



Neutral Citation Number: [2018] EWHC 1737 (Ch)

Case No: CR-2017-004057

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**  
**COMPANIES COURT**

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

Date: 24/06/2018

**Before:**

**INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS (CHIEF REGISTRAR)**

-----  
**Between :**

**CURTIS MICHAEL HARRY**

**Petitioner**

**- and -**

**(1) MAYNARD DANIEL HARRY**

**Respondents**

**(2) SALISBURY AUTISTIC CARE LIMITED**

-----  
**SRI CARMICHAEL (instructed by DEBENHAMS OTTAWAY SOLICITORS) for the**  
**Petitioner**

**MARK WATSON-GANDY (instructed by DUNCAN LEWIS & CO) Respondents**

Hearing dates: 19 and 20 June 2018  
-----

**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

**ICC Judge Briggs**

1. This hearing is to determine the liability in respect of an unfair prejudice petition made pursuant to section 994 of the Companies Act 2006. Mr Curtis Harry (“Curtis”) and his brother Maynard Harry (“Maynard”) were members of a company known as Salisbury Autistic Care Limited (the “Company”). Maynard was the sole appointed director from incorporation until March 2015. Curtis was the appointed company secretary from incorporation until December 2015. The shareholding was held in unequal amounts with Maynard holding 90% and Curtis 10%. The Company provided support services to adults under the age of 65 who are on the autistic spectrum. It achieved this in numerous ways including providing residential home care for sufferers of autism. The Company was dissolved by way of compulsory strike off from the register on 8 November 2016. It was subsequently restored to the register on 25 May 2017 for the purpose of this petition.

### **The petition**

2. The main business of the Company was carried on at two premises in Middlesex, Castleton Avenue and Holt Road. Both premises were used as care homes. The properties were owned by Maynard. Curtis and Maynard worked together until about September 2009 when their relationship soured. The last year end full accounts filed at Company’s House were for 2007. The Company last filed abbreviated accounts to 2012.
3. In November 2014 Maynard incorporated a company known as Salisbury Support 4 Autism Limited (“SS4”). He was the sole director and shareholder of SS4 until he resigned from his post as director on 1 March 2015. The petition alleges that Curtis has been prejudiced unfairly in his capacity as a member as a result of Maynard’s action of (a) transferring the business of the Company to SS4 in 2015 (the “Diversion”) and (b) failing to provide any financial information on the Company when requested including failing to disclose the amount of rent and remuneration he received. The Diversion is said to have taken place when Maynard was in control of both the Company and SS4. In addition, it is alleged that Maynard received excessive rent and remuneration and failed in his duties to the Company by allowing a judgment to be entered against it in June 2015 for the sum of £54,985 due to a failure to comply with an unless order.

### **Defence to the petition**

4. Maynard denies the Diversion but admitted that he loosely remained involved in the Company and SS4 after his resignation. It is a requirement of the Care Quality Commission to have a registered responsible individual in respect of businesses such as that of the Company and SS4. He signed a consultancy agreement with SS4, and remained the registered responsible individual at Holt Road and Carleton Avenue. Nevertheless, he denies that he was a *de facto* or shadow director of the Company or SS4 as claimed. Maynard denies he received excessive remuneration, denies that the rent paid for the premises he owned was excessive, stating that it was below the market rent, and denies that there was a failure to produce accounts to Curtis.

### **The Company**

5. In the early days the Company needed working capital and Maynard says he obtained the capital by borrowing money from different sources including borrowing from Curtis. The Company’s only source of income was from local learning disability teams and health departments. His written evidence is that the Company experienced constant cash flow pressures. One of the reasons for this is that the Company hired what it thought to be high quality professionals. In order to attract high quality staff, higher than average salaries were required. The pressure came as the local authorities wished

to reduce the fees paid to the Company. Maynard explains that he had a regular exchange of e-mail with Curtis over the years, and spoke with him frequently. At one point in the life of the Company Maynard decided to start repaying Curtis for a loan he made by making monthly payments of £15,000. The repayment plan faltered and Curtis has £20,000 of the loan outstanding. ] ← .

6. In or around 2011 one of the local authorities terminated several contracts. This is said to have had an adverse effect on cashflow and led to a decision to delay the filing of accounts. Maynard hoped that by altering the accounting period there would be a greater chance for an upturn in fortunes and any delayed filed accounts would reflect the upturn. Maynard accepts that he incorporated two other companies at this time: SS4 and Salisbury Autism Services Ltd. The intention, he said, was that Salisbury Autism Services Ltd (“SAS”) was to be set up as a charity taking advantage of tax relief on business rates.
7. Maynard states that he decided to resign as managing director of the Company in 2015. His reasons for resigning are said to be that he had started a different business in Asia and was spending a great deal of time there. He accepts that “I appointed” Julalak Kaewdonree (“JK”) as managing director for the Company. He said that she had connections and experience in running a business. Maynard says that he received no remuneration or dividends from SS4 and no dividends from the Company.
8. Maynard explains that the Company decided not to defend the proceedings due to costs. The claimant was in custody and was unlikely to be able to pay the Company’s costs if it succeeded in defending the claim. The defence costs were likely to become disproportionate. As regards the appointment of JK and liquidation of the Company he says:

“I appointed Julalak Kaewondree in good faith, to perform professionally upon my resignation. She was appointed through normal practice of selection and interview. But also had strong references from two business people I know. I felt she had the ability improve/resolve our situation at a time that I had run out of ideas. She also had access to investors, people who were actively looking to invest or lend. Having been appointed Managing Director, Julalak had full authority to run the company and make decisions. She informed me that she had decided to cease trading as there were a number of liabilities which we had no way of settling. The bank was not able to assist, and there were no investors who were prepared to inject money to support the firm. She explained that she felt it would not be legal to continue to trade. I was not able to participate in the decision-making process because the decision had already been made. Neither did I have the funds to alter the chain of events.”

9. As for the Diversion Maynard’s evidence is that the Company could not be sold due to its debts and a registered county court judgment. JK had looked for investors and:

“Julalak had confirmed to the investors that the 2 dormant companies which I had incorporated were not being used, and so she was asked if they could use one of them. They chose SS4A and I agreed. The company had no value so there was no consideration or fee to be paid. I believe that the all changes were effected electronically with the verification code at Companies House. I was very much a passenger throughout this process. The investors brought their own people to run the firm and their aim was to slowly implement their own processes. I was asked to remain as a consultant offering consistency and reassurance (particularly with parents) and expertise in local authority procedures. I was not very often called upon but I am available for a meeting; or phone calls when needed. My name does appear in and around the company even now, although this shouldn't be the case and where spotted

the admin error is corrected. This is the reason why I remained the registered individual, and why I may have appeared on an organisational chart.”

10. In his witness evidence Curtis explains his involvement in the Company in the early days. He considered the business of the Company as a “family” business. There were no formal documents because it was a “family” business and he trusted his brother in respect of all business things. He was an investor and shareholder, investing £110,000. The brothers would discuss the business at least once a week and Curtis was in a position to advise Maynard on issues such as interviewing. They discussed staff, staff bonuses, marketing, strategy, renovations to Castleton Avenue and Curtis even worked in Holt Road for a short time to better understand the day to day business. He accepts that after 2009 he had very little to do with the Company. He explains that this was partly due to his falling out with his brother and partly because he felt he could not contribute to the growing business. He is an IT specialist, and believed he was not qualified to give business advice to a growing company.
11. Curtis invested further in 2006. Maynard asked for more money as the Company experienced cash flow issues and Curtis obliged by making two payments (one in May and another in October) totalling £120,500. This money was important to him as it was borrowed and the borrowing was secured against his home. He says that they did not discuss “repayments or interest or anything like this, it was to be sorted out when the Company was in better shape”. There is a dispute about whether the money provided by Curtis should be treated as loans to the Company or equity. Curtis says:

“I wanted Maynard to buy out my shareholding for what it was worth. He decided that my original investment was a loan and he would pay it back. He made a couple of offers, but I refused them on principle since I had..... invested my money in order to benefit from the return. We had agreed an initial shareholding of 10% and that we would set the shareholding to an appropriate level later, since the 10% was not proportionate to my initial investment. I had a conversation with Maynard about my initial shareholding and he suggested a percentage between 20% and 30%, I do not remember precisely. I told him we would set it to 10% and when I felt comfortable we would reset it according to the percentages we had discussed. This would have worked, because there was trust then. This is why I refused his offers and demanded that my shareholding be set to the appropriate level as we had previously discussed. Eventually Maynard decided that my investment was a loan and set out the repayment terms for the £110,000, the £120,000 loaned and £44,500 interest.”

12. In respect of the Diversion, Curtis argues that the timing of the transfer to SS4 is revealing. First, the last period the Company filed its abbreviated accounts was for the year ending November 2012. The accounts show that the Company was demonstrably solvent. Secondly, two years later SS4 was incorporated with Maynard the sole shareholder and director. Solicitors acting for Curtis wrote on several occasions asking for financial information and expressing concern about the incorporation of SS4. Thirdly after incorporation SS4 operated the same care homes as the Company and Maynard was recorded as the “accountable person”. Fourthly the annual return filed at Companies House on 13 January 2016 disclosed that the entire share capital of SS4 had been transferred to Shanna Attidore and two days after that Maynard resigned with JK and Pradthana Khankaew (“Pradthana”) were appointed as directors of the Company and SS4 respectively. Fifthly the website for SS4 referred to the history of the Company as part of the history of SS4. Sixthly the accounts for the year ending 2016 disclosed that SS4 had creditors of nearly £2 million. To Curtis’s eyes a start-up in the industry would be unlikely to accrue such debts in such a short space of time. There

has, he says, to be a link to the Company. Seventhly, Pradthana has failed to explain her role in SS4.

### **Legal framework**

13. It was hard to detect a difference in submission about the legal test to be applied. I shall summarise the position here starting with the jurisdictional machinery.
14. Section 994 of the Companies Act 2006 provides, so far as material:
  - “(1) A member of a company may apply to the court by petition for an order under this Part on the ground-
    - (a) that the company’s affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
    - (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.”
15. The requirements of section 994 are relatively clear and the law was not debated before me. I shall set out some established principles starting with the jurisdictional basis for the claim, namely the Companies Act 2006 (the “Act”). Section 996 of the Act provides:
  - “(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.
  - (2) Without prejudice to the generality of subsection (1), the court’s order may.....

“(d) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company’s capital accordingly.”

16. In *Re Unisoft Group Ltd (No. 3)* [1994] BCLC 609 at 611, Harman J. stated in relation to the terms “act” and “omission”:

“...the words are wide and anything that the company does or fails to do can be relied upon. But wide as the category of acts may be it is necessary that the act or omission is done or left undone by the company itself or on its behalf, Thus, voting at a general meeting, whether annual or extraordinary, may result in a resolution being passed or defeated. The resolution is, obviously, an act of the company notwithstanding that the votes which pass or defeat it are the votes of members which are their private rights which...can be exercised as they choose. The acts of the members themselves are not acts of the company and cannot found a petition under [section 994].”

17. To satisfy the test of unfair prejudice the acts or omissions have to be unfair and prejudicial. Unfairness is a notion. In *Grace v. Biagioli* [2006] 2 BCLC 70 at [61], the Court of Appeal highlighted the following principles from the speech of Lord Hoffmann in *O’Neill v. Phillips* [1999] 2 BCC 1:

“(1) The concept of unfairness, although objective in its focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually take the form of the articles of association and any collateral agreements between shareholders which identify their rights and obligations as members of the company. Both are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable.

(2) It follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann’s words, “consist in a breach of the rules or in using rules in a manner which equity would regard as contrary to good faith”...; the conduct need not therefore be unlawful, but it must be inequitable.”

18. The authorities show that prejudice is not a narrow concept. In *O’Neill v. Phillips* [1999] 1 BCLC 1 at 15, Lord Hoffmann said that “the requirement that prejudice must be suffered as a member should not be too narrowly or technically construed”. Prejudice may found in the form of an economic and non-economic act or omission. More recently Lady Justice Arden explained in *Re Tobian Properties Limited* [2012] 2 BCLC 567 that fairness is contextual

and it is “also flexible and open-textured. It is capable of application to a large number of different situations.”

19. One issue that arises in this case concerns the ability of a member’s right to relief where the company is insolvent. The issue has been the subject of authority. In *Re Tobian Properties Limited* Arden L.J said at 572:

“[11] Shares in an insolvent company in liquidation are clearly valueless unless the value of any claims which the company has against the respondents to the petition will eliminate the deficiency and produce a surplus for members. Section 994 of the Companies Act 2006 requires the petitioner to show that the respondent's wrongful acts have caused him prejudice in his capacity as a member. If the company is insolvent, that means that - in general - the petitioner must show that his shares would have had a value but for the wrongdoing of the respondents.

[12] There is a qualification to this requirement: the courts take a wide view of prejudice suffered by a shareholder. Where, for instance, the shares are worthless but the petitioner has suffered prejudice in some capacity connected with his shareholding, such as that of a lender under a loan made as part of the same investment as the acquisition of shares, unfair prejudice proceedings may be brought (*Gamlestaden Fastigheter AB v Baltic Partners Ltd* [2007] UKPC 26, [2008] 1 BCLC 468).

[13] There are no parallel facts in this case but the approach in *Gamlestaden* has an analogue in this case. *Gamlestaden* serves as a reminder that this court should not erect technical difficulties to prevent Mr Maidment from obtaining redress if there is a sufficient prospect that a potential surplus can at some stage be shown and no unfairness to the other parties is involved. At that level, this authority can be used analogically to assist in the resolution in this case.”

20. The Court’s discretion to grant relief is wide. In *Re London School of Electronics* [1985] BCLC 273 at 279 Nourse J (as he was) explained that the conduct may affect the relief which the court thinks fit to grant. And in *Re Tobian Properties Limited* Arden L.J observed that the “courts are also given wide powers to fashion relief to meet the circumstances of a particular case. Parliament clearly intended the courts to adopt a flexible approach to proceedings under section 994, and to be flexible in the exercise of their powers in relation to these proceedings.”

21. As regards duties owed to a company, a director is obliged to:

- i) act within his powers and to exercise those powers for a proper purpose pursuant to section 171 of the Companies Act 2006;
- ii) promote the success of the company for the benefit of its members as a whole pursuant to section 172 of the Companies Act 2006;

- iii) exercise reasonable care, skill and diligence, pursuant to section 174 of the Companies Act 2006; and
- iv) avoid placing himself in a position of conflicting personal interests, pursuant to section 175 of the Companies Act 2006.

A failure to comply with the statutory duties is relied upon by Curtis to claim unfair prejudice relying on *Re Tobian Properties Limited* and in particular it is said that there was a breach of sections 172, 174 and potentially s175 in respect of the Diversion.

### Witnesses

22. Mr Hardy was the first in time to give evidence. He gave straight forward evidence. The evidence he gave was of an out-of-court statement by a senior care worker offered to prove the truth of a matter asserted which was that Maynard remained involved in the business of the Company after he resigned. Mr Hardy accepted that he told the case worker that he was seeking information on behalf of a friend who lived abroad and had an autistic relative. That, he says, was a pre-text. The evidence obtained by Mr Hardy, was countered in cross-examination by reference to a letter purportedly produced by the senior case worker. The letter did not contain a statement of truth and the writer did not attend for cross-examination. It has no evidential weight. I shall give the appropriate weight to the evidence of Mr Hardy when taking account of all the circumstances.
23. The second and last witness for the petitioner was Curtis. He was cross-examined by Mr Watson-Gandy for two hours. In my judgment he gave honest evidence but at times, for instance when answering questions about the Company's solvency and responding to questions concerning excessive remuneration, his evidence was at times tainted by pettifogging. At least that is how it appeared at the time he gave his evidence. On reflection the manner in which he gave his evidence was more to do with being unsure of his ground. He was unsure because he did not have some of the Company documents to hand. His claim is that the Company has failed to disclose relevant material. His approach to evidence did not always help him explain fully his answers to questions put by Mr Watson-Gandy. For example, when taken to the Company's accounts and asked to accept the figures contained in the accounts he refused. Mr Watson-Gandy asked Curtis if he would accept the deficits on the face of the accounts and that the Company was insolvent at the time. Curtis responded, "I need information about inflows and outflows otherwise I am not going to make a comment".
24. Nevertheless, I was impressed that he did not claim to recall every detail or try to guess at answers. His evidence was clear and, in my judgment, straightforward. When he didn't remember a specific event, he would say so. An example will suffice. He responded to a question put by Mr Watson-Gandy "I don't remember when I found out that my brother was not a director in SS4". Throughout his evidence he said, and I accept, that he had little or no influence or involvement in the running of the business from about 2007/2008.

25. The year 2009, became a watershed year, not only for the Company but also for the relationship between Curtis and Maynard. It seems that after 2009 the brothers rarely spoke. The e-mail exchanges between them are judgmental and venomous. As company secretary and accepting he signed company documents it is more likely than not that he understood the Company's accounting position albeit he would have less day to day visibility than Maynard. He accepted in cross-examination that he had no evidence to support the claim that Maynard took excessive remuneration: "it is really about non-disclosure". No evidence had been offered to aid the court as to what "excessive" might be for a company involved in the business of the Company. He also accepted that he did not know if the rent paid by the Company was more than it should have but in cross examination he articulated his concern that the Company was paying £100,000 per year in 2005 and that figure did not change during the course of the Company's life. His evidence was that it is odd that the figure remained more or less stable over the years despite the number of properties changing. This is a curiosity.
26. Curtis seeks to demonstrate that the change in management of the Company in 2015 was not real in the sense that it was not meaningful. The theme is that he did not know what was happening in the Company. However, on his own admission he asked for no more involvement in the Company from 2009. In an e-mail dated 17 October 2009 he wrote to Maynard "you need to make sure that in exactly one month from now all your mail that comes to my house is redirected. It will go back return to sender". The rather intemperate e-mail (and there are others) does not reflect the person who gave evidence in the witness box. In my judgment Curtis shares with his brother a keen intelligence but Curtis was less agitated and displayed more humility being prepared to accept that he may have got a few things wrong. He is careful and gave the impression that he was less likely to take a risk than Maynard. Reflecting his careful nature, he explained that one of the reasons he had less involvement in the Company after 2009 was that he felt he was less able to give meaningful advice to a company that was growing fast.
27. He accepted that JK may be a real person and that he had seen her profile on LinkedIn. He accepted the information contained on the LinkedIn webpage as likely to be accurate. He accepted that she was registered at Companies House as director. In the bundle there is a fax dated 19 January 2018 purportedly written and sent by JK. The fax became the subject of extensive cross examination. In the fax JK states she is resident in Thailand. She explains that the Company had no assets at the time (2015) and ceased trading. The faxed letter claims that there was no diversion of business because there was no value in the business. It was asset-less and due to the high salaries paid it had cashflow problems. JK had not seen a service contract for Maynard but had approached some outside investors who supported entering new contractual relations with the local authorities to run a similar business. As part of the new business Maynard would be required to be named as the "responsible individual", for a "smooth transition". She refuted any allegation that he was a shadow or *de facto* director. She claims that she received no remuneration. Curtis criticised the fax in a number of ways pointing out inconsistencies of

font type, misspellings and language used. He surmised that it was written by his brother to support his case. The criticisms are not unfounded.

28. The last witness was Maynard. He was the only witness called on behalf of himself and the Company. His evidence was considered but at times a little tempestuous. Nevertheless, he came across as a person with self-awareness accepting that some of the e-mails he wrote to Curtis should have been more tempered. When taken to an abusive e-mail he nodded and explained that it was written and sent "with intense anger, but I don't necessarily regret it because this is between brothers". I am not sure why the relationship of brothers justified his position. In some ways this evidence characterised the whole of his evidence. He was in the witness box to deny he had done anything wrong and if necessary justify his actions. He found it hard to answer questions at times and so would ask counsel a question in response thereby failing to answer. When challenged about whether he sent Curtis financial information about the Company prior to March 2015 he said he had. He had instructed the office to send him the information and it was sent out. It was Curtis who refused to read or open the mail as it was addressed to him as the company secretary. He said, and I accept, "I had no problem in sending it to him". He knew that Curtis wanted the information sent to him in his capacity as shareholder and not as Company Secretary. He may have thought that Curtis was being petty but, characteristically, he was not prepared to change his position to accommodate Curtis's request.
29. He was cross-examined about the solvency of the Company. I initially thought that the focus of the cross-examination was that the Company was not insolvent at the time of the Diversion. However, it was directed at demonstrating that Curtis is not in a position to challenge the accounts due to a failure to provide full disclosure. On this basis he was asked about the finances and he said that the Company did not make enough money for him to draw a salary. He admitted he "took money when needed" professing that the sums were not large. He referred to his redacted banks statements that showed his drawings. He said he "mainly lived off the rent" from the properties. He paid "about £3,500" per month in mortgage payments and rented his home which cost £3,000 per month. His evidence was not wholly satisfactory, failing to explain the maths. One conclusion that could be reached is that he charged for three properties in the early years, even though there were not three properties, so that he could take a living without disclosing it to Curtis. That is not a position that was put to him but it demonstrates why the evidence was less than satisfactory.
30. He gave unimpressive evidence about the Diversion. When confronted with the dates for new tenancy agreements with SS4, and the date of the consultancy agreement with SS4 he was unable to offer an adequate explanation. He continued to use his tactic of answering a question with a question. When he did answer it failed to impress. He said, "I was busy and had other things to sign and although this does not show me in a good light that is what happened". The mistakes, if that is what they were, are not mentioned in his witness evidence. Ms Carmichael took him to the consultancy agreement and asked "this agreement comes into effect on 1

March 2015, the same day you resigned as director of the company and the same day that Khankaew was appointed. The transfer was pre-meditated wasn't it? He responded: "No. I don't accept that there was a transfer of the business." He thought the consultancy agreement should have been dated March 2016. This was not mentioned in his witness statement. The tenancy agreements, for example 79 Castleton Avenue, are dated 15 June 2015 at a time before SS4 is said to have commenced business. Maynard said in cross-examination that the date is an error and the effective date should have read "about November 2015". He said the same in respect of Holt Road and Castleton Avenue.

31. Another aspect of the evidence given by Maynard that was unsatisfactory concerned the appointment of JK as director of the Company on 1 March 2015, Pradthana's appointment as director of SS4 on the same day and the transfer of Maynard's shareholding in SS4 to Shanna Attidore. The appointment process of JK as director and reasons for her appointment were unconvincing. The January fax, mentioned earlier, has been added to the trial bundle in order to support Maynard's version of events, yet her name was misspelt or was at odds with her name used on her LinkedIn profile, and spelt differently in the director's appointment form submitted to Companies House. Her stated experience as an employee is Bosch, Maynard said, was not mentioned (a mistake) and her years of experience at Salisbury Asian inaccurate (another mistake). A common theme to Maynard's oral evidence was that if there was an inconvenient document providing contrary evidence, the document contained a mistake or there had been an unexplainable oversight giving rise to a mistake.
32. Maynard was unable to produce any documents that JK had written (other than the contentious supporting October fax which was not too dissimilar to a shortened version of Maynard's witness statement), unable to demonstrate what process took place in order to appoint her or explain why she was the right appointment other than to say she had worked for Bosch and knew some high net worth individuals. There was a complete failure to explain why he would appoint a non-resident with no experience in the care sector to be the sole director of the Company.
33. This incredulity led Ms Carmichael to ask why JK was not in Court giving evidence. Maynard responded that he could not contact her. He did not expand his answer. It appears the most recent contact with JK was in February 2018 when Mary Sarabia wrote to solicitors acting for Curtis to say, "As requested by Julalak Kaewdonree, please find archived documents relating to Salisbury Autistic Care Limited". Mary Sarabia did not attend Court for cross-examination. Towards the end of the cross-examination Maynard was asked why he transferred the entire shareholding in SS4 to Shanna Attidore in January 2016 and backdated the transfer to 2 March 2015? He didn't get an opportunity to answer that question as it was quickly followed up with "She is a nominee of you?". The answer was a simple but unsatisfactory "no". He did not seek to answer the first question put. The reason for the appointment of Pradthana was not well explained if explained at all. She is Thai, living in Thailand, and was only 28 years of age when she was registered as a person of

significant control of SS4 in April 2016. She countersigned the consultancy agreement with Maynard on behalf of SS4. Maynard was asked if she is his nominee and he responded curtly “no”. She was not called to give evidence. The evidence regarding others taking control of the Company or SS4 did not stand scrutiny, was unconvincing and unsatisfactory. At one point Maynard resorted to answering Ms Carmichael’s questions on the issue of his control over SS4 and the Company after March 2015 by stating “you have no proof [I was in control]”. His answers reflected his defence to the petition. He was prepared to sit back and let Curtis prove the case and avoid where possible putting forward a positive case.

## Conclusions

34. It is not in issue that the Company was a family business and there was trust and confidence between the shareholders. It is not argued that sections 994-996 of the Companies Act 2006 do not apply.

### *(i) Insolvency*

35. Maynard’s position is that the Company was insolvent from an early stage of trading albeit that there were times when its prospects looked better. Curtis’s position is that he does not know. Ms Carmichael submits it is likely that the Company was solvent. It is agreed that the time for determining insolvency is 1 March 2015.

36. I take into account the following factors when determining whether on the balance of probabilities the Company was insolvent:

- A. In the year ending 2005 the Company was balance sheet insolvent;
- B. The balance sheet improved by 2006 but the Company remained balance sheet insolvent partly because it took on new credit in the shape of a directors’ loan which was said to fall due within a year but in addition the costs of sales was greater than sales;
- C. In the year ending 2007 the cost of sales was less than sales but the Company remained balance sheet insolvent;
- D. In the year ending 2008 creditors falling due within a year rose significantly and there was a large injection of shareholder funds giving rise to a greater accumulated profit and loss;
- E. In the year ending 2009 the Company accounts showed that it remained balance sheet insolvent but by the year ending 2010, 2011 and 2012 the Company was balance sheet solvent;
- F. I take into account that Curtis was the company secretary during the periods I have mentioned above and remained named as company secretary in 2012; he had access to the accounts;
- G. There are no accounts for the year ending 2013 or 2014;

- H. SS4 accounts for the year ending 2015 showing the Company to be heavily insolvent on a balance sheet basis (see (ii) of conclusion below);
  - I. Croydon council was seeking payment of £40,843.33 as a result of overpayments made to the Company in the period October 2014 to February 2015;
  - J. By 2015 HMRC had demanded £151,827 of the Company;
  - K. A claim had been made in the County Court on 25 February 2015; and
  - L. The Company had faced a claim for rent arrears accruing in the period November 2012 to May 2013 and loss to goods. The claim was conceded on advice and judgment made against the Company in June 2015 for £54,985.
37. In my judgment, in order to determine whether a company is balance sheet insolvent the starting point should be the company's accounts. The difficulty in this case is the gap between 2012 and the relevant date. The last accounts demonstrate that the Company was trading to the extent that it was balance sheet solvent. The Court must do the best it can on the evidence before it.
38. In my judgment taking into account the factors I have set out in paragraph 36 and in particular the (i) judgment debt (ii) demand from HMRC which was not paid (iii) other pressing creditors and (iv) unchallenged evidence that some of the local authorities were “extremely” late in paying, and the insolvency of SS4 I find, on the balance of probabilities, the Company was balance sheet insolvent on the relevant date. If the business of the Company was diverted to SS4 and SS4 was heavily insolvent there is more likely than not to be a connection between the insolvency of SS4 and the insolvency of the Company (which held the business before the Diversion: see (ii) of conclusions below) was insolvent. There is no evidence that the above-mentioned creditors were paid or could have been paid.
39. This is a *prima facie* finding based on the evidence before the Court but that may alter with further disclosure.

*(ii) Diversion, retaining control of the Company after resignation and SS4*

40. The petition states that at the time the business “was diverted from the Company to SS4, Maynard was continuing to direct both the Company and SS4...”. It is pleaded that “Maynard’s Appointees and Pradthana Khankaew acted in accordance with Maynard’s instructions”. It is no-one’s case that the Company or SS4 was rudderless at any stage. To determine this issue I turn first to the documents. The TM01 termination of appointment of director filed at Companies House states the termination date as 1 March 2015. It was not received at Companies House until January 2016. By contrast Curtis’ resignation as Company Secretary is dated Christmas Eve on 2015 and received on the same day in 2016. The received date may be coincidence, but it is possible to infer the TM02 and TM01 were sent on the same day and the TM01 was back-dated. Both documents were signed by Maynard. I make that

inference and find there was a backdating. The Company had received a notice from Companies House that it would be struck off and dissolved due to a failure to comply with submission of accounts in September 2015.

41. The appointment of JK is dated 1 March 2015 but the coincidence of the date of receipt at Companies House persists. The AP01 provides an incorrect spelling for JK and puts her usual address as the Hawthorns at Maples Cross. She is Thai and lives in Thailand. Her full date of birth has not been completed. Her LinkedIn page fails to show that she had been a director of the Company or SS4 but does give experience of other directorships in the same period (2015 and 2016). On 1 March 2015, another Thai resident was appointed director of SS4, Prathana, whose personal service address was put at Castleton Avenue. Adding to the activity of the day Maynard entered into a consultancy agreement with a sum of £18,000 per annum which was purportedly countersigned by PK.
42. In June 2015 Maynard, in his capacity as landlord, entered new leases with SS4. A screen shot of SS4 website after September 2016 mentions Maynard on several occasions. He is said to fulfil many roles: the responsible individual; the owner; the person in charge of accommodation needs; the person who deals with personal care; and if there are any complaints about the operational manager, he is the complaints manger. Maynard's explanation that the website is wrong is incredible. He said in evidence that a new company would find it arduous to obtain approval to provide care due to the processes. SS4 is unlikely to have suffered the inconvenience due to Maynard's obvious public role in SS4. This may explain why SS4 was able to trade so quickly. Further as the website states that SS4 is a continuum of the Company the local authorities will not have seen SS4 as a wholly new business starting out in the sector.
43. The evidence given by Maynard in respect of this issue I said was unsatisfactory. Indeed, in light of the coincidences mentioned, the unexplained mistakes in documents, the failure of the newly appointed directors or shareholders to attend court to give evidence, the unreliable fax from JK, the continued involvement in the business by Maynard through the consultancy agreement, the evidence of continuum from the website of SS4, and the tenancy agreements I conclude his evidence cannot be trusted on this issue.
44. I do not accept that the appointment of Pradthana was real in any sense, and I do not accept the evidence concerning the appointment and divesting of shares to Shanna Attidore was in any sense real. There is no evidence from JK, Pradthana or Shanna Attidore. There is no evidence of activities they undertook. There is an absence of reference to them in any operations. Their resident status makes corporate governance of a UK based company operating in a local community within the care sector highly improbable. There is no evidence other than the documents partially completed by Maynard to support their appointments. I take into account the evidence of Mr Hardy, albeit I do not give his evidence full weight. His evidence supports these conclusions.
45. A *de facto* director is an individual who exercises real influence (otherwise than as a professional adviser) in the corporate governance of a company:

*Secretary of State for Trade and Industry v Tjolle & Ors* [1998] BCC 282 approved by various subsequent authority including *Holland v The Commissioners for Her Majesty's Revenue and Customs (Appellant) v Holland and another* [2010] UKSC 51, (*Re Paycheck*). I do not accept that Maynard was a passenger. He is, on the balance of probabilities, likely to be the only person, as he was before 2015, who undertook the functions in relation to the Company and SS4 which could only properly be discharged by a director. The accumulation of evidence regarding his continued involvement and the absence of evidence to support the involvement of the appointed directors firmly supports this conclusion. Maynard owed fiduciary duties to the Company and owes fiduciary duties to SS4. I find that on the balance of probabilities Maynard was a *de facto* director of the Company after his purported resignation and is a *de facto* director of SS4.

46. As a *de facto* director I find that Maynard conceived, engineered and executed the Diversion. SS4 was a successor company of the Company.

(iii) *Unfair Prejudice*

47. In terms of unfairly prejudicial conduct, the legal background of the corporate structure must be considered. The Company was managed and directed by one director. The Company was a family company with a minority shareholder who trusted the business acumen and integrity of the majority shareholder and manager. Fairness, and its opposite unfairness, is not to be considered in a vacuum. Unfairness is made out on the facts of this case as the majority shareholder and director conceived and implemented the Diversion of the family business without consultation, without warning and in a cloud of obscurity backdating documents and denying his own involvement and control in the successor company when patently he remains involved. The circumstance of the Company's demise, the role played by Maynard, the transfer of the business to a new company and Maynard's involvement in the new company; these actions and omissions were objectively unfair on the minority.
48. As prejudice may be found in the form of an economic and non-economic acts or omissions Curtis suffered prejudice in a non-economic manner by reason of Maynard's failure to consult on what would be a major event in the history of the Company: its demise. Curtis must show he suffered prejudice in his capacity as member. The Diversion had a detrimental and terminal effect on Curtis's shareholding giving rise to economic prejudice potentially rendering his shares valueless. The effect of the Diversion was to take away the Company's life blood and with it any expectation of a return on equity. Expert evidence will need to be called to determine whether the shares did have a value prior to the prejudicial acts and omissions. I will hear submissions on the appropriate time of the valuation.
49. There is insufficient evidence before the Court at this hearing to satisfy it that Maynard received excessive remuneration, but further disclosure may demonstrate otherwise. At present there is insufficient evidence to support the contention that Maynard caused the Company to pay excessive rent for the properties in the latter years. The rent for the three properties in the same

period was £108,000. This does not explain the payments made for rent in the early years when there were fewer properties. This is the curiosity I mentioned earlier in this judgment. My finding that his evidence is untrustworthy in relation to the Diversion, means that I will require full disclosure of the issue for the quantum hearing. I conclude, doing the best I can, that, on the face of it, there is a real prospect that the actions of Maynard in the period 2012 to 2015 will disclose that there was value in Curtis's shares at the date of the Diversion.

50. This conclusion is reached on the basis that the Company was solvent in 2012 by reason of an unexplained injection of shareholder funds, and it is more likely than not that the motivation for maintaining and transferring the business of the Company to SS4 was due to a forecast that it had reasonable prospects of providing a return to the members, legal and/or beneficial. There are many questions about SS4 that remain unanswered including questions regarding its accounts that were filed at Companies House for the year ending November 2015 and November 2016 which showed heavily insolvent balance sheets, the threatened strike-off as a result and, as Ms Carmichael put it the 'discontinuance' of the strike-off on 10 November 2017.
51. As regards the litigation ending in a judgment made against the Company in Bristol County Court, the allegation is that Maynard breached his duty to exercise reasonable care and skill pursuant to section 174 of the Act by permitting judgment to be entered. Judgment was entered in June 2015. The claim was commenced in July 2013 by a claimant who was serving a custodial sentence. The Company was represented by solicitors. Maynard's defence is that he was no longer in control of the Company when judgment was entered in June. I do not accept that evidence. He explained in evidence that he acted on advice (consistent with my judgment that he was in control and making decisions of a corporate governance nature). Privilege has now been waived. That advice must be disclosed.

*(iv) remedy*

52. I shall hear argument as to directions on the quantum issue.