Belgrave Developments (Poole) Ltd v David Kenneth & Amanda Penelope Vaughan [2005] Adj.L.R. 06/30

JUDGMENT : Recorder David Blunt. Portsmouth County Court. 30th June 2005

INTRODUCTION AND PROCEDURAL HISTORY

1. In this claim the Claimant alleges that it has suffered loss as a result of entering into two contracts (dated 24th December 2002 and 10th April 2003) with an entity named Parkside Construction. On 18th June 2004 the Claimant obtained adjudication decisions, based on breaches of contract, in respect of those alleged losses.

2. The present proceedings were commenced on 15th July 2004. The "Brief details of claim" entered onto the Claim Form NI/1 being:

   "MONIES DUE PER ADJUDICATION AWARD UNDER THE HOUSING GRANTS AND URBAN REGNERATION ACT 1996"

3. In the Particulars of Claim, which were attached to the Claim Form:
   (1) it was alleged that the First and Second Defendants traded together as Parkside Construction and were partners in that business;
   (2) it was further alleged that in November 2003, not having completed the works in respect of either of the contracts referred to above, the Claimant advised that no further payments could be made until all works were completed, that in breach of contract the Defendants then withdrew from site and refused to complete any further works, and that the Claimant therefore, in order to mitigate its loss, completed the works necessary in respect of both contracts;
   (3) the two adjudication decisions were pleaded;
   (4) it was recited that the Defendants had failed to make any payments in respect of those decisions;
   (5) it was alleged that although the adjudication decisions were against the First Defendant, the Second Defendant had at all times held herself out to be a partner in the business of Parkside Construction and was equally liable therefore;
   (6) claims were advanced for "the sum of £104,061.29" (the total of the sums awarded in the adjudications), interest, and costs.

4. A default judgment was entered against the First Defendant.

5. On 16th November 2004 the Particulars of Claim were amended:
   (1) to allege that the Claimant had suffered loss as a result of the Defendants' breach of contract;
   (2) to include a paragraph in the following terms:
   "8. The Second Defendant's personal bank accounts were used in the course of Parkside Construction's normal trading activities. If, contrary to the Claimant's primary case, the court finds that the Second Defendant was not a partner in Parkside Construction, the Claimant claims that all monies received by her from or on behalf of the First Defendant trading as Parkside Construction are held by the Second Defendant upon trust for the First Defendant absolutely."
   (3) to claim the sum of £104,061.24 as damages as well as in debt;
   (4) to include a claim for a declaration that
   "... all sums received by the Second Defendant from or on behalf of the First Defendant as Parkside Construction are held by the Second Defendant upon trust for the First Defendant absolutely."

6. The Second Defendant, in her Amended Defence:
   (1) denied that she was or ever had been a partner in Parkside Construction;
   (2) denied that she had ever held herself out as a partner in that business;
   (3) alleged that the contract dated 24th December 2002 was made between the Claimant and the First Defendant;
   (4) alleged that the contract dated 10th April 2003 was made between the Claimant and a company called Parkside Construction (Bournemouth) Ltd;
   (5) admitted the adjudication decisions, but not their correctness;
   (6) admitted and averred that those decisions were against the First Defendant alone;
   (7) admitted that she had made no payments in respect of the sums awarded in the adjudications, giving as her reason that she was under no liability to do so, (even if, which was denied, she had been a partner in Parkside Construction) not having been a party to those proceedings or having been fixed with liability in the adjudicator's decisions;
   (8) admitted she allowed funds due to the First Defendant (who was unable to establish a bank account of his own) trading as Parkside Construction and Parkside Construction Limited to be paid into her bank account, but stated that she released those funds as and when instructed to by the First Defendant;
   (9) admitted that she held such funds in her bank account on trust for the First Defendant or Parkside Construction Limited (as appropriate), but stated that she had released all such funds paid into her account by the Claimant as and when instructed to by the First Defendant, had not used any part of those funds for her own purposes, and did not retain any part of those funds, and had discharged her obligations as trustee to the First Defendant and Parkside Construction Limited by dealing with the funds as instructed by the First Defendant;

(10) averred that a declaration that the Second Defendant held funds on trust for the First Defendant would consequently be of no assistance to the Claimant even if the Second Defendant was found to have been in breach of trust or to have retained any of the funds in question.

7. In this action the Claimant was represented by Mr Paul O'Doherty and the Second Defendant was represented by Mr Scott Allen. The Skeleton Argument prepared by Mr O'Doherty, and dated 6th June 2005:

(1) included a section entitled "Evidence proving Parkside Construction was a partnership" which in turn referred to evidence that the Second Defendant had been in receipt of a share in the profits of Parkside Construction, and to Section 1(3) of the Partnership Act 1890;

(2) emphasised that the Claimant's primary cause of action was based on the adjudication decisions, but stated that if the Second Defendant was correct that the decisions had been made against the 1St Defendant not Parkside Construction, then the Claimant would base its claim upon the underlying breach of contract (the particularisation of which secondary cause of action occupied five pages of the Skeleton Argument);

(3) indicated that the Claimant was seeking a declaration as to the amount that the Second Defendant held in trust, asserted that the Second Defendant had made payments out of her account totalling £32,403.24 which she could not account for, and stated that the Claimant sought a declaration in that amount - *"the assets claim*".

8. At the outset of the trial Mr Allen objected to Mr O'Doherty advancing the case summarised in the last paragraph on the grounds that:

(1) the matters in question were not within the "concise statement of the nature of the claim" endorsed on the Claim Form;

(2) neither the "*share of profits*" nor the allegation that the Second Defendant still held assets on trust, nor the "*underlying breach of contract*" claim had been pleaded, that accordingly they had not been investigated or dealt with in any witness statement served by or on behalf of the Second Defendant;

(3) it was much too late and unfair and unjust to seek to include them in the trial.

9. Mr Allen pointed out that under CPR Part 16.2(1) there was a mandatory requirement for a claim form, amongst other things to

"(a) contain a concise statement of the nature of the claim;

(b) sped the remedy which the claimant seeks.."

He referred to the terms of the "*brief details of claim"* entered on the form (see paragraph 2 above), and submitted that on the face of it the action was stated to be limited to the enforcement of the adjudication decisions. Mr O'Doherty submitted that the words *"monies due per adjudication award*" were of a general descriptive nature and were broad enough to embrace claims associated with the underlying facts of the adjudication decisions. I was of the view that the wording was not compliant with CPR Part 16.2(1) both with respect to the claim advanced in the Amended Particulars of Claim and with respect to the case now foreshadowed in Mr O'Doherty's Skeleton Argument. Nevertheless, non-compliance with Part 16.2(1) is not stated to render a claim-form ineffective, and whilst the court has power under CPR Part 3.4 to strike out a statement of case if it appears that there has been a failure to comply with a rule, there is no obligation to do so, and the court has broad powers of management under CPR Part 3.1(1) to pursue the appropriate course to achieve *"the overriding, objective"*. It seemed to me that in general, where no issue of limitation arose, where particulars of claim have been served, and no objection has been taken as to the endorsement on the claim form prior to trial, the court should be more concerned to see whether the particulars of claim adequately forewarn the defendant of the case which is to be advanced, than with requiring costs to be incurred in amending the "*brief details of claim"* to effect compliance with CPR Part 16.2(1). Accordingly, it did not seem to me that non-compliance with that Rule was by itself, in the circumstances of the present case, a reason for refusing to allow the Claimant to pursue a case which was otherwise properly signalled to the Second Defendant, and I indicated to counsel that this was my view. Nevertheless, Mr Allen was entitled to rely upon the limited terms of the "*brief details of claim*" as being relevant to the issue as to what case was actually signalled in the Particulars of Claim or the Amended Particulars of Claim.

10. The "share of profits" claim and the associated claim that the Second Defendant still hold assets on trust was not based on any expert accountancy report, but upon an analysis done by Mr O'Doherty. This analysis, however, first saw the light of day in his Skeleton Argument i.e. two days before the date (8th June 2005) on which the trial was scheduled to commence. Further, as Mr Allen pointed out in argument, on 17th November 2004 the Claimant had been requested, pursuant to CPR Part 18, to "*set out with full particularity all facts and matters relied upon for the proposition that the Second Defendant was a partner in the business of Parkside Construction, ...*" and the Claimant's Reply, dated 13th December 2004, contained no allegation that the Second Defendant had been in receipt of a share in the profits of Parkside Construction. Nevertheless, the Second Defendant had accepted in her Amended Defence that monies relating to Parkside Construction's business had been received into her bank account and had averred that it had all been utilised in accordance with the First Defendant's instructions, and accordingly could reasonably be assumed to have given thought at the date of that pleading, to what had happened to the monies from Parkside Construction which she had received. Further, in a further witness statement, dated 21" May 2005 she had stated that she had not received any share of the profits of the First Defendant's business and described the financial arrangements between them. Having regard to the overriding objective of the Civil Procedure Rules ("CPR") and in particular to subparagraphs (a) to (e) inclusive of sub-paragraph (2) of

CPR 1.1, I was of the view that the appropriate course was to allow Mr O'Doherty to pursue the "*share of profits*" and the *"assets"* claims, provided only that time was given to enable Mr Allen to take instructions in relation to them and to enable a further witness statement to be prepared on behalf of the Second Defendant in order to address the analysis which Mr O'Doherty had carried out and included in his Skeleton Argument, and accordingly I gave directions to this effect. In the event, the court was adjourned early on the afternoon of the first day of the trial and the further witness statement was provided the following morning, some further time being allowed for Mr O'Doherty to consider that witness statement before cross-examining the Second Defendant upon it.

11. Mr Allen submitted that the "*underlying breach of contract*" claim was simply not pleaded at all, and had not been understood by the Second Defendants' representatives to be being advanced by the Claimant. In my judgment, having regard to the terms of the Amended Particulars of Claim and the "*brief details of the claim*" endorsed on the claim form, the perception of the Second Defendants' representatives was entirely understandable. It is true that a list of issues in the Case Summary (dated 1St June 2005) lodged with the Court included, at paragraph 9:

"(iv) Is the Claimant entitled to enforce its Adjudication decision against Mrs Vaughan or seek damages for breach of contract against her"

Further, the First Defendant had not contested the allegations of breaches of contract advanced in the adjudication, nor had he sought to challenge the adjudicator's decisions in litigation, or sought to set aside the default judgment in the present proceedings. Nevertheless, the Second Defendant had not admitted the correctness of the adjudicator's decisions and would have been entitled in these proceedings to challenge the *"underlying breach of contract*" claim had it been clearly pleaded. As it was, this claim, quite understandably, was simply not addressed in the evidence which had been served on her behalf. It seemed to me to be unfair for her *to have to make a hurried decision as to whether she would want to contest the "underlying* breach of contract" claim if it were permitted to be advanced, and, unless she decided not to contest it, it seemed likely that it would have been incapable of being tried within the three days allowed for the trial, even if the Second Defendant had come prepared to meet it. Further, it is plain that the "underlying breach of contract" claim would be academic if either there was a partnership as alleged and the adjudication decisions were enforceable against the Second Defendant or if there was no partnership. However, if an application to re-amend were disallowed and the Claimant later had to pursue the claim in a fresh action additional costs would be incurred in commencing those fresh proceedings. Accordingly, I concluded and directed that the overriding objective would be best served by permitting Mr O'Doherty to re-amend the Amended Particulars of Claim, but for the claim based on "*underlying breach of contract*" then to be adjourned with a liberty to restore should it become appropriate to do so. Mr O'Doherty subsequently presented a Re-Amended Particulars of Claim including the "*underlying breach of contract*", claim. I gave permission for the re-amendment, and then adjourned that claim.

THE ISSUES

12. As a consequence of the procedural decisions referred to in the last section of this judgment the issues for the court to determine are as follows:
    (1) Was Parkside Construction a partnership with Mrs Vaughan a partner?
    (2) If Mrs Vaughan was not actually a partner in Parkside Construction, was she `held out' as a partner so as to estop her from denying that she was a partner?
    (3) Is the Claimant entitled to enforce its Adjudication decision against Mrs Vaughan?
    (4) Was the Beresford contract between the Claimant and Parkside Construction or between the Claimant and Parkside Construction (Bournemouth) Limited?
    (5) Did Mrs Vaughan hold the monies paid into her bank account on trust and if so for whom and in what sums?

THE PERSONALITIES

13. The Claimant's directors are, and at all material times were, Mrs Louise Davies and Mr Andrew Bell. Until she married recently, Mrs Davies's surname was Dalton-Biggs. Mrs Davies described Mr Bell as a "business partner'". Together they incorporated or acquired the Claimant for the purposes of developing properties.

14. Mr Bell is a Chartered Management Accountant. He had worked for a number of businesses or other organisations as company accountant or finance director. He had studied some contract law and some general business law during his training. At all material times he understood the meaning of, and difference between, a sole trader, a partnership, and a limited company. He knew what "trading as" or "t/a" signified. It was his invariable practise to ensure that all business contracts were reduced to writing, and he would not regard them as binding until signed.

15. Mrs Davies had at one time run a business installing bespoke kitchens for developers. She dealt with the on-site and specification side of the Claimant's business. Mr Bell managed the contractual and financial aspects of that business.

16. The First Defendant has worked in the building trade all his life, either on his own account or as an employee. He appears to have been made bankrupt in 1997. In 2004 he swore an affidavit in which he stated that his discharge had been indefinitely suspended. In fact it appears from an order in the trial bundle that in October 2002 that the suspension of his discharge from bankruptcy was lifted "*with effect from 28 July 2000 such that ... (he was) ... discharged from bankruptcy with effect from S July 2002*." Nevertheless, at all material times he appears to have believed himself to be an undischarged bankrupt. It is common ground that from about July 2002 he carried on business under the name "*Parkside Construction*". The Claimant asserts that this business was

carried on in partnership with the Second Defendant. The Defendants assert that he was in business on his own as a sole trader.

17. The Defendants are not in fact married, but they have lived together for many years and have had three children together, the oldest of whom is now aged 18. It is common ground that at the material time, because the First Defendant was understood to be bankrupt and thus unable to have a bank account, payments relating to the building activities carried on by the First Defendant were made to and from the Second Defendant's personal bank account. It is also common ground that the Defendant's son's bank account and a bank account opened in about June 2003 in the name of Parkside Construction (Bournemouth) Limited were also used for the same purpose. This company was incorporated on 1St April 2003. The Second Defendant was the sole director. The Defendant's son was the company secretary. The company is now in insolvent liquidation.

18. It is also common ground that the Second Defendant, on a word-processor, produced letters, contracts and invoices relating to the building work carried out by the First Defendant, and also (though, apparently with assistance) did the book-keeping for that business. Of course, there is an issue as to whether she was a partner in that business or was merely a provider of services to the First Defendant.

19. At all material times the Defendants lived with their children at 33 Kings Park Road, Kings Park, Bournemouth.

DOCUMENTATION

20. One property owned by the Claimant was at 3 Carysfort Road, Boscombe, Bournemouth. This was developed under two contracts in writing, one to convert an existing structure into six flats, and the other for the construction of two new-build houses. The first of these contracts is undated. The *"Parties"* are identified as the Claimant and *"Kenny Vaughan*". It is signed by Mr Bell on behalf of the Claimant, and by the First Defendant above the words "*Kenny Vaughan*". In the second contract the *"Parties*" are identified as being the Claimant and "*Parkside Construction (Parkside): whose place of business is 33 Kings Park Road, Kings Park, Bournemouth BH7 7AE".*

21. On 24th December 2002 the Claimant entered into a written contract to convert a property into flats. That property was at Glen Court, Glen Road, Bournemouth. The signatories were Mr Bell on behalf of the Claimant and the First Defendant. The First Defendant's signature appeared over the words "Ken Vaughan", which in turn appeared above the words "Parkside Construction".

22. On 10th April 2003 Mr Bell signed a further contract in writing. This related to the conversion of a former-nursing home into flats. The property was at 16 Beresford Road, Bournemouth. The contract was also signed by the First Defendant. His signature appears above the words "*Ken Vaughan*", below which, on the next line, appear the words "Parkside Construction (Bournemouth) Ltd.".

23. When the dispute arose and boiled over, the Claimant's solicitors correspondence was addressed to "*Mr Vaughan Parkside Construction"*. A *`Legal Action'* file compiled by Mr Bell in relation to the dispute was entitled by him as being between Belgrave Developments (Poole) Ltd. and "Mr K Vaughan trading as Parkside Construction ". In May 2004 the disputes relating to the contracts in respect of the works at Glen Road and Beresford Road were referred to adjudication. In the applications to the RICS for the nomination of an adjudicator the "*Other party/respondent*" was identified as *"K. Vaughan (Mr.) t/a Parkside Construction.*" In the notices of intention to refer to adjudication "*The Main Contractor*" is identified as being "*Mr K. Vaughan trading as Parkside Construction*".

24. Mr Bell wrote to the adjudicator on 10th June 2004. He gave the letter the title *"Kenny Vaughan t/a Parkside*".

25. In his Decisions the adjudicator described the Responding Party as "K. *Vaughan t/a Parkside Construction*" and his findings of liability were expressed to be findings against "K. *Vaughan t/a Parkside Construction*". When the adjudication decisions were handed down, the Claimant's solicitors wrote to "*Mr Vaughan, Parkside Construction*" in seeking recompense under those decisions.

26. The accounts for Parkside Construction for the year to 31St July 2003, prepared by TaxAssist Direct, accountants, and dated 31 October 2003, were prepared as accounts for "Mr D.K. Vaughan Ma Parkside Construction". The letter setting out the accountants' terms of engagement for the production of these accounts was dated 1 April 2003, was addressed to *"Mr DJ Vaughan Parkside Construction*", and undertook, amongst other things, to "*prepare your sole trade accounts .....*

27. A certificate of registration for VAT was issued on 30 September 2003 to the First Defendant, and the "Legal Entity" is described therein, and thus he must have described himself to HM Customs and Excise as, "Sole Proprietor'".

28. There is no contemporaneous document describing the Defendants as being in partnership, or describing Parkside Construction as a partnership. Nor was any mention of partnership made in correspondence to either of the Defendants until 13th July 2004, when the Claimant's solicitors wrote to the Second Defendant a letter before action which included the following paragraphs:

"We act for the above. We have proceeded with an adjudication and the adjudicator has determined the sums due to our clients in respect of projects at 22 Glen Road and 16 Beresford Road, in the sum of £104,061.29, as set out in our letter dated 22 "d June 2004 written to Mr K Vaughan.

We have subsequently considered with our client all of the correspondence in relation to this matter, and note that in fact most of the correspondence has been conducted by you on behalf of your partner. We note too that payments

have been made directly into your account at your request. In the circumstances we have advised our client that you are a partner of Mr K Vaughan, and consequently fully liable for the sums due and owing to our client. We have therefore advised our client that we should write to you demanding payment of the sums as set out in the letter dated 22"d June, per copy attached hereto, and in the event that you do not settle the outstanding debt, we shall be instructed to commence proceedings against you for recovery of the monies due. Such proceedings would include bankruptcy proceedings, and your immediate response is therefore sought."

The assertion that the Defendants had been in partnership was also made to the First Defendant in a letter bearing the same date.

TERMINATION OF THE PROJECTS

29. According to Mrs Davies, the projects at Carysfort Road finished somewhat over time and budget, but in general terms she and Mr Bell were satisfied with the finished product. However, a according to her and Mr Bell, there were concerns about progress on the other two projects, that there were cash flow problems, that Parkside Construction had taken on too many other projects, and were diverting resources to other projects.

30. Mrs Davies's account of the events leading up to the termination of the projects may be summarised as follows:

(1) By mid May 2003 she had become very concerned as the works were clearly behind schedule. She had a meeting with the Defendants at their home. She believes that that meeting took place in the week commencing the 19th May. They discussed the fact that the contract was going to take longer and she asked them to give a time estimate for completion. She was told that they were about 6 weeks behind and therefore it was agreed, at the meeting, to reduce payments to stretch across the new contract programme.

(2) The contracts, should both have been completed within a four month period i.e. by the end of August 2003. After 6 months on site at Glen Road, no end was in sight. The outstanding list of jobs for Glen Road was at that time over three A4 pages long. Beresford Road was even further behind, very little having been done after 4 months on site. She and Mr Bell were easy-going people and tried to be fair at all times with Parkside Construction. They always paid when they were asked to, and yet they could not get the Defendants to fulfil their contractual obligations.

(3) They met with the Defendants in mid July 2003. It was agreed that progress was very unsatisfactory but they were promised by the Defendants that both contracts would be completed by the end of September. The agreed tactic was for Parkside Construction to concentrate all its efforts on Glen Road and leave Beresford Road for a while. With this in mind it was agreed to stop the next payment on Beresford Road due on the 24th of July and pay extra to finance additional materials and labour at Glen Road. [There was some confusion in Mrs Davies's evidence about the year, but, from the general context, it appears to me that she must have been intending to refer to 24 July 2003].

(4) Matters came to a head in September as the deadline for completion of both sites by the end of September 2003 became unachievable. At the beginning of September the four of them had a further meeting. The Defendants assured them that they could finish at the end of September but the Second Defendant informed them that they had under-costed both contracts and they were struggling to finish them for the prices they had quoted. The Defendants also advised them that Carysfort Road new-build houses had cost them an extra £6,500 as they had got their costing wrong. Despite the errors being Parkside Construction's and the fact that "their backs were against the wall" and the feeling that they were being blackmailed with regards to the state of the two contracts at Beresford and Glen Road, she and Mr Bell eventually agreed to pay the Defendants the extra payment of £6,500, as a goodwill gesture. They also agreed to pay extra, again as an act of goodwill, over and above the original agreed fixed contract price, on both the Glen and Beresford Road contracts. The Defendants agreed that if they paid the extra monies they (the Defendants) would definitely be in a position to finish by the time that Mrs Davies went away in mid-October. It was also agreed that this would be the final demand for extra money.

(5) There was a subsequent meeting some weeks later before Mrs Davies left for a trip as again the timetable for completion agreed was looking very unachievable. All four of them attended the meeting at the Defendants' home. Mr Bell said that they did not want to pay any more monies, until there was a significant improvement on both sites to move forward to their dead line. The Second Defendant advised that more money was required to complete the works. Initially Mrs Davies and Mr Bell refused to pay more money. The First Defendant became quite heated and said that if they did not make additional payments they would just have to take the Defendants to court to get them to finish the work. They agreed to disagree and she and Mr Bell left feeling very let down.

(6) She and Mr Bell knew it would be very difficult to get another contractor to take over and give them the certifications which they required to conclude the outstanding sales which they had already agreed. They could not afford any more delays as they would lose some of their potential buyers. Again they felt backed into a corner and therefore, reluctantly, did agree to make further payments on the basis that the deadline agreed was now mid October 2003 and no later.

(7) Mid October came and went. She prepared a list of outstanding works on both projects. Mr Bell sent that to the Defendants. There was a site meeting on the day before she went away, in which she informed the First Defendant that Mr Bell would be making weekly site visits to ensure that the work promised would actually be put in motion. Parkside assured them that they would finish the projects, by the date of her return from her trip.

(8) She returned to work on Monday the 10th November. She was extremely upset by the lack of progress during her absence. It appeared that, in the three week period, probably three days work had been completed. Mr Bell told her that Parkside had "ceased" work the week before following this having e-mailed that he would make no further payments since only a few thousand pounds remained owing on the total contract. She tried to contact the First Defendant so that he could meet them on site and explain why they had, yet again, failed to fulfil their promises but the Defendants ignored her calls.

(9) She finally got hold of the First Defendant and agreed to meet him on the sites on 11th November. He was very flippant and unconcerned and appeared to have lost interest completely. She formed the impression that he no longer cared. He could not even be bothered to give her any explanations as to why the work had stopped. When she suggested that she and Mr Bell had kept their side of the agreement and still had been paying money over, even though we had not seen any improvement on either site, he shrugged. She remembered that he laughed, said to her "she could do her worst", and nonchalantly walked off site leaving her totally flabbergasted by his attitude.

(10) After taking advice from their solicitor with regards termination of the contract, she arranged for a building contractor to work for them on a day rate in the role of site foreman, to employ all of the required contractors on a day rate only basis, and to purchase materials themselves as required. It became obvious very quickly that the standard of workmanship had deteriorated badly over the previous few months, that many mistakes had been made, and that many corners had been cut. The building regulations had not been adhered to on either project, which caused a lot of extra expense and many extra days working. They were constantly putting right work that they had been told had been completed and signed off, by the Building Inspector. They later discovered that the Building Inspector had not signed off any work from Parkside Construction. It was an absolute nightmare and consequently it took over four months, to complete both sites.

31. The two outstanding contracts were actually terminated on 18th November 2003. On 17th November 2003 Mr Bell wrote to the First Defendant, reciting the history of the projects as he perceived it, and complaining that work had ceased on the sites. He then offered a compromise on the following terms:

"To help bring the outstanding contracts to conclusion quickly I propose a compromise as follows:

Glen Road:

- *Install remaining boiler and obtain CORGI Gas certificate for the five flats.*
- *Carry out all outstanding items on the Building Reg list and obtain the building Reg certificate.*
- *Complete installation of video entry system, this has been issued to you and has already been paid for.*
- *Finish off Fascia, soffit and guttering work to the outside.*
- *Put cupboards around electrical board in hallway.*

As an act of goodwill Belgrave will assume responsibility for all other outstanding items on this site including the decorating, tarmacing and installation of TV aerials.

I agree to pay you the remaining £1,000 owing on this contract once the above work is completed and certificates handed over. 5 working days is the time allowed to complete this work

Beresford Road

- *Complete Electrical installation and supply Certificates.*
- *Complete Gas installation, test and obtain CORGI certificates.*
- *Carry out works to obtain necessary Building Reg compliance and obtain the certificates for the four flats.*
- *Complete entry system installation and commission.*
- *Finish small amount of work to roof on the extension to the rear of the building.*
- *Install the final bathroom.*

I agree to pay you an additional £1,000 to that already paid to complete this small amount of work if it is completed within three weeks and the certificates handed over.

Again as an act of goodwill Belgrave to assume responsibility for all other items of work at Beresford Road.

Assuming you accept this compromise and the works, as noted above, are completed in a timely manner I agree that the matter will be deemed closed and pursued no further.

Unless I receive a letter or fax by 1.00 pm today advising that you accent the above compromise, that you will commence works on Tuesday 18th November at 9.00 am and complete in a timely manner then please deem the two contracts with you TERMINATED at that time ...

As noted above with only £4, 000 owing on the two jobs I will be incurring additional monies to get these contracts completed and I will seek recompense from you as you have already received advance monies for the works not yet done. I see two ways to move forward.

- *The simple option - you return to me £10,000 plus VAT of the advance monies paid to Parkside and acknowledge, by letter, that no further monies are due from Belgrave. Monies and the letter need to be received within the next seven days.*
- *If you do not accept the simple option above then I will seek recompense through the courts for actual costs that we incur in fulfilling the contracts..."*

32. The events which followed are matters of dispute. In his witness statement (dated 26th January 2005) the First Defendant stated, at paragraph 28:

"Unfortunately my relationship with the Claimant broke down, essentially because Mr Bell declined to make a payment in November 2003 simply because Louise Dalton Biggs was not available to approve the payment. "

He stated, amongst other things, in a letter dated 18th November 2003, that Mr Bell had changed the proposed terms for the payment of the £10,000, now demanding the money immediately instead of in 7 days. In the result Mr Bell's deadline passed without the conditions he was attaching being fulfilled, and the contracts were thus terminated.

33. For the reasons already indicated, the accuracy of the Claimant's version of the history of the projects has never been investigated. The letter from Mr Bell to the First Defendant dated 18th November 2003 included a paragraph which appears to advance at least a different "slant" on that history:

"We have sought legal advice and the original contracts with you for Beresford and Glen Road are now null and void as you have altered, rearranged, re-designed and had new plans drawn up for the flats on so many occasions, it is impossible for us to keep to the original contract. We have a copy of the original plan that the contract was based on and it is totally different to the present one. We have done our best to try to complete the flats for the monies paid, but it is an impossible task. We have a list of extra works already carried out on the two properties that far exceed the money paid by you. We understood that we were meeting yesterday to go through this list, but again you changed your mind."

Nevertheless, the First Defendant did not resist the claims advanced in the adjudications, and for reasons which I have indicated, the full history of the projects have not been investigated in this trial. Plainly, however, if the version of events put forward by Mrs Davies and Mr Bell is correct, both they and the Claimant were, to say the least, very shabbily treated.

CONFLICTS OF EVIDENCE

34. The Second Defendant's case, as set out in her principal witness statement, may be summarised as follows:

(1) On 4th August 2002 she met Mrs Davies for the first time at a barbecue at her house.

(2) She met Andrew Bell sometime later. He went to the Defendants' house in his new Porsche motor car sometime, she believes, in September 2002. When he arrived she was just going out. She recalled that he complained he had scuffed the wheels on the kerb. She and he looked at the car together briefly. The First Defendant joined them and she then went out. The suggestion that she had attended a meeting at Mr Bell's house in July was incorrect. They had been on holiday until 14th July and thereafter she had spent much of July in Southampton visiting a sick relative in hospital.

(3) Thereafter Mrs Davies and Mr Bell went to the Defendants' house from time to time. She would make tea or coffee but would have no further involvement in the meetings.

(4) Her only involvement in the work was to look after the First Defendant's books and type letters on his behalf and later emails. Towards the end of the first job that he carried out on behalf of the Claimant at Carysfort Road an issue arose about CIS tax deduction. It was then that a meeting took place at Mr Bell's home. She attended the meeting with the First Defendant and took with her details of what had been paid to Mr Vaughan. Mrs Davies was also there. They agreed the figures that had been paid so that a CIS tax deduction certificate could be prepared. During the meeting Mr Bell asked for an email address in order to speed communications and she gave him her email address.

(5) Subsequently the First Defendant was asked to prepare a specification and quote to carry out work at Glen Court. On the 17th December 2002 she typed out the original specification for Glen Court, typing up information given to her by the First Defendant. They sat down together to do this. She gave copies of the quotation to the First Defendant and copies were given to Mrs Davies and to Mr Bell. On the 20th December 2002 she received an email addressed to her with an attachment being a letter to the First Defendant concerning the specification. She then retyped the specification incorporating Mr Bell's amendments and emailed it back to him.

(6) Thereafter her email address became one of the means of communication between the Claimant and the First Defendant but the emails would be sent to her and she would reply to them on his behalf.

(7) She never attended at any of the sites where the First Defendant was working for the Claimant and had never been to any meeting on her own with either Mr Bell or Mrs Davies. As developments progressed, there would be the occasional meetings at the Defendants' house and when financial matters were discussed she would participate but she had no input in relation to any other matters.

(8) At no time had she traded in partnership with the First Defendant or claimed that she was a partner in the business of Parkside Construction.

(9) However, because of the First Defendant's bankruptcy he did not have a bank account and therefore used both her bank account and their son's bank account for business purposes, from time to time, including and in particular with regard to transactions involving the Claimant.

(10) In order that the First Defendant could offer NHBC certification a company was formed, namely Parkside Construction (Bournemouth) Limited. Because of his bankruptcy, the First Defendant could not be a director of that company she became a director of it.

(11) When the Claimant asked the First Defendant to prepare a specification and quote to carry out the conversion of the property at Beresford Road, she and the First Defendant again sat down together and she

typed up a specification dated 10th April 2003, but showed at the foot of that document the name Parkside Construction (Bournemouth) Limited.

(12) Although she did assist Mr Vaughan in running his business her role was limited to bookkeeping, secretarial and similar duties. [In an affidavit dated 22nd July 2004 she explained that the First Defendant was not good at paperwork or computer literate and that she had "worked for him dealing with administrative, Office, and clerical matters"].

(13) She was not paid for her work in connection with the First Defendant's business, although she was paid a salary by Parkside Construction (Bournemouth) Ltd. (This was recorded in the report of the liquidator of that company to have amounted in total to £5500.

35. In her oral evidence the Second Defendant reiterated that she had only been to Mr Bell's house once (i.e. towards the end of the Carysfort Road project) and that she had never, on her own, met with either Mrs Davies or Mr Bell.

36. The substance of the evidence given in the First Defendant's witness statement was as follows:

(1) In June 2002 he was supervising the refurbishment of a flat in Boscombe on behalf of a business called "Parkbury" with a team of sub-contractors working under him. When he returned from holiday on 14th July he discovered that the Boscombe site had been closed and his team of subcontractors were thrown off the job. He therefore decided that he would once again go into business on his own under the name Parkside Construction and within a very few days was offered the opportunity of carrying out work at Clingan Road, Southboume. With various subcontractors, he carried out that work over a period of two weeks.

(2) Towards the latter part of that project he received a telephone call from Mrs Davies, in which she stated that she had a contact with substantial funds who wanted to undertake development work and had a property that needed to be converted into flats.

(3) They met up at the property at Carysfort Road. She showed him around the property and showed him the plans. Subsequently he was given a written contract by the Claimant to carry out the works. At some stage payment into his bank account was discussed and he explained that he did not have a bank account because of his bankruptcy. Accordingly payments were made to the Second Defendant's account on his behalf.

(4) To the best of his recollection he started work on the flats on 5th August 2002. The contract was with the Claimant, Belgrave Developments (Poole) Limited and from time to time he met with Mr Bell, the man behind the business.

(5) From time to time Mr Bell and/or Mrs Davies went to his home to discuss matters. Often the Second Defendant would be at home as well, and she would make tea or coffee but she was not involved in any of the discussions save, considerably later on, when bookkeeping arrangements were discussed.

(6) Very shortly after he had started work on the site, possibly the same week, they were invited to a barbecue at Mrs Davies's house.

(7) In the course of his work the Second Defendant would type correspondence for him and later deal with emails on his behalf as well as dealing with bookkeeping matters.

(8) It was because she dealt with the figures that his wife attended with him at the home of Mr Bell together with Mrs Davies in late 2002. He had not been supplied with any CIS tax deduction certificates and Mr Bell and Mrs Davies wanted to go through the figures in order to supply him with the necessary certificates. He and the Second Defendant therefore went to Mr Bell's house together and she told him what had been paid. Shortly after this he received the CIS tax deduction certificate.

(9) At about the same time he was invited to prepare a specification for building works at 22 Glen Road to convert the property into five flats. Having inspected the property he sat down with the Second Defendant at home and prepared the specification. She typed out the specification essentially at his dictation.

(10) In 2003 he decided to form a limited company in order to be able to obtain NHBC certification and a company called Parkside Construction (Bournemouth) Limited was formed. Because of his bankruptcy he was not able to be a director of the company and instead the Second Defendant was company director but essentially it was his trading vehicle.

(11) When he was offered the opportunity to carry out further work on behalf of the Claimant at 16 Beresford Road he again visited the site and prepared the specification. Once again the Second Defendant typed up the specification which was to become the contract but concluded it with the name Parkside Construction (Bournemouth) Limited.

(12) In June 2003 Mr Bell and Mrs Davies took him out to lunch to celebrate the completion of Carysfort Road and discuss further projects. The Second Defendant was not invited by them to attend, and did not attend.

(13) At no time was the Second Defendant a partner with him in his business Parkside Construction nor was she ever held out to be such a partner.

37. In his oral evidence the First Defendant:

(1) insisted that there was no meeting at the Bell's home in July 2002;

(2) stated that the Second Defendant did not "deal with contracts", that he took the lead role, and that he did not need a partner;

(3) reiterated that he had informed Mr Bell of his bankruptcy because it was his duty to do so;

(4) stated that he ran the company though he could not be a director;

(5) accepted that the Second Defendant dealt with all "*the paperwork, contracts etc*", but *"not anything which he had to see*".

38. Mrs Davies's account of her contacts with the Defendants, as set out in her witness statement, may be summarised as follows:

(1) One of the developers for whom she worked was Tony Gray of Parkbury Construction. The First Defendant was, as she understood it, an employee of Tony Gray and did a lot of building works for him. As a consequence she got to know the First Defendant. Some friends told her that he would be setting up as a building contractor. She recollected that he told her that he would be starting up a business trading as Parkside Construction.

(2) When she and Andrew Bell acquired the property at Carysfort Road (on 28th February 2002) she telephoned the First Defendant to ask if he was interested in doing the building works, and he replied "yes". They arranged a meeting at Mr Bell's house. The First Defendant told her that he would be bringing with him his wife, who was involved in his business. He lead Mrs Davies to believe that his wife was coming because she was involved in the business and that they made all decisions jointly, which was clarified in the meeting. She would not have expected his wife to come if she was simply a clerical assistant. The point of the meeting was that they would all understand who they were dealing with.

(3) The meeting was attended by herself, Mr Bell and the Defendants. They each went round the table introducing themselves to each other and explaining their involvement in the business. The Second Defendant was introduced as "Kenny's wife". Mrs Davies explained that she was responsible for the on-site supervision of all works in the properties which they were acquiring. Mr Bell explained that his background was in accountancy and that he would be responsible for ensuring the administration of the contracts and also for all financial matters. The First Defendant explained that he was involved in the construction side and made it clear that he was the `hands on site' person. The Second Defendant made it clear that she was responsible for the contracts, and financial and administration side of their business. Right from the beginning the First Defendant made it clear that the Second Defendant had equal authority to negotiate contracts and manage the cash. Even at that first meeting, it became rapidly apparent that it was the Second Defendant who made all the major contractual decisions within the contracts themselves and that he was effectively implementing the works. The meeting closed with Mr Bell and she indicating that when they got the Planning Approval through, they would get in touch with the Defendant again with regard to the final plans.

(4) Throughout their business dealings both the Defendants referred to the business as "we". "You can trust us" was one of the phrases that they both regularly used.

(5) When planning was received, she gave a copy of the drawings to the First Defendant. Thereafter they had several more meetings which all four of them attended. In addition to these meetings she met the First Defendant on site to discuss the actual works. All off-site meetings involved the Second Defendant and again it was made absolutely clear at all of the meetings that it was she who would negotiate the terms of the contract, and it was she who would be supervising payments under the contracts. In all meetings where contractual or payment issues were discussed the Second Defendant played a greater part than the First Defendant.

(6) Once the main terms had been agreed between the parties, she had further meetings with the Second Defendant in which they specifically discussed the specifications. Mr Bell and the Second Defendant prepared the contract for the first Carysfort Road contract. At no time when they discussed contractual changes, did the Second Defendant call on the First Defendant to make any comment. The second contract relating to Carysfort Road was concluded in about September 2002.

(7) Work began on site and they made payments, (as per the Second Defendant's instructions) not only in accordance with the contract, but sometimes in advance to help with the Defendants' cashflow. Mrs Davies recollected a number of discussions with the Second Defendant in which the latter telephoned and asked for further payments. The Second Defendant would tell her where the payments were to be made and she would relate the information to Mr Bell, who already had details of the Defendants' accounts. She recollected that initially many of the payments were made to the Second Defendant's personal account, at the Abbey National Building Society. Subsequently some payments were made to an account in the name of D K Vaughan which she understood that to be the First Defendant's personal account, although she was now under the impression that it probably was the account of his son, who has exactly the same name as the First Defendant. However, at all times the First Defendant maintained to her, and to various other people on site and other customers, that it was his account. She saw the First Defendant produce a cheque book from that account and sign cheques in favour of the workmen many times. Throughout the contract, the Second Defendant made it clear that unless the Claimant paid monies into the appropriate account, there could be difficulties in paying up front for materials, as the Defendants had no accounts set up with the various builder's merchants, and so had to pay cash in advance for materials ordered. The Second Defendant made it clear that they had some financial cashflow problems, having just started their business.

(8) If ever occasion arose and she asked the First Defendant where a payment should be made or what payment should be made, or if she spoke to him about changing the specification or whether an item was an extra or included within the contract, he always made it clear to her that all such matters had to be negotiated with the Second Defendant. Occasionally, if they had met on site and she needed a quick answer and did not have time to go to the house to see the Second Defendant, he would ring her to verify any information which she

had requested, but in the main he instructed her to take up all such matters with the Second Defendant. He made it very obvious that he did not get involved in the finance and administration side of the business.

(9) Before they had finished the projects at Carysfort Road, she and Mr Bell started negotiations in respect of two more properties that they wanted to acquire, one at Glen Road and one at Beresford Road. Before they exchanged contracts, they got the First Defendant to go over the premises and look at them to see what would be involved in the re-development of the properties. Therefore they started discussing with him the sort of works that they wanted and the sort of prices that would be involved. In particular on Beresford Road, the initial budgets he gave to them, provided them with the information to go ahead with the purchase, as they felt the profit margin was reasonable. Again, she had several meetings with the Second Defendant in which they started to discuss more specifically the specifications for Glen Road and Beresford Road. She remembered that they had at least one meeting where they all sat round the table again to discuss the matter, and at that meeting in particular they talked about whether Parkside would be able to run both contracts at the same time. The Defendants assured Mr Bell and herself that it was actually much more cost efficient if they did both of the contracts at the same time, because they could have the same workmen going from site to site. Therefore she and Mr Bell regarded these contracts as both being with Parkside Construction and being contemporaneous.

(10) After those discussions, the Second Defendant started to prepare the draft specifications and these were sent to Mrs Davies. She remembered that there were a number of drafts and alterations to them. They concluded the Glen Road contract with Parkside Construction in December 2002.

(11) There were some difficulties in finalising the Beresford Road contract. She remembered the specification going backwards and forwards on a number of occasions. The reason for this, was that originally, they had planned to convert the building into five units but only received planning for four. The original budget, done by Parkside Construction was based on five units. She visited the Second Defendant at her house to finalise and amend the details of the Beresford Road contract, as Mr Bell and she had various amendments which they wanted to make. The Second Defendant amended the contract in front of her on the computer and then handed her a copy. This was the final draft and this was handed to Mr Bell. It is dated 4th April 2003. Following a further review by Mr Bell and his subsequent email to confirm timing of the final payment schedule, a final version of the Contract was produced by the Second Defendant.

(12) When this final contract was received it was dated 10th April 2003. Although the reference to the limited liability company appears on that document, it was never drawn to the attention of Mr Bell or herself. Indeed, throughout they dealt with both the Glen Road and Beresford Road contracts in exactly the same way. Subsequently in June 2003, she and Mr Bell became aware that the Defendants were trading through a new legal entity and they were instructed by the Second Defendant to make future payments into the limited liability account.

(13) Cashflow was a major problem for Parkside Construction. They were trying to grow their business without sufficient trade credit accounts and often payments to contractors and suppliers would not be met.

39. In her oral evidence Mrs Davies stated that:

(1) At the first meeting attended by the Second Defendant they did discuss what their roles would be, that it was stated that Mr Bell would deal with contracts, CIS, and VAT and that the Second Defendant would do the same, and that Mrs Davies and the First Defendant would be on site.

(2) At that meeting the Defendants used the first person plural - *"we are starting up this business", "this is what we are going to do"*. There was no discussion of any partnership, or sharing of profits between the Defendants, nor did either of the Defendants say "*we decide everything together*".

(3) She had nothing to do with and did not take particular notice of who were `parties" from a contractual point of view, and Mr Bell did all the contractual side of things.

(4) She would draw up the specifications and hand them over to the Defendants to amend or add to. She recalled certainly two occasions when she saw the Second Defendant alone at her home, and requested amendments to specifications which the Second Defendant made there and then on the word-processor without any reference to the First Defendant.

40. Mr Bell's witness statement is substantially to the same effect as that of Mrs Davies. Referring to the initial meeting in his house he stated:

"There was no question of Amanda simply being an administrative assistant. Right from the beginning she acted as someone able to negotiate the contracts and administer the finances. They treated each other as equals. He with the building skills and she with the administration skills. The size of these projects was such that he was not going to be doing all the work. They advised that they were jointly to organise skilled craftsmen to carry out the work. I drew the impression from that meeting that between them they had the skills and experience that would be necessary to run the projects on our behalf. I was favourably impressed. They said to us `trust us, we won't let you down'."

41. Referring to subsequent meetings he stated:

"Although Louise and Mr Vaughan had some meetings on site to discuss the building works. I would discuss with Amanda the terms of the contract. Where I was not able to attend any meeting Louise would attend on my behalf under my direction. From their side at all such meetings Amanda took the lead role with regards contractual words and payment schedules. To start the contract discussions Louise forwarded a works specification to Amanda and together Amanda Vaughan and I produced the initial draft contract. Amanda invited discussion on the contract

initially with Louise to discuss the specification and then the draft document which was jointly produced was sent to me. Amanda made it clear that she was negotiating on their behalf and was able to amend on her own authority without referring back to Mr Vaughan. Once the contract was agreed then Amanda sent the document to me to sign."

42. With regard to the payments which the Claimant made, he observed:
"I always took Amanda's instruction either direct to me or relayed via Louise as to the account she wanted payment made to. I never questioned her request for payments into either his or her account as I believed them to be married and partners in their business. They always worked together and I never saw any disagreement between them. They had a very united front. I understood them to be running the business out of both their accounts as being in business together. Neither of them ever suggested that it was simply his business or that she was working for him. Often correspondence would refer to "we" eg the initial letter thanking us for our interest was based on the term `We' 7th October 2002."

43. He described the making of the Glen Road contract in the following terms:
"Once we had exchanged contracts at Glen Road Louise took Mr Vaughan around the property and gave him the drawings and invited him again to give us costings. Again the draft contract for the proposed works came to me from Amanda on the 17th December 2002. The contract again being on behalf of Parkside Construction ... We signed the contract with Parkside Construction for Glen Road on the 24th December 2002."

44. The contract relating to the Beresford Road property was addressed as follows:
"5. Our purchase of 16 Beresford Road was completed on 15th November 2002, ... As part of our purchasing due diligence on this property Mr Vaughan inspected the property and gave us an outline budget price for the conversion works. As Louise states in her witness statement, the idea was that the timings of the projects were such that Parkside would start work on Glen Road as they finished Carysfort Road and then that would feed naturally into the Beresford Road project and thus keeping their workforce busy and the costs down. We raised at a joint meeting that this might be over stretching them. However they both assured us that they could deal with this and it would be better to keep the workforce busy. Again our meetings to discuss these contracts other than the site meetings had all four of us present.

6. Having obtained planning permission for Beresford Road on the 11th March 2003 I received a draft contract from Parkside Construction dated 4th April 2003 ... I believe that this was given to Louise by Amanda Vaughan following a meeting between them to discuss the specification details. I draw attention to the fact that this document is again expressed to be on behalf of Parkside Construction. I emailed my comments back to both Mr Vaughan and Amanda Vaughan on the 5th April 2003, although I see that Amanda's copy was opened by her on the 7th April 2003. On the 10th April 2003 I had an on-site meeting at Carysfort Road to review work done on that property. At that meeting Mr Vaughan stated that Amanda had given him the contract amended as requested and it was back in his van. I accompanied him back to his van to sign that contract per his request. He did not draw my attention to the fact that this contract was now to be with the limited liability company. I simply did not notice this. The headed stationery was exactly the same as I had been used to. I only checked that the alterations that I had requested had been made and contract sums were as they should have been and then signed my part. I made a first payment in relation to the Beresford Road works on the 8th April 2003 (two days before the actual contract was signed as initial works had already commenced) to the account of D K Vaughan. ... I received an invoice (No.5) see attached AB5 dated 6th June 2003 for £38,000 + Vat for initial payments made to Parkside Construction for the Beresford Road contract to that date. No mention on the invoice that the contract was with the limited entity. In total £38,000 + vat or 54% of the contract value was actually paid into Mr Vaughan's personal bank account.

7. I had been told that they were trying to set up a limited liability entity in order to obtain credit accounts with builders merchants as they were struggling to obtain trade credit under the name of Parkside Construction due to Mr Vaughans poor personal financial history. At no time however did they suggest that we would have contracts with the limited liability company. The first communication that I had regarding a limited liability company being in place was the email of the 10th June 2003 when Amanda asked me to make that payment into the `business account' and details were given of Parkside Construction (Bournemouth) Limited. Until that time, and as noted above, all invoices were from Parkside Construction and not the limited liability company and all payments made into either her account or his account as instructed by Amanda. From that time payments went to the limited liability account for all contracts, even those clearly not with the limited entity. At no time was any distinction made between the Beresford Road contract and the other contracts at Glen Road or Carysfort Road. My understanding therefore was that the Beresford Road contract was made with Amanda and Mr Vaughan exactly the same as the others and then when they incorporated a limited entity I assumed they assigned the contracts into the company. I did not enquire how or why. It was not until November 2003 when we took legal advice that we became aware that the limited liability status had been entered onto the contract. ..."

45. He stated that his experience as an accountant was solely working within large corporations, that he had little knowledge of partnerships. He saw the building issues as those for the First Defendant to deal with and by naming him he thought the First Defendant was at all times acting on behalf of them both, just as he (Mr Bell) believed that the Second Defendant acted on behalf of them both.

46. In his oral evidence Mr Bell:
(1) Described the initial meeting with the Defendants as taking place at the middle to the end of July;
(2) Stated that he produced the first and final drafts of the first of the two Carysfort Road contracts;

(3) Asserted that the fact that that contract was expressed to be with the First Defendant was a mistake, and did not reflect what he had understood from the initial meeting;

(4) Reiterated that he thought that throughout the Claimant was contracting with Parkside Construction, which he believed to be the business of both the Defendants;

(5) Stated that he believed that the adjudication proceedings were against the business, which he believed to be a partnership;

(6) Agreed that at no time in his presence did either of the Defendants state that they were partners in the business, use the word `partner", or discussed anything about the sharing of profits; however, he stated that they presented themselves as being in business together;

(7) Stated that if he had noticed that the Beresford Road contract was with a limited company he would still have signed it, but would have ensured that any payments would be made to that company;

(8) Described the First Defendant as the builder and the Second Defendant was the "back-office" person, stating that the Claimant dealt with on-site planning and building with the First Defendant, the Second Defendant's role being to help out on the administration side.

BACKGROUND FINDINGS

47. The witness statements of Mrs Davies and Mr Bell need to be approached with caution. This is because it became apparent from their oral evidence that important assertions made in those statements were not fully supported by their oral evidence or were their conclusions or impressions rather than simple descriptions of what had been said or had taken place.

48. By way of example, in Mrs Davies's witness statement it was stated that the First Defendant had lead her to believe that he and the Second Defendant made all decisions jointly and this was "*clarified at the meeting*" [see paragraph 38(2) above], whereas in her oral evidence she stated that at the meeting neither of the Defendants said that "*we decide everything together*". Her witness statement includes repeated assertions that the Defendants *"made clear*" various matters without referring to the words used. Her witness statement includes assertions that the Second Defendant made it clear that she was responsible for the contracts, and that it was apparent that the Second Defendant made all the major contractual decisions, that the Second Defendant made it clear that it was she who would negotiate the terms of the contract, whilst also stating that at meetings where contractual issues were discussed the Second Defendant played a greater (but not exclusive) part than the First Defendant. Her witness statement includes references to the fact that it was not drawn to her attention that the Beresford Road contract would be with a limited company, but in her oral evidence she stated that she had nothing to do with and did not take particular notice of the identity of the "parties" from a contractual point of view, and that Mr Bell did all the contractual side of things, so that it would be hardly surprising if she was not aware of the fact that the contract was entered into with a limited company.

49. Mr Bell, in his witness statement, referring to the procedures which were followed, stated "*I would discuss with Amanda the terms of the contract*", and "*together Amanda Vaughan and I produced the initial draft contract*". The impression given was that this procedure applied to all the projects which were dealt with in this way. In his oral evidence he stated that in relation to the first Carysfort Road contract he produced the first and last drafts of the contract. In his witness statement it is asserted that the Second Defendant "*made it clear that she was negotiating on their behalf and was able to amend on her own authority...",* but the words spoken by the Second Defendant are not given. The witness statement includes the assertion that "*They advised that they were jointly to organise skilled craftsmen to carry out the work*". Having seen and heard both the Defendants in the witness box I consider any suggestion that they used the word `jointly" in such a context to be inherently implausible. Mr Bell's written evidence to the effect that throughout his understanding was that all the contracts were with both the Defendants trading as a partnership is inconsistent with the contracts themselves, with the adjudication proceedings, and with his oral evidence that all material times he knew the difference between sole traders, partnerships, and limited companies.

50. On the other hand, the Defendants' assertions that the "*initial meeting*" never occurred and that the Second Defendant never attended a meeting on her own with either Mr Bell or Mrs Davies does not *"sit well"* with the documentation. Communications dealing with administrative matters were addressed to or signed by her, whilst communications dealing with building matters were addressed to the First Defendant. This is consistent with Mr Bell's and Mrs Davies's evidence that they had been told what each of the Defendants would be dealing with. Further the suggestion that the Second Defendant never on her own met Mr Bell or Mrs Davies and that at meetings at the Defendants' house the Second Defendant was little more than a coffee-maker are not consistent with the contemporaneous e-mails. There is an e-mail from the Second Defendant to Mr Bell dated 17th February 2003 in which she thanked him for invoices for Carysfort and stated that *"it would be most helpful if you could come over and go through it with me"*. In an e-mail dated 5th September 2003 Mr Bell asked the Second Defendant to "*arrange to get together*" to fmalise invoicing and discuss the "*position re Beresford and Glen*". She e-mailed back that the First Defendant was tied up but could meet up later on Wednesday of that week, stating "*10.30am at our home would be good for us ...*".

51. The witness statement of Mrs Davies included assertions of impropriety by the First Defendant which, if true, would impugn his integrity. As recounted in paragraph 38(7) above, she asserted that she had seen him signing cheques drawn on an account which is now known to be the account of his son. However, this was not put to the First Defendant in cross-examination and accordingly it would be inappropriate to make any finding in relation to it.

She also referred to an incident when, she stated, the First Defendant ordered materials which had been delivered to the Carysfort site and paid for by the Claimant for utilization at that site to be loaded on to a vehicle and taken to some other site, not belonging to the Claimant. However, this evidence was based on hearsay and, again, was not put to the First Defendant when he gave evidence, so, again, I consider it inappropriate to make any finding in relation to it. Nevertheless, on the First Defendant's own evidence, he was managing a limited company at a time when he believed himself to be disqualified from acting as a company director. The question of whether he actually knew that this was illegal was not explored with him, but on any view he must have known that he was "sailing close to the wind".

52. Having seen and heard the witnesses I have reached the conclusion that Mr Bell and Mrs Davies were essentially honest witnesses and that the Defendants were not. This does not mean that everything Mr Bell and Mrs Davies said was true and that everything the Defendants' said was false. Mr Bell's and Mrs Davies's oral evidence was generally convincing in that they both made concessions which were not at all in their interests and to some extent undermined what was in their witness statements. The unsatisfactory nature of certain aspects of their witness statements may be due to the manner in which they were compiled (as to which, I heard no evidence) or to a lack of understanding (exhibited by many persons with little or no experience of the legal process) of the need for witness statements to be rigorously accurate. However, importantly, in my judgment, the accounts given by Mr Bell and Mrs Davies from the witness box were expressions of their honest beliefs, even if not entirely true, as I shall explain below.

53. I prefer the evidence of Mr Bell and Mrs Davies in relation to the issues as to whether or not the initial meeting ever took place and whether or not the Second Defendant ever attended meetings with either Mr Bell or Mrs Davies on her own. I am satisfied on the balance of probabilities and find as a fact that the initial meeting did take place at Mr Bell's home at about the end of July or beginning of August 2002, and that at that meeting the Defendants did describe what their roles were in relation to the new construction business and what they would be in relation to the project then under discussion, which was the Carysfort Road project. I accept Mrs Davies's evidence that there were at least two occasions when she saw the Second Defendant on her own at the home of the Defendants and that specifications were amended there and then by the First Defendant in the manner which she described. It is also plain from the documentation, and I find as a fact, that after the initial meeting the First Defendant was involved in meetings and in the drafting and administration of the contracts, both in a secretarial capacity and in an administrative capacity. However, it is also quite plain and find as a fact that neither Defendant ever in terms described themselves as business partners, nor did either of them ever state that the Second Defendant had equal authority to negotiate contracts and manage the costs. I am quite satisfied that the Second Defendant was more than a "clerical assistant", but it does not necessarily follow from this that she was a partner. It is quite possible for a person to perform executive and administrative functions in an unincorporated business without being either an employee or a partner.

ISSUE 1: PARTNERSHIP

54. A partnership is defined by Section 1 of the Partnership Act 1890 as follows:

"*Partnership is the relation which subsists between persons carrying on a business in common with a view of profit ...*".

There is no requirement for there to be a written partnership agreement. The Claimant does not allege that there was such a written agreement. The Claimant in effect alleges that it should be inferred from the Defendants conduct that there was an oral contract or a definite understanding between the Defendants to engage in a business in common with a view to profit.

55. Section 2 of the Partnership Act 1890 provides guidance as to how it may be ascertained whether a relationship of partnership exists in any given case.

"2. *In determining whether a partnership does or does not exist, regard shall be had to the following rules:*

(1) ...

(2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(3) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular -

(a) ...

(b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not make the servant or agent a partner in the business or liable as such ..."

56. There is no doubt that the entity known as Parkside Construction was carrying on business with a view to profit. The issue is whether it was a partnership.

57. It is, I think material to examine the business transactions of which evidence has been given, and consider who were the parties to those transactions. The first Carysfort Road contract were expressed to be with the First Defendant. The second Carysfort Road contract and the Glen Court contract were expressed to be with the First Defendant and indicated that he was using the name Parkside Construction as a trading name. In the absence of other evidence to establish that there was a partnership trading under that name, there could be no question of anyone other than the First Defendant being able to sue or be liable to be sued upon any of these contracts.

58. The Beresford Road contract, even in its draft form, provided for it to be signed by the First Defendant over the words "Parkside Construction". In the event, the draft contract was amended and signed by the First Defendant over the words Parkside Construction (Bournemouth) Limited. Again, this documentation provides no evidence that Parkside Construction was a partnership.

59. In summary, therefore, the contractual documentation, far from supporting the case that the Claimant was doing business with the Defendants in partnership. provides prima facie evidence that the Claimant was doing business with the First Defendant acting either as a sole trader or, in the case of the Beresford Road contract, through the medium of the limited company.

60. Mr O'Doherty submitted that:

(1) The First Defendant and the Second Defendant conducted themselves both initially and throughout the period that the Claimant dealt with them, in a manner consistent only with Parkside Construction being a partnership.

(2) From the outset it was clear, unambiguous and unequivocal that the First Defendant and the Second Defendant were partners, and he relied particularly upon the evidence of Mr Bell and Mrs Davies as to "the first meeting" and to Mr Bell discussing the terms of the contract with the Second Defendant.

(3) Thereafter the Second Defendant's conduct demonstrated that she was an equal partner in the business, and he referred particularly to the evidence summarised at paragraph 38(3) above.

(4) Both Defendants referred throughout to the business as "we" and "our". This reflected that the business of Parkside Construction was more than just the First Defendant as a sole trader: it was clear that this was the case from the Defendants' conduct and the correspondence: see e.g. letter from Parkside Construction dated 07/10/02; e-mail from Second Defendant dated 12/03/03.

(5) The correspondence throughout 2002 and 2003 supported the Claimant's case that there was a partnership, with a clear division of duties between the First Defendant and Second Defendant:-

i) The content and style of the correspondence indicated that the Second Defendant considered Parkside Construction was her business.

ii) Matters of a financial, contractual or administrative nature were referred solely to her, for her attention. Matters of an operational nature were referred to the First Defendant.

iii) The issues addressed in the Second Defendant were not matters that an administrative assistant or secretary could deal with or would be expected to deal with.

(6) The First Defendant was an undischarged bankrupt and therefore he needed a partner with a bank account and access to credit in order for the business of Parkside Construction to function. The Second Defendant was that partner.

(7) Parkside Construction used the Second Defendant's bank account, Abbey National account no. 3534460. The very first payment made between the Claimant and Parkside Construction was made into this account on 12/08/02. This was admitted by the Second Defendant. Her explanation that it was only done because of the First Defendant's bankruptcy strengthened rather than weakened the point that she was in partnership with him.

(8) Parkside Construction used a limited liability company for part of its business which ran in parallel to the partnership from April 2003, Parkside Construction (Bournemouth) Limited ("the company"). The Second Defendant was a director of the company. This was compelling evidence that she was more than the purported secretary and administrative assistant in Parkside Construction as alleged by the Defendants. She was an equal partner in the business of Parkside Construction.

(9) The denial of the partnership was simply a ploy to avoid liability to bona fide creditors. The Second Defendant contended that she was a "notional" director because of her husband's bankruptcy: i.e. to circumvent company law in order to benefit from limited liability and obtain credit for part of their business. This characterised the behaviour of both Defendants. The company was now in insolvent liquidation.

(10) The Second Defendant shared in the profits of Parkside Construction; her share in the profits had enabled her to enjoy a lifestyle well in excess of her income. In the circumstances of this case, the sharing in the profits of Parkside Construction was good evidence of the existence of the partnership: Partnership Act 1890, Section 2(3).

61. So far as the first meeting is concerned, and the discussions which preceded it, I am satisfied on the balance of probabilities and find as a fact that neither of the Defendants described the Second Defendant as being a partner in the First Defendant's business or said or did anything which, looked-at objectively, amounted to a communication to that effect. In her oral evidence Mrs Davies indicated that she was not much interested in the question of who would be or were the contracting parties. I am satisfied that by the time the first payment was made on 12 August 2002 Mr Bell had been informed by the Defendants that the payment needed to be made to the Second Defendant's bank account because the First Defendant was in a poor financial situation. The First Defendant stated that from the outset he informed Mr Bell and Mrs Davies in terms that he was an undischarged bankrupt. I do not accept that evidence but Mr Bell accepted that at some subsequent stage he was informed that the First Defendant was a bankrupt. Having regard to Mr Bell's professional training, experience, and knowledge of the law, I am quite satisfied that had he believed that there was a partnership or that the Second Defendant was in the partnership with the First Defendant he would have insisted that the contracts entered into after that date were drawn so as to ensure that the partnership was unequivocally recognized as a party. His failure to do so,or to raise the whole subject with either of the Defendants, is even more remarkable in the light of his

knowledge of the First Defendants financial position. The fact that he did not do so, and the fact that the adjudications were commenced solely against the First Defendant, in my judgment indicates that neither Mr Bell nor Mrs Davies ever believed or had been given to understand that the Defendants were, as a matter of law, in a business partnership. Their evidence to the contrary is unconscious reconstruction informed by hindsight and wishful thinking.

62. To describe the Second Defendant as discussing or negotiating terms of contracts is also, I consider, capable of being misleading. These were simple contracts, consisting principally of specifications describing the works, contract sums, and provisions for stage payments. They also include miscellaneous provisions relating to insurances, compliance with building and other regulations, the provision of certificates etc. and a clause which entitled the Claimant to cancel the contracts at any time without notice or liability for "consequential costs". It seems to me to be likely that Mr Bell was the author of the miscellaneous provisions. As to the other provisions, the picture to be gleaned from the evidence is that Mr Bell was the original author of the miscellaneous provisions, that the specifications would be developed by Mrs Davies and the First Defendant, the initial draft emanating from her, but that the Second Defendant was involved in discussions or communications about the contract price and the stage payments, and in the word-processing of the documentation.

63. Having had the opportunity of observing the First Defendant in the witness box, I formed the clear impression that he has a strong personality. I am quite satisfied on the balance of probabilities, and find as a fact, that the Second Defendant discussed with him the pricing of the contracts and any issues about stage payments before communicating in relation to those matters with Mr Bell - which she did, either on her own or at meetings at which all four witnesses were present. Whilst I accept Mrs Davies's evidence that on two occasions at her request the Second Defendant amended specifications without reference to the First Defendant, I do not regard this as particularly significant. The Claimant, as building employer, was at liberty to seek or instruct variations to specifications. Such variations might or might not require adjustments to the contract sum. The fact that the Second Defendant acted on the Claimant's instructions in relation to a specification would not rule out additions to the contract sum. The fact that the Second Defendant considered that she had authority to make such changes is not consistent only with her believing that she was a partner in the business. I reject the suggestion in Mrs Davies' witness statement (see paragraph 38(3) above) that the Second Defendant "made all the major contractual decisions". I am satisfied and find as a fact that she did not do so and nor did she give that appearance.

64. The fact that the Defendants used the first person plural when acting for Parkside Construction is not inconsistent with the Defendants' case. An employee in a shop may use the plural e.g. explaining that "they" are out of stock. In correspondence undertaken on behalf of a business, whether incorporated or not, the first person plural is frequently used. An employer and employee who are to work together on a project may well use the first person plural when describing to someone else what they will be doing in relation to that project. That does not, by itself, imply that the two of them are undertaking the project as business partners.

65. I have already referred to correspondence in which the Defendants or one of them used the first person plural. There are also communications in which the Second Defendant communicated in the first person singular. The following is an example:

"Dear Andrew,

I am speaking to my accountant again this morning, but in the meantime I looked up the invoices you paid on our behalf for Carysfort Road flats and the fire extinguishers. You charged us the full VAT @ 17.5% on all these invoices and we lost all the VAT, you obviously claim these back through your books, so it cant work both ways.

Kind regards Mandy"

The reference to "*my accountant'* was, it appears, a reference to a lady who helped the Second Defendant operate the "Sage" accounting system which Mr Bell had recommended to her. The use of the first person plural is in my opinion, as already indicated, "neutral" so far as partnership is concerned, and although the first person plural is a reference to the contracting business I do not consider that the use of the first person singular implies any proprietorship in the business. If anything, it is an indication to the contrary.

66. In relation to Mr O'Doherty's submissions, I do not accept that the content and style of the correspondence indicated that the First Defendant considered Parkside Construction was her business. Whilst I accept that matters of a financial, contractual or administrative nature were referred to her, for her attention, and that matters of an operational nature were referred to the First Defendant, this really does not advance the case. Even if the issues addressed to the Second Defendant were not matters that a secretary could deal with or would be expected to deal with they were matters which someone engaged in administrative activities might be expected to deal with. The authority to deal with them is not consistent only with the existence of a partnership.

67. I do not accept Mr O'Doherty's submission that the First Defendant, because of his belief that he was an undischarged bankrupt, needed a partner with a bank account and access to credit in order for the business of Parkside Construction to function. The fact that he needed banking services and was provided with them by the Second Defendant does not mean that he needed a partner, or that by providing those services she became a partner.

68. Even if one assumes that Parkside Construction (Bournemouth) Limited was a part of Parkside Construction's business, the fact that the Second Defendant was a director is no pointer to her being a partner in that business.

Nor is the fact that she was a director of the company compelling evidence, as Mr O'Doherty suggests, that she was more than a purported secretary or administrative assistant in the Parkside Construction's business.

69. Mr O'Doherty's assertion that the denial of a partnership *"is simply a ploy to avoid liability to bona fide indicators"* is simply an assertion of what he has to prove. The description in the Amended Defence of the Second Defendant as a "notional" director is plainly inapt. Her evidence was that she and her son were directors, and one can only assume, therefore, that they had been duly appointed as such. Her evidence was that the company was formed so that NHBC certification could be provided. This was not challenged, and is plausible. The First Defendant is recorded in the report of the liquidator as having stated that the company had been incorporated on the advice of his accountant "to protect his own liability" - which is, of course, one of the principal effects of using a limited company as a trading vehicle, and is permissible.

70. It is common ground that proceeds of the business of Parkside Construction and of the Parkside Construction (Bournemouth) Limited were paid into the Second Defendant's bank account and that she made payments from that account for the materials etc. utilized in those businesses. Of course, the mere receipt of such business revenue, even if it includes elements of "profit", does not make the recipient of the revenue a partner. Nevertheless the retention or expenditure for personal purposes of that revenue or a part of it may be evidence of partnership.

71. Mr O'Doherty produced an analysis of the Second Defendant's bank account, and subsequently corrected it in the light of further material identified in the further witness statement which she signed on 9th June 2005. Mr O'Doherty:

(1) referred to the Second Defendant's ability to service a mortgage of over £100,000 on her property, and of her being able to run a Mercedes Benz ML270 at a finance cost of £562 per month;

(2) analysed the back statements for the period from lst December 2002 to 28th February 2003;

(3) submitted that the statements showed (after the correction to which I have referred) that over that three month period £58,104.43 which had emanated from the Claimant had been paid into the Second Defendant's account, but out of payments-out of £53,324.29 the payments out which could be identified as being on behalf of Parkside Construction amounted to only £31,708.82, so that £21,616 was not accounted for;

(4) submitted that a reasonable conclusion was that the unaccounted discrepancy related to extraction of profit from the business: given the Second Defendant's unexplained funding of her lifestyle, it was reasonable to conclude that she shared in such profit;

(5) referred to what appear to be unexplained debits from a cash account ("the Schedule") produced by the Second Defendant amounting to some £16,000;

(6) suggested that in 2003 the Second Defendant paid out more in terms of domestic finances than was shown in the First Defendant's accounts as having been drawn by him from his business, and submitted that this was further evidence that the Second Defendant was in receipt of profits.

72. The exercise performed by Mr O'Doherty was not assisted by the fact that in the Schedule what appeared to be debits appeared in a column entitled "credit" and vice versa. The Second Defendant stated that the schedule had been prepared by the lady who helped with the accounts and that she herself had difficulty understanding it. However, she did not accept Mr O'Doherty's analysis, stating that over the three month period there would be no reason for there to be an exact balance between credits received and payments out on behalf of Parkside Construction.

73. In a statement dated 21" May 2005 the Second Defendant described the Defendants' financial arrangements as follows:

"2. Mr Vaughan and I have lived together for some twenty years and throughout that time I have dealt with all of the household finances and accounts. It has been Mr Vaughans' practice to give to me weekly sums by way of housekeeping out of which I pay all of the bills.

3. Mr Vaughan pays me this housekeeping allowance and the amount is not fixed and it will vary from week to week being between £500 and £800.

4. These were the arrangements that were in place in 2001, prior to Mr Vaughan starting trading as Parkside Construction, and remained in force thereafter. At no time was there any discussion between myself and Mr Vaughan let alone any agreement that I should receive any part of the profits from his business.

5. I cannot recall exactly the amounts that I was paying out each month two or three years ago but I have produced a list in January of this year and refer to the copy document annexed hereto marked "APVI ". I do not believe that the figures three years ago would have been substantially different.

6. When the company Parkside Construction (Bournemouth) Limited was formed the accountants advised that I should receive a salary from the company and suggested a relatively low figure for tax purposes.

7. I took the salary during the first month of the company traded but thereafter cash flow did permit such drawings and I took no further money from the company."

The document marked "APV 1" showed monthly expenditure of £2817.20 or £704.30 pw.

74. In her further statement, dated 9th June 2005, the Second Defendant gave the following further information in relation to her bank account:

"2. Although this account is in my name it was used largely for the receipt of money on behalf of the First Defendant and payment of moneys on his behalf.

3. *In addition payments were made from this account on behalf of the family generally.*
4. *As I set out in my statement dated May 2005, the only money I received from the First Defendant was by way of weekly housekeeping to discharge household liabilities which money would also have been drawn from the account, for example payment of the TV licence, Household Insurance and other similar items by monthly standing order, ...*
5. *I should reiterate that these payments did not bear any relation to the profit made by the First Defendant either projected or actual. All that the First Defendant has given to me and our family is such sum as he can reasonably afford each week towards our living expenses ..."*

75. In her oral evidence the Second Defendant indicated that the First Defendant was not working solely for the Claimant, that he gave her money weekly or monthly to cover the mortgage payments and household expenditure, and that she no longer had the Mercedes-Benz. She did not accept that it was appropriate to compare payments into, and payments out from, her bank account in respect of the Parkside Construction's business over a three-month period, making the point that there was no reason why, during a fixed period, that the two should balance, and she did not accept that there was a discrepancy of £26,616 as suggested by Mr O'Doherty. She was uncertain about the unexplained debits of £16,000, though she said that she thought that one for £3000 was a transfer to her son's account which was then expended on building materials etc. (the son's bank statements are not inconsistent with this suggestion) and that the debit of £13,000 was an error. (There is a paymentout from the son's account of a sum of £1300 which nearly matches the date of the debit from the cash account of the sum of £13,000). Although she agreed with Mr O'Doherty that items of monthly expenditure in 2003 would not have been the same as those in 2005, she expressed the view that there had been no substantial change in the overall monthly total. She agreed that in the year to 31" July 2003 her household expenditure had exceeded the sum of £32,290 shown in the First Defendant's accounts for that period as having been withdrawn by him from the business of Parkside Construction, but she did not concede that that meant that she had been spending the profits of that business for purposes of her own. The same point was put to the First Defendant. He stated that he did not understand the accounts, the figure for withdrawals being "done by the accountants". All he knew was that he took what he needed, paid the Second Defendant £500 - £800 per week or whatever was needed, and if this involved paying her out of profit that did not mean that he was sharing it with her, and it was his money.

76. In relation to the issue of whether or not there was a partnership it is material that the accounts of the business were drawn up as the accounts of "Mr D.K. Vaughan t/a Parkside Construction", and the VAT Registration was in his name. Mr O'Doherty submitted that the evidence adduced by the Second Defendant to support her case that there was no partnership was self serving and must be treated with caution; the Accounts and VAT registration certificate, in the name of the First Defendant as a sole trader was of limited evidential value in this case; they must be considered in the context of the First Defendant being sophisticated and determined in avoiding the legal framework designed to protect creditors. However, I consider it significant that the accountants terms of engagement to draw up "sole trade accounts" for the First Defendant were dated lSt April 2003 (see paragraph 26 above) i.e. before any significant `falling-out" with the Claimant.

77. In my judgment the evidence does not substantiate the Claimant's case that the Second Defendant was in receipt of any quantifiable share of the profits of the business of Parkside Construction. A thorough analysis of the financial affairs of that business (over a substantial period) and of the Defendants' financial records would be required before any firm conclusion could be reached in relation to this issue. In legal proceedings such an analysis would usually take the form of a report from an accountancy expert, but there was no such report in the present case. There can be little doubt, however, that the earnings of the business were utilised by the Defendants not only for the outgoings of the business but also for domestic and personal expenditure. However, I do not consider that such expenditure or any part of it was in any way related to the concept that any defined part of the revenue income belonged to the Second Defendant. Thus, it seems to me, although such revenue would, theoretically at least, include a profit element I do not consider the receipt by the Second Defendant into her bank account and her expenditure of it, amounts to her being in "receipt ... of ... a share of the profits ..." of the business within the meaning of Section 2(3) of the Partnership Act 1890. Even if this conclusion were wrong, it would not follow that a partnership was established. The receipt of such profit is only prima facie evidence of partnership, and has to be considered in the context of the evidence taken as a whole.

78. Having had the opportunity of seeing and hearing the Defendants giving their evidence, I am satisfied on the balance of probabilities and find as a fact that the Defendants regarded the earnings from Parkside Construction as solely the First Defendant's earnings. As already stated, there can be little doubt that those earnings were utilised by the Defendants not only for the outgoings of the business but also for domestic and other expenditure. However, whilst the Second Defendant was instrumental in making those payments, I am satisfied that this was not because she regarded any part of them as her own, but simply because she believed she had the authority of the First Defendant to utilise his earnings in the manner which she did. Putting it another way, she received the earnings of the business not in her own right as a partner in the business but as the First Defendant's partner in life.

79. Looking at the matter in the round, and taking account of all the evidence and arguments referred to in paragraphs 54 to 78 above, I have reached the clear conclusion that the partnership claim has not been established. The evidence does not substantiate a finding that there was an agreement express or implied or any

definite understanding between the Defendants that the business in question was the property of both Defendants. I am satisfied, on the balance of probabilities, and find as a fact that that business was understood by the Defendants to be entirely that of the First Defendant.

ISSUE 2: HOLDING OUT

80. "Holding Out" was not in fact pleaded in the Particulars of Claim. It was introduced into the case by a Request for Further Information served on behalf of the Second Defendant. Nevertheless, it was relied upon in the Claimant's Skeleton Opening.

81. In his Skeleton opening Mr Allen accurately summarised the law in the following terms:

"36. Persons who are not in fact partners may be found to be liable to third parties as if they were partners if an estoppel can be established, either at common law or under section 14 of the Partnership Act 1890, which reads as follows:

(1) Everyone who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to anyone who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

37. There are accordingly three elements that must be established under a section 14 estoppel. These are almost identical to the elements necessary to establish the more usual equitable estoppel, i.e. `holding out' (representation), reliance and giving credit' (detriment). As the case law has developed it seems that there is now little if any difference between a section 14 estoppel and equitable estoppel. Addressing each element in turn:

Holding out

*38. In order to establish that someone has been held out as a partner in a firm, a representation must have been made that is sufficiently clear and unambiguous to entitle a third party, acting reasonably, to infer that a partnership exists (i.e. that a profit sharing agreement exists and that each partner has joint and several liability for any obligations/debts incurred by the firm) - see **Hudgell Yeates & Co v Watson** (1978] and **Wendover Developments Ltd v Fish** (Unreported, TCC, HHJ Thornton QC, November 11th 1999), and the plethora of equitable estoppel cases which establish precisely this principle*

Reliance

*42. Even if it could be established that Mrs Vaughan had been `held out' as a partner at the time the contracts were entered into, English law does not recognise any presumption that this understanding was relied upon by the Claimant in entering into the contract. Reliance must be specifically proven in every case - see **Nationwide Building Society v Lewis** (19981 Ch 482.*

Giving of credit

45. This requirement has been interpreted by the courts very widely and it seems that entering into a contract with another party will come within the definition of giving of credit'. In any event entering into a construction contract would certainly constitute sufficient detriment to establish equitable estoppel. Accordingly Mrs Vaughan recognises that if the Claimant establishes the first requisite two elements (i.e. holding out and reliance), it will establish the third element namely giving of credit. It should be reiterated that the Claimant has no prospects whatever of establishing either holding out or reliance ..."

82. Mr O'Doherty submitted that the manner in which the Defendants' conducted themselves was calculated to give, and did give, the impression that Parkside Construction was more than just the First Defendant as a sole trader. He accepted that the Claimant had to prove that it relied upon the "holding out" of the Second Defendant as a partner when it entered the contracts, but it was clear from Mr Bell's evidence that the whole basis of the Claimant entering into the contracts with Parkside Construction was that, together, the Defendants had the requisite skills to perform the contracts. He submitted that the effect of entering into the contracts with Parkside Construction was to satisfy the requirement that the partnership had been "given credit" by the Claimant.

83. The Claimant neither pleaded nor proved any clear and unequivocal representation that the Second Defendant was in partnership with the First Defendant - See paragraphs 39(2), 46(6), 53 and 61-68 above. I am satisfied that the Second Defendant did not represent herself to be and did not suffer herself to be represented to be a partner with the First Defendant. Nor did the First Defendant represent her to be his business partner.

84. Further, for the reasons given in paragraph 61 above I am satisfied that Mr Bell and Mrs Davies did not at any material time believe that the Second Defendant was in partnership with the First Defendant. It follows that even if, by, for example, entering into the contracts or making payments in advance, the Claimant gave "credit", it did not do so in the faith of any belief which would fulfil the requirements of the Section referred to in paragraph 81 above. There was no reliance.

85. My conclusion, therefore, that there was not in this case any partnership by estoppel or under Section 14 of the Partnership Act 1890.

ISSUE 3: ENFORCEMENT OF ADJUDICATION DECISIONS

86. Since I have decided Issues 1 and 2 in favour of the Second Defendant, Issue 3 does not in fact arise. Nevertheless, had I reached a different conclusion upon either of the first two issues I would have found for the Second Defendant in relation to Issue 3.

87. In his closing submissions Mr O'Doherty conceded that even if there were a partnership the adjudication decisions would not be enforceable against the Second Defendant unless, as a matter of construction, they could be treated as being directed to the partnership (i.e. Parkside Construction) rather than against the First Defendant.

88. It seems to me that this concession was rightly made. Although I have found no direct authority in relation to the immediate issue, it is plain that at common law a judgment against one joint debtor was a bar to an action against another. Had the judgment been enforceable against the other joint debtors the issue as to the viability of a second action would never have arisen. Further, an adjudication decision against one joint debtor alone ought not, as a matter of principle, be enforceable against another joint debtor who has not been served with and taken no part in the adjudication proceedings.

89. Mr O'Doherty's submissions as to the correct construction of the adjudication decisions of course, began with the premise that it was established that "Parkside Construction" was a partnership. He argued that because the words "Parkside Construction" appeared in the references to adjudication and in the adjudication decisions themselves (see paragraphs 23 to 25 above) that must be a reference to the partnership. I cannot accept this submission. One cannot "cherry pick" words of identity. In this case the respondent was clearly identified, both in the references to adjudication and in the decisions themselves as being the First Defendant "Ma Parkside Construction". Accordingly, in my judgment the Claimant would have failed on Issue 3 even if it had succeeded on either Issue 1 or Issue 2.

ISSUE 4: PARTY TO BERESFORD CONTRACT

90. This is another issue which, because of my conclusions in relation to Issues 1 and 2, has become academic. Nevertheless, in case either of those conclusions are wrong, and because Issue 4 has been thoroughly investigated and argued, it is appropriate to address it in this judgment.

91. The case advanced by the Claimant was as follows:
    (1) The draft Beresford Road contract (dated 04/04/03) was sent to Mr Bell.
    (2) The parties to the contract were named therein as the Claimant and Parkside Construction.
    (3) The terms of the contract were agreed by the Claimant on the basis of the 04/04/03 draft, and on the basis that the contracting party was Parkside Construction. In an e-mail to the Defendants dated 05/04/03, Mr Bell requested that the wording be varied in respect of certain items and this was done.
    (4) The Claimant began performing its obligations under the contract on 08/04/03 by payment of £10,000 to the account of DK Vaughan.
    (5) The Defendants agreed to the Claimant's variations to the terms of the contract and produced the varied contract dated 10/04/03. This was produced to Mr Bell at an on-site meeting and described by the First Defendant as "amended as requested". Neither Defendant at any time brought to the Claimant's attention the amendment to the contracting party, which had been changed unilaterally to the company. Mr Bell did not notice the change and signed the 10/04/03 document. The change in party was never agreed; but by 10/04/03 there was already a contract with the partnership.

92. Mr O'Doherty submitted that the Claimant's case was supported by the following factors:
    (1) The judgment against the First Defendant, based on the adjudication award on the Beresford Road Contract, was entered on the basis that the contracting parties were the Claimant and Parkside Construction. This had not been challenged by the First Defendant either during the adjudication proceedings or in these proceedings. This was compelling evidence to prove that the First Defendant effectively admitted the Beresford Road Contract was with Parkside Construction not the company.
    (2) In a written document evidencing an attempted compromise of the dispute on the contracts in November 2003, the First Defendant clearly treated both contracts as between the Claimant and Parkside Construction. No mention was made of the company.
    (3) No mention of the company was made to the Claimant until an e-mail dated 10/06/03, in which the Claimant was informed that the company now had a bank account . Further, monies from other contracts, including the Glen Court Contract, went into the bank account of the company in any event.
    (4) None of the stationery used in correspondence purportedly relating to the company was compliant with Section 351 of the Companies Act 1985, which requires a company to include its registered number, registered office address, and place of registration on all correspondence.
    (5) The only mention of the Defendants incorporating any part of their business was in the context of obtaining credit accounts with suppliers. This was mentioned in the context of the partnership suffering as a result of the First Defendant's admitted bad credit history.

93. The factual assertions referred to in the last two paragraphs are broadly correct. It is to be observed that in the contract dated 10th April 2003 Mr Bell's signature appears immediately above the signature of the First Defendant which is clearly expressed to be "on behalf of Parkside Construction (Bournemouth) Limited". The Defendants did not challenge the evidence that they did not draw to Mr Bell's attention the fact that the signature provisions of final draft of the contract were different to those in the earlier draft. However, they stated that Mr Bell and Mrs Davies were well aware of the fact that a company was being formed to carry on the business, and that the fact that early Beresford Road payments were not made to the company was simply due to the fact that there was delay in opening the company bank account. It does appear that the Claimant was aware of the proposal to form a company - see paragraph 7 of Mr Bell's witness statement, quoted at paragraph 44 above.

Therefore, it is not correct to say that the company was not mentioned to the Claimant until 11th June 2003. The fact that the First Defendant took no part in the adjudication or subsequent legal proceedings is evidence against him, but may reflect mere passivity rather than a reliable admission. The significance of the matters referred to in subparagraphs (2), (4) and (5) of paragraph 92 above is limited and would not be capable of effecting a variation as to the parties of the contract if it was in fact originally made between the Claimant and the company.

94. Mr Bell's own evidence was that he did not regard any contract as effectively made until it was signed. This, it seems to me, is fatal to Mr O'Doherty's contention that a binding contract was made with Parkside Construction once the first payment was made. Even if this were the correct analysis, that contract would be perceived to have been superseded once the final draft had been signed. It seems to me that the Claimant could only have escaped from the situation by rectification of the contract, by rescission for misrepresentation, or on the basis of a plea of non est factum. No such claims were pleaded or advanced. In any event Mr Bell's evidence that he would have signed the contract even if he had noticed that it was expressed to be with the limited company would appear to have presented any such claims with insuperable obstacles. In my judgment it is plain that the Claimant contracted, in relation to the works at Beresford Road, with Parkside Construction (Bournemouth) Ltd., and I so find.

ISSUE 5: MONIES HELD ON TRUST

95. As already indicated, the Second Defendant conceded that she had held monies belonging to the First Defendant on trust. There is no evidence that she still holds any of such monies. She asserted, and I accept, that the monies arising out of the business with the Claimant which she had held on behalf of the First Defendant were expended in accordance with his authority. The pleaded claim was in the terms set out in paragraph 5(4) above. This was presented in a modified form in Mr O'Doherty's Skeleton Opening - see paragraph 7(3) above. By the end of the trial he had reduced the sum claimed to £26,616 - see paragraph 71(3) above. However, as indicated, I am satisfied that the Second Defendant no longer has any of the relevant funds and that they were expended in accordance with the First Defendant's authority, so that no question of any breach of trust could arise. Accordingly, the Claimant is not entitled to a declaration that the Second Defendant presently holds on trust the sum claimed by Mr Doherty, or, indeed, any of the monies which she received from the businesses on trust, and no purpose would be served in making a declaration that at one time she did hold such monies on trust.

MR HOPSON

96. It would be remiss of me not to refer to the fact that I heard the evidence of a further witness, a Mr Hopson, who worked with the First Defendant at the material time. Suffice it to say that his evidence was essential neutral in effect, and did not advance the case of either the Claimant or the Second Defendant.

CONCLUSION

97. It follows from the conclusions expressed above that any action against the Second Defendant for the "underlying breaches of contract" could not succeed, since there was no partnership. Accordingly, it is appropriate for the action to be dismissed in its entirety, and that accordingly judgment be entered for the Second Defendant.