



Neutral Citation Number: [2021] EWCA Civ 287

Case No: A3/2020/0051

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Mr James Pickering sitting as a Deputy Judge of the High Court
[2019] EWHC 2584 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 March 2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE ARNOLD
and
LORD JUSTICE NUGEE

Between :

SATYAM ENTERPRISES LTD

Claimant and
Appellant

– and –

(1) JOHN VINCENT BURTON

Defendant and
Respondent

(2) JVB SEVEN PROPERTIES LTD

Defendant

Robert-Jan Temmink QC and Gabriel Buttimore (instructed by Teacher Stern LLP)
for the Appellant

Peter Shaw QC and Philip Brown (instructed by Richards Solicitors) for the Respondent

Hearing date: 3 February 2021

Approved Judgment

Lord Justice Nugee:

Introduction

1. This is an appeal by the Claimant from the Order dated 11 December 2019 of Mr James Pickering, sitting as a Deputy Judge of the High Court (“**the Judge**”), in which he dismissed the Claimant’s claims for the reasons given in a judgment at [2019] EWHC 2584 (Ch) (“**the Judgment**” or “**Jmt**”), handed down on 7 October 2019 following trial of the action.
2. The Claimant is now called Satyam Enterprises Ltd but was formerly called JVB Five Properties Ltd and I will refer to it, as the Judge did, as “**JVB5**”. The 1st Defendant, Mr John Burton, was at the material time JVB5’s sole director and shareholder. JVB5’s claims against him were based on the fact that he had caused JVB5 to transfer a number of properties to the 2nd Defendant, JVB Seven Properties Ltd (“**JVB7**”), another company of which he was sole director and shareholder. In this action JVB5 alleged that that was at an undervalue and in breach of his duties as director and claimed damages from him. It also brought a separate claim against JVB7 for what was alleged to be non-payment of the purchase price.
3. The Judge dismissed both claims. JVB5 has not sought to appeal the dismissal of its claim against JVB7. It has however appealed the dismissal of its claim against Mr Burton, which it does with permission granted by Males LJ given on 23 June 2020. The Judge dismissed the claim against Mr Burton primarily on the ground that the properties were, both before and after the transfer, held on trust for a Mr Vidya Sharma (“**Mr V Sharma**”) and all that had been transferred by JVB5 to JVB7 was a bare legal title which had caused JVB5 no loss. The main ground on which JVB5 appeals is that the finding that the properties were held on trust for Mr V Sharma was the Judge’s own idea which had formed no part of either party’s case.
4. There is no dispute that that is so. In those circumstances I have come to the conclusion that the Judgment cannot stand, and the appeal must be allowed, and the matter remitted to the High Court for further hearing. This is deeply unfortunate, and very unsatisfactory for the parties, but I do not think any other course is open to us in the circumstances.

The issues for trial

5. Apart from certain basic facts, almost everything else was disputed. Documents were alleged to have been forged and fabricated, and witnesses to have given false evidence, and the Judge indeed found much of the oral evidence (on both sides) unreliable. In those circumstances there were few secure footholds for him as he picked his way through the allegations. Such a case poses particular difficulties for a trial judge, and requires careful findings of fact, firmly set in the context of what each party alleges, and which of the allegations have either been admitted or proved to the requisite standard. Regrettably, as will appear, this is not what happened here.
6. It is helpful to start with those basic facts which were not in issue:
 - (1) At the end of May 2012 Mr V Sharma attended an auction and successfully bid for four freehold investment properties in Croydon (“**the Croydon**”

Properties”) at a total price of £1,096,000.

- (2) When the time came for completion, however, the purchase was not completed in the name of Mr V Sharma, but in the name of JVB5, the Croydon Properties being transferred to JVB5 on 13 July 2012. JVB5, as its name suggests, was one of Mr Burton’s companies and he was then, and until February or March 2013 remained, its sole director and shareholder.
- (3) The total cost of the purchase, including costs and expenses of £41,000, was £1,137,000. £763,000 of this was borrowed from two lenders, Finance and Credit Corporation Ltd (“**Fincorp**”) and Rann Investments Ltd (“**Rann**”), secured by charges against each property.
- (4) On 12 (or possibly 16¹) October 2012 JVB5, acting by Mr Burton, executed a TR1 form transferring the Croydon Properties to JVB7, another of his companies of which he was again the sole director and shareholder (“**the Transfer**”). The price shown in the TR1 was £2,230,000. No money in fact changed hands however, nor were the charges in favour of Fincorp and Rann then discharged, so the properties were transferred subject to those charges.
- (5) During 2013 JVB7, acting by Mr Burton, sold and transferred all the Croydon Properties, save for a studio flat in one of the properties, to two purchasers, one in February 2013 and the other in November 2013, the total price shown on the TR1s being £1,865,000. The studio flat was transferred for nil consideration to a Mr Amey Aulakh.
- (6) The liabilities to Fincorp and Rann were discharged by JVB7 out of the proceeds of sale.

These facts were all pleaded by JVB5 in the Amended Particulars of Claim and admitted in Mr Burton’s Amended Defence.

7. It is next helpful to set out the parties’ respective pleaded cases. On the basis of the facts set out above JVB5’s claim against Mr Burton was pleaded quite simply. It alleged various breaches of his duties as director of JVB5. For present purposes it is sufficient to refer to one alleged breach which was that by the Transfer Mr Burton had transferred the Croydon Properties out of JVB5 at a gross undervalue, their true value being said to be not less than £1,661,600, thereby causing JVB5 loss. The loss was pleaded as the true value of the Croydon Properties, but with credit to be given for the value at the date of the transfer of the loans which were subsequently discharged.
8. Paragraph 10 of the Amended Particulars of Claim pleaded, by way of anticipation of a possible ratification defence, as follows:

“It is averred that the breaches of duty set out above constituted an unlawful return of capital to shareholders at a time when [JVB5] had no distributable reserves and was accordingly ultra vires and incapable of ratification by Mr Burton.”

¹ The TR1 itself is dated 12 October 2012. JVB5’s pleaded case is that the transfer was on 16 October. That was neither expressly admitted or denied in Mr Burton’s Defence. The Judge referred to the TR1 as having been executed “on or about 16 October”. Nothing would appear to turn on this.

9. The relief claimed against Mr Burton was damages (calculated at the true value of the Croydon Properties less credit for the value of the loans) and interest.
10. The remainder of the Amended Particulars of Claim pleaded a claim against JVB7 for alleged non-payment of the agreed purchase price of £2,230,000, less any credit to be given to JVB7 for subsequently discharging JVB5's secured creditors. As already referred to, there has been no appeal by JVB5 against the Judge's dismissal of that claim, and we are not directly concerned with it. We are only concerned with the claim against Mr Burton.
11. Next, Mr Burton's defence to the claim, as pleaded in his Amended Defence. Although the pleading does not quite follow this structure, it is convenient to set out separately what it said about the original purchase in JVB5's name, the Transfer from JVB5 to JVB7, and subsequent matters.
12. So far as the original purchase is concerned, it pleaded as follows:
 - (1) The completion of the purchase in the name of JVB5 was arranged by Mr V Sharma and Mr Burton together (paragraph 3B). At the time Mr Burton held the entire issued shareholding of JVB5 on express trust for Mr V Sharma, and the purchase by JVB5 was undertaken by JVB5 in accordance with his instructions (paragraph 6). The reference to an express trust was to a Trust Deed ostensibly dated 20 June 2012 ("**the June 2012 Trust Deed**"), which was one of the documents whose authenticity was challenged by JVB5.
 - (2) In addition to the £763,000 borrowed from Fincorp and Rann, the total purchase cost of £1,137,000 was financed with £365,000 borrowed from a Mr Saoud Almana and £9,000 from Mr Burton himself (paragraph 5).
13. So far as the Transfer on 12 (or 16) October 2012 from JVB5 to JVB7 is concerned, the Amended Defence pleaded as follows:
 - (1) On 12 October 2012 JVB5 agreed to sell the Croydon Properties to JVB7 for a stated purchase price of £2,230,000 less an allowance of £1,134,000 making £1,096,000 (paragraph 7(a)). This contract ("**the Contract**") was signed by Mr Burton on 12 October 2012 on behalf of both JVB5 and JVB7 (paragraph 7A(c)(a)).
 - (3) The consideration was paid by JVB7 agreeing to take over JVB5's liability to discharge its borrowing in the sum of £1,096,000, and interest accruing thereon, from Fincorp, Rann and Mr Almana, and to repay further sums paid by third parties on the purchase of the Croydon Properties or incurred, including the sum promised to Mr Aulakh and to a Mr Toni Singh for introducing Mr Almana (paragraph 7(b)). This agreement (referred to as "**the Consideration Agreement**"), the Contract and the Transfer formed part of a single agreement (paragraph 7A(c)(c)).
 - (4) It was accepted that the Croydon Properties were transferred to JVB7 subject to the existing charges in favour of Fincorp and Rann (paragraph 7(c)), and that the consideration stated in the TR1 was £2,230,000 (paragraph 7(e)).

14. JVB5 had pleaded that the purpose of the Transfer was to enable Mr Burton and JVB7 dishonestly to represent to a subsequent lender and/or purchaser that the Croydon Properties had been purchased at a substantially higher price than had in fact been the case. In support reliance was placed on an e-mail dated 30 October 2012 from Mr Burton to a Mr David Wilson of Handelsbanken in which he confirmed that he had bought them for £2,230,000, which was not true. In response to this allegation Mr Burton pleaded as follows:
- (1) The purpose of the transaction was to effect a transfer of the Croydon Properties at their true value, to enable JVB5's liability to its secured lenders to be paid off, to pay Mr Almaná, and to discharge sums paid by third parties on the purchase, including the sum promised to Mr Aulakh and Mr Singh (paragraph 7B(a)).
 - (2) JVB5 was paying a high rate of interest on its borrowing and it was thought that JVB7 could obtain finance at a lower rate than JVB5 (paragraph 7B(b)).
 - (3) The e-mail to Mr Wilson of Handelsbanken was admitted, and it was also admitted that it did not accurately set out the agreement (paragraph 7B(c)).
 - (4) At the time of the transaction Mr Burton held the entire issued shareholding of both JVB5 and JVB7 on express trust for Mr V Sharma and the sale was undertaken in accordance with his instructions (paragraph 8). The reference here to the express trust of JVB7 was to another Trust Deed, ostensibly dated 2 October 2012 ("**the October 2012 Trust Deed**"), whose authenticity was again challenged by JVB5.
15. So far as subsequent matters are concerned, the Amended Defence pleaded as follows:
- (1) It was admitted that the consideration stated in the TR1s on the further sales by JVB7 was £1,865,000 (paragraph 7B(d)(a)). But the actual monies received were £1,326,656 (paragraph 7B(d)(b)).
 - (2) The sums secured by the existing charges in favour of Fincorp and Rann were paid by JVB7 and the charges discharged (as was common ground) (paragraph 7(d)).
 - (3) In addition £365,000 was repaid to Mr Almaná.
 - (4) The studio flat was transferred to Mr Aulakh in lieu of commission.
16. On the basis of these facts, Mr Burton denied that there had been any breach of duty. JVB5 had received the consideration that it was agreed it should, and it was denied that that consideration was less than the full value of the Croydon Properties (paragraphs 9 to 11A).
17. In response to paragraph 10 of the Amended Particulars of Claim (see paragraph 8 above), paragraph 12 of the Amended Defence pleaded as follows:
- "Paragraph 10 is denied. There was no unlawful return of capital to its shareholders."

18. JVB5 served an Amended Reply. It is not necessary to refer to it in any detail but among other things it pleaded (i) that the Contract and Consideration Agreement were not in fact entered into on 12 October but were subsequently devised by Mr Burton to seek (retrospectively) to justify his actions; and (ii) that he did not hold the shareholdings of JVB5 and JVB7 on trust for Mr V Sharma, nor was the sale from JVB5 to JVB7 undertaken on his instructions.
19. It can be seen that the essential issues which required resolution at trial were as follows:
 - (1) What were the terms on which the properties were transferred from JVB5 to JVB7? Was it agreed, as pleaded by Mr Burton, that this would (i) not be at the ostensible price of £2,230,000 but at a true price of £1,096,000 and (ii) that the £1,096,000 be satisfied by JVB7 agreeing to discharge JVB5's liabilities? Or was this all made up later, as pleaded by JVB5?
 - (2) Was the Transfer at an undervalue? That required not only identifying the consideration provided to JVB5 but also the true value of the Croydon Properties at the time of the Transfer. It might also require identifying what liabilities were incurred by JVB5 on the original purchase and discharged by JVB7.

Once those factual issues had been resolved, the legal consequences could be worked out. There were a number of potential consequential issues, such as whether the composite agreement for the Transfer said by Mr Burton to have been made in October 2012 complied with s. 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (“**LR(MP)A 1989**”), and if not whether JVB7 could establish an estoppel; what loss (if any) had been suffered by JVB5; and whether there had been an unlawful return of capital. But the primary task of the Judge was to find whether the facts pleaded in the parties' respective cases were proved.

The Judgment

20. After a brief introduction, the Judge at [8] to [30] set out in narrative form the relevant events, starting with the auction at the end of May 2012 at which Mr V Sharma successfully bid for the Croydon Properties and continuing through to the sale of them by JVB7 and the use of the proceeds of sale, adding one further section explaining how JVB5 had been transferred in 2013 to Mr V Sharma's son, Mr Satyam Sharma (“**Mr S Sharma**”), its name being changed from JVB5 to Satyam Enterprises Ltd, and Mr S Sharma becoming sole director and shareholder in place of Mr Burton. In this section of the Judgment the Judge referred to the parties' rival contentions where matters were in dispute, but did not seek to resolve them.
21. In the next section of his Judgment at [31] to [44] the Judge referred to the witnesses. The Judge's assessment of the principal factual witnesses was very unfavourable. Of JVB5's witnesses he said that Mr S Sharma had little or no first-hand knowledge of the events in question but he was in any event far from impressed by him [33]-[34]; and that Mr V Sharma did not attend trial, ostensibly for medical reasons although the Judge said there must be a suspicion he did not want to face the many accusations of dishonest (and criminal) behaviour made against him, and that he could give little weight to his witness statement [35]. Of Mr Burton he said that he was a dishonest

witness, whose explanations of certain matters were wholly unbelievable and who had admitted to involvement in numerous scams designed to mislead and defraud lenders; he could give little or no weight to anything said by him unless corroborated [37]. He did however find two of Mr Burton's witnesses more credible: Mr Bhupinder Panesar, who was the witness to Mr Burton's signature on both the June 2012 and October 2012 Trust Deeds, and Mr Wasim Ahmad, who had worked for Mr V Sharma at the time and who gave evidence that Mr V Sharma had told him that Mr Burton held the Croydon Properties on trust for Mr V Sharma [38]-[40].

22. The Judge also referred in this section to the expert witnesses. Each side called a valuer to give evidence of the value of the Croydon Properties at the time of the Transfer in October 2012. The Judge recorded their respective valuations of £1,661,600 (Mr Richard Alford for JVB5) and £1,200,000 (Mr Horace Blackburn for Mr Burton). He said that he found Mr Alford an impressive witness [42], whereas Mr Blackburn got off to a bad start in falsely stating that he had never acted for Mr Burton before, although he put this down to inexperience rather than any intention to mislead [43]. He then said at [44]:

“Both experts relied (unsurprisingly) on comparables. In broad terms, however, I have to say that I found the comparables used by Mr Alford to be more on point and I preferred his methodology and approach generally.”

That completed his consideration of the expert evidence, and he did not make any express finding as to what the value of the Croydon Properties at the time of the Transfer was.

23. In the next section of the Judgment at [45] to [64] the Judge considered the claim against Mr Burton. At [45] he referred to Mr Burton's admitted duties as director. At [46] to [48] he summarised the submissions made by Mr Robert-Jan Temmink QC who appeared for JVB5 (as he did before us, with Mr Gabriel Buttimore). These were that at the time of the Transfer the properties were worth in the region of £1,661,000 and subject to lending in the region of £1,096,000 thereby giving rise to equity in the region of £565,000, but that Mr Burton had caused JVB5 to enter into a transaction, the net effect of which was that JVB5 came out with nothing [46]; that if the consideration in the TR1 of £2,230,000 was genuine, then JVB5 should have made a gain of £1,134,000; but that even if the Contract were genuine and the net sale price was £1,096,000, Mr Burton must have acted in breach of duty in any event in causing JVB5 to sell the Croydon Properties in such a way as to come out with nothing despite there being £565,000 in equity [47]. At [48] he recorded Mr Temmink's submissions in relation to Mr Burton's pleaded defence that he had at all times held the shareholding in both JVB5 and JVB7 on trust for Mr V Sharma. Mr Temmink challenged the authenticity of the June and October 2012 Trust Deeds in relation to the shareholdings in JVB5 and JVB7 respectively, but submitted that even if they were genuine it made no difference as Mr Burton's duties as director were owed to JVB5 whoever the beneficial owner of the shares was.

24. The Judge's response to this submission at [49] was as follows:

“As a matter of general principle, the submissions of leading counsel for JVB5 are of course correct. In general terms, he is right to say that it is JVB5 who is the claimant and it is therefore only the duties owed to JVB5 and any breach of the

same that should concern me without regard to who in fact owns the underlying shares in JVB5. Having said that, for the reasons set out below, it seems to me that in order to properly consider the question of breach, I do need to consider the question of the beneficial ownership of not only the shareholding in JVB5 but also the beneficial ownership from time to time in the Croydon Properties themselves.”

25. At [50] to [54] the Judge considered Mr Burton’s case that it was agreed between him and Mr V Sharma that he would hold the shareholding in JVB5 for Mr V Sharma. Having said that he could give little weight to the evidence of Mr Burton or either Mr Sharma, he placed more weight on the evidence of Mr Panesar and Mr Ahmad, and concluded that Mr V Sharma was behind all stages of the various transactions [55]; that it was agreed that one of Mr Burton’s dormant companies would be used on the understanding that Mr V Sharma would at all times remain the ultimate beneficial owner of the project [55]; and that the June and October 2012 Trust Deeds were each executed at the times indicated on their face [56]-[57].
26. He then considered what those findings meant, and said that his analysis meant that the claim failed for two reasons [58]. The first was explained by him at [59] which I should cite in full:

“First, although the primary submission put forward on behalf of Mr Burton was that at the relevant time Mr Burton was holding his shares in JVB5 on trust for Mr V Sharma, having considered the evidence as a whole it seems to me that in fact matters went further than that – the true position is that Mr V Sharma was at all material times the ultimate beneficial owner of not only the shareholding in JVB5 but also, so I find, of the Croydon Properties themselves. Indeed, there is no dispute that it was Mr V Sharma who initially bought them at the auction. Because of the need to raise finance (and the fact that Mr V Sharma was *persona non grata* at Fincorp) he needed a vehicle which transpired to be JVB5. I do not think, however, that there was any real intention that JVB5 would benefit from the Croydon Properties – it was simply a conduit to enable him to raise finance. JVB5 was doing nothing more than holding the Croydon Properties for him as bare trustee. Accordingly, when Mr V Sharma wanted to raise further finance, he instructed Mr Burton to transfer the Croydon Properties to another corporate vehicle – which this time transpired to be JVB7 – in order to create the impression of an arm’s length sale at a significantly inflated price with a view to deceiving further lenders. Again, though, there was no real intention that JVB7 should beneficially own the Croydon Properties – it too, I find, was nothing more than a bare trustee holding them to Mr V Sharma's order.

The consequence of that was that Mr Burton did not act in breach of duties to JVB5 when he caused it to transfer the Croydon Properties to JVB7 as it only ever had a bare title to them [60].

27. His alternative reason for rejecting the claim was based on the *Duomatic* principle. He referred to his finding that Mr V Sharma was the ultimate beneficial owner of the shareholding in JVB5 [62], and continued at [63], which again I cite in full:

“This being the case, I accept the submission of counsel for Mr Burton that the *Duomatic* principle would be of application. If I am wrong in my primary finding that Mr V Sharma was at all material times the ultimate beneficial owner of the Croydon Properties themselves, it would follow that as from July 2012 the beneficial ownership in the Croydon Properties was held by JVB5 (as well as the

legal title). If this were to be the case, I would accept JVB5's submission that by simply transferring the Croydon Properties to JVB7 on terms which meant that it did not benefit from the expected gain, Mr Burton would have acted in breach of his various duties to JVB5³. Importantly, however, in so acting it is clear that Mr Burton was acting on the instructions of Mr V Sharma for whom, as I have found, Mr Burton held the shareholding in JVB5. In short, therefore, the very acts of which JVB5 complain were expressly authorised and carried out at the direction of its sole beneficial shareholder, Mr V Sharma. In such circumstances, so it seems to me, Mr Burton would have a complete defence to any breach of duty to JVB5 which he would otherwise be deemed to have committed."

Footnote 3 referred to in the middle of this passage was as follows:

"For the avoidance of doubt, I find the only breaches for which, in this scenario, Mr Burton would be liable are those relating to the transfer of the Croydon Properties from JVB5 to JVB7 without proper consideration. I do not find that Mr Burton would also be liable in respect of an unlawful return of capital in relation to which the *Duomatic* principle would not apply."

28. He therefore dismissed JVB5's claim as against Mr Burton, primarily on the basis that all material times the Croydon Properties were beneficially owned by Mr V Sharma such that JVB5 was only a bare trustee and there was no breach of duty; and in the alternative on the basis that even if the Croydon Properties were held beneficially by JVB5, such breach was expressly authorised by JVB5's sole beneficial shareholder, Mr V Sharma, and Mr Burton would have a complete defence under the *Duomatic* principle [64].
29. In the remainder of the Judgment at [65] to [69] the Judge considered the claim against JVB7. He referred to the fact that the primary focus had been on the Contract, the authenticity and effect of which had been challenged on the basis first that it had been fabricated, and second that it would in any event be of no effect because of failure to comply with s. 2 LR(MP)A 1989 [66]. He then said at [67] that not only was no sum paid by JVB7 to JVB5 but it was plain that no sum was ever intended to be paid:

"The purpose of the transfer of the Croydon Properties from JVB5 to JVB7 was simply to manufacture a transaction with an artificially inflated price which would enable monies to be (fraudulently) raised."

On this basis he held that the Transfer was a sham [68], and:

"The TR1 was not in fact intended to effect or record a transfer of property in return for the payment of a sum of money; there was no intention that the beneficial interest in the Croydon Properties should pass (at all times the beneficial interest remained with Mr V Sharma and only the legal title changed); and there was certainly no intention that money should change hands. The TR1 was nothing more than an instrument of fraud."

The TR1 therefore did not give really give rise to any debt; and it was unnecessary to consider the Contract at all: even if it was created at the time and satisfied the statutory requirements, it would at best also be part of the sham and therefore an instrument of fraud too [69]. He therefore dismissed that claim as well.

Grounds of Appeal

30. JVB5 sought permission to appeal on four grounds, but Males LJ refused permission on Ground 4 which only concerned costs. The grounds for which he granted permission can be summarised as follows:

- (1) Ground 1 is that the Judge's finding that the Croydon Properties were held on trust for Mr V Sharma was not part of either party's pleaded case, nor addressed or raised in argument.
- (2) Ground 2 is that the Judge was in any event wrong to find that the Croydon Properties were held on trust for Mr V Sharma.
- (3) Ground 3 is that the Judge was wrong to find that the *Duomatic* principle applied to ratify, or absolve Mr Burton from, his breach of duty.

Given the Judge's two reasons for dismissing the claim, JVB5 needs to succeed both on Grounds 1 and/or 2 and on Ground 3. But so far as Grounds 1 and 2 are concerned, Mr Peter Shaw QC, who appeared with Mr Philip Brown for Mr Burton, did not seek in his skeleton argument to uphold the Judge's finding that the Croydon Properties were held on trust for Mr V Sharma.

Respondent's Notice

31. A Respondent's Notice was however served on behalf of Mr Burton seeking to uphold the Judge's decision on three alternative grounds:

- (1) On the Judge's factual findings, JVB5 remained the beneficial owner of the Croydon Properties and there was therefore no breach of duty or loss.
- (2) On the Judge's findings the payments made by JVB7 out of the proceeds of sale were on the instructions of Mr V Sharma and the *Duomatic* principle applies.
- (3) On the Judge's findings the Transfer was for an unlawful and fraudulent purpose on the instructions of Mr V Sharma, and JVB5 ought to not be able to bring a claim based on an illegal transaction carried out at the behest of the beneficial owner of its shares.

In the course of the exchange of arguments before the hearing, however, Mr Shaw expressly abandoned the third of these (the illegality point), and it is not necessary to say any more about it.

Ground 1 of Appeal – not part of either party's case

32. I have already said that Mr Shaw did not seek to uphold the Judge's finding that the Croydon Properties were held on trust for Mr V Sharma, thereby in effect conceding Grounds 1 and/or 2 of the Appeal. It is not therefore necessary to deal with this aspect of the case at any great length but I should indicate why I consider that he was right to do so.

33. I have already summarised the pleadings above. The entire basis of JVB5's claim

against Mr Burton was that JVB5 was not only the legal but the beneficial owner of the Croydon Properties; that by executing the Transfer he had transferred the properties (both legally and beneficially) to JVB7; and that that was a breach of duty because the Transfer was at an undervalue. Neither Mr Burton's Defence nor that of JVB7 (which although a separate pleading was also settled by Mr Brown and was in all respects aligned with his) took issue with JVB5 having been the legal and beneficial owner of the Croydon Properties up to the date of the Transfer, or with the Transfer having been effective to pass the legal and beneficial ownership to JVB7. Mr Burton's substantive defence to the breach was that the Transfer was at an effective price of £1,096,000, to be paid not in cash but in discharging JVB5's liabilities, and that that was in the circumstances for full consideration (paragraphs 13(2), 13(3) and 16 above).

34. Nor was this a case where the case advanced by Mr Burton at trial was at odds with his pleading. On the contrary his witness statement for trial was to the same effect as his defence, specifically saying that the Transfer was a sale at the true value of the Croydon Properties; and Mr Brown's skeleton argument for trial similarly said that Mr Burton's intention was to transfer the properties at their true value. Mr Temmink in his skeleton argument for the appeal said that the question of whether the Croydon Properties were, or even might be, held on trust for Mr V Sharma was simply not an issue in the case, and so was not explored at trial or during cross-examination, or raised in closing argument. We have been shown nothing to suggest that this statement is wrong.
35. This is not therefore a case, as sometimes happens, where one or other of the parties seeks to run a different case at trial from that pleaded. That itself is unsatisfactory and can cause difficulties, as has been said recently by this Court more than once: see *UK Learning Academy Ltd v Secretary of State for Education* [2020] EWCA Civ 370 at [47] per David Richards LJ where he said that statements of case play a critical role in civil litigation which should not be diminished, and *Dhillon v Barclays Bank plc* [2020] EWCA Civ 619 at [19] per Coulson LJ where he said that it was too often the case that the pleadings become forgotten as time goes on and the trial becomes something of a free-for-all. As both judges say, the reason why it is important for a party who wants to run a particular case to plead it is so that the parties can know the issues which need to be addressed in evidence and submissions, and the Court can know what issues it is being asked to decide. That is not to encourage the taking of purely technical pleading points, and a trial judge can always permit a departure from a pleaded case where it is just to do so (although even in such a case it is good practice for the pleading to be amended); in practice the other party often, sensibly, does not take the point, but in any case where such a departure might cause prejudice he is entitled to insist on a formal application to amend being made: *Loveridge v Healey* [2004] EWCA Civ 173 at [23] per Lord Phillips MR.
36. The present case however is not one of a party seeking to depart from his pleaded case, but one where the parties addressed in their evidence and submissions the cases that had been pleaded, but the Judge decided the case on a basis that had neither been pleaded nor canvassed before him. In our system of civil litigation that is impermissible, and a misunderstanding of the judge's function which is to try the issues the parties have raised before him. The relevant principles were stated by this Court in *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041. There the trial judge

had rejected the claimant's pleaded allegation of how she had sustained an accident but nevertheless found the defendant liable on the basis of his own theory of what had happened (referred to as the "third man theory"), which had never formed any part of either party's pleaded case. Dyson LJ (with whom Tuckey and Brooke LJ agreed) said at [21]:

"In my view the judge was not entitled to find for the claimant on the basis of the third man theory. It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness."

37. In that case the Judge had in fact raised the third man theory with counsel in the course of closing submissions, and there was a "rather faint-hearted" espousal of it by the claimant's counsel, but that was far too late for the claimant to take the point as it had not been explored with any of the witnesses: see at [23]-[24]. Dyson LJ said that the judge, having rejected the claimant's pleaded case, should have dismissed the claim, and by making findings for which the claimant was not contending, had crossed the line which separates adversarial and inquisitorial systems; what he did might have been legitimate in an inquisitorial system but was impermissible in our system: see at [25].
38. In the present case, the possibility that the Croydon Properties were held on trust for Mr V Sharma does not appear to have been even canvassed by the Judge during the hearing, but, as far as we know, first emerged fully-formed in the Judgment. That, for the reasons given by Dyson LJ in *Al-Medenni*, was not a course that was open to him. Judges may sometimes think – and may even sometimes be right – that their own theory better fits the facts than that of either party, but if it is wholly outside the scope of the pleaded issues, that is nothing to the point, and to decide a case on a basis that has not been explored in evidence or addressed in submissions is likely to leave at least one, if not both, parties with a profound and justified sense of unfairness.
39. I therefore have no doubt that Ground 1 was well-founded, and Mr Shaw wise not to attempt to uphold the Judgment in this respect. It is unnecessary in those circumstances to address Ground 2.

Ground 3 of Appeal – the Duomatic point

40. The next question therefore is whether the Judge's alternative reason for dismissing the claim on the basis of the *Duomatic* principle can be upheld. Mr Temmink advanced three separate reasons why it cannot:
 - (1) It was not possible for the shareholder of JVB5 (whether Mr Burton as legal shareholder, or Mr V Sharma as beneficial owner) to ratify or authorise the transfer of the Croydon Properties at an undervalue as that would amount to an

unlawful distribution of the company's assets.

- (2) There was no relevant outward manifestation by Mr Burton or Mr V Sharma of the requisite intent to bring the *Duomatic* principle into play.
 - (3) The Transfer that was purportedly ratified was part of an intended fraud and therefore not capable of ratification.
41. The *Duomatic* principle is that anything the members of a company can do by formal resolution in a general meeting they can also do informally if all of them assent to it: *Ciban Management Corpn v Citco (BVI) Ltd* [2020] UKPC 21 (“*Ciban*”) at [31] per Lord Burrows JSC. It takes its name from *Re Duomatic Ltd* [1969] 2 Ch 365, although the principle itself long pre-dates it and can be found in *Salomon v Salomon & Co Ltd* [1897] AC 22: *Ciban* at [32]. The principle was expressed by Buckley J in *Re Duomatic Ltd* as follows (at 373C):
- “Where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.”
42. That refers to shareholders with a right to attend and vote, or in other words the registered (legal) owners of the shares, but the same applies to beneficial owners, at least where they take all the relevant decisions. See *Ciban* at [47] per Lord Burrows:
- “...in some cases doubts have been expressed as to whether the principle applies where it is the beneficial owners, rather than the registered shareholders who consent... But the correct view is that, at least as here where the ultimate beneficial owner, and not the registered shareholder is taking all the decisions in the relevant transactions, the *Duomatic* principle applies as regards the consent of (and authority given by) the ultimate beneficial owner.”
43. Mr Temmink said that in his pleaded case Mr Burton did not raise ratification as a defence. Ratification was raised as an issue by JVB5 by way of anticipation (paragraph 8 above), but Mr Burton did not in his defence assert that there had been ratification or, if so, what it consisted of.
44. It is correct that Mr Burton did not in terms plead ratification; but he did plead (i) that he held the shares in JVB5 (as well as those in JVB7) on express trust for Mr V Sharma and (ii) that the sale from JVB5 to JVB7 was undertaken in accordance with Mr V Sharma's instructions (paragraph 14(4) above). That seems to me sufficient to enable Mr Burton to rely on the Transfer having been authorised or ratified by Mr V Sharma as the sole beneficial owner of JVB5. The Judge found that the shares in both JVB5 and JVB7 were indeed held by Mr Burton on trust for Mr V Sharma; and that the Transfer was on his instructions (Jmt at [57]-[58], [63]: see paragraphs 25 and 27 above). The factual finding therefore that Mr V Sharma as sole beneficial owner of JVB5 authorised the Transfer seems to me sufficient to satisfy the *Duomatic* principle, subject to the three points raised by Mr Temmink.

Outward manifestation of consent

45. I do not think there is anything in the second point, that is the requirement for an outward manifestation of consent. I will assume for present purposes that Mr Temmink is right that there is such a requirement, although we heard little argument on the question, and it is not necessary to decide the point. There is undoubtedly some authority in support of it: see *re New Cedos Engineering Co Ltd* [1994] 1 BCLC 797 at 813e-g per Oliver J, where he said that he found it difficult to believe that Buckley J contemplated that the company could be bound by the “lonely soliloquies” of a sole shareholder; and *Rolfe v Rolfe* [2010] EWHC 244 (Ch) at [41] per Newey J where he said that it was desirable that decisions of a company should be objectively verifiable. But in the present case the Judge found that the Transfer was “expressly authorised” and carried out “at the direction of” Mr V Sharma (Jmt at [63]: see paragraph 27 above). No attempt has been made to show that that was not a finding open to him on the evidence. We have not seen all the evidence, but there happens to be included in the material before us an e-mail from Mr V Sharma to Mr Burton dated 6 October 2012 which includes “Agreed you transfer the croydon properties to jvb7” which certainly suggests not only that Mr Sharma knew about the proposed transfer but expressly assented to it, and not merely in his private thoughts.

Unlawful return of capital

46. The first point however, namely that there was an unlawful return of capital, needs to be considered at somewhat greater length. The principle relied on by Mr Temmink is that stated by Lord Walker JSC in *Progress Property Co Ltd v Moore* [2010] UKSC 55 (“*Progress Property*”) at [1] as follows:

“A limited company not in liquidation cannot lawfully return capital to its shareholders except by way of a reduction of capital approved by the court. Profits may be distributed to shareholders (normally by way of dividend) but only out of distributable profits computed in accordance with the complicated provisions of the Companies Act 2006 (replacing similar provisions in the Companies Act 1985). Whether a transaction amounts to an unlawful distribution of capital is not simply a matter of form. As Hoffmann J said in *Aveling Barford Ltd v Perion Ltd* [1989] BCLC 626, 631: “Whether or not the transaction is a distribution to shareholders does not depend exclusively on what the parties choose to call it. The court looks at the substance rather than the outward appearance.” Similarly Pennycuik J observed in *Ridge Securities Ltd v Inland Revenue Comrs* [1964] 1 WLR 479, 495:

“A company can only lawfully deal with its assets in furtherance of its objects. The incorporators may take assets out of the company by way of dividend, or, with the leave of the court, by way of reduction of capital, or in a winding up. They may, of course, acquire them for full consideration. They cannot take assets out of the company by way of voluntary distribution, however described, and, if they attempt to do so, the distribution is ultra vires the company.” ”

47. If, in accordance with this principle, an impugned transaction is an unlawful return of capital, the *Duomatic* principle cannot be relied on because the transaction would be *ultra vires* the company, and the incorporators cannot do informally what they have no power to do formally: see *Ultraframe (UK) Ltd v Fielding* [2003] EWCA Civ 1805 at [40] per Waller LJ:

“That principle [ie the *Duomatic* principle] accepts that all shareholders may formally or informally assent to or approve an arrangement or a transaction so that it is binding on the company. But that principle as Mr Oliver pointed out only applies to acts or transactions which are *intra vires* the company... Thus ... if a director of a company 100% owned by himself decided simply to take the assets of the company for himself, he would not be able to rely on the *Duomatic* principle, because such conduct could not be considered a *bona fide* distribution of profits and would be a reduction of capital and *ultra vires* the company without the sanction from the court.”

48. There is no dispute as to the principle. Nor did I understand it to be disputed that it was potentially engaged if the assets of the company were transferred at an undervalue to the sole shareholder; and the same must apply if instead of transferring the assets to himself the sole (beneficial) shareholder transfers it to a company of which he is again the sole (beneficial) shareholder. It is therefore capable of applying to the Transfer on the basis that that was a transfer at an undervalue of JVB5’s assets on the instruction of Mr V Sharma to JVB7 of which he was the sole beneficial owner. And there was no suggestion that JVB5, which had filed accounts as a dormant company, had any distributable reserves that could be declared as dividends at the time of the Transfer.

49. But that is not the end of the inquiry. As *Progress Property* itself illustrates, the question is not simply whether the impugned transaction was in fact, viewed objectively, at an undervalue. In that case it was assumed for the purposes of the appeal that a subsidiary whose net assets might have been worth as much as £4m had been sold for little more than £60,000, but it was found that the relevant director genuinely believed that the sale was at market value: see at [4]. On those (assumed) facts the Supreme Court upheld the decision of this Court that there was no unlawful distribution of capital for the reasons given by Lord Walker at [27]-[33], and summarised by him at [29] as follows:

“If the conclusion is that it was a genuine arm’s length transaction then it will stand, even if it may, with hindsight, appear to have been a bad bargain. If it was an improper attempt to extract value by the pretence of an arm’s length sale, it will be held unlawful. But either conclusion will depend on a realistic assessment of all the relevant facts, not simply a retrospective valuation exercise in isolation from all other inquiries.”

50. Those being the relevant principles, the next question is what relevant findings of fact the Judge made. Here we are at a disadvantage because the Judge has not dealt expressly with all the necessary matters. He considers the application of the *Duomatic* principle in a few sentences in [63], and the question of an unlawful return of capital in a footnote. I will repeat the relevant sentences in [63], which are as follows:

“If I am wrong in my primary finding that Mr V Sharma was at all material times the ultimate beneficial owner of the Croydon Properties themselves, it would follow that as from July 2012 the beneficial ownership in the Croydon Properties was held by JVB5 (as well as the legal title). If this were to be the case, I would accept JVB5’s submission that by simply transferring the Croydon Properties to JVB7 on terms which meant that it did not benefit from the expected gain, Mr Burton would have acted in breach of his various duties to JVB5.”

51. It is implicit in this passage that the Judge was not only proceeding for the purposes of this part of the case on the assumption that JVB5 was the legal and beneficial owner of the Croydon Properties, but also that the Transfer was effective to transfer the legal and beneficial ownership to JVB7, as otherwise there would have been no breach of duty (as JVB5 would have remained the beneficial owner). One can probably also tease out of this passage the conclusion that he was proceeding on the basis that the Transfer was at an undervalue, as if it had been sold at an effective price of £1,096,000 and that was full value (which was Mr Burton's case), then again there would have been no breach of duty: see also footnote 3 referring to a sale "without proper consideration".
52. But he nowhere finds what the actual value of the Croydon Properties was at the time of the Transfer. The closest he comes to it is in his discussion of the expert evidence where he says that he found Mr Alford an impressive witness, broadly found his comparables more on point, and preferred his methodology and approach generally (paragraph 22 above). Since Mr Alford's valuation was £1,661,600 and Mr Blackburn's £1,200,000 it seems likely that he thought the true value was above £1,200,000, and somewhat closer to £1,661,600, but in the absence of any finding we cannot even be sure of that.
53. But as explained above, the conclusion with hindsight that the Properties were sold at an undervalue does not by itself lead to the conclusion that there was an unlawful return of capital. Mr Burton's case at trial was that JVB5 had paid £1,096,000 for the Croydon Properties in June 2012; that JVB7, by agreeing to discharge JVB5's liabilities to Fincorp, Rann and Mr Alman, effectively agreed to purchase them at the same price (if not a higher one, given that there was interest accruing on the Fincorp and Rann loans, and JVB7 also agreed to take care of the costs of transfer and the commissions promised to Mr Aulakh and Mr Singh); and that this was a *bona fide* sale at their true value. As he put it in his witness statement for trial:

"This was a sale at the true value of the Croydon Properties, and while no new valuation was obtained at the time as it was so soon after the purchase that there was no reason to believe that the prices had varied by any significant degree."

That therefore put in issue whether the Transfer, even if in fact at an undervalue, was an unlawful return of capital given the distinction drawn in *Progress Property* between a genuine transaction that turns out with hindsight to have been a bad bargain, and an attempt to extract value by dressing up a sale at an undervalue as an arms' length transaction.

54. I do not think there are sufficient findings of fact in the Judgment to enable us to determine on which side of the line the Transfer falls. Had the Judge said that he expressly accepted Mr Burton's explanation, that would have been one thing. But he does not. All he says, in footnote 3, is that the only breaches for which Mr Burton would be liable would be those relating to the Transfer without proper consideration and:

"I do not find that Mr Burton would also be liable in respect of an unlawful return of capital in relation to which the *Duomatic* principle would not apply."

That seems to me a wholly inadequate treatment of the question. Reasons for a

judgment do not have to be over-long but they do need to explain to the parties, and if necessary this Court, why the judge reached the conclusion he did. It is possible that the reason that the Judge found that there would be no unlawful return of capital is because he accepted Mr Burton's explanation as set out in his witness statement; but he has not said so, and I do not think that we can be confident that this was so. At the end of the Judgment when considering the claim against JVB7, he said that it was not necessary to consider the Contract at all (Jmt at [69]: see paragraph 29 above), which suggests he had not reached any conclusion as to whether it was even made, let alone whether it was a *bona fide* sale at what was genuinely thought to be true value.

55. In those circumstances I do not think we have the material on which to conclude whether Mr Temmink's first point is an answer to the *Duomatic* principle or not. Unless the appeal can be resolved on the basis of the other points, I think we have no alternative but to remit the case for further hearing on this question.

Transaction not bona fide or honest

56. The next question concerns Mr Temmink's third answer to the *Duomatic* point, namely that the *Duomatic* principle does not apply unless the transaction in question is *bona fide* and honest: see eg *re Bowthorpe Holdings Ltd* [2002] EWHC 2331 (Ch) ("**Bowthorpe**") at [50] per Sir Andrew Morritt V-C. Here Mr Temmink relies on the Judge's finding that the purpose of the Transfer was to manufacture a transaction with an artificially inflated price to enable monies to be fraudulently raised (Jmt at [67]: see paragraph 29 above). That is a finding which seems to have been entirely justified on the evidence, Mr Burton's own evidence being that the price on the TR1 was artificially inflated to induce a lender to lend against the higher price either by being tricked into believing that was the true value, or because some of those working for the lender would turn a blind eye to the same (Jmt at [20]), although the plan to re-mortgage was in the event for various reasons unsuccessful (Jmt at [26]).
57. Mr Shaw does not dispute the principle but points out that it is not any dishonesty associated with the transaction which brings it into play but only "relevant" dishonesty: *Ciban* at [43] per Lord Burrows. This is exemplified by the example Lord Burrows gives at [46] of the agent (Mr Costa) dishonestly stealing the proceeds of sale. Mr Shaw submitted that "relevant dishonesty" connoted dishonesty or bad faith towards the company.
58. I accept this submission. The way in which Morritt V-C put it in *Bowthorpe* at [55]-[56] is that the *Duomatic* principle would not provide a defence if the sole member had misapplied the assets of the company otherwise than in good faith; in other words the principle is that the members of the company cannot simply help themselves to its assets. But if the members are not acting dishonestly towards the company, we have been shown no authority that the fact the transaction was intended to be used subsequently as an instrument to defraud someone else precludes the application of the *Duomatic* principle. Nor would there seem to be any good reason in principle why it should: this restriction on the application of the *Duomatic* principle would appear to be for the protection of the company and its creditors, not the Court's response to fraud more generally.
59. I would therefore reject Mr Temmink's third ground for challenging the Judge's finding that the *Duomatic* principle applied. The fact that the Judge found that the

TR1 contained a deliberately inflated price so as to enable a fraud to be committed on a future lender, although undoubtedly dishonest, was not in my judgment relevant dishonesty such as to prevent the application of the *Duomatic* principle.

Conclusion on Ground 3 of Appeal

60. For the reasons I have given, I would dismiss Mr Temmink's second and third reasons for challenging the Judge's reliance on the *Duomatic* principle. But I would accept that the Judge has not adequately dealt with the question of whether the Transfer involved an unlawful return of capital, and unless the Judgment can be upheld on the alternative grounds put forward in the Respondent's Notice, I would allow the appeal and remit the case for further hearing.

Respondent's Notice Ground 1 – did JVB5 remain the beneficial owner?

61. The first ground in the Respondent's Notice, and the principal one argued before us by Mr Shaw, is that on the Judge's findings the effect of the Transfer was to transfer only the legal title from JVB5 to JVB7, and that JVB5 had remained the beneficial owner.
62. For this purpose Mr Shaw relied on the findings by the Judge that the Transfer was a sham, that there was no intention that the beneficial ownership should pass, and that only the legal title changed (Jmt at [68]: see paragraph 29 above). The Judge had also found that the Croydon Properties were before the Transfer beneficially owned (i) by Mr V Sharma or (ii) if that were wrong by JVB5. Since Mr Shaw accepted that the Judge was wrong to find (i), it followed, he said, that the Properties were beneficially owned by JVB5, and that since the Judge found that this did not change, the beneficial ownership remained with JVB5. There was therefore no breach of duty, nor any loss sustained by JVB5.
63. There are a number of difficulties with this analysis. First, the Judge never found that the beneficial ownership remained with JVB5. On his primary view, that the Croydon Properties were held by JVB5 on trust for Mr V Sharma, he said that the Transfer only transferred the bare legal title to JVB7 as that was all that JVB5 had vested in it (Jmt at [60]). One cannot simply transpose this finding to his alternative view that JVB5 was the beneficial owner of the Properties, as in that case JVB5 would both have the legal title and be the beneficial owner, and a transfer by JVB5 to JVB7 would *prima facie* pass the whole of JVB5's interest, both legal and beneficial, to JVB7.
64. Second, insofar as the Judge made any findings at all as to the position on his alternative basis, it was that the Transfer from JVB5 to JVB7 was not for proper consideration and would have been a breach of duty but for the *Duomatic* principle. As set out above, it is implicit in that finding that the Transfer on this view did pass the legal and beneficial ownership to JVB7 (paragraph 51 above).
65. I therefore do not accept that the Judge's findings can support a conclusion, even on an alternative basis, that the Transfer only passed a bare legal title leaving the beneficial ownership with JVB5.
66. Quite apart from this, even if the Judge had found this, it would have been, as Mr

Temmink submitted, another finding that was outside the parameters of the pleaded cases. It was no more part of Mr Burton's case that the Croydon Properties remained throughout beneficially owned by JVB5 than it was that they were beneficially owned by Mr V Sharma. Nor indeed was it any part of either party's case that the Transfer was a sham as the Judge found. If that meant no more than that the price ostensibly stated in it was inflated above the true price, then that was a finding that was open to him; but if the Judge meant (as he appears to have done) that it was of no effect, or at any rate of no effect beyond transferring the legal title, then that was not a finding open on the pleadings either.

67. Mr Shaw developed his argument under this head at some length, but what I have already said is sufficient to explain why I do not consider this ground can succeed. It is also unnecessary to consider an application by Mr Temmink to adduce further evidence on the point, which was vigorously opposed but which does not arise in the light of my views.

Respondent's Notice Ground 2 – Duomatic principle and proceeds of sale

68. That leaves Ground 2 of the Respondent's Notice which is that the proceeds of sale of the properties by JVB7 were applied in the manner directed by Mr V Sharma, and hence, to the extent that this is alleged to be a breach of Mr Burton's duty to JVB5, the *Duomatic* principle applies.
69. There is to my mind a very simple answer to this submission, which is that given by Mr Temmink. No allegation is made, or ever was, that the application of the proceeds of sale by JVB7 was a breach of duty owed by Mr Burton to JVB5. The breach of duty alleged against Mr Burton was the transfer of JVB5's properties to JVB7 at an undervalue. In those circumstances the suggested application of the *Duomatic* principle simply does not arise.
70. Mr Shaw also said that on Mr Burton's case it was always intended that JVB7 would either remortgage or sell the Properties and then discharge JVB5's liabilities, and that one could not assess what loss, if any, JVB5 had suffered without investigating to what extent that had been done. Mr Burton's case was that *all* the proceeds of sale received by JVB7 were used for the benefit of JVB5. Mr Shaw accepted however that there were no sufficient findings on the point, and that we could not determine for ourselves what had or had not been spent by JVB7 on JVB5's liabilities.
71. I accept that such matters may be relevant to an assessment of JVB5's loss. But I do not see that they are relevant to the question of breach of duty; and we certainly cannot conclude that there was in fact no loss. In those circumstances I do not see that they provide any basis for upholding the Judgment on other grounds.
72. I would therefore dismiss the two grounds advanced by Mr Shaw in support of the Respondent's Notice.

Disposal

73. It follows, if my Lords agree with me, that (i) the appeal against the Judge's primary basis for dismissing the claim should be allowed on Ground 1 but (ii) it is not possible to determine whether the Judge's secondary basis for dismissing the claim is well-

founded or not. In those circumstances I think we have no choice but to remit the case to the High Court for a further hearing to resolve the matters left unresolved by the Judgment. I would also direct that it be heard by a different judge.

74. We invited, and received, submissions on what should be the scope of any further hearing.
75. Given my conclusions above, in my view the first question for the judge hearing the further hearing to determine will be whether the Transfer amounted to an unlawful return of capital such that it could not be ratified under the *Duomatic* principle. That will require the judge to find whether the Transfer was at an undervalue and, if so, which side of the line drawn by Lord Walker in *Progress Property* it fell on. In order to determine whether it was at an undervalue the necessary inquiry will be: (i) what was the true value of the Croydon Properties on 12 October 2012? and (ii) what was the value of the consideration agreed to be provided by JVB7 to JVB5?
76. If the Transfer was not at an undervalue, or even if at an undervalue was not an unlawful return of capital, the claim will then fall to be dismissed. If however the Transfer was at an undervalue and an unlawful return of capital, then a breach of duty will be established and the remaining question will be the loss that JVB5 suffered. That calculation would *prima facie* start with the true value of the Properties at the date of the Transfer but Mr Temmink accepted that credit should be given for any liabilities of JVB5 discharged by JVB7 (that is not only to Fincorp and Rann, but to Mr Almaná, Mr Aulakh and Mr Singh, and Mr Burton himself).
77. Mr Temmink relied on one other head of loss, which is penalties and interest payable by JVB5 to HMRC for any corporation tax attributable to a profit made by JVB5 on the Transfer. He accepted that this is not a claim which is currently pleaded. We have heard no argument as to whether JVB5 should now be allowed to introduce it, nor indeed have we been addressed on the tax legislation at all. I do not think we can fairly resolve this question ourselves.
78. Mr Temmink also sought a direction that the inquiry should be conducted on the basis of the evidence already adduced at trial. Mr Shaw asked for permission to adduce further evidence. I do not think we are best placed to determine this question. There is an undoubted attraction in not duplicating the trial unnecessarily, but I do not think we can determine whether the existing evidence is sufficient, or prevent the judge conducting the further hearing from hearing oral evidence as he or she will have to form their own view. I consider the preferable course in the circumstances is simply to remit the case to the High Court to be listed for a case management conference at which suitable directions can be given. I would expect that such directions would for example direct that the existing witness statements (so far as relevant) and expert's reports stand as the witness statements and expert's reports for the further hearing, deal with any applications to amend the pleaded heads of loss, and direct whether any further evidence should be permitted.
79. I would therefore allow the appeal and remit the case to the High Court on that basis.

Lord Justice Arnold:

80. I agree.

Lord Justice Lewison:

81. I also agree. It is doubly regrettable that the judge (a) decided the case on an unpleaded and unargued basis and (b) failed to make crucial findings of fact on pleaded matters that were in issue. I agree also that the Respondent's attempt to cobble together yet another unpleaded and unargued case was misconceived. Unfortunately, because of the judge's errors, we have no choice but to remit the case for further hearing.