

Mark John Wilson (in his capacity as liquidator of 375 Live Limited (in liquidation)), 375 Live Limited (in liquidation) v SMC Properties Limited, Unitguide Limited, Vincent Clegg

Case No: 1520 of 2014

Case No: 6097 of 2014

High Court of Justice Chancery Division Companies Court

2 April 2015

[2015] EWHC 870 (Ch)

2015 WL 1472518

Before: Mr. Registrar Briggs

Date: 02/04/2015

Hearing dates: 17 March 2015-20 March 2015

Representation

Christopher Harrison (instructed by Wedlake Bell LLP) for the Claimants/Respondents.

Hugh Sims QC (instructed by Hausfield Solicitors LLP) for the First Defendant/Applicant.

Judgment

Mr. Registrar Briggs:

Introduction

1 Before the court is an application that a contract dated 6 March 2014 (the "Transaction") made between 375 Live Limited (the "Company") and SMC Properties Limited ("SMC") be validated pursuant to [section 127 of the Insolvency Act 1986](#) (the "IA 1986"). The court also has before it a Part 8 Claim form seeking a declaration that the Transaction is void and relief against Mr. Vincent Clegg who was at all material times the sole de jure director of the Company intimately involved in the Transaction. This judgment deals with the validation application and by extension the claim for a declaration that the Transaction is void.

The factual matrix

2 Most of the factual background is common ground. The Company was incorporated on 21 December 2010 and carried on business as a scrap gold and silver merchant. The Company purchased 58G Hatton Garden, London, EC1N 8LX (the '**Property**') on 4 August 2011 for £1.2 million. In the same month on 12 August 2011 it purchased the freehold development property known as Broadhey Farm ("Broadhey") for £370,000. Broadhey provided a development opportunity for 4 barns. The title was divided and on 28th February 2014 three of four barns were sold with the last barn being sold on 2 April 2014.

3 On 7 February 2013 the Company obtained a short term loan for £600,000 from Unitguide Limited ('**Unitguide**'). Unitguide secured the loan by means of a charge which was registered over the Property. The short term loan was extended, in October 2013, through to April 2014. As indicated, the Property was sold to SMC on 6 March 2014 for £850,000.

4 The Company defaulted on its VAT. It also defaulted in filing VAT returns from the period ending 31 January 2013. In December 2013, HMRC raised an assessment for £98,000. That was followed in January 2014 by a further assessment for £86,000. The Company placed the Property on the market with Richard Susskind & Co in early November 2013 at an asking price of £1.5 million. A board minute dated 5 November 2013, signed by Mr Clegg records a decision to sell the Property on that date at a price of £1.1m.

5 Sometime presumably shortly thereafter, Mr Clegg, for the Company, signed a contract for sale to Zea Solution Ltd for £1.1 million. A note produced by the Company's solicitor (Wiseman Lee) dated 13 November 2013 and sent to Mr. Clegg, records that he had requested the return of documents from Zea Solution Ltd as *"I understand that you have now successful [sic] resold the property for an increased price of £1,300,000"*.

6 In the event, two offers were received, for £1.1 and £1.3 million. At some point in about November 2013, Mr Clegg, for the Company, signed a contract for sale to Warren Properties for £1.3 million.

7 On 26 February 2014, HMRC presented a petition in respect of a VAT debt for some £280,000. There is some suggestion that the Company may have been involved in a MTIC VAT fraud. However the matter before me does not concern this issue nor does it concern Broadhey.

8 The sale to Warren Properties did not proceed. In the meantime a creditor holding a fixed charge over the Property was pressing for payment. In these circumstances the Company sold the Property to SMC for £850,000.

9 On 14 April 2014, a winding-up order was made on HMRC's petition. On 6 May 2014, Mark Wilson (the "Liquidator") was appointed by the Secretary of State.

10 A firm of solicitors, Coldham, Shield & Mace ('**CSM**'), acted for SMC in relation to the Transaction. The relevant fee earner who dealt with the conveyancing at the firm was Mr Jan Kayani ('**Mr Kayani**'). Completion took place on 4 April 2014.

11 The proceeds of sale received by the Company were distributed in the following way:

11.1. £631,049£05 was remitted to Unitguide. This repaid the debt owed by the Company to Unitguide and released the charge.

11.2. £217,366£95 was paid into Mr Clegg's personal bank account.

12 At completion, Mr Clegg purported to execute a form TR1 for and on behalf of the Company to transfer title to the Property to SMC. On 2 May 2014 HM Land Registry raised a requisition in respect of the TR1. On a date sometime after 2 May 2014 (but before 18 June 2014, when the TR1 was re-submitted to HM Land Registry), it appears that someone at Wiseman Lee attested Mr Clegg's signature on the TR1. By that time, Mr Clegg had ceased (by reason of the winding-up order of 14 April 2014) to have any authority as a director of the Company.

13 On 10 June 2014, Ms Saunders (at the time a member of the Liquidator's team) visited the Property. On 13 June 2014, agents instructed by the Liquidator visited the Property, found it occupied by builders, and were told that it had been purchased by SMC.

14 Mr Green (director of SMC) told Mr Kayani of CSM about the petition and liquidation on 13 June 2014. On 17 June 2014, Ms Saunders called Mr Kayani and told him that a winding-up order had made been made on 14 April and that the sale to SMC was void. The file note records as follows:

"[Ms Saunders] introduced herself to [Mr Kayani]. Mr Kayani informed [Ms Saunders] that his client Mr Steve Green of SMC Properties ... had been in touch and explained that there was an issue with the purchase of the Property.

[Ms Saunders] explained that Mark Wilson had been appointed Liquidator of 375 Live Limited ... on 6 May 2014 following a Winding up Order dated 14 April 2014.

[Ms Saunders] explained that she understood that SMC had purchased the Property on

4 April 2014 however this was after the date of the Winding up Petition ... and in accordance with [Section 127 of IA 86](#) , the transfer of the Property is void. [...]"

15 Nevertheless on 18 June 2014 CSM lodged the TR1 at HM Land Registry. HM Land Registry then registered SMC as the legal proprietor.

16 The factual issues fall into two areas of dispute. The first concerns good faith at the time SMC negotiated and entered into the Transaction. The second is the value (price) obtained by the Company for the Property.

17 I heard oral evidence from Mr. Green who said that the Transaction was at arm's-length. Mr. Kayani who gave evidence about his state of knowledge regarding the petition stated "there is ...no way that I or my client could have known about the petition before the purchase was completed other than by reviewing the London Gazetteand in any event there is certainly no way that I would have known about the petition when contracts were exchanged on 6th March 2014....". Mr. Kaye of Unitguide gave evidence regarding the pressure that he put on the Company to repay the debt "Had the amount owing to Unitguide not been discharged by the sale, Unitguide would have entered into possession of the Property and sought to sell it to recover its debt." Mr. Franks of Richard Susskind & Co estate agents gave evidence about the marketing of the Property undertaken and the interest he had from prospective purchasers, and in particular an offer of £1.3m made by Rachel Munro-Peebles. I heard from Rachel Munro-Peebles of Warren Properties, about her offer and how she would still purchase the Property if it were available. Mr. Davey had been in the property business for over 20 years, acted as a sales and letting agent as well as undertaking small refurbishments. Mr. Green asked his opinion about the Property prior to agreeing to purchase it. I also heard from Mr. Pett (Mr. Green's brother-in-law who carried out some repairs at the Property after the date of the Transaction) and Mr. Liassides who works as an administrator for SMC and Mr. Green. Mr. Clegg provided a witness statement but did not attend court for cross-examination. The Liquidator and SMC rely on his statement for different reasons. I shall therefore take account of his evidence giving it the appropriate weight.

18 In addition to the witnesses of fact I heard from two experts regarding valuation, and had the advantage of reading a third expert report. Mr. Hewetson gave expert evidence for the Liquidator contending that the Property should be valued on an owner occupier or investment basis and Mr. Wolfenden gave evidence for SMC contending that the Property should be valued on an investment basis only. Mr. Garfinkel was SMC's original expert but took no part at the final hearing. He produced a draft statement of agreed facts with Mr. Hewetson but that has been superseded by a joint statement provided by Mr. Hewetson and Mr. Wolfenden. Mr. Hewetson was asked questions by SMC following the joint statement and has provided answers to clarify his position. I take account of Mr. Garfinkel's report but give it less weight on the basis that he was not called and his evidence is untested.

Section 127 IA- analysis

19 The first provision which concerned the security of an insolvent estate in the vulnerable period between petition and order has been traced back to 1571 (13 Eliz, c7, [section 2\(12\)](#)) and was explained by Lord Coke in The Case of Bankrupts 2 Co Rep 25a in the following terms:

"if, after a debtor becomes a bankrupt, he may prefer one it would be unequal and unconscionable, and a great defect in the law, if after he hath utterly discredited himself by becoming a bankrupt, the law should credit him to make a distribution of his goods."

20 It was introduced into the Joint Stock Companies Act of 1856 in an amended form making void any dispositions after the commencement of the winding up. The provision can be seen in a modern form in Section 153 of the Companies Act 1862 . [Section 127 of the IA 1986](#) , re-enacts [s.522 of the Companies Act 1985](#) , and provides that in a winding up by the court "any disposition of the company's property" made after the commencement of the winding up is void unless the court otherwise orders. Mr Harrison for the Liquidator submits that the section automatically makes a post-petition transaction void. Mr. Sims QC for SMC yields to that submission but argues that the underlying principle is maintenance of the *pari passu* principle and the harshness

of the section should be ameliorated by validation in circumstances where a post-petition disposition is made without notice of a petition and where a disponent is not being preferred. The principal concern of the section, it is submitted, is to underpin the second fundamental principle of insolvency law, namely all the estate of the insolvent should be distributed rateably among creditors of the same class.

21 Mr. Harrison submits that the principles underlying [section 127](#) can be gleaned from (among others) [Re SA&D Wright Ltd; Denney v John Hudson & Co Ltd \[1992\] BCLC 901](#) and the decision of Nicholas Warren QC (as he then was) in *Re Tain Construction Ltd; Rose v AIB Group (UK) plc* [2003] EWHC 1737 (Ch), [2003] 1 WLR 2791. He submits the policy is aimed at the first fundamental principle of insolvency law as well as the second fundamental principle.

22 Mr. Sims QC relies on [Re Gray's Inn Construction Co Limited \[1980\] 1 All ER 814](#) at 820 d-j where Buckley LJ explained:

“since the policy of the law is to procure so far as practicable rateable payments of the unsecured creditors' claims, it is, in my opinion, clear that the court should not validate any transaction or series of transactions which might result in one or more pre-liquidation creditors being paid in full at the expense of other creditors, who will only receive a dividend, in the absence of special circumstances making such a course desirable in the interests of the unsecured creditors as a body”.

23 From this passage it can be seen that the essential purpose is to give effect to the policy underlying the statutory scheme for insolvencies, namely to provide for a *pari passu* distribution of a company's assets so as to protect the interests of unsecured creditors. Nicholas Warren QC (as he was) considered the language used in *Re Gray's Inn Construction Co Limited* (paragraph 21) and said:

“In the language used in *Gray's Inn Construction*...I consider that there was here an attempt by Tain to prefer the bank in order to benefit Mr Bernard. In the context of the application of preference to section 127 and its predecessors, I do not think that judges have been using the word “prefer” (for instance Buckley LJ at p 718G) in the technical sense of preference under the sections avoiding transactions as preferences....; rather it has been and is to be taken as meaning a circumvention of the *pari passu* distribution of assets which it is the policy of section 127 to achieve.”

24 Many of the cases concerned payments to creditors and the question for the court was whether or not one creditor should be paid ahead of others. In *Gray's Inn Construction Company* the issue was whether payments into and out of the company's bank account were dispositions of the company's property and if so whether the dispositions should be validated. The payments out were made to trade creditors. The sums paid out to the trade creditors were preferences in fact and law and as such should have been reclaimed from those creditors. In context it can be seen that the sections permitting a liquidator to avoid transactions as preferences bolster the *pari passu* principle: *Gray's Inn Construction Co Limited* page 819 g-h. The rationale of the passage *Rose v AIB Group (UK) Ltd* lends weight to Mr. Sims QC's submission.

25 The first fundamental principle of insolvency law is that all the property of the insolvent estate is available to creditors. Mr Harrison submits that [section 127 IA 1986](#) buttresses the first fundamental principle as well as the second. He says that Parliament could not have intended to provide less protection in the period after the presentation of a petition to wind up a company than it does before the presentation of the petition. He points to the avoidance provisions of [sections 238 and 239 IA 1986](#). The undervalue provision ends on the commencement of the winding up and works backwards: he argues that there would be no statutory protection afforded to undervalue transactions after the commencement of winding up if [section 127 IA 1986](#) did not address the issue.

26 In *Re Wiltshire Iron Co* (1868) LR 3 Ch App 443 at 446 Lord Cairns LJ referred to section 153 of the Companies Act 1862 as:

“A wholesome and necessary provision, to prevent, during the period which must elapse

before a petition can be heard, the improper alienation and dissipation of property of a company in extremis”

27 In [Hollicourt \(Contracts\) Limited v Bank of Ireland \[2001\] 2 WLR 290](#) Mummery LJ agreed with Lightman J in [Coutts & Co v Stock \[2000\] 1 WLR 906](#) where he commented that [section 127 of the IA 1986](#) was:

“Part of the statutory scheme designed to prevent the directors of a company, when liquidation is imminent, from disposing of the company's assets to the prejudice of its creditors and to preserve those assets for the benefit of the general body of creditors.”

28 Buckley LJ also expressed the view that post-petition dispositions should not prejudice the general body of creditors: Gray's Inn Construction Co Limited Buckley LJ (page 820 b).

29 The section does not itself express its purpose but by making every post-petition transaction void is indiscriminate.

30 In his fourth edition of Principles of Corporate Insolvency Law, Professor Roy Goode observes (page 610):

“The purpose of this “relation back” of the commencement of winding up is to protect the interests of the general body of creditors by preventing a dissipation of the company's assets while the hearing of the petition is pending and by ensuring that no payment or transfer is made which is preferential and *would* thus infringe the principle of *pari passu* distribution.

If the section were limited in scope to the achievement of this purpose, it would cause no great inconvenience, for it would then be providing no more than a logical extension of the preference period to the date of the winding up order.

Unhappily, it is not so limited: it applies as much to bona fide business transactions as to preferences; it nullifies transactions that increase the company's asset value no less than transactions which reduce that value. Indeed, it effectively paralyses the company's business, for without the court's leave not so much as a stitch of cloth can be disposed of, not one penny spent even to acquire an asset worth a pound, and technically the company cannot even pay cash into its bank account. Hence the importance of the company's ability to obtain authority from the court which will enable it to continue trading pending the hearing of the petition.

31 In my judgment the modern authorities are consistent with a policy designed at preventing and remedying a breach of the second fundamental principle of insolvency law. The section has another function which acts by its mere operation and may be traced back to its origins: to prevent dissipation. The section prevents (to borrow the phrase used by Lightman J) a disposition ‘of the company's assets to the prejudice of its creditors’ or as Lord Cairns put it, prevents ‘improper alienation’ by making every post-petition transaction void. This function arises due to the section's effect on dispositions made during the relevant time, but permits the court to validate dispositions even where full value is not obtained. The cases *Wiltshire Iron Company, ex parte Pearson* (1858) LR 3 Ch App 443 and *Re Tramway Building & Construction Co Limited* (1987) 3 BCC 433 provide instances of court validation where full value was not obtained, although the examples can only be taken so far: the transaction in *Wiltshire Iron Co* was validated because it was considered necessary to preserve its business.

32 The policy however is clear in that it seeks (as Buckley LJ explained) ‘to procure as far as practicable rateable payments to the unsecured creditors' claims’. Its purpose is to ensure creditors are paid *pari passu* : *Re Civil Service and General Store Limited* (1887) 57 LJCh 119 . The court is unlikely to validate where there is a breach of the policy behind the section unless the facts of the case demonstrate salvage or the assets are swollen as a result: [J Leslie Engineers Co Limited \[1976\] 1 WLR 292](#) . The policy of the section and its effect by operation need to be distinguished as explained by Professor Goode. Accordingly, in my judgment, the

operation of the section will bite equally if:

32.1. Full value was provided for an asset of a company after a petition is presented in circumstances where the directors pay one of many creditors in full (breaching the *pari passu* principle) and

32.2. If a substantial undervalue was provided to a company in the same situation but the directors decided to ensure that every creditor in the same class was paid *pari passu*.

33 The engagement and its effect are an important distinction when considering an application for validation. With the policy and the effect of the section distinguished the relevance of the present case swings back into focus. The issue before me is not uncommon and has been summarised by Lord Justice Buckley in Grays Inn Construction Co Limited (page 820) where he said:

“It may not always be feasible, or desirable, that a validating order should be sought before the transaction in question is carried out. The parties may be aware at the time when the transaction is entered into that a petition has been presented; or the need for speedy action may be such as to preclude an anticipatory application; or the beneficial character of the transaction may be so obvious that there is no real prospect of a liquidator seeking to set it aside, so that an application to the court would waste time, money and effort. But in any case in which the transaction is carried out without an anticipatory validating order the disponent is at risk of the court declining to validate the transaction.”

34 Usually the court is faced with prospective or retrospective applications for payments to be made to creditors: employee wages, suppliers and HMRC. This matter is quite different in that (i) the disposition was not in favour of a pre-liquidation creditor of the Company and (ii) the Company (through its agent Mr. Clegg) thought that the price obtained was the best price obtainable in the prevailing circumstances and (iii) the evidence is that the purchaser believed that the disposition was made at value.

35 With the policy firmly in mind I turn to the general principles which govern the exercise of the court's discretion to make a validation order.

Section 127 IA 1986-principles governing discretion

36 Ultimately the court exercising its discretion, mindful of the policy behind the section, carries out a balancing exercise weighing the interests of the general body of creditors against the target transaction under scrutiny. In another case which concerned the payment of some trade creditors ahead of others, Fox L.J summarised the principles which govern the exercise of the court's discretion to make a validation order under [s 127 IA 1986](#) : [Denney v John Hudson & Co Ltd \[1992\] BCLC 901](#) , at 904C–905B. They are that:

36.1. The discretion is entirely at large. It is not confined by any express statutory requirements.

36.2. As discussed above the policy which underlies s 127 is the assets of the insolvent should be distributed *pari passu* among the same class of creditors.

36.3. The policy is not of invariable application. There are cases where it may be beneficial for the company and the unsecured creditors that dispositions made during the closing period should be permitted to be made so that a company can continue the business in its ordinary course.

36.4. In deciding whether to make a validating order in such a case, the court should endeavour to ensure that the interests of the unsecured creditors are not prejudiced.

36.5. Whether it is desirable that the company should be enabled to carry on its

business involves speculation. The court has to carry out a balancing exercise. It should not, save in special circumstances, validate any transaction or transactions where the result might be that one or more pre-liquidation creditors get paid in full at the expense of other creditors, who will only receive a dividend, unless there are special circumstances making such a course in the best interests of the creditors generally. A good example might be where goods supplied before the presentation of the petition, which are essential for the company to continue in business, have not yet been paid for. The court might exercise its discretion to validate payment made after the petition was presented.

36.6. A disposition made in good faith in the ordinary course of business at a time when the parties were unaware that a winding up petition had been presented, normally will be validated unless there are grounds for supposing that the payment was intended to prefer the recipient above other unsecured creditors.

36.7. Good faith alone is not enough. It is a powerful factor in favour of validation, but it must be weighed against the consequences of validating the payment and the extent to which validation would contradict the principle of *pari passu* distribution.

36.8. In considering whether a validating order is likely to be beneficial to the creditors of the company, Harman J emphasised in [Re Fairway Graphics Ltd \[1991\] BCLC 468](#) that the court will have regard to the interests of all of the creditors and not just certain creditors who may be supporting the winding up petition or be willing to consent to the application under s 127.

37 The reference to the ordinary course of business was an important factor in *Denney v John Hudson & Co* as the insolvent company continued to pay a supplier of fuel in order that it could carry on trading. The particular facts of the case under consideration by Fox L.J. led the Court of Appeal to focus on the harsh effect of [section 127 IA 1986](#) on a trading company. The engagement of the section effectively (as Professor Goode explains) paralyses the company's business. The principles enunciated took into account the possibility that it may not be in the best interests of the general body of creditors for a company's business to be paralysed upon the presentation of a petition and set out principles that the court should balance when considering validation applications.

38 In a different sort of case different factors may be relevant but the policy consideration remains constant. Each case has therefore to be determined on its own facts: *Clifton Place Garage Limited* [1970] Ch 470 . I therefore add that the court would be slow to validate a transaction if there were a significant reduction in the Company's assets. Good faith in the context of [section 127 IA 1986](#) relates to knowledge of the petition (the narrow view of good faith). However I acknowledge that good faith may extend beyond knowledge of the petition (the wider view). If this is correct, a transaction which significantly depletes the assets of a company to the detriment of the general body of creditors is unlikely to be made in good faith. In other words the further away from value a transaction is or was, the less likely it is that the court will find that it is or was made in good faith.

39 There may be another way of expressing the same principle which is as follows: where good faith exists in the narrower sense there needs to be a balance between the rights of the general body of creditors on one hand and an innocent third party on the other: *Re Tramway Building & Construction Co Limited* .

The evidence

40 SMC's position is that they entered into the Transaction without knowledge of the petition, acted in good faith and purchased the Property for full value or near full value. The Liquidator sought to impugn the Transaction on the basis that it was not entered into in good faith and was at an undervalue.

41 One aspect of this case which is of note is the lack of documentary evidence to support either party's case. As both parties relied on Mr. Clegg and his motivation as director of the Company is relevant (at least to context) I start with him. His statement, signed with a statement of truth, is

candid. He explains that the real controlling mind behind the Company was not him but someone called Mr. Conway. He was used to acting on his instructions. He thought that the Property belonged to Mr. Conway. The reasons for this are not clear. However if Mr. Clegg believed that the Company was 'his' he could equally believe the Property was Mr. Conway's too. His evidence is (where relevant) that:

"The property belonged to Mr Conway and was subject to a charge from a lender called Unitguide which had advanced a bridging loan to the company in February 2013 that was the payable in October 2013. Because the Company operated no bank account it was not possible to obtain a loan from the usual lenders such as a bank or building society. In February 2013 I had also given a personal guarantee in respect of that loan although I did not become aware of this until October 2013 when a payment of around £46,000 had to be made to secure an extension of the due date. Whilst it might seem odd that I was not aware I had given a guarantee at the outset, this was because I simply signed papers without reading the same in advance.... I was not involved in the original decision to sell the property or in instructing selling agents this was done by Mr Conway it was his Property and his business..... All I knew was that by the early November there were a number of creditors pressing and I knew the sums owing by Mr Conway were high. By this stage I was also aware of my personal exposure under the guarantee.

I can confirm that by the time the property was being marketed in the autumn of 2013 its general state of repair had deteriorated markedly since 2012 due to neglect and the number of unorthodox alterations carried out by Mr Conway.

In or around early November an offer of £1.1m was received from Zea Solutions Limited.

In the middle of November 2013 an increased offer of £1.3m was received from Warren Properties....with the promise to exchange within 2 weeks and completion within a month.

In early January I spoke to the selling agents... I instructed him to make it known to Warren properties that if it did not complete within a short time scale the company would pull the plug....Warren Properties did not complete as requested so on 23 January 2014, with the knowledge of there being other interested parties, I wrote to my solicitors and requested that the transaction be aborted.

I am not exactly sure when SMC came forward with its offer of £850,000 but I believe it was sometime in the latter part of January 2014. My key concern by this stage was the ability of any prospective purchaser to perform so that funds can be realised to discharge the Unitguide debt before the April deadline. The ability to perform was at this stage far more important than price. With personal threats being made against me and exposure under the guarantee I would have accepted less than £850,000 if necessary."

42 Mr. Clegg's evidence regarding the negotiations with Mr. Green was challenged, and prior dealings became a focus during cross-examination. Mr. Clegg explained that he had no prior dealings with Mr Green or SMC and met Mr Green in about late January early February 2014. He says he stressed to Mr. Green that if he wanted the Property he would have to complete quickly and after some negotiations the sum of £850,000 was agreed on the basis of a quick completion.

43 In cross examination Mr. Green was asked about the negotiations and how he reached the figure of £850,000:

"Q. Your £850,000 figure was therefore one which you came up entirely by yourself?

A. No, I based it on the 1.1 that this Vince Clegg was asking me, and from property experience I knew, you know- I felt confident that no sooner do I knock the 150/200 off, that I was comfortable with this sort price on this building and I have done it previously"

44 I accept Mr Green's evidence that he was not good with paper-work, and kept no records or

papers. He said "I am a trader. I do virtually all my business either in person or by telephone and do not keep records of deals reached other than what might exist in files held by professional advisers I retain."

45 This produced fertile ground for cross-examination. Mr. Green was asked about the production of documents produced by Mr. Pett, documents typed by Mr. Green's administrator (Mr Liassides), and workings on costs and invoices relating to repair works undertaken at the Property. The answers were generally not fruitful. Mr. Green's eye for detail was conspicuously lacking. In his first witness statement he said that he consulted Mr. Davey before making an offer for the Property. In his third witness statement he thought that was inaccurate and consulted Mr. Davey after making an offer. This admission was made after the Liquidator obtained meta-data attached to photographs taken by Mr. Davey during his visit to the Property. This gave an further opportunity to discredit Mr. Green in cross-examination:

Q. So to go back to Mr Davey's involvement. The position, Mr Green, is this: what I say, just so you are clear about this, is that in your first witness statement you said that, falsely, in your statement, that you had had advice from Mr Davey before you made your offer, and when you made that statement you knew that that was not true?

A. No, it wasn't falsely, I just couldn't — and I have explained that I can't remember the exact dates. He has always given me advice, a second opinion on whether I am looking at different properties, and he is a support in that, you know, from there.

Q. The sequence of events, which you explained just now when my learned friend asked you a few questions, was perfectly clear; within the space of a few days, you went to look at the property, you spoke to Mr Clegg on the telephone, you discussed it with him, you went to look at the property yourself, you made an offer. Nothing to do with Mr Davey at this stage.

A. But I wasn't committed to that offer. I had that in my own way of looking at — from the figure that Mr Clegg was assuming, he was asking me what I was prepared to go to, but I had given two or three weeks of time that — be it the second view from Magnus, if it wasn't right I had time to sort of come away from it, and then I didn't have to put the offer in.

Q. Very well. The point I need to put to you is that you said that in your first statement knowing it to be wrong because you wanted to give the impression that your £850,000 offer was based upon help and advice from a third party, Mr Davey. That is the impression you wanted to give?

A. It may well look like that from your end, but it wasn't, because I had already taken account the refurb fees and if you put that to the 850, it brings it up to approximately 1 million/1,050,000 and then it was the figure I was only prepared to go to.

Q. And just before leaving paragraph 5, then, of your first statement, if we just go back to tab 1 above. You say the informed advice was to be on the valuation of the property and upon receiving this advice, you made your offer. Did Mr Davey ever give you advice on the valuation of the property, as opposed to what repair work might be necessary?

A. No — I can't remember.

46 The closer the questioning the more vague Mr. Green's evidence. He thought he remembered he consulted Mr Davey before making an offer for the Property. He changed his mind on being challenged and thought it was after he made the offer. He finally relented saying he could not remember.

47 A key issue in cross-examination was the negotiations regarding the price for the Property. I had the advantage of hearing Mr. Green give evidence in chief on this point. I found his evidence straightforward and credible.

Q. Can you explain how you were introduced to Mr Clegg?

A. Yes. There is a friend close to me who has a building adjacent to him, Chiam Cohen,

a friend of mine of years of being in the jewellery business. I went into the jewellers of Chiam's and he then said to me in conversation, "Did you know that a building up on the corner was for sale?" Because I had been looking for the last two to three years for a property, and from his information it led me to go and introduce myself to next door.

Q. Okay. So as a result of that suggestion, then, being introduced to next door, when you went through to next door, what happened then?

A. Well, as far as I could see they were sort of trading there. It was like a small shop unit and I asked was the building for sale. They said, "Yes, it is", but the guy you needed to contact wasn't there, so I said obviously, "Have you got a contact number?" And from there, knowing now, it was the number of Vincent Clegg. Given five or 10 minutes, I had called him on his mobile and discussed, you know, "Are you interested in selling the property?" Which he said he was, and then we obviously said, well, we will meet up, a day or two from there, and discuss the figures and so on.

Q. Okay. So you had that meeting. And did he indicate to you what price he was interested in, or did you make a bid? How did it work?

A. Yes, from — it was a year ago, but from what I can remember rightly it was in the region of approximately 1.1.

Q. When you say it was, who said that?

A. Vincent Clegg.

Q. And what was your response to that?

A. Well, I wasn't — I say, I wasn't interested, I said leave it with me because I need to obviously to look further into the building, the condition and so on, and I said bear with me. And obviously, from discussing this with Vincent Clegg, it allowed me another two or three days to look at this building, look at the condition and so on, and from there I had decided I wasn't prepared to go to 1.1, and I started to get a better idea of a figure in my head to obviously offer, but it may have taken me a week before I obviously responded to him.

Q. Okay. So what did you say to him, then?

A. Well, I took the condition of the building, like I say, and it needed a fair amount of expenses spent on it and so on, refurb with all floors, and I was only prepared then, because I am pretty familiar with how to price the pricing of refurbs and so on, that the maximum I would go to was 850.

Q. So did you tell him that?

A. Yes, I think — a week — I mean, I can't remember now, it has gone on, like I say, for a year. But when I had spoken to him maybe four or five days later, that was the offer I had in my head to offer him. I think from my understanding he was coming back to me at 950, in that region, but I wasn't prepared to go to it because of the works in the building.

Q. So how quickly after you made your offer of 850 did he come back and indicate whether he was willing to accept that or not?

A. I can't remember timescale. It was all maybe a week, 10 days, it was all around about that sort of time period.

Q. So not the same day?

A. No, not the same day, no. It was at least three or four days of discussing, you know, is there movement, because of the condition of the building and so on. And like I say, over a period of week a week/10 days, I was more sure of the figure that I wanted to offer, because of the condition of the building, and that is why it went on that length of time.

Q. Did you have a figure in your head as to what you thought at the time the repair and

refurbishment costs might have been?

A. Yes, approximate. Not exactly, approximate.

Q. What were those?

A. Well, I had in my — approximate figures of 150, you know, I can look at certain things and price them from experience.

48 Although there was a suggestion of conspiracy in both cross-examination and closing, Mr. Harrison was clear in his submissions to the court that he was not alleging there was a conspiracy between Mr. Clegg and Mr. Green to sell the Property at less than market value. The context of the purchase is an important factor. Time was important. Mr. Clegg had proceeded with a potential purchaser offering a greater sum than a previous potential purchaser on a promise of a fast exchange but had failed Mr. Clegg. He was clearly weary of those who would promise a great deal but not deliver. Mr. Green had been looking for a property for some time and knew some of the traders in Hatton Gardens. I accept his evidence that Hatton Gardens is a small trading area where the traders have some knowledge of each other's business affairs. Where a property in Hatton Gardens had been marketed on the internet for several months by an agent it is understandable that the local traders would gain some knowledge about the Property. It is not a great leap to get from that position to Mr. Green being told by Mr. Cohen that the Property was available. I accept that was how he found out. There was no advantage in covering up how he was introduced to the Property.

49 Having in mind that the parties rely on the witness statement of Mr. Clegg, the close examination of Mr. Green by Mr. Harrison, in particular the cross examination carried out regarding the negotiation process, and his evidence in chief, I find Mr. Green gave credible evidence on this issue. He was unsure about dates, timing or paper work and would, when pressed, simply say he was not sure. That, in my judgment reflected his true position. He could not remember whether he made the offer on Tuesday or Wednesday, whether Mr. Davey saw the Property before or after he made the offer. His failure to be precise without reference to a diary merely reflects real life. His lack of precision cohabits with his failure to keep notes or a record of his dealings.

50 He was sure as he could be that Mr. Clegg was prepared to offer the Property on a quick sale basis at £1.1m and he counter-offered having made a quick assessment of the Property's state of repair. The negotiation process reflects the accepted evidence of Mr. Clegg who permitted the offer of £1.3m made by Warren Properties to be preferred over an earlier accepted offer made by Zea Solutions Limited of £1.1m only to find that Warren Properties did not and could not perform.

51 By late January 2014 Mr. Clegg was under pressure from Unitguide Limited. Mr. Kaye's evidence, which was largely unchallenged and in any event credible, was that Unitguide was prepared to enter possession and sell the Property as mortgagee in possession if the whole secured debt had not been repaid by April 2014. With the failure of Warren Properties to perform at £1.3m and in the knowledge that £1.1m had been offered by an earlier party Mr. Clegg offered the Property to SMC for the sum which he thought he could obtain, namely £1.1m. Mr. Green having been offered the Property at this price sought to negotiate on the basis of its state of repair. Time was closing in on the Company. It was not until 10th February 2014 that Mr. Green instructed a solicitor, Mr. Kayani, to conduct the conveyancing in respect of SMC's purchase of the property from the Company.

52 In weighing the evidence of Mr. Green I take account of the thoughts of the late Lord Bingham of Cornhill in "The Judge as Juror: The Judicial Determination of Factual Issues" published in "The Business of Judging", Oxford 2000, reprinted from Current Legal Problems, vol 38, 1985 p 1-27, where he wrote:

"... Faced with a conflict of evidence on an issue substantially affecting the outcome of an action, often knowing that a decision this way or that will have momentous consequences on the parties' lives or fortunes, how can and should the judge set about his task of resolving it? How is he to resolve which witness is honest and which dishonest, which reliable and which unreliable? ...

The normal first step in resolving issues of primary fact is, I feel sure, to add to what is common ground between the parties (which the pleadings in the action should have identified, but often do not) such facts as are shown to be incontrovertible. In many cases, letters or minutes written well before there was any breath of dispute between the parties may throw a very clear light on their knowledge and intentions at a particular time.... To attach importance to matters such as these, which are independent of human recollection, is so obvious and standard a practice, and in some cases so inevitable, that no prolonged discussion is called for. It is nonetheless worth bearing in mind, when vexatious conflicts of oral testimony arise, that these fall to be judged against the background not only of what the parties agree to have happened but also of what plainly did happen, even though the parties do not agree.

The most compendious statement known to me of the judicial process involved in assessing the credibility of an oral witness is to be found in the dissenting speech of Lord Pearce in the [House of Lords in Onassis v Vergottis \[1968\] 2 Lloyd's Rep 403](#) at p 431. In this he touches on so many of the matters which I wish to mention that I may perhaps be forgiven for citing the relevant passage in full:

“Credibility’ involves wider problems than mere ‘demeanour’ which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.”

Every judge is familiar with cases in which the conflict between the accounts of different witnesses is so gross as to be inexplicable save on the basis that one or some of the witnesses are deliberately giving evidence which they know to be untrue ... more often dishonest evidence is likely to be prompted by the hope of gain, the desire to avert blame or criticism, or misplaced loyalty to one or other of the parties. The main tests needed to determine whether a witness is lying or not are, I think, the following, although their relative importance will vary widely from case to case:

- (1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;
- (2) the internal consistency of the witness's evidence;
- (3) consistency with what the witness has said or deposed on other occasions;
- (4) the credit of the witness in relation to matters not germane to the litigation;
- (5) the demeanour of the witness.

The first three of these tests may in general be regarded as giving a useful pointer to where the truth lies. If a witness's evidence conflicts with what is clearly shown to have occurred, or is internally self-contradictory, or conflicts with what the witness has

previously said, it may usually be regarded as suspect. It may only be unreliable, and not dishonest, but the nature of the case may effectively rule out that possibility.

The fourth test is perhaps more arguable ... ”

53 As was said by Lord Pearce every day that passes the memory becomes fainter. Mr. Green is not a man concerned with detail. Although many witnesses find navigating a trial bundle difficult Mr. Green's incompetence could only be remedied with assistance. It was clear to me that he was someone unused to paper work. He could not remember detail even though he had recently read his own witness statement. He therefore found detail difficult to recall if the event in question was at some distance. His bewilderment at some questions was palpable. In keeping with his character his reactions to questions regarding his intentions, his dealings with Mr. Clegg and the timing of each step of the purchase was credible. There was no real conflict of evidence in this case. Mr. Green's version of events is substantiated by the generally accepted evidence of Mr. Clegg. His evidence does not conflict with the evidence provided by Mr. Kaye, Mr. Pett or Mr. Kayani. Although the evidence of Mr. Liassides was difficult to understand when compared with the normal working practices of a professional person there is no evidence to say that the working office of Mr. Green was run differently from that put forward. Mr. Green's evidence was consistent on the major issues and there was no evidence that he should be discredited for reasons not germane to this litigation.

54 I accept Mr. Green's evidence and accept the evidence provided by Mr. Kayani that he and Mr. Green did not know about the presentation of the petition before the agreement to purchase the Property or the date of the Transaction. The petition dated 26 February 2014 was not advertised until 3rd April 2014. I further accept his version of events in respect of how he found out that the Property was for sale, his negotiations regarding the sale and how he calculated the value. I find that the Transaction was made in good faith and at arm's-length within the context of a tight time frame imposed by a concerned and pressing secured creditor who would have taken possession and sold the Property as mortgagee in possession if not paid.

Valuation

55 Hatton Garden runs north/south linking Holborn Circus to Clerkenwell Road in an area that is described as fringe City. The Property lies at the north end of Hatton Garden which is a well-known centre of diamonds and jewellery traders. The road is dominated by ground floor retail units and offices or residential flats in the main on the other floors.

56 The Liquidator's position is that the market value of the Property was £1.3m. Accordingly the sale to SMC was at a significant undervalue. Mr. Harrison relies on a number of factors to support this position. He points to a cluster of values starting with the purchase of the property in August 2011 for £1.2m and makes reference to the offers prior to SMC's offer. He relies on the marketing of the Property between November 2013 and the date of the Transaction, and he relies on the expert evidence provided Mr. Hewetson. Mr. Sims QC relies first on the actual sale price of the Property contending that this is the best evidence of the market value. Secondly he relies on the expert evidence of Mr. Wolfenden. Mr. Harrison discounts the actual sale to SMC on the basis that it would be wrong to consider the impugned Transaction as evidence of value. As mentioned above Mr. Garfinkel also produced a report but as his evidence was untested at trial I give less weight to his findings as a result

57 I did not hear evidence from Zea Solutions Limited regarding its failed bid for the Property. I did hear evidence from Rachel Munro-Peebles who is a partner of Warren Properties (although it has been referred to as a company I understand it is a partnership). She provided a witness summary and was skilfully cross-examined by Mr. Sims QC. In examination in chief she explained that her enterprises bought Grade II listed Georgian buildings buying one or two freeholds a year and selling one freehold each year. Mr. Harrison carefully asked how she reached the offer figure of £1.3m. Her reply was that the figure was based on a long term value "so it is speculative". She said that she did not consider herself a developer (or any of her enterprises) but a landlord. She bought buildings, keeping them for the 'long term' and let them out. Long term meant 5–10 years.

58 Warren Properties needed to raise money from a lender in order to purchase the Property and

a survey was commissioned. Her evidence was that the valuer produced a value of £1.1m and not £1.3m. This led to difficulties with raising the purchase money and ultimately led to failure to purchase in the time frame required by the Company. Candidly Ms Munro-Peebles explained that she spent some time seeking further evidence to support a value of £1.3m but her attempt was forlorn. She persuaded the valuer to increase the value to £1.2m but he would not go further. This valuation was not good enough to obtain the funds required. Mr. Harrison also asked her about the Property's state of repair. She said that in her business the cost of repairs to older buildings was a 'guesstimate' and that such a guesstimate could have wide parameters:

"In the building trade, you guesstimate, so you know in your head that it is not going to cost any less than 100 but it will not cost any more than 200 and where it comes in the middle really depends on what builders you go for".

59 This, in my judgment supports Mr. Green's version of events and aligns with his method of estimating the costs of repairs to the Property.

60 Mr. Sims QC elicited the following information from Ms Munro-Peebles in cross examination:

60.1. The agreement for Warren Properties to purchase the Property was on a short exchange basis;

60.2. Short exchange meant two weeks from agreement of the price;

60.3. 2 weeks to exchange was not unusual in her business;

60.4. The purchase of the Property was linked to a larger refinancing transaction and the purchase of another property at the same time;

60.5. Due to the financing problems Warren Properties was not able to respond to an ultimatum to exchange contracts after the lapse of the 2 week period;

60.6. The solicitors acting for Warren Properties did not respond when they were told that the deal was off;

60.7. Warren Properties was in a position to proceed only after another purchase had fallen-through and after the date of the Transaction. The solicitors acting for Warren Properties wrote on 31 March 2014 enquiring if the Property was still available. Even if it was available the parties would have been hard pushed to complete before the loan fell due (accepting Mr. Kaye's evidence that if he was persuaded that matters were progressing he would have given a one or two week period of grace);

60.8. She was valuing (in her own mind) on an investment basis as she had plans to refurbish and let the upstairs floors to 'high tech' companies to provide a return;

60.9. She made the offer on the basis that she was gambling on a rising market; and

60.10. She took little or no account of the valuer's report which valued the Property at £1.2 million and assumed a cost spend of £100,000.

61 I have little difficulty in finding that Ms Munro-Peebles was an honest witness who tried to assist the court as far as she could. She represents a disappointed purchaser who was unable to raise the finances in the time frame imposed by the Company. Her method of valuation is similar to that of Mr. Green. The major difference between them was that the Company offered the Property to Warren Properties for a sale price of £1.5m and accepted £1.3m if the sale could proceed in a two week window, whereas the Company later offered the Property at £1.1m to SMC and accepted £850,000 on the basis that it could exchange and complete in a similar timescale. Ms Munro-Peebles reduced the asking price by £200,000 on the basis that it would require refurbishment and Mr. Green reduced the asking price by £250,000 on the same basis. Ms Munro-Peebles undertook a similar calculation. It is possible that if Mr. Green had made an offer in November/December 2013 and delayed he would have been jettisoned as was the case with Warren Properties. From the point of view of the Company, the timing and quality of the offer, no mortgage being required, and the attraction of a quick exchange represented the best

value.

62 I was assisted by the evidence of Mr Jonathan Franks an estate agent in the area and the estate agent engaged by the Company to sell the Property. His evidence was that the Property had been subjected to full market exposure. He thought that the addition of a board outside the shop may have helped but that it was advertised on the internet. He thought that the sale price of £1.3m was high but that nothing surprised him in terms of high prices. He accepted that there may be a difference in getting the highest achievable price and selling a property in a short period of time. Mr. Clegg's evidence is the 'ability to perform was at this stage far more important than price.' In Mr. Franks' experience he thought that the Property would require £75-£100 per square foot to refurbish.

63 Before turning to the expert evidence I mention some court directions to put their evidence in context. The court directed on 29 July 2014 that the valuation of experts should produce their respective reports on the open market value of the Property as at 6 March 2014, for exchange on or before 22 August 2014. It further ordered that an assumption should be made (the "Special Assumption") that the market value should be based on a constrained marketing period between 23 January 2014 and 6 April 2014. The latter date is a reference to the date the loan was due to be repaid to Unitguide and the former date a reference to the date when the Company's solicitors sent a letter to Warren Properties' solicitors confirming it was not proceeding with the proposed sale to Warren Properties, having given Warren Properties a deadline to exchange which Warren Properties could not meet. Mr Green's offer to purchase came shortly after the former date, and in any event before 10 February 2014, and thus towards the beginning of this constrained marketing period.

64 Mr Wolfenden and Mr. Hewetson both consider that the market value of the Property as at 6 March 2014 on the Special Assumption that the sale of the Property was agreed following the constraint of a limited marketing period between 23 January 2014 and 6 April 2014, would result in a discount to the normalised market value of between 10% and 15%, though Mr Hewetson also suggested the discount might be as high as 20%. On an agreed yield Mr Wolfenden values the Property on an investor basis, without taking into account the Special Assumption, at £935,000. Mr Hewetson values the Property on the same basis at £1,050,000, with a minimum value of £840,000 (the lower figure takes account of the Special Assumption). Mr. Hewetson increased the value by £100,000 on the basis of a special purchaser: an owner occupier.

65 The experts had full knowledge of the purchase price of the Property and the offers made which did not proceed. The experts were both seeking to assist the court. Mr. Hewetson and Mr. Wolfenden were cross-examined about the owner occupier valuation. Mr. Wolfenden said that he had walked up and down the road looking for evidence of owner occupation. His researches showed that there was no market for owner occupiers in a road that primarily dealt with retail on the ground floor and offices above. The planning restrictions were strongly in favour of retail use and there was little or no evidence of owner occupiers.

66 Mr. Hewetson's evidence is that the Property was purchased by the Company for owner-occupation but he accepted that comparable evidence was scarce in 2014. He considered that the best method was to check any comparable evidence by reference to the investment method of valuation. Mr Hewetson was challenged in cross examination on the owner-occupation valuation, and he accepted that the Property was a commercial property which was more likely to attract an investor. The differences between the parties on this issue is that Mr. Hewetson, accepting that there is no comparable evidence, has resorted to the investment method of valuation but says that the yield does not need to reflect uncertainties that face an investor, such as the requirement to allow for a marketing period, and rent free allowance on letting the premises. On this evidence I have little difficulty in finding that the realities of the market point strongly in favour of an investment basis for valuation. I find that this is the appropriate basis for valuation.

67 I find that the appropriate yield is that used by Mr. Wolfenden namely 5.75% which has been agreed by Mr. Hewetson.

68 Where there are differences between the experts I prefer the evidence of Mr. Wolfenden. Mr. Hewetson's evidence was undermined in cross-examination in several respects. Mr. Hewetson accepted that he produced a value on an owner-occupier basis without any evidence that there was a market for such a purchaser and that in any event the Property should be classified as

'commercial'. Mr. Hewetson ultimately gave way, under the pressure of cross examination by Mr. Sims QC, on the issue of yield and accepted both that an actual 'sale is evidence of price' and it would be 'unsafe to assess market value by reference to offers' without an understanding about the ability to complete. On this basis he agreed that part of his report was incorrect. He accepted that due to the Property's configuration it would not easily convert to flats, and although he thought conversion to a single residential unit may be possible, he accepted it is a remote prospect at that time. He also accepted that a 'prudent' purchaser would not buy in the hope of a rising market.

69 In cross examination Mr. Hewetson accepted that his figure for the refurbishment cost was at the lower end of the spectrum and that the cost could easily be greater. I find that the best evidence of the cost of refurbishment comes from Ms Munro-Peebles who saw the building at the relevant time and was used to making guesstimates, and that of Mr. Franks who had both seen it and was used to calculating refurbishments on a square foot basis to suit the market. I am also attracted to their evidence as it is unpartisan. Mr. Clegg's evidence is that the Property had deteriorated considerably since the date of purchase and, required considerable work in order to get it to the standard appropriate for a property that is 'fringe City'. I take account of that evidence. The cost of repair and refurbishment is not an exact science but as Mr. Franks said may very well depend on the target occupier. At the top end of the market Mr. Franks thought that £100 per square foot was not out of the question. Applying this figure to a building which Mr. Hewetson calculates in the joint report to have 3,121q ft, the cost of refurbishment would be in excess of £310,000. Ms Munro-Peebles thought that she would set a target sum and try not to go above it, but that it was possible that a ceiling would be breached. I take account that she negotiated a price that was £200,000 below the marketed price on the basis of the Property's condition while betting on a rising market. Taking their evidence together and coupled with the acknowledgement that Mr. Hewetson's refurbishment costs of 30 per square foot are on the low side, I am persuaded that the appropriate cost of refurbishment of a building of this size in this location is to be calculated using a figure less than £100 per sq ft but greater than £60 per sq ft. I reach the conclusion that the appropriate cost is £200,000.

70 I accept Mr. Harrison's submission that Mr. Wolfenden's evidence is correct in that there should be limited scope for a margin of error in valuations of this nature. A 5% margin is applicable.

71 Using the calculations provided by the experts, capitalising the agreed rent at a yield of 5.75% and deducting the cost of purchase, refurbishment and other costs I find the appropriate value of the Property as at the date of the Transaction was £898,495, excluding any application of the Special Assumption. I have arrived at this figure using Mr Wolfenden's revised valuation, annexed to the joint statement of expert valuers, and accepting the cost deductions listed by him, save for the refurbishment costs, which I have found should be £200,000. As a result of the refurbishment costs increasing I anticipate an increase in the profit/risk figure and the consequential calculations would also change in a small way, but on a rounding exercise I reach the conclusion that the appropriate sum is £900,000 (see the attached appendices). I take into account that Mr. Wolfenden agreed in cross-examination that the costs figure of 5.8% was taken at the wrong part of the calculation nevertheless I accept his evidence that it would have a *de minimis* effect on the overall calculation, and as such it forms part of my rounding exercise. I also take account of the evidence that rates would not be a cost to a purchaser during the three month empty period.

72 When reaching this conclusion I take account of the cluster of values properly referred to by Mr. Harrison, the concessions made by Mr. Hewetson in cross examination and the reverse engineering undertaken by him in relation to the Warren Properties offer which did not and could not proceed in the time frame imposed by the Company. As regards the time frame, I accept the evidence of Mr. Kaye, director of Unitguide. If the sums due to the fixed charge holder had not been repaid by 6th April 2014 Unitguide would have entered into possession and sold the Property. I also accept his evidence that such a sale would have been a distressed sale and the best market price is hard to achieve in such circumstances. As a result I find that the Special Assumption applies.

73 In considering the appropriate values I have regard to the RICS guidance which assists in reaching an objective position. The guidance is set out in the evidence of Mr. Garfinkel and defines a willing buyer and willing seller:

A willing buyer as a buyer who is “neither over eager nor determined to buy at any price. This buyer is also one who purchases in accordance with the realities of the current market and current market expectations, rather than in relation to an imaginary or hypothetical market that cannot be demonstrated or anticipated to exist. The assumed buyer would not pay a higher price than the market requires.” And

“where the parties had acted knowledgeably, prudently” presumes that both the willing buyer and willing seller are reasonably informed about the nature and characteristics of the asset, its actual and potential uses and the state of the market as of the valuation date. Each is further presumed to use that knowledge prudently to seek the price that is most favourable for their respective positions in the transaction”

74 I find that the cluster referred to by Mr. Harrison provides useful background but does not assist in reaching a concluded view regarding the value of the Property at the date of the Transaction for the following reasons. First Ms Munro-Peebles accepted that her offer was based on hope value for a change of use. This falls outside the RICS guidance and was ultimately discounted by Mr. Hewetson. Secondly her desire to purchase involved a strong element of emotion, purchasing a building that was ‘beautiful’. Thirdly she was purchasing on the basis of a rising market and was prepared to offer a higher purchase price to obtain it in the belief that the market would catch it up. Fourthly her offer was made by reference to a headline market offer of £1.5m and she negotiated £200,000 off the asking price (seemingly without too much difficulty). Fifthly the sale did not proceed. Sixthly there is no evidence that if the Property was offered to Warren Properties on 31 March 2014 it would have exchanged and completed before enforcement action was taken by the fixed charge holder. Seventhly, the offer from Zea Solutions Limited did not proceed even though the rug was pulled from underneath this purchaser there was no evidence before the court to demonstrate that it was in a position to complete the sale. I find it interesting that Mr. Clegg offered the Property for sale to SMC at the same price as that agreed with Zea Solutions Limited which was (at the time) £400,000 below the marketing price. Eighthly the condition of the Property had deteriorated markedly from the date it had been purchased. This gave rise to two issues. First money would have to be spent on refurbishing the Property to get it back to the standard it was in when the Company purchased it, and secondly a purchaser would have an empty building not producing a yield while works were carried out. This may have had a downward pressure on its market value as a purchaser would not be able to obtain an immediate return by letting it. Ninthly market expectation at the date of the Transaction was that a purchaser would be an investor. Lastly the expert evidence has been given knowing about the offers made by the various different parties. Accordingly I give more weight to the expert evidence which takes the offers into account, than the cluster of failed offers and the previous purchase price on a stand alone basis.

Conclusion

75 I have found that SMC entered the Transaction in good faith. I express this finding in both the narrow sense described above and in the wider sense. The Transaction was an arm's-length commercial transaction.

76 I do find it helpful to consider the position from the perspective of both the general body of creditors and the innocent third party. If the fixed charge holder had gone into possession and sold the Property the evidence is that it would have achieved no more than £850,000. It may have received less.

77 I have concluded that the court would be slow to validate a transaction if there is a significant reduction in the value of the Company's asset available to the general body of creditors as result. The value of the asset lost to the Company was in my judgment was approximately £900,000. This does not take account of the Special Assumption. In exchange the Company received £850,000. The loss is approximately £50,000. If a 5% margin is applied (2.5% either way) as discussed by Mr. Wolfenden the general body of creditors will not have suffered significantly or at all. If the Special Assumption is applied the same result is reached.

78 Accordingly I find that the policy behind [section 127 IA 1986](#) is not undermined as the Transaction did not favour a pre-liquidation creditor. In any event my findings lead to a conclusion

that there has been no or no significant loss to creditors. In these circumstances I exercise my discretion and validate the Transaction. This is not inconsistent with *Denny v John Hudson & Co Limited* (supra) and aligns with the court's findings in *Oriental Bank Corp* (1184) 28 Ch 634 and [Burton & Deakin Limited \[1977\] 1 WLR 390](#). I would have reached the same conclusion if the margin discount is not applied and the Special Assumption disapplied as the balance between the innocent third party (SMC) and the general body of creditors lies in favour of the innocent third party in the circumstances of this case and on the values found (SMC paid 5–6% less than the open market value without any allowances).

79 I test the decision to make a retrospective validation order against a prospective application. If the matter had come before the court on a prospective application in early March 2014, and the court had been apprised of all the facts it would, in my judgment, have made a validation order.

80 Validation disposes of the Part 8 Claim.

Appendix 1

[replica of p20 — Statement of Agreed Facts and Issues in Dispute between Expert Valuers]

Mr Wolfenden's revised valuation;

Rent	£76,875
Capitalised at 5.75%	<u>17.39</u>
Gross Value	£,1,336,956
Less costs at 5.8%	<u>£77,543</u>
Market Value when improved and leased up;	£1,259,412
SAY	£1,260,000

Less costs from paragraph 5.4.3 of report

**dated 4 December
2014**

**as amended by this
document;**

Construction/refurbishment costs -	£163,495
Letting fees 10% of ERV -	£7,688
Legal fees at 5% of ERV -	£3,844
Marketing costs -	£2,000
Empty rates 3 months —	£6,450

Lost of rent 9 months X £76,875 -	£57,656	
Profit/risk at 10% of above costs -	<u>£24,113</u>	
		<u>£265,246</u>
Adjusted Gross Value		£994,754
Less acquisition costs of 5.8%		<u>£57,695</u>
		£937,059
SAY		£935,000

(Nine hundred and thirty five thousand pounds)

Appendix 2

Mr Wolfenden's revised valuation;

Rent		£76,875
Capitalised at 5.75%		17.39
Gross Value		£1,336,956
Less costs at 5.8%		<u>£77,543</u>
Market Value when improved and leased up:		£1,259,412
SAY		£1,260,000
Less amended costs calculation		
Construction/refurbishment costs -	£200,000 (increase of 36,505)	
Letting	£7,688	

fees 10% of ERV -		
Legal fees at 5% of ERV -	£3,844	
Marketing costs -	£2,000	
Lost of rent 9 months X £76,875 -	£57,656	
Profit/risk at 10% of above costs -	£ 27,764 (increase of 3651)	
		£ <u>298,952</u>
Adjusted Gross Value		<u>£961,048</u>
Less amended costs calculation		£55,740
	<u>£905,308</u>	
SAY		<u>£900,000</u>

(Nine hundred thousand pounds)

Crown copyright

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