining whether he is to be regarded as the real party behind RR's defence, pursuing it in his own interests rather than RRs. As was observed by Lord Justice Coulson in *Goknur* at [36]: "if a director has strayed outside his duty to the company to act in good faith, then he or she may no longer be able to rely on the rules of corporate limited liability". It is therefore unnecessary for me to seek to dissect out what part of the costs were caused by the particular aspects of his conduct that the Judge criticised, as

might (at least arguably) be the case on other facts where conduct was relied upon by itself, as a freestanding basis for making an order.

119. I have not lost sight of the fact the Judge made certain criticisms of Mr Downing's evidence and rejected some aspects of Asprey's case, which like that of RR had travelled outside the boundaries of what was strictly required to resolve the point of construction. However, I regard all of those matters as being firmly for the trial Judge to have taken into account (as I assume he did) in making the costs order, as between Asprey and RR, that he did. They do not in my view bear on the question of whether it is appropriate for Mr Gupta to be ordered to pay the costs for which RR is liable to Asprey.

120. Conversely (and contrary to Mr Mallalieu KC's submission), it does not follow from the fact that the Judge took account of the failure to engage with the Part 36 offer when he made the costs order and interest award that he did, that those matters then become irrelevant to whether I should make the order sought against Mr Gupta. The price tag to be attached to that "egregious failure" has been determined by the trial judge when fixing the terms of his Order but the conduct that led to that conclusion was, as I find, Mr Gupta's responsibility and that conduct remains relevant to the separate question, which is for me, as to whether he should be made personally liable.

Conclusions on "real party"

121. To conclude:

i) Taking all of this in the round, it is clear that Mr Gupta failed in important respects to distinguish the interests of RR from his personal interests and instead equated the two. This manifested itself in various aspects of his management of RR's business affairs which I have detailed above, most notably in respect of the HSAL Phase 1 payments. I do not need to go into whether there may also have been other such occasions, as Asprey contended. The matters I have addressed in this judgment are sufficient for me to conclude that Mr Gupta ran RR without maintaining at all times a proper regard for its separate corporate identity and interests. It seems likely to me that he did so because he regarded it as being his investment vehicle, to do with as he thought fit.

ii) In seeking to paint a picture of RR as a company whose successful defence of the claim would be of significant benefit to others than himself, whose interests he should be taken to have been protecting in acting as he did, he has placed reliance on a debt supposedly owed to ASB which, I find, is a fiction. Whilst HMRC would (as it happens) potentially have benefited had RR won the action, Mr Gupta could not claim to have had that as an objective at the time, given the chronology. The reality is that Mr Gupta would have been far and away the greatest beneficiary of a successful defence of the claim.

iii) These would be sufficient reasons for holding Mr Gupta to be the real party behind RR's defence of the claim. However, they are further reinforced by consideration of his conduct. The failure on Mr Gupta's part to distinguish between his own interests and those of RR also manifested itself in the fact that (although defending Asprey's claim was in itself a reasonable thing to do

in RR's interests), it is clear from the Judgments that the manner in which Mr Gupta directed that defence was in significant respects unreasonable and, it seems, driven to a significant degree by personal animus towards Mr Downing. That again was not in the interests of RR, when viewed at all objectively.

iv) This is therefore not to be regarded as a case where a director is realistically to be regarded as merely discharging his duty to the company and protecting the interests of its creditors. Rather, Mr Gupta was defending his own interests and it would be unjust to allow him now to hide behind the separate corporate identify of RR, when he has demonstrated a willingness to ignore that separate identity on occasions when it suited him to do so.

v) The fact that the Judge found aspects of his evidence to have been dishonest also weighs in the scale, when considering the justice of making the order sought.

Absence of advance warning not a reason to decline to make an order

122. No advance warning was given during the course of the litigation that Asprey was contemplating such an application. By the time the case concluded, Mr Gupta was alive to the risk that anyone funding RR's defence might be exposed to the liability for the Claimant's costs, since he refers to that in his evidence in support of the application for a stay of the judgment, but he says he was not aware of this at any earlier stage. Be that as it may, I do not in any event see any basis for concluding that earlier notice of a possible s.51 application would have altered the evidence he gave, which was found to be dishonest, or his instructions in respect of settlement, or the basis on which I have found him to be "the real party". That being so, I do not consider the absence of an earlier warning to be a reason to decline to make the order I otherwise consider to be appropriate.

Conclusions

123. I am satisfied that in all the circumstances it is just that Mr Gupta should be made personally liable to pay the costs RR was ordered to pay pursuant to the Order of Sir Michael Burton GBE dated 25 October 2021 and I shall therefore make an NPCO requiring this. I invite the parties to seek to agree the terms of the order, including consequential matters.

Correspondence following the hearing

124. Subsequent to the hearing, I received a letter from the Liquidator dated 5 December 2022, swiftly followed by a letter of the same date from Trowers & Hamlins, on behalf of Mr Gupta, to which an earlier letter from Mishcon de Reya to the Liquidator was attached. As I was occupied with other matters at the time, I did not have an opportunity to read any of that correspondence upon receipt and, since it became evident from simply glancing at the opening paragraphs of each that there was a controversy about whether I should have any regard to the letter from the Liquidator, I set the whole of that correspondence aside until I had written my judgment, which

reached the conclusions set out above without any reference at all to any of that material.

125. I have now read that correspondence. My conclusions on the point with which I am concerned are wholly unaffected. I would simply make two observations.

i) First, I see nothing at all inappropriate in the fact the Liquidator provided the witness statement containing factual material derived from his investigations upon which I have relied in reaching my conclusions. To ensure that the Court is properly informed as to the facts does not denote a lack of appropriate neutrality and is not inconsistent with his duties. As was proper, the Liquidator left to Asprey to argue what conclusions should be drawn from the facts there set out. To the extent that the outcome of this application results in RR being relieved of a liability, because Mr Gupta pays the costs in question, that can only be of benefit to RR's creditors as a whole, as any assets of RR's can then be distributed in meeting a somewhat smaller burden of debt.

ii) Second, there may have been some misunderstanding on the part of the Liquidator about comments I made during the course of the hearing. I was not suggesting there was any "direct overlap" between the Liquidation and this application. I simply observed that the Liquidator of an insolvent company has significant powers for the purpose of investigating and, where appropriate, bringing proceedings to obtain remedies and redress under the insolvency regime. These enable a Liquidator to delve into disputed facts to a far greater degree than is feasible, or right, for me to attempt in the context of this application. I do not in any way purport to prejudge the conclusions the Liquidator may ultimately reach about the exercise of any of those powers or remedies, which are entirely a matter for him to reach as and when he concludes his investigations, which are still in train.

126. For the rest, I do not consider that the matters raised in this exchange of correspondence bear in any way on this application and I say no more about it.