Neutral Citation Number: [2017] EWHC 3397 (Ch)

Case No: HC-2015-003369

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A1NL

Date: 21/12/2017

**Before** :

**MR JUSTICE NUGEE**

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**Between :**

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| **(1) MARK ALAN HOLYOAKE**<br>**(2) HOTBLACK HOLDINGS LIMITED** | **Claimants** |
| **- and -** | |
| **(1) NICHOLAS ANTHONY CHRISTOPHER CANDY**<br>**(2) CHRISTIAN PETER CANDY**<br>**(3) RICHARD STEVEN WILLIAMS**<br>**(4) STEVEN MILES SMITH**<br>**(5) TIMOTHY JAMES DEAN**<br>**(6) CPC GROUP LIMITED** | **Defendants** |

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**Roger STEWART QC, Richard FOWLER** and **John BERESFORD** (instructed by **Gunnercooke LLP**) for the **Claimants**
**Tim LORD QC, Thomas PLEWMAN QC, Geoffrey KUEHNE** and **Ben WOOLGAR** (instructed by by **Gowling WLG (UK) LLP**) for the **Defendants**

Hearing dates: 7-10, 13-17, 20-24, 27 & 28 February 2017,
1-3, 6-10, 13-17, 20-22 March & 4-7 April 2017

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# Judgment Approved

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**Mr Justice Nugee:**

## *Introduction*

1. Grosvenor Gardens House (**"GGH"**) is a Grade II listed mansion block designed by the distinguished Victorian architect Thomas Cundy III and completed in around 1868. It is situated in the Grosvenor Gardens Conservation Area in the City of Westminster, on the eastern edge of Belgravia, just around the corner from Victoria station. The major part of the conservation area consists of two triangular open spaces known as Grosvenor Gardens, lined with grandly-scaled mid-Victorian terraces, and GGH defines the north-east side of the lower, southern, triangle.

2. In the relevant volume of Sir Nikolaus Pevsner's *Buildings of England (London 6: Westminster)* the authors describe the area as having been developed:

> "in large blocks, mostly from corner to corner; the style chosen was a version of the rich c17 French Renaissance which started in London at the Grosvenor Hotel (q.v. Victoria Station, the terminus for Paris)"

and GGH itself as having been built for the Belgrave Mansions Co and containing:

> "first-class flats, which, in imitation of 'the Parisian mode of life' were let furnished, the earliest in London. A restaurant within saved residents from having to cook."

The building consists of a ground and four upper storeys, faced in red brick with Portland stone dressings, with fifth and attic storeys contained in steeply pitched slate mansard roofs of distinctly French pavilion character. It occupies an entire island site with its principal façade of 23 bays fronting onto Grosvenor Gardens, with short returns on Beeston Place and Buckingham Palace Road, and a noticeably utilitarian and irregular elevation at the rear facing a narrow service-road, Eaton Lane, on the other side of which is the garden of The Goring Hotel.

3. Much of the original architectural and structural integrity of GGH has survived but by 2011 it had long since ceased to be used for its original purpose. Apart from some retail units on the ground floor, the building was let out as relatively low grade office units to a range of small business tenants. When an opportunity arose to buy the freehold, Mr Mark Holyoake (the First Claimant in this action), who had some experience of developing property in the area, was attracted to the idea of buying it with a view to converting it back into high-class residential use, and on 18 July 2011 caused Hotblack Holdings Ltd (the Second Claimant, **"Hotblack"**), a Jersey company ultimately owned by him, to contract to buy the freehold for £42m.

4. Under the terms of the contract completion was originally due on 16 September 2011, but Mr Holyoake was not in a position to complete on that date, and secured an extension. He was however still short of the funds needed and on 12 October, after other attempts to raise funds had been unsuccessful, he approached Mr Nicholas (or Nick) Candy (the First Defendant) for a loan of £12m at very short notice, offering generous terms of interest at 20% per annum and 20% of the net profits of the development for an unsecured personal loan. Mr Holyoake had met Mr Nicholas

Candy at university and they were close friends; by 2011 he and his younger brother Mr Christian (or Chris) Candy (the Second Defendant), universally referred to as "the Candy brothers", had become famous as highly successful and wealthy property developers, well-known for expensive residential property development, not least at One Hyde Park, whose units were sold at what was then the highest price per square foot ever achieved in the London property market. Mr Nicholas Candy passed Mr Holyoake's request to his brother, and a loan was duly negotiated over the course of the day and completed on 13 October. It took the form of a loan from CPC Group Ltd (the Sixth Defendant, **"CPC"**) to Mr Holyoake personally, initially unsecured but to be secured if not repaid within 5 months, with interest of 20% per annum, compounded quarterly, and carrying an entitlement to 30% of net profits with a minimum of £10m. CPC is a Guernsey company wholly owned, at least ostensibly, by Mr Christian Candy. The loan enabled Hotblack to complete the purchase of GGH on 13 October.

5. Mr Holyoake had anticipated not only benefiting from having the funds to complete the purchase but also from the Candy brothers' expertise in high-class residential development, his plan being to obtain planning permission, redevelop GGH and sell it as luxury flats, a project which he thought would be very profitable. He was disconcerted therefore to find that instead of devoting their energies to supporting the project, the Candy brothers seemed more intent on securing CPC's position in relation to its loan. CPC queried the sufficiency and accuracy of a net asset statement Mr Holyoake had provided as part of the terms of the loan; threatened, in Mr Holyoake's view unjustifiably, to disclose the loan to the senior lender into the project; and then on 29 November 2011 formally confirmed that in its opinion Mr Holyoake was in default under the loan for failing to provide an acceptable net asset statement. CPC then attempted to get Mr Holyoake either to repay the loan or provide security for it, and a long series of supplemental agreements between Mr Holyoake and CPC, rescheduling the loan on terms, were negotiated and entered into, some against the background of actual or threatened proceedings.

6. Mr Holyoake in due course succeeded in obtaining planning permission for the development of GGH which was granted to Hotblack in July 2013. But he did not build out the development, being already bound under one of the agreements with CPC to sell GGH. Hotblack in the event sold it in February 2014 for over £86m. That enabled Mr Holyoake to repay CPC's loan in full, and in all he paid CPC over £37m, made up of the principal of the loan (£12m), interest (some £7.5m), the minimum profit share (£10m) and extension fees (£7.5m). He also paid large sums (some £795,000) in respect of CPC's legal costs. The sale proceeds were also sufficient to enable Hotblack to pay back its senior lender, Capital A Finance plc (**"Capital A"**), and a junior or mezzanine lender, Oscarone Investments Ltd (**"Oscarone"**), but a large number of other smaller investors had lent into the project, and many of those have not been repaid. Overall the project made a substantial loss.

7. In this action, Mr Holyoake brings a number of claims, largely in tort. He claims that he was deceived into entering the loan in the first place by a misrepresentation by a director of CPC, Mr Richard Williams (the Third Defendant), said to have been made fraudulently, that his net asset statement was being sought as a formality and would not be used against him. A second group of claims is based on allegations that CPC

used threats and intimidation to persuade him to enter into the supplemental agreements, this giving rise to claims that the agreements were entered into as a result of duress, undue influence, intimidation, extortion under colour of due process and unlawful interference with economic interests, and that he and Hotblack were the victims of an unlawful means conspiracy, the alleged conspirators being Messrs Nicholas and Christian Candy, Mr Williams, two other directors of CPC (Mr Steven Smith and Mr Timothy Dean, the Fourth and Fifth Defendants) and CPC itself. Mr Holyoake also claims that he is entitled to damages, and an injunction, for misuse of his personal misinformation; and has a further claim to reopen the terms of the loan agreements under the Consumer Credit Act 1974 (**"CCA"**). This is only a brief summary of the claims but is enough to give a general idea; I give the detail below. The Claimants seek not only the repayment of what Mr Holyoake asserts are excessive sums paid to CPC, but also damages consisting of the profits which it is alleged would have been due to Hotblack had it successfully completed the development, a claim that is pleaded at over £100m.

8. The Defendants, as well as denying the factual basis of the claims, rely on a Settlement Deed dated 15 October 2013 (**"the Settlement Deed"**) under which Mr Holyoake and Hotblack released any claims that they might have against CPC or its associates (defined in terms which would include all the other Defendants). The Claimants' response is that the Settlement Deed itself was entered into as a result of duress or undue influence and/or is liable to be reopened under the CCA.

9. I set out below my findings of fact. This litigation was hard fought and many issues of fact were raised in the course of the trial, some of less relevance than others. I have not found it necessary to deal with all of them, but have sought to deal with all the matters directly relevant to the allegations in issue, and such other matters as seem to me to assist in resolving them.

***The witnesses***

10. The protagonists, Mr Holyoake on the one side, and Messrs Nicholas and Christian Candy on the other, were each cross-examined at great length. Each side made a sustained attack on the other's veracity. The meticulous forensic examination of these matters has persuaded me that there is some justification for these attacks on both sides, and that each of these three has been shown to be willing on occasion to lie when they consider their commercial interests justify them in doing so. I do not go into the grounds for these conclusions here: I give the detail below where appropriate. For present purposes what is significant is that it means that in assessing what happened – or to be more precise, in deciding whether any particular factual allegation has been proved to the requisite standard, that is on the balance of probabilities – I have had regard in particular to the contemporaneous documentary material (of which there is an abundance in this case, particularly e-mails) and the inherent probabilities. This indeed is what the Court usually does when faced with a conflict of oral evidence – it is by now a commonplace that the memory even of witnesses doing their honest best is often unreliable (see *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC (Comm) at [15]-[23] per Leggatt J) – but is particularly apt when, as in this case, the veracity of witnesses is in question, as has long been recognised: see *The Ocean Frost* [1985] 1 Ll Rep 1, 57 per Robert Goff LJ:

> "I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities."

11. I start by giving some of the background of the more significant of the participants in the events giving rise to the litigation. Each of these gave evidence before me; there were also other witnesses that I will refer to as appropriate, but these are the central ones.

*Mr Holyoake*

12. Mr Holyoake was a student at Reading University in the early 1990s where he met Mr Nicholas Candy. He then set up a business called Bloomsbury International Ltd which was involved in the distribution and manufacture of food and seafood products. This grew into a significant group of companies, known as British Seafood, which collapsed in early 2010, at least four of the companies, including Bloomsbury International Ltd itself, then one of the group's principal trading companies, being put into administration on 19 February 2010 by Morgan J. Mr Holyoake was then Chief Executive Officer or CEO of the four companies, as well as the majority owner of the business, holding over 50% of the ultimate holding company, British Seafood Group Holdings Ltd, and about 50% of a related holding company, British Seafood Distribution Group Holdings Ltd.

13. The collapse of British Seafood led to Mr Holyoake being involved in heavy High Court litigation, being sued in at least three sets of proceedings in 2010. The detail of these claims is not relevant to the present action, but it is possible to gain an idea of the scale and seriousness of them from some of the material in evidence.

14. The first action, brought by claim form dated 16 March 2010, was a claim brought by the four companies already referred to as a result of investigations by the administrators, who were partners in Deloitte LLP. According to the Particulars of Claim, the companies' liabilities at the time of going into administration were said to be then in excess of £250m, owed to a large number of bank lenders, against assets in the shape of non-related party trade debts and realisable stock of some £15.6m. The Particulars of Claim alleged that Mr Holyoake, together with Mr David Wells, the companies' Finance Director, had conspired to commit a large-scale fraud on the companies. The essential allegation was that the two of them, who were said to have had complete managerial control over the companies, had caused the claimant companies to obtain, and then borrow large sums under, bank facilities for the purpose of funding specific purchases of fish products; that they had caused these sums to be remitted to suppliers in Hong Kong on the basis that the companies were purchasing such products; and that many such payments were not made in respect of any genuine legitimate business transaction, being paid to ostensible suppliers in Hong Kong that were not genuinely supplying such product and that were ultimately beneficially owned by Mr Holyoake. I should make it clear that although it was suggested to Mr Holyoake in cross-examination that he would not have settled the claims in the way he did (as to which see below) unless there was something in them,

I was not asked to, and am in no position to, form any view as to whether the claims were well-founded; it is also fair to point out that in a reported judgment, *Bloomsbury International Ltd v Holyoake* [2010] EWHC 1150 (Ch), Floyd J recorded, when considering whether to require fortification of the claimants' cross-undertaking, both that the allegations were hotly contested and that the scale of the fraud, if there was one at all, might turn out to be more limited than it was originally presented to be (see at [3]). Nevertheless the claims were sufficiently cogent to lead to the grant by Floyd J on 16 March 2010, and the later continuation, of both a worldwide freezing order in the sum of £210m, and a search order, against Mr Holyoake.

15. On 25 March 2010 a second action was brought by GMAC Commercial Finance Ltd against Mr Holyoake, Mr Wells, and Mr Holyoake's father (Mr Alan Holyoake) and brother (Mr Laurence Holyoake). This concerned another company, Seatek Ltd, part of the distribution side of the business, of which Mr Holyoake and Mr Wells were directors and which had gone into administration on 23 February 2010. The claim here was that GMAC had advanced monies to the company under an invoice discounting agreement against debts notified to it, but that the debts had turned out not to be bona fide obligations in the ordinary course of business. All the defendants were sued for breach of warranties given by them, and Mr Holyoake and Mr Wells were also sued for damages for deceit, the claim being for some £6m.

16. A third action was brought by claim form dated 12 May 2010 by 3i Group plc and other companies in the 3i group (together **"3i"**), again against Mr Holyoake and Mr Wells (and others). 3i had invested in the British Seafood group, and although I have not seen the details of the claims made in this action, it was accepted in evidence that the claim was for fraud, and an online report referred to 3i claiming the sum of £75m that it had been fraudulently induced to invest in British Seafood. Undertakings in the nature of a freezing order were given by Mr Holyoake to Vos J, and later continued, and Floyd J was told that the amount frozen by such undertakings was £90m (see *Bloomsbury International Ltd v Holyoake* at [28]).

17. Other related proceedings were taken in Hong Kong, Luxembourg and Iceland and although they do not appear to have involved Mr Holyoake personally as a defendant, they involved his companies.

18. The Bloomsbury and 3i actions (and the related foreign proceedings) were settled, with no admission of liability, by a Deed of Settlement, known as the Overarching Agreement, dated 23 December 2010. For present purposes two points are relevant. The first is that scheduled to the agreement were lists of Mr Holyoake's assets and liabilities, which he warranted to be true, accurate and complete. Where values are given for his assets they form an interesting contrast with those shown on the net asset statements provided by Mr Holyoake to CPC less than a year later. The second is that under the terms of the agreement Mr Holyoake was obliged to pay substantial sums to the claimants in both actions by way of settlement. A total of £13.8m was to be paid to a 3i company (which acted as Security Trustee on behalf of the two groups of claimants). Mr Holyoake was personally liable to pay, or (as the case may be) procure the payment of the entire sum; although it was envisaged that £250,000 was to come from Mr Wells, and some sums from others, the bulk of this was expected to come from Mr Holyoake himself. The sum was payable by instalments, with certain

sums payable in short order, a further instalment, to take the total paid up to £6.975m, due in September 2011 and the balance of £6.825m due in December 2011. Mr Holyoake gave charges over his assets, including in particular his properties, to secure this liability.

19. The GMAC action was in the event also settled, although in this case not until 12 January 2012. The Settlement Agreement required the defendants to pay £1m immediately and a further £2.13m by 2 March 2012.

20. Mr Holyoake was also the subject of an investigation by the Serious Fraud Office in connection with the collapse of British Seafood. Again I do not have the details, but ultimately the investigation did not result in any action being taken against Mr Holyoake.

21. It is scarcely surprising in the circumstances that Mr Holyoake's energies in 2010 were devoted to dealing with the litigation. In April 2011 he told Mr Kalkwarf, an architect who was pressing him for payment of his fees, that the litigation during the course of the previous year was *"all-consuming"*, and that his time since the settlement in December 2010 had been spent unwinding the injunctions on his businesses and personal assets.

22. The upshot of all this was at the time when he was trying to acquire GGH (that is in the middle of 2011), he had not entirely put the British Seafood episode behind him. He still owed substantial sums (of the order of £10m in October 2011) to 3i under the Overarching Agreement, and had charged his properties to them, which meant that he had little collateral to offer lenders. He also had reputational issues, which made raising finance more difficult. For example in July 2011 he tried to obtain a loan for the purchase of GGH from Investec, a bank of which he was a long-standing customer (an Investec company had a subsisting mortgage for about £9m on a property he owned at 42-44 Grosvenor Gardens). Mr Daniel Austin of Investec, who was in general supportive of Mr Holyoake's application, told him on 6 July that he had been asked by others at Investec not to lend him funds, and it was *"causing him issues internally"*; Mr Holyoake said in evidence, when asked if his role in the collapse of British Seafood was causing these issues, *"Yes, there were issues wherever I went in that respect."* In August 2011 Mr William Pym (a close associate of Mr Holyoake's who I refer to in more detail below) approached Deutsche Bank on his behalf and received a response that compliance colleagues had carried out preliminary checks on Mr Holyoake and the bank would like to discuss their findings, which Mr Pym forwarded to Mr Holyoake with the comment *"You continue to be a naughty boy"*. Indeed at the end of April 2011 a Google search of his name threw up 7 negative results in the first 10, and Mr Holyoake engaged a business called Digitalis Media to seek to improve this.

23. Mr Holyoake's own evidence in cross-examination was that when he acquired GGH he was *"transitioning"*, that is that he was in a transition period between finally paying off 3i and moving into a new life, building a new business. He accepted that the GGH opportunity did not come at an ideal time for him, and it would have been better if it had come up 6 months later.

24. Three other points by way of background can conveniently be noted here. First, Mr Holyoake's main business interest in 2011 was another seafood business. This was Iceland Seafood International ehf (**"ISI"**), an Icelandic company. Mr Holyoake was in the process of acquiring a substantial shareholding in it, using Oakvest Holdings sarl, a Luxembourg company wholly owned by him, which held a 55% interest in International Seafood Holdings sarl (**"ISH"**), another Luxembourg company, which had agreed to acquire the shares in ISI. At the time of his acquiring GGH however, these shares had not been fully paid for.

25. Second, Mr Holyoake and his wife Emma had sold their London house in 2010 and moved to live in their villa in Ibiza, Casa Campanilla. Mr Holyoake told me that although he moved in 2010, he thought he did not become formally resident in Spain until 2011 because it took some time to process the paperwork. The villa and the land it stood on was held by an Irish company, Hollywell Ltd (**"Hollywell"**), and some additional land by another Irish company, Blue Valley Ltd (**"Blue Valley"**), the shares in each company being owned 50/50 by Mr Holyoake and his wife. The land owned by Hollywell and the shares in Hollywell were charged to Citibank.

26. Third, Mr Holyoake had had some experience of property development, including in the immediate vicinity of GGH. The assets disclosed in the Overarching Agreement included (i) a leasehold interest in 42-44 Grosvenor Gardens (together with 42-44 Grosvenor Gardens Mews South) held by Mr Holyoake through Jaybright LLP and (ii) a leasehold interest in 46-48 Grosvenor Gardens (together with interests in 38, 46 and 48 Grosvenor Gardens Mews South) held through Wellgold LLP. Nos 42 to 48 Grosvenor Gardens are four adjacent buildings forming part of the terrace on the west side of the lower triangle of Grosvenor Gardens and so are directly opposite GGH; the mews properties are behind them. Mr Holyoake had acquired 46-48 in January 2007, and 42-44 in March 2007, and both had been redeveloped in 2009/10 for offices (including offices he used himself which overlooked Grosvenor Gardens and from which you could see GGH), the mews properties being redeveloped for residential use. The Overarching Agreement also disclosed another property acquired for development, a freehold at 2 Westbourne Grove Mews W11, held through Hazelend LLP, which Mr Holyoake had acquired in 2007 as a car repair garage and which he had plans to redevelop for mixed commercial and residential use. None of these projects however was on anything like the same scale as GGH, and Mr Holyoake confirmed in evidence that GGH was the biggest project that he had done.

27. It is convenient at this stage to deal briefly with my assessment of Mr Holyoake as a witness. I have already said that the evidence shows that he was willing to lie when his commercial interests justified it. The evidence reveals some striking examples of this. In April 2012 he and Mr Wells created a loan agreement between Mr Holyoake and Hotblack, and in July 2012 board minutes of Hotblack, both of which were backdated. In plain language these were forgeries, designed to conceal from CPC the fact that Hotblack had also borrowed money from Oscarone. In April 2013, he and Mr Lovering colluded to put forward to CPC a contract for a sale of GGH to Sherbourne Properties Ltd (**"Sherbourne"**) as if it were a Qualifying Contract for the purposes of one of the agreements with CPC. This was despite the fact that a Qualifying Contract required the purchaser to be an arm's length third party, and as Mr Holyoake and Mr Lovering knew, Sherbourne was not, being wholly owned by

Mr Lovering. In September 2013 Mr Holyoake and Mr Lovering colluded to set up a telephone call between Mr Dean and Mr Lovering in which Mr Lovering impersonated a representative of a proposed financier, Arlington Properties SA (**"Arlington"**). In evidence Mr Holyoake sought to justify such acts on the basis that CPC had behaved so badly towards him, starting on 8 November 2011, that he considered himself absolved from any duty to be honest towards them. That is in itself a novel and somewhat surprising proposition, but in any event it cannot explain a series of lies that he can be shown to have made before the loan from CPC was concluded, such as a lie to the vendor of GGH that he had finance available, and a lie to 3i that he had not acquired GGH.

28. Moreover his lies included what I am satisfied was a deliberate lie in his pleadings. As appears in more detail below Mr Holyoake completed the purchase using not only a senior loan of £24m (at that stage from Investec) and CPC's loan of £12m but also a mezzanine loan from Oscarone of £7.5m. Oscarone's loan was made to Hotblack in October 2011 and there is no doubt that Hotblack needed to, and did, use it in order to complete the purchase. The Candys knew nothing of this at the time and indeed Mr Holyoake never disclosed the Oscarone loan to them during the entirety of the time he was dealing with them.

29. By the time of the Defence in these proceedings (served on 15 October 2015) however, the Defendants had discovered the existence of the Oscarone loan. That enabled them to plead that Mr Holyoake had deliberately omitted reference to the loan in net asset statements that he provided to CPC in October and November 2011 (paragraph 65.9 of the Defence), and that a confirmation given by Mr Holyoake to Mr Christian Candy on 18 March 2012 that he only used his equity and CPC's loan to acquire GGH and no other third party equity was a knowing lie as he had used funds from Oscarone (paragraph 147). In his Reply (served on 8 December 2015 and containing a statement of truth signed by Mr Holyoake personally) Mr Holyoake pleaded in response to paragraph 65.9 that the net asset statements only required Mr Holyoake to show assets of £120m at the time immediately prior to the making of CPC's loan and:

> "the fact that Oscarone thereafter became a source of funding for the Project was wholly irrelevant."

And in response to paragraph 147 he pleaded that he did give the confirmation:

> "and it was true. While Mr Holyoake did obtain funds from Oscarone, this was not in order to purchase the Property, but in order to help fund the next stage of the Project."

Both these statements were flatly untrue, and the second one in particular, which contained a clear denial that the Oscarone facility was obtained in order to purchase GGH, is not something that can easily be explained away as a mere lapse of memory. Mr Holyoake asserted in oral evidence that this was rather something that he simply did not pick up, but I do not accept this evidence; the allegation that was being responded to was that he had told a knowing lie and that obviously meant not only that instructions on this point could only realistically have come from him, but also that care would be taken to obtain those instructions accurately. Quite apart from this,

the Defendants' solicitors (formerly called Wragge Lawrence Graham & Co, later called Gowling WLG) continued to pursue the point: on 15 December 2015 they served a Request for Further Information which expressly asked for all matters relied on in support of the contention that the funds obtained from Oscarone were to help fund the next stage of the project and details of what funds were obtained, when, and how they were applied; the Request was answered on 27 January 2016 (again supported by a statement of truth signed by Mr Holyoake personally), the response to this question being that the Claimants' case was perfectly clear and no clarification was necessary. If the original pleading in the Reply had been an honest mistake which had crept in by oversight, it is very difficult to believe that an explanation to that effect would not have been given. Then on 24 May 2016 Gowlings sent a letter to the Claimants' solicitors, gunnercooke, referring to the completion statement for the purchase of GGH, which they had by then obtained and which showed that the Oscarone monies were used for the purchase, and inviting Mr Holyoake to explain the true position on affidavit. That letter, and several chasing letters, were simply ignored. If it had been an honest oversight, one would again have expected that to be said promptly.

30. I do not need to set out any more examples here. I have said enough to explain why I approach Mr Holyoake's evidence with very considerable reserve. And while I doubt whether the law ever regards lies as an acceptable way to conduct business dealings, it need hardly be said that the Court is bound to take a particularly adverse view of a litigant who lies in the course of litigation, as this undermines the Court process itself.

*Mr David Wells*

31. I have already referred to Mr Wells as a defendant in the litigation arising out of British Seafood. He is a chartered management accountant. He has worked with Mr Holyoake since 1998 on a day-to-day basis and served as financial director and board member of many of his businesses. He is in effect Mr Holyoake's right-hand man when it comes to his financial affairs.

32. The evidence reveals that he was willing to do whatever Mr Holyoake asked him to do, including the forgery already referred to. There were a number of other examples of questionable behaviour, some of which I will come to as appropriate.

33. Mr Wells disclosed in his witness statement that he had an arrangement with Mr Holyoake under which Mr Holyoake pays him 5% of the profits on all investments, which would have included any profit made on GGH; and in oral evidence explained that the 5% would apply to any recoveries made by the Claimants in this action (but only on a net basis so after allowing for the repayment of any outstanding liabilities).

34. In oral evidence Mr Wells had difficulty distinguishing between his own position and that of Mr Holyoake, frequently referring to what *"we"* did or thought when he meant Mr Holyoake. I do not think his evidence is truly independent of Mr Holyoake's.

*Mr William Pym*

35. Mr Pym is a banker. He spent 10 years as a private banker with Citibank in Geneva,

and then in 2006 moved to Crédit Suisse. He first met Mr Nicholas Candy in 2004, and was introduced to Mr Christian Candy about a year later, and (by Mr Nicholas Candy) to Mr Holyoake in about 2006, becoming friendly with both the Candy brothers, particularly Mr Christian Candy (who accepted in cross-examination the description of Mr Pym as a *"good and close friend of yours"*, and who himself described him as *"one of my dearest friends, one of only six people or seven people on my stag weekend"*), and also with Mr Holyoake. While at Citibank and Crédit Suisse he assisted the Candy brothers with financing some of their larger developments, including the refinancing of One Hyde Park, and the business he received from them made up a significant portion of his overall business. He was also Mr Holyoake's banker at Crédit Suisse.

36. In 2009 he left Crédit Suisse, and in March 2010 became one of the managing partners of a Swiss company called The Private Office SA (**"TPO"**). TPO had initially been set up under the name Heritage Private Office as a joint venture between Banque Heritage and 3 partners, one of whom was Mr William Lovering, but in March 2010 Banque Heritage had sold its stake to the management. It was set up to provide wealth management services to wealthy individuals, the business model being that it would charge its clients commission on transactions and for advice, and would also seek returns by investing its own capital alongside its clients' capital.

37. Mr Holyoake encouraged Mr Pym to join TPO, and had a very close involvement in it personally. The precise details of his involvement remained somewhat obscure to me even after the issue had been explored in oral evidence, but it is apparent that he either was, or was intended in due course to become, the majority shareholder in the business: a list of shareholder contributions dated 20 May 2011 showed Mr Pym and Mr Lovering as each holding 3,000 out of 19,000 shares (just over 15% each), another individual holding 500 (2.6%) and "NB/MH" as holding the remaining 12,500 shares (over 65%). MH is Mr Holyoake and NB is Mr Nicholas Barton, a very close friend of his, and Mr Holyoake explained in evidence that because of the collapse of British Seafood he had enough on his plate and it was not the right time for him to invest, so he had asked Mr Barton if he would like to invest instead of him, but that from February 2011, Mr Holyoake had started taking over Mr Barton's position. Although the process may not have been completed by July 2011 when he acquired GGH, Mr Holyoake accepted that he had an influence on TPO from its inception.

38. Mr Pym also has an interest in the outcome of the litigation. He and Mr Lovering each had a 15% stake in the GGH project, and he accepted that that had been transferred to the litigation: Mr Holyoake's evidence was that after all the third parties who had lent into the project had been repaid, Mr Pym and Mr Lovering would get 15% each and he would get the balance.

39. Mr Pym gave some evidence for the Claimants at an interlocutory stage in which he denied that he was doing so because of any personal interest in the litigation. Mr Lord QC, who appeared for the Defendants, submitted that this was misleading and untrue, but that I think overstates it: he did not in terms deny that he had a personal interest, but only denied that he was giving evidence because of any personal interest, which is not the same. But neither there nor in his witness statement for trial did he clearly explain that he did have such an interest and what it was, and indeed in his

witness statement for trial he referred to having at one stage discussed a potential profit share which was in the event rejected. In oral evidence he said that he had said in his witness statement that he had invested in GGH (this was certainly made clear in Mr Lovering's witness statement) and it was *"inferred"* that he had an interest in the litigation. I found his evidence on this very unimpressive; a witness who is not a party to an action will normally have no financial interest in the outcome and if, unusually, he does, it is appropriate that he disclose it fully and fairly so that the Court can assess his evidence in the light of that fact. To leave it to be inferred from some vague words (which to my mind do not justify the inference in any event) is not good enough.

40. Mr Pym was shown to have been willing to mislead CPC (and at an earlier stage Investec) as to the availability of funds to Mr Holyoake, as detailed below. I find that he is not truly independent of Mr Holyoake and treat his evidence with considerable caution.

*Mr William Lovering*

41. Mr Lovering was one of the founder members of TPO, and from March 2010 ran it with Mr Pym. He also had a background in banking, working at a Swiss private bank called Lombard Odier. From 2005 to 2009 he worked for the family office of a Saudi family known as Al-Rajhi.

42. As already referred to, he too had an interest in GGH which has been transferred to the outcome of this litigation. He made it clear in his witness statement for trial that he and Mr Pym had invested their own funds in GGH. But he too failed to say anything about having a 15% interest in the outcome of the litigation, and indeed said, under the heading *"Interest in GGH"*, that:

> "I do not have, and have never had, any other direct or indirect ownership interest in the GGH project."

In oral evidence he initially denied that he had any interest in the outcome of the proceedings specifically; having then admitted that he had a 15% profit share in GGH and that that carried over to the litigation, he sought to explain what he had said in his witness statement by distinguishing between an interest or stake in GGH and a profit share at the back end or *"carry"*. I was not impressed with this evidence. However it was originally structured, whether as a back-ended carry or not, Mr Lovering plainly has a significant financial interest in the outcome of this litigation and it should have been fully and fairly disclosed.

43. I have already referred to the role Mr Lovering was willing to play in deceiving CPC both as to the existence of a Qualifying Contract and in impersonating a representative of Arlington. I find that he too is not truly independent of Mr Holyoake, and again I treat his evidence with considerable caution.

*The Candy brothers*

44. Mr Nicholas Candy, as already mentioned, met Mr Holyoake at Reading University where they became friends, sharing a house together in their second year. They then

lost touch with one another, but were put back in touch in about 2007, and thereafter became close friends, Mr Nicholas Candy seeing Mr Holyoake every few weeks for drinks or dinner, visiting his villa in Ibiza a number of times, and travelling to Hong Kong with him.

45. It was suggested to Mr Holyoake, on the basis of certain e-mails, that despite his apparent friendship with him, he privately had a rather disparaging view of Mr Nicholas Candy. I am not persuaded that this was so, the e-mails in question (which I need not set out) not being anything other than jokey banter. I see no reason to doubt that Mr Holyoake and Mr Nicholas Candy were indeed in 2011 genuinely close friends who saw a lot of each other socially and enjoyed each other's company. They had not however done any business together.

46. Mr Stewart QC, who appeared for the Claimants, asked me to find that Mr Holyoake trusted Mr Nicholas Candy, and through him Mr Christian Candy, and was excited at the prospect of working together in relation to GGH. I accept that Mr Holyoake trusted Mr Nicholas Candy as a friend; and that he was excited at working with the Candy brothers in relation to GGH. I am not sure that he trusted Mr Christian Candy in particular – he was not a close friend of Mr Holyoake's although he had met him through his brother on a number of occasions – but I accept that he had no particular reason to distrust him.

*The ownership of CPC*

47. The Candy brothers have a very high profile in the media and are well known for being highly successful in the field of high-end property development. Mr Nicholas Candy estimated that from 1995, when they bought their first property, to about 2005, when he left the UK to live in Monaco for tax reasons, they had probably done some 50 developments together, and he had made *"tens and tens and tens of millions of pounds"*. They used a number of corporate vehicles for their developments and in 2001 also established together Candy & Candy Ltd (**"C&C"**); C&C was an English-registered company that specialised in luxury interior design. The ostensible position is that they subsequently split their interests, Mr Christian Candy resigning as director of C&C in March 2011 and selling his shares to Mr Nicholas Candy, and concentrating on CPC, which operates principally in the field of property development, leaving Mr Nicholas Candy to own and run C&C which deals with interior design, project management and marketing. The position of both brothers is that Mr Christian Candy is the sole beneficial owner of CPC (a company which he personally had established in Guernsey in 2003, the company name representing his initials), and that Mr Nicholas Candy has no interest in it. That this was the true position was supported by each of the witnesses who were or had been directors of CPC (Messrs Williams, Smith, Dean and David) when they gave evidence.

48. The Claimants however have alleged that this ostensible position is a façade. It is common ground that the brothers have different roles suited to their somewhat different skills. Mr Pym, who had been friends with both of them, put it like this: Mr Nicholas Candy covered the public representation and promotion side of the business, being the *"front of shop"* with all the sales talk, and his brother covered the operations and financials, being the *"brains in the back office"*. Mr Christian Candy

accepted as fair the way it was put to him by Mr Stewart in cross-examination: *"you are the number and details man and he is the salesman and showman"*, Mr Candy agreeing that he was more numerate and his brother more marketing based. But the Claimants say that the reality is that despite their different roles, they are in truth joint beneficial owners of CPC, an assertion that the Claimants have advanced vigorously and persistently in the face of the brothers' denials.

49. This case was based on a number of strands. First, there was the evidence of witnesses who said that Mr Nicholas Candy routinely held himself out as a co-owner of everything. Mr Holyoake's evidence was that Mr Nicholas Candy told him on innumerable occasions that he and his brother jointly owned all their business interests together; that they had been advised to restructure their businesses for tax reasons, which would mean one of the two brothers would have to live offshore and the company used for their property development would also have to be based offshore; that it was for this reason that his brother Chris had moved offshore while he remained in the UK to have a presence on the ground, CPC being set up in Guernsey with Chris as the only shareholder; and that he trusted his brother completely and was comfortable that he would get his 50% share of the profits. Mr Holyoake also said that he had hundreds of conversations with Mr Nicholas Candy about his business interests and they were always about CPC projects, not about C&C.

50. Mrs Holyoake gave evidence that Mr Nicholas Candy (whom she had known through her husband for many years and seen on numerous occasions socially) used to tell her that he and his brother were 50/50 partners and owned everything jointly, although his brother held the properties and projects for tax reasons abroad. She also became good friends with Holly Valance (formerly Mr Nicholas Candy's girlfriend and now his wife), and recounted an incident at a party at a friend's house in Ibiza in June 2012 when Ms Valance told her that Mr Nicholas Candy was upset because his brother was not giving him his 50 per cent of the money. Despite submissions from Mr Lord that Mrs Holyoake's evidence should be rejected on the grounds that she was simply parroting untrue explanations given by her husband, I found her a credible witness. She was obviously fiercely loyal to her husband and deeply supportive of him, but did not strike me as a woman who was simply repeating untruths at his behest, but as one who was giving her own independent evidence to the best of her recollection.

51. In similar vein, Mr Pym said that during the entirety of his dealings with the Candy brothers, both brothers had always been intimately involved and they told him that their business was owned 50/50 between the two of them; he regularly dealt with both of them in relation to CPC business, and Mr Nicholas Candy was not only involved but often leading the decision making process.

52. Second, the Claimants called Mr Clive Hyman. No objection was made to his giving evidence although none of it directly concerned GGH or the events on which the action is based. Mr Hyman is a chartered accountant. He was formerly a partner at KPMG, who left KPMG in 2004 and set up his own consultancy under the name Hyman Capital in 2005. For a number of months in 2005 he acted as interim CEO of C&C. His brief included stabilising the business after a period of upheaval, reviewing files on completed transactions, putting them in order and completing the paperwork, and implementing appropriate financial controls. It also included preparing for the

split of the business into two companies, one to be located offshore and the rump of the business to be left onshore. He understood that this proposal was driven by tax considerations and had been drawn up some 6 months before his engagement by Mr Kevin Cubitt, who was the Tax Strategy manager for C&C. Mr Hyman said that the brothers used to joke that no-one would ever understand their tax affairs, not least because nothing was written down. The understanding was that they were brothers and would share everything equally; although Mr Christian Candy was the sole shareholder of CPC, it was Mr Hyman's clear understanding that he would *"look after"* his brother's financial interests, this being common knowledge among at any rate the senior management team. This was a purely verbal agreement between brothers, not recorded anywhere.

53. Mr Hyman had come forward to give evidence voluntarily. There was an unusual aspect of his evidence which is that after giving his first witness statement (dated 5 November 2016) he made a second witness statement (dated 23 February 2017), which detailed some approaches he said he had received since his first statement. I need not refer to the first such approach, but the others were telephone calls from a business contact of his, Mr Bradley Annis. According to Mr Hyman Mr Annis claimed to have an (unnamed) contact who worked for Mr Christian Candy. On one call, around early February, Mr Annis said that his contact had told him that the Candy brothers were unhappy with certain aspects of Mr Hyman's evidence and would go for him very heavily at trial; on another call, on 20 February, Mr Annis said that his contact had told him that the Candy brothers had let it be known that should their defence of this action be successful, they would pursue anyone who had given evidence for the Claimants, through the Courts. Mr Hyman took this last approach sufficiently seriously to report it to the police. Mr Hyman was naturally cross-examined about this, but stuck to his evidence; he gave it convincingly and I am disposed to accept that he was telling the truth about the calls from Mr Annis. It was suggested that he had an axe to grind against the Candys but I was not persuaded that his evidence could be explained away on that basis.

54. None of that of course establishes that what Mr Annis said to him, let alone what Mr Annis's unnamed contact is supposed to have said to Mr Annis, is true and the episode as a whole illustrates the undesirability of relying on untested multiple hearsay evidence. However much I am disposed to accept Mr Hyman's evidence about it, it would I think be wrong to base any findings against the Defendants on it. There was however an interesting sequel: Mr Christian Candy was asked if he had let it be known that he would be pursuing any witnesses who came to give evidence for Mr Holyoake, and gave what I consider to be a rather surprising series of answers. Instead of simply saying that he had not considered, and would never consider, such a thing, his answers were:

> *"A. No, my Lord. I take this in steps. First of all I need to get through this litigation. Once this litigation is resolved, I will then consider my next steps. I'm a guy who works very much in projects, so I'm just focused purely on this litigation.*
>
> *Q. So do I take it from that that you are contemplating taking steps against Mr Hyman?*

> *A. My Lord, as my legal team have told me, "Christian, one step at a time. Focus on your evidence. Focus on this case. Wait for his Lordship to give judgment and then we can regroup."*
>
> *Q. Can you answer my question please?*
>
> *A. I think I have, my Lord. I do not look beyond actually the giving of my evidence, then look beyond the trial and then we wait patiently for your judgment, my Lord.*
>
> *Q. Do I take it that you are contemplating steps against Mr Hyman?*
>
> *A. No, my Lord.*
>
> *Q. Your previous answer, I suggest, strongly suggests that that is actually within your contemplation.*
>
> *A. I see no basis on which I can take any action against Mr Hyman, so, I just want to get through this litigation and then we will sit down with my legal team and figure out where to go next."*

That indicates that Mr Candy had taken some advice from his legal team and been told that he should focus on the case and his evidence, and that they could consider any next steps after judgment; it also rather suggests that he has been told, or discovered, that there is no action that can be taken against Mr Hyman, which itself suggests that he was interested in whether there might be. There is other evidence that Mr Candy does not like to be crossed, and I think there may be some truth in the suggestion that he was angered by Mr Hyman's evidence. I am not however going to make any positive finding to this effect, as I do not consider it ultimately assists in the resolution of the issues in this trial.

55. Third, the Claimants relied on a number of documents which they said demonstrated that Mr Nicholas Candy had an interest and involvement in CPC that can only reasonably be explained by him being a co-owner. Some of them do not I think bear the weight which Mr Stewart sought to put on them: an example is an e-mail of 4 February 2012 from Mr Christian Candy to his brother where he said:

> "We have loans out to him of [redacted]"

This was a reference to monies owed by Mr Smith to CPC (which had advanced him money) and it was suggested that the *"We"* here was a reference to the two brothers. But it seems to me quite natural for Mr Christian Candy as the owner of CPC to refer to his company as *"we"*; indeed Mr Christian Candy said that he used *"we"* to refer to himself and CPC without any distinction between them, an explanation that I accept. Similarly Mr Stewart placed considerable emphasis on an e-mail from Mr Christian Candy to Mr Holyoake on 14 December 2011 in which he referred to his brother as *"my lifetime business partner"*. But he was not here giving an account of any financial arrangements that he had with his brother, but explaining why he felt able to trust him. On any view, they had built their fortunes together. They also continued to have a close working relationship: where CPC carried out a development, C&C would be engaged to provide a number of services for the

development such as development management, interior design, planning and marketing. They also spoke regularly on the telephone and Mr Christian Candy routinely consulted his brother on business propositions, and used him as a sounding board for ideas. Indeed as well as the board meetings of CPC at which *"actual operational decisions"* (to use Mr David's words) were taken on behalf of CPC by its properly appointed directors (and which Mr Nicholas Candy never attended), there were regular strategy meetings which he did attend and which discussed matters at a more high level; I do not think it matters if he was there as representing C&C which might have an interest in CPC's projects, or simply as someone whom his brother trusted and whose advice he valued. In those circumstances I do not find Mr Christian Candy's reference to his brother as his *"lifetime business partner"* to be any indication of the true ownership of CPC.

56. There is however other material which is not quite so readily explicable. In particular Mr Nicholas Candy had a habit of referring to CPC's business as if he had an interest in it. There are numerous examples in the disclosure of which I will give a few. At the very inception of the loan on 12 October 2011, having spoken to his brother, he e-mailed Mr Holyoake and referred to Mr Smith and Mr Williams as *"my directors"* when what he meant was the directors of CPC; in e-mails to his brother on 13 and 24 January 2012 he referred to *"we"* making £10m from a 4 month investment and *"our 30%"* and *"the profit he is giving us"*; in e-mails to his brother on 6 February 2012 he referred to *"we"* needing to take a charge as *"we have zero security"* and asked whether an agreed deal his brother had reached was *"a good deal for us"*; in an e-mail of 30 March 2012 to his brother, Mr Smith and Mr Dean he referred to *"the £12 million we gave him"*. All of these were in respect of the loan made by CPC in which on the face of it he had no financial interest at all.

57. Then there are instances where Mr Nicholas Candy can be shown to have been consulted in decisions that were properly decisions for CPC. Again I will give only a few examples. In August 2011 an opportunity arose to acquire the London Heliport; on 10 August Mr Nicholas Candy, having just told the vendor's agent that the potential purchaser would be CPC, e-mailed his brother, Mr Smith and Mr Ben David (another director of CPC), to say *"If we can buy this…"*, and later that day Mr David e-mailed him asking him to confirm *"what level you propose"* for an indicative offer. On 23 January 2012, there was an e-mail exchange where Mr Holyoake was suggesting that each side bear their own costs of a particular transaction in relation to the loan, to which Mr Nicholas Candy's reaction was that surely he should be covering all costs; Mr Smith replied *"Your call"*. Strictly speaking it was no business of his at all what arrangement as to costs CPC came to with Mr Holyoake. Again in December 2013 Mr Christian Candy e-mailed him referring to a bonus for Mr Dean (to be paid by CPC), and saying that *"We can discuss his bonus once MH repays"*.

58. Mr Stewart also referred to a promotional video which had been made for One Hyde Park, and comments on the video by Mr Smith (who had been CPC's Head of Tax until August 2014) to the effect that it contained numerous statements which were unhelpful from a tax perspective, such as that *"the Candys"* are property developers, and that *"the Candy brothers"* needed a return on their money. Mr Smith explained that he was correcting factual inaccuracies, whereas Mr Stewart submitted that the comments in the video reflected the reality, which Mr Smith was trying to cover up.

59. In fact I think the video, and Mr Smith's comments on it, are of no real assistance. Mr Smith, as Mr Stewart accepted, was very careful in his evidence, with an impressive recall of detail. He gave evidence that he had always had strong views about tax avoidance. Tax avoidance might be legal (as opposed to tax evasion which was illegal) but he personally had a strong aversion to artificial and highly technical tax avoidance schemes. He therefore took the view that it was necessary that the substance or reality of the transaction had to be such as to mitigate tax. I accept this evidence, and viewed against this background, it is not difficult to see why he should be concerned that loose and imprecise statements in the video such as that the Candys needed a return on their money did not accurately reflect the real position. In fact his main concerns seem to have been statements by Mr Christian Candy implying that he made all the decisions on One Hyde Park, whereas the true position was that the developer was a company called Project Grande Guernsey Ltd (**"PGGL"**), a joint venture between CPC and the former Prime Minister of Qatar in which CPC had a minority interest; and a statement by Mr Christian Candy that he had been on site every single week for 5 years, which Mr Smith described as very unhelpful (no doubt because Mr Candy was non-resident and there were limits on how much time he could spend in the UK without losing that status). Neither of these points would appear to have had anything to do with the true ownership of CPC.

60. The final strand in the Claimants' case is that Mr Nicholas Candy is admittedly very wealthy but the source of this wealth is unclear. It is apparent from C&C's accounts that although over the years it has generated enough money to pay Mr Nicholas Candy a reasonable salary, it has made little profit, and certainly not enough to sustain his lifestyle. His brother has made a number of substantial loans to him and in recent years three substantial gifts to him, one in July 2013 of £10m, and two in 2014 of a property called Gordon House and a penthouse at One Hyde Park, both properties being very valuable. Mr Christian Candy explained in evidence that he made these gifts as a result of a request that his late father had made to him, shortly before he died in September 2013, to share his wealth with his brother. Mr Stewart's submission was that in reality they represented his brother's share in the profit of CPC. Again I find this point of no real assistance. It is not disputed that the gifts took place. For a very wealthy man to share some of his wealth in this way with a brother to whom he is very close is not so extraordinary a thing as to suggest that the ostensible motivation must be rejected and some different explanation sought.

61. I have set out the material on which Mr Stewart relies at length because he put this point at the forefront of his submissions. Some of it seems to me of limited value as I have said, but some of the material is certainly quite striking. It is true that the focus of the trial was on the loan to Mr Holyoake, and that Mr Nicholas Candy both had a much closer relationship with him than his brother did, and had introduced the opportunity to CPC and felt he bore a responsibility for it; it is not surprising therefore that he was closely involved in this particular loan, and the fact that he was does not tell one very much about his involvement in CPC's business generally. But that still does not explain how he came to refer to the £10m *"we will make"* or *"our 30%"*, which on any natural reading would indicate that he had a financial interest in the loan, not just a concern that he had been responsible for introducing his brother to it. And the evidence of Mrs Holyoake, who I have already said I found to be a credible witness, does suggest that Mr Nicholas Candy held himself out as a joint owner with

his brother, and the account of the conversation she had with Ms Valance suggests that her husband had at least an expectation of sharing in his brother's wealth even if not a formal arrangement to that effect; this was consistent with the evidence of Mr Hyman.

62. Nevertheless I am not persuaded that it is either necessary or appropriate for me to seek to resolve this question. Mr Stewart submitted that there were three reasons why the issue was important. The first was that it vindicated Mr Holyoake's belief that he considered the transaction to be one with friends. But the true ownership of CPC does not seem to me logically relevant to what Mr Holyoake believed. That depends on what he thought, not what the true position was. For reasons given below I am quite prepared to assume that he may have thought he was in effect dealing with both of them. That does not require me to decide whether Mr Nicholas Candy in fact had any ownership interest in CPC or not.

63. The second reason put forward by Mr Stewart was that it demonstrated that Mr Nicholas Candy had a motive for entering into the conspiracy which the Claimants allege. Again this seems to me quite unnecessary. The evidence demonstrates that Mr Nicholas Candy took a close interest in the loan, and was as keen to see that it was repaid as CPC itself. Whether that was because he had a direct financial interest in the loan being repaid, or because he felt responsible for introducing CPC to the loan in the first place, or was simply because he wanted his brother not to lose out, does not matter; nor do I think it really assists in resolving whether he became party to a conspiracy to use unlawful means as alleged by the Claimants.

64. The third reason put forward by Mr Stewart (and said by him to be the most important) was that it demonstrated that there was a lie at the heart of CPC, which on the Claimants' case was set up as a fraudulent scheme to evade very large amounts of tax for the benefit of both Candy brothers, thereby demonstrating the nature of their characters. On analysis that has nothing, or at any rate very little, to do with the issues in the case. In civil proceedings similar fact evidence is admissible in principle if it is logically probative of the issues (*O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 53) but even if it were proved beyond doubt that the Candy brothers had committed a tax fraud, I do not see that this would provide any meaningful assistance in resolving the quite different allegations (conspiracy, intimidation and the like) on which these proceedings are based. No doubt as a very general statement a person who is shown to have committed fraud might be thought more likely to have committed other wrongdoing than an upstanding citizen, but that seems to me a long way removed from the sort of logically probative evidence that can be relied on as similar fact evidence. Proved or admitted dishonesty by a witness may also be relevant to credit, that is to whether their evidence is to be believed, but as I understand the law that does not allow a party to call evidence that goes merely to credit, and I do not think it permits a party to seek to prove a hotly contested allegation of dishonesty that has nothing to do with the facts of the case simply in order to discredit a witness.

65. In those circumstances I do not consider it necessary to resolve the issue. Nor do I think it would be appropriate to do so. Mr Lord submitted that it is in fact entirely clear that Mr Christian Candy is the sole legal and beneficial owner of CPC, placing

particular reliance on Mr Holyoake's own assessment of the position in an e-mail of 15 April 2012 to his then solicitors, Collyer Bristow, namely:

> "Post the transaction Chris was the only person who I discussed the matter with. He appeared to be the sole decision maker and effective owner of the business…"

(As appears below this was one of a number of e-mails between Mr Holyoake and Collyer Bristow in which privilege was waived). He said much the same in another e-mail to Collyer Bristow of 16 April 2012 where he said he felt misled as he had believed that Mr Nicholas Candy was a co-owner, but from what he could see this:

> "does not appear to be the case as he is not involved in any key decisions and cannot decide upon anything himself as one would expect if one was an owner."

But in the earlier e-mail Mr Holyoake also says:

> "I believe but do not know for sure that CPC is co owned by Nick and Christian Candy"

and I do not think these e-mails are as conclusive as Mr Lord suggested.

66. Mr Lord submitted in the alternative that the issue was of such tangential relevance that it was disproportionate for the Court to investigate the ownership, and that it would be unfair to do so. The disclosure in these proceedings has been focused on CPC's conduct in respect of GGH, and the Court does not have before it disclosure in relation to the hundreds of other transactions CPC has transacted. Any challenge to the evidence of the Defendants would require investigation of all of CPC's business dealings. I accept this submission. Even in a case where similar fact evidence is relied on, the Court retains case management powers which may lead to such evidence being excluded: the Court's overriding purpose is to promote justice but that requires that the trial process be fair to all parties, and it is necessary to weigh the potential probative value of the evidence against its potential for causing unfairness: see *O'Brien v Chief Constable of South Wales Police* per Lord Bingham at [5]-[6]. In the same way it seems to me that the Court should be reluctant to reach a conclusion on an issue which is of no, or very limited, potential probative value but which has the potential (if decided one way) of causing significant unfairness. I remain of the view that I expressed at an interlocutory stage that the purpose of this trial is to determine the allegations in the action, not the tax affairs of the Candys, and that it would be wrong, on necessarily limited evidence, to reach a conclusion on a matter that I do not need to reach a conclusion on.

67. Mr Stewart asked me to find as a fact that Mr Nicholas Candy was a co-owner or partner in CPC. For the reasons I have given I make no such finding. He also asked me to find that Mr Holyoake believed as much, and entered into the loan agreement believing that he was entering into an arrangement with one of his closest friends. I accept that although Mr Holyoake knew that the loan was formally coming from CPC and not Mr Nicholas Candy personally, he thought he was dealing with his friend and his friend's brother, and I am prepared to assume that he believed that both had an interest in the loan. I have already referred to his e-mail of 15 April 2012 where he said that he believed (but did not know) that they were co-owners of CPC, but even

leaving this aside, I think that he understandably drew no sharp distinction between the two Candys (both of whom were involved in the negotiation of the loan) or between them and the corporate vehicle put forward for the transaction. I find that he regarded the loan as in effect from the Candys, and in effect from friends, although he knew before the loan was signed that the formal position was that it was coming from CPC and that CPC had its own directors who needed to be satisfied.

68. Mr Stewart asked me also to find that Mr Nicholas Candy, even if not an owner of CPC, stood to benefit (and did benefit) as a recipient of substantial gifts and loans from his brother which must ultimately have derived from the profits of CPC, and so had an interest in CPC's profitability even if he had no ownership interest in it. I accept that Mr Nicholas Candy did in the event benefit from gifts (and loans) made by his brother, and the likely source of those was the profits of CPC, but I do not accept that he *"stood to benefit"*. That would suggest that he had an expectation of benefiting, and for the reasons I have given I have not made any decision to that effect.

*The Candy brothers' style of doing business*

69. Some of the evidence called by the Claimants went to what might compendiously be called the Candy brothers' style of doing business. Mr Hyman gave evidence from his time at C&C as to such matters as their relationships with employees, their attitude towards paying suppliers and their attitude to contractual terms. I do not propose to enter into these matters at all. None of them are of direct relevance to the issues in the action, or logically probative of the Claimants' allegations; no particular reliance was placed on them by Mr Stewart in closing; and I have not found them of any assistance.

70. Mr Ian Roberts gave evidence about his experience with a start-up technology business that he founded called Crowdmix, and for which Mr Nicholas Candy, through one of his companies, provided significant financial support, being his greatest financial backer. At a critical moment, Mr Nicholas Candy declined to invest yet further funding unless certain terms were agreed and in due course the business went into administration; Mr Candy later bought its assets from the administrators. Mr Roberts feels very strongly that Mr Candy acted in an underhand manner in engineering the collapse of the business with a view to taking control of it. Mr Candy on the other hand gave an account in evidence of how Mr Roberts had been unrealistic in his attempts to raise further funding. Again I do not propose to resolve these matters. This case is not about the collapse of Crowdmix, and although Mr Roberts was eloquent in explaining why he considered Mr Candy's actions to have been unacceptable, it would be wrong for me to attempt to reach any conclusions without a detailed consideration of such evidence as there is, and in my judgment to do that in circumstances where I have necessarily only been shown a small part of the story, only heard from two of the participants, and received very little in the way of submissions directed at these matters, would be potentially very unfair; it would also be disproportionate to any assistance I might derive from the exercise. What I take from Mr Roberts' evidence is that he was patently sincere in his belief that he had been badly treated by Mr Candy; that I do not find of any substantial help in resolving the issues in this action, and other than that I am not prepared to go into these matters

at all.

*The Candys as witnesses*

71. It is more convenient to give my assessment of the Candys as witnesses below after I have considered one particular matter which Mr Stewart placed great reliance on, which is a series of e-mails between Mr Christian Candy and Mr Holyoake on 8 November 2011 which Mr Stewart characterised as containing a series of lies by Mr Candy (with the knowledge and encouragement of his brother).

72. I should record here however that I heard a very small part of the evidence in private; this was intended to show Mr Nicholas Candy in a distinctly poor light in relation to an unrelated matter, but I thought it likely that it would prove to be of no real assistance in resolving the issues in this action and was only designed to embarrass him. So it proved to be: I did not find this episode, unedifying though it was, of any help and have taken no account of it. It is not necessary to go into the details.

73. There was one other curious feature of Mr Nicholas Candy's evidence which Mr Stewart placed some reliance on. On Day 23 (Friday 10 March) Mr Stewart asked him if he knew someone called Dominic Cooper-Smith. Mr Candy said more than once that he did not and that he had never heard of him, despite Mr Stewart prompting him that Mr Cooper-Smith was asking for payment for flights for guests travelling to Mr Candy's wedding in Los Angeles. On Day 24 (Monday 13 March) Mr Stewart asked him again, by which time he had remembered that Mr Cooper-Smith was connected with an issue over flights to his wedding that his wife's family had paid for but not received. Mr Stewart asked if he had threatened to send the boys round to Mr Cooper-Smith's house, which Mr Candy denied; and later that day put to Mr Nicholas Candy an e-mail from Mr Cooper-Smith to Mr Candy dating from September 2012, which Mr Candy accepted he received, in which Mr Cooper-Smith said:

> "Nick
>
> I do not react very well to being threatened that you will send "the boys over to my house" nor that you will not pay invoices for flights that have been provided."

Mr Stewart accepts that I cannot make any findings as to what happened between Mr Candy and Mr Cooper-Smith, but submitted that Mr Candy's claimed inability at first to remember Mr Cooper-Smith's name was surprising. One would have thought that to be accused of a threat like that would be very memorable. Either Mr Candy did in fact remember his name (in which case he lied to the Court when he said he could not); or if he did not, it suggested that he is so regularly accused of such behaviour that he cannot remember all his accusers' names. I do not know, and do not intend to speculate, on the truth of the matter, but I accept that Mr Candy's evidence on this left something to be desired, and I was left with the suspicion that I was not being told the whole story to the best of his recollection.

*Mr Richard Williams*

74. Mr Williams is a chartered management accountant. He joined C&C as Finance Director in April 2003, and in October 2005 moved to Guernsey and started to work

as Chief Operating Officer at CPC. That involved running the Guernsey office and having oversight over CPC's developments, which were managed from Guernsey.

75. He stepped down as director of CPC in March 2014. Since then he has continued to be employed by CPC, principally to oversee the completion of the One Hyde Park project until its eventual conclusion, but not on a fulltime basis.

76. Mr Williams had a close involvement in the GGH loan up to the end of March 2012 when Mr Dean took over that role.

77. Although he was uncomfortable at times when giving evidence, in general he gave his evidence in a straightforward and credible manner.

*Mr Steven Smith*

78. Mr Smith is a chartered accountant and chartered tax adviser. Until he stepped down as a director in August 2014, he was a director of CPC and in charge of the group's Corporate Finance Activity and Head of Tax.

79. In August 2011 Mr Smith sustained very serious injuries when robbers attacked him in his house in the south of France and he jumped out of a first floor window to escape them. As a result he was in hospital, first in Nice and then in Wimbledon, until the end of November 2011, and off work for the remainder of the year, and when he returned to work in early 2012 was only working about 2 hours per day. His involvement in the GGH matter at the outset was therefore limited although he was copied into e-mails and sent some replies even when he was in hospital.

80. As already referred to, Mr Smith gave very careful and precise evidence, and had an impressive recall of detail. I found him an entirely straightforward and credible witness.

*Mr Timothy Dean*

81. Mr Dean is a chartered accountant. He joined CPC in January 2007, and in February 2007 became Finance Director of CPC. He took over primary responsibility for the GGH loan from Mr Williams at the end of March 2012. He was a straightforward and credible witness.

*Mr Benjamin David*

82. Mr Benjamin David is also a chartered accountant. He started working for C&C in April 2005, initially providing support to Mr Williams (then C&C's Finance Director) and Mr Cubitt. In October 2005 he moved to Guernsey to provide support to Mr Williams and Mr Smith, becoming a director of CPC in 2010. He too was another straightforward and credible witness.

## *The Facts*

*Mr Holyoake contracts to acquire GGH*

83. GGH was on the market in 2010, and Mr Holyoake's evidence was that he became aware of the possibility of buying GGH in 2010. That is not confirmed by anything in the documentary evidence, but he had certainly become interested by 8 March 2011 when an e-mail exchange between him and Mr Pym referred to a possible deal on GGH, Mr Holyoake saying that he had just had it confirmed that Mr David Pearl was the majority owner of GGH, with a Mr Alaa Ghanis (actually Ghani) also having an interest. By 10 April 2011, a financial appraisal had been prepared for Mr Holyoake based on a mixed use development of GGH (retail on the ground floor, residential above) and a purchase price of £38m: this projected total costs of some £92m and a developed value of some £169m, delivering a profit of over £77m.

84. In May Mr Holyoake sought to interest Mr Nicholas Candy in the property, inviting him to a meeting at his offices on 10 May (which he went to with Mr Simpson of C&C – they went on to have a quick look at GGH) and having the appraisal sent to him; Mr Nicholas Candy forwarded it to his brother with the comment *"Very interesting deal"*, and replied to Mr Holyoake *"Love it"*. Mr Christian Candy's own initial view was that he quite liked the proposal and he spent some time looking at it, having his own appraisals prepared internally. He made encouraging noises to Mr Holyoake, for example on 24 May asking *"Does he* [Mr Pearl] *know CPC is your partner?"*, and on 26 May *"What law firm are we going to use?"* but nothing was formally agreed, and by 7 June he was expressing the view internally that he was against participating. On 16 June he e-mailed Mr Holyoake to the effect that he had spoken to his brother and CPC was unfortunately not interested, the upside not being large enough and the biggest risk being English Heritage. Mr Holyoake said in oral evidence that he was surprised by this as previous conversations were exceptionally positive, but he accepted that they had a right to say Yes or No.

85. Mr Stewart asked me to find that as a result of the site visit and the appraisals the Defendants had a good knowledge of GGH and its potential for profit. That seems to me to overstate the position: they had done some preliminary work, as a result of which they concluded that it might make money but there were risks, and it was not an attractive enough proposition to wish to invest in. Mr Stewart also asked me to find that Mr Nicholas Candy knew that Mr Holyoake was not a man of straw, and it is wrong to say that the loan was made without any due diligence on him. I do not make that finding. Mr Nicholas Candy as Mr Holyoake's friend may have had a general impression of his wealth (or at any rate his standing of living, which is not necessarily the same thing), but at the time of the loan, neither he nor anyone else on the Defendants' side had investigated it at all.

86. By the time Mr Christian Candy withdrew from the proposed purchase Mr Holyoake had already made an offer on GGH. He had initially hoped to do a deal whereby he paid only £30m upfront with further overage payments after planning permission had been granted, but the vendors made it clear they wanted an unconditional sale at £40m. That was more than Mr Holyoake wanted to pay but after an offer of £38.1m had been rejected, he offered £40m on 21 May, which was accepted on 24 May.

87. On 9 June Mr Richard Doffman, who was acting on behalf of the vendors, e-mailed Mr Holyoake noting that their lawyers had twice asked for his source of funding without having had a reply and asking him to confirm by return. Mr Holyoake replied the same day:

> "In regards to funding this is already in place what do you need and I will provide"

On 13 June he sent Mr Doffman some background information on himself and his other properties. Mr Doffman replied the same day saying that he was expecting something more specific in relation to the funds being used to purchase GGH, that he had to satisfy the trustees who were the JV partner, and that he must insist that Mr Holyoake provide specific information. Mr Holyoake replied by return (at 09.17):

> "In regards to funding we have a bank facility in place from Investec 70% loan to value – and the equity will be coming from myself. This is all in place and ready to go."

88. These statements were not true. The true position was that Mr Holyoake at that stage had approached Investec and that on 7 June Mr Jonathan Arnst of Investec had sent him an e-mail referring to a proposed funding structure under which Investec would lend £26m for a term of 3 years at 4.5% over LIBOR. The e-mail however made it clear that it was for discussion only and did not constitute a formal offer of funding. At 08.00 on the morning of 13 June (that is shortly before his e-mail to Mr Doffman) Mr Holyoake told Mr Christian Candy that he would be speaking to the bank at 3pm, and at 14.30 he e-mailed Mr Arnst with some further information (a planning letter) and asked him if he thought credit approval would be forthcoming at the end of the week. This to my mind establishes that Mr Holyoake was fully aware that the proposed facility had not yet been approved by the bank's relevant credit committee, and could not be said to be *"in place"* and *"ready to go"*. Nor for that matter was it accurate to say that the loan was 70% loan to value: Investec was at that stage considering a proposal to lend £26m on a purchase price of £40m, which is 65%. Mr Holyoake was asked about this in cross-examination and said that he had been given a clear steer that they were good to go with Investec but accepted that he had not received credit approval at that stage and that he was exaggerating the position.

89. Nor was it correct to say that the equity would be coming from Mr Holyoake himself. At a purchase price of £40m, there would be a further £14m needed to complete the purchase (plus costs and stamp duty), and Mr Holyoake did not have that kind of money to hand. He was in fact in the middle of seeking to persuade a Mr Ranjan, who had connections with the Petchey Group, that the Petchey Group should contribute mezzanine funding to the project. The proposal was that they should provide funding, to rank after the bank debt but before equity, in return for interest and a share of profits. Mr Holyoake's initial suggestion was that the Petchey Group contribute £20m, to rank after a bank facility of £25m; by 11 June this had become a proposal that they provide £15m of funding to rank after debt of up to £27.5m, in return for interest of 15% per annum and 25% of profits. Mr Ranjan had invited Mr Holyoake to progress this proposal, but it had not been agreed and on the afternoon of 13 June Mr Holyoake was e-mailing Mr Pym to the effect that if Mr Pym did not hear from Mr Ranjan, they should maybe have a call with him that evening *"because I*

*really need to nail this down"*; on 14 June he was e-mailing Mr Christian Candy (who he still thought would be participating in the project) asking if *he* had any contacts for mezzanine finance, saying *"I know a few people but not sure how quick they would be bearing in mind we need to move on this."*

90. Mr Doffman evidently returned to the question, as on 23 June Mr Holyoake asked Mr Pym to send a letter to Mr Doffman on the headed notepaper of TPO. As set out above, Mr Holyoake was closely involved as an actual or pending majority shareholder in TPO; the letter which he drafted for Mr Pym however referred to TPO as a regulated financial advisory and wealth management business that assisted a large number of high net worth individuals, and to Mr Holyoake as one of their clients who had instructed them to provide corporate advice and assistance in regards to his intended purchase of GGH, and said nothing about Mr Holyoake being a part-owner of the business as well as a client, being written as if his relationship with TPO was merely that of one of many clients. The draft had TPO confirming that:

> "Mr Holyoake has all the funding in place to complete the transaction within 45 days of exchange at a purchase price of £40m".

91. A letter along these lines appears to have been sent (although it is not in evidence) as on 27 June Mr Holyoake asked Mr Pym to send Mr Doffman a second letter, again drafting a suggested text for him, and this letter referred to the previous one. Mr Pym sent it to Mr Holyoake in the form Mr Holyoake had drafted, and Mr Holyoake forwarded it to Mr Pearl and Mr Doffman at 16.00 on 27 June. It said:

> "We reiterate that Mr Holyoake has the funding requirements in place and we confirm that such bank funding is being provided to him at the level of £27.5m and that further funds of £15m are immediately available to Mr Holyoake for the purposes of completion and costs. These funds are being provided substantially by ourselves via our regulated fund business together with funds from Mr Holyoake himself."

92. These statements were again untrue. Although Mr Holyoake had succeeded in obtaining indicative heads of terms from Investec on 14 June (for a loan of £27.5m at 4% over LIBOR), the proposed loan had still not gone through the credit process, a formal UK credit committee meeting being due on 29 June. The credit process was evidently not going to be a formality as Investec had continued to ask Mr Holyoake some quite difficult questions: on 13 June Mr Arnst had e-mailed Mr Holyoake saying that they needed to understand where the cash equity requirement was coming from, that it was not clearly evident from the net asset position he had disclosed and that it would *"no doubt be a key focus of the credit process"* given the size of the transaction and the personal recourse that had been proposed; by 22 June Investec had asked Mr Holyoake for the last 3 years' accounts for ISI and Mr Holyoake was sufficiently concerned to ask Mr Wells to think about how they could show them as it was very important that it was very profitable, following that up with a suggestion that maybe the previous owner had taken a big salary or dividend or a big management charge; and on the morning of 27 June (at 10.15, that is about 6 hours before Mr Holyoake forwarded Mr Pym's letter of 27 June) Mr Simon Brooks of Investec had told Mr Holyoake that they were hoping to run through the deal with a couple of the credit guys ahead of the formal credit committee meeting so that they did not see it cold, so

they might get a steer. That plainly suggests that Mr Brooks did not regard, or convey the impression to Mr Holyoake, that credit approval was a formality.

93. It was therefore incorrect to say (on 23 or 27 June) that the funding was *"in place"*, the Investec loan being dependent on approval being obtained. Nor was it correct to say that Mr Holyoake had a further £15m *"immediately available"*, being provided substantially via TPO. Mr Pym had suggested to Mr Holyoake that TPO might circulate its clients and contacts with an opportunity to participate in a syndicated loan note in the sum of £15m, but there is nothing to suggest that this sum or anything like it had in fact been raised. Mr Pym in evidence said that TPO had set up a so-called SICAV fund in Malta, and had had verbal commitments to fund it to the tune of £15m. That does not seem to me to justify a statement that Mr Holyoake had £15m immediately available to him, and the £15m was not in fact available at completion when he needed it.

94. Mr Holyoake was asked about these letters in cross-examination. He denied they were misleading, and said Mr Doffman's request was unfair; he also said he had been assured by Mr Daniel Austin of Investec that there would be no problem. I am satisfied he is wrong about the latter point as Mr Austin did not return from holiday until the morning of 28 June; and I conclude that he was deliberately overstating the position to Mr Doffman because he did not want to tell him the truth, which is that he had had promising discussions with Investec which had led to indicative heads of terms but these had not been approved by the bank's credit committees and he was not yet in receipt of a formal offer.

95. On 4 July Mr Holyoake asked Mr Pym to send a third letter to Mr Doffman, again drafting it for him, and again Mr Pym duly signed it as drafted. This said:

> "We confirm again that we have provided Mr Holyoake with a mezzanine financing facility of up to £15m GBP that is available from our fully regulated property and project finance fund."

There is no reason to think that this was any more true than the previous confirmations.

96. Mr Doffman was still not satisfied and spoke to Mr Holyoake on the evening of 4 July and to Mr Holyoake's solicitor, Mr Philip Saunders of Saunders Bearman LLP, on the morning of 5 July. At 09.15 on 5 July Mr Saunders sent Mr Doffman an e-mail saying:

> "It has been confirmed this morning that Investec Bank Channel Islands are issuing to my client a formal mortgage offer on the lines and for the amount of 'Indicative Terms' which you have previously seen."

That would also appear to have been quite untrue. The application had gone to the UK credit committee on Wednesday 29 June, and was due to go to the global credit committee in South Africa on Friday 1 July. But despite the fact that on Tuesday 28 June Mr Austin had told Mr Holyoake that they were all very supportive and he did not perceive any major issues, and was comfortable that the credit would be agreed, the global credit committee did not in fact reach a conclusion on 1 July; it met again

on Monday 4 July but declined to approve the facility. Mr Austin e-mailed Mr Holyoake on the evening of 4 July and told him that he was not able to procure a sign off. On the morning of 5 July at 10.05 he sent another e-mail confirming that he could not get his credit guys over the line, which was a real shame because he had a tacit yes in London but got knocked back in South Africa. It is impossible to believe in the circumstances that Investec had given any form of confirmation on the morning of 5 July that it was issuing a formal mortgage offer. Mr Holyoake sought to explain this away by suggesting that he had not told Mr Saunders that global approval had been declined, and that they were confident that the global approval would be forthcoming. I reject that as an explanation: Mr Saunders is referring to a specific confirmation received that morning and Mr Saunders is unlikely to have said this without being told that such a confirmation had been given. The obvious source of such information was Mr Holyoake and I conclude that it is likely that he told Mr Saunders that, despite knowing that it was untrue. Even on his own evidence he knew that Mr Saunders' e-mail (which was copied to him) was misleading when sent, but did nothing to correct it.

97. Mr Doffman however replied at 10.25 to the effect that the proof of funding provided had throughout been non-specific and vague and he was instructing their solicitors to withdraw the papers. Mr Holyoake increased his offer to £42m. On 6 July Mr Austin told Mr Holyoake that he had pushed hard but could not get the ok to write the loan, and on 8 July that he must now admit defeat; he offered to introduce Mr Holyoake to another lender, Topland, who would charge 1-1.5% per month.

98. On 9 July in the course of an e-mail exchange with Mr Nicholas Candy, Mr Holyoake told him that he still not exchanged on GGH and that the price was now up to £42m. Mr Nicholas Candy passed this onto his brother with the comment *"Look at price Mark is paying"*, to which Mr Christian Candy replied *"Crazy. He will struggle with this site in my opinion."*

99. In the event Mr Holyoake's offer of £42m was accepted, and contracts were exchanged at that price on 18 July 2011. By that stage Mr Holyoake had no confirmed funding with which to complete. He had had an initial offer from Topland of a loan of £25m at 1.25% per month, but terms had not been agreed (Mr Holyoake regarding this as very expensive) and he was exploring the possibility of other banks. For the balance he had a number of possibilities but nothing firmly in place.

*From contract to 12 October 2011*

100. Under the contract for sale a deposit of £3m was payable, £2m on exchange and a further £1m by 29 July 2011, and completion was due on 16 September 2011. The contract incorporated standard conditions of sale which provided in the familiar way for the vendor to serve notice making time of the essence in the event of the buyer failing to complete on the due date.

101. The buyer under the contract was Hotblack. The structure for the ownership of GGH had been provided for Mr Holyoake by a business called Caversham SA, and consisted of Hotblack, which was wholly owned by a BVI company called Greenlander Ltd (**"Greenlander"**), which was in turn wholly owned by another BVI

company called Dorry Holdings Ltd (**"Dorry"**), the two issued shares in which were held by two nominees for Mr Holyoake. None of Hotblack, Greenlander or Dorry had any other business or interests except GGH. An e-mail of 3 August 2011 from Mr Andrew Crichton, the Executive Chairman of Caversham, to Mr Holyoake explained that they had given the structure a number of levels so that shareholders could be introduced at the appropriate level. Mr Holyoake also gave evidence that he thought there was some tax reason, but this was not explored further and I did not really understand the point; nothing turns on it anyway.

102. Mr Holyoake set about trying to tie down the funding to complete the purchase, that is both the senior debt and the balance. So far as the senior debt was concerned, Investec was in the event interested in participating alongside Topland and Mr Holyoake in due course accepted an offer of a loan from Investec and Topland together of £24m (£15m from Topland and £9m from Investec), of which £1.8m was to be retained in an account at Investec, for a term of 12 months from drawdown, at an interest rate of 1.25% per month. Although this was a joint Topland/Investec facility, Investec acted as the agent for the lenders and I will refer to it as **"the Investec facility"**.

103. So far as the balance needed to complete was concerned, he had a number of potential leads that he followed up; he did receive various proposals but thought them expensive. Then on 7 August 2011 Mr Ranjan forwarded to him a proposal from a Mr Yaser Martini who had a Saudi investor who would be prepared to inject £7.5m into the deal in return for interest of 15% per annum and 15% of the profit, a proposal that Mr Holyoake was happy to accept in principle subject to negotiation of certain ancillary terms. This in due course was agreed and a facility of £7.5m was made available to Hotblack as mezzanine financing through the investor's vehicle, which was Oscarone.

104. Mr Holyoake had not however finalised everything in time for the contractual completion date of 16 September. On 28 September the vendors' solicitors (in fact by then acting for receivers who had been appointed over GGH by the vendors' bank, although nothing turns on this) served a notice to complete under the terms of the conditions of sale, the effect of which was to require completion within 7 working days, that is by Friday 7 October.

105. Meanwhile a further payment was due to 3i under the Overarching Agreement. Mr Holyoake had sold the commercial part of 42-44 Grosvenor Gardens in August, which enabled him to pay £2.15m to 3i, but a further £3.2m was due on 8 October. On 29 September Mr Holyoake e-mailed Mr Kevin Dunn, the general counsel of 3i who was dealing with the matter, asking for a 30-day extension to enable him to sell the mews property at 42-44. Mr Dunn said he would get back to him, but before he did so, an article in Property Week from 16 September came to his attention. Under the noticeable headline *"Former British Seafood boss dives for Pearl's jewel"* this reported that Mr Holyoake had bought GGH and that *"it is understood that Holyoake paid around £42m"* for the building, and that his asset management company Medici was believed to be considering a conversion to residential. That led Mr Dunn to e-mail Mr Holyoake on 4 October asking him to explain:

> "1. Why, if you were able to invest £42m in a new property investment, is it that you are now requesting an extension of time to meet your payment obligations under the settlement deed?
>
> 2. The settlement deed (clause 2.2) makes it very clear that you will pay the settlement instalments on the due dates – and that you will "in any event use all reasonable endeavours to pay, or procure the payment of, these amounts before these due dates." Please help me understand in what way your choice to make an investment in 35/37 Grosvenor Gardens was consistent with this obligation?
>
> 3. The source of your funding for the £42m investment at 35/37 Grosvenor Gardens."

106. Mr Holyoake replied the same day:

> "I am afraid that is the press making a good story.
>
> I am acting if the deal actually happens (as it has yet to despite the press report) as the managing company for the project – we have developed 42/44/46/48 Grosv Gdns as you know and as such have negotiated a role to oversee development going forward of this project which is located in the same area and in which we have considerable experience. The aim is for me to oversee the development using our knowledge and get paid for this role."

107. Mr Holyoake was asked in cross-examination about this, and gave an explanation that what he was seeking to put over to Mr Dunn, without spelling it out, was that he had not put £42m cash into the project. I regard that as a disingenuous answer. The article did not say, or suggest, that he had paid in cash, and it is clear that Mr Dunn was not asking if he had. That would no doubt have been a most unusual way to purchase a £42m property and if Mr Dunn was really asking if Mr Holyoake had done so, he would have said so in terms; in any event his third question expressly asked for the source of Mr Holyoake's funding. Mr Holyoake's e-mail to Mr Dunn was plainly intended to suggest that the article was inaccurate, to deny that he had bought GGH for £42m, and to convey the message that his only role in the proposed development was to act for a fee in overseeing a development by someone else. As such Mr Holyoake's e-mail was grossly misleading and I conclude that Mr Holyoake deliberately misled Mr Dunn to put him off asking awkward questions at a time when he was under some pressure to complete the contract, and did not have the funds to make the payment due to 3i.

108. Under the notice to complete, completion was due on Friday 7 October. Mr Holyoake was still not in a position to complete and as a result an agreement was entered into on 7 October amending the contract. This required Hotblack to pay immediately an additional deposit of £100,000, forfeited the increased deposit of £3.1m, and gave Hotblack a further opportunity to complete the contract by 3pm on Friday 14 October at an increased price of £43m (with a reduction to £42.5m if completed by 2 pm on Wednesday 12 October), failing which the contract would automatically be rescinded. It also required Mr Holyoake to give a personal guarantee for £1m if the contract had not completed by 2pm on Monday 10 October.

109. At this stage Mr Holyoake had available to him the £24m Investec facility, and the

£7.5m mezzanine loan from Oscarone. But after allowing for various deductions for arrangement fees and legal costs and the like, and the retention of the £1.8m in the Investec account, these only gave him net monies available for completion of about £21.8m and £7.2m respectively, or some £29m in all. The money required to complete at a price of £42.5m, after taking account of the £3.1m deposit and various apportionments and other adjustments, was about £39m, so that still left him about £10m short, not counting his own costs and stamp duty.

110. He did not however have the cash required; indeed on Sunday 9 October he told Mr Wells that he was waiting for *"billys money"*, this being a reference to a man called Mr Billy Allen who had been introduced to him by Mr Pym. Mr Allen claimed to be very wealthy and to be interested in participating in GGH, and at various stages promised to produce large sums, but he never did provide any funds and turned out to have a serious criminal record: see *Allen v Matthews* [2007] EWCA Civ 216 at [6] where Lawrence Collins LJ refers to his serving two periods of imprisonment for fraud and assault. Mr Lord spent some time in cross-examination exploring the issue of the proposed participation of Mr Allen, which had not been referred to at all in the Claimants' witness statements. In particular, on 2 September 2011, at a stage when Mr Holyoake was expecting Mr Allen to participate, he had e-mailed Mr Pym to the effect that he didn't want to mention Mr Allen's participation to the bank (that is, Investec) as if they had to do KYC (know your customer checks) on him they would never get a loan, to which Mr Pym replied *"True enough"*; on the basis of this it was suggested to them that they had both known of Mr Allen's dubious past. Mr Holyoake denied it, asserting that all that he knew was that Mr Allen had had considerable difficulties passing KYC checks when a client of Mr Pym's at Crédit Suisse, although he did accept that he had decided not to make any reference to Mr Allen in his witness statement, despite referring to a fair number of potential funders, and that he had done so because he felt embarrassed once he discovered the truth about him. Mr Pym accepted that he had introduced Mr Allen to Mr Holyoake, and said that he too did not know about his criminal record, but said that Mr Holyoake was wrong to think that Mr Allen had ever been a client of his or gone through KYC. On this evidence I am left quite unsure what the truth of the matter is. I am prepared however to give Mr Holyoake and Mr Pym the benefit of the doubt and I therefore do not find it proved that they actually knew of Mr Allen's criminal record; but on any view they were willing to arrange Mr Allen's anticipated participation in the project in such a way as to deliberately conceal it from Investec.

111. Over the next few days Mr Holyoake repeatedly claimed that the funds to complete were on their way: on Friday 7 October he told Mr Brooks of Investec that the delay on funding was simply because he was in Hong Kong and would be resolved on Monday; on Monday morning (10 October) that he was back from Asia and had arranged for the relevant original instruction to be sent by courier and that they would complete no later than Tuesday morning; on Monday afternoon that a signed transfer request was in the UK and would be with Citibank (one of his bankers) very shortly and that completion would be first thing on Tuesday; on Tuesday morning (11 October) that the instruction had been received at the other end, that all was on course for completion that day and that Mr Saunders would be in funds *"in next few hours"*; and later that morning that funds were *"on their way"*; finally on Tuesday afternoon Mr Saunders told Mr Brooks that he understood – I infer from Mr Holyoake – that the

funds, being a £14m loan from Mr Holyoake, *"have been sent and they are certainly expected to be received tomorrow morning"*. I have seen nothing to suggest that any of these statements were true, but the question whether Mr Holyoake was lying in this respect was not, I think, explored in cross-examination and it is not necessary to make any express finding to that effect.

112. Whatever possible sources of funding he had been hoping for previously, Mr Holyoake accepted in evidence that by 12 October he had run out of any realistic alternative. So it was that he turned to the Candy brothers.

*The events of 12-13 October 2011*

113. Over the course of some 30 hours or so from the morning of 12 October to the early afternoon of 13 October, the loan from CPC was negotiated and finalised, and the purchase of GGH completed. There are a large number of e-mails in evidence; it has not been entirely straightforward to disentangle the precise chronology because although all the e-mails have time-stamps, the times are not internally consistent. This is partly because different participants were in different time-zones (Mr Holyoake in Ibiza, Mr Nicholas Candy, the lawyers on both sides and Mr Williams (initially) in London, Mr Christian Candy in Los Angeles, Mr David (and Mr Williams later) in Guernsey, and Mr Wells in Switzerland), but partly because of some technical issue with the time-stamps which meant that the same e-mail has different times in different iterations. I heard no technical evidence and this issue was never fully explained, but, with the help of some detailed analysis by counsel, it is I think possible to reconstruct the order of events with some confidence. In the account which follows the times which I give are those which I believe represent the time in London, which was British Summer Time (that is GMT + 1 hour); Guernsey was then on the same time, Ibiza and Switzerland 1 hour ahead, and Los Angeles 8 hours behind.

114. It is necessary to give a detailed account of the exchanges, although most of the to-ing and fro-ing appears from the e-mails and is not in dispute. There are two significant areas of dispute that do however fall to be resolved: one is whether Mr Williams made a fraudulent misrepresentation to the effect that Mr Holyoake's net asset statement was being sought as a formality and would not be relied on; the other is what, if anything, was said about keeping the CPC loan confidential, in particular from Investec.

115. The story starts with an e-mail from Mr Holyoake to Mr Nicholas Candy at 09.36 on 12 October, confirming a discussion he had already had with him, in which he asked for a personal loan of £12m, saying that it was needed that day and that he understood that it was probably too short notice, but offering terms of 20% interest (per annum), no specific term (*"up to you 6 months would be ideal or longer if you want to get interest on these funds"*), an extra *"kicker"* of 20% GGH profits via a declaration of trust (*"happy to also consider minimum fixed sum if that helps ie £10m"*), and a *"PG"* (personal guarantee) from him for the full amount plus interest. Since what Mr Holyoake was suggesting was a loan to himself, the reference to a guarantee was not technically accurate but he (and others) used this as a shorthand for his personal liability for the loan.

116. Mr Holyoake did not tell Mr Candy that they were his last resort, instead presenting it as a *"contingency plan"* should his existing lender fail to come through (*"as they were supposed to be in funds today"*); he later added plausibility to this by offering to arrange something meaningful as a thank you if *"the transfer from mezz comes in"*, subsequently quantified as £1m if he did not need to use CPC's moneys but used *"the Saudis"* instead. That indicates that what he told the Candys was that he was expecting mezzanine finance from a Saudi source, that he still hoped they would deliver and that the CPC loan was merely a back-up plan. In February 2012 he told Mr Pym that he had been thinking of the Al-Rajhi family, and he confirmed this in oral evidence. The Al-Rajhi family had indeed been approached by Mr Lovering and had shown some interest in investing in GGH. But I have seen nothing to suggest that by 12 October Mr Holyoake had been actually expecting funds from them to complete: Mr Lovering was still trying to push them to conclude an agreement on 16 October (and was described by Mr Pym on 18 October as getting frustrated with their speed of reaction), and Mr Holyoake accepted that they never in the event committed any funding. Mr Lovering's own evidence was that their decisions were normally made very quickly, but this took longer and nothing came of it, and that although a proposition was put to them, for various reasons it didn't happen. I conclude that the suggestion that funds were expected from them and that the CPC loan was needed as a back-up was another stretching of the facts by Mr Holyoake, no doubt to avoid looking too desperate.

117. Mr Nicholas Candy promptly forwarded the offer to his brother, commenting *"This could be a great deal for us"*, and at 11.00, having spoken to his brother in Los Angeles, replied *"We will do it and can do it today…My directors will sort out"*, followed by a more formal e-mail at 11.19 confirming that CPC wanted to proceed on specified terms. The terms were similar to those offered by Mr Holyoake, but slightly amended in CPC's favour: the 20% interest was to run for a minimum period of 24 months even if repaid earlier, and the profit share was to be 30% not 20% (with a minimum profit of £10m). Mr Holyoake promptly accepted those terms at 11.20, and these basic commercial terms did not thereafter change.

118. Mr Nicholas Candy in his 11.19 e-mail described the loan as one that would *"effectively be the mezz piece in your deal"*, and Mr Holyoake did not correct him when replying. This illustrates something that was not disputed, namely that Mr Holyoake did not tell the Candys about the Oscarone loan on 12 October, or subsequently. Indeed as already referred to Mr Holyoake did not reveal the Oscarone loan to the Candys during the almost 2½ years the loan was outstanding, at one point taking active steps to fabricate documents so as to conceal Oscarone's participation from them, and continuing to lie about Oscarone even after the proceedings were brought.

119. Mr Stewart asked me to find that the existence of Oscarone did not cause any significant prejudice to CPC's position; that CPC, although unaware of Oscarone's involvement as at October 2011, were well aware that Mr Holyoake would be seeking funding other than from just the senior lender and CPC (because it was obvious); and that it was not necessary to disclose the involvement of Oscarone at the outset as CPC was making a personal loan to Mr Holyoake and must have been aware that he would have been seeking diverse sources of funding for GGH.

120. I do not consider that any of these findings is justified. I find that CPC thought that the only other lending taken out for the acquisition of GGH was the Investec facility, and that although lending to Mr Holyoake personally they were effectively replacing a mezzanine funder. I also find (as evidenced below) that CPC would not have made the loan if they had known about Oscarone; and that the existence of the Oscarone loan significantly prejudiced their position.

121. The same e-mail also made it clear that the loan would be coming from CPC, not from either of the Candys personally. Again there is no dispute that Mr Holyoake understood this – for example at 11.53, at a stage when he envisaged that the loan would be made initially on the basis of binding heads of terms (with full documentation to follow), he asked Mr Nicholas Candy for *"CPC full address for heads"*, and Mr David, who was tasked with progressing the loan in Guernsey, duly provided him with both a correspondence address and the registered address, both in St Peter Port, Guernsey. Again when Mr Saunders provided a letter addressed to Mr Nicholas Candy, referring to him sending £12m as a loan and undertaking to hold the monies *"to your order"*, Mr Williams picked up that the letter was wrong as it was CPC not Mr Nicholas Candy that was making the loan; Mr Nicholas Candy then sent an e-mail to Mr Saunders' secretary, copied to Mr Holyoake, asking for the letter to be rewritten and addressed to CPC, emphasising *"**It is not me sending the money**…I am NOT personally involved other than in an advisory capacity"*; the revised letter was duly sent, addressed to CPC, and then a further revised version giving CPC's registered address, and marked for the attention of Mr Williams and Mr David. That enabled the funds to be transferred and at 13.02 they were sent to Saunders Bearman to be held to CPC's order pending finalisation of the terms (although perhaps characteristically Mr Holyoake had texted Mr Brooks of Investec as early as 12.43 confirming that they were already with Mr Saunders); Mr Saunders sent the funds on to the vendors' solicitors (DLA) where they had arrived by 14.48 at the latest. (Mr Saunders did not regard this as in breach of his agreement to hold them to CPC's order, as DLA were themselves holding the funds to his order pending completion; I do not intend to resolve if he was right about that or not).

122. It will be recalled that under the contract of sale as amended the price went up from £42.5m to £43m if not completed that afternoon, and Mr Holyoake was therefore anxious to finalise the loan and complete the purchase before the deadline (initially 2pm but extended to 3pm). He had therefore hoped that the loan could be made on the basis of some quite short but binding heads of terms. But CPC instructed their solicitors, then called Wragge & Co LLP (**"Wragges"**), and by 13.15 Mr Christian Candy was telling Mr Holyoake that Wragges wanted different documentation; and it was then agreed that Wragges would draft loan documentation, and Saunders Bearman would draft declarations of trust in respect of the profit share, and in due course it became apparent that the 3pm deadline could not be met.

123. In the meantime CPC had raised the question of Mr Holyoake giving a net asset statement. The first suggestion to this effect came in an internal e-mail from Mr David to the Candy brothers and Mr Williams at 12.24. He attached Mr Christian Candy's e-mail of 16 June in which he had told Mr Holyoake that CPC was not interested in GGH because of the risks involved. He pointed out that putting CPC's £12m behind Investec's £25m amounted to loans totalling £37m against a property

valued at £40-42m, *"so 2nd charge could easily end up under water if say English heritage get involved"* and said that they should therefore only proceed if they were happy with Mr Holyoake's personal guarantee and willing to take action against him if necessary. He added:

> "Is it worth asking Mark for a net asset statement and a confirmation of his current personal guarantees? I have a memory that he is giving Investec a PG also (although I may be wrong)."

(He was right about the latter point as the terms of the Investec facility required Mr Holyoake to give them a £2m personal guarantee, which he did). This e-mail is revealing about the practical effect of Mr Holyoake not telling the Candys about the Oscarone loan. If they had known of that, CPC would have seen that the total borrowed for the project was not £37m but £44.5m, and that CPC would have been *"under water"* and reliant on either GGH increasing in value or Mr Holyoake's personal liability right from the outset. What is more, as Mr Christian Candy explained in evidence, CPC was in effect, although it did not know it, providing 100% of the equity but only receiving 30% of the profits. He said in evidence that if he had known of the Oscarone loan, he would not have done the deal, evidence which in the light of these considerations seems to me entirely believable and which I accept.

124. Mr Christian Candy replied at 12.39 that he agreed with Mr David's suggestion, and asked his brother *"are you Ok for me to ask this from Mark?"*; and then at 13.50 e-mailed Mr Holyoake to the effect that he did not like asking but since the loan was personal to him, CPC needed to understand his net asset statement and what personal guarantees he had given, asking him to provide this before any drawdown. He confirmed that the information would stay confidential to CPC group, and even be kept from Mr Nicholas Candy if Mr Holyoake requested. He followed this up at 14.01 with a request for a second charge on one of Mr Holyoake's assets with enough equity in it to cover the loan and 2 years' interest, his Ibiza house being CPC's preferred choice; he described this as *"a big issue to CPC, and I think fundamental to the loan."* Mr Holyoake said in evidence that he regarded this as Mr Christian Candy *"pushing the envelope"*, that is attempting to improve the terms of the deal. He replied at 14.04 rejecting both the request for a net asset statement (*"can we discuss have some sensitivities around this and don't feel for this sum its needed"*) and the request for a second charge, offering instead a second charge only in the event of a default on an asset to be chosen by him so long as it provided coverage of 125% by value.

125. There was then a telephone call between Mr Holyoake, Mr Christian Candy and Mr David at about 14.15, and it was agreed that Mr Holyoake need not provide a net asset statement. When Mr Chris Gayle, a solicitor at Wragges, circulated a first draft of the loan however (at 14.52), it included an obligation on Mr Holyoake to provide CPC with a net asset statement and liability schedule quarterly; Mr Holyoake replied (at 15.08) that this was not as agreed with Mr David. Mr Gayle's second draft (circulated at 16.01), nevertheless contained the same provision; Mr Holyoake again replied (at 16.03) pointing out that it was still there; and Mr David agreed (at 16.10) that it should be removed. Mr Gayle's second draft had also introduced a new Minimum Net Asset Cover provision by which Mr Holyoake represented and warranted that his

net assets were at the date of the agreement, and until all amounts due under the agreement had been paid would remain, in excess of 10 times the Loan (defined as the principal amount of the loan, or as the context required, the principal amount outstanding as increased by the interest compounding under the agreement), and a covenant that he would maintain this Minimum Net Asset Cover.

126. Mr Holyoake also queried the provision of a second charge (which he wanted to provide only in the event of default, not, as drafted, within 60 days) and suggested a call. Mr David set up a call which initially took place between himself, Mr Williams and Mr Gayle. The call started some time between 16.16 when Mr David set it up and 16.58 when Mr Nicholas Candy e-mailed Mr Holyoake. Mr Nicholas Candy was not himself on the call (nor was his brother who was by then in a meeting in Los Angeles, having apparently been up most of the night) but both he and Mr Williams gave evidence that Mr Williams was in his offices in London and joined the call from there. In his e-mail Mr Nicholas Candy said *"the guys"* were still on the call, and then said:

> "Mate, we can't do a £12 million loan without full security. This means second charge and understanding of net asset statement.
>
> We have been burnt in the past and so this is not personal just belt and braces."

He then asked Mr Holyoake to jump onto the call. Mr Holyoake did so, and agreement was then reached. It was recorded in an internal e-mail from Mr David at 17.53. It provided for Mr Holyoake to provide within 5 days of closing three specific matters including:

> "net asset statement signed by reputable auditor/lawyer/bank"

(the others being a lawyer's letter confirming that the declaration of trust was not in breach of the Investec loan, and a Jersey legal opinion that Hotblack had full power to enter into the loan agreement); it also made provision for Mr Holyoake to provide a second charge if he had not repaid the loan in full (with the 2 years' interest) within 6 months; and it provided:

> "Requirement to maintain min net assets of £120m to remain."

Mr David asked Mr Gayle and Mr Williams if he had missed anything; there is no trace of any reply suggesting that he had. Mr David then (at 18.23) asked the Candy brothers if they were happy with what had been agreed. Mr Nicholas Candy replied (at 18.57) that he was; Mr Christian Candy was not entirely happy, pointing out (at 19.26) that CPC was at risk for 5 days and querying why CPC had to wait 6 months for a second charge. Mr David replied to him (at 19.37) that they had 5 days with no confirmation of net wealth or validity of profit share and that if Mr Holyoake failed to provide these, they were into default and would go after his guarantee; the 6 months had been suggested by Mr Holyoake as he needed time to get a dividend out of one of his businesses; they were at risk and reliant on his guarantee until they got the second charge, but this position was reflected in the pricing/profit upside. The key call was whether Mr Candy trusted him and he was a man of substance. Mr Candy replied (at 20.30) that he was fine but asked Mr David to squeeze the 6 months to 4.

127. Meanwhile (at 19.51) Mr Gayle had circulated a third draft of the loan agreement. This contained the obligation on Mr Holyoake to maintain the Minimum Net Asset Cover (now defined as meaning £120m), and new obligations to grant a second charge if the loan were not repaid in full by 12 April, and to provide within 5 business days a net asset statement signed by a firm of accountants or lawyers or bank certifying that Mr Holyoake had net assets not less than the Minimum Net Asset Cover. Mr Holyoake (at 20.07) raised a couple of queries and also asked for a confidentiality clause as follows:

> "finally bearing in mind the nature of information to come over can we have a confidentiality clause – saying the terms of this agreement will remain confidential and not released without the others permission unless in the event of default etc and the information provided ie net assets statement particularly etc will equally be treated in complete confidence and not released without express permission – sorry not worded v well but hopefully the point is clear."

Otherwise he was ok with the document and happy to execute it. Mr David (at 20.15) raised some minor drafting comments, including the addition of the words *"established and reputable"* in front of *"accountants or lawyers"* in the net asset statement provision, to which Mr Holyoake replied (20.24) that he was fine with all Mr David's points (including this one).

128. Mr Gayle drafted a confidentiality clause and there was some negotiation over its terms and other fine-tuning; Mr Christian Candy then went through the documents and discussed them on a call (at about 20.55) with Mr David and Mr Williams; Mr Holyoake and Mr Gayle were then invited (at 21.10 – this e-mail for unexplained reasons has time-stamps of 20.10 and 22.10 in different iterations but must I think actually be 21.10) to join the call on the basis that there were only a couple of points left to agree. Agreement must have been reached on all outstanding points as the next event was that Mr Gayle (at 22.13) circulated a clean copy of the loan agreement for signing if finally approved. The obligation to provide a charge was now to arise if the loan and interest had not been repaid by 12 March 2012 (that is after 5 months, so representing a compromise), and was to be granted within 30 days over Additional Property, this being one or more properties shown on a list of properties to be included in the net asset statement; in addition there was a negative pledge under which Mr Holyoake agreed not to grant any further security, beyond that already existing, over any such property; the net asset statement provision was included, with the additional words *"established and reputable"* as agreed. Mr Holyoake replied (at 22.26) that he was happy to execute if Mr David and Mr Williams were happy it was in final form.

129. At 22.23 Mr David e-mailed Mr Williams to the effect that they did not need to sign anything that night, they just needed to agree the document, for Mr Holyoake to sign, and for them to instruct his lawyer to release the funds. Mr Williams replied at 22.31 agreeing, and adding *"I'll have a glass of wine then"*; he was by then at home in Guernsey, having flown back from London in the early evening, and his concern was that if had to sign documents that evening, it would have meant driving into the office.

130. At 22.54 Mr Holyoake asked again if there were any comments *"or is it ok to sign ?"*;

Mr Williams replied (at 23.07) that he had spoken to Mr David and they were happy with it, and asked him to sign and scan back; Mr Holyoake replied (at 23.10) that he would do and he would be 5 minutes. At 23.12 Mr Williams e-mailed Mr Holyoake to say that a small amendment was required; Mr Holyoake replied (at 23.16) accepting the change and asking Mr Gayle to amend and recirculate, but at 23.36 Mr Williams replied that having spoken to Mr Gayle the document was fine as it was.

131. By this stage the documents (the loan agreement and two declarations of trust) were in final form, and there were no further changes, and Mr Holyoake signed and sent them back at 23.53. It took however several attempts, and quite a long time, before they were all finally executed to Mr Gayle's satisfaction – there were difficulties over the execution of the declarations of trust, which required to be signed twice, once by Mr Holyoake himself and once on behalf of Hotblack, and both signatures needed to be witnessed, which in the end Mr Holyoake got Mr Wells to do (despite the fact that he signed them in Ibiza and Mr Wells was in Switzerland). It is not however necessary to detail the process: eventually by 01.56 on the morning of 13 October Mr Holyoake had sent everything through, and at 02.14 Mr Gayle acknowledged that he now had the loan agreement signed by Mr Holyoake and the two declarations signed by all parties and witnessed. At 02.25 Mr Williams confirmed that the funds could be released, and the contract of sale of GGH to Hotblack was duly completed during the day of 13 October. The receivers did not in the event insist on the full £43m, and the final purchase price was some £42.85m.

132. As finally executed the Loan Agreement contained the following provisions, so far as relevant:

(1) The agreement was made between CPC as Lender and Mr Holyoake as Borrower.

(2) By cl 2 the loan facility was £12m, all of which was in fact drawn down in one tranche.

(3) By cl 6 interest was payable at 20% per annum, compounded quarterly, with default interest of an extra 10% on any amount not paid when due.

(4) By cl 7 Mr Holyoake agreed to pay all costs incurred by CPC in the negotiation and preparation, amendment, extension, alteration, preservation and enforcement of the loan.

(5) By cl 8.1 the loan was repayable on 12 October 2013; by cl 8.2 Mr Holyoake:

> "may repay the Loan and all accrued interest at any time…"

(and was obliged to do so on a sale before 12 October 2013); cl 8.3 provided that Mr Holyoake:

> "shall pay the Redemption Amount at the same time as making payment under clause 8.2"

The Redemption Amount was defined by cl 1.1 to mean:

> "an amount equal to the compounded interest element on the Loan (as determined by [CPC]) [CPC] would have been entitled to if the Loan was repaid on 12 October 2013."

Despite the reference to accrued interest being payable under cl 8.2 *and* the Redemption Amount under cl 8.3, it was never suggested that this entitled CPC to claim interest for the same period twice, and it was common ground at trial that the full amount of interest on £12m at 20% compounded quarterly came to £5,743,578, with the practical effect that Mr Holyoake was obliged to repay, whether at the end of the 2 year term or on any earlier repayment, the sum of £17,743,578 (which I will refer to as **"the £17.74m"**).

(6) By cl 9.1(a) Mr Holyoake represented and warranted that Hotblack was (and until all amounts due under the agreement had been paid would remain) the wholly owned subsidiary of the Parent (defined as "Greenland Ltd") and that Mr Holyoake was *"the legal and beneficial owner of all of the shares in the Parent"*. This was incorrect in two respects: the name of the parent of Hotblack was Greenlander Ltd rather than Greenland Ltd, and Mr Holyoake was not the legal (or indeed beneficial) owner of the shares in Greenlander, as the shares were held by Dorry. The former seems to have been a simple error. As to the latter, Mr Holyoake accepted in cross-examination that he did not disclose the existence of Dorry to CPC, and that it was in fact a mistake to say that he was the owner of the shares in Greenlander, but did not accept that it was of any potential significance to CPC. Although it was suggested to him that it might undermine CPC's rights under the declarations of trust, he did not appear to me to understand the point and I am not persuaded that this this was his intention; I find that this too was just an error, not a deliberate attempt to mislead or prejudice CPC.

(7) By cl 9(1)(b) Mr Holyoake warranted and represented that his net assets were (and would remain) in excess of the Minimum Net Asset Cover, defined as £120m; and by cl 10.1(b) Mr Holyoake covenanted that until all his liabilities under the agreement had been discharged he would maintain the Minimum Net Asset Cover.

(8) By cl 10.1(c) Mr Holyoake covenanted that if the Loan and all accrued interest and the Redemption Amount (that is the £17.74m) were not repaid in full by 12 March 2012 he would procure that CPC would be granted within 30 days thereafter the Additional Property Charge. The Additional Property Charge was security in the form of a charge or mortgage over the Additional Property, that being one or more properties chosen by CPC from the list of properties owned by Mr Holyoake (or by an entity wholly owned by him) and included in his net asset statement, the property or properties being required to have an aggregate minimum net asset value of not less than 125% of Additional Property Total Indebtedness. That expression was defined to mean the aggregate of the Loan and any indebtedness secured against the relevant Additional Property. The general effect of this is clear enough which is that there should be sufficient free equity in the relevant properties, after taking account of existing debts secured against them, to provide 125% cover for the

Loan, but it is not entirely clear what this was intended to mean in practice as the Loan was defined as the principal amount of the Loan made under the agreement (or the outstanding amount) *"as increased by the interest compounding under this agreement"*, so leaving it obscure whether the 125% would as at April 2012 be calculated on the £17.74m, or only on the £12m together with the interest accrued up to that date. What is clear however is that this provision did not entitle CPC to any security for its profit share.

(9) Cl 10.1(d) contained a covenant by Mr Holyoake to deliver to CPC various financial information on the Project (the proposed residential development of GGH), and in particular by cl 10.1(d)(4) such financial information in relation to *"the Property* [GGH], *the Project, the Company* [Hotblack] *or the Parent* [*"Greenland Ltd"*]*"* as CPC might from time to time request.

(10) Cl 10.1(e) contained the obligation on Mr Holyoake to deliver the three post-completion deliverables within 5 Business Days of the date of the agreement. The first of these, in cl 10.1(e)(1), was as follows:

> "a net asset statement for the Borrower signed by a firm of established and reputable accountants or lawyers or a established and reputable bank in each case approved by the Lender certifying that the Borrower has net assets of not less than the Minimum Net Asset Cover."

The second, in cl 10.1(e)(2), was as follows:

> "a letter from Saunders Bearman LLP confirming that all requisite Authorisations (including from Investec) to enable the Declaration of Trust to be validly given and enforced by the Lender on its terms have been obtained or that the grant of the Declaration of Trust by the Borrower and its enforcement on its terms by the Lender do not and will not be in breach of or otherwise conflict with any agreement or instrument binding upon each of the Borrower and the Company or constitute a default or termination event (however described) under any such agreement or instrument."

(Authorisations meant consents, approvals and the like). The third deliverable was a Jersey law legal opinion as to the due capacity, authority and enforceability of the Declaration of Trust by Hotblack.

(11) Cl 10.1(f) contained a covenant by Mr Holyoake that after the date of the Agreement no Security (mortgage, charge and the like) would be granted over any Additional Property prior to the repayment of the Loan in full or the grant of the Additional Property Charge.

(12) Cl 11 set out a list of Events of Default, any of which entitled CPC to declare the Loan *"and all accrued interest and other amounts outstanding under this agreement"* to be immediately due and payable. Among the Events of Default were Mr Holyoake failing to comply with any provision of the Agreement and the default not being remedied (if CPC considered it capable of remedy) within 7 Business Days; any representation or warranty being incomplete, untrue, incorrect or misleading in any material respect; and the Minimum Net

Asset Cover being breached and not restored on terms and within a period acceptable to CPC.

(13) Cl 15 permitted CPC to assign its rights under the agreement.

(14) Cl 20 contained provisions as to confidentiality. The agreement was marked *"Private & Confidential"* on its title page; cl 20 then provided under the heading *"Disclosure"*:

> "(a) The Lender may (following notification to the Borrower) disclose to any person with whom it is proposing to enter, or has entered into, any kind of transfer, participation or other agreement in relation to this agreement:
>
> (i) a copy of this agreement; and
>
> (ii) any information which the Lender has acquired under, or in connection with, this agreement
>
> but only if, in the case of confidential information, the relevant recipient has undertaken in writing with the Borrower to keep that information confidential in accordance with the terms of clause 20(b).
>
> (b) The Lender shall keep confidential all confidential information relating to the Borrower which is received by it under this agreement unless (and to the extent that):
>
> (i) the information is or becomes public knowledge otherwise than as a result of the default of the Lender;
>
> (ii) the Lender is required to disclose the information pursuant to any law or regulation;
>
> (iii) the disclosure is to any taxation, banking, insurance or other regulatory or self-regulatory authority;
>
> (iv) the Lender needs to disclose the information for the protection or enforcement or any of its rights under this agreement or any other Transaction Document;
>
> (v) the disclosure is to those of its officers and employees who reasonably need to have the information in connection with this agreement or any other Transaction Document; or
>
> (vi) the disclosure of any such information is to its lawyers, auditors or other professional advisers."

133. The two declarations of trust were made by deed. One was made by Hotblack as Trustee in favour of CPC as Beneficiary (**"the Hotblack Declaration of Trust"**) and its substantive provision was as follows:

> "NOW IT IS HEREBY AGREED AND DECLARED that the Trustee holds the Property in trust for the Beneficiary as to 30% of the equity in the Property and in

> the event of the Property being sold the Trustee shall pay to the Beneficiary the sum of £10,000,000 out of the proceeds of sale after all sale expenses directly referable to the sale but if that does not produce £10,000,000 Mr Holyoake shall personally make up the difference but for the avoidance of doubt the Beneficiary shall not be responsible for any loss whatever."

The Property was not specifically defined but it is clear from the recital that it was the freehold of GGH. Mr Holyoake was a party to this deed (because of his obligation to make up the difference), and executed it both for himself and for Hotblack which was said to be *"acting by a director"*. In fact Mr Holyoake was not a director of Hotblack, the only directors then being Mr Andrew Crichton and Ms Helen Crichton, both of Caversham. Mr Holyoake seems to have thought that as the ultimate beneficial owner he could execute the deed for Hotblack.

134. The other declaration of trust was by Mr Holyoake as Trustee in favour of CPC as Beneficiary (**"the Holyoake Declaration of Trust"**) and its substantive provisions were as follows:

> "The Trustee is the Beneficial owner of the entire issued share capital of Greenland Limited a private company incorporated according to the laws of the British Virgin Islands, which company in turn owns the entire issued share capital of HOTBLACK HOLDINGS LIMITED (the Shareholding).
>
> NOW THE TRUSTEE HEREBY DECLARES that he holds 30% of the Shareholding for the benefit of the Beneficiary pursuant to the terms of the loan agreement. In the event that the Shareholding is sold (as distinct from the Property) the Trustee shall pay 30% of the net profits to the Beneficiary but if 30% of such net profits do not produce the sum of £10,000,000 (provided that for the avoidance of doubt the Beneficiary shall be under no liability whatsoever for any loss) the Trustee shall make up the difference forthwith."

The two Declarations of Trust suffer from some fairly obvious deficiencies of drafting, some of which were later corrected by Deeds of Amendment, but it is not necessary to refer to them here.

*The alleged fraudulent misrepresentation by Mr Williams*

135. I can now consider the first of the two disputed factual issues. This is pleaded as follows: that in the early hours of 12 October, one of the directors of CPC, to the best of Mr Holyoake's recollection Mr Williams, spoke to Mr Holyoake on the telephone, and represented (i) that CPC required a net asset statement from him, (ii) that CPC was starting a business lending to high net worth customers, that CPC would be seeking net asset statements from its customers, and that it would assist CPC to have a net asset statement from Mr Holyoake that they could refer to, and (iii) that the net asset value should be ten times the proposed amount of the loan; that Mr Holyoake replied that such a net asset value was grossly excessive and should be two or at most three times the loan; and that Mr Williams then represented (iv) that:

> "Mr Holyoake's net asset statement was being sought purely as a formality, and would never be relied on by CPC or used in the context of CPC's loan to Mr Holyoake in view of his friendship with Nick Candy, and that the purpose of the net

asset statement was merely to assist with its new loan business."

This representation (iv) was said to be false, and to have been made fraudulently, Mr Williams knowing it to be false or having no belief in its truth.

136. In his witness statement for trial (his second statement dated 7 November 2016) Mr Holyoake gave an account largely in line with this pleading, but putting the call in the early hours of the morning on which the loan was signed (that is 13 October, not 12 October as pleaded), saying that the proposal for a net asset statement came in quite late in the day, in the early hours, and that, looking back, it was deliberately raised at the last minute in order to be used against him. This is impossible to reconcile with the e-mails, and an attempt by Mr Holyoake to suggest that all he had meant to convey was that it had not been raised at the outset is unconvincing because of the reference to it being deliberately raised at the last minute. Having studied the e-mails however Mr Holyoake gave a rather lengthier account in his fourth witness statement (dated 17 January 2017, shortly before the trial) which respected what they show; he now placed the call with Mr Williams somewhere between the telephone call at 21.10 and his e-mail of 22.23 at which he said he was happy to sign. In closing Mr Stewart placed the call slightly later, between Mr Gayle's circulation of the final form of the loan agreement at 22.13 and Mr Holyoake's e-mail of 22.54 asking if there were any further comments.

137. Mr Williams denied that any such call had taken place. The onus is on Mr Holyoake to establish this allegation, and although the standard of proof is the balance of probabilities, it is well established that the more serious an allegation is, the more cogent the evidence needs to be to discharge the onus: see *In re H (Minors)* [1996] AC 563. I have come to the clear conclusion that I cannot find this allegation proved on the evidence before me. This is for the following reasons:

(1) The only persons alleged to have been on the call are Mr Holyoake and Mr Williams, and so far as the oral evidence is concerned, it comes down almost entirely to the evidence of one against the other. (I say almost entirely because Mr Wells and Mr Pym both refer to Mr Holyoake having told them that the net asset cover would not be relied on, but these assertions carry very little weight, not least because it is clear that Mr Holyoake, Mr Wells and Mr Pym, all of whom share a financial interest in the successful outcome of this action, have discussed the issues between themselves on many occasions – Mr Pym said of one point (the Candys having ulterior motives in rejecting an offer to pay £13.5m) that it was something that he, Mr Holyoake, Mr Lovering and Mr Wells had discussed *"ad nauseam"* – and I do not think their accounts of what Mr Holyoake told them are truly independent of his evidence).

(2) I have already said that Mr Holyoake can be shown to have been guilty of stretching the truth or telling outright lies when it suited him, and given some examples. That does not mean his evidence is necessarily false on this or any other occasion, but it does mean that I am cautious about his evidence and should test it against the contemporary documents and the inherent probabilities.

(3) So far as the documents on the day are concerned, the detailed examination of the chronology of the e-mails lends no support to the suggestion that Mr Holyoake ever queried the provision of a net asset statement again after the telephone call which he was invited to join at 16.58, at which it was agreed. On the contrary he expressed himself to be happy with the drafting on several occasions, namely (i) with Mr Gayle's third draft, circulated at 19.51, which Mr Holyoake said at 20.07 he was happy to execute with certain changes; (ii) with Mr David's suggested addition, at 20.15, of the words *"established and reputable"*, which Mr Holyoake said at 20.24 he was fine with; and (iii) with Mr Gayle's final draft, circulated at 22.13, which Mr Holyoake said at 22.26 he was happy to execute. None of this begins to suggest any further reservations by Mr Holyoake once the matter had been discussed and agreed at the 16.58 telephone call, or any further attempt to query it.

(4) Moreover, there is no obvious gap in this chronology for the call to have taken place. In particular Mr Stewart's position in closing, placing the call between 22.13 and 22.54, suffers from the difficulty that at 22.26 Mr Holyoake said he was happy to execute the loan agreement if Mr David and Mr Williams were happy it was in final form, and at 22.54 he asked if there were any comments or if it was ok to sign. Not only do these e-mails not refer to any telephone call; they suggest very strongly that Mr Holyoake had *not* spoken to Mr Williams between 22.13 and 22.54 as if he had, the obvious thing to have done would have been to ask him, when he spoke to him, if he and Mr David were happy with the agreement, rather than asking him in an e-mail before the supposed call, and then again in another one shortly after it.

(5) As appears below, Mr Holyoake did provide a net asset statement which CPC almost immediately challenged, which led in due course to CPC sending a formal letter claiming that Mr Holyoake was in default for failing to comply with the net asset statement provision. Mr Holyoake disputed that he was in breach; but it is striking that there is no written complaint by Mr Holyoake, either when he was being pressed to comply, or when a claim was made that he was in default for not having complied, that this was contrary to the assurance he had received from Mr Williams. He gave an explanation in his fourth witness statement to the effect that he did raise it orally with Mr Christian Candy in November 2011 who told him that *"we are where we are"* and that it was too late to raise the issue, so he dropped it. This explanation was denied by Mr Candy and is difficult to accept: it would mean that despite being threatened with an immediate demand for the £17.74m and despite Mr Holyoake having, on his case, an answer to the allegation of default, he did not deploy it, a surprisingly meek reaction from a man who has otherwise not been shy to fight his corner.

(6) On 23 December 2014 Mr Holyoake's then solicitors, Jones Day, sent a letter before action to CPC, enclosing draft Particulars of Claim settled by his then leading counsel, the proposed parties being Mr Holyoake and CPC. The relief sought was the setting aside of the Settlement Deed for duress, and repayment of some £20m (that is the sums paid to CPC of £37m, less the £17.74m, plus some costs) under the CCA. The draft Particulars referred to Mr Holyoake's

obligation under the loan agreement to provide a net asset statement, and to the later dispute whether Mr Holyoake had complied with it, without alleging anywhere that Mr Holyoake had been assured that it would not be relied on. Again that seems a surprising omission from a claim that otherwise relies on many of the same complaints as are made in this action and had evidently been drafted with considerable care (and at some expense). Mr Holyoake gave an explanation that this was only the first claim and there was potentially a second, but this was not explored further (no doubt because Mr Holyoake had not waived privilege in the advice he was receiving). Jones Day's letter does indeed reserve the position in respect of a future claim to loss of profits, but this does not seem an adequate explanation why the allegation now relied on was nowhere mentioned. One would have thought that it would have supported the case that was being advanced in the Particulars of Claim, even if a second action for loss of profits was genuinely being kept in reserve.

(7) Mr Williams gave evidence as to the implausibility of his having given the assurance that Mr Holyoake alleges. As he pointed out, Mr Christian Candy had first (at 13.50) asked Mr Holyoake for a net asset statement, and then (in the telephone call at 14.15) agreed that he need not provide one; it was Mr Williams (who was in London on other business and in and out of meetings, and not on that call) who had, he said, been unhappy with the terms when he saw them and sought to renegotiate them, which was done in the telephone call after 16.58; having thus, as he put it, *"stuck my neck out to overrule my boss"*, he was not going to turn round to Mr Holyoake and say that he was only doing it to annoy Mr Christian Candy and CPC would never rely on it. That evidence seemed to me inherently credible, as did his evidence that even though Mr Holyoake was Mr Nicholas Candy's best friend, the loan was actually coming from CPC of which he was a director, and £12m was an awful lot of money, and that was why he insisted on putting in place the necessary protections for CPC, in case what they were being told by Mr Holyoake was not true.

(8) What is more, whenever the call is put, Mr Holyoake was giving every sign by the late evening of wishing to put the agreement to bed. He had first said he was willing to execute it subject to one or two points at 20.07, and repeated this thereafter. If the call had taken place at all and Mr Holyoake had expressed some unease at being asked to give the net asset statement, one would have thought that Mr Williams would have been far more likely to tell him that it had been agreed some time back and that it was too late to change it rather than give him an assurance that it was only there for some marketing reason, and would not be relied on.

(9) It is correct that CPC had recently launched a lending business called Omni Capital Partners Ltd (**"Omni"**) which was aimed at lending to high net worth individuals, that Mr Christian Candy was at the time concerned that it was not doing as much business as he had hoped, and that it can be shown that at around this time CPC was taking steps to publicise Omni's business, with a press release on 18 October 2011 announcing a significant expansion of its funding capabilities. But the suggestion that Mr Holyoake's net asset

statement might assist in promoting Omni's business makes little sense. Omni was in the business of secured lending, which was rather different from the unsecured loan to Mr Holyoake; but even leaving that point aside, it is difficult to see how CPC could use Mr Holyoake's net asset statement in any meaningful way. CPC had agreed to confidentiality provisions which prevented them actually publicising his net asset statement, so the most they could do is refer to it in anonymous terms, at which point the exercise becomes rather pointless. CPC did not need a net asset statement to say that it had made a loan of £12m to an anonymous borrower whose net worth was £120m.

(10) The main point made by Mr Holyoake in oral evidence was that he would scarcely have agreed to give a net asset statement at £120m, a figure that he thought he could stretch to but was at the top end of possible values, without seeking to negotiate the figure down to a more reasonable 2 or 3 times the loan, if he had thought it was actually going to be used against him. This point was advanced tenaciously not only by him but by Mr Wells, but the force of it is somewhat blunted by the chronology. It is apparent that the figure of 10 times the loan had appeared in the documentation as early as Mr Gayle's second draft (at 16.01), and the evidence is that it came out of the telephone call at 14.15, where Mr Holyoake's main concern was to avoid having to give security and he was seeking to make the point that he had more than enough assets to repay the loan. He also successfully resisted giving a net asset statement on that call, and the upshot was that Mr Christian Candy agreed to accept a minimum net asset covenant instead, using the figure of 10 times the loan. Having put that figure forward, or agreed it, for the minimum net asset covenant, one can understand that Mr Holyoake might have had some difficulty in trying to row back from it when it was agreed (in the call after 16.58) that a net asset covenant would be given after all. If he had tried at that stage to reduce the figure it would have cast doubt on what he had already said about the scale of his wealth, at a time when that was really all that the directors of CPC (Mr Williams and Mr David, neither of whom knew him personally) had to rely on. In any event, Mr Holyoake's own evidence was that he thought that if he found it difficult to meet £120m he could always reduce the figure by repaying a small part of the loan, believing that he only had to show 10 times the outstanding amount of the loan (which was not how the loan agreement ended up being drafted but had at one stage been the case). He also gave evidence that he thought that for some assets, such as his interest in ISI, there was such a wide range of possible values that it would be possible to have a lengthy argument about the value if it ever became necessary (*"you could have a ding dong match about 120 or not 120 for two years"*) so the net asset statement was unlikely to prove fatal. In all the circumstances the fact that he did not try and argue down the £120m figure is not I think a strong indicator that he ultimately accepted it because of an assurance from Mr Williams.

(11) Two other points were made by or on behalf of Mr Holyoake. One was that he saw this as an agreement between friends. He therefore trusted the Candys and did not believe they would try to take unfair advantage of him. I have

already accepted that he and Mr Nicholas Candy were close friends, although he did not have the same relationship with Mr Christian Candy, and that although it was made clear to him (and he understood) that the loan was formally coming from CPC, I do not have difficulty in accepting that he did not distinguish sharply between a loan from the Candy brothers and a loan from CPC which he thought of, whether correctly or not, as their company. I also accept that the fact that he thought he was dealing with friends may have made him less careful than he would have been in a purely commercial relationship. But I do not find this of any real assistance in deciding whether Mr Williams gave him the specific assurance he alleges. Indeed, immediately after the deal had been done (at 03.04 on 13 October) he sent an e-mail to both Candy brothers in which he said that they had a very good team around them and *"Richard in particular I thought was excellent"*. Since Mr Williams's efforts, once he had come into the transaction, were directed at negotiating, agreeing and having documented the protections he wanted, I read this as Mr Holyoake commenting that he had been assiduous in his role as director of CPC in protecting CPC's (and hence the Candys') interests. Thus although Mr Holyoake had initially approached Mr Nicholas Candy as a friend, by the time the deal closed he knew that he had to negotiate the small print of it with a director of CPC who was not himself a friend of his – they had never met – and who was acting in a purely commercial fashion.

(12) The other point made by Mr Holyoake was that he was set up to fail – that is that the net asset covenant was a *"Trojan horse"* clause, deliberately designed to make it difficult for him to comply with, with the aim of being able to call an early default. He was particularly exercised about the requirement that the net asset statement be certified, something which became a bone of contention later on. I deal with this point in more detail below, but I will say here that I am not persuaded that the requirement for certification was slipped in as a trap for Mr Holyoake to fall into, or that the net asset statement obligation was put into the agreement in the expectation or hope that Mr Holyoake would be unable to comply with it. Mr Stewart made it clear in closing that he only relied on this point in support of the allegation of the fraudulent misrepresentation by Mr Williams, and again on this point I do not find it of any real assistance.

138. There was one other source of evidence which emerged late in the day. Mr Lord suggested to Mr Holyoake in cross-examination that he had made up certain allegations (including this allegation of fraudulent misrepresentation), and in re-examination Mr Stewart waived privilege in a number of e-mails from Mr Holyoake to his then solicitors, Collyer Bristow, in an attempt to rebut the allegation of recent fabrication. There is one on 29 March 2012, and then a series of 5 (numbered 1 to 5) on 15 and 16 April 2012; there is also an exchange with Collyer Bristow on 13 February 2012 concerning a file note they made, which is referred to in the e-mail of 29 March 2012 and privilege in which I held to have been waived as it was incorporated, as it were, by reference. These documents are therefore much closer in time to the events in question; and since they were written to his own solicitors to give them his account, there was no reason for him not to mention something if it had happened. As such, they seem to me to be of considerable evidential value. There are

three relevant passages. In e-mail no. 2 of 15 April 2012 in answer to the question *"Why did you agree to sign up the terms?"*, Mr Holyoake wrote:

> "I didn't think the terms were that bad and I was reassured at every point that this was merely to document the position between friends rather than something that would ever be used. The one key point I remember worrying about after was the net asset covenant as the 120m was derived as I was asked by Chris what my assets could be worth – i said 120m he said let's use that then as a covenant figure – more normally one [m]ay have offered 1 X the loan or maybe 2X the loan amount – here I was now agreeing to 10 X. I was reassured again as this was not something they said they were concerned about but had to put something in the agreement so I went along. I remember after the deal was done feeling somewhat concerned at this but I took comfort that this transaction was being done with my oldest friend"

This is self-evidently a rather different account from a specific assurance from Mr Williams that the net asset covenant would never be used. In particular the reference to worrying about it *after* the deal was done, and taking comfort in the transaction being between friends, and to being reassured because they said it was not something they were concerned about, is inconsistent with a suggestion that he was not worried about it because he had been assured it would not be relied on. The rather vague statement that the loan agreement was merely to document the position and would never be used cannot sensibly be elevated into an assurance that no action would be taken if there was an event of default – the loan agreement as finally drafted is a full and detailed legal document and Mr Holyoake accepted that it was in principle intended and understood to be legally binding.

139. In e-mail no. 4 of 16 April 2012, under the heading *"Breach"*, Mr Holyoake wrote:

> "CPC … were claiming without merit an asset value default…I was furious a[t] this as the 120m figure was supposed to be a figure of wealth not a figure to be challenged I had raised this during the completion process and been told not to worry now I was being held to ransom."

This is obviously a bit closer to Mr Holyoake's present allegation, but is still some way short of it. Being told not to worry about giving a net asset covenant is not the same as being told that it was only being sought for use in connection with a lending business and an assurance that it would not be relied on. It should also be read with the third passage, later in the same e-mail, where, in answer to the question *"Explain the issues surrounding the net asset valuation. Why did CPC want a NAV of £120m when the loan was only for £12m?"*, Mr Holyoake wrote:

> "This is explained previously it was suggested as being just a figure for the agreement rather than anything meaningful – Chris Candy stated on Oct 12th that it was nothing I should worry about the fact I had 10 x loan value was a positive and as such let's use that – I would more normally have said No and used a more standard 1x or 2 x cover but at this point we were friends and so I mistakenly agreed to it."

Here the statement (by Mr Candy not by Mr Williams) that the net asset statement was nothing he should worry about cannot be taken as any form of agreement not to rely on it, but as merely referring to the fact that if, as he said, he was worth that

much, there was nothing to worry about; and that Mr Holyoake agreed to it not because of any assurance but because he thought he was dealing with friends.

140. Overall it can be seen that there is no support in these e-mails for the detailed and specific allegation that Mr Holyoake now puts forward. Reading the three passages together suggests instead that Mr Christian Candy said (no doubt in the 14.15 telephone call) that he was not overly concerned about the figure but some figure had to be put in (which would at that stage have been for the Minimum Net Asset covenant, not for the net asset statement), and that Mr Holyoake later agreed to use that for the net asset statement; but not that there was any specific assurance from Mr Williams later in the evening.

141. In all the circumstances, as I have already said, I find that this allegation has not been established: I am not persuaded that there was any late evening telephone call between Mr Williams and Mr Holyoake about the net asset statement at all; and even if there was, I find that nothing was said that would amount to an assurance by Mr Williams that the net asset statement was a formality and would never be relied on or used.

142. This misrepresentation is the only basis on which Mr Stewart submitted that the Loan Agreement was not legally binding on Mr Holyoake. It follows from my findings that the Loan Agreement was binding on Mr Holyoake in accordance with its terms.

143. The other disputed factual issue on the events of 12 October is whether Mr Holyoake made it clear that he did not want the CPC loan disclosed to Investec. It is more convenient to deal with this below.

*After 13 October – the net asset statement*

144. Immediately after completion, the parties were enthusiastic about working with each other. At 2.04 on 13 October Mr Holyoake e-mailed the Candy brothers saying it was a good transaction for them all, to which Mr Christian Candy replied that as CPC had a profit share their combined interests were aligned and he would like CPC and C&C to be more than a passive party – they could bring a lot to the party including improved financing and planning and development skills; Mr Holyoake replied he was open to all this, to which Mr Nicholas Candy added that he was 100% agreed; they were now a team with all interests aligned and would be formidable together. A meeting was arranged for 20 October between Mr Nicholas Candy and Mr Holyoake; and Mr Tim Simpson, the Group Planning Director, put together a crib sheet for Mr Candy which set out the ways in which CPC and (separately) C&C could add value to the project, and a suggested professional team. I see no reason to doubt that these were genuine attempts to assist. Thus although there was nothing in the shape of a formal joint venture between them, the parties were preparing to work together for their mutual benefit.

145. At the same time however Mr Christian Candy was from the outset very alive to CPC's contractual rights. On the morning of 13 October he had requested Mr David to give him the key dates; later that day when Wragges sent CPC a bill for the work they had done, he agreed with Mr David that Mr Holyoake should pay it (and pointed

out that it should be him personally not Hotblack), and asked Wragges for a 1 page summary of the transaction, again to be at Mr Holyoake's cost; on 18 October he sent a reminder to CPC's directors that Mr Holyoake needed to provide the post-completion deliverables by close of business the next day, and when Mr Smith asked what the remedy would be if he failed, replied immediately *"Enforce the loan, and take him to court."* This assumed that the time allowed by cl 10.1(e) of *"within 5 Business Days of the date of this agreement"* was to be calculated from the date on the face of the agreement (12 October) rather than the actual date the agreement was finally signed and the money released (13 October); Mr David had in fact already told Mr Wells (who was handling this aspect for Mr Holyoake) that he expected the deliverables by 20 October, and that was the date Mr Wells was working to.

146. In fact none of the three deliverables turned out to be straightforward. The second deliverable was the Saunders Bearman letter required under cl 10.1(e)(2) of the Loan Agreement. Such a letter was sent by Mr Wells to Mr Williams on the morning of 20 October, but CPC and Wragges wanted it redrafted, and it went through a number of versions before being finally accepted on 16 November, Mr Holyoake having by then also executed Deeds of Amendment to each Declaration of Trust as drafted by Wragges. The letter did not confirm that the requisite Authorisations (including from Investec) had been obtained; instead it confirmed (as permitted by cl 10.1(e)(2)) that the Declarations of Trust were not in breach of, or in conflict with, and did not constitute a default or termination event under, any agreement or instrument binding on Mr Holyoake, Hotblack or Greenlander. It is very doubtful if Saunders Bearman should have given such a confirmation, but I do not propose to go into this issue here: Mr Holyoake's obligation was to deliver a letter from Saunders Bearman in acceptable form, which he did.

147. The third deliverable was the Jersey law opinion. An opinion from Jersey lawyers called Viberts was sent in draft on 21 October, but again Wragges wanted it redrafted and it took some time before Viberts were willing to sign off on the revised version, not least because Mr Russell Homer, the legal counsel of Caversham, was initially unhappy that Mr Holyoake had executed the Hotblack Declaration of Trust when he was not a director of Hotblack. But a board meeting was held at which the Declaration was ratified and Viberts ultimately signed off an opinion in acceptable form on 23 November.

148. The other deliverable was the first, namely the net asset statement, and this proved more controversial. Mr Wells handled the preparation of this for Mr Holyoake. He had in fact recently prepared a net asset statement for Mr Holyoake for the purpose of applying to a Spanish bank, La Caixa, for a re-mortgage of the Ibiza property. This was signed off by Mr Holyoake's personal and tax accountant, Mr Colin Burns of Gerard Edelman, on 20 September, but not in fact forwarded by Mr Wells to La Caixa until 14 October. It gave an overall value for Mr Holyoake's net assets of about £82.5m and income of another £6m odd.

149. On 14 October Mr Wells e-mailed Mr Holyoake, saying that they were *"currently at 90m with property and income – we need to get to 120m"*, and Mr Wells and Mr Holyoake then considered how to do this. That led to an e-mail from Mr Wells to Mr Burns on 18 October attaching a draft net asset statement; Mr Burns approved it and

sent it back to him on 19 October. Before sending it to CPC, Mr Wells sought and obtained from Mr David an explicit confirmation that it would be kept confidential to CPC, and within CPC to the board directors (5 in total); he then sent it in the evening of 20 October.

150. The net asset statement as sent (**"the October net asset statement"**) gave net assets of just over £120m at £120,111,333. It was sent with a letter from Mr Burns which said that they (Gerard Edelman) had been asked to provide a statement of his net assets and liabilities which they enclosed, and the information was given in good faith but *"on our normal terms, such that no liability attaches to ourselves."* A comparison with the La Caixa net asset statement reveals a number of differences, the most significant of which were that the value of Mr Holyoake's holding in ISI, which in the La Caixa statement had been given as £28.8m (60% of £48m), was given in the CPC statement as £49.2m (60% of £82m); and that the value of Mr Holyoake's interest in GGH, given in the La Caixa statement as £15.3m (calculated as 85% of equity of £18m, based on a gross value of £42m and debt of £24m), was given in the CPC statement as £23.703m (100% of equity, based on a gross value of £45.503m and debt of only £21.8m). Neither the Oscarone loan of £7.5m nor the loan which Mr Holyoake had taken from CPC of £12m was shown as a liability. The net asset statement also included a round £5m cash which had not been shown on the La Caixa statement.

151. Mr Williams replied on 21 October with a number of comments. He said that the letter from Gerard Edelman was insufficient as it excluded liability, the intent being that CPC could rely on their certification if need be. He also adjusted the statement because it did not include the fact that 30% of Mr Holyoake's interest in GGH was held for CPC, or the £12m CPC loan. These two adjustments reduced the net position to c £101m.

152. That led to a protracted dialogue. Mr Wells (and Mr Holyoake who got involved) disputed that the word *"certify"* meant that Gerard Edelman had to assume personal liability, saying that it would be unrealistic to expect this to be done in 5 days, and challenging Mr Williams to produce an example of a net asset statement certified in such terms. (As already noted, one thing that noticeably does not appear in their e-mails was any contention that Mr Williams had assured Mr Holyoake that the net asset statement was a formality and would not be relied on). Mr Williams for his part reiterated that the key point was that CPC wanted to rely on a third party professional, and so their PI cover, because the loan was arranged without there being time for any due diligence. On 8 November Mr Wells sent Mr Burns a package of material (valuations and the like) and asked him to provide more colour around the statement, and on 10 November Mr Burns duly signed off a second letter enclosing an amended net asset statement. The letter (drafted by Mr Wells and Mr Holyoake) contained considerably more detail seeking to justify the figures, but again said that while the information was given in good faith, it was given *"on our normal terms such as that no liability attaches to ourselves."* The net asset statement enclosed (**"the November net asset statement"**) showed some downwards adjustments to the values of certain properties (the residential part of 46-48 Grosvenor Gardens and the development property at 2 Westbourne Mews, but not GGH which was left at the same value), offset by an upwards adjustment to the value of Mr Holyoake's holding in ISI to

about £51.7m (calculated as 60% of £86.163m). The total again came to just over £120m at £120,348,052.

153. Neither this nor supporting information which Mr Wells provided satisfied Mr Williams, and eventually on 29 November, having got the go-ahead from Mr Christian Candy, he sent a formal letter on behalf of CPC asserting that Mr Holyoake was in default and reserving all CPC's rights. The reservation of rights letter relied on two matters: the failure to provide a net asset statement certified pursuant to cl 10.1(e)(1) of the Loan Agreement in form and substance acceptable to CPC, and the failure to maintain the Minimum Net Asset Cover. It did not call for any particular action, but cross-referred to without prejudice discussions which CPC hoped would result in a positive resolution. At the same time CPC sent a without prejudice letter which took issue with the property values and enclosed a further revision to the net asset statement, showing a net position of some £90m; it suggested a way forward under which professional valuations of the properties (other than GGH) would be carried out at Mr Holyoake's cost by Mr Sharpe-Neal of Savills plc (**"Savills"**), cautions would be placed on the properties at the Land Registry, and in the event that the valuations confirmed CPC's concerns over the values, charges would then be given to secure a minimum of £15m. Savills was one of the firms that CPC used regularly for high-end valuations, and was one of the two agents instructed on the One Hyde Park development, and Mr Sharpe-Neal was very well-known to both Candy brothers and had been for a long time.

154. Two issues were canvassed at the trial on this: whether the requirement for the net asset statement to be certified required Gerard Edelman not only to confirm the net asset statement, but to accept personal liability for it; and whether the net asset statements were accurate statements of Mr Holyoake's net worth. The latter was investigated at some length but in the course of cross-examination Mr Holyoake accepted that various liabilities were omitted from the net asset statements (although he said that various assets were also omitted); and when asked what he was worth at the time that the net asset statements were put forward said he would be comfortable with the figure in the La Caixa statement, that is approximately £82m as a broad-brush figure. He qualified this somewhat by saying that he drew a distinction between what he actually felt he was worth if he had to choose a figure (about £82m), and what he could put forward as a figure that could be justified (the £120m) since the value of his interest in ISI in particular was one where there was a wide range of potential values. But in closing Mr Stewart expressly accepted that Mr Holyoake did not have net assets of £120m at the material times, and put forward as the Claimants' case the contention that he had a net worth in the range of £60m to £100m as at 12 October 2011 and at all material times thereafter, and that this was best reflected by the La Caixa net asset statement, that is of the order of £80-£85m.

155. The Defendants contend that Mr Holyoake's actual net worth was very much lower than this, indeed that he was a man of straw, and expert evidence was called both as to the value of various property assets and as to the value of Mr Holyoake's holding in ISI. But in the light of Mr Stewart's position it does not seem to me that I need to reach any final conclusions on this, and it is sufficient to say that whatever Mr Holyoake's true net worth, it was some way short of £120m. Since I have rejected his case that the Loan Agreement was induced by a fraudulent misrepresentation, the

consequence is, as Mr Stewart expressly accepted, that Mr Holyoake was in breach of the terms of the Loan Agreement.

156. I will however refer to some of the features of the net asset statements put forward in October and November 2011:

(1) The parties agreed that certain values should be attributed to Mr Holyoake's properties for the purposes of these proceedings. The agreed figure for the remaining (residential) parts of 42-44 and 46-48 Grosvenor Gardens, with the values shown in the October and November net asset statements respectively in brackets, is £7,042,500 (£10,025,000 (Oct), £7,950,000 (Nov)). The agreed figure for 2 Westbourne Grove Mews is £7,500,000 (£12,500,000 (Oct), £12,313,884 (Nov)). The agreed figure for the Ibiza villa and surrounding land is €22m (approximately £19m) (£22.5m (Oct and Nov)). These adjustments alone reduce the value of Mr Holyoake's assets by several million pounds.

(2) So far as GGH is concerned, the parties have agreed on a value of £42m. In both the October and November net asset statements, this was shown as worth £45.503m, a figure reached by adding the stamp duty and costs of purchase to the purchase price. It is self-evident that stamp duty and costs are part of the cost of buying a property but are not usually any reliable indication of value.

(3) The debt shown against GGH in both the October and November net asset statements was £21.8m. This was a change from the La Caixa statement where the figure was given as £24m. Although the £21.8m figure was not challenged in cross-examination, the £24m figure seems plainly more appropriate: the Investec loan may have only produced £21.8m in net moneys available for completion but the amount of the drawdown was £24m, all of which was secured by a first charge on GGH.

(4) More significantly the net asset statements omitted any reference to the Oscarone loan, also secured on GGH, of £7.5m. Mr Holyoake accepted that this should have been included, and Mr Wells accepted that it was a deliberate omission in the sense that they had not forgotten about it. Mr Holyoake denied however that it had been deliberately omitted so as not to reveal it to CPC, saying that they had simply put in the gross position between the purchase price and senior debt; they had omitted certain of the debt but also certain of the upside, what he referred to as overage, that is the potential future profits from the development of GGH. I found this a very lame explanation. What was presented to CPC was that Mr Holyoake owned the equity in GGH after allowing for a debt secured on it of £21.8m. The true position was that his equity was (at most) what was available after allowing for debts secured on it totalling £31.5m. Not to disclose that was misleading, and it does not cease to be misleading because it might have been possible to place a higher value on GGH. The obvious inference is, and I find, that Mr Holyoake deliberately said nothing about the Oscarone debt because he had not disclosed it to the Candy brothers when taking the loan, and to do so now would provoke very difficult questions.

(5) Nor, as Mr Williams pointed out, was there any reference to Mr Holyoake's liability to CPC of £12m. Mr Holyoake's evidence was that the £120m was intended to be a statement of his assets including GGH, but without taking into account the £12m loan as it was intended to be a statement of his assets prior to the taking on of that liability. I have great difficulty understanding this. Before CPC lent him the money, Mr Holyoake did not own GGH. He did have, through Hotblack, a contractual right to acquire it, but he could only do so by completing the contract and since he did not have the cash that meant borrowing the £12m, either from CPC or from someone else. In these circumstances I do not see how he could claim to have a valuable interest in GGH without a corresponding liability under the loan. If he had not taken a loan he would not have been able to complete and would have lost all interest in GGH; once he had taken the loan he did have an interest in GGH but also a liability under the loan. Any statement of his net worth that included GGH should logically therefore also have included the liability under the loan without which it would never have been acquired. Moreover the obligation under the Minimum Net Asset covenant was one that undoubtedly continued through the term of the loan, so even if Mr Holyoake's net worth was initially to be looked at before the loan was taken, he had covenanted that he would continue to have £120m of net assets after taking on the loan.

(6) Mr Williams also took the point that 30% of the net equity in GGH was held for CPC. Again I think he was justified in doing so: under the Declarations of Trust Hotblack and Mr Holyoake had declared themselves trustees of 30% of their respective interests for CPC. These Declarations were not well thought out, in particular in regard to how the two of them fitted together, but it seems clear that the intended effect was that CPC should have a 30% interest in Mr Holyoake's stake in GGH, and it is difficult to see how, consistently with that, Mr Holyoake could claim that he owned 100% of the net equity. Indeed when Mr Wells and Mr Holyoake were initially considering how to put the net asset statement together Mr Wells had sent an e-mail to Mr Holyoake (on 18 October) asking him how he wanted to show GGH and which said *"your 70% is 14.7"*. The inference I draw is that Mr Wells understood Mr Holyoake to be left with 70% of the net equity (thus omitting Oscarone's 15%, although that could admittedly be bought out), calculated at £21m (probably by taking a value of £45m and debt of £24m), but that Mr Holyoake decided that he should be shown as owning 100% of the net equity, calculated at £23.703m.

(7) The net asset statement also omitted some other liabilities. Most notably it omitted Mr Holyoake's continuing liability to 3i under the Overarching Agreement of some £10m. This was a particularly misleading omission as 3i had security over his properties, which meant that the ostensible equity shown as owned by Mr Holyoake was not in fact available to provide the Additional Property Charge which CPC would be entitled to if the loan were not repaid by March.

(8) Other liabilities that were omitted from the net asset statements include liabilities to a number of smaller investors (friends and family) who had put money into GGH at the time contracts were exchanged by way of loans to

Dorry (totalling over £1m), a loan owed by Mr Holyoake to his parents (which he claimed, without any documentary support, had been forgiven), and another owed to his wife. It is not necessary to detail them all or other criticisms that could be made of the net asset statements. It is apparent that Mr Stewart was entirely right to concede that Mr Holyoake's net worth was less than £120m at the time of the net asset statements.

157. It is also not necessary to consider the true value of Mr Holyoake's interest in ISI. This was addressed at length by the expert witnesses, and their evidence revealed a very stark difference of view, Mr Ballamy (the Claimants' expert) valuing ISI in October and November 2011 at between £34.6m and £47.8m and Mr Ellison (the Defendants' expert) at £5m, but however interesting it would be to consider and resolve the differences between them, I do not see that any useful purpose would be served by doing so.

158. Two points can however be made briefly about the value placed on Mr Holyoake's interest in ISI in the net asset statements which do not turn on any expert evidence. First it is apparent from both the October and November net asset statements that Mr Holyoake's interest in ISI was calculated at exactly 60% of the value of the whole (£49.2m, being 60% of £82m (Oct); £51,697,835, being 60% of £86,163,058 (Nov)). In fact Mr Holyoake did not own 60% of ISI. The evidence is that he owned (or rather had agreed to buy – he confirmed to his father in February 2012 that he did not have the equity and that it was in escrow pending the final payment due, and he did not make the final payment until after GGH was sold in 2014), a 55% interest in ISH. Indeed when Mr Wells was putting together a presentation for him in July 2011, Mr Wells had initially referred to Mr Holyoake as having a 55% interest. Mr Holyoake had however told him to use 60% *"as that's what companies house says"* and thereafter Mr Wells used the figure of 60% for the presentation, and later for the net asset statements. Mr Holyoake accepted that by July 2011 his (beneficial) shareholding was only in fact 55% (confirmed by the Overarching Agreement, which said that 5% of the shares held by his company Oakvest Holdings were held on trust for someone else); but he gave an explanation that because he had disposed of 5% of the equity in return for income, there was a dilemma as to how to value that. I did not understand this: on the face of it, Mr Holyoake's assets only amounted to 55% of ISI.

159. Second, the value of ISI was derived by taking a multiple of its forecast profits (that is earnings before interest, tax and depreciation or EBITDA). For the October net asset statement it appears that the multiple used was 8.3 and the forecast EBITDA £9.96m. For the November net asset statement, as the property values had been reduced, Mr Holyoake asked Mr Wells to boost the ISI figures slightly by increasing the forecast EBITDA to get over the £120m, which Mr Wells did. On 14 November however, after the November net asset statement had been sent, Mr Wells sent an e-mail to Mr Holyoake in which he said:

> "we have 2012 forecast at 10.2m and just realised they in euros and we have done it in £ so would need to make forecast at 11.5m. He has not asked for forecast so I can change up if we get to that…"

That on the face of it is a clear admission by Mr Wells that when he was calculating a

value for ISI to go into the November net asset statement he was working off a forecast of 10.2m without realising that all of ISI's accounts were in Euros, and that he would therefore have to produce a revised forecast showing profits of €11.5m for 2012, which would be the equivalent of £10.2m and hence justify the figure he had put in the net asset statement. In cross-examination Mr Wells attempted to explain this away but I could not follow, and do not accept, his explanation. It really follows from this that the values for the ISI shares were not based on genuine attempts by Mr Holyoake and Mr Wells to predict the likely level of EBITDA; rather the forecasts were manipulated to produce the result they wanted. This is only the simplest and clearest example of a whole series of criticisms of the forecasts, which were explored at some length, but which I do not need to go into.

160. I find therefore that Mr Holyoake did not have net assets of £120m at the time of the Loan Agreement, or at the time the net asset statements were given in October and November. I also find that the net asset statements were not acceptable to CPC, in that, among other things, they did not show liability for CPC's loan and they included the value of 100% of the equity in GGH without allowing for CPC's 30% interest. In those circumstances Mr Holyoake was in breach of the Loan Agreement, both in not delivering a net asset statement that was in substance acceptable to CPC, and in not maintaining the Minimum Net Asset cover, and CPC was therefore justified in asserting, as it did, that there had been an Event of Default.

161. That makes it strictly unnecessary to resolve whether Mr Holyoake was also in breach of the requirement that the net asset statement be *"certified"* by a firm of accountants on the ground that Gerard Edelman had excluded any personal liability. I will however briefly give my views. As a matter of normal language the requirement that a firm certify the net asset statement requires it to say something along the lines of: "We hereby certify that Mr Holyoake's net assets are as shown on the attached statement". I do not see in the wording of the contract any express requirement that the firm go further and also accept a personal liability to CPC. So in order for the requirement to exist it is necessary to imply a term to that effect. The tests for implication of contractual terms are well-known and strict, and in my judgment they are not satisfied here: to require that a firm of accountants not only certifies Mr Holyoake's net wealth but puts its own liability and professional indemnity insurance on the line, is not, it seems to me, implicit in the express terms, or so obvious as to go without saying, nor do I see that it is needed for business efficacy or to make the contract work. One can well understand Mr Williams' point that in the absence of due diligence before making the loan, CPC wanted to have a professional firm and its insurance cover to look to, but that does not mean that without this extra protection the clause is robbed of all utility. It should be some reassurance to a recipient of a net asset statement that a reputable professional firm is prepared to certify it even if it is not prepared to accept liability for it, as one would not expect a reputable firm to do that without having satisfied themselves that there was some basis for it, and whether a term should be implied into the contract or not cannot of course be affected by the fact that Mr Burns was in the event content to send out the net asset statements as he was asked to without any very detailed investigation. I therefore find that Mr Holyoake was not in breach of the net asset statement obligation in failing to provide one which Gerard Edelman was prepared to accept liability for.

*Set up to fail?*

162. Mr Wells in his evidence made much of the contention that the net asset statement provision in the Loan Agreement was a *"Trojan horse"* clause that was impossible to comply with, such that Mr Holyoake would inevitably be in breach and that he was being set up to fail. This was primarily based on the word *"certifying"* and Mr Williams' contention that this required the certifier to accept a direct liability to CPC. I have already said that I do not accept this contention. I accept that it was perhaps unlikely that a firm of accountants – or a firm of lawyers or a bank – would agree to accept direct liability to CPC, and even more unlikely that they would be prepared to do so within 5 days. It is noticeable that when Mr Wells asked Mr Williams for an example of a certified net asset statement he did not provide one, and in fact he confirmed in evidence that he had never seen one, although he had seen a certified statement of affairs for a company. But I am not persuaded that this was something that was deliberately designed as a trap, nor do I accept, as Mr Stewart asked me to, that this construction was being advanced improperly in the knowledge that it was impossible for Mr Holyoake to comply. What the documents show is that it was agreed on the telephone call which Mr Holyoake joined after 16.58 that he provide a net asset statement signed by a reputable auditor/lawyer/bank, and Mr Gayle then circulated a third draft of the loan agreement at 19.51 which contained such a provision, including the word *"certifying"*. Mr Williams' evidence was that it was he who wanted the net asset statement backed up by somebody else and he wanted that person to be a professional and for it to be certified, and that he did not think it would be difficult to get a professional sign-off from someone who knew his affairs intimately. I accept this evidence, which seems to be both consistent with the documents and inherently credible.

163. A second question is whether CPC expected Mr Holyoake to have difficulty complying with the net asset covenant at £120m. Mr Christian Candy's evidence was that he thought at the time of the loan that Mr Holyoake was worth some £200m, that he knew he was an immensely wealthy man through British Seafoods and had taken a substantial hit after British Seafoods, and that the source of his information was his brother. Mr Nicholas Candy said he thought Mr Holyoake had told him that he was worth about that, but was very vague about it. Mr Williams too said he was under the impression that Mr Holyoake was worth £200m, but was unclear whether this was something Mr Holyoake had told them or not.

164. I am sceptical of this rather vague evidence, which is not supported by any contemporary documents. What can be demonstrated from the documents is that on 7 November 2011 Mr Christian Candy e-mailed both his brother and Mr Williams to pass on what Mr Pym had told him over the weekend when they were having a drink at a hotel in Paris, probably in the early evening of Saturday 5 November, Mr Candy having taken Mr Pym and various other guests to Paris for the weekend to celebrate his wife's birthday. What Mr Candy said in his e-mail was that Mr Pym had told him that Mr Holyoake was worth £400m pre British Seafoods, and *"is worth £200m now"* and that he had put assets in trust in Hong Kong. That is not quite how Mr Pym reported the same conversation to Mr Holyoake the previous day, which was that he had said that *"I had full oversight on your assets which were in excess of £250MM, of which the majority were held in Trust! He took it on board!"*. (The reference to a

trust in this conversation, attested to by both accounts, was unexplained: there are various other references to a trust scattered through the documents, but neither side explored them in evidence.) Mr Pym's evidence about this conversation was in general very unimpressive and unconvincing, he being unable to explain either how he came to claim full oversight over Mr Holyoake's assets, or what the £250m figure was based on, or what he meant by his explanation marks, which on at least one interpretation suggest he knew he was pulling the wool over Mr Candy's eyes. Nevertheless this conversation, as reported by Mr Candy, is I think likely to be the source of the idea that Mr Holyoake was worth £200m, and I am very doubtful if Mr Candy or his brother or Mr Williams really thought on 12 October that Mr Holyoake was worth £200m. Mr Williams also said that Mr Holyoake gave the impression that the £120m figure was not a hurdle; that I think is more likely to be an accurate recollection.

165. I think it likely that none of them really knew what he was worth or quite what his wealth consisted of: there is an e-mail of Mr Christian Candy to his brother of 20 October in which he says that Mr Holyoake was due to send them his net asset statement that day and adds *"Will make an interesting read"*, to which his brother replied *"Very"*. And despite Mr Pym's belief that Mr Christian Candy had taken on board what he told him, by 7 November neither brother thought he was worth anything like £200m – Mr Nicholas Candy's reaction to his brother's account of what Mr Pym had said was that he did not think Mr Holyoake was worth £100m, to which Mr Christian Candy replied that he thought he was worth a maximum of £75m. That was said after they had seen his net asset statement at just over £120m, but there is no hint that they had very recently believed he was worth nearly twice that.

166. I do not therefore accept that Mr Christian Candy or CPC believed at the time of the loan that Mr Holyoake was worth £200m. However that does not mean that he or they expected or intended him to fail the £120m covenant. By the early afternoon of 12 October (UK time) Mr Candy had calculated the interest payable over 2 years at £5.28m, equivalent to an annual interest rate of 22%, and circulated the figures, saying to Mr Tim Dean of CPC, who was with him in LA, that he would talk him through this at breakfast. He later queried why Mr Holyoake was being given 6 months before CPC obtained security, and was told by Mr David that the 6 months was driven by Mr Holyoake taking a dividend out of one of his companies and that Mr Holyoake had suggested 6 months so as to resolve this. On 13 October, after completion of the loan, Mr Christian Candy sent his brother an e-mail to the effect that Mr Holyoake intended to repay the loan in full in February 2012, which would be a £5.28m profit, saying *"If this happens it is an off the scale deal"*. On 26 October, he circulated an internal e-mail passing on the information (which he had probably got from Mr Pym whom he had seen the previous evening) that Mr Holyoake thought he had paid over the odds for the loan, to which he added the comment *"No shit Sherlock!!!"*. I conclude from all this that Mr Candy at the time of the loan thought that the returns Mr Holyoake was offering, simply in terms of interest and even without taking into account the profit share, were very attractive, even if the interest was paid at the end of 2 years, and very much more so if the loan was repaid in full in the spring of 2012. That sufficiently explains why he was keen on CPC doing the loan, and it is not necessary to assume that he went into the loan intending Mr Holyoake to fall into a trap so he could call a default. I am not persuaded that I

should infer that he did.

167. What is true is that, as I have already said, Mr Christian Candy was very alive to CPC's contractual rights, and not averse to enforcing them. I have already referred to his response to Mr Smith on 18 October that if Mr Holyoake did not comply with his obligations in relation to the deliverables he would enforce the loan and take him to court. Mr Wells in his oral evidence said that he thought the deal was between friends, and that was not how friends behave: what friends would do is have a conversation and agree that the net asset requirement was too high and reduce it to say £90m. I think it is a fair comment that Mr Christian Candy did not treat Mr Holyoake in any way like a friend. Mr Candy was well aware that in strictly enforcing CPC's contractual rights, Mr Holyoake might think he was being anything but friendly – he sent an e-mail to his brother on 2 November, forwarding one of Mr Williams' e-mails where he was pressing Mr Wells on what the certification requirement meant, with the comment *"At some point, MH will piss in your ear about us pressurising him"*, a phrase that he explained as meaning bleating or complaining without any foundation.

168. And on the morning of 18 November he had a telling e-mail exchange with Mr Williams. He asked Mr Williams if he now had everything he required. Mr Williams replied that he was waiting for the Jersey legal opinion which he was expecting that day. Mr Candy's response was:

> "Ok. Let me know once in. We can then apply pressure on the net asset statement, correct?"

Mr Candy said in evidence that what he meant by that was using pressure to obtain a compliant net asset statement, and that by pressure, he meant legal, contractual legitimate pressure. He denied that what he meant was seeking to use the net asset statement to assert that Mr Holyoake was in breach. But I think that was exactly what he was thinking of. He would get Mr Williams to press for a compliant net asset statement, but by this stage I think Mr Candy believed that Mr Holyoake would be unlikely to be able to show net assets of £120m, and thought he could then use that to his advantage. I have already referred to the fact that he did not believe Mr Pym's assertion that he was worth £250m or £200m, and told his brother on 7 November that he thought Mr Holyoake was worth £75m at a maximum; on 10 November CPC had had Mr Holyoake's second attempt at a compliant net asset statement (the November statement) which Mr Williams was still not happy with; then on 11 November there had been a telephone call to discuss it between Mr Williams, Mr Christian Candy, Mr Wells and Mr Holyoake in which Mr Wells and Mr Holyoake agreed to provide further information on Mr Holyoake's properties and on ISI, a call that Mr Candy described in an e-mail sent to his brother that evening as *"uncomfortable"*. I infer that Mr Candy was not reassured and that by 18 November he was very doubtful if Mr Holyoake would be able to provide a net asset statement that he and Mr Williams would regard as compliant. When therefore he referred to applying pressure on the net asset statement, I consider he was not referring so much to getting a compliant net asset statement but to taking advantage of the fact that Mr Holyoake would be unable to comply, and that he was already contemplating calling default on the loan.

169. None of this however establishes, and I am not prepared to infer, that when the Loan

Agreement was drafted and agreed Mr Candy was expecting Mr Holyoake to fail the net asset covenant provision and setting him up to fail. Rather what it illustrates is Mr Candy's readiness to exploit the provisions of a contract. His own description of himself was that he was a *"candid and tough"* businessman; and his brother gave evidence that he was a *"very firm"* businessman, very candid, to the point, a bit too much so even for him, and that *"if you sign a contract with my brother, he expects it to be obeyed"*. The evidence I have heard suggests that that could perhaps be rephrased as that *"if you sign a contract with Mr Christian Candy, you can expect him to be astute to take every advantage of its provisions"*.

*The threat to approach Investec*

170. On 8 November, while the debate over the net asset statement was still ongoing, Mr Christian Candy told Mr Holyoake that he wanted to tell Investec about the CPC loan. Mr Holyoake's reaction was that he had made it clear that he did not want Investec to be told. Mr Stewart placed great reliance on this episode and I should deal with it in detail. It played out in a series of e-mails over the course of 8 and 9 November as follows:

(1) At 06.01 on 8 November Mr Candy e-mailed Mr Holyoake to the effect that his brother was seeing the CEO of Investec on Thursday (that is 10 November) about doing more business with them. He continued:

> "Am I correct in saying that they do not know that CPC Group has loaned you monies to acquire Grosvenor Gardens House, and they think you have done the entire equity yourself? Apologies if I have got this wrong.
>
> If they do not know, I am keen for them to be told. If CPC Group are going to start doing business with Investec, I want to ensure that CPC are totally open with them. Additionally, they will want to see the CPC Group net asset statement, and this has on it the loan to you personally, and details of it, so they would find out anyway.
>
> By being open and transparent with Investec will also allow you to ask them for a 2nd charge for CPC Group on Grosvenor Gardens House. This will resolve all the issues of charges early next year if the loan has not been repaid. I am very keen to ensure clean charges, and I think having one on GGH is the most elegant solution for all."

(2) Mr Holyoake replied at 07.13 that Mr Candy's understanding was correct, saying that he was *"very clear prior to taking the loan that Investec were NOT aware and requested this remained the case. I discussed this with Nick and yourself at that point and was assured that this was fine"*; he also indicated that he would be refinancing the facility early in 2012. He then forwarded Mr Candy's e-mail to Mr Pym commenting that it was *"V random! They knew not to speak to investec and agreed 100% no problem."*

(3) At 07.22 Mr Candy replied:

> "The issue we have is that Investec will want the CPC Group net asset statement and the loan is on here. They will find out one way or another in

the next couple of weeks."

He forwarded this to Mr Williams and his brother with the comment that *"He clearly does not want us talking to Investec."*

(4) At 08.13 Mr Holyoake forwarded Mr Candy's 7.22 e-mail to Mr Pym with the comment:

> "…they trying to tell investec they supported me so they look good for a debt facility as I know when we looked at hbos together citi bank and investec said they wouldn't do it if they involved – this will make me look seriously stupid and also ran/yaser issues – all in all they ruin my relationship and try and gain one for themselves – nice…"

He then (at 08.21) replied to Mr Candy suggesting that they have their meeting but keep the loan confidential *"as agreed"*; and that if they then had realistic business they were going to do, then they discuss it beforehand as they would need to handle it carefully to avoid embarrassment and reputational impact *"for the reasons we discussed at the outset"*.

(5) Mr Candy replied at 08.25:

> "Regarding Investec, I can tell you now that we have to provide CPCs net asset statement, and the loan will come to light."

He forwarded this to Mr Williams and his brother with the comment:

> "Slowly slowly we will get to what he is resisting telling us."

Mr Nicholas Candy replied to this at 08.30:

> "Tell him we need to tell Investec this week as we are working on a big deal with them. he will then have to tell Investec."

(6) Mr Holyoake's next e-mail at 08.49 said:

> "On investec it's a relationship point and as we discussed prior to the loan I had not informed them hence the provision of other security for the debt to you – i would prefer to refi them however if I am forced to disclose prior to then I have a dinner being arranged 3rd week in Nov with them and we will discuss internally how to handle and raise at this point…
>
> Could you update me post Nick's meeting as if you are not going to work with them it saves this problem and we can refi as planned…"

(7) Mr Christian Candy then had a telephone conversation with his brother and Mr Williams. That led to an e-mail from him to Mr Holyoake at 09.50 as follows:

> "Investec are selling a large asset, that CPC is looking to acquire and also finance through investec. As such we need to provide them with our net asset statement before Thursday, and Nick will be discussing with them on Thursday. The loan to you will come to light I am afraid, so this is the

heads up that you either tell them before Thursday, or they will spot it.

Let us know what you prefer. Sorry if this is painful for you, but CPC Group must be transparent to its lenders or proposed lenders."

(8) Mr Holyoake sent that to Mr Pym with the comment *"It gets worse!!"* and at 10.18 replied that he thought it was a couple of weeks (citing Mr Candy's e-mail of 7.22) and adding:

"Is it def tomorrow now? Also on the A+L [asset and liability] statement you will provide can I ask what is stated in this regard – I presume a £12m loan to MH? Is that correct?"

(9) Mr Candy's next e-mail at 11.47 was as follows:

"I thought it was a couple of weeks. CPC has confirmed they want to issue all financials this week to Investec, and asap, in order to progress the financing of the acquisition.

It will state £12.00mn loan, who the borrower is, what the loan was for, and the minimum exit fee that was personally guaranteed."

(10) Mr Holyoake again forwarded this to Mr Pym with the comment *"He's such a ..... Going to screw me big time"* and then replied to Mr Candy at 12.56 with a longer e-mail asserting that it would be embarrassing for the terms on which he had borrowed from CPC to be revealed as they were very high and asking if the information could be reduced: did it need to show the returns, did the borrower even need to be revealed? It included the following:

"Investec are a longstanding bank for me we have worked together since 2000 and I just do not want to damage this especially as we are raising a mezz fund that could sit alongside future deals going fwd – this is why I raised this sensitivity at the outset prior to the loan to everyone on your side as I want to protect this relationship…

[If the information cannot be reduced] can we discuss a prompt repayment from me and I will seek to arrange asap in the next week as I do feel exposed here reputationally if the shoe were on the other foot I am sure you would feel the same and part of our transaction was that this would be a confidential deal done between us which did not need to expose either party or cause any issues to either party."

(11) Mr Candy had another discussion with his brother, Mr Williams and Mr David (who had been brought in), and replied at 15.17:

"I feel that I may be perceived as being difficult. I am genuinely not trying to be. I am sensitive to your position.

CPC Group is looking to do a large acquisition with Investec, that will involve substantial equity, debt and mezz. This means CPC Group will need to open its kimono to Investec, and detail its assets and liabilities. This means we need to give full disclosure, and although I may be

> comfortable economising with what I say, Richard is categorically not [you know how Richard is, as you dealt with him on the loan]. Richard believes it is essential that we are open, candid, and honest with Investec on all our assets [and liabilities], and, as such, would want to disclose the nature of all assets at CPC Group.
>
> I am sorry we are now both in this position. I will not over rule Richard on this, and am sensitive to your position. Happy to take out the information on your loan, as it needs to go very soon, on the condition that you agree to repay in the near future [you say in the next week?]. Let me know how you want to proceed.

(12) Mr Holyoake replied at 15.35 thanking him and saying that he was prepared to work on removing the loan as soon as possible – he could not guarantee that it could be done in 7 days but it was reasonable to expect that it would be done by the end of the year.

(13) Mr Candy's next e-mail was on 9 November at 08.12 saying that he did not understand Mr Holyoake's sensitivity, adding *"I get the feeling you are not telling me or Investec something"*; he also asked that Mr Wells send the outstanding information on the net asset statement to Mr Williams; and asked how Mr Holyoake was going to repay £17.74m in 45 days as he could not see from his net asset statement how he was going to do it.

(14) Mr Holyoake replied at 10.26. His e-mail included the following:

> "I feel all of a sudden the Investec thing is something that I didn't mention – when in reality i went to great pains to discuss with everyone prior to the loan and got clear confirmation I had thought that our position would not be disclosed indeed I have several confirmations on this point including from Nick and yourself. This is not something new and I have not changed our position in this regard."

He also said Mr Wells would send the information over to Mr Williams, and that he would revert next week on the timing of the repayment of the loan.

(15) Mr Candy forwarded this to his brother, Mr Williams and Mr David with the comment *"I don't think I push this any further"* and that he would not respond to Mr Holyoake's e-mail as it did not need a response. Mr Nicholas Candy replied agreeing with this, and no response was sent.

171. Mr Nicholas Candy did have a meeting on 10 November with Investec, having drinks with Mr Bernard Kantor and Mr David Currie. Mr Kantor was the co-founder of Investec and its CEO, described by Mr Currie as a major force in the organisation; Mr Currie was then and had been since 2003 the head of Investec's Investment Banking Division. On 23 November Mr Nicholas Candy e-mailed Mr Holyoake, who was trying to set up a meeting, and said, in passing, that he had had drinks with the CEO of Investec 2 weeks before and thought Investec would allow a second charge on GGH: he had not mentioned Mr Holyoake or GGH, but was talking generically about Omni. Mr Currie confirmed that at the meeting there was a fairly general business discussion around the London property market and what opportunities might arise for

the Candy businesses and Investec to work together, and that there was no mention of the fact that CPC had loaned money to Mr Holyoake.

172. I am entirely satisfied that the e-mails from Mr Candy to Mr Holyoake on 8 November contained a series of deliberate lies. The true position was revealed by some late disclosure given during the cross-examination of Mr Christian Candy, and was as follows:

(1) In August 2011 there was an opportunity to acquire the London Heliport in Battersea. Mr Nicholas Candy expressed interest in doing this, and was enthusiastic to his brother about it (*"If we can buy this for £40 million and exchange immediately then I love this deal…Let's do it"*); Mr Christian Candy wanted CPC to review the opportunity and on 10 August asked Mr David to do so. CPC was put forward as the potential purchaser and signed a confidentiality agreement.

(2) Information was then provided which showed that what was on offer was a sale of the freehold of the heliport with a lease-back to the existing operator, either at a fixed rent, or at a rent that equated to 50% of the operating profit, and that the vendor (effectively a Mr Andrew Davis) was looking for £55m. Offers were invited, but once Mr Christian Candy had seen Mr David's analysis of the potential returns, he e-mailed his brother (on the evening of 15 August) to the effect that based on that analysis CPC should not touch it, and no offer was made, and on 17 August Mr Nicholas Candy confirmed to Mr John Seaton of Black Pearl Solutions (a property agent who was pushing the opportunity) that they were not going to make a bid.

(3) The story picks up again in October when on 20 October Mr Currie of Investec contacted Mr Nicholas Candy to say that they had an asset for sale which might interest him. This was a reference to the heliport. Mr Candy replied asking him to set up a meeting with his CEO and himself to discuss Omni; he said that they were interested in the heliport but not with Mr Davis involved or any leaseback to him. Mr Currie confirmed that a sale without a leaseback was definitely on the cards, and on 26 October Investec sent Mr Candy a document outlining an opportunity to buy either the company which owned the heliport or its assets and inviting expressions of interest by 4 November.

(4) Mr Nicholas Candy forwarded this to his brother, who asked Mr David to remind him why they had said no to the deal before. Mr David said they did not want to do a sale and leaseback, to which Mr Nicholas Candy said that was not the position now. However, despite Investec sending a reminder on 1 November that expressions of interest were sought by 4 November, CPC did not submit one.

(5) On the evening of 8 November (at 20.41) Mr Nicholas Candy e-mailed his brother to say that the Reubens brothers were interested in it and *"We should relook at it"*. Mr Christian Candy replied asking what the angle was; the Reubens owned Oxford airport, so he saw synergies for them. This exchange,

with its reference to relooking at it, indicates that CPC had looked at the opportunity and decided against it; and that Mr Christian Candy could not see why his brother was suggesting looking again at it.

(6) On 9 November Mr Seaton sent further information to Mr Nicholas Candy, to which Mr Nicholas Candy said they would be interested. On 14 November Mr Seaton e-mailed both Candy brothers saying that he would set up another meeting with Mr Davis and asking when they would be available, but Mr Christian Candy's immediate reaction was to e-mail his brother:

> "Waste of time. CPC [won't] buy this asset"

(The e-mail actually reads "want" but Mr Candy accepted that this should have been "won't").

(7) There is nothing in any of the e-mails to suggest that CPC came anywhere near the stage of making a bid for the heliport, let alone considering how to finance it.

173. It seems clear from this material, and I find, that (i) although Mr Nicholas Candy was keen on the idea of acquiring the heliport in August 2011, CPC then decided against it; (ii) when Mr Currie raised the question of the heliport in October 2011, Mr Nicholas Candy was again interested but CPC was not; and (iii) when Mr Seaton sought to interest Mr Nicholas Candy again, Mr Christian Candy said that it was a waste of time. CPC therefore rejected any deal involving acquisition of the heliport on three occasions despite Mr Nicholas Candy's interest in it. In particular, on the morning and afternoon of 8 November the position was that CPC had no plans to acquire the heliport, and had given no consideration to seeking finance from Investec, let alone what information Investec might require to progress such financing.

174. It was not suggested that CPC were looking at any other potential deal with Investec at the time. It was therefore flatly untrue, and known by Mr Christian Candy to be untrue, to say, as he did in his e-mail of 09.50 on 8 November, that CPC was *"looking to acquire"* a large asset which Investec was selling, that it was one that they were looking to *"finance through Investec"*, or that that meant that CPC had to disclose its net asset statement by 10 November. It was untrue, and known by Mr Christian Candy to be untrue, to say, as he did in his e-mail of 11.47, that CPC wanted to issue all financials to Investec as soon as possible *"to progress the financing of the acquisition"*. It was untrue, and known by Mr Christian Candy to be untrue, to say, as he did in his e-mail of 15.17, that CPC was looking to do a large acquisition with Investec that would involve *"substantial equity, debt and mezz"* or that that meant that CPC would need to *"open its kimono to Investec, and detail its assets and liabilities."* It was untrue to suggest, as he did in the same e-mail, that Mr Williams had insisted on full disclosure to Investec, and that Mr Candy had decided not to overrule him.

175. Mr Holyoake was not deceived by the lies he was told. He was very clear in his evidence that he did not believe Mr Christian Candy when he said that CPC was doing business with Investec.

176. Mr Candy was asked about his e-mails. He was initially asked on Day 17 (2 March 2017) before the late disclosure about the heliport. He accepted that he knew that his brother's suggestion at 08.30 that *"we need to tell Investec this week"* was a lie, and that his own e-mail at 09.50 that *"we need to provide them our net asset statement before Thursday"* was a lie and one that he made deliberately to put pressure on Mr Holyoake, but maintained persistently that the lie was simply that he shortened the period when the net asset statement would have to be provided from two weeks to two days. He refused to accept that there was anything wrong with the statements (at 07.22) that *"Investec will want the CPC Group net asset statement…they will find out one way or another in the next couple of weeks"* and (at 08.25) that *"I can tell you now that we have to provide CPC's net asset statement"*, although he sought to justify them by saying repeatedly that Investec would have seen CPC's balance sheet *if* CPC were to progress the transaction, *if* they were to proceed with the heliport, *if* the transaction was to proceed, *if* there were going to be further discussions regarding the heliport. He said however that there was indeed a transaction, that at the time he believed they would have to provide the net asset statement, and that he believed Investec would need to see the information in a couple of weeks.

177. Mr Stewart returned to the question on Day 19 (6 March) after the late disclosure (which was largely disclosed on 5 March). Mr Candy refused to accept that he had fabricated anything other than shortening the period from two weeks to two days; and reiterated that if CPC were looking to acquire the heliport, something which was under consideration, then they would have asked Investec for finance. In fact it was clear from Mr Currie's evidence that although Investec might well have been willing to lend to CPC if CPC had wished to acquire the heliport, they were not in a position to match the rates which CPC could borrow at elsewhere, and it is highly unlikely that CPC would have financed the acquisition through Investec.

178. I was very unimpressed with Mr Candy's evidence on this aspect of this case. There is a significant difference between what he was telling Mr Holyoake – namely that CPC were actually intending to do a substantial deal with Investec which would involve disclosing its assets and liabilities – and what he suggested in the witness box – that they were still considering it and would have sought finance from Investec if they had gone ahead; and an even greater difference between what he was telling Mr Holyoake and the reality, which was that on 8 November CPC had no plans to acquire the heliport, there was no question of seeking finance from Investec, and there was no imminent likelihood of having to disclose financial information to them. I am entirely satisfied that Mr Candy's statements were a pretence designed to put pressure on Mr Holyoake. Mr Candy took advantage of the coincidence that Mr Currie had approached his brother about the heliport, and that there was a meeting between Investec and his brother fixed for 10 November, to put forward, and then embellish, this concocted story. He did so because he thought that Mr Holyoake was hiding something from him. He was right about that as Mr Holyoake was concealing the Oscarone loan from him, but this does not justify the series of lies. And when he came to give evidence, despite his protestation that if he had lied he would stand up and admit it, he was only in fact willing to admit to shortening the timescale, and tried to gloss over the wider pretence.

179. Mr Christian Candy is an intelligent man who pays close attention to detail and in his

evidence showed an impressive knowledge of the disclosed documents, and I was left with the distinct impression that he had prepared for giving evidence by studying them with considerable care – that is no doubt why he felt constrained to admit to lying in shortening the time period from two weeks to two days – but that he was somewhat caught out by the late disclosure about the heliport which only came to light after he had gone into the witness box, and which he had therefore not had a chance to study beforehand; indeed on Day 20 he said in answer to one question that *"most of this was news to me yesterday"*.

180. Mr Nicholas Candy was also asked about these e-mails. He too refused to accept that his brother had lied in any respect other than shortening the time period from two weeks to two days. I found his evidence on this part of the case very weak. It was he who suggested at 08.30 that his brother tell Mr Holyoake they were working on a big deal with Investec, and I find this was untrue and known by him to be untrue. In oral evidence he attempted to justify it by reference to other matters he discussed with Mr Kantor (Omni, and Investec's relationship with CPC and C&C generally); but leaving aside the fact that he had not had his meeting with Mr Kantor by 8 November, it was in any event only an exploratory meeting to discuss business generally (Mr Currie confirming that Investec had not to date done any business with the Candys) and the difficulty with this explanation is that Mr Nicholas Candy's e-mail quite clearly refers to a specific transaction, not to the sort of business that Investec could do with the Candys generally. Mr Nicholas Candy also said in evidence that at the meeting with Mr Kantor they would have discussed the heliport briefly. That I can accept, and Mr Currie said in evidence that he would have taken the opportunity to mention the heliport in front of Mr Kantor, and Mr Nicholas Candy was still quite keen on the heliport – indeed he said in the witness box that he thought to this day that they had missed out on the deal. But that is not the same as CPC having decided to acquire it, and for reasons already given I am satisfied they had not. Yet Mr Nicholas Candy participated in a telephone discussion with his brother and Mr Williams the result of which was Mr Christian Candy's e-mail of 09.50 in which the story was that Investec were *"selling a large asset that CPC is looking to acquire and also finance through Investec"*, which could only be a reference to the heliport; and it is very likely (and I find) that it was agreed on that telephone call to put this story forward even though it was not true.

181. For the reasons I have given, I have found it difficult to accept the evidence of either Mr Candy on this aspect of the case. Not only were both willing that Mr Holyoake be told a series of lies at the time, but neither was willing to admit to it in the witness box. That naturally undermines the extent to which I can have confidence in their evidence, and as a result I have approached the remainder of their evidence with some caution.

*Did Mr Holyoake request that the loan be kept confidential from Investec?*

182. It can be seen that Mr Holyoake repeatedly referred in the e-mail exchanges to having made it clear to the Candys before taking the loan that he wanted the loan kept confidential from Investec: see his e-mails of 07.13, 08.21, 08.49, and 12.56 and again the next day at 10.26. Both Messrs Candy denied it, and Mr Christian Candy made the point that he would have been very suspicious if Mr Holyoake had told him he

could not talk to Investec, who were the senior lender. Although CPC's loan was not in fact a loan to Hotblack but to Mr Holyoake personally, Mr Christian Candy thought of it, as his brother had said in his e-mail of 12 October at 11.19, as in effect a mezzanine loan for the project, sitting above Investec in the so-called *"capital stack"*, and his evidence was that it was a matter of course for lenders to the same project, in the same capital stack, to speak to each other as they had a mutual interest; anything else would be a huge red flag.

183. Nevertheless it is striking that despite Mr Holyoake's repeated reference back to what he had said at the outset, there was no attempt in any of Mr Christian Candy's replies to challenge him on it. And the content of his very first e-mail (at 06.01) suggests that Mr Holyoake had indeed told him that Investec did not know about the CPC loan and thought he was doing the equity himself, as Mr Candy could only have got that information from Mr Holyoake.

184. I conclude that it is probable that when Mr Holyoake approached the Candy brothers for a loan, he did explain that he was buying GGH with a loan from Investec of £24m and did tell them that Investec did not know of this approach and thought he was doing the equity himself. That accords with what Mr Holyoake said in his first response at 07.13 (that he was *"very clear prior to taking the loan that Investec were NOT aware"*), and in his e-mail of 08.49 (*"as we discussed prior to the loan I had not informed them"*). It follows, and I also find, that Mr Candy knew when he sent his e-mail of 06.01 that Mr Holyoake had not told Investec about the CPC loan, and that he was being somewhat disingenuous in asking it as a question (*"Am I correct in saying…?"*). He suggested in evidence that it was the fact that Mr Holyoake had not put the £12m loan on his net asset statement for CPC that had made him think he had not told Investec about the £12m loan either, as he was aware that Mr Holyoake had also provided a net asset statement to Investec. That was an unconvincing explanation, firstly because Mr Holyoake would be likely to have provided his net asset statement to Investec some time before he had approached the Candys for a loan, and secondly because leaving the £12m loan off the net asset statement provided to CPC could not be said to be a concealment of anything (as CPC of course knew about the loan) and the inference that he had concealed it from Investec does not follow. I do not accept this explanation, or Mr Candy's evidence that this was the genesis of his e-mail and that he was genuinely unsure whether Mr Holyoake had or had not told Investec. I find that he knew that Mr Holyoake had not.

185. I am in left in considerably more doubt whether Mr Holyoake specifically asked the Candys not to tell Investec. Mr Holyoake undoubtedly had very good reason to want to keep the CPC loan a private matter between himself and the Candys. First, there was a serious and obvious risk that if CPC talked to Investec, they would discover the existence of the Oscarone loan; Investec knew all about the Oscarone loan, and indeed had entered into a lengthy Intercreditor Deed with Oscarone containing detailed provisions regulating priorities between them. That is no doubt what Mr Holyoake was referring to by *"ran/yaser issues"* in his e-mail of 08.13 to Mr Pym.

186. Second, just as Mr Holyoake had led CPC to believe that they were in effect the mezzanine piece in his deal (and he was providing the rest of the equity himself), he had also led Investec to believe that the only lenders were Investec and Oscarone, and

he was providing the balance himself, as indeed Mr Candy had referred to in his e-mail of 06.01. Back in June, Mr Arnst of Investec had asked him where the cash equity requirement was coming from, and he had replied suggesting that he was contemplating a combination of a dividend from ISI and some equity release from one of his properties, although he did say that he might sell down a minority percentage of the deal (less than 25%). That would have led Investec to think he was proposing to fund at least the greater part of the equity himself. Then on the afternoon of 11 October, once it had become apparent, despite Mr Holyoake's assurances about transfer of funds, that completion was not going to take place that day, Mr Brooks of Investec asked Mr Holyoake and Mr Saunders to confirm that it was Mr Holyoake's intention to fund the acquisition of GGH with the £24m senior facility and Oscarone and no other lenders, and Mr Saunders replied that it was indeed Mr Holyoake's and Hotblack's intention to fund the acquisition of GGH with the £24m senior debt facility and the Oscarone junior facility and that *"There is no other lender"*. That may have been strictly true on the afternoon of 11 October, but there is nothing to suggest it was ever corrected. The likelihood is therefore that Investec continued to believe that Mr Holyoake had completed the acquisition of GGH without borrowing money, and had financed the amount needed over and above the Investec and Oscarone loans himself. That, rather than (as he suggested in his e-mail of 12.56) the generous returns he had offered, is no doubt why he was so concerned about Mr Candy's threat to approach Investec and why he referred to it in his e-mails to Mr Pym as something that would *"ruin my relationship"* and *"screw me big time"*.

187. So Mr Holyoake had powerful motives for wanting CPC to keep the loan confidential. But he did ask for the terms of the loan to be confidential (in his e-mail of 12 October at 20.07), and a confidentiality clause was negotiated in some detail and agreed, and the Loan Agreement as executed was marked *"Private & Confidential"* on its title page. That was sufficient for his purposes: he did not need to go on and get CPC to agree specifically not to tell Investec. There is some force in Mr Candy's point that if Mr Holyoake had specifically said he did not want CPC disclosing the loan to Investec, it would have been a red flag to him. Mr Williams said much the same. In all the circumstances I am not persuaded that Mr Holyoake did say this; what I find he said, and secured agreement to, was that the Loan Agreement should be private and confidential to the parties, subject to the terms of the confidentiality clause.

188. It was submitted by Mr Lord that CPC were nevertheless entitled to disclose the loan to Investec. I do not think this is right. The *prima facie* position was that the Loan Agreement was private and confidential as shown by the marking on the title page. Mr Lord said that the loan cannot have been intended to be confidential from Investec, as it was entirely standard for lenders in the same capital stack to talk to each other; but I do not think that can displace the agreement that the Loan Agreement be private and confidential. Mr Lord referred to cl 10.1(e)(2) under which Saunders Bearman were to confirm that all requisite Authorisations, including from Investec, had been obtained to enable the Declarations of Trust to be granted; but this clause permitted Saunders Bearman in the alternative to confirm that the Declarations of Trust would not be in conflict with any existing agreements (which is what Saunders Bearman did) so this clause did not make it inevitable that Investec would be approached for their consent. Mr Lord also referred to cl 10.1(c) under which CPC would be entitled to security if Mr Holyoake had not repaid the loan by 12 March

2012, which would entitle CPC to approach Investec for consent to a second charge over GGH, and there would have been nothing unlawful about that. That I accept, as indeed Mr Holyoake accepted in evidence, but I do not see that CPC's right to approach Investec for a second charge under cl 10.1(c) meant that CPC could disclose the loan to Investec months beforehand and in circumstances where it was unknown whether the loan would be repaid or not (and hence whether CPC would be entitled to a second charge under that clause).

189. I am not therefore persuaded that the terms of the Loan meant that CPC was under no obligation to keep the loan confidential from Investec. I see no reason why the *prima facie* confidentiality arising from the marking on the title page should not apply. That could only be displaced if the circumstances could be brought within the terms of the confidentiality clause, which was clause 20. Cl 20(a) permitted CPC to disclose a copy of the Loan Agreement to any person with whom it was proposing to enter into a transfer, participation or other agreement in relation to the Loan Agreement, but at this stage CPC was not proposing to enter into any such arrangement. It was not suggested that any of the exceptions in cl 20(b) applied.

190. It follows, and I find, that Mr Candy was threatening to reveal the existence of the CPC Loan Agreement (and some of its terms) to Investec in breach of an obligation of confidence binding on CPC. But that threat was not carried out, and shortly afterwards Mr Nicholas Candy told Mr Holyoake he had not spoken to Investec about the loan at all.

*From 29 November 2011 to 31 January 2012*

191. Mr Holyoake and Mr Christian Candy had arranged to have dinner together at Le Petit Bistro, a restaurant in Guernsey, on 1 December. Despite the two letters sent by CPC on 29 November, Mr Holyoake flew out to Guernsey and they did have dinner. It was a cordial occasion – in fact the first time the two men had met since the Loan Agreement. There is no record of the discussion as such but it is apparent that they discussed a proposal for early repayment of the loan in its entirety, with Mr Candy being prepared to accept £5m as an exit fee (in addition to principal and interest) in satisfaction of CPC's right to a profit share, and that Mr Candy agreed that CPC would not for the time being proceed with the process of formal valuations and charges although it reserved all its rights. Mr Williams calculated the precise figure for Mr Candy on 5 December at £22,743,578, and on 9 December Mr Holyoake sent a message to Mr Candy to say he was comfortable with the quantum, followed by an e-mail on 13 December agreeing to pay the £22.74m before the end of January. Mr Candy replied on 14 December accepting the £22.74m figure so long as repayment was received by the end of January.

192. On 15 December however Mr Williams circulated to Mr Christian Candy and his brother and others in CPC an e-mail with information as to what he had discovered about Mr Holyoake's properties. The development property at Westbourne Grove Mews was held through Hazelend LLP, and a search at the Land Registry or Companies House had revealed the registration of a charge in favour of 3i, which prevented the creation of any further charges without 3i's consent; 3i also had a charge over another of Mr Holyoake's properties at 47 Earls Court Road. Mr

Williams pointed out that there was no reference to any liability to 3i in Mr Holyoake's net asset statement, and that that left only the residential mews properties at Grosvenor Gardens to charge as security for the loan. He added:

> "Notwithstanding that he is your friend it is 100% clear that he has not been open and honest about his circumstances and I take whatever he says or writes with a pinch of salt. My view is that at best he is an unfortunate bankrupt and at worst he is criminal."

Mr Christian Candy's response was that he agreed that Mr Holyoake was a liar and untrustworthy but firmly believed that he would repay.

193. On 19 December there was a telephone call between Mr Christian Candy, Mr Williams and Mr Holyoake. Mr Holyoake promised to repay £12m by 13 January and the remaining £10.74m by 20 January. He also said he would have the charges in favour of 3i removed. Almost immediately after the call Mr Williams discovered that there was also a charge registered in favour of 3i against 38 Grosvenor Gardens Mews South, a mews house which was the most valuable of the mews properties, and e-mailed Mr Holyoake about it; Mr Holyoake replied that this would be removed as well. Mr Williams' evidence (which was not challenged, and which I accept) was that Mr Holyoake had claimed in the telephone call that the charges were old and defunct, and that the debt to 3i had been discharged. That was another lie by Mr Holyoake: the true position was that there was some £10m still outstanding to 3i under the Overarching Agreement. Indeed Mr Holyoake had missed a payment due on 8 December and on 9 December 3i's solicitors had sent him and his solicitors a formal reservation of rights letter noting that this was an Event of Default under the Overarching Agreement.

194. During January 2012 Mr Holyoake repeatedly said that he would repay CPC, although the date slipped from the original dates of 13 and 20 January to a single payment on 27 January, and then the end of the month; he gave every impression that everything was on track, negotiating and agreeing the drafting of the documents to be signed, and giving details of the transfers that would take place. Mr Christian Candy told his colleagues that he was confident Mr Holyoake would repay, and Mr Nicholas Candy also thought he would repay. Others in CPC were more doubtful – indeed Mr Smith had been very sceptical about the loan from the outset, and Mr Christian Candy bet him £10,000 that Mr Holyoake would repay £17m by the end of March at the latest. Mr Holyoake however, as he accepted in oral evidence, had no intention of paying £22.74m by the end of January; he thought that Mr Candy was greedy and that for CPC to almost double their money in three months was farcical. He decided to play along with it in order to buy himself time, his strategy being to offer them something between £12m and £15m (in the event £13.5m, which he regarded as giving them a generous return, £1.5m in 3 months on a loan of £12m being the equivalent of a 40% return per annum) and then negotiate anything else. He was reluctant in oral evidence to accept that he was deceiving CPC, preferring to describe it as playing them at their own game, but he did accept that he was telling them that he would repay £22.74m by the end of January when the reality was that it was not going to happen. In plain language he was stringing them along.

195. By 31 January no repayment had been made, and Mr Holyoake pushed the date back again, this time for another 48 hours. That afternoon however Mr Williams circulated an e-mail explaining that he had discovered that two new charges, dated 11 January 2012, had been placed on Mr Holyoake's properties, one by Wellgold LLP on the mews house at 38 Grosvenor Gardens Mews South, and the other by Hazelend LLP on the Westbourne Grove Mews property, each in favour of Aeriance UK Loan Oy (**"Aeriance"**), that being a straightforward breach of cl 10.1(f) of the Loan Agreement which prevented any further security being granted over any Additional Property. These charges had in fact been granted as security for two loans from Aeriance, one of about £5.1m to Wellgold and the other of about £4.5m to Hazelend. The total net money available after fees and retentions for interest was some £9.1m which Mr Holyoake used to pay 3i in return for their agreeing to the discharge of their security over the relevant properties (leaving a balance of just under £1m still due to 3i under the Overarching Agreement).

196. None of this had of course been mentioned to CPC by Mr Holyoake. Both Mr Christian Candy and Mr Nicholas Candy described the discovery as a *"watershed"* moment, and their immediate reactions bear this out, Mr Nicholas Candy e-mailing *"It needs to get tough from today. He can't put second charges on things. I am not happy with this…"* and again *"This is not good"*; and his brother replying *"He is a fucking liar"*. Mr Christian Candy's evidence was that until then he had, despite some concerns, believed that Mr Holyoake had been about to repay the loan, but this shattered his remaining belief in Mr Holyoake's good faith: he had strung him and CPC along with the promise of repayment while using the time to grant charges over the properties, thereby undermining Mr Candy's *"Plan B"*, which was to seek security on them if Mr Holyoake did not repay. This evidence is inherently credible and I accept it.

197. Mr Holyoake's pleaded case is that during January 2012 a number of telephone conversations took place between him and Mr Christian Candy, and a number of e-mails exchanged, in which Mr Candy made repeated, insistent and aggressive demands that Mr Holyoake repay the loan by the end of January, and that in a telephone conversation on 23 January 2012 Mr Candy, using a highly aggressive and threatening tone, told Mr Holyoake that unless he repaid the loan by the end of January, he would do everything he could to obtain GGH. I do not find these allegations proved. The e-mails in January show Mr Candy repeatedly asking Mr Holyoake to confirm that he would repay the loan by the end of January, but since this was what Mr Holyoake was himself promising, I do not think it is right to characterise them as insistent and aggressive demands. They also show that Mr Candy made it clear, for example in an e-mail of 11 January and again in e-mails on the morning of 31 January, that if repayment were not made CPC would be seeking to put charges on Mr Holyoake's assets on the basis that Mr Holyoake was in default. In those e-mails Mr Candy portrayed Mr Williams as being the one who would be pushing for charges to be put on the assets; this was an exaggeration, as it was in reality Mr Candy's own intention to do so, but it did not significantly affect the essential message that CPC would pursue charges if Mr Holyoake did not make repayment. Mr Holyoake was very resistant to the idea of granting security, and this exchange was no doubt a threat, and designed to put pressure on Mr Holyoake to ensure that he did make the repayment he had promised (Mr Candy himself said in an internal e-mail with

reference to this exchange *"Things are hotting up. We need to be careful [we means I] that we do not push him too far. Just enough pressure is what is required."*) but I do not see that it was unduly aggressive or insistent.

198. As to the telephone conversation on 23 January, there is no trace in the documentary record of a telephone call on that day, let alone an aggressive and threatening one. More significantly, the privileged documents disclosed by Mr Holyoake give no support to any aggressive threats having taken place before 31 January. In his e-mail to Collyer Bristow of 29 March 2012 he referred to Mr Candy having made very aggressive and hostile threats on a daily basis *"since end of Jan 2012"* and listed certain telephone calls when threats were made, the earliest of which was on the evening of 31 January; in his e-mail no. 4 of 16 April he said:

> "As soon as Jan 31st came and went CPC and Christian Candy changed irreversibly he [now] was completely focused on claiming a default and started to become extremely abusive and threatening. He claimed I was a liar and that he would ruin me."

And in response to the question *"When did CC become more threatening"* he said:

> "CC became more threatening after Jan 31st – he called me regularly and was deeply unpleasant – I felt he was blackmailing me and threatening me v directly – it was extremely uncomfortable."

This suggestion of a marked change in Mr Candy's behaviour on and after 31 January fits very well with Mr Candy's own evidence as to the discovery of the Aeriance charges being a watershed moment that shattered his remaining trust in Mr Holyoake's good faith. It does not fit with Mr Holyoake's pleaded case of repeated threatening telephone calls during January 2012, and I find that that allegation is not made out.

199. However I accept that there was a rather different telephone call on the evening of 31 January. Mr Williams' e-mail revealing the existence of the Aeriance charges had been circulated at 16.32, and a conference call with Mr Holyoake, Mr Christian Candy and Mr Williams was set up for 18.30. It took less than half an hour as it was over by 18.54. Mr Holyoake's description of it to Mr Pym later that evening was *"A disaster…Chris was unbelievable"* and *"As bad as it gets. I have never heard anyone speak that way"*, and to Mr Candy the next day was *"a v difficult conversation last night"*. Mr Candy's own evidence in cross-examination was that it was a *"tough phone call"*, that he was *"very, very angry…royally upset…really annoyed"*, that he would have used *"candid, blunt, colourful language"*, and that he would have made it clear that Mr Holyoake's behaviour was unacceptable. He denied however shouting and screaming at Mr Holyoake or losing his temper, saying that he prided himself on being measured, focused and clear.

200. I do not think it ultimately matters whether Mr Candy was shouting and screaming or measured and focused. By his own account he was very blunt with Mr Holyoake, telling him, no doubt in no uncertain terms and with a great deal of swearing, that he had categorically lied to them; that he had breached the loan agreement; that his net assets were not certified and below £120m; that the 3i charges pop up in December

and he says he will get rid of them, and CPC then find out that he had taken £9m out of the assets which were on the net asset statement and were subject to a negative pledge. For what it is worth I am sceptical as to whether Mr Candy was quite as measured as he sought to portray himself in the witness box: as I have said it is not in dispute that he was very, very angry and I think it entirely credible, and more probable, that he did lose his temper with Mr Holyoake, although I do not think anything turns on this.

201. It was suggested to Mr Candy (and was Mr Holyoake's evidence) that he told Mr Holyoake that he would do anything he could to take GGH from him, but he denied it, saying that he wanted repayment not the asset. I accept Mr Candy's evidence on this. Mr Candy explained, and I accept, that having been confident that Mr Holyoake would repay at the end of January, he was now seriously worried about not being repaid at all and losing the entire £12m. What he wanted was a route to repayment, not the asset.

*Wragges' letter of 2 February 2012*

202. The upshot of the call was that Mr Holyoake was given 48 hours to repay, although CPC could send a formal letter to him after 24. There is evidently a threat implicit in that, if not explicit, that if he did not repay in 48 hours, steps would be taken.

203. The steps that were threatened can be seen from a formal letter before action sent by Wragges on 2 February to Mr Holyoake, headed "Letter of Claim". It referred to the breaches of the Loan Agreement in not maintaining the Minimum Net Asset cover level of £120m and in granting the Aeriance charges in breach of the negative pledge provision, and demanded immediate payment of the £17.74m as being due and payable under cl 11 (the event of default clause), with costs (to be quantified). If payment was not made by 4pm on 6 February, CPC reserved the right to take enforcement action including issuing proceedings for a money judgment, petitioning for Mr Holyoake's bankruptcy, seeking to enter a restriction on GGH at the Land Registry to protect CPC's interest under the Hotblack Declaration of Trust, and seeking a transfer and then sale of the shares held in trust under the Holyoake Declaration of Trust.

204. There are two other noticeable features of the letter. First, after referring to the two Declarations of Trust, the letter said that the sums demanded were not in satisfaction or reduction of CPC's interests under the two Declarations and added:

> "Those interests being worth the aggregate sum of £20,000,000. In the event that there is a shortfall after those interests are realised our client will look to you personally for such shortfall."

Second, at the end the letter said this:

> "If our client elects to make you bankrupt then it may also begin that process by advertising that a statutory demand has been made upon you as a precursor to the issue of a bankruptcy petition in local and national newspapers. It may also advertise in those same newspapers the fact that you have been made bankrupt when the Court eventually grants that order." (emphasis in original).

205. Mr Stewart submitted that both of these passages were improper. As to the first, the Declarations of Trust are admittedly not well thought out or drafted because it makes no sense for CPC to be entitled to a beneficial interest in 30% of "the Property" (that is the freehold of GGH, implicitly in the original Declaration and expressly by the Deed of Amendment) and in addition 30% of the shareholding in Hotblack (which if taken literally would mean CPC would be entitled to 30% of GGH and 30% of the value of Hotblack's remaining 70% of GGH). It is tolerably clear however from reading the two together that the intention was that CPC should receive its share (30% of the net profits with a minimum of £10m) either under the Hotblack Declaration of Trust if there were a sale of GGH, or under the Holyoake Declaration of Trust if the shares in Hotblack (as distinct from GGH) were sold, but not both; or in other words that the two Declarations of Trust were intended to provide money for CPC in the alternative not cumulatively. And if there were any doubt about that, the e-mails of 12 October make it clear that CPC was intended to have one minimum sum of £10m not two, and if necessary the Declarations of Trust could doubtless have been rectified accordingly. So I accept that the claim to a minimum of £20m was not well-founded and would never have succeeded.

206. Mr Candy was asked about this. He accepted that the claim for £20m was a mistake and it should have been £10m, although he suggested that he did not know that at the time, and said that Wragges had advised that on one interpretation the minimum sum payable could have been £20m. Mr Williams was also asked about it. He accepted that his personal understanding of the deal was that CPC would be entitled to a minimum not of £20m but £10m, but said they were advised that the declarations of trust worked that way, and if you are making a claim you put your best foot forward and if there is a legal construct that says *"Actually that is 20 not 10"* you go *"Great"*. I find on this material that both Mr Candy and Mr Williams knew at the time that what had been agreed on 12 October with Mr Holyoake was a minimum of £10m (I do not think Mr Candy would have forgotten this), but that Wragges advised that a legally tenable argument could be put forward that the minimum sum was £20m, and they were happy for such an argument to be advanced. That might be thought a bit sharp – opportunistic was Mr Stewart's word – but however commercially questionable, I doubt if advancing a claim that you have been advised is legally sustainable is by itself an unlawful thing to do. In any event there was no question of the minimum sum, be it £10m or £20m, being then payable, and Wragges were not demanding payment of the £20m but reserving CPC's rights to it; Mr Holyoake was advised to seek (and did seek) legal advice; and Mr Holyoake made no mention in his witness statement of this assertion being something that concerned him. The contention does not appear to have been raised again, and I do not think it had any significant impact at all.

207. As to the second point, a statutory demand is not something that is routinely advertised. Under the Insolvency Rules 1986, which were then in force, there was provision in rule 6.3(3) for a creditor to advertise a statutory demand in certain limited circumstances as follows:

> "Where the statutory demand is for payment of a sum due under a judgment or order of any court, and the creditor knows, or believes with reasonable cause –

> (a) that the debtor has absconded or is keeping out of the way with a view to avoiding service, and
>
> (b) there is no real prospect of the sum due being recovered by execution or other process
>
> the creditor may advertise the demand in such manner as the creditor thinks fit; and the time limited for compliance with the demand runs from the date of the advertisement's appearance (or as the case may be) its first appearance."

As is clear from its terms this rule would not apply to a demand made by CPC on Mr Holyoake because CPC had no reason to believe that he had absconded or was keeping out of the way (and if the demand were issued as an alternative to taking proceedings it would not be for payment of a sum due under a judgment or order).

208. Mr Stewart submitted that the effect of the rule was to permit advertisement in only those circumstances and hence to prohibit it in any other circumstances. I heard no real argument on the point but I do not think that is right: the purpose of the rule was to provide an alternative to the general position under rule 6.3(2) which provided that a creditor was under an obligation to do all that was reasonable for the purpose of bringing the demand to the debtor's attention and if practicable to effect personal service. That is how it was treated in the then current *Practice Direction: Insolvency Proceedings* [2007] BCC 842 at para 11 (headed *"Substituted service"*) where para 11.1 referred to the creditor's obligation under rule 6.3(2); para 11.2 provided that *"advertisement can only be used as a means of substituted service"* in the circumstances set out in rule 6.3(3) and then set out a suitable form of advertisement, this being addressed to the creditor; and para 11.3 then set out *"where substituted service is effected"* the quite detailed steps that the creditor must have taken to bring the statutory demand to the attention of the debtor.

209. These provisions then are all directed at the question of service of the statutory demand. I do not think they have the quite different purpose of prohibiting advertisement in other circumstances, and I do not read rule 6(3) as imposing a statutory restriction on the advertisement of a statutory demand. Any obligation on a creditor not to advertise a statutory demand must I think be found elsewhere.

210. I can leave on one side any question of defamation, as it was not suggested that the advertisement by CPC of a statutory demand would have been libellous. I can see that a creditor who advertised a statutory demand might be thought to be running a risk of being sued for libel if the alleged debt was not in fact due, as it is no doubt defamatory to suggest falsely that a debtor cannot pay his debts as they fall due. But this as I say was not suggested in the present case, and given that on my findings there had been an Event of Default and the loan was indeed due, CPC would one assumes have had a defence of justification in any event.

211. What Mr Stewart relied on was the practice in insolvency proceedings. It is well established that in both personal and corporate insolvency, it is inappropriate for a creditor to resort to insolvency proceedings if the debt on which the proceedings are founded is bona fide disputed on substantial grounds. In personal insolvency, a debtor who is served with a statutory demand may apply to set it aside (under what

was then rule 6.4 of the Insolvency Rules 1986) and the Court may – and usually will – grant the application if the debt is disputed on grounds which appear to the Court to be substantial (under what was then rule 6.5(4)(b)). In corporate insolvency there is no equivalent provision in the rules but the long-standing practice is not to allow the Companies Court to be used for the trial of genuinely disputed debts, and an injunction will be granted to restrain presentation of a petition founded on such a debt, on the grounds that it is an abuse of process (see eg *Re a Company (No. 012209 of 1991)* [1992] 1 WLR 351).

212. Mr Stewart submitted that CPC knew very well that its debt was disputed and hence that it would have been an abuse of process to serve a statutory demand in these circumstances. I am not sure about that. The question is not whether Mr Holyoake disputed the breaches, but whether there was anything of substance in the dispute. I accept that the question whether Mr Holyoake was in breach of the net asset provisions (the Minimum Net Asset covenant and the provision of a sufficient net asset statement) would have been the subject of a substantial dispute. But Wragges also relied on the granting of the Aeriance charges as being a breach of the negative pledge in cl 10.1(f). Here there was no dispute of fact, as there is no doubt that charges had been granted over the relevant properties. The only defence Mr Holyoake had was an argument that the clause did not bite as Additional Property was defined to mean one or more properties chosen by CPC from the Additional Property List (being the list of properties included in Mr Holyoake's net asset statement), and CPC had not actually made such a choice. That was an argument that was identified by Collyer Bristow when Mr Holyoake consulted them after receiving the letter (as appears from Mr Holyoake's e-mail exchange with them on 13 February 2012 which records advice to that effect from Mr Stephen Gawne of Collyer Bristow). I can see that that is a possible interpretation of the Loan Agreement based on the literal wording, but I have serious doubts whether it is the correct construction as it would seem to lead to a commercially nonsensical result, the purpose of the negative pledge provision being fairly self-evidently to protect CPC against any further erosion of the equity in the properties which made up the Additional Property List. But I do not propose to resolve this question of construction: for present purposes, what is significant is that there is nothing to suggest that this point had been articulated before Wragges wrote their letter of 2 February or that they knew that this point was going to be raised. I am therefore not persuaded that Wragges threatened bankruptcy proceedings in the knowledge that there was a genuine and substantial dispute that there had been an Event of Default and the loan was due. In any event one of the purposes of a letter before action such as this one is to give the proposed defendant an opportunity to explain why he is not liable, and if Wragges had received a reasoned argument why the loan was not due, they would no doubt have considered with CPC whether bankruptcy was in fact appropriate.

213. Mr Stewart also relied by analogy on the provisions relating to advertisement in corporate insolvency. Under the Insolvency Rules (then rule 4.11 of the 1986 Rules) a petitioner is obliged, unless the Court otherwise directs, to advertise the petition in the Gazette, but the advertisement cannot appear less than 7 business days after service of the petition. That period of 7 days has been said to be to allow the company to consider its position generally with regard to the petition, thereby giving it an opportunity to either discharge the debt if it is not disputed, or apply to restrain

advertisement of the petition if it is disputed, and to consider, for example, applying for relief under s. 127 of the Insolvency Act 1986: see *re Bill Hennessy Associates Ltd* [1992] BCC 386 per HHJ Bromley QC (sitting as a High Court Judge), referring to what Slade J had said in *re Signland Ltd* [1982] 2 AER 609. In the *Bill Hennessy* case the petitioner had served the petition on the company and on the same day faxed a copy to the company's bankers, with the result that the bank immediately froze the company's bank account. HHJ Bromley held that that was designed to put pressure on the company and was a misuse of the Companies Court jurisdiction and procedures, adding:

> "It would, I think, be deplorable if creditors could select for the purpose of maximising pressure on a company whom they would inform, and how, and how quickly."

On that basis he dismissed the petition.

214. The provisions relating to personal and corporate insolvency are not identical and one must be careful about uncritically transposing principles applicable in the one to the other. In the *Bill Hennessy* case the Court was influenced by the express provisions of rule 4.11 requiring 7 business days to elapse before the petition is advertised in the Gazette, a provision which does not apply in bankruptcy. Nevertheless a person served with a statutory demand in personal insolvency is given a period of time under the rules to apply to set it aside (18 days from the date of service under what was then rule 6.4(1) of the 1986 Rules), and by analogy with the *Bill Hennessy* case (which it was not suggested to me was wrongly decided) it seems to me that that time is given to the debtor to allow him to consider his position generally, and that for a creditor, before that time has elapsed, to choose who to inform and how for the purpose of maximising pressure on the debtor is inappropriate, and is likely to lead to any petition being dismissed. Indeed no argument to the contrary was put and Mr Lord in closing submissions accepted that the reference to advertising the position was probably something that should not have been done.

215. That is not to say that CPC knew that it was improper. It was put to Mr Candy that as a businessman he knew that the threat to advertise a statutory demand was improper, to which he said he was not a lawyer and did not know. It was put to Mr Williams that as a chartered accountant he would have known full well that advertising a statutory demand in these circumstances was improper, to which he said that it was not his field of expertise and he was not aware that it was improper. Neither answer seems to me at all surprising and I accept this evidence. I do not consider that they are shown to have done anything other than leave it to Wragges to identify the steps that might be taken, and I find they had no reason to think that Wragges were suggesting anything improper. The threat does not appear to have ever been repeated, and indeed when CPC did resort to litigation (as it did on four occasions, detailed below), it did not serve a statutory demand or seek to make Mr Holyoake bankrupt, but issued claim forms.

*Meeting in Guernsey on 6 February 2012*

216. After receipt of Wragges' letter Mr Holyoake spoke to Mr Christian Candy who asked

him to come to Guernsey for a meeting on Monday 6 February with himself, Mr Smith and Mr Williams; Mr Holyoake agreed.

217. He was asked to provide in advance a large amount of information and documentation as to his assets and liabilities and the like. One of the items he was asked to provide was a list of the source and application of the funds used for the GGH transaction. That was not in fact provided by the time of the meeting, but Mr Wells sent it on 8 February. This showed a total of £52m under "Sources of Financing", made up of Investec (£24m), CPC (£12m), Mr Holyoake (c. £6.9m) and Aeriance (£9.1m), and how that had been spent, almost entirely on GGH. It was misleading in at least two respects, first in not showing the Oscarone loan and second in suggesting that the Aeriance money had been used for the GGH project whereas it had in fact been used to pay 3i. Mr Wells attempted to give an explanation in oral evidence but it was thoroughly unconvincing: I am satisfied that once again the Oscarone loan was deliberately concealed from CPC.

218. Mr Holyoake went to the meeting on 6 February alone. It started at 3pm and lasted some 4 hours or so. By the end of it an agreement in principle had been reached. Mr Candy had written the outline of it on a whiteboard, a photograph of which was in evidence. With the aid of that and some other material, it is possible to identify the basic structure of the agreement as follows. Mr Holyoake asked for further time to pay and was given until 28 February. In return he would as a first step grant security over the Ibiza property, and there would be new restrictions on him preventing him disposing of assets, taking on new loans or giving new charges, or making new acquisitions without CPC's consent. On the whiteboard this was due to happen *"now"*. If he repaid £22.74m by 28 February, that would be that and the parties' dealings would be at an end. If he did not, there would then be a repayment schedule designed to repay £27.74m by quarterly instalments by the end of September 2013, starting with £5m on 28 February; he would also provide collateral in the form of security over his interest in a valuable stamp collection built up by his father. In default of repayment, the Ibiza property and the stamp collection would be sold in November 2013.

219. That led to a Supplemental Loan Agreement which was signed by Mr Holyoake on 10 February 2012. It provided as follows;

    (1) It contained a recital (B) that Mr Holyoake had breached the terms of the Loan Agreement as specified in Wragges' letter of 2 February.

    (2) Cl 2 amended the Loan Agreement as specified in sch 2. This contained amendments introducing the three new negative pledges or restrictions on Mr Holyoake. It also restated cl 11 (the Events of Default clause) by making it clear that on an Event of Default the amount payable included not only the Loan but also the Redemption Amount, thereby putting it beyond doubt that on a default the whole £17.74m was payable. Under the previous wording, which referred to *"the Loan (and all accrued interest and all other amounts outstanding under this agreement)"*, that might have been debatable.

    (3) Cl 3 required Mr Holyoake to procure as soon as practicable the grant of

security to CPC over the Ibiza property (in the shape of mortgages on the land and charges on the shares of the companies owning it).

(4) Cl 4 provided again that Mr Holyoake had breached the terms of the Loan Agreement in the three respects specified in Wragges' letter, namely the breach of the Minimum Net Asset Cover requirement, the failure to deliver a net asset statement in form and substance satisfactory to CPC, and the granting of security in breach of the negative pledge provision. Since the whole of the substantive part of the agreement was introduced by the words "**IT IS AGREED** that", the effect of this was that Mr Holyoake was agreeing that he had broken the Loan Agreement in these respects.

(5) Cl 5 in effect provided that if security on the Ibiza property was not provided by certain deadlines, or if Mr Holyoake did not pay the amounts demanded in Wragges' letter by 28 February, then CPC would be at liberty to enforce its rights with respect to the breaches that had been identified.

220. Mr Holyoake was reluctant to sign the agreement in this form. He thought he had arguments that there had been no breach of the Loan Agreement. He had consulted Collyer Bristow, and both they and he sought to persuade CPC to drop the requirement that he agree that there had been breaches, suggesting that the agreement be redrafted to refer instead to it being CPC's view that there had been breaches. CPC however refused to do this, Mr Williams saying in an e-mail on the evening of 9 February:

> "We will not proceed with this if there is scope to have it set aside by virtue of there being a dispute over whether there is a breach or not – we can have that dispute if you wish but my understanding is that you do not want to go down that route."

Mr Holyoake gave in on this point and sent an e-mail to Mr Williams on the morning of 10 February saying that they had accepted the agreement with almost no changes, although describing it as *"extremely one-sided"* and *"against advice our side"*. Mr Smith, who was copied in, was immediately suspicious of this and suggested it might be *"a "set-up" to claim duress at some further point"* – he explained in oral evidence that he had seen people write e-mails like that before – and Mr Williams replied to Mr Holyoake that the agreement (which he called the standstill agreement) was:

> "not one-sided – you are receiving valuable time to continue to arrange for repayment to occur before the 28th February."

221. Mr Holyoake also wished the agreement to set out what was to happen if he did not repay by 28 February, that is the provision of collateral security and an agreed schedule of quarterly repayments. Again CPC refused, Mr Williams saying that this was an attempt to bring in terms that had yet to be fully examined by CPC, and that CPC would not be bound to the terms of a subsequent agreement in the standstill agreement. Again Mr Holyoake gave in and he signed on the terms that CPC wanted.

222. I can now return to the question of what was said at the meeting in Guernsey, as it forms an important part of Mr Holyoake's case. His pleaded case is that at the meeting Mr Candy made a number of statements in the nature of threats to him. As to

the general tone of the meeting, Mr Holyoake described Mr Candy as being extremely aggressive and swearing at him; he felt under huge pressure and was in a really bad way. It is clear, and I accept, that he found the meeting a difficult one: that evening Mr Wells e-mailed him to say that he hoped he got home all right and he replied:

> "V v painful but ended ok – charge Ibiza asap and repayment schedule"

And in an e-mail of 16 February, in response to a suggestion by Mr Smith that Mr Holyoake had been clever, Mr Christian Candy said:

> "When he came to see us in Guernsey he did not look that clever. He looked terrible!!!"

223. Mr Candy's own description of the meeting was cordial but strained, and that it was neither aggressive nor threatening – he might have been blunt with his language but would have remained professional throughout. He did not claim however to have a good recollection of the meeting, although he had read Mr Williams' witness statement and agreed with what he said. Mr Williams also described the meeting as cordial, at least to begin with, but quite strained and that it involved some straight-talking as one might expect, but was never anything other than professional. Mr Smith gave a similar account in his witness statement, but in oral evidence it became clear that he had very little recollection of the meeting – he was still recovering from the serious attack made on him – and I do not think his evidence adds anything of significance.

224. As to the particular statements said to have been made and relied on as threats, it is convenient to take them in turn:

(1) Mr Candy said that they would *"take a wrecking ball to your assets and leave you with nothing"*.

Mr Candy accepted that he might have used this phrase, and Mr Williams positively recalled it being used by both Mr Candy and himself. The explanation given by both of them was that if they had to enforce the loan against Mr Holyoake, it would mean going after his assets but since most of them were already heavily charged with little equity left, they would need to pursue one after the other to recover the whole amount. I accept this explanation. The wrecking ball is a metaphor (it was obviously not intended, or understood by Mr Holyoake, literally), and an example of Mr Candy's blunt, straight-talking about what would happen if CPC had to enforce the loan.

(2) Mr Candy said that they would not stop at any lengths to get what they wanted.

Mr Candy accepted that they would have made it clear that CPC would pursue all its legal options to recover the sums due to it. I am rather doubtful if he was so careful at the time as to insert the word *"legal"* into such a statement, but I do not see that this matters. I find it entirely credible that Mr Candy would say something to the effect that unless Mr Holyoake agreed to what

CPC wanted they would pursue him by any means available, and I do not think it matters whether his exact words were *"go to any lengths"* or *"pursue all its legal options"* or some other variant; I am not prepared to regard it as connoting an intention or threat to do something unlawful or improper. It is not unlawful for a creditor to pursue a defaulting debtor nor to threaten to do so.

(3) Mr Candy said that they would call every lender that Mr Holyoake had worked with and use all their powers to ruin him.

Mr Williams recalled there being reference to contacting lenders. He explained this as being in the context of needing to contact other lenders if CPC needed their co-operation to take charges. He also recalled mention of CPC talking to Investec, but said this was in the context of getting security over GGH.

I am not so sure. Mr Holyoake's allegation has the merit that he mentioned similar allegations at a very early stage, in his e-mails to Collyer Bristow; in an e-mail of 13 February 2012 he wrote:

> "CPC have made it clear to me on numerous occasions that they don't care about the contract but that as per the wragges letter of claim they would contact national and local media as well as call directly ALL my lending banks…the threat posed of "ruining" me via press and other routes…the thought of having all my assets ruined…"

In his e-mail of 29 March 2012 he put it like this (in the context of the request to sign the supplemental loan agreement):

> "We will contact directly every bank you work with and tell them you will be bankrupt and then watch your life implode – we will fucking ruin you"

This is consistent with a reference in the same e-mail to a call "*last Thursday"* (that is on 22 March) when Mr Holyoake said that Mr Candy:

> "informed me that by issuing proceedings and making whatever calls necessary he would stop any chance of us being able to refinance him out or sell the building to pay him out."

Mr Holyoake reverted to a similar theme in his e-mail no. 4 of 16 April 2012 when he said of Mr Candy that:

> "he meant he would contact my lending banks and speak to them directly to about me – he would use newspapers and journalists to publicly humiliate me – he would sue me for bankcruptcy and tell everyone and he would generally not stop until I had lost everything – he was clear in the fact that he would financially kill me unless I did what he wanted."

(This was not said specifically in relation to the Guernsey meeting but of Mr Candy's threats generally).

Moreover, the threat of using adverse publicity to ruin Mr Holyoake is not very different from the threat in Wragges' letter of 2 February to advertise the statutory demand in newspapers; it is also consistent with a suggestion made by Mr Nicholas Candy to his brother on 5 February (the day before the meeting), in an e-mail which Mr Holyoake had not of course seen when he gave his account to Collyer Bristow:

> "He needs to understand that if this goes nuclear not one bank will lend to him again.
>
> Investec is where he shits himself and so we need to tell him we will speak to the CEO unless he plays ball tomorrow."

An interesting sidelight into Mr Nicholas Candy's perception of the appropriate way of dealing with commercial disputes is given by his dispute with Mr Cooper-Smith (paragraph 73 above). He was asked if he had threatened to telephone the head of every airline he knew in relation to Mr Cooper-Smith and replied:

> *"A. I would have done, because he was providing fake tickets or was not providing tickets and said all these tickets had been paid for and he had not provided them. If you buy something from someone and they don't provide it, you have the right to go to the police and you have the right to go to an airline, and you see today in the world of social media people use social media to shame airlines and shame various different people."*

I conclude that it is entirely credible that Mr Christian Candy would have told Mr Holyoake at the meeting that if he did not do what CPC wanted CPC would ring up all the banks who had lent to him and tell them that they intended to bankrupt him, and I find on the balance of probabilities that he did.

(4) Mr Candy added that Mr Holyoake had not seen anything like the extent to which they could ruin his life, and that they would do so.

Mr Candy probably did say this or something along these lines; it seems to me to go with the statements that CPC would take a wrecking ball to his assets, leave him with nothing, and contact his lenders.

(5) Mr Candy said that Mr Holyoake could avoid this only by handing over the keys to GGH and losing all his monies in the project so that he could get on with his life.

I am not persuaded that this was brought up at this stage, although it is something that did happen later. Mr Candy's evidence was that he did not want the keys, he wanted repayment. I accept this evidence (with the addition of the fact that he also wanted security because he was by now doubtful whether Mr Holyoake would in fact repay). This is consistent both with what he told Mr Holyoake the purpose of the meeting was (in an e-mail of 2 February where he said *"The objective of Monday is for you to be totally*

*transparent, and give Richard and CPC Group the comfort they need on loan security, and also loan repayment"*), and with the actual outcome of the meeting (namely that Mr Holyoake agreed to provide security over the Ibiza property, and then either repay at the end of February, or in accordance with a repayment schedule backed by further security). That does not of course rule out Mr Candy having a secret agenda to use the default to obtain the keys to GGH, but I have seen nothing in CPC's internal documents which suggests that he did.

(6) Mr Candy said that CPC would take security over the Ibiza property but that they would continue to *"hold* [Mr Holyoake's] *feet to the flames"*.

Mr Williams recalled Mr Candy using this phrase, and Mr Candy accepted in evidence that either he or Mr Williams used it. As Mr Williams explained, what was meant by it was ensuring that Mr Holyoake did what he had said he would, by holding over him the threat of taking action if he did not. Mr Stewart suggested that it was a pretty unpleasant, and sinister, metaphor, but it seems to me no more than a way of conveying, as Mr Williams said, that CPC would not relax simply because Mr Holyoake provided security over the Ibiza property: that did not mean everything was sorted.

(7) Mr Holyoake suggested that CPC should make an offer to him for GGH at a fair price, or at cost price, but Mr Candy said they did not need to do this and would find a way of taking GGH, and Mr Holyoake should just lose his money.

It is correct that Mr Holyoake had raised the idea of selling GGH to CPC – he had put this forward to Mr Nicholas Candy in a telephone call on 1 February and confirmed it in an e-mail to him on 2 February, and raised it again in e-mails to Mr Christian Candy on 3 and 4 February (although he was not sincere about it: he told Mr Pym on 31 January that this was a *"cosmetic offer to gain time"* and he had no intention of selling). I also accept that Mr Candy was not interested in buying GGH; but I do not accept that he said they would find a way of taking GGH.

225. Mr Candy also made a reference at the meeting to Mr Holyoake's wife Emma. This was a very contentious issue at trial and deserves close consideration. The position is as follows:

(1) Mrs Holyoake was pregnant in February 2011. Mr Candy knew that, as he accepted.

(2) She had had a miscarriage the year before, in October 2010, which had led to a planned trip to Paris with a number of friends being cancelled at the last minute. Mr Nicholas Candy was one of those and when the trip was cancelled he asked Mr Holyoake why, and Mr Holyoake told him but asked him to keep it quiet, as she did not want anyone knowing. Mr Candy replied *"Will not say a word mate"*, but in fact promptly told his brother. Mr Christian Candy's evidence was that the story had later got out, but he accepted that his brother

told him almost immediately, that day or the next; and Mr Nicholas Candy accepted that he had told his brother because his brother had asked him and he did not want to lie to him.

(3) Mr Holyoake's pleaded case is not in fact that anything was said about his wife at the meeting in Guernsey but that in telephone calls between then and the signing of the Supplemental Loan Agreement on 10 February, Mr Christian Candy said that if Mr Holyoake did not sign CPC would create a situation that would be extremely stressful not only for Mr Holyoake but for his wife, saying *"you need to think about your pregnant wife"* and that he would *"feel terrible if anything were to go wrong during the pregnancy for her or the baby"*. In his witness statement however Mr Holyoake placed these remarks at the Guernsey meeting.

(4) Mr Candy said in his witness statement that although he did not recall the exact date, he recalled saying to Mr Holyoake that the situation must be stressful for his wife; Mr Williams however said that he recalled Mr Candy saying at the Guernsey meeting that this must all be very stressful for Emma, and in oral evidence Mr Candy, who said he had thought long and hard about this, accepted that he said something at the meeting.

(5) It is not therefore in dispute that Mr Candy referred to Mrs Holyoake at the meeting. When asked to repeat what he had said he gave these answers:

> "Mark, this is stressful for you. It is certainly stressful for me. I am staring a loss of £12 million down the barrel of a gun, yes and this must be stressful for your wife as well."

and:

> "This is stressful for me. This is stressful for me, it is stressful for you, it will be stressful, I am sure, for your wife, especially in the context that we are talking about security on your Ibiza home, your primary residence."

Mr Stewart fastened on the shift from *"this must be stressful for your wife"* to *"this will be stressful … for your wife"* and submitted that the word *"will"* was necessarily referring to a future state of affairs (and hence a threat); however that kind of close textual analysis does not seem to me appropriate. It is unrealistic to expect witnesses to be able to reconstruct the precise words used at a meeting that took place years before.

(6) Mr Candy categorically denied linking the comment that *"this must be stressful"* with Mrs Holyoake's pregnancy or referring to her pregnancy; and categorically denied saying anything along the lines that he would feel terrible if anything were to go wrong during the pregnancy for her or her baby. Mr Williams in oral evidence also said that he didn't think Mr Candy referred to the pregnancy, but he did remember Mr Candy making a comment along the lines of *"I would hate for anything to happen"*. Mr Williams was not himself aware of Mrs Holyoake's pregnancy and got the impression that Mr Candy and Mr Holyoake knew something that he did not know. He also said that this

was said not in a threatening way but a compassionate and empathetic way; it was out of kilter with the meeting. He also thought that Mr Candy was responding to something that had been said.

(7) Both parties relied on the accounts given by Mr Holyoake to Collyer Bristow. The earliest document is the e-mail exchange on 13 February 2012 (that is, only one week after the Guernsey meeting) which contains a file note made by Mr Gould of Collyer Bristow referring to the possibility of Mr Holyoake having signed the Supplemental Loan Agreement under duress, but which says nothing about reference having been made to Mrs Holyoake or indeed any threats having been made at the Guernsey meeting at all; and Mr Gould accepted in evidence that if Mr Holyoake had mentioned a threat to Mrs Holyoake, he would certainly have made a note of it. On the other hand in his e-mail no. 4 of 16 April 2012 Mr Holyoake said this:

> "I had agreed to travel to Guernsey to see CPC I wanted to stop this asap as I had never encountered such threats before. They were v personal indeed for example my wife who was 5 months pregnant at this stage started to get mentioned – "you don't want us on our back when your wife is pregnant she may not be able to take the stress we will put you through" – we had lost a baby the year before and Chris knew this so to make these comments was nothing short of disgusting and caused me huge concern and many sleepless nights."

(8) Mr Lord also relied on the fact that in Mr Holyoake's brief e-mail to Mr Wells on the evening of 6 February he had referred to the meeting as *"V v painful"* but said nothing about any reference to his wife. I do not think any weight can be attached to this: it is obviously not a full account of the meeting and Mr Holyoake was agreeing to speak to Mr Wells in the morning.

(9) Mr Lord also referred to an e-mail from Mr Holyoake dated 14 March 2012 in which he declined to give security over the Ibiza villa, saying:

> "In addition as you know I have my pregnant wife and children in the house and I simply cannot put them in this position when its not needed."

Mr Lord submitted that it was inconceivable that Mr Holyoake would have referred to his wife's pregnancy in this way if Mr Candy had made use of it to threaten him the month before.

226. It is not possible to reconstruct the precise words used but my findings are as follows. Mr Candy did make some reference to Mrs Holyoake at the meeting. I accept that this was in the context of saying how stressful the situation was for everyone – for Mr Candy, for Mr Holyoake and for his wife. Mr Candy also said something along the lines that he would not want anything to happen to her. I am not persuaded that he made specific reference to her being pregnant, as I accept Mr Williams' evidence that he got the impression Mr Candy and Mr Holyoake knew something he did not. But Mr Candy knew that she was pregnant, and knew that she had had a miscarriage the year before, and in the context that could only be, and was understood to be, a reference to her condition. On the other hand, I am not persuaded that he said it in a

threatening or menacing way, or was threatening to do anything in particular. He had been pointing out that unless Mr Holyoake and CPC could reach agreement on a way forward, the alternative would be disastrous for him as CPC would have to take steps to enforce the loan, taking a wrecking ball to his assets, and leave him with nothing, and in that context I find that he was referring to the fact that it would inevitably be immensely stressful for him and his wife. He may indeed, as Mr Williams said, have said it in an empathetic or compassionate tone. Nevertheless it was I think an ill-judged and insensitive thing to say.

227. It did not however tell Mr Holyoake anything he did not already know. According to his e-mail no 4 of 16 April to Collyer Bristow he had already told his wife about the Wragges letter because of the threat it contained to inform the media and because he did not want her finding out about the dispute from some third party; that had upset her and she had worried about the impact of stress on the baby. So the idea that fighting CPC might be stressful for her in her condition was something that he was already well aware of. That I think is why he did not mention it specifically to Mr Gould on 13 February, and I accept that the fact that he himself referred to his wife's pregnancy in the e-mail of 14 March suggests that he did not regard that as crossing an impermissible line.

228. Mr Holyoake's pleaded case also alleges a series of other threats in telephone calls between the Guernsey meeting and the signing of the Supplemental Loan Agreement. These were dealt with very briefly in the evidence and add little to what was said at the meeting. There are three particular allegations that I should deal with. One is that Mr Candy said that if Mr Holyoake did not sign the Supplemental Loan Agreement, CPC would *"nuclear bomb him"*, a phrase which Mr Candy denied. But it was not in dispute that both sides talked about the *"nuclear option"* which meant CPC enforcing its demands by litigation. There was some debate as to who had first used the term *"nuclear"* in this context: the earliest written reference to it is in an e-mail sent by Mr Holyoake on 4 February, but Mr Nicholas Candy used it the next day, and it is not possible to ascertain, nor do I think it matters, whose word it was originally. Mr Christian Candy explained what was meant by it – if CPC had to litigate it would cause both parties, both Mr Holyoake and CPC, to lose money so it would be mutually destructive. I think it probable that in the period between the meeting and the signing of the Supplemental Loan Agreement CPC (that is Mr Candy or Mr Williams) reiterated what had been said at the meeting, namely that the choice facing Mr Holyoake was to sign the agreement as drafted or face the nuclear option of litigation.

229. The second is a threat to call Investec to try to make Investec exercise its rights under its security over GGH. Mr Williams remembered mention of Investec at the Guernsey meeting, and Mr Christian Candy accepted that he may have said that he would call Investec. In fact it is clear from internal e-mails that CPC were at that stage considering contacting Investec, not in order to persuade Investec to call default under its loan, but so that CPC could take over Investec's position, either by taking an assignment of its loan and security, or by paying off Investec. Mr Smith in particular was keen to pursue this, saying in an e-mail of 9 February (to both Candy brothers and Mr Williams):

> "We just need to get the revised Agreement signed and then tell him the facts of life: Investec is the only way out."

He meant by this, as he confirmed in evidence, that the only way out for CPC was to buy Investec's debt. Mr Christian Candy circulated an e-mail in the early hours of 10 February in which he said:

> "We must decide on Friday *[ie 10 February]*, whether and how we take over the Investec position. I see 2 x options:
>
> 1) We buy out the Investec debt, and maintain their documentation and MH has to honour the current Investec documentation [which CPC stands behind]
>
> 2) We repay Investec, and we will need new loan docs with Mark."

He then referred to the amount they would want a charge on GGH to cover, namely the senior debt of £24m, the mezz (ie CPC's loan) of £12m, interest on both and the £10m minimum equitable interest, amounting to almost £54m (CPC did not of course then know about the Oscarone loan), and added:

> "…that is why we want charges on Ibiza and also GGH, so we have enough equity across the 2 assets to cover this off.
>
> We also need to understand if in Oct 2012 MH fails to repay the senior loan, how would CPC enforce its security to get back the £54.00mn across either/both Ibiza + GGH."

That seems to me to confirm both that Mr Candy was not then thinking of going to Investec to get them to default the loan, but of taking over their position; and that he did not have in mind calling an immediate default on the Investec loan but looking forward to October 2012 when the loan fell due. Given the terms of these e-mails I am rather doubtful if CPC did refer to contacting Investec at all in this period as they wanted Mr Holyoake to sign up to the Supplemental Loan Agreement first; and even if they did, I am not persuaded that they said anything about getting Investec to default the loan.

230. The third is an allegation that Mr Candy said that even once Mr Holyoake granted security to CPC over his home in Ibiza, CPC could state there was an ongoing default and try to obtain GGH or use the fact that Mr Holyoake's home was at risk to force him to give up GGH. Mr Candy said in oral evidence that Ibiza was not on any view sufficient security for the £17.74m, and it would be a difficult asset to sell, so you would need further security other than just Ibiza; he also explained that GGH was the only meaningful asset on the net asset statement as CPC did not want the Icelandic Seafood business, and Mr Holyoake had refinanced a lot of his assets through Aeriance.

231. In fact although the Ibiza property had been put into the October and November net asset statements at a value of £22.5m (with debt of over £4m) CPC had recently discovered that Savills had valued it for Mr Holyoake at much less, namely €16m. Mr Nicholas Candy had had lunch with Mr Sharpe-Neal of Savills on 9 February who told him that they had valued it for Citibank at circa €16m (for both the house and the

additional land), and that Mr Holyoake did not go with the Savills valuation and got another valuer (Jones Lang LaSalle or **"JLL"**) to do it who came in at €25m. Mr Sharpe-Neal agreed to provide a copy of the valuation to Mr Candy, and later did so. Mr Christian Candy, Mr Nicholas Candy, Mr Williams and Mr Smith all accepted that it was improper and wrong for CPC to have obtained the valuation in breach of confidence. I should make it clear that I have not heard any explanation from Mr Sharpe-Neal or Savills, and they are of course not parties to these proceedings and I am not to be taken as deciding anything that affects them, but it follows that it is common ground between the parties to these proceedings that Mr Sharpe-Neal should not have disclosed the valuation to CPC. For present purposes what is significant is that as Mr Candy said, the Ibiza property was insufficient to cover the £17.74m. I find that Mr Candy was envisaging how CPC could take further security, and probably did say that even if Mr Holyoake granted security over Ibiza there would still be a default, and (unless full repayment was made at the end of February) he would be looking for ways to get it, including over GGH.

*Was the Supplemental Loan Agreement binding on Mr Holyoake?*

232. It is convenient at this stage to give my conclusion on the question whether the Supplemental Loan Agreement was binding on Mr Holyoake.

233. Mr Stewart relied on three matters in support of a submission that it was not binding. First, that Mr Holyoake was coerced into it by threats directed at his and his family's welfare (duress to the person). If one puts on one side the remark about his wife, I do not see that anything said at or after the Guernsey meeting was directed in any way at Mr Holyoake's or his family's physical safety. The references to ruining his life and the like are all directed at his economic wellbeing. No doubt if he ended up being made bankrupt or losing all his assets that would have a profound effect on his family's way of life and comfort, but I do not see that that can be equated with a physical threat. Nor do I think that what Mr Candy said about his wife amounted to duress to the person. It was not a threat to do anything to her. It was a reference, however ill-judged and insensitive, to what the consequences might be if agreement could not be reached and litigation ensued. I conclude that the agreement was not voidable for duress to the person.

234. Second, Mr Stewart relied on threats and pressure against Mr Holyoake's economic and financial position, which he said amounted to economic duress. Mr Holyoake was indeed threatened with financial ruin if he did not agree. But one needs to retain a sense of reality. The alternative facing Mr Holyoake if he did not agree to the terms CPC wanted was that CPC, who had no security for the loan and no reason to believe that he would repay voluntarily, would be left with no real alternative but to commence proceedings against him, either seeking to bankrupt him or to obtain judgment on the loan. Mr Holyoake had advice from Collyer Bristow, on the basis of which he might have been able to resist any immediate move to make him bankrupt; but that would mean that he would become embroiled in litigation under the Loan Agreement. As he himself explained, once proceedings are issued in relation to a property transaction, the property and the funding for the project are normally ruined – litigation creates a *"smell"* around the property which puts off buyers. Mr Holyoake thought that if he fought CPC in any litigation, then he would have a tainted

asset and this was the very asset which was his only way of generating the money to pay off CPC and get rid of them. So what he was concerned about was that litigation might destroy any value in GGH, which would make it impossible for him to raise money on it; but he would still have a personal liability (for both the loan and the £10m minimum profit share) to CPC. He was very clear in his oral evidence that it was this risk of both losing his largest asset and still being personally liable to CPC that made him agree to CPC's terms rather than face litigation, which he regarded as potentially ruinous for him.

235. He repeated this on several occasions but it is worth citing just one example as it sets out with great clarity the considerations that made him decide not to go down the litigation route (from Day 7):

> *"Sir, the law is a wonderful thing, but unfortunately it doesn't help individuals in certain locations and the reason why it doesn't is because the speed at which the wheels turn does not stop something financially happening that is so catastrophic and difficult to deal with that it doesn't improve the position. I considered deeply taking legal action many times, and it was, I felt, whilst the right thing to do on many levels, it was not going to stop the fact that this project was going to be ruined, our work, effort, profits, commitment to it, everything else was going to be ruined, and more importantly I felt that the backstop position for me would be the bank would probably have enough of two parties fighting and I would still be left with a personal guarantee which would have then caused me double heartache. So I was – I found myself and I felt very much absolutely cornered on this position. Because I couldn't guarantee I could protect the asset but I could guarantee that if I failed to protect the asset they would come after me nonetheless for the money and therefore I would have lost my largest asset, the asset that was going to repay them and I would have lost therefore a lot of the other assets, including my home potentially, that were on my personal liabilities – as a result of my personal liability to them."*

This was the *"nuclear option"* which CPC also regarded as potentially disastrous for both parties, and which both sides were seeking to avoid.

236. Signing the Supplemental Loan Agreement meant Mr Holyoake giving up the argument that he was not in breach, and accepting that £17.74m was due, as well as agreeing to give security over the Ibiza property. Those were undoubtedly things he was reluctant to do. But he did so in return for obtaining more time to raise money on GGH to pay off CPC rather than facing the immediate prospect of litigation. I find that the critical factor in his decision to sign the Supplemental Loan Agreement was the threat of litigation and the consequences which he saw that as entailing. That means the substantive question is whether CPC were justified in threatening to bring proceedings against him. The essence of economic duress is the use of illegitimate pressure: I do not see that it can amount to economic duress for a creditor who believes that he has an accrued cause of action against a debtor to threaten to bring proceedings, even if the result is likely to be disastrous for the debtor, and even if the creditor spells out in strong language why it will be disastrous. In fact in the present case I have already concluded that Mr Holyoake was in default under the Loan Agreement, and it must follow that CPC were entitled to bring proceedings. If they were entitled to bring them, they were entitled to threaten to bring them.

237. Since I have found that it was the threat of litigation that was the critical factor in Mr Holyoake's decision, I do not think the other matters raised at the meeting, or any intemperate language used, change the analysis. Matters such as whether CPC would ring up his lenders and try and ruin him, or the threat in Wragges' letter to advertise a statutory demand did not in my judgment make any significant difference: the effective cause of Mr Holyoake's decision was the threat of litigation. Proceedings of course cannot usually be kept secret, and it is noticeable that Mr Holyoake himself anticipated that if proceedings had been brought that would have become common knowledge in the property world: that seems entirely probable given the evidence I heard, which was to the effect that the London property market is very gossipy. That means that any proceedings would be likely to come to the attention of Investec. Since it was an event of default under the Investec facility for any litigation to be brought against any Obligor (which included Mr Holyoake) that would have entitled Investec to call a default under that facility and sell GGH under its powers as chargee. That is no doubt what Mr Holyoake had in mind when he referred to the backstop position being that the bank would probably have enough of two parties fighting and to his not being able to protect the asset.

238. The third matter relied on by Mr Stewart was CPC's threatened approach to Investec on 8 November 2011, the effect of which was to make Mr Holyoake concerned to remove CPC from the project as soon as he could. I accept that Mr Holyoake's reaction to the threats on 8 November was to realise that CPC were not his friends, and that as a result he decided to try and repay them; but this was all past history by the time of the Supplemental Loan Agreement. By then CPC had discovered the Aeriance charges, as a result of which it had caused Wragges to send the letter of claim and threaten proceedings. And for the reasons I have just given, that would have been likely to lead to Investec discovering the position. The threats made on 8 November did not in my view play any continuing part in Mr Holyoake's decision to enter into the Supplemental Loan Agreement.

239. In these circumstances I conclude that the Supplemental Loan Agreement was not voidable for economic duress. Mr Stewart also relied on the lies told by Mr Candy on 8 November 2011 as fraudulent misrepresentations entitling Mr Holyoake to rescind the Supplemental Loan Agreement. That raises a point of law which I deal with below, but my conclusion is that he was not entitled to rescind, and that the Supplemental Loan Agreement was binding on Mr Holyoake.

240. Mr Stewart also submitted that the requirement to pay the £17.74m by 28 February was so onerous that the Defendants knew that Mr Holyoake would have great difficulty in complying with it and that CPC's purpose in persuading him to enter into it was to set him up to fail so that they could impose other onerous agreements on him.

241. I do not accept this. I accept that Mr Christian Candy had by now become very sceptical as to whether Mr Holyoake would come up with the money. On the evening of 6 February he e-mailed his brother referring to *"the £10k we will lose on the MH loan"*, which was a reference to the bet he had made with Mr Smith, and Mr Candy accepted in evidence that at this point he did not think Mr Holyoake would repay; on 16 February when Mr Holyoake said that a sum of £13.5m would be drawn down

*"early next week"* Mr Candy expressed the view that the chances of that happening were less than 5%; on 2 March when Mr Holyoake said that he expected the transaction to close as soon as possible, he told his brother that he did not expect the money; on 5 March he said the chances of the £13.5m coming in were less than 10%; and in general it is clear from CPC's internal e-mails that there was no real expectation that he was likely to pay.

242. But Mr Holyoake was undoubtedly telling CPC that he would repay. He had told Mr Nicholas Candy on 1 February that he was getting money from the Bank of China and HSBC, with the result that one of the items of information that Mr Williams asked him for in preparation for the meeting was evidence of *"the facility being arranged to repay the CPC loan (HSBC/Bank of China?)"*. That caused him no little difficulty, but he did provide a copy of a revolving line of credit facility from Bank of China (Hong Kong) Ltd (albeit dating from September 2010, for €630m, and in favour of a borrower whose name he redacted). On the face of it that had nothing to do with a facility to repay CPC, but Mr Holyoake described it as an existing facility which provided for the drawdown of funds, his requirements being only a very small part of the general funding available to others, and said he could discuss it further at the meeting. After the Supplemental Loan Agreement had been signed, Mr Holyoake made a number of references to the imminent prospect of refinancing: on 14 February, in response to a question from Mr Williams whether there was any news from *"the East"*, he said that they would be proceeding that week, referring to a first tranche of £13.5m and a second tranche to follow; on 16 February he said that *"BofC"* (that is the Bank of China) had confirmed that they were meeting the next afternoon to finalise matters and the first £13.5m would be made early the next week; and on 20 February that it would now appear that they were going to receive the £13.5m tranche that month but not the £9.25m tranche.

243. I infer from this that what Mr Holyoake had told CPC at the meeting in Guernsey was that he was proposing to obtain the funds to repay CPC from some source associated with the Bank of China facility, and that it would come in two tranches, a first tranche of £13.5m and a second of £9.25m (together making up £22.75m). That gets partial support from an undated manuscript note made by Mr Williams, which seems very likely to be a note made at the meeting in Guernsey, and which refers to a £22.5m facility to repay, described as *"Makmeti"* and with reference to a drawdown date of 31 January. Mr Holyoake was in fact hoping to raise funds from a Mr Dmitry Chernyshev, whose corporate vehicle was Mekmetal, and it seems therefore that Mr Holyoake made some reference to this at the meeting.

244. Thus although it is not entirely clear from this material quite what Mr Holyoake was telling CPC at the Guernsey meeting, it does seem likely, and I find, that he gave them to believe that funds were being made available to him of a total of £22.5m or £22.75m, referring both to the Bank of China and to Mekmetal. Since he also said (according to Mr Williams' note) that he had liquidity of £4.5m, that would have been more than enough to repay not just the £17.74m but the £22.74m by 28 February.

245. In these circumstances I do not see how it can be said that CPC set him up to fail the Supplemental Loan Agreement. Mr Holyoake had been saying he would pay £22.74m since the dinner at Le Petit Bistro, or shortly afterwards. He was claiming to

have some facility arranged which would enable him to do this. CPC cannot in my judgment be criticised for giving him the opportunity to do just that, however much they doubted that he would. That is not CPC imposing an onerous requirement on him so that he would fail it; that is CPC giving him the chance to do what he claimed to be able to do.

*From the Supplemental Loan Agreement to 19 March 2012*

246. The first step under the Supplemental Loan Agreement was the giving of security over the Ibiza property. As set out above, this consisted of two parcels of land, one on which the villa stood, owned by Hollywell, and the other some additional land, owned by Blue Valley. The villa and the shares in Hollywell were already charged in favour of Citibank, but the additional land and the shares in Blue Valley were not. The Supplemental Loan Agreement required Mr Holyoake to procure charges over the shares (a first charge in the case of Blue Valley and a second charge in the case of Hollywell) by 13 February, and mortgages over the land (again a first mortgage in the case of the Blue Valley land and a second mortgage in the case of the Hollywell land) by 17 February.

247. Mr and Mrs Holyoake provided a charge over the shares in Blue Valley, but by 17 February had not provided the charge over the shares in Hollywell or either mortgage. Mr Christian Candy on that day sent Mr Holyoake an e-mail complaining that although he could take a £12m loan off him in 36 hours, it had taken him almost 2 weeks to get security which was still not in place, and that was not fair. He and Mr Williams had a telephone call with Mr Holyoake in the afternoon in which according to Mr Christian Candy Mr Williams *"had a right go at"* Mr Holyoake; Mr Candy described Mr Holyoake to his brother as a *"pathological liar"* and his brother replied *"Agreed and I no longer trust him"*. In the event Mr Holyoake never did provide security over the villa, ultimately refusing to do so, relying among other things on his wife's pregnancy as already referred to.

*The £13.5m from Mr Chernyshev*

248. There are four particular matters in the ensuing period that I should note. The first is what was said to CPC about the £13.5m that Mr Holyoake was trying to raise from Mr Chernyshev. Under the Supplemental Loan Agreement payment of the £17.74m was due by 28 February, failing which CPC could enforce its rights. Mr Holyoake as set out above had been promising that at least the first tranche of £13.5m would be available but he was not in fact in any position to pay by 28 February, as no agreement had been reached with Mr Chernyshev. Over the next 2 weeks, Mr Holyoake continued to tell CPC in a series of e-mails that the monies were imminent, ultimately getting Mr Pym to confirm that the monies were Mr Holyoake's. It is not necessary to set them all out but they culminated in e-mails from Mr Pym to Mr Christian Candy as follows:

(1) On the morning of 12 March (at 10.06) Mr Pym sent Mr Candy an e-mail confirming that:

> "the £13.5MM is freely available to Mark and can be used as he needs.

> These funds can be sent at Marks instruction to TPO and they are fully available to him."

This was followed by another (at 10.28), addressed to both Mr Candy and Mr Holyoake, confirming that TPO's client's lawyer was:

> "holding £13.5MM to Mark's order".

(2) Mr Candy's response was to ask for the funds to be sent to Collyer Bristow and then from them to Wragges to be held to Collyer Bristow's order. Mr Pym replied to Mr Candy (at 11.20) and said that the funds:

> "are available to Mark"

but that he would incur interest once he drew them down.

(3) Mr Candy then had what he described as a *"candid conversation"* with Mr Pym, in which he made Mr Pym aware of CPC's position.

(4) At 15.05 Mr Holyoake told Mr Candy that he had requested a funds transfer and at 16.04 Mr Pym sent a further e-mail to Mr Candy as follows:

> "Myself and William Lovering have now activated the transfer of monies to TPO on behalf of Mark from our client. This is now confirmed and the deal is completed. The funds are now Marks in every way."

(5) On 13 March Mr Pym told Mr Candy that Mr Holyoake was now incurring *"2 lots of interest"*. That was evidently intended to confirm that he had drawn down the monies.

I am satisfied that each of these confirmations was untrue. On the evening of 12 March Mr Lovering was e-mailing Mr Chernyshev from which it is clear that no contract had been finally agreed with him, and on 13 March Mr Pym e-mailed Mr Holyoake and Mr Lovering and said:

> "Ultimately, though, we need that money so I would suggest get everything agreed sooner rather than later."

Later that evening he suggested to Mr Holyoake that he call Mr Candy and discuss security over his house

> "as if you have the money."

Those e-mails demonstrate that it was a lie to say that the deal had completed and the funds were Mr Holyoake's on 12 March; and Mr Holyoake confirmed in oral evidence that no deal was ever agreed with Mr Chernyshev, explaining that he would not have completed the transaction and taken on that debt without having reached agreement with CPC. Since Mr Candy would not negotiate without rather better proof that the £13.5m was there, this never happened. That means it was a lie to say that the funds transfer had been activated or that Mr Holyoake was incurring two lots of interest.

249. I am also satisfied, as submitted by Mr Lord, that at one point Mr Holyoake resorted to having Mr Wells forge a fake proof of transfer, although it was never in fact used. The position is as follows (the timings on the e-mails are again unreliable; I have given what I believe to be the timings in Central European Time, but what is more significant is the sequence of events, which is fairly secure):

(1) By 13 March it was apparent that Mr Candy was not satisfied with Mr Pym's assurances. Mr Holyoake told Mr Pym that Mr Lovering was going to go to Mr Chernyshev's lawyers and get a screen print. Mr Pym replied (12.49):

> "Perfect. Give them something, anything to keep them happy."

He followed this up with another e-mail (12.53) to Mr Holyoake and Mr Lovering to the effect that CPC did not believe the money was there, and that showing them there was money, irrespective of whose account it was in, would give them some comfort and spin it out for a few hours. Mr Holyoake replied agreeing that anything would help as Mr Candy was going to keep emailing every 20 minutes.

(2) At 14.36 Mr Pym asked Mr Lovering if he was still outside, to which Mr Lovering replied (14.38) that he was waiting.

(3) Mr Holyoake then e-mailed Mr Lovering and Mr Pym (14.38) as follows:

> "I hate to say but I am v tempted to spk to david as discussed –it gives us the time we need –i don't want this going backwards again"

There is no dispute that the reference to David was a reference to Mr Wells.

(4) Mr Pym replied (14.38):

> "Speak to him and see what he says. Tread carefully my friend."

(5) Mr Holyoake responded (14.41):

> "Ok here goes"

(6) The next relevant document is an e-mail from Mr Wells to Mr Holyoake (16.40) which attached a pdf. Mr Holyoake forwarded it to Mr Pym (16.51). This pdf is timed at 16.03 and purports to be a Crédit Suisse document headed *"Paiment en Suisse avec IBAN"* which gives details of a transfer of £13.5m to an account at UBS in Geneva, the beneficiary being TPO and the purpose of the transfer (*"Motif du versement"*) Mark Holyoake, an execution date of 14 March and a probable value date of 14 March. The name of the sender is redacted.

The pdf was never in fact used, and each of Mr Holyoake, Mr Pym and Mr Wells said in evidence that it was prepared to be able to send to CPC once the funds had been received. But Mr Wells admitted that the form of document was one that you could print off when the funds had been transferred, and that he had been asked by Mr

Holyoake to prepare this and had anticipated the transfer by generating his own document. That seems to me an acceptance that he forged the document to make it look as if it were a genuine confirmation of transfer from Crédit Suisse at a stage when no such transfer had taken place.

*CPC approaches Investec*

250. The second matter to note in this period is CPC's approach to Investec. As referred to above, CPC had already given some thought to taking over the Investec position, and while waiting for the 28 February deadline, internal e-mails show that CPC were taking steps to prepare for this; Wragges were asked to draft documentation, and Mr Smith took advice, including Jersey law advice, as to how CPC could enforce against GGH and what would happen in an insolvency of Hotblack.

251. By 1 March Mr Holyoake had neither paid the £17.74m contemplated by the Supplemental Loan Agreement nor put in place the charge over the shares in Hollywell; he and his wife had in fact executed such a charge but it had not been dated pending confirmation from Citibank of the terms on which they would consent to it. Mr Christian Candy sent Mr Holyoake an e-mail saying that unless everything was in place by close of play the next day they would call Investec on Monday (5 March) for a full and frank discussion.

252. Mr Holyoake's pleaded case is that Mr Candy spoke to him on the telephone on 1 March and told him (i) that CPC was not satisfied with security over the Ibiza property and wanted security over GGH as well; (ii) that he and CPC wanted to take over the Investec facility so that they could obtain full security over GGH; and (iii) that if Mr Holyoake executed the security over his home in Ibiza, Mr Candy would take possession of it and then take GGH too. These are pleaded as threats. Mr Lord in his closing submissions accepted that there was a call on that day (although this is not reflected in the e-mail traffic). The content of the call was not however explored in evidence with Mr Candy. That makes it difficult to assess whether any of these things were said at all. I am rather doubtful about it – in an e-mail of 9 March, Mr Holyoake refers to having just had *"the proposal"* dropped on him in a call that morning, which I take to be the proposal to approach Investec to take over their position – but even if they were, I see nothing wrong with (i) or (ii) at all. If they were said, they were no more than the truth, which was that CPC did regard the Ibiza property (over which it did not yet have security in any event) as inadequate, and did wish to obtain security over GGH by taking over the Investec position. I do not see them as threats, but as an explanation of CPC's position. I think it highly unlikely that (iii) was said, as Mr Candy was at this stage still hoping to obtain security over the Ibiza villa, and to say this would only be likely to dissuade Mr Holyoake from giving it.

253. By Friday 9 March Mr Candy had made the decision that he would approach Investec to take over their position on Monday 12 March. He had a call with Mr Holyoake on the morning of 9 March. It is apparent from later e-mails that he explained to Mr Holyoake that he wanted to take out Investec and would be contacting them on Monday and asked Mr Holyoake to send Investec an e-mail to set up the discussion. At 12.58 Mr Candy sent an e-mail to Mr Holyoake asking when his e-mail would be

sent; Mr Holyoake replied that he did not want to send any emails to Investec that day, and putting forward a proposal. At 14.08 Mr Candy rejected that proposal and said that he planned himself to e-mail Mr Gary Dobson, the Head of Property at Investec at 2.30pm requesting an urgent conference call on 12 March with Mr Holyoake.

254. This e-mail at 14.08 is pleaded by Mr Holyoake as a threat to breach cl 20(a) of the Loan Agreement. But I do not read it that way. What Mr Candy wished to speak to Mr Dobson about was taking over the Investec position, that is the Investec facility, and in his e-mail he asks for Mr Holyoake's contact at Investec *"who wrote the loan for you"*. The only explicit threat therefore is to talk to Investec about taking over their facility. That did not necessarily involve saying anything about CPC's loan to Mr Holyoake. Nor did Mr Candy's actual e-mail to Mr Dobson, which was sent at 14.25 with a subject-line referring to GGH and which said:

> "I know Ed Parsons at Candy & Candy has been speaking to you.
>
> Are you free please on Monday March 12th, as Mark Holyoake [the borrower on GGH], Richard Williams [CPC Group COO] and myself would like a conference call regarding this loan…"

In context, I do not read the reference to *"this loan"* as being to CPC's loan to Mr Holyoake, but to the Investec facility.

255. Mr Stewart submitted that it was to be inferred from this e-mail that Mr Parsons had spoken to Mr Dobson about CPC's loan to Mr Holyoake in breach of the confidentiality provisions of the Loan Agreement. This is not an inference that can in my judgment be drawn. All that can be demonstrated from the documentary record is as follows. Mr Parsons was Chief Financial Officer of C&C. He was not, and never had been, a director of CPC, although he was a director of Omni. On 8 March he invited a Mr Gilchrist to join him in a box at Cheltenham; Mr Gilchrist replied that he had been at an Investec lunch the previous day and was speaking with Mr Dobson, and had mentioned that *"you"* (that is Mr Parsons, or C&C, or possibly Omni) might be interested in participating in some of their transactions, to which Mr Dobson had said that they were considering putting together a pool of preferred partners for such transactions and would welcome the chance to meet or discuss this with Mr Parsons. On 9 March, when Mr Candy was planning to contact Investec, he wanted the name of someone appropriate to contact, and circulated an e-mail asking for the name of either Mr Holyoake's contact, or someone senior. Mr Parsons, who was one of those circulated, replied that the person he had been introduced to was Mr Dobson. That was the context in which Mr Candy sent his e-mail to Mr Dobson at 14.08 referring to Mr Parsons having spoken to him. As can be seen, there is no reason to suppose that Mr Parsons had been speaking to Mr Dobson about the CPC loan – he had been introduced to Mr Parsons so as to speak about participating in Investec's transactions generally, and there is no trace in the documentary record of his being involved in the CPC loan at all.

256. On the evening of 10 March Mr Candy had a call with Mr Holyoake. Mr Holyoake asked Mr Wells to join the call. Mr Wells was at a dinner and stepped out to join the

call which meant he missed the start of it but he made a contemporaneous manuscript note of the rest, which although not perfect gives an almost verbatim account of the conversation. In closing submissions Mr Stewart referred to this call as one where various threats were made against Mr Holyoake. This appears to be an unpleaded allegation, and is also unparticularised, but one can see what Mr Candy actually said from Mr Wells' note. Four points in particular can be noted. First, Mr Candy made it very clear that CPC intended to go to Investec to buy Investec's debt. He expected to get it by Friday (16 March); he said that in 5 days CPC would be their (senior) lender. Mr Holyoake would not then hear from them, and he would have a breathing space until October. Second, Mr Holyoake tried to interest him in a potential buyer that he said he had, but Mr Candy was not interested, saying that would take 3 weeks. Mr Candy also said more than once that CPC did not itself want GGH. Third, Mr Holyoake said that if he got the £13.5m to CPC, it was unfair for CPC to still go after his house as Mr Candy would have had his money back and still have his personal guarantee. Mr Candy however said the issue was that CPC did not trust him, and he would still owe another £4m interest and the £10m profit share and they would want the house as well as the £13.5m. Mr Holyoake said he did not want to wake up one night to find Mr Williams had taken the house; Mr Candy said they would not kick him out, and that he was safe in Ibiza. Mr Candy thought Mr Holyoake would be able to sell GGH in October for between £45m and £80m with planning if he could not refinance. As long as he sold for more than £52m there would not be a problem (the £52m presumably being made up of the £24m senior loan, the £17.74m and the £10m profit) but if he sold for less than £52m, then there would be an issue with the Ibiza property. Fourth, there is an incomplete note of a statement by Mr Candy which reads:

> "Your best is
>
> If you say no we go nuclear"

This is fairly clearly a statement by Mr Candy that Mr Holyoake's best option was to do X, failing which he would *"go nuclear"* (which had become a shorthand for taking proceedings and enforcing CPC's rights), but unfortunately does not indicate what X is. In context, I think it is likely to have been completing the security over the Ibiza property.

257. I do not see in this any threats by Mr Candy to do anything unlawful. What was suggested to him in cross-examination was that he was still using Investec as a threat to Mr Holyoake. But what Mr Candy was actually telling Mr Holyoake he was going to do was to approach Investec to buy Investec's debt. That is not in itself unlawful and would not by itself necessarily involve the disclosure of CPC's loan to Mr Holyoake. It is possible that Mr Candy did say he would also do this (there is a note of Mr Candy referring to going to Investec *"with £12m tell with PG"*, which is incoherent as it stands but may refer to Mr Candy disclosing CPC's £12m loan to Mr Holyoake personally); but this was not suggested to Mr Candy in cross-examination. I am not going to find that he made a threat which is unpleaded, unparticularised and was never suggested to him, and was probably not unlawful anyway (see below). Mr Candy also made it clear that CPC did want security over the Ibiza property, but this was something Mr Holyoake had agreed to give in the Supplemental Loan

Agreement. He also said that if CPC did not get what it wanted, it would resort to litigation and enforcement. That may be a threat but is not unlawful.

258. A conference call had been arranged for 1 pm on Monday 12 March between Investec (Mr Dobson, Mr Austin and Mr Arnst), CPC (Mr Candy and Mr Williams) and Mr Holyoake. Mr Candy made it clear to Mr Holyoake that he was not intending to speak to Investec prior to that call, and indeed suggested they have a pre-call to discuss who said want.

259. Mr Holyoake however did not want CPC talking to Investec. This was no doubt out of a fear that Investec might disclose the Oscarone loan – indeed Mr Pym had on the night of 9/10 March sent him an e-mail in which he said that the concern was still Oscarone and that it was imperative to delay the call with Investec or somehow get agreement from them not to release the loan details. On the morning of 12 March, after Mr Pym had sent his e-mail of 10.28 confirming that the funds were held to Mr Holyoake's order, Mr Holyoake said he would cancel the Investec call. Mr Candy replied that it would not be cancelled and if necessary CPC would go ahead on its own; until the monies were with Wragges CPC intended to proceed with the process of buying the Investec debt. Mr Holyoake then sent an e-mail to Mr Austin at Investec effectively postponing the call. He and Mr Candy spoke at about 12.45, after which Mr Candy e-mailed Mr Dobson apologising that the call had been postponed. He said that the purpose of the call was to discuss GGH, that CPC was interested in acquiring the Investec and Topland debt of £24m and had been in discussions with Mr Holyoake about it, and that CPC's preferred route was an assignment (with the alternative a loan repayment); and asked Investec to consider and revert to CPC. Mr Dobson replied that Mr Arnst would pick this up. Mr Candy then telephoned Mr Arnst and spoke to him briefly (the call lasted less than 10 minutes as Mr Arnst sent Mr Candy his telephone number at 14.51, and Mr Candy reported on the conversation to his brother, Mr Smith and Mr Williams at 15.00). What Mr Candy reported was that Investec were keen to sell at full value and preferred the assignment route, and would revert by Wednesday (14 March). He added:

> "I mentioned nothing about the MH issues."

260. Mr Stewart invited me to find that the Defendants approached Investec to discuss CPC's loan to Mr Holyoake, and that in so doing they were misusing Mr Holyoake's private information, in breach of a duty of confidence and in breach of their obligations under the Data Protection Act 1998 (**"DPA"**). As to this, the e-mails from Mr Candy to Investec make no reference to CPC's loan, but only to CPC wishing to take over the Investec facility. There is no reason to doubt that Mr Candy only had the one telephone call, with Mr Arnst. That call was very short, and Mr Candy's account of it in his contemporaneous e-mail deals only with the question of CPC taking over the Investec facility and expressly says that he mentioned nothing about the issues CPC were having with Mr Holyoake. It was not I think suggested to him in cross-examination that that was untrue. It also receives confirmation from Mr Arnst. Mr Arnst is now resident in Australia and was not called as a witness but the Claimants put in a statement from him under the Civil Evidence Act. In that he says he recalled speaking with Mr Candy on around 13 March, that the purpose of the call was to talk about the Investec loan to Hotblack, that Mr Candy was told that the loan

could not be discussed with him as he was not Investec's client and that *"there was no discussion regarding Mark's arrangements with CPC"*. I am not sure he is right about CPC being told he could not discuss the loan – shortly afterwards Mr Candy got his PA to send Mr Arnst his telephone number and Mr Arnst said he would revert that week as soon as possible, which seems unlikely if he had declined to talk to CPC at all – but there is no reason to doubt what he says about there being no discussion about Mr Holyoake's arrangements with CPC. In these circumstances there is in fact no evidence that Mr Candy said anything to Investec about it.

261. In his closing submissions however Mr Lord accepted that Mr Candy did tell Investec about the CPC loan. I think this may have been an uncharacteristic slip, and am rather doubtful if I am bound to accept a concession which is contrary to all the evidence, but I will assume that I am. Even so, I do not think there would have been any, or any significant, breach of the Loan Agreement. First, under cl 20(b)(iv), CPC was entitled to disclose any information relating to Mr Holyoake if it needed to disclose it for the protection of its rights under the agreement. It seems to me that if Mr Candy had disclosed the existence of CPC's loan to Investec, it could only have been because he thought he needed to do this in order to explain to Investec why CPC wanted to take over the Investec position; and CPC undoubtedly wanted to take over the Investec position in order to protect its rights to repayment under the Loan Agreement. Second, quite apart from this, under cl 10.1(c) CPC was entitled to seek security by way of the Additional Property Charge if the £17.74m had not been paid by 12 March. That would entitle CPC to seek a second charge on GGH (being one of the properties on the net asset statement), for which purpose it would have had to speak to Investec, and, as Mr Holyoake accepted in cross-examination, Investec would necessarily have learnt of the CPC loan and there would have been nothing unlawful in CPC speaking to Investec in that way at that stage. Mr Holyoake may well be right that cl 10.1(c) only permitted CPC to approach Investec once there had been a failure to repay on 12 March; but on this footing, it was by the time Mr Candy spoke to Mr Arnst inevitable that Mr Holyoake would not pay the £17.74m that day – he was trying to negotiate terms for payment of £13.5m – and if Mr Candy did reveal the CPC loan to Mr Arnst, he at most anticipated by less than a day what he would have been entitled to do the next day.

*Threats to Mr Pym*

262. The third matter to note in this period is that Mr Christian Candy had a number of telephone calls with Mr Pym, who, it will be recalled, had been a good friend of his. On the afternoon of 9 March he had a call with Mr Pym which Mr Pym gave an account of to Mr Holyoake, describing Mr Candy as *"calm during the call and friendly to me"*. Mr Pym asked for Mr Holyoake to have more time to resolve the situation but Mr Candy said the conference call had already been arranged with Investec and time was up.

263. On the morning of 12 March, Mr Candy had another call with Mr Pym. This was the one Mr Candy described as a candid conversation. He had another on the evening of 13 March. Mr Pym made a note of both conversations on 16 March, describing the overall tone of both as extremely aggressive, vindictive and abusive, with Mr Candy seeming less intent on trying to get his money back and more intent on *"destroying"*

Mr Holyoake. His note of the first call recorded Mr Candy as suggesting that Mr Holyoake was a pathological liar (which Mr Candy did not dispute); that Mr Holyoake had no intention of paying the money back (which was again not disputed, Mr Candy at that stage being fed up with Mr Holyoake's broken promises); that Mr Holyoake's net asset statement was *"all bullshit"* and that he was a *"fucking lying scumbag"* (to which Mr Candy said that he did not believe that was his language, but he accepted he used colourful language, more probably *"bollocks"*); that he would *"fuck up his world…take the nuclear option…destroy his world"* (to which Mr Candy said that was not his language, and that the nuclear option would mean massive equity loss for both CPC and Mr Holyoake); that Mr Holyoake was concerned that CPC wanted a charge over his residence where his pregnant wife and children lived, but that Mr Candy said he *"didn't give a shit"* (which Mr Candy said he did not recall saying); and that Mr Candy said he would do whatever it took to get his money back (to which Mr Candy said he had said he would do whatever he could contractually). Mr Pym's note of the telephone call of 13 March recorded Mr Candy as saying that Mr Holyoake was a *"fucking liar"* (Mr Candy accepting that he would have said Mr Holyoake was a liar); that he was going to bankrupt Mr Holyoake and take pleasure in doing so (to which Mr Candy said that if Mr Holyoake went bankrupt that would not bother him, but it would be a consequence of his own actions); that he *"couldn't give a shit"* about ruining other people's lives and the best thing for Mr Holyoake to do was prepare for the full weight of CPC to come down on him (to which Mr Candy said that the only weight CPC had was a contract which they would enforce); and that after this Mr Holyoake would never be able to work again and would be *"wiped out"* (which Mr Candy said he did not believe he said).

264. These calls are pleaded as further threats, and Mr Stewart asked me to find that Mr Candy in substance repeated the threats he had made in January and February against Mr Holyoake and his and his wife's welfare. Mr Lord submitted that Mr Pym's note, which was not made until some days after the calls and at a time when Wragges had sent a draft claim form to Mr Holyoake (which Mr Holyoake had forwarded to Mr Pym), was unreliable and an exaggeration. I do not think there is actually very much difference between what Mr Pym recorded and what Mr Candy accepted, apart from some of the more colourful phrases. Mr Candy clearly was angry with Mr Holyoake (in his own words frustrated, disappointed and *"peed off"*), and considered (with justification) that he had been lied to, both by Mr Holyoake and by Mr Pym; he also said he would pursue Mr Holyoake, if necessary to bankruptcy, and I find that he probably said that he would destroy his world, and wipe him out or the like. Mr Pym's oral evidence was that he was taken aback by how aggressive Mr Candy was; he had known Mr Candy a long time and Mr Candy had never been anything other than kind, generous and a good friend to him, whereas on this call Mr Candy made it clear that Mr Pym had to take sides and decide whether to side with Mr Holyoake or Mr Candy; that shocked Mr Pym as he was suddenly now being portrayed as the bad person in the scenario. That evidence I found credible, not least because Mr Candy, as he himself said, was frustrated and disappointed that one of his best friends was fundamentally and categorically lying to him. He had evidently come to the conclusion a long time before that he could not trust a word Mr Holyoake said, but I think it came as an unpleasant surprise that Mr Pym was prepared to back Mr Holyoake up in the way he did. I do not therefore accept that Mr Candy was quite as *"measured and considered"* as he claimed; I find that these calls, in marked contrast

to the calm and friendly call on 9 March, were in substance as Mr Pym recorded them to be, give or take a few adjectives.

265. But in the end I do not think it ultimately matters whether what was said was in an aggressive tone or not. What is significant is whether Mr Candy was threatening to do anything improper or unlawful. Threats to sue Mr Holyoake, pursue him as vigorously as possible, make him bankrupt and thereby ruin him, however unpleasantly expressed, in whatever tone of voice and with whatever colourful language, are not in my judgment threats to do anything more than any creditor is entitled to do. Nor do I think that vague expressions such as *"doing whatever it takes"* to get his money back, or preparing for the *"full weight of CPC to come down on him"* or destroying Mr Holyoake's world and wiping him out are to be taken as threats to do anything unlawful: Mr Holyoake was in fact at one stage advised by his own solicitors that phrases such as *"we will take a nuclear bomb to you"* are relatively common hyperbole in litigation. It was put to Mr Pym, who was after all the person to whom such statements were made, that he did not understand that Mr Candy was threatening to do anything unlawful, to which he said that he did not know what Mr Candy was planning to do; all he remembered was that the call was extremely aggressive.

*Conspiracy to steal the site?*

266. The final particular matter that I should deal with in this period is the suggestion that CPC's actions evidence the conspiracy alleged against the Defendants. The allegation of a conspiracy runs through the entire period of Mr Holyoake's dealings with CPC but it is convenient to take stock at this stage and consider whether any conspiracy has been established for the period to date.

267. The pleaded claim is that the Defendants combined together from no later than 10 October 2011 to use unlawful means against the Claimants, the purposes of the conspiracy being (1) to obtain by unlawful means GGH or all or part of the benefit of it and the redevelopment opportunity it represented for the benefit of CPC or the Defendants, or (2) to obtain substantial sums of money by unlawful means from the Claimants.

268. As recognised by this pleading an unlawful means conspiracy in essence requires (i) a combination between two or more people (ii) to carry out unlawful acts (iii) with the intention of injuring the claimant and (iv) which do injure the claimant.

269. There are as can be seen two limbs to the pleaded conspiracy, one being to obtain GGH, and the other being to obtain as much money as possible from Mr Holyoake. I will consider the second limb later, but it is convenient to consider the first limb at this stage. This is because Mr Holyoake places great reliance on the fact that Mr Candy did not want to agree terms for the payment of the £13.5m to him, and it is this, he says, which demonstrates that Mr Candy's real agenda was to get hold of GGH.

270. The pleaded case takes this conspiracy back to October 2011, and in his closing submissions Mr Stewart asked me to find that the conspiracy had come into existence

by the time the loan was made on 12 October 2011. That depends on proving that the intention of CPC and its directors, at the time the loan was made, was to use unlawful means to acquire GGH for CPC. The unlawful means relied on by Mr Stewart were that CPC set up the agreement to fail, and that CPC assured Mr Holyoake that the loan would not be disclosed to Investec and assured him that the net asset provisions would not be relied on, but planned to renege on those assurances. I have no hesitation in rejecting this case. I have already found that CPC did not set up the agreement to fail, were not asked to, and did not, give explicit assurances about keeping the loan confidential from Investec, and did not give the assurance about the net asset provisions relied on. There is therefore no question of CPC planning at the outset to renege on the assurances. But quite apart from that, I find that at the time of the loan CPC had no intention or desire or plan to try to acquire GGH for itself. There is not the slightest trace of this being any part of their thinking at the time. Mr Christian Candy, as already referred to, was attracted by the prospect of large returns (see paragraph 166 above).

271. Mr Stewart's next submission was that if the conspiracy had not come into existence on 12 October 2011, it came into existence on 8 November 2011 when Mr Christian Candy agreed with his brother to tell lies to Mr Holyoake about the need to disclose the loan to Investec. I accept that that is evidence of a combination between at least those two to tell lies; and I will assume that an agreement to tell lies is a sufficient agreement to use unlawful means, even if, as in this case, the lies do not deceive as they are not believed. But I can see nothing in the events of 8 November which suggests that what Mr Candy or CPC were trying to do was to put themselves in a position to get hold of GGH. Mr Candy's explanation in evidence of what he was trying to do was to find out what Mr Holyoake was concealing from them. That is supported by the contemporary internal e-mails and I accept it. In fact of course Mr Holyoake did not reveal what he was concealing from CPC (the Oscarone loan), and these lies, which Mr Holyoake did not believe, did not cause him (or Hotblack) any loss.

272. Mr Stewart then submitted that the conspiracy came into being in late January / early February 2012 when the Defendants were prepared to use threats at the Guernsey meeting and through the use of Wragges' letter of 2 February to secure Mr Holyoake's entry into the Supplemental Loan Agreement. The Defendants did put pressure on Mr Holyoake to enter into the Supplemental Loan Agreement by threatening litigation. But leaving aside the question whether there was anything unlawful in doing so (which I have considered above), I do not accept that they were doing so so as to obtain GGH. I have already said I accept Mr Christian Candy's evidence that what he wanted, at the time of the telephone call of 31 January and at the Guernsey meeting, was repayment or security, not the asset; and what the Supplemental Loan Agreement delivered to CPC was an acknowledgment that Mr Holyoake was in default, amendments to the Loan Agreement, an agreement to provide security over the Ibiza property, and an acknowledgment that CPC could take enforcement action if payment of £17.74m was not made. It did not give CPC any greater interest in GGH and it was not designed to do so.

273. That brings me to the £13.5m. Mr Stewart said Mr Holyoake was in a position to draw down £13.5m from Mr Chernyshev, that he offered it to CPC and that they

refused to accept it, and that, as Mr Holyoake said in evidence, this must have been because it would make their attack on the asset more difficult, the point being that under the Loan Agreement, CPC were only entitled to seek security under cl 10.1(c) for 125% of the loan and not the interest. Considered in this light, he said, CPC's refusal of the £13.5m becomes explicable as in furtherance of the conspiracy. He referred to an internal e-mail from Mr Smith of 28 February 2012 where he said:

> "If it [the £13.5m] comes we have an interesting problem; if it doesn't we go nuclear!"

and submitted that the interesting problem was how CPC could justify its aggressive stance if Mr Holyoake had paid off the entirety of the principal of the Loan and some of the interest.

274. I do not accept this submission. I do not accept that CPC refused to accept the £13.5m because that would enable them to have a better chance of acquiring GGH. In circumstances where there was a real concern as to whether Mr Holyoake was in a position to, or would, repay anything and where litigation was thought to be potentially disastrous for both sides, it was obviously in CPC's interest to take the £13.5m if it was available.

275. The three relevant individuals are Mr Christian Candy, Mr Smith and Mr Williams. Of these Mr Smith had been in his own words a sceptic from the very beginning, and had from the outset been concerned about the fact that CPC had no security. He had expressed the view as early as 9 February that *"Investec is the only way out"* and that once they had obtained the Supplemental Loan Agreement they should tell Mr Holyoake that. On 10 February his reaction to being told that Mr Holyoake had signed was to say that they needed to decide the timing on Investec. When Mr Christian Candy raised the question on 20 February what CPC should do if Mr Holyoake actually did want to repay £13.5m, Mr Smith's response was that it would be a nice problem to have, and that if Mr Holyoake did pay them back, they should still seek to take out the Investec loan; as late as 14 March, by which time Mr Candy had come to the conclusion that the £13.5m did not exist, Mr Smith was saying that if it was real they should take it. There is nothing to suggest that he ever thought they should refuse it so as to get closer to the asset. As to the *"interesting problem"*, on 21 February he said:

> "He will say that he doesn't want to draw down the funds until he has a revised deal.
>
> You can see where he is going with this! Take £13.5m and be happy!"

Then on 28 February he sent two e-mails on 28 February, the first saying that *"The fun begins if the money arrives!!"* and the second referring to the *"interesting problem"* if the money comes in. In those circumstances, although it is not entirely clear what he was referring to, I think the most likely explanation is that he was expecting Mr Holyoake to put forward a revised deal as the price of paying £13.5m (which was exactly what Mr Holyoake tried to do in the event), and the *"interesting problem"* was what the terms would be and whether they would be acceptable. I do not think that he was referring to the problem of how to justify continuing to pursue Investec if £13.5m had been paid off. CPC would still be entitled in that event to the

balance of the interest (a further £4.24m) and a minimum of £10m for the profit share, and Mr Smith had long been of the view that the best way for CPC to protect itself was to take over the Investec facility. As he explained in evidence, that would not give them security as such for these amounts, but it would put CPC in the position of first secured chargee which would give CPC control over the realisation of GGH in the event of an insolvency. Taking over the Investec position did not depend on the operation of cl 10.1(c) of the Loan Agreement, but was something that CPC could try and do whatever the amount of the loan still outstanding.

276. So far as Mr Williams is concerned, on 28 February he sent an e-mail saying:

> "If we can get £13m off him it can be used to fund investec facility"

and there is no reason to think that he, any more than Mr Smith, was advocating refusing the £13.5m because it would make CPC's attack on the asset more difficult.

277. So far as Mr Candy is concerned, I can equally detect nothing to suggest that he refused the £13.5m because he thought it would make it more difficult to get hold of GGH. What the e-mails show is that Mr Candy was very sceptical that the £13.5m existed at all. That was what he told Mr Pym on 12 March, which is why Mr Pym reported to Mr Holyoake on 13 March that CPC did not believe the money was there, and why he was insistent on the money being sent to Wragges, or, as he suggested to Mr Holyoake on 14 March, to Collyer Bristow. By that stage, as he had told Mr Smith, Mr Williams and his brother earlier that morning, he had come to the conclusion that the £13.5m was not real but an illusion. He told Mr Holyoake that a sensible discussion could be had once Collyer Bristow confirmed they had £13.5m, but no-one at CPC believed he had it. If and when Collyer Bristow confirmed the £13.5m, he was sure CPC would be softer in its position, but until then CPC had no options but to commence legal proceedings. They would no longer chase the £13.5m.

278. There is no reason to reject that explanation. Mr Holyoake was very indignant that Mr Candy would not accept the £13.5m, but he was trying to persuade CPC to restructure the loan on the basis that he paid them the £13.5m, that he would remain personally liable for the balance of the interest and profit share, but that they would go forward without any default and a much lower net asset covenant and no further security, and Mr Candy, as this e-mail makes clear, was not willing to negotiate until he could be assured the £13.5m existed. Mr Holyoake said in evidence that he did not think there was anything in the Loan Agreement preventing him making an early repayment or partial repayment. I need not consider if he was right about that as he never put it to the test by offering an unconditional partial repayment. Indeed, as already referred to, he was not willing to draw down the money from Mr Chernyshev without having reached agreement with CPC. That was because the £13.5m was not the full £17.74m so unless they had reached agreement with CPC as to what it could do after receipt of the funds, Mr Holyoake would still be exposed to action to enforce the balance. Mr Holyoake would therefore never have completed the transaction until there was a deal on both sides.

279. I find that CPC never refused an unconditional payment of £13.5m because it was

never offered; and that CPC declined to negotiate on the terms on which £13.5m might be paid not because it would make it more difficult to get close to GGH, but because Mr Candy (whose decision it ultimately was) did not believe that the money existed.

280. That is not the end of the material on which Mr Stewart relies in support of the conspiracy to obtain GGH. When on 12 March Mr Candy reported on his conversation with Mr Arnst, Mr Williams replied that it was encouraging, to which Mr Candy replied as follows:

> "I agree. They are 100% sellers. We need to discuss, as I think once we buy this loan, we may want to call default under this loan agreement also.
>
> We need to do what HE did to us, and that is Bad Boy penalties. I think CPC can steal this site off MH if we are clever."

Unsurprisingly, Mr Holyoake relied on this e-mail as confirmation that Mr Candy's intention was to steal the site off him, and as proof of the conspiracy to do so.

281. This needs to be seen in context. On 9 March Mr Holyoake had asked Mr Candy to consider again buying him out *"as it feels to me that CPC want the building"*; he told Mr Pym and Mr Lovering that he was contemplating a sale to CPC as this in his view was what they wanted; and then on 10 March put forward a proposal to Mr Candy under which he sold GGH to CPC for £45m with all his liability to CPC removed and a profit share for him. On the call that evening Mr Candy rejected this proposal saying he did not want the asset. His thinking at the time is revealed in an e-mail he sent to his brother later that evening. This calculated what the internal rate of return or IRR would be if CPC bought out Investec, and the subject line is:

> "If we get the senior position, CPC will make £17.80mn off a £36.00mn investment, so a 40% IRR. A great tax free return."

The calculation assumes that CPC pays £24m to Investec (hence the total investment of £36m) and recovers a total of £53.8m made up of the senior loan of £24m together with interest of £2m odd, the £17.74m and the £10m profit share, making a profit of £17.8m. The calculation of the IRR assumes that CPC would recover this by 24 December 2012, which I think was probably based on an assumption that CPC would be able to default the loan in October, and then sell it as first chargee. The calculation also shows that CPC assumed that Mr Holyoake had contributed £9m equity himself.

282. On 11 March Mr Smith, who had been through the Investec documentation, reported to Mr Candy on its terms. He said that he doubted if the CPC loan in itself put the Investec loan in default, but that the Declaration of Trust did. I think he was right about that, as one of the Events of Default under the Investec facility was a failure by the Borrower (Hotblack) to comply with the undertakings in clause 21; and cl 21.7 contained a negative pledge provision under which Hotblack was not to dispose of any of its assets. By the Hotblack Declaration of Trust Hotblack declared that it held GGH in trust for CPC as to 30% of the equity, which seems to me to amount to a disposal in breach of cl 21.7. Mr Candy was interested in the default rate of interest (which was an extra 4% making 19%), and I infer from that that his thinking was that

if CPC took over the Investec position, it could call a default and charge the default rate of interest.

283. There was then a discussion between Mr Candy and his brother about selling GGH, with Mr Nicholas Candy putting forward a couple of suggested purchasers who he could speak to but saying he would not do anything until they had the right charges in place.

284. That is the background to Mr Candy's e-mail of 12 March referring to stealing the site. As can be seen, what he was thinking about at the time was acquiring the Investec loan, and then calling default on it. That would not give CPC GGH, but it would enable them to have GGH sold. Both Mr Candy and Mr Smith were asked about this. Mr Candy said that if they could buy the Investec debt, he would be in for £36m, he could then call default, appoint a receiver and the receiver could sell it, and the reference to stealing was to acquiring the site for £36m as opposed to the £42m Mr Holyoake had paid, the *"steal"* referring to getting it at a better price. Mr Smith said that what would happen if they got into the Investec position and there was a default and they called in an administrator would be that the administrator would appoint a sales agent and the site would be sold at market value. If CPC were interested at that value they could make a bid, but if not they wouldn't. He never saw it as a way of acquiring the site but as a way of protecting the position.

285. Neither of these explanations seems to me a complete explanation. Neither explains why Mr Candy appears in his e-mail to link the comment about stealing to the *"Bad Boy penalties"*. This was a reference, as Mr Candy explained, to payments that CPC had to make to their joint venture partner at One Hyde Park as a result of cost overruns (the reference to *"HE"* being a reference to His Excellency the former Prime Minister of Qatar). In the context of the CPC loan, Mr Candy said he was thinking of charging extension fees to Mr Holyoake for his breaches, and in due course, although not for some months, this is what CPC started doing. In these circumstances I consider the most likely explanation of what Mr Candy meant by stealing the site was taking all the value from the site. If CPC could acquire the Investec position and call default, they could then, as both Mr Candy and Mr Smith recognised, put in a receiver or administrator to sell the site. Mr Candy had already calculated that a sale at a high enough price could produce total recoveries of £53.8m for CPC, and was I think now considering using the imposition of further charges to Mr Holyoake to ensure that even if it sold for more, CPC could take the extra, thereby squeezing Mr Holyoake out of any remaining equity.

286. That seems to me to get some support from an e-mail from Mr Candy to Mr Smith, Mr Williams and his brother on 14 March (at 12.10) in which he says:

> "what we know:
>
> 1) He has lied to Investec, and they will be pissed if they find out about this, and
>
> 2) He has no money to repay us, and we have a charge on his house
>
> 3) His options today are limited. He needs to find £17.75mn in 10 working days to repay CPC, otherwise he has bankruptcy proceedings in process against him,

> and he may lose his house. He has no real assets to gear to repay us. He will need to sell the asset today over £52.00mn to start recovering his equity. This will [be] tough when proceedings start against him.
>
> Why don't we offer this to Mark:
>
> 1) Give us GGH
>
> 2) MH loses his equity of £9mn
>
> 3) MH gets off Investec knowing what he did
>
> 4) MH gets the charge removed from his house
>
> 5) CPC are then in for a breakeven position of £36mn, so our equity is safe.
>
> 6) CPC then get to recover 100% of its monies over £36mn, so it needs to get to £52.00mm to get all of its returns
>
> MH gets to walk away, and he loses £9mn as a lesson to himself."

This seems to me to represent a development of his thinking. The problem with taking proceedings against Mr Holyoake would be that he would have to sell GGH and it might not reach £52m – the reference to it being tough when proceedings started against him being a recognition of what Mr Holyoake referred to as the effect of creating a smell around the property, or tarnishing the building – and so CPC might not recover the full £52m. The same would no doubt be true if CPC took over the Investec position and called default. In practice therefore Mr Candy thought that Mr Holyoake was already in a position where he stood to lose the £9m Mr Candy believed he had put in, and this suggestion was intended to put CPC in a better position, and Mr Holyoake in no worse a one, then they already were. In effect it would mean that CPC would obtain GGH, not so as to develop it but so as to give it the best chance of selling it and recovering the returns which CPC was contractually entitled to.

287. I find therefore that Mr Candy was planning ways of effectively acquiring control of GGH so as to recover for CPC all the monies that it was entitled to and leave nothing for Mr Holyoake. But it does not follow that there was any combination to do that by unlawful means, and I find that there was not. The plan was to take over Investec's position and use the rights given to Investec in the Investec facility to put CPC in the best position to recover what was due to it. There was nothing unlawful in taking an assignment of Investec's debt. Mr Stewart also referred to the Defendants being willing to use allegations of contractual breach (whether or not legally sustainable) to achieve their objectives; but I find that the Defendants did think they would be entitled to default the Investec facility once they had it (as a result of Hotblack granting the Declaration of Trust); and although at this stage Mr Candy was thinking of using extension fees to squeeze Mr Holyoake out of any remaining equity, this plan was not then put into action. I consider below whether there was anything wrong in the extension fees that were later charged.

288. The plan did however require Investec to agree to allow CPC to take over its position.

Initially Mr Arnst, as I have said, appears not to have been discouraging, and Mr Candy thought it would happen, discussing on 13 March with Mr Parsons whether the £24m loan should be put through Omni or not. On 14 March he e-mailed Mr Tim Simpson of C&C about the prospects of obtaining planning permission on GGH asking him to review the position *"as CPC may end up taking over this site in the near future, confidentially"*. That is I think likely to have been a reference to the plan to acquire the Investec loan and call default (in which case the prospects of obtaining planning would affect the price that a receiver or administrator could expect to realise); although given that the e-mail was at 11.58, just before his e-mail of 12.10 with the proposal of suggesting to Mr Holyoake that he give CPC GGH and walk away with a loss of £9m, he may also have been thinking about that.

289. But by 15 March Mr Holyoake had spoken to Investec and persuaded them not to agree to an assignment of the facility. He told Mr Candy that on a telephone call (and Mr Currie later confirmed it to Mr Smith). That led to a different proposal, discussed on the telephone call on 15 March, under which CPC would lend Mr Holyoake the money to pay off the Investec facility, Mr Holyoake would by 26 March pay the £13.5m and give security over the Ibiza property and, in default of doing so, ownership of GGH would be transferred to CPC in full and final settlement of Mr Holyoake's obligations. That was effectively similar to the suggestion in Mr Candy's e-mail of 12 March at 12.10 with the addition of the opportunity for Mr Holyoake to provide both the £13.5m and the security over the Ibiza property. Since Mr Candy thought that the £13.5m did not exist, it is perhaps not surprising that he e-mailed Mr Simpson on 16 March to the effect that *"It is probable, confidentially, that CPC will take possession of this site next week, and will own 100% of it"*: if Mr Holyoake did agree to this proposal, Mr Candy expected the outcome to be that CPC would acquire GGH.

290. Mr Holyoake however never did sign up to the proposal. On 16 March Wragges sent a letter to Collyer Bristow with a draft claim form and particulars of claim; the claim was issued in the Commercial Court on 19 March and served the same day. The claim was for the £17.74m, on the basis that Mr Holyoake had failed to comply with the terms of the Supplemental Loan Agreement (having neither provided security over the Ibiza property nor paid £17.74m by 28 February) with the result that CPC could enforce the Loan Agreement on the basis of the breaches identified in Wragges' letter of 2 February.

*From 19 March to 4 April 2012*

291. On 19 March (the day it was issued and served) CPC sent a copy of the claim form to Mr Dobson and Mr Arnst at Investec, and thereafter sought to engage Investec in a discussion. Mr Stewart submitted that the approach must be taken to be a deliberate attempt to destabilise Mr Holyoake's relationship with Investec. I find that the purpose of doing so was, as Mr Christian Candy accepted in evidence, to persuade Investec to allow CPC to take over their position. The approach however failed as Investec was not interested.

292. Mr Holyoake alleges that at around this time Mr Nicholas Candy interfered with a potential purchaser. The facts are as follows. It can be seen from e-mails that by 22

March Mr Holyoake was hoping to receive an offer from the Heron group. It is also apparent that by 23 March he had been told that CPC had had a telephone call with Mr Gerald Ronson of the Heron group. Mr Nicholas Candy accepted in his witness statement that he had heard that Heron might want to buy the property, that he had called Mr Ronson and had told him that CPC had lent Mr Holyoake money but Mr Holyoake was now *"playing games"* and CPC was having to work very hard to get repaid. In oral evidence he accepted that he had been discussing confidential information with Heron and that he must have known that to be wrong at the time. Then in the afternoon of 23 March Mr Ronson sent an e-mail to Mr Nicholas Candy letting him know that they would not be pursuing GGH *"for a number of reasons"*, which Mr Candy forwarded to his brother with the comment:

> "This is Mark Holyoake's idea of selling it to Heron out of the question."

In cross-examination Mr Candy denied that he was trying to put Mr Ronson off buying it, and said he would have encouraged him to buy it as that would have repaid CPC's loan. I am left in some doubt if that is really what happened: one might have thought that if Mr Candy had been trying to encourage Mr Ronson to buy GGH he might have pushed back at Mr Ronson's e-mail or at least expressed disappointment to his brother that despite his best efforts he had failed to persuade him, and Mr Candy's evidence left it rather unclear why he mentioned CPC's loan at all. But this episode was only very briefly explored in evidence; I was not told what basis Mr Holyoake had for thinking that CPC had sought to dissuade Mr Ronson, and when he suggested this to Mr Christian Candy on 26 March it was immediately and strenuously denied; Mr Nicholas Candy's actual e-mail to his brother is consistent with his either having tried to persuade Mr Ronson to buy it or put him off; and in the end I am not persuaded that Mr Nicholas Candy had any good reason to try and frustrate a purchase. All the evidence to date indicates that what CPC was looking for was a way of getting repaid. In the circumstances, despite my doubts, I do not find this allegation proved.

293. The next relevant allegation concerns an approach by CPC to Mr Clifford Knuckey. The facts are as follows. On 30 March Mr Nicholas Candy circulated an e-mail in which he said that the more he heard about Mr Holyoake, the more he thought he was a serial fraudster, and said he would not be surprised if he had been in prison. I should say that I have heard nothing to suggest that there was any basis for this – it was just speculation by Mr Nicholas Candy. He also said that Mr Wells needed to be brought into the proceedings as well. Mr Dean, who had recently (on 27 March) been asked by Mr Christian Candy to take over responsibility for the litigation, replied that he was checking with Wragges and they were securing a quote from a private investigator to see if Mr Holyoake or Mr Wells had been in prison. I have not seen any response from Wragges, which would no doubt be privileged, but on 2 April Mr Smith responded to a redacted e-mail with the subject line *"Re: Fees Quotation"* by saying that Cliff might be able to do this, Cliff being a reference to Mr Knuckey, who was then the Chief Executive of a private investigations company he had set up in about 2009 called Hermes Forensic Solutions Ltd (**"Hermes"**). I infer that the redacted e-mail contained advice from Wragges as to what could or could not be done and perhaps some explanation of the potential cost. Mr Christian Candy asked Mr Smith to get a quotation. Mr Smith spoke to Mr Knuckey, and sent him the details of

Mr Holyoake and Mr Wells. He then circulated an e-mail saying:

> "Cliff says he will do it for £200!"

Mr Smith accepted in cross-examination that the exclamation mark indicated that he thought this was extremely cheap. When Mr Candy asked him when they would have the information, Mr Smith replied:

> "He said [it] may take a few days as he would have to call in a favour. He doesn't really do this kind of work."

Mr Knuckey came back to Mr Smith on 4 April confirming that neither man had received a term of imprisonment of in excess of 2½ years. He explained that if either had received a shorter sentence then it would have become spent after 10 years under the Rehabilitation of Offenders Act, and fines, probation etc were treated as spent after 5 years. He added:

> "We cannot get details of spent convictions."

I will refer to these e-mails as **"the Knuckey e-mails"**.

294. Mr Knuckey is a former police officer who retired from Scotland Yard in 2003; he was a Detective Inspector with over 30 years' police experience and had led Scotland Yard's Money Laundering Investigation Team. Mr Smith knew him because Mr Smith had been since October 2005 a non-executive director of a company called RISC Management Ltd (**"RISC"**), of which Mr Knuckey was for a time the Managing Director. RISC described itself as an international risk management and corporate investigations company whose core services included corporate investigations (fraud inquiries and asset tracing) and business intelligence (enhanced due diligence). Mr Smith in evidence described RISC's business as classic private investigation-type work, doing KYC checks and the like, and confirmed that CPC retained RISC to carry out KYC checks on potential purchasers at One Hyde Park. In November 2009 CPC also retained RISC to investigate one of the purchasers, a Mr Geoffrey Logue, who had a dispute with the developer (PGGL) about variations in the layout of the apartment, as CPC admitted in its Defence to proceedings subsequently brought by Mr Logue (**"the Logue proceedings"**); and in January 2010 CPC engaged Hermes (that is Mr Knuckey), initially to investigate the source of Mr Logue's funds, and thereafter on other aspects of the dispute.

295. On the basis of the Knuckey e-mails Mr Stewart submitted that what Mr Knuckey was offering to do, and what CPC through Mr Smith was asking him to do, was to carry out criminal record checks that involved access to some non-publicly available source such as the Police National Computer (**"the PNC"**) and hence were, and were known to the Defendants to be, unlawful.

296. This was based on three matters: first, that the £200 charged by Mr Knuckey was excessive for an internet search; second that an internet search would not have required Mr Knuckey to call in a favour; and third that Mr Knuckey was a man of dubious reputation and background such that his instruction by Mr Smith was sinister, it being hard to see how such checks could be carried out lawfully or how the

Defendants could have thought that they could.

297. There are a number of difficulties with this submission. First and foremost, a similar argument has already been rejected in previous litigation between the parties: see *Holyoake v Candy* [2017] EWHC 52 (QB). Mr Holyoake had made a subject access request under s. 7 of the DPA against Mr Nicholas Candy and CPC. That sought data under a number of headings, including communications containing Mr Holyoake's personal data between Mr Candy and USG Security Ltd. Mr Candy's response to the request accepted that some data existed in this category, but claimed litigation privilege in relation to it. It is well established that litigation privilege cannot be maintained in respect of documents that are evidence of criminal conduct, and Mr Holyoake contended that the privilege was lost through breach of s. 55 of the DPA, which makes it an offence to obtain personal data unlawfully. For this purpose Mr Holyoake relied on the Knuckey e-mails as demonstrating the commission of an offence under s. 55 of the DPA, and specifically that Mr Knuckey must at least have gained access to the PNC. Warby J held that whatever the Knuckey e-mails revealed, they did not assist in showing that the separate USG data might contain evidence of criminality. That was sufficient to dispose of the point, but he went on to say that he would in any event have decided the issue against Mr Holyoake on the additional footing that there was no real basis for believing that the events evidenced by the Knuckey e-mails involved a s. 55 offence: see at [79]. Mr Knuckey expressly told Mr Smith that he could not get details of spent convictions, but Warby J found that it was inherently unlikely that the PNC was confined to unspent convictions; this was confirmed by reference to authority, and was consistent with his own experience in criminal cases. In those circumstances his conclusion (at [83]) was that:

> "In short, the Knuckey e-mails do not suggest that Mr Knuckey gained direct or indirect access to the PNC; they suggest the opposite. Hearsay evidence of bad character in the form of newspaper cuttings about other alleged conduct of Mr Knuckey is relied on by Mr Holyoake, but cannot alter these facts."

Although Warby J said it might be thought undesirable for him to pre-empt decisions that had yet to be made in the present proceedings, it does seem clear that this was not a tentative or provisional view, but his considered decision on what he described as a matter in issue before him which had been sufficiently explored in evidence and argument to allow a safe conclusion. I consider in the circumstances that what he said about it is not an *obiter* or incidental comment, but a second ground for his decision.

298. Mr Lord submitted that the conclusion of Warby J on the point was one that the Claimants were precluded from collaterally attacking by the principles of issue estoppel or abuse of process; see *Hunter v Chief Constable of the West Midlands* [1982] AC 529, *Arthur JS Hall & Co v Simons* [2002] 1 AC 615, *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1. None of these was in fact a decision on issue estoppel, strictly so-called, which as I understand it is a principle based on the binding effect of matters decided in previous litigation, and as such only affects the parties to that litigation and their privies (see *Hunter* at 541A per Lord Diplock). Of the Defendants to the present action only Mr Nicholas Candy and CPC itself were parties to the previous action, and only Mr Nicholas Candy was relying on the point on legal privilege and hence directly affected by Warby J's decision on this point. I

was not I think addressed on who counts as a privy for the purpose of the doctrine of issue estoppel, and in the absence of any argument on the point, I do not think I should conclude that the other Defendants are entitled to the benefit of an issue estoppel, although Mr Nicholas Candy might be.

299. The principle of abuse of process however is a wider one which prevents a party from making a collateral attack on an earlier decision even if the parties are not identical and they are not strictly bound by it. The relevant principles are set out by Morritt V-C in the *Bairstow* case at [38]. Not every collateral attack is an abuse of process; if the earlier decision is that of a civil court and the parties to the later proceedings are not bound by the earlier decision it will only be an abuse if it is manifestly unfair to a party that the issues should be relitigated, or if to permit this would bring the administration of justice into disrepute. In my judgment both tests are here satisfied. Although the issue in the earlier proceedings only directly affected Mr Nicholas Candy, it would be artificial to regard the other Defendants to this action as if they were mere bystanders to whom the outcome of the DPA proceedings was irrelevant. By the time the DPA proceedings were brought, the present proceedings were already on foot, and the parties had been divided into two hostile camps, with Mr Holyoake and Hotblack on one side, and the Defendants on the other. There has never been any suggestion that the interests of the Defendants diverge: they served a single Defence, and have at all times been represented by the same solicitors and counsel. Warby J found that one of the purposes of the DPA proceedings, and a significant one, was to obtain disclosures which might be deployed in these proceedings: see his judgment at [47]. In effect therefore, although brought as separate proceedings in a different division of the High Court, the DPA proceedings were, at least in part, a preliminary skirmish in the present litigation, and indeed they might have been capable of being brought by way of an interlocutory application in these proceedings. In those circumstances all the Defendants had exactly the same interest as Mr Nicholas Candy in seeing off Mr Holyoake's attack on his claim to privilege. Even if strictly speaking they were not privies to the earlier decision, it would in my judgment be manifestly unfair to them if Mr Holyoake, having lost on this point before Warby J, were now able to run the same point before me: cf the comments of Lord Hoffmann in *Hall v Simons* at [2001] 1 AC 701D on *Reichel v Magrath* (1889) 14 App Cas 665:

> "Although the parties were different, the case was within the spirit of the issue estoppel rule."

It would also in my judgment bring the administration of justice into disrepute: see the extract from the speech of Lord Halsbury LC in *Reichel v Magrath* at 668 cited by Lord Diplock in *Hunter* at 542C:

> "I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the case again."

There is an exception if some new fact has been discovered which, in the words of Earl Cairns LC in *Phosphate Sewage Co Ltd v Molleson* (1879) 4 App Cas 801, 814, *"entirely changes the aspect of the case"*: see *Hunter* per Lord Diplock at 545C-E and *Bairstow* per Morritt V-C at 14B-F. But no attempt has been made to satisfy that test

here, and it appears that the material and arguments deployed before Warby J were much the same as those deployed before me.

300. In those circumstances it is not strictly necessary for me to express my own view. But I will say that I see no reason to reach a different conclusion from Warby J in any event. Warby J gave reasons for concluding that the PNC contains details of spent convictions. No attempt was made before me to adduce evidence suggesting that that conclusion was wrong (and for what it is worth, it is consistent with my own experience of sitting in criminal cases, the antecedents of the defendant being regularly placed before the Court whether spent or not). That seems to me to make it very unlikely that Mr Knuckey accessed the PNC as the one thing that is clear is that he told Mr Smith that he could not get details of spent convictions. I have not understood why he should have told Mr Smith that if the reality was that he could, and had. In those circumstances I do not think any safe inference can be drawn from the fact that Mr Knuckey charged CPC £200 (which Mr Smith at any rate thought was cheap, rather than expensive, perhaps by contrast with what Wragges were suggesting), or as to what Mr Knuckey meant by calling in a favour. Other than accessing the PNC there was no suggestion as to what he might actually have done (unlike Warby J, I was not given any evidence as to the means by which information about criminal records can be obtained legitimately from public sources), and once the suggestion that Mr Knuckey had accessed the PNC has been rejected, I do not think I can find he behaved in some other unspecified improper way, far less that CPC instructed him to.

301. A number of allegations about Mr Knuckey's conduct were ventilated in the course of the trial, but Mr Knuckey was neither a party to these proceedings, nor gave evidence, and, as Mr Stewart recognised, that means that I should be cautious about making any findings about his conduct unless it is necessary. Thus for example Mr Knuckey was arrested, with considerable publicity, in May 2012 (that is subsequently to the Knuckey e-mails) after allegations had been made that he and RISC had been involved in passing defence information to the police and bribing police officers; Mr Knuckey was in the event charged with one offence and acquitted. I do not propose to decide, nor do I have the material to do so, whether there was any basis for suspecting Mr Knuckey of such behaviour; all that is material is whether it is shown that Mr Smith knew of such matters in April 2012 and there is nothing to suggest that he did. The same applies to allegations against Mr Knuckey aired much more recently in press articles dating from October last year; although the underlying allegations date back to 2007, it is not shown that Mr Smith knew anything about them.

302. The one thing that can be said is that Mr Logue made allegations in the Logue proceedings that Mr Knuckey had sought to elicit information from him by dishonest and underhand means, including at one stage impersonating a representative of the Saudi royal family and at another claiming to be a representative of Vodafone, and that in July 2010 Roth J, who heard an application by Mr Logue to discharge a freezing order that had been granted against him, in part on the basis of Mr Knuckey's evidence that he was evading service, was of the provisional view that it was highly unlikely that Mr Logue had invented his account: see *The Complete Retreats Liquidating Trust v Logue* [2010] EWHC 1864 (Ch) at [39]. Mr Smith accepted in

evidence that he had read Roth J's judgment at the time; that having discussed it with Mr Knuckey, he had proceeded on the basis that he accepted the judgment; and that there were no excuses for Mr Knuckey's behaviour (albeit Mr Smith understood that he was seeking to serve proceedings on Mr Logue). He also accepted, albeit with hindsight, that he should not have used an investigator who to his knowledge had behaved improperly in the past, but said that he probably did so out of laziness, it being easier to pick up the phone to him than start from scratch.

303. That no doubt evidences a slightly casual attitude to wrongful behaviour by Mr Knuckey, but cannot I think make good the allegation that Mr Smith engaged Mr Knuckey to act unlawfully when he asked him to find out whether Mr Holyoake or Mr Wells had criminal convictions. If, therefore, contrary to the view I have expressed, this point is open to Mr Holyoake in these proceedings at all, I find that it has neither been established that Mr Knuckey obtained the information from the PNC or some other illegitimate source, nor that the Defendants asked him to.

*Telephone call of 4 April*

304. The next allegation concerns a telephone call between Mr Nicholas Candy and Mr Holyoake on 4 April 2012. This is the most serious of the remaining allegations – indeed the most serious of all Mr Holyoake's allegations – and requires detailed consideration.

305. Mr Holyoake's pleaded case is that during the conversation Mr Nicholas Candy made the following threats: (i) he told Mr Holyoake *"as a friend"* that Mr Holyoake must do everything Christian Candy demanded; (ii) he stated that if Mr Holyoake did not, Christian Candy was going to sell the debt to certain people, potentially Russians, who would not think twice about hurting Mr Holyoake or his family to get what they wanted; (iii) he warned that Mr Holyoake needed to understand that Christian Candy would do this and was about to do it if Mr Holyoake did not do everything he wanted; and (iv) he further warned that Mr Holyoake had better listen to Christian Candy and do everything needed, because he (Mr Nicholas Candy) did not want to see Mr Holyoake or his family physically hurt. It is then pleaded that Mr Holyoake was extremely alarmed by this conversation, which he took to be, and which amounted to, a direct threat of direct physical violence against himself and his wife and children, and that he immediately hired private security guards at home for his wife and children.

306. I will start with what the contemporaneous e-mails show. On 3 April CPC sent a letter to Mr Holyoake formally requiring him to procure the grant by Hotblack of a second charge over GGH by 11 April in accordance with cl 10.1(c) of the Loan Agreement (which required Mr Holyoake, if he had not repaid the £17.74m by 12 March 2012, to procure the grant of the Additional Property Charge within 30 days). It also sought extensive financial information under cl 10.1(d)(4) including confirmation of the source of funds used to purchase GGH. That reflected the fact that on 18 March Mr Christian Candy had asked Mr Holyoake to confirm that he had used *"only your own equity, and CPCs £12mn equity, and no other third party equity was used"* to which Mr Holyoake had replied *"That's correct"*, but that Mr Nicholas Candy had heard on the grapevine that there was other equity in the deal, and when

Wragges asked Mr Saunders to confirm whether any other source of funds was used for the acquisition, there was no answer. After repeated stalling by Mr Holyoake, Mr Gould of Collyer Bristow did on 30 March repeat to Wragges Mr Holyoake's confirmation that there was no other equity provider to Hotblack, but Collyer Bristow were not of course involved in the purchase, and it is apparent that CPC continued to be sceptical. Also on 3 April Wragges sent a letter to Collyer Bristow requiring Mr Holyoake to sign an undertaking by 11 April to complete the charges over the Ibiza property.

307. On 4 April Mr Dean sent Mr Nicholas Candy an e-mail (timed at 18.03, although the time stamps are again confusing), copied to Mr Christian Candy, with details of what he should say on a proposed call to Mr Holyoake. That referred to the current status (that CPC's letter required by 11 April a charge over GGH and extensive financial information, and Wragges' letter required charges over the Ibiza property), and a proposal that Mr Candy was to put to Mr Holyoake on a without prejudice basis, which involved Mr Holyoake putting a charge on GGH and putting the charge over the Hollywell shares in place, in return for which CPC would drop the claim and accept that repayment of the loan was not due until October 2013. The e-mail then continued:

> "Perhaps mention the following
>
> 1. We have received very positive feeback from senior QCs (including Seafoods barrister Sonia Tolaney)
>
> 2. Chris is very angry at the position and there is talk of freezing orders, injunctions, summary judgement and bankruptcy
>
> 3. Point out that once Chris bunkers down he will keep fighting until he wins – mention that he has dragged me off some other litigation to focus on this
>
> 4. We have been approached by a debt collector to buy the obligation – they will not be as balanced as CPC
>
> 5. Really is a last chance to resolve this – he must get this done by next Wednesday [ie 11 April]"

308. Later on 4 April both Mr Christian Candy and Mr Dean asked Mr Nicholas Candy if he had had the call, and he replied that he had just got off the phone and could update them. What he told them was set out in an e-mail the next morning from Mr Dean which recorded that Mr Holyoake had said he was repaying the loan before the deadline so the proposal was not relevant, and that he was adamant that he would not give security for the profit share.

309. Meanwhile Mr Lovering had asked Mr Holyoake on the evening of 4 April how Mr Nicholas Candy was, to which Mr Holyoake replied (copying in Mr Pym):

> "Wants to sort things out as chris thinking of selling debt to a debt collector !
>
> Wants security for full interest and profit share ie 27.74m over GGH

Said he knew chris was unreasonable but me and him would solve it

Said I would call him tomorrow afternoon

Seemed all a bit desperate to me"

Mr Lovering replied:

"Do you tell the lawyer….debt collector!?!?!"

And Mr Holyoake responded:

"I know also said they were building a big legal team etc etc etc

It felt like he was told to call me as we have gone quiet over the past few days

Anyway lets get dm *[Mr Chernyshev]* over the line and tell them where to go"

Mr Pym also replied to Mr Holyoake's earlier e-mail saying:

"Veiled threats, pathetic"

The next morning Mr Holyoake e-mailed Mr Lovering and Mr Pym saying:

"If any news let me know as have cpc on my case and would love to tell them where to go ! Got to call nick in 30 mins too no doubt to listen to more veiled threats."

310. It is helpful next to consider the various accounts subsequently given by both sides. In chronological order they are as follows:

(1) The earliest is the series of 5 e-mails sent by Mr Holyoake to Collyer Bristow on 15 and 16 April 2012 in which privilege was waived. These are notable for what they do not say. There is no reference to Mr Nicholas Candy having less than 2 weeks before threatened Mr Holyoake with direct physical violence against himself and his wife and children. One of the questions asked by Collyer Bristow was under the heading *"Duress"* and asked Mr Holyoake to be very precise as to wording and dates. Mr Holyoake's response in e-mail no 4 on 16 April was that he had written on this in a previous e-mail (a reference to his e-mail of 29 March) and would firm up and revert. When asked what Mr *Christian* Candy had said by way of threats, Mr Holyoake included as one of the examples:

"We can sell the debt down to some very unpleasant people if needed"

When asked what he thought the result would be if had told him (Mr Christian Candy) to get lost, Mr Holyoake said:

"I worried that it might escalate to threats of personal violence…"

And when asked if the threats continue, Mr Holyoake said that between 31 January and the end of March they were almost everyday but since legal proceedings had been issued and he had raised the threats in correspondence

they had stopped.

In e-mail no 5 of 16 April, he was asked why he agreed to sign up to the Supplemental Loan Agreement and replied:

> "Because I had no choice the consequences of not doing so were worse and in my mind could escalate to personal threats which I worried about for my sake and that of my children."

Under a question asking about his overall impression of his involvement with CPC and Mr Christian Candy he said

> "I cannot comment on NC as he was my closest friend and he has been kept out of matters."

(2) The first time the allegation appears to have been put to the Defendants was on 23 December 2014 when Jones Day sent to Wragges the letter before action with draft particulars of claim. These alleged that Mr Holyoake received a telephone call from Mr Nicholas Candy but placed the call early in the evening at the end of January 2012. They alleged that Mr Candy had said that Mr Holyoake had defaulted on the Loan Agreement and now needed to do everything that Christian Candy told him to do because otherwise he would not stop and would ruin Mr Holyoake, and that Mr Candy told Mr Holyoake that Christian Candy would sell the debt should Mr Holyoake not do exactly as Christian Candy wanted, that they had strong links to Russian buyers and that these people can be *"very, very nasty"* and Mr Holyoake should not put himself *"in that danger"*.

(3) Wragges sent a substantive reply to the letter before action on 30 January 2015. In relation to the particular allegation, they said that Mr Nicholas Candy had no recollection of having the telephone conversation alleged, that it was desperate to seek to conjure menace by the mere mention of Russians, and that Mr Candy categorically denied making a threat to the safety of Mr Holyoake or his family.

(4) When these proceedings were issued (in August 2015), the relevant allegation was pleaded as it currently is (save that the call was not then placed on 4 April but *"at or about this time"*, namely 22 March). The Defence (in September 2015) pleaded that Mr Nicholas Candy and Mr Holyoake did speak by telephone around 4 April; that he did say that Christian Candy could assign the debt and if he did so the purchasers might well be harder to deal with than him, and continued:

> "He may have referred to Saudi Arabians or Russians as possible buyers in order to refer to the Saudi Arabian or Russian lenders who (as Nick Candy recalled) Mr Holyoake had initially been relying on for the funding but had not come through with the monies. He did not threaten Mr Holyoake (who was still his friend at this point) with violence or in any other way, nor would he have done, nor could anyone have reasonably thought he was doing so."

Save that the words *"who was still his friend"* have been replaced with *"who he still thought was his friend"*, the Defence remains in the same form.

(5) In his witness statement for trial (dated 7 November 2016) Mr Holyoake said that Mr Nicholas Candy had said that he was calling as a friend to let him know that his brother had decided to sell his debt to Russian debt collectors who would not act like CPC but would physically hurt him and even his family, adding:

> "He said these people would not think twice to "seriously fucking hurting you" and "you don't want to have your legs broken you need to think of your family and not get hurt"."

(6) Mr Nicholas Candy's witness statement for trial said that he did not recall precisely what he said but he would have closely followed the script prepared by Mr Dean; he explained that his brother had other options available to him; he could for example sell the debt down and whoever purchased it might not be as easy to deal with as him. He denied threatening that his brother or CPC would sell the debt down to Russians.

311. Mr Nicholas Candy's oral evidence was that the call was a nice call, a friendly one, not a hostile or aggressive one: he and his wife (then fiancée) were in Los Angeles at Venice Beach at lunchtime doing a food tasting with a person they were thinking of using for their forthcoming wedding, the sun was shining and he was in a happy mood. He suggested that he and Mr Holyoake had dinner together when he got back to London, which they did at Nobu on 20 April. He said he did not threaten Mr Holyoake, he himself had been threatened with kidnapping and it was the worst feeling in the world and he would never threaten anyone, that was not how he was or how he behaved. He had simply followed the script he had been given, with his mobile in one hand and his blackberry with Mr Dean's e-mail in the other.

312. Mr Lord asked me to find that this extremely serious allegation is baseless and should never have been made.

313. I have not however found it quite so easy to dismiss it out of hand. First, there is the fact that Mr Holyoake increased his security in Ibiza not long afterwards. Although his pleaded case was that he did so *"immediately"*, Mr Holyoake corrected that in evidence to *"promptly"*, by which he meant within weeks, but I do not regard that change as of significance. It is not disputed that Mr Holyoake signed a contract (in Spanish) which provides for various security services to be provided to him at an estimated monthly fee of €9000; the contract is dated Ibiza 4 July 2012, but Mr Holyoake's evidence was that the security guards were hired initially on a trial basis for 2 or 3 months before they went to contract, which I do not find difficult to believe.

314. Mr Lord submitted that it was a lie to say that what prompted the hiring of the security guards was the telephone call of 4 April as Mr Holyoake and his wife had been exploring the hiring of security in November 2011, long before it is alleged that CPC made any physical threats to him. This was based on e-mails from November 2011 which show (i) that on 21 November a Mr Anton Bilton e-mailed a Mr Simon Evans saying he had a friend in Ibiza who would like to employ an ex Gurkha to be a

security man on his estate in Ibiza and asking who to contact; (ii) on 22 November Mr Evans gave him the name of Mr Tony Hunt who *"has access to various Gurkhas who might suit the role"*, and Mr Bilton passed Mr Hunt's name to Mr Holyoake; and (iii) on 29 November Mr Matt Cooke e-mailed Mr and Mrs Holyoake with details of two options, one from Mr Hunt recommending two men at a time at a monthly cost of over £11,000, and one from a Mr Hill recommending one close protection officer at a time at a cost of £10,500 per month. Mrs Holyoake gave an explanation of these e-mails in her oral evidence which was that as her husband was frequently travelling, and the villa is isolated, she wanted someone to help around the house, but that it would also give her some peace of mind to have a man living in when her husband was away; that she had become friends with Mr Bilton who also lived on Ibiza and he recommended hiring a Gurkha which he told her would cost about £200 a week; that Mr Pym had suggested instead getting someone who used to be in the army; that the quotes that Mr Cooke (an old friend of hers who worked with her husband) had obtained from Mr Hunt and Mr Hill were for much more extensive (and expensive) security than she had envisaged and not at all what she had in mind; and that that was why she did not take it forward at that time. Mr Lord invited me to disregard this evidence as obviously rehearsed with her husband, but I have already said that I found her to be in general a credible witness and I see no reason not to accept this evidence.

315. The fact therefore that these quotations were obtained in November 2011 (but security of this type was not then hired) does not detract from the fact that Mr Holyoake did increase his security at the Ibiza property from some time in the spring of 2012. Mr Lovering who visited the Ibiza property twice, once in 2010 and once in the summer of 2013, contrasted the safe and open atmosphere when he first visited when there was no security – something that was confirmed by Mr Nicholas Candy who said that whenever he went to stay with Mr Holyoake, which he had done many times, Mr Holyoake had lots of staff but no security – with the Fort Knox like atmosphere of his second visit with cameras and people checking you in. Mrs Holyoake said that she still had security at the estate, and again I accept this evidence.

316. Then there is the evidence as to whether it was true that CPC had been approached by a debt collector:

(1) Mr Nicholas Candy was asked who the debt collector and said he did not know.

(2) Mr Christian Candy was asked and said that he had not been approached himself but from recollection Mr Smith had; he too did not know who the debt collector was. It became apparent that he had had a conversation with Mr Smith in 2016 when Mr Smith had told him he had been approached by a debt collector but did not recall who. I was left unsure whether Mr Candy had any real recollection of Mr Smith saying this to him or was just relaying what Mr Smith had told him last year.

(3) Mr Smith himself gave evidence of a previous occasion when CPC had sold a debt: they had had a claim of $30m in the administration of Kaupthing Bank, had gone through a process of getting it confirmed as a valid claim, had made it known that they would like to sell it, were approached by two or three large

banks and had in the event sold it for, he thought, 30 cents in the dollar to Deutsche Bank. He also gave evidence that once they had established Omni, he would receive calls from time to time asking if they had any debts that were saleable, and added:

> *"In that context I could well have said something to Christian Candy around or about that time that we had had another call from somebody, I can't remember: Would we be interested in selling any of our debts."*

He accepted that any such approach would have been on a generic basis, not specifically in relation to the loan to Mr Holyoake which was not publicly known.

(4) Mr Dean said that he thought the proposal for the call must have come from Mr Christian Candy as he himself would not have initiated it; he said the reference to a debt collector would also have come from Mr Christian Candy, and that he thought he had not told him anything other than was written there – if Mr Candy had mentioned anything more or the name of the debt collector he would have put it in the script.

Overall this evidence left it unclear to me what basis there was for the statement in the script that *"We have been approached by a debt collector to buy this obligation"*. Mr Dean was reliant on what Mr Christian Candy told him; Mr Candy thought Mr Smith had told him, but his recollection of that was not strong; Mr Smith could not say that anyone had approached him to buy this particular obligation, but only that he had generic approaches from time to time, he could not say who might have approached him, or even that he had said anything to Mr Candy, only that he could well have done.

317. Moreover, as referred to in more detail below, in July 2012 Mr Candy did think about going to debt collectors but did not go back to Mr Smith and ask him to contact those who had been in touch with him; instead he went to Mr Knuckey. That is in itself a rather odd thing to have done, as one would have thought the obvious first port of call for advice as to how to enforce a judgment would be Wragges; but it does raise the question why Mr Candy did not simply ask Mr Smith to contact those who had been interested in buying up debts to see what they would offer. All this raises real doubts as to whether it was true to say that CPC had been approached by a debt collector who might have bought this debt.

318. Then there is the curious feature of the reference to Russians. When Mr Holyoake first made the allegation, in the draft Particulars of Claim, it included an allegation that there had been a reference to the Candys having strong links to Russian buyers. Wragges' answer to that was that Mr Nicholas Candy had no recollection of the call but that it was desperate to suggest that the mere mention of Russians was menacing. By the time of the Defence in these proceedings, the Defendants' position was that Mr Nicholas Candy *"may have"* referred to Saudi Arabians or Russian buyers. When he came to give oral evidence he said that he had indeed referred to the Saudis who Mr Holyoake had originally been planning to borrow from, or the Russian that he was going to borrow £13.5m from, and said:

> *"If your Russian is there with his 13 and a half million, your Saudi guy that was there on 13 October, get them to do it."*

This is a very odd piece of evidence. Leaving aside the way that his recollection has apparently improved since the allegation was first made, Mr Nicholas Candy was by his own account closely following Mr Dean's script. The script said nothing about *Mr Holyoake* finding someone else to buy the debt – it was designed to persuade Mr Holyoake to agree to put charges in place by 11 April or face the consequences. There had been no reference to Saudis as potential investors since the inception of the loan in October; and Mr Holyoake had been promising the £13.5m from Mr Chernyshev for 2 months without any sign that it would actually happen. I think it very unlikely that Mr Nicholas Candy said this at all. But if he did not, that raises the question why he gave this evidence, and whether the explanation might not be that there was indeed a reference to Russian buyers after all, and he was seeking to explain this away.

319. Then there is the whole question why the script mentions debt collectors at all. The purpose of these points was to reinforce the message that it would be better for Mr Holyoake to agree to give the charges than to face the alternative. Point 2 of the points for Mr Nicholas Candy to *"perhaps mention"* referred to CPC seeking freezing orders, summary judgment and bankruptcy. It is not clear what the suggestion of selling the debt to someone else was intended to add to that. It was perhaps unlikely that a bank or other legitimate buyer would buy a debt that was disputed, as they would simply be buying litigation; but even if they could be persuaded to, they could scarcely do any more than CPC were itself threatening to do. If the reference were instead to obtaining summary judgment and then selling the judgment, there was no reason to think that CPC would be at all hesitant to collect on a judgment it had obtained. Its hesitation in pursuing Mr Holyoake more vigorously to date was because it could see that litigation was a risky course for it to pursue.

320. For all these reasons I am left in real doubt as to quite what was said on the call. I have no difficulty in accepting that Mr Nicholas Candy's tone was friendly enough. Mr Holyoake himself said that Mr Nicholas Candy was *"trying to pretend he's my friend"* and that he did not know whether Mr Nicholas Candy was being a good friend to him, nobly trying to help him, or was involved in it and being conspiratorial. (It is in fact clear from CPC's internal e-mails that Mr Nicholas Candy had long since lost faith in Mr Holyoake's integrity (indeed since the end of January 2012 when the Aeriance charges were discovered), felt guilty for having got his brother into the position where he stood to lose his money, and was fully behind doing what was necessary to recover it.) Nor is it suggested that Mr Nicholas Candy made any threats to do anything himself: the message he was asked to convey, and did, was that his brother was angry and that Mr Holyoake had to do what was proposed or else his brother would take various steps. What I have found more difficult to resolve is whether he crossed the line to suggest that one of the steps his brother might take was to sell the debt to those who might resort to violence.

321. In the end however, despite my doubts, I find that this allegation has not been established. I find it very striking that Mr Holyoake did not refer to this call in his e-mails to Collyer Bristow of 16 April. That was less than two weeks after the call,

and if he had really been threatened with physical violence, it is very difficult to understand why he did not say so. Instead he twice said (admittedly in slightly different contexts) that he was worried that it might *escalate* to threats of physical violence or personal threats. That is obviously and starkly inconsistent with his having understood that such a threat had already been made, especially as his most recent evidence is that Mr Nicholas Candy had been graphically explicit, not just hinting at it. Nor is it likely that he would have said that the threats had stopped since proceedings had been issued, nor that he could not really comment on Mr Nicholas Candy as he had been kept out of it. And there is the curiosity that although he referred to one of Mr Christian Candy's threats being that they could sell the debt down to some very unpleasant people (an allegation that was neither pleaded nor put to Mr Christian Candy in terms), he does not link that to the call with Mr Nicholas Candy that had taken place so recently.

322. In those circumstances although there are a number of unanswered questions, I find that this allegation has not been made out.

*From 4 April to 14 June 2012*

323. Although Mr Holyoake's pleaded case is that thereafter the Defendants continued to apply unlawful pressure, threats, intimidation and coercion against him, there are no more examples pleaded of specific threats, and it is possible to deal with matters more briefly.

324. The period from 4 April to 14 June 2012 was taken up with negotiations for alternative solutions, while the time for Mr Holyoake to serve a Defence in the Commercial Court proceedings was repeatedly extended. A number of possibilities were taken forward in turn, but since none of them were completed it is not necessary to consider them in any great detail. The first suggestion was to make use of the fact that Mr Holyoake had paid the £12m lent to him by CPC into Hotblack by way of loan, the suggestion being that he *"novate"* this loan to CPC (in fact I think better described as an assignment than a novation). Mr Lord submitted that the initiative for this idea came from Mr Holyoake, whereas an e-mail from Mr Dean of 11 April suggests that it had emanated from Wragges, but I do not think this is significant. What matters is that Mr Holyoake was willing to take this forward. That incidentally involved Mr Wells falsifying a number of documents. On 16 April Mr Holyoake forwarded to Mr Dean a form of loan agreement between Hotblack and himself. Mr Wells had adapted this from a loan agreement which had been duly entered into in October 2011 (it is dated 7 October 2011 although probably executed rather later). The original 2-page agreement on page 1 recited (at recital B.) Hotblack's intention to finance the purchase of GGH using a combination of facilities including the Investec loan of £24m and the Oscarone loan of £7.5m, and provided in clause 1 for Mr Holyoake to lend £14m to Hotblack; on page 2 it was signed by Helen Crichton as director of Hotblack. Mr Wells adapted this by replacing page 1 with a new page that recited (at recital B.) Hotblack's intention to finance the purchase by a combination of facilities including the Investec loan of £24m and a loan from Mr Holyoake of £20,750,000; and provided in clause 1 for Mr Holyoake to lend £20,750,000. What Mr Holyoake forwarded to Mr Dean was a pdf of the new page 1 (dated 12 October 2011) and two versions of the original page 2, one signed by Ms Crichton and the

other by Mr Holyoake. Mr Holyoake also forwarded to Mr Dean management accounts for Hotblack that Mr Wells had produced, and that contained no reference to Hotblack's liability to Oscarone. Mr Holyoake accepted in evidence that he had asked Mr Wells to remove Oscarone's name from the documents. He sought to justify this on the basis that CPC had behaved so badly that he did not owe them any duties, but they were clearly deceptive documents, and the loan agreement was a straightforward forgery. So too was a version of board minutes for Hotblack dated 10 October 2011 which Mr Holyoake later forwarded to Mr Dean on 22 June 2012. These were adapted by Mr Wells from genuine board minutes which had scheduled to them a list of Finance Documents, including a reference to an intercreditor deed which referred to Oscarone, and a loan agreement between Hotblack and Mr Holyoake which referred to a loan of *"up to £14m"*; Mr Wells adapted this schedule by removing the reference to the intercreditor deed, and altering the amount of the loan from Mr Holyoake to *"up to £20.75m"*.

325. By 17 April the novation idea had evolved into a proposal that a new company be inserted above Hotblack and that there be a distribution in specie of GGH to the new company. Mr Holyoake appeared to be willing to progress this transaction. It required Investec to co-operate and on 25 April Mr Holyoake told Mr Dean that he spoken to Investec and they were happy with the proposal provided their position was not prejudiced; he confirmed this in an e-mail the next day. I accept Mr Lord's submission however that Mr Holyoake cannot have been sincere as the proposal would necessarily involve Investec and an intercreditor deed, and would inevitably have led to Oscarone coming to light, which would have prevented it working, and I am very doubtful if he spoke to Investec about it at all. In effect, Mr Holyoake was simply pretending to go along with this proposal to obtain more time.

326. The next proposal was that CPC purchase GGH, something suggested by Mr Holyoake on 18 May but which he told Mr Pym and Mr Lovering he hoped he would not have to do. There was considerable negotiation of the terms for the sale, which took the form of a sale and purchase agreement (**"SPA"**) whereby Greenlander was to sell the shares in Hotblack to a new CPC company, GGH (Guernsey) Ltd, and for some time it looked as if the transaction would complete; on 9 June however Mr Holyoake told Mr Dean that he was expecting to refinance imminently which would enable him to repay CPC. That initially led to a proposal that the SPA be entered into but with an option for Greenlander to repurchase the Hotblack shares from GGH (Guernsey); but on 11 June it was agreed that instead the SPA would be signed but put into escrow, Mr Holyoake being given 6 weeks to repay the loan. On 14 June 2012 the parties duly signed an Escrow Deed to allow him the opportunity to do that.

327. Mr Holyoake's pleaded case is that the Escrow Deed, and a series of further escrow deeds, were highly disadvantageous agreements which Mr Holyoake felt himself coerced to enter into against his will as a result of pressure, threats, intimidation and coercion and the legal proceedings that CPC brought. In closing submissions Mr Stewart submitted that the SPA was the means by which the Defendants were seeking to obtain ownership of GGH, that Mr Holyoake was able to stave off the SPA for short periods of time by putting it in escrow, that he was required to make substantial payments to prevent CPC from exercising its rights and that if Mr Holyoake was unable to repay, CPC would be able to take steps to put into effect the SPA and

purchase Hotblack.

328. That seems to me to misunderstand the purpose and effect of the escrow deeds. I can illustrate the point by reference to the first one dated 14 June 2012. This provided as follows:

(1) Copies of the SPA signed by the parties had been delivered to Wragges as Escrow Agent to hold on the terms of the Escrow Deed (cl 2.1).

(2) Mr Holyoake was given 6 weeks to complete his proposed refinance. If he did so and paid the £17.74m to CPC by 2 August 2012, the agreement would terminate (cl 6.1(b)), the copies of the SPA would be returned to the parties and the SPA would be treated as never having had effect, and the Declarations of Trust would continue (cl 6.2).

(3) If Mr Holyoake did not pay the £17.74m by 6 pm on 2 August (and there had been no material changes to Hotblack) then the escrow condition would be fulfilled. This would not however lead automatically to the SPA being completed. Instead cl 4.1 provided:

> "If the Condition is satisfied, the parties may instruct the Escrow Agent (in the form set out in schedule 2) to release the SPA (and date it with the Closing Date) at 6.00pm on the Closing Date and the Escrow Agent shall promptly make the SPA available to all parties to enable them to attempt to complete the SPA if they so wish."

The Closing Date was 3 August 2012. Schedule 2 contained a form of instruction to Wragges that required the signatures of both Mr Holyoake and CPC. I can see nothing in the Escrow Deed which obliged Mr Holyoake to sign such an instruction, and the terms of cl 4.1 seem to me to make it clear that the effect of the escrow condition being satisfied was that both parties could proceed to complete the SPA if they both wished, but neither was obliged to. Mr Dean explained in oral evidence that that was his understanding of the arrangements. I agree with him. Indeed, Mr Holyoake's pleaded case in fact appears to accept this, as it pleads (at paragraph 130(iii) of the Particulars of Claim) that under the escrow agreements it was agreed that if Mr Holyoake failed to repay the total amount by the relevant deadline and various other conditions were satisfied the parties *"would be at liberty to agree to sign"* the SPA.

(4) If the parties did not complete the SPA, then the agreement would again terminate (at 9 am on 4 August), the copies of the SPA would be returned to the parties, the SPA would be treated as never having had effect, and the Declarations of Trust would continue (cl 6.2). In that event, CPC would release Mr Holyoake from all liabilities under the Loan Agreement, and Mr Holyoake would be liable to pay the £17.74m as a new debt payable by 5pm on 6 August, with interest at 15% per annum on such sum, compounded monthly (cl 6.3).

(5) The Commercial Court claim was to be discontinued by consent with no order

as to costs.

329. I have not understood in what way this was disadvantageous to Mr Holyoake, let alone highly disadvantageous. The practical effect was that he obtained another 6 weeks in which to complete his refinancing if he could. On the view I take of the Escrow Deed, he could not be forced to complete the SPA if he failed to refinance. The only consequence would be that he would be liable for the £17.74m. But on the findings I have made above Mr Holyoake was already bound by the Supplemental Loan Agreement. That had admitted the breaches relied on by CPC, entitled CPC to enforce its rights at any time after 28 February 2012, and amended the Loan Agreement to make it clear that on an Event of Default the whole £17.74m would be payable. CPC had indeed proceeded to enforce its rights by issuing and serving the claim form on 19 March. It seems to me to follow that Mr Holyoake was already liable to pay the £17.74m, and had been since at least 19 March, and that for the Escrow Deed to provide that in place of that liability he would be liable for a new debt of £17.74m on 4 August 2012 did not materially worsen his position. Mr Holyoake also obtained the benefit of the current proceedings being dropped, which was clearly a benefit to him, not least in not having to spend any more money on defending them.

330. His reaction on 11 June to Mr Wells when CPC had agreed to allow him to refinance and give him 6 weeks to do so was that it had been a very heavy day but not bad, that *"above is big movement"* and *"from where we were today we have moved mountains"* and in oral evidence he accepted that he was telling Mr Wells that CPC were seemingly giving some significant commercial ground to him. That does not suggest that he thought he had done a highly disadvantageous deal, and for the reasons I have given I do not find that he had. Indeed it is difficult to see quite what benefit CPC got from the Escrow Deed in return for giving Mr Holyoake another 6 weeks in which to attempt to raise enough money to pay them off, other than the prospect that they might indeed get paid.

*Further escrow agreements*

331. A whole series of further escrow agreements followed, starting with a New Escrow and Guarantee Deed dated 31 July 2012 and continuing up to a Tenth New Escrow Deed and Guarantee Deed dated 15 October 2012. These took much the same form as the first Escrow Deed.

332. On each occasion Mr Holyoake was in effect seeking an extension of time to complete his refinancing. CPC was willing to grant such extensions at a price. For the first extension, granted by the New Escrow Deed of 31 July 2012 (which extended the time for repayment by 3 weeks to 23 August 2012), the price consisted of a variation to the terms of the SPA. For the subsequent extensions, CPC required Mr Holyoake to make a cash payment in part repayment of the £17.74m. Thus for example the Second New Escrow and Guarantee Deed, dated 24 August 2012, granted an extension for a further two weeks until 6 September in return for a payment of £1,250,000 made by Mr Holyoake on 22 August, the effect being to reduce the outstanding debt from the £17.74m to £16,493,578. By the time of the Tenth New Escrow and Guarantee Deed on 15 October, Mr Holyoake had in this way

paid a total of £3,093,578, and the £17.74m had been reduced to a round £14,650,000.

333. These demands for cash no doubt put pressure on Mr Holyoake's cashflow, but I do not see that he was in any sense forced into these successive agreements. He was the one who in each case wanted further time to complete his refinancing. CPC were not obliged to give him any further time and could at any stage have refused an extension and proceeded to enforce the claim for £17.74m. One can take as an example the position he found himself in as the deadline of 23 August set by the New Escrow Deed approached. If he failed to refinance and repay CPC by 6 pm on 23 August, then he would either have had to complete the SPA or the £17.74m would have become payable by 5 pm on 28 August. For reasons given below I do not think Mr Holyoake ever had any intention of completing the SPA. So the practical alternative to agreeing terms for an extension beyond 24 August was to face the prospect of crystallising the debt on 28 August and putting himself in a position where CPC could sue him for it. Given that he had agreed in the New Escrow Deed that a new debt of £17.74m would become due by 5 pm on 28 August, he would obviously be in some difficulty in defending such proceedings. No doubt Mr Holyoake wished to avoid the prospect of being sued, but for a debtor to obtain further time to pay by making part-payments of his debt does not seem to me at all out of the ordinary or highly disadvantageous to him. And although Mr Holyoake's position was not enviable, CPC's position was not that enviable either. In an e-mail of 27 July 2012 Mr Dean told Mr Christian Candy and Mr Smith that *"He knows he has us by the balls – the joy of unsecured debt"*; that reflects the fact that CPC had no security over GGH and its only real option if Mr Holyoake would not complete the SPA was to proceed with litigation. But litigation would not be guaranteed to work: Mr Dean's evidence was that from his first involvement at the end of March 2012 onwards, there was an overriding concern that public litigation would lead to Mr Holyoake's other creditors stepping in and Mr Holyoake's property ventures collapsing and that there was a real danger of CPC not being able to recover. In these circumstances CPC did not hold all the cards, and I accept Mr Lord's submission that Mr Dean's e-mail of 27 July accurately reflects the fact that the parties' respective commercial strategies were finely balanced.

334. In the same e-mail of 27 July Mr Dean referred to Mr Holyoake having given him a *"gentleman's agreement"* that if he did not refinance in two weeks he would sell CPC the property, something Mr Dean told him was worthless. In oral evidence, Mr Dean said that he was very mindful that the escrow agreement did not bind Mr Holyoake to enter into the SPA, but also hopeful as he thought Mr Holyoake did want to proceed with the SPA, and that he, perhaps foolishly, genuinely thought that the SPA they had negotiated was something that Mr Holyoake wanted to enter into. In fact I do not think Mr Holyoake would ever have completed any of the SPAs, and I accept Mr Lord's submission that the arrangements would not have worked because of the existence of the Oscarone loan. I can take the first version of the SPA as an example. This contained as one would expect extensive warranties by Greenlander as seller of the Hotblack shares (cl 6.1), and a guarantee by Mr Holyoake of Greenlander's obligations and liabilities, including liabilities for any breach of the warranties (cl 8.1). The warranties included a warranty that Hotblack had no borrowings or indebtedness other than the Investec loan and the loan advanced by Mr Holyoake to Hotblack, and no liabilities other than those loans and its obligations under the leases

of GGH (sch 2 paras 3.3 and 3.4). That was of course untrue because of the Oscarone loan, and completion of the SPA would sooner or later have brought that to light and exposed Greenlander and hence Mr Holyoake to a claim under the warranties.

335. In the event when Mr Holyoake failed to refinance by the deadline of 16 October 2012 set by the Tenth New Escrow and Guarantee Deed, and Mr Dean asked him about completing the SPA, Mr Holyoake said that they had decided that it was inappropriate to complete the sale and put forward new proposals.

336. There are two specific matters relied on Mr Stewart in this period which I should deal with. The first concerns a further approach to Mr Knuckey by CPC (as already referred to (paragraph 317 above)). The facts are as follows. On 18 June 2012 Mr Christian Candy e-mailed Mr Dean and his brother to report that he was *"sourcing debt collectors now as a back-up"*. This was shortly after the first Escrow Deed had been entered into (on 14 June). Then on 2 July he sent them and Mr Smith a further e-mail, the subject of which was *"Cliff Knuckey re Mark Holyoake post summary judgment"*, reporting that he had just spoken to Mr Knuckey and that he had some people who could do debt collection at the size they were discussing. On the basis of these e-mails, Mr Stewart submitted that what Mr Candy was discussing with Mr Knuckey was not legitimate debt collection but illegitimate debt collectors.

337. This allegation is not pleaded; it is not suggested that Mr Holyoake knew of Mr Candy's approach to Mr Knuckey at the time (Mr Holyoake only discovered it as a result of disclosure) and it is not suggested that anything came of it – there was no actual attempt at debt collection, legitimate or otherwise, and no suggestion that there were threats of debt collection after the call on 4 April. In those circumstances I do not think it is in fact necessary for me to make any findings about the matter one way or the other. It is certainly a bit odd that Mr Candy thought of turning to Mr Knuckey. His explanation in evidence is that he was thinking ahead, modelling ahead, as to what they would do if Mr Holyoake did not repay them – they had an unsecured debt, Mr Holyoake was in the Balearics, Hotblack in Jersey, Greenlander in the BVI, and he was thinking about how, if they got a summary judgment, they could actually recover it. He asked Mr Knuckey because he knew that he had been involved in anti-money laundering and thought he might know someone who could deal with cross-border recovery. As Mr Stewart submitted, that raises a number of questions. An ex-policeman who is in the business of private investigation might well be very helpful to trace assets, but is far from being an obvious source of advice on cross-border recovery. If Mr Candy wanted to know what the legal options for recovery were, one would have thought the first thing to have done would be to ask Wragges, a large commercial law firm. If he wanted to find someone to sell the judgment to once they had one, Mr Smith's evidence was that he received regular inquiries from people wishing to buy debts. Moreover, Mr Knuckey had by then been arrested on serious charges, which had received a measure of publicity. Mr Candy said that he was not aware of this at the time, but Mr Smith certainly was, and one might have thought that it would be natural for Mr Candy to ask Mr Smith if it was worth talking to Mr Knuckey before doing so, both because Mr Knuckey was primarily a contact of Mr Smith's, and because Mr Smith was likely to have a better understanding of Mr Knuckey's business. Overall, I am not satisfied that I have had a full explanation of this unorthodox approach to Mr Knuckey, and I am left in some doubt as to why it

was done and what was actually discussed. But for reasons already given I do not think I need try and resolve the doubts – it did not in the event affect Mr Holyoake and nothing came of it.

338. The second specific matter that Mr Stewart relied on is also not pleaded as such. This is that the Defendants interfered with Savills in the summer of 2012 to delay Savills' work on valuation, which hampered the Claimants' efforts to refinance and forced them to engage JLL as alternative valuers. The facts are as follows:

(1) I have already referred to the facts that Savills were instructed on One Hyde Park, and Mr Sharpe-Neal was well known to the Candys, and that in February 2012 he had had lunch with Mr Nicholas Candy, disclosed to him the valuation of the Ibiza property and later provided him with a copy (paragraph 231 above).

(2) On 19 March 2012, Mr Christian Candy asked his brother to speak with Mr Tim Whitmey of Savills about the possible site value of GGH with planning, forwarding to him a spreadsheet on which he had highlighted his own view that it might be worth £70m with planning. Mr Christian Candy's evidence was that Mr Whitmey is now, and he thought was then, a senior director in the sites and land division of Savills; that he had experience in sites; that there were not many people who dealt with site sales in London and that he was very, very good. Neither Mr Candy could recall what the outcome of this approach was.

(3) Then on 23 May 2012 Mr Christian Candy contacted Mr Whitmey again, asking for his views on what GGH would sell for with planning, asking for a fire sale value, an expected sales price and a maximum sales price each with a 4 month window; Mr Whitmey ran an appraisal and came up with values of £41.5m, £59m and £84m (based on assumed sales prices for the completed flats of £2000, £2250 and £2750 per square foot). Mr Candy accepted that the 4 months was a restricted sales period, and it was submitted by Mr Stewart that the implication was that the valuation would be lower which would be to the Defendants' advantage. I have not understood this submission. At the time the proposal was that GGH be sold to CPC, and Mr Candy would obviously wish to know what the asset might fetch. I see nothing sinister in him adopting a cautious view.

(4) Then on 5 July Mr Christian Candy sent Mr Dean an e-mail with an account of a call he had had from Mr Whitmey who told him that the Pears brothers had been all over the site and were seeking information from Savills; Mr Candy recorded that he had asked Mr Whitmey to stop as he had signed an agreement with good and bad faith provisions in it and did not want to enter into any dialogue. It was suggested to Mr Candy that he was "papering the file". Mr Candy accepted that he sent the e-mail (which was an unusually long one for him) as a record of the call in case there was ever a claim from Mr Holyoake, but I see no reason to doubt that it was an accurate record.

339. That is the background to the allegation that the Defendants interfered with a

valuation by Savills. Mr Holyoake was attempting to refinance. On 24 July 2012 Mr Holyoake told Mr Dean in a telephone call that the only outstanding condition precedent to the refinancing was a valuation, that Savills had delayed providing the valuation, and that he had therefore agreed with the funder to use a new valuer who would report in 10 working days from Friday 20 July (the implication being that the new valuer had only been instructed on 20 July). Mr Holyoake also alluded to the connection between Savills and CPC being the reason they had not delivered. There is in evidence an appraisal by Savills dated 14 June 2012 at a sales price of £3,000 per square foot which led to a value of some £93m, and Mr Stewart suggested to Mr Candy that he specifically did not want Savills providing a valuation in accordance with that appraisal, which he denied. Mr Dean sent Mr Holyoake an e-mail on 25 July summarising the conversation, and asking him to confirm that he had no objection to CPC speaking to Savills to establish their view of his allegation. Mr Holyoake's response was that he did not wish to get into the Savills matter – he simply wanted to explain why there was a delay in the valuation. Further correspondence ensued in which Mr Dean made it clear that no-one at CPC had interfered with the valuation process.

340. On this material I do not find the allegation that CPC interfered with the Savills valuation proved. The fact that Mr Holyoake did not want to pursue it with Savills when Mr Dean offered to do so casts doubt on whether he had any real basis for making the allegation; although he continued to assert the allegation in oral evidence, he did not explain what the basis for it was; I do not regard the matters relied on by Mr Stewart as sufficient to infer that there had been such interference; nor do I accept that CPC had any real motive for doing so. The whole purpose of the repeated escrow agreements was to give Mr Holyoake the time to complete a refinancing which would enable him to pay CPC the £17.74m, and to frustrate that process would simply make it less likely that they would recover the full £17.74m.

341. Moreover the suggestion that Mr Holyoake had instructed JLL on 20 July in response to delays in Savills providing their valuation is demonstrably untrue. Mr Holyoake had already been in contact with JLL by 4 July, and they had been formally instructed by 6 July. When Mr Dean later asked for a copy of the valuation, Mr Holyoake told Mr Wells that the date of JLL's letter confirming instructions on 6 July, which was included as Appendix 1 to the report, was a *"big problem"* and asked him to remove it or blank it, and the report was sent without appendices. It seems probable that Mr Holyoake was simply using the suggestion that Savills had delayed as a way of justifying a further extension of time for the refinancing to complete.

*Extension and Joint Marketing Agreements*

342. As already referred to, on the failure of Mr Holyoake to refinance by the deadline of 16 October 2012 in the Tenth New Escrow and Guarantee Deed, he did not complete the SPA. That meant that under its terms the balance then outstanding, being £14.65m, became due on 19 October, and Wragges sent a letter on that date to Collyer Bristow demanding payment of the £14.65m. Mr Holyoake however had put forward new proposals for staged repayments, starting with a £2m payment within 14 days of agreement, and for him to put in place a sale subject to planning or a refinancing once planning had been achieved.

343. Those led in due course to the parties signing an Extension Agreement, dated 26 October 2012. Its effect was to permit Mr Holyoake to pay the £14.65m by monthly instalments of £1m, in return for an Extension Fee of £3.5m payable as to £1.8m by 1 November and as to £1.7m by 30 November. If the Extension Fees were paid on time they would reduce the principal amount of the debt. Interest continued to accrue at 15% per annum from 17 October, but CPC agreed to waive it if the debt were repaid in accordance with the schedule. The parties also agreed to co-operate in good faith to complete a Joint Marketing Agreement (**"JMA"**) which would give Mr Holyoake 6 months to find a buyer failing which CPC could step in and direct a sale. The proposal for the JMA had been evolved by Mr Holyoake with Mr Alex O'Connor of Collyer Bristow and put forward by Mr Holyoake to Mr Dean in an e-mail of 23 October.

344. Mr Holyoake had told Mr Dean that the £1.8m was coming from ISI, but in the event he only paid £0.8m of the first instalment of £1.8m, which came from a refinancing of the Investec facility by Capital A (some of the Investec personnel having moved to Capital A). The effect under the terms of the Extension Agreement was (i) that the unpaid £1m of the first Extension Fee was added to the debt (ii) the total amount then outstanding was therefore increased to £14.85m (being £14.65m less £0.8m plus £1m) and (iii) the whole amount became immediately due. On 20 November 2012 CPC issued a claim form in the Chancery Division for the sum of £14.85m plus interest from 17 October 2012.

345. That led to the negotiation and agreement of a Second Extension Agreement dated 23 November 2012, together with a JMA, the claim being discontinued by consent. The Second Extension Agreement again rescheduled the debt so that instalments (of £0.5m or £0.75m) were payable monthly, with the balance due on 30 April 2013, or if a Qualifying Contract had been exchanged before 30 April 2013, by 1 October 2013. A Qualifying Contract had the meaning given to it in the JMA (see below). The cost to Mr Holyoake of the extension was an Extension Fee of £2m. This was added to the debt (which thereby became £16.85m), but there was provision for £1m to be credited against this if all instalments were paid on time. If any instalment was not paid on time the whole balance outstanding would become due as a new debt and bear interest at 15% per annum compounded monthly.

346. The JMA entered into on the same day was made between CPC, Hotblack and Mr Holyoake. It obliged Hotblack to diligently market GGH on the open market and use all reasonable endeavours to complete a sale of GGH to an arms-length third party buyer on the open market at the best price reasonably obtainable in the open market. It provided for CPC to apply to the Land Registry for a restriction to be entered against the title to GGH preventing a disposition of GGH without CPC's consent. It also granted CPC step-in rights which took the form of an option granted by Hotblack to CPC to require Hotblack to complete a sale of GGH to a third party buyer identified by CPC, CPC being under a similar obligation to diligently market and use all reasonable endeavours to agree a sale to an arms-length third party buyer on the open market at the best price reasonably obtainable. The option was to be exercised during the Option Period; the Option Period was the period of 18 months following the Long Stop Date; and the Long Stop Date was 30 April 2013, or, if Hotblack had exchanged on a Qualifying Contract on or before 30 April 2013, 1 October 2013.

347. The combined effect of the Second Extension Agreement and the JMA therefore was that if Mr Holyoake found a purchaser by 30 April 2013 and Hotblack entered into a Qualifying Contract (i) Hotblack would have until 1 October 2013 to complete the sale and (ii) the balance of Mr Holyoake's debt would not become payable until 1 October 2013; but that if Hotblack did not enter into a Qualifying Contract by 30 April 2013, the balance of the debt would become due and CPC would have the right to sell the property. The definition of Qualifying Contract was therefore important. It was defined (in the JMA) as follows:

> "a contract for [Hotblack] to sell [GGH] to an arms length third party buyer ("the Buyer") which is conditional upon satisfactory receipt of the Planning Permission and where:
>
> a. the purchase price to be paid by the Buyer under the contract is at least £75 million;
>
> b. the Buyer has provided a non-refundable deposit of at least 5% of the purchase price; and
>
> c. the completion date pursuant to the contract is expressed to be no later than 30 September 2013."

348. Mr Holyoake made the monthly payments required under the Second Extension Agreement from December 2012 to 3 April 2013, a total of £3.25m (thereby reducing the debt to £13.6m).

349. On 22 April 2013 Mr Holyoake sent Mr Dean a draft contract for the sale of GGH. Mr Dean said that it would be helpful if Mr O'Connor could confirm that it was a qualifying contract, and Mr Holyoake said he would do so when all the detail was agreed, and on 25 April Mr O'Connor duly sent a letter to Wragges confirming that they had advised their client that the contract once entered into would be a Qualifying Contract. On 30 April Mr O'Connor confirmed to Wragges that he had exchanged contracts, and a contract was indeed entered into on that day between Hotblack and Sherbourne; on 2 May Mr O'Connor e-mailed Wragges confirming that in his view the contract was a Qualifying Contract as defined in the JMA, although he had agreed with Wragges that the confirmation was given on the basis that no reliance could be placed on it and without any liability for him or Collyer Bristow.

350. In fact it is clear that the contract was not a Qualifying Contract. It is not in dispute that at the time it was entered into Sherbourne was wholly owned by Mr Lovering, and both Mr Holyoake and Mr Lovering accepted in oral evidence that Sherbourne did not qualify as an arm's length third party purchaser, and that they had misled CPC.

351. Moreover, the contract, which was for a sale at £79m, provided for a deposit to be paid as follows: £50,000 on the date of the contract, a further £200,000 within 7 working days, and a further payment to bring the deposit up to 5% within 6 weeks after planning. Mr O'Connor in oral evidence suggested that the definition of Qualifying Contract was ambiguous and could be read as meaning that a contract was a Qualifying Contract if it was one whereby or whereunder a 5% deposit was payable,

that is a contract which provided for a 5% deposit, which this contract did. That seems to me a most unlikely construction of the definition of Qualifying Contract which requires not that the contract is one where the buyer is to provide, or will provide, or will by completion have provided a 5% deposit, but one where the buyer *"has provided"* a 5% deposit. The structure of the JMA requires one to be able to answer the question whether a contract is a Qualifying Contract at the date it is entered into (or at the latest on 30 April which in the circumstances comes to the same thing), because the question whether the Long Stop Date has been extended to October or not (and hence whether CPC's step-in rights have arisen or not) depends on the answer to that question. If the question had been asked on 30 April "Is the contract with Sherbourne one where the buyer has provided a 5% deposit?" the only answer that could be given to that is No. I am not suggesting that Mr O'Connor was deliberately misleading Wragges – he seemed to me to have genuinely persuaded himself that there was a point of some difficulty there and that he could properly conclude that the fact that the 5% deposit had not yet been paid did not prevent it being a Qualifying Contract – but I have no hesitation in concluding that he was wrong, although in the light of the acceptance that Sherbourne was not an arm's length purchaser, it does not in fact make any difference.

352. As I have said Mr Holyoake and Mr Lovering both accepted that it was misleading to tell CPC that the contract was a Qualifying Contract. It was in fact a brazen and elaborate deception. It started with Mr Lovering instructing a firm of solicitors, HowardKennedyFsi (**"HKfsi"**), and Collyer Bristow and HKfsi, both of whom thought they were acting for independent parties, then negotiating the contracts, while Mr Lovering and Mr Holyoake were exchanging e-mails discussing what to say to their respective solicitors to keep up the pretence of negotiation. Mr O'Connor said in oral evidence that he asked Mr Holyoake if the purchaser was an arm's length third party, and he said that it was; I accept this evidence which means Mr Holyoake had on this point deceived his own solicitor.

353. Mr Dean remained suspicious despite Mr O'Connor's confirmation and asked for Wragges to review the contract. Mr Holyoake prevaricated, citing confidentiality reasons (although Wragges had seen a draft, and Mr Dean made it clear that CPC were not interested in the identity of the buyer) and then offering to provide a QC's opinion (which was never provided, no doubt because it proved impossible to obtain an unequivocal opinion); eventually on 16 May 2013 Wragges were allowed to inspect a copy of the contract. Wragges advised CPC that it was not a Qualifying Contract because of the deposit provisions, and on 17 May Mr Dean spoke to Mr Holyoake and told him that Mr Christian Candy was concerned that the low deposit must mean the buyer was not real and asked for the name of the buyer so CPC could get comfortable, the call being followed by a formal letter from Wragges to the same effect, requiring concrete and corroborated evidence that the buyer was a bona fide arm's length buyer. Mr Holyoake did not provide this and on 20 May CPC issued its third claim, in the Chancery Division, asserting that the contract was not a Qualifying Contract and claiming the outstanding sum of £13.6m.

354. On 21 May Mr Holyoake e-mailed Mr Dean saying that the buyer was the Al-Rajhi group. That was untrue and misleading, as Mr Holyoake accepted in evidence. But it was sufficient to persuade CPC to discontinue the claim which it did on 29 May.

355. The deception that there was a genuine arm's length buyer continued all the way through to September 2013. Mr Holyoake in evidence sought to justify it by saying that he was trying to buy time to get through planning and receive the value uplift that that would bring, as otherwise CPC could step in and sell the property which would mean that he might be left with nothing. Mr Stewart submitted that the deception was justifiable in the circumstances. That is not a view that I can take: having agreed to a contract under which CPC could sell the property unless a Qualifying Contract had been entered into, it cannot be a justification for resorting to deception that if CPC did step in and sell the property as they were contractually entitled to do, the consequences would be unattractive to Mr Holyoake.

356. On 3 July 2013 Westminster City Council granted planning permission for the development of GGH to provide 42 residential units on the first to seventh floors. There was a six week period for judicial review which expired on 14 August 2013 with no judicial reviews having been brought. Completion of the contract with Sherbourne was due on 22 August. But on 21 August Mr Holyoake revealed that he was working on a Plan B which involved a refinancing instead of a sale. He was still however suggesting that the sale might go ahead and confirmed in an e-mail to Mr Dean that the buyer was totally third party and nothing to do with him in any shape or form.

357. By this stage Mr Holyoake had referred to a possible claim under the CCA. This had first been referred to on a telephone call he had with Mr Dean on 18 August. On 19 August Wragges wrote to Collyer Bristow threatening proceedings if completion did not take place on 22 August; on 22 August Collyer Bristow wrote to Wragges saying that if proceedings were brought, there would be a counterclaim under the CCA, and making an offer to settle CPC's claims for some £13.7m and a further £5m payable within 12 months.

358. That led to a call between Mr Dean and Mr Holyoake. Mr Holyoake's pleaded case is that the call took place on 23 August, although the contemporary e-mails make it probable (as Mr Stewart accepted) that it was in fact on the evening of 22 August. Mr Holyoake's pleaded case is that Mr Dean told him that even if his CCA position was correct, it would make no difference as Mr Holyoake had a choice either to accept a complete *"cleansing"* such that he would be unable to sue CPC and Mr Christian Candy or they would take GGH and *"ruin"* him. Mr Dean accepted that there was some reference to *"cleansing"* on the call, and that it might have been by him; he said that in this context all it meant was making a clean start, that is by entering into an agreement whereby any potential claims on both sides would be surrendered. He denied saying that the alternative was that CPC would *"ruin"* him, but accepted in his witness statement that if Mr Holyoake declined to enter into such an agreement then the only alternative would be litigation. There was little further exploration of the point in oral evidence, and I am left unsure quite what was said. I am not persuaded that Mr Dean referred to ruining Mr Holyoake, although he no doubt did make it clear that the alternative to an agreement which involved dropping the CCA claims would be litigation. Since Mr Holyoake had consistently taken the view that litigation would be disastrous, he no doubt did regard this as a threat to ruin him, but it does not follow that Mr Dean used the word. In any event although Mr Stewart asked me to find that this was an example of economic duress, I find that for Mr Dean to state that unless

the parties agreed a settlement of the claims, the alternative would be litigation was not economic duress: CPC were entitled to pursue their claims by litigation (and in the light of what is now known about the Sherbourne contract, their claim that the debt had become due was in fact well founded).

359. On 30 August 2013 Mr Holyoake was still pretending that there was a purchaser who was due to complete but said that the buyer's concerns were *"restriction release delays"*, suggesting therefore that this was CPC's fault in delaying the removal of the restriction which it had entered against the title. That led to a letter before action from Wragges on 2 September denying that CPC had caused any delay (Wragges being willing to give an undertaking to lift the restriction once Mr Holyoake had agreed the figure payable to CPC), and threatening proceedings unless CPC were repaid that day. On 3 September CPC duly issued its fourth claim, again in the Chancery Division, claiming £13.3m and interest, on the basis that the Sherbourne contract was not a Qualifying Contract, or alternatively that if it was, instalments due under the Second Extension Agreement had not been paid (the £13.3m was the amount of £13.6m due under the Second Extension Agreement less two payments of £100,000 and £200,000 made in August).

360. Mr Holyoake continued to try and negotiate terms under which CPC would allow the property to be refinanced rather than sold, and eventually on 4 September told Mr Dean that the sale was not a viable option. Mr Dean said that CPC wanted to speak to the proposed lender for the refinancing. Mr Holyoake gave him the name of the lender, which was Arlington, and arranged for him to speak to a representative from Arlington the next day. In fact, he got Mr Lovering to pretend to be a representative from Arlington, and Mr Dean spoke to him.

361. There was then a meeting on 6 September at the Bulgari Hotel in London attended by Mr Holyoake, Mr Christian Candy and Mr Dean. Mr Holyoake's pleaded case is that Mr Christian Candy told him that he had to *"choose* [his] *lane now"* by either allowing the agreements to be *"cleansed"* as CPC wanted, or else Mr Candy would do everything in his power to take over GGH and ruin him, and ensure that following a sale *"not one penny"* of the proceeds would come back to him. Mr Candy accepted that he used the phrase *"pick a lane"*, meaning that Mr Holyoake had a choice between two options, lane A or lane B. One option was to press on with the litigation. The other was for Mr Holyoake to proceed with his proposed refinancing, but in order to do that there needed to be a clean start for both parties, that is that their respective claims should be settled. Mr Candy accepted that the word *"cleansing"* might have been used, possibly by Mr Dean or by Mr Holyoake. Mr Holyoake said that he thought that the comment about him not getting a penny back was actually to a later meeting at Rutland Gardens in February 2014.

362. These are pleaded as further threats to Mr Holyoake, but I see nothing surprising, or unlawful, about CPC being unwilling to proceed with the refinancing except on terms that allegations were dropped. Under the JMA, which still governed the parties' relations, CPC had the right both to immediate payment of the outstanding debt and to step in and sell the property (at the latest, even if the Sherbourne contract had been a Qualifying Contract, in October). The threat to do so if a settlement could not be agreed was no doubt a potent one, but I do not see that it was unlawful.

363. There was also discussion at the meeting about CPC's restriction on title. In the event the Arlington refinance did not proceed, and Mr Holyoake complained that this was because CPC insisted that they retain their restriction over GGH. This is not a specifically pleaded allegation but in closing Mr Stewart submitted that this was an example of CPC interfering with Mr Holyoake's attempts to refinance, which imposed extra costs on him, and I will deal with it.

364. Collyer Bristow had proposed protection for CPC on the register of title when the JMA proposal was first floated on 23 October 2012, albeit at that stage it took the form of CPC being entitled to register a unilateral notice against the title to GGH, with the JMA containing a prohibition against disposal without CPC's consent. By the time of the Extension Agreement on 26 October 2012, the parties had agreed indicative terms for the JMA which were set out in schedule 1 to the Extension Agreement, and these included (at para 9) an agreement that CPC would be protected by a restriction on title preventing any disposal of GGH without CPC's consent.

365. This duly found its way into the JMA executed on 23 November 2012 as cl 4: by cl 4.1 CPC was to apply to the Land Registry to register a restriction preventing a disposition being registered without CPC's consent; and by cl 4.5, CPC covenanted to release the restriction on the sums referred to in cll 3.1, 3.2 and 3.3 being paid in full. These clauses referred respectively to the proceeds of sale being used to pay (1) the senior lender (Capital A), (2) CPC in respect of the debt and (3) CPC in respect of the sums to which it was entitled under the Declarations of Trust. Since the JMA was designed to lead to a sale, either by Mr Holyoake, or in default by CPC, and since a sale of GGH would trigger the liability under the Hotblack Declaration of Trust, that no doubt made sense. The practical effect however was to give CPC a considerable degree of comfort in relation to the £10m minimum due under the Declaration of Trust. The restriction did not give them formal security as such, but the ability to block a disposition unless all sums were duly paid undoubtedly gave them a significant protection – Mr Dean referred to it in oral evidence as a *"passive security"* that was *"potent"* and *"had teeth"*.

366. On a refinancing however the payments under the Declarations of Trust would not be immediately payable but would await a future sale. Mr Holyoake wanted the restriction lifted and replaced with his personal guarantee for the future sums due under the Declarations of Trust. CPC made it clear that they were not interested in his personal guarantee. That was the background to the discussion at the Bulgari Hotel meeting. Mr Dean's evidence was that at the meeting it was agreed that CPC's restriction be lifted to allow the refinancing to take place and then put back on to protect CPC's remaining interests. That appears to be borne out by the e-mails: on 9 September Mr Dean told Mr Holyoake that Wragges had given advice as to how the restriction could be *"removed and replaced seamlessly"*, to the effect that they would need to speak to the lender's solicitor. Mr Holyoake resisted this suggesting that the lender would not agree, and proposing instead that he agree to put the restriction back on without telling the lender; but by 17 September Mr Holyoake was telling Mr Pym and Mr Lovering that support had been secured from Tuvi (a reference to Mr Tuvi Keinan, Arlington's solicitor) for the restriction, and at that stage completion of the refinancing seemed imminent.

367. In the event the Arlington refinance did not collapse until much later. Mr Coplestone-Crow, a solicitor at The Wilkes Partnership LLP, acted for Hotblack on the proposed refinance. He gave evidence that negotiations continued through October 2013, and that the form of documentation was basically agreed by the end of October. He did not know why after such difficult negotiations and drafting, having agreed the paperwork, engrossments were never issued; and in oral evidence confirmed that his role was to negotiate the documentation for the release of the existing restriction and the imposition of a new restriction which ranked behind that of Arlington. He was not however privy to commercial negotiations between the parties; and accepted that he did not see e-mails from 29 October which appeared to show that there were commercial issues still being debated. The precise issue which caused the negotiations to collapse was not explored in any detail in the evidence, but I was shown nothing which suggests that the problem in the end was anything to do with CPC retaining a restriction. Instead it appears (although I was not I think addressed on any of this) that Arlington was proposing to lend a total of some £53m (enough to repay not only Capital A and CPC but also Oscarone), but that CPC thought they were going to lend no more than £40m. When CPC discovered the true position, Mr Dean concluded that not only did that weaken CPC's position by pushing them significantly higher up the capital stack, but that Arlington had been *"greedy at the very last minute"*, had been *"playing games"*, *"mischievous"* and *"underhand"*, and CPC decided they were not prepared to sit behind them following their actions. I have a strong suspicion that Arlington were not to blame in this but that the real cause of the problem was that Mr Holyoake had been intending to borrow £53m from Arlington but had told CPC he was only borrowing £40m; but it is unnecessary to make any findings to this effect. It is sufficient to say that I find that it was not CPC's insistence on retaining its restriction which caused the refinancing with Arlington to fail.

368. Returning to the Bulgari Hotel meeting on 6 September, Mr Dean described the meeting that evening as having gone well and the next day e-mailed Mr Holyoake to the effect that they had arrived at a pretty clear way forward, later describing it to Mr Holyoake as *"what you had proposed"* and *"your proposal"*. The basic idea was that Mr Holyoake would be given more time to sell the property. There was also a proposal that CPC's interests under the Declarations of Trust would be bought out, but with payment deferred. It was also agreed that there be a settlement of all the existing claims and counterclaims. Mr Holyoake on 9 September referred to this in an e-mail, saying:

> "In addition I am willing to keep all the cleansing of the CCA position in there too by way of good faith
>
> That then gives a clean and simple position."

369. In due course that led to three agreements being executed on 15 October 2013. One was the Settlement Deed. I will have to consider its provisions in more detail below, but in essence it provided for a full and final settlement of any claims which Mr Holyoake or Hotblack had or might have against CPC and its directors (and their relatives, thereby extending to Mr Nicholas Candy) and vice-versa; it also provided for the parties to release to each other a further extension agreement (the Second Supplemental Extension Agreement) and a further JMA (the Second JMA); and for

them to lodge at Court a consent order discontinuing the then existing proceedings (that is CPC's fourth claim).

370. The second agreement executed was the Second Supplemental Extension Agreement. This extended time for repayment until 24 January 2014 (or earlier sale). In return Mr Holyoake agreed to pay an Extension Fee of £2m which was added to the debt, which therefore consisted of (a) the principal sum of £13.3m outstanding under the Second Extension Agreement; (b) interest thereon pursuant to the terms of the Second Extension Agreement; and (c) the Extension Fee of £2m. He also agreed to make interim repayments of £500,000 by 4 November 2013 and £4.5m by 9 December 2013. Interest was to accrue from 18 October 2013 at the rate of 15% per annum.

371. The third agreement entered into on 15 October 2013 was the Second JMA. This followed the same format as the first JMA but gave Mr Holyoake until 24 January 2014 to sell GGH, with CPC then having step-in rights.

372. Both agreements were to enter into effect on 18 October 2013, but would not take effect if Mr Holyoake had repaid £10.3m and entered into a Third Extension Agreement instead. This was to give Mr Holyoake the opportunity to complete the refinancing with Arlington, which, as already referred to, did not in fact happen.

373. There followed a series of further extension agreements, each accompanied by a further JMA. They followed a pattern: in each case, Mr Holyoake defaulted in making one of the interim repayments stipulated in the then current agreement, thereby making the entire debt due; CPC agreed a further extension, usually in return for a fee; the debt was restated to include interest accrued under the previous agreements; and Mr Holyoake agreed to make new interim repayments. When he defaulted on those, the process was repeated.

374. Thus Mr Holyoake did not pay the £500,000 interim repayment due on 4 November 2013. On 8 November 2013 the parties entered into a Third Supplemental Extension Agreement (and Third JMA). This extended the time to 31 January 2014 if Hotblack had entered into a contract to sell GGH by 20 December 2013, but otherwise only until 21 December 2013. No extension fee was charged, but the debt was restated as (a) £15.3m (being the £13.3m under the Second Supplemental Extension Agreement plus the £2m Extension Fee under that agreement); (b) interest due under the Second Extension Agreement; and (c) interest due under the Second Supplemental Extension Agreement. Mr Holyoake agreed to repay £250,000 by 29 November 2013 and £750,000 by 20 December 2013. Under cl 4.2 interest again accrued on the total from the date of the agreement at 15% per annum.

375. Mr Holyoake paid the £250,000 due on 29 November 2013, but not the £750,000 due on 20 December 2013. On 20 December 2013 the parties entered into a Fourth Supplemental Extension Agreement (and Fourth JMA). This provided for the debt to be repaid on 20 January 2014 in return for an Extension Fee of £1m, which was added to the debt. The debt was restated as £17,428,411 made up of (a) the £15.3m; (b)interest accrued under the Second Extension Agreement of £970,299; (c) interest accrued under the Second Supplemental Extension Agreement of £127,042; (d) interest accrued under the Third Supplemental Extension Agreement of £281,070;

(e) the £1m Extension Fee less (f) the £250,000 interim repayment. Mr Holyoake was obliged to make an interim repayment of £750,000 by 10 January 2014. Interest again accrued on the debt from the date of the agreement at 15% per annum.

376. Mr Holyoake paid only £333,000 of the £750,000 due on 10 January 2014. On 15 January 2014 a Final Supplemental Extension Agreement was entered into (and Final JMA). This extended time to 22 January 2014 unless Hotblack had entered into a contract for the sale of GGH by then in which case it was extended to 14 February 2014. An Extension Fee of £1.5m was charged which was added to the debt. The debt was restated at £18,780,948 being the £17,428,411 due under the Fourth Supplemental Extension Agreement, interest under that agreement of £185,537, and the Extension Fee of £1.5m less the interim repayment of £333,000. No interim repayments were required but interest again accrued due at 15% per annum from the date of the agreement.

377. On 16 January 2014 Hotblack entered into a contract to sell GGH to Key Platinum Investments Ltd (**"Key Platinum"**) at a sale price of £90m with completion due on 11 February 2014. In the event the sale completed on 17 February 2014 at a slightly reduced price of £89m and with a retention of £2.15m. The net proceeds of sale (including the deposit) were some £86m. A funds flow statement shows that of this some £31m was paid to Capital A as senior lender, slightly over £29m to CPC and some £13m to Oscarone. After various fees and costs that left about £11.8m for Hotblack, most of which was in fact paid to Oakvest Ltd (one of Mr Holyoake's companies that he had used to make payments on the GGH project). The precise sum paid to CPC was £29,049,149, together with interest on that sum of £159.17 (being one day's interest at the rate of 0.2%). It is not entirely clear how the £29,049,149 was calculated but it seems to me to have been likely to be made up as follows: (i) the £18,780.948 debt as restated in the Final Supplemental Extension Agreement; (ii) interest under that agreement of £254,701 (being interest at 15% for 33 days); (iii) the £10m minimum due under the Declarations of Trust; and (iv) £13,500 for Wragges' costs.

378. As well as the senior loan, Oscarone and CPC, Mr Holyoake, with the assistance of Mr Pym and Mr Lovering, had borrowed money for the project from a large number of small investors (referred to by Mr Holyoake as *"friends and family"*). A spreadsheet prepared by Mr Wells in November 2013 lists these loans as they then stood. This indicates that a total of over £13.8m had by then been raised by way of loan notes, some as recently as November 2013, and examples of loan notes in evidence show that these were unsecured loans made to Dorry. There was evidence that Mr Holyoake, Mr Pym and Mr Lovering had raised monies from these small investors by continuing to sell the project as a good investment when they knew it was not. Thus on 30 August 2013 Mr Lovering e-mailed Mr Pym and Mr Holyoake referring to having been *"going round with the same group of friends lying to them now for too long"*; on 31 October 2013 in another e-mail he referred to the small investors disparagingly as *"rats and mice"* and said that his moral compass was *"stretched beyond anywhere I can comprehend"* and that *"looking friends in the face brings on a shoe stare"*; and on 29 December 2013 when Mr Holyoake was encouraging Mr Pym to *"sell it as a real positive"*, Mr Pym replied *"Will try, just struggle with the constant lying"*. Mr Holyoake accepted in evidence that he probably

had lied to third parties; Mr Pym said he realised it was all going horribly wrong from March 2012 but was still telling people it was a fantastic transaction when from his standpoint it obviously wasn't; and Mr Lovering in an e-mail of 30 December 2013 confessed that he was worried *"about the fraud we have committed"*. He attempted to explain this in oral evidence as being a reference to a fraud committed by the Candys, but this evidence was frankly incoherent and I infer that he was referring to the way he and Mr Pym had continued to raise money from investors by selling GGH as a wonderful investment when they knew it was not.

379. These loans carried varying rates of interest and the total shown as repayable on Mr Wells' spreadsheet, assuming a repayment in December 2013, was over £17.3m. Mr Holyoake accepted in evidence that although some of this was repaid out of the proceeds of sale, not all of it was. His estimate was that about £7m or £8m had not been repaid, but Mr Wells said that it was more like £10m. I was not given any detail of how Mr Holyoake decided who should be repaid and who should not. At one point (on 28 February 2013) Mr Pym e-mailed Mr Holyoake to the effect that he needed to sort out some of the *"smaller, painful ones"* if possible, and that they also needed to work out what to do with the ones he and Mr Holyoake had a personal guarantee on; but Mr Holyoake said that although it was a consideration it didn't actually happen that way in the end, although he did not explain what did.

380. Not all the money that Mr Holyoake received was however used to repay these investors. Mr Holyoake appears to have paid the final instalment on his ISI shares by 10 March 2014, that is shortly after completion, and he was unclear in oral evidence whether he used the money from GGH to pay for it or not – it seems likely that he did, although I do not make any positive finding to that effect. What does seem clear however, as accepted by Mr Wells, is that £500,000 of the proceeds of sale was used to make a new investment in a mining company, Kincora Copper Ltd; Mr Lovering said that that was Mr Holyoake's decision and a matter for him. I have not understood on what basis he felt entitled in the circumstances to do that rather than repay other investors, but he was not specifically asked that question and I have therefore not heard whether he has any explanation.

381. Even before completion, Mr Holyoake had attempted to engage Mr Nicholas Candy or his brother in dialogue with a view to reducing the amount he had to pay CPC. The Candys declined to speak to him, but after completion a meeting was set up for 26 February at C&C's offices in Rutland Gardens. Mr Holyoake attended as did both Messrs Candy and Mr Dean. Mr Holyoake had told Mr Dean beforehand that the primary focus of the meeting was to repair his former friendship with Mr Nicholas Candy, but at the meeting he argued for a repayment. Mr Holyoake makes a number of allegations as to what Mr Christian Candy said to him: that he was never going to pay him *"a fucking penny back"* and that if Mr Holyoake sued he would make sure he was put in a *"deep dark hole"*. It is clear that the meeting was not an amicable occasion: Mr Dean who made a note of the meeting that evening described the parties as *"robust"* and the meeting as having become *"somewhat heated"*. Mr Candy did not dispute that he said Mr Holyoake would not get a penny back, or that he used expletives: he did not accept having made the *"deep dark hole"* remark, but he did accept that he told Mr Holyoake to *"fuck off and die"*, something that Mr Dean also remembered. I do not think I need to resolve whether the *"deep dark hole"* remark

was made – it would not seem to have any legal consequences.

382. Mr Holyoake also met Mr Nicholas Candy at the Bulgari Hotel on 27 March 2014. That did not produce any resolution either, and after CPC had rejected Mr Holyoake's suggestion of arbitration, the draft proceedings were sent by Jones Day in December 2014 and these proceedings followed in August 2015.

***The Claims***

383. I can now deal with the pleaded claims. I have already in effect considered a fair number of them but it is convenient to pull them all together here, and deal with any legal points that require to be resolved.

384. Logically there is something to be said for considering first whether the Settlement Deed is binding on Mr Holyoake, because Mr Stewart accepted that unless this can be set aside the claims in this action cannot succeed (save insofar as any arose after the date of the Settlement Deed). But I find it more convenient in fact to deal with the claims in the order in which they are pleaded before considering the Settlement Deed.

*Fraudulent misrepresentation by Mr Williams on 12 October 2011*

385. This is the allegation that Mr Williams told Mr Holyoake on the evening of 12 October 2011 that the net asset statement was being sought purely as a formality and would never be relied on. I have considered this allegation at length above (paragraphs 135-141). I am not persuaded that Mr Williams made the representation alleged and this claim fails.

*Fraudulent misrepresentations by Mr Christian Candy on 8 November 2011*

386. This refers to the lies that Mr Candy told Mr Holyoake about having to disclose CPC's net asset statement to Investec. I have considered the primary facts at length above (paragraphs 170-174), and have concluded that Mr Candy did indeed tell a series of deliberate lies. On the other hand, Mr Holyoake did not believe him and was not in any sense deceived by them (paragraph 175 above).

387. Mr Holyoake's pleaded case is that if it had not been for Mr Candy's lies, Mr Holyoake would not have entered into the Supplemental Loan Agreement, that his consent to the Supplemental Loan Agreement was vitiated and that he is therefore entitled to rescind it; he also claims to have suffered loss and damage by reason of the lies.

388. On the face of it, the fact that Mr Holyoake was not for one moment taken in by Mr Candy's lies is a complete answer both to the claim for rescission and to the claim for damages. The whole basis of rescission for misrepresentation is that the misrepresentation induces the representee to enter into a contract; and the whole basis of claiming damages for fraudulent misrepresentation is that the misrepresentation induces the claimant to act in a way which causes him damage: see for example the extended discussion of the law on inducement by Christopher Clarke J in *Raffeisen Zentralbank Osterreich AG v Royal Bank of Scotland PLC* [2010] EWHC 1392 (Comm) at [153]-[199] (there dealing with a claim for damages). To put it more

simply the essence of the tort of deceit is that the claimant was deceived, and if he knows that what he is being told is a lie, he is not deceived. Equally, it is difficult to see how he can say that he has been induced to enter into a contract by a lie if he knows that it is untrue.

389. Mr Stewart however submitted that that was not a complete answer. He referred me to the Supreme Court decision in *Hayward v Zurich Insurance Co plc* [2016] UKSC 48. In that case Zurich had settled Mr Hayward's claim for personal injuries despite being very sceptical as to whether his injuries were as extensive as he claimed. When they later received evidence that he had grossly and dishonestly exaggerated his claim, they sought to set aside the settlement. The Supreme Court held that they were entitled to, on the basis that it was not necessary for Zurich to prove that it believed the representation to be true. It was sufficient to show that they were induced to settle as they did because of Mr Hayward's lies, and the question whether they were so induced was a question of fact, not a question of law.

390. I of course accept that as a correct statement of the law. But it does not detract from the fact that in the paradigm case where A lies to B in the hope of inducing B to do something, B will in fact usually only be induced to do so if he believes A's lie. Indeed Lord Clarke himself says at [18] that if the representee does not believe that the representation is true:

> "he may have serious difficulty in establishing that he was induced to enter into the contract or that he has suffered loss as a result"

and referred to the point made *"clearly and accurately"* in the *"admirable"* judgment of the trial judge (HHJ Moloney QC), namely:

> "In the ordinary case, sale of goods for example, reliance by the purchaser is effectively equivalent to his *belief in the truth* of the statement; if he believes the goods are as represented, he will be relying on the representation (and acting on it by his purchase) and if not, not."

391. There were two reasons why the *Zurich* case was not a paradigm case like that. One was that however strong Zurich's suspicions were that Mr Hayward was lying, they did not know that he was: see per Lord Clarke at [40] where he accepts the submission that a qualified belief or disbelief does not rule out inducement, and that Zurich only knew the true position when Mr Hayward's neighbours came forward, so that:

> "As Mr Hayward knew, Zurich was settling on a false basis."

Indeed Zurich accepted in its written case that had it known the true position, it would not have been able to rescind: see sub-paragraph (vi) of the summary of its argument set out at [28] and also [43].

392. The other is that the distinctive feature of the case was that the claims put forward by Mr Hayward were not just lies told to Zurich; they were also lies told to the Court. However much Zurich did or did not doubt what he was saying, the effect of that was that they ran the risk that Mr Hayward's claim would be accepted by the Court. This

was a point clearly made by HHJ Moloney; and see per Lord Clarke at [45] where he thought that in those circumstances the representee might well establish inducement on the facts even if he knew the lie was a lie. See also the concurring judgment of Lord Toulson at [71] where he makes the point that Mr Hayward's deceitful conduct was intended to influence the minds of the insurers, not necessarily by causing them to believe him, but by causing them to value his litigation claim more highly than it was worth if the true facts had been disclosed, because the value of a claim for insurers' purposes is that which the Court is likely to put on it.

393. That seems to me a very different type of case from the present. What caused Zurich to settle the claim was not its own belief in the truth or otherwise of the fraudulent claim but the effect that the fraudulent claim might have on a third party (namely the Court); in other words it was a case where A lies to B and B is induced to act in a particular way because of the risk that A might tell the same lie to C and the effect that that might have on C. It is difficult to see that that principle can have any application where there is no third party or C involved. Where all that happens, as in the present case, is that A tells a lie to B, it is difficult to envisage the circumstances in which that can induce B to act in a particular way unless B is taken in and believes that what A says is true, or at least might be true. In the present case Mr Candy told Mr Holyoake that CPC were doing a deal with Investec and would need to disclose the £12m loan to Investec; he was obviously not going to tell the same lies to Investec, and it is difficult if not impossible to see how those lies could have induced Mr Holyoake to do anything in circumstances where he knew that they were lies.

394. Mr Stewart submitted that Mr Candy's statements were fraudulent misrepresentations and that *"they (that is, the threat that [Mr Candy] might do as he represented)"* induced Mr Holyoake to seek to pay off the loan as soon as he could, and to enter into the Supplemental Loan Agreement. But as this formulation shows, what Mr Stewart was really relying on was not the lies, but the threat to go to Investec. As I have already said (paragraph 238 above), the fact that Mr Candy was prepared to make these threats made Mr Holyoake realise that CPC were not his friends, and as a result he decided to try and repay them; and no doubt the fact that Mr Candy was prepared to resort to lies to seek to justify the threats reinforced the point. The suggestion of early repayment was raised at the dinner at Le Petit Bistro on 1 December 2011 and Mr Holyoake had agreed to do so by 13 December (paragraph 191 above). But I do not see that this caused Mr Holyoake any quantifiable loss: he did not in fact repay by the end of January, nor indeed in the event did he repay anything until August 2012 by which time the whole sum was due under the terms of the Supplemental Loan Agreement in any event.

395. The real question therefore is whether the lies induced him to enter into the Supplemental Loan Agreement. I find that they did not: see paragraph 238 above where I concluded that the threat to go to Investec did not play any continuing part in Mr Holyoake's decision to enter into the Supplemental Loan Agreement. The fact that the threat was accompanied by lies which Mr Holyoake never believed cannot make any difference. He was not in my judgment induced to enter into the Supplemental Loan Agreement by the lies told on 8 November.

*Duress*

396. The next pleaded claim is duress at common law. There was no dispute as to the legal principles. Duress is the obtaining of agreement or consent by illegitimate means, and an agreement entered into as a result of duress is not valid as a matter of law: *Borrelli v Ting* [2010] UKPC 21 at [34] per Lord Saville.

397. Duress can take two forms: duress to the person and economic duress. Duress to the person is where a threat of physical violence is directed against the claimant or a close relation or associate of the claimant. In the present case two specific threats to the person are relied on: what was said by Mr Christian Candy about Mrs Holyoake at the meeting in Guernsey on 6 February 2012, and what was alleged to have been said by Mr Nicholas Candy on the telephone call of 4 April 2012. I have found that the first did not amount to a threat of violence or constitute duress to the person (paragraph 233 above); and that the second allegation is not established (paragraphs 321-322 above). Apart from these two specific matters, I do not think that any of the other matters relied on, such as threats to ruin Mr Holyoake's life, to take a wrecking ball to his assets, and to leave him with nothing, can be equated with physical threats (see paragraph 233 above). I find that none of the agreements entered into by Mr Holyoake are voidable for physical duress.

398. The recognition of economic duress began in 1976 with *Occidental Worldwide Investment Corp v Skibs A/s Avanti* [1976] 1 Ll Rep 293, and was accepted by the Privy Council in *Pau On v Liu Yiu Long* [1980] AC 614, and by the House of Lords in *Universe Tankships Inc of Monrovia v ITWF* [1983] AC 366; in *Dimskal Shipping Co SA v ITWF* [1992] AC 152 Lord Goff said (at 165G) that it was:

> "now accepted that economic pressure may be sufficient to amount to duress for this purpose [that of entitling a party to avoid a contract on the ground of duress], provided at least that the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the relevant contract."

In *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] 1 Ll Rep 530 Dyson J summarised the law as follows:

> "The ingredients of actionable duress are that there must be pressure, (a) whose practical effect is that there is compulsion on, or a lack of practical choice for, the victim, (b) which is illegitimate, and (c) which is a significant cause inducing the claimant to enter into the contract: see *Univers[e] Tank[ships] of Monrovia v ITWF* [1983] AC 336, 400B–E, and *The Evia Luck* [1992] 2 AC 152, 165G. In determining whether there has been illegitimate pressure, the court takes into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract. These are all relevant factors. Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining."

399. The essential question in the present case is whether the pressure exerted by CPC was

illegitimate. In *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 AER 714 the defendants had threatened to refuse the plaintiffs credit on future dealings. They were entitled to refuse to deal with the plaintiffs at all, and *a fortiori* entitled to insist on no longer granting credit (see at 718a-b). Steyn LJ accepted that the fact that the defendants had used lawful means did not by itself remove the case from the scope of the doctrine of economic duress (see at 718e). But he said that in a purely commercial context it might be a relatively rare case in which "lawful act duress" could be established; and that it might be particularly difficult to establish duress if the defendant bona fide considered that his demand would be valid, although *"I deliberately refrain from saying never"*. Farquharson LJ and Sir Donald Nicholls V-C agreed, although the latter made it clear that he did not think very much of the defendant's conduct. Mr Lord told me that there had been no reported case in the 23 years since that decision in which lawful act duress had been established in a commercial context.

400. I have already considered the question of illegitimate pressure in the context of whether the Supplemental Loan Agreement was voidable for economic duress: see at paragraph 236 above where I said that the essential question was whether CPC was justified in threatening litigation if Mr Holyoake did not agree to sign the Supplemental Loan Agreement, and concluded that it was.

401. The same applies to the subsequent agreements. They can be taken in turn:

(1) The next substantive agreement was the Escrow Deed dated 14 June 2012: this gave Mr Holyoake time to try and complete refinancing, and I have already said (paragraphs 329-330 above) that I have not understood in what respect this agreement was highly disadvantageous to him, or indeed what CPC got out of it except for a hope that Mr Holyoake might actually refinance and repay them.

(2) The Escrow Deed was followed by a series of further Escrow Deeds. From the Second New Escrow Deed dated 24 August 2012 onwards CPC required Mr Holyoake to make cash payments in partial payment of the £17.74m as the price for them, but as I have already said (paragraph 333 above) it was in each case Mr Holyoake who wanted further time to complete the refinancing. The effective commercial pressure that CPC could bring to bear was that it could at any stage have refused him further time and proceeded to enforce the claim for the £17.74m. Mr Holyoake had by that stage repeatedly agreed that the amount due was £17.74m, and under the terms of the agreements he had signed it had become due; and for a creditor with an acknowledged debt to insist on part-payment of the debt as a price for granting an extension in respect of the balance does not seem to me to be capable of being characterised as illegitimate pressure.

(3) The next agreement was the Extension Agreement of 26 October 2012, followed by the Second Extension Agreement of 23 November 2012 and the JMA. As set out above (paragraph 342), on Mr Holyoake's failure to refinance by the expiry date of the Tenth New Escrow Deed, the balance of the debt fell due. It was Mr Holyoake who wanted further time and who put

forward the mechanism of the JMA which would lead to a sale or refinancing. CPC required payment of Extension Fees as the price for these agreements, and this set the pattern for the remaining life of the loan with a total of £7.5m being payable by way of Extension Fees. These significantly increased Mr Holyoake's overall repayment. But if one asks what practical pressure CPC had that enabled them to demand these sums, the answer is effectively the threat of litigation: the Extension Agreement was executed against the background of Wragges' demand for £14.85m, and the Second Extension Agreement against the issue of a claim form for that sum (paragraphs 342-345 above). Again that is not in my judgment illegitimate pressure.

(4) The next suite of agreements were those signed on 15 October 2013, being the Settlement Deed, the Second Supplemental Extension Agreement and the Second JMA. These were agreed against the background of the Bulgari Hotel meeting at which Mr Christian Candy told Mr Holyoake to pick a lane. I have already said (paragraph 362 above) that the effective threats CPC had if Mr Holyoake did not agree to the settlement were to press on with the litigation that had been issued, and to sell GGH under its step-in rights, which were no doubt potent threats but not unlawful. I do not think they can be characterised as illegitimate pressure either – particularly since it is now clear that CPC were right that the Sherbourne contract was not a Qualifying Contract with the result that CPC had in fact had the right to sell GGH since the end of April 2013.

(5) The final series of agreements were the successive further Extension Agreements, together in each case with JMAs, usually in return for Extension Fees and a restatement of the debt (which had the effect of cumulating the interest). Again the effective pressure that CPC had was to refuse an extension, sue Mr Holyoake for the loan and sell GGH. I do not see that that was illegitimate pressure either.

402. In these circumstances I find that none of the agreements entered into by Mr Holyoake are voidable for economic duress. The reality is that once he had signed the Loan Agreement, with its requirement for minimum net assets of £120m, he was always at risk of CPC taking a tough line and calling an event of default and hence he was always vulnerable to being sued, and very much more so after granting the Aeriance charges. It was that threat of litigation which I have found was the effective cause of his agreeing to the terms of the Supplemental Loan Agreement, and it remained that threat which at every stage persuaded him to agree to the terms required by CPC for the successive extensions of time and other agreements that he wanted.

403. Mr Stewart also submitted that damages could be recovered for duress: see the discussion of the point in *Chitty on Contracts* (32nd edn, 2015) at §8-056. The point does not arise on my findings in the present case, and since it appears to be a controversial one and is said to be one of some potential importance, I prefer not to deal with it but to leave it for a case where it has to be resolved. In practical terms, most if not all cases of duress will also amount to the tort of intimidation (considered below), and if the claimant has suffered damage, the claimant will be able to recover damages for that tort, and the question whether damages can be recovered for duress

as such will not arise.

*Actual undue influence*

404. The next pleaded claim is that the same threats, intimidation and coercion as are relied on as constituting duress also constituted actual undue influence in equity. At first sight this is slightly surprising. The doctrine of undue influence is one of the doctrines developed by equity to protect the vulnerable and weak, and as the word "influence" suggests, the paradigm cases are cases where one party to a transaction has acquired a position of influence or ascendancy over another. Many of the cases are therefore concerned with a relationship where A reposes trust or confidence in B, and B abuses that relationship: indeed *Chitty* at §8-057 introduces the doctrine as one that covers:

> "cases in which a transaction between two parties who are in a relationship of trust and confidence may be set aside if the transaction is the result of an abuse of the relationship."

That seems a long way from the present case where the relationship between Mr Holyoake and CPC was the very opposite of one of trust and confidence.

405. Nevertheless I accept that the doctrine is not confined to what might be called abuse of relationship cases. The leading case on the doctrine of undue influence is that of the House of Lords in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44. At [7] Lord Nicholls said that the law would not permit a transaction to stand if the means used to persuade a person to enter into it were unacceptable; that the means used were regarded as an exercise of improper or "undue" influence and hence unacceptable whenever the consent thus procured ought not fairly to be treated as the expression of a free person's will; and that it was impossible to be more precise or definitive as the circumstances in which one person acquired influence over another, and the manner in which influence might be exercised, varied too widely to permit of any more specific criterion. At [8] he continued:

> "Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with the principle of duress as this principle has subsequently developed. The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage."

That makes it clear that a case of threats and improper pressure can be within the doctrine. See also the discussion by Lord Hobhouse at [103] where he refers to the division between actual and presumed undue influence, and continues:

> "Actual undue influence presents no relevant problem. It is an equitable wrong committed by the dominant party against the other which makes it unconscionable for the dominant party to enforce his legal rights against the other. It is typically some express conduct overbearing the other party's will. It is capable of including conduct which might give a defence at law, for example, duress and misrepresentation… Actual undue influence does not depend upon some preexisting relationship between the two parties though it is most commonly associated with

> and derives from such a relationship. He who alleges actual undue influence must prove it."

That too makes it clear that actual undue influence need not consist of abuse of an existing relationship, although it commonly does. See too the valuable discussion of the law of undue influence in the recent judgment of Rose J in *Libyan Investment Authority v Goldman Sachs* [2016] EWHC 2530 (Ch) at [136]-[137] where she again makes the point that cases of actual undue influence can be divided into those where there is what she calls a *"protected relationship"*, and those where there has been an improper threat of some kind (or arguably an improper inducement); for this latter kind of actual undue influence there is no need to establish any particular relationship between the parties.

406. In the present case it is not suggested that the relationship between CPC and Mr Holyoake was either such as to give rise to a presumption of undue influence or was a protected relationship of the kind referred to by Rose J. The case is solely put as one of actual threats, menaces and coercion. As appears from the citations from both Lord Nicholls and Lord Hobhouse in *Etridge*, there is in such a case a considerable overlap with the common law doctrine of duress, and indeed *Chitty* at §8-067 suggests these cases are now probably better viewed as cases of illegitimate pressure (covered by the doctrine of duress).

407. In these circumstances it is not clear to me what, if anything, the plea of actual undue influence adds to the plea of duress, or how it could succeed if, as I have held, the plea of duress fails on the facts. Mr Stewart submitted that one practical difference was that it was not necessary to establish that the claimant would not have entered the impugned transaction but for the undue influence, citing *UCB Corporate Services Ltd v Williams* [2002] EWCA Civ 555. Mr Lord countered that the *UCB* case was a case where there had been an actual fraudulent misrepresentation and the basis of the decision was that actual undue influence is a species of fraud (see at [86]) and that in cases of fraud, the claimant need only show that the representation was a factor in his decision to act in a particular way; not all cases of undue influence can however be equated with fraud: see the analysis in *Snell's Equity* (33rd edn, 2016) at §8-020.

408. I do not propose to resolve this question, which raises quite recondite issues. One does not need to get into questions of causation. I have found that the substantive threat that caused Mr Holyoake to enter into the Supplemental Loan Agreement and the series of subsequent agreements was the threat by CPC to litigate. If, as I have held, that was not illegitimate pressure for the purposes of the law of duress, it was in my judgment equally not undue influence for the purposes of the equitable doctrine. I hold that none of the agreements were voidable for actual undue influence.

*Intimidation*

409. The next pleaded claim is for intimidation. Intimidation is a tort and Mr Holyoake and Hotblack seek to recover damages. The facts relied on are the same threats as are relied on in support of the duress and undue influence claims.

410. The essential ingredients of the tort of intimidation were expressed by the Court of

Appeal in *Berezovsky v Abramovich* [2011] EWCA Civ 153 at [5] as follows:

> "(1) a threat by the defendant to do something unlawful or "illegitimate"; (2) the threat must be intended to coerce the claimant to take or refrain from taking some course of action; (3) the threat must in fact coerce the claimant to take such action; (4) loss or damage must be incurred by the claimant as a result."

411. For the same reasons as I have already given when discussing duress, I find that the threats made by CPC, effectively a threat to pursue Mr Holyoake by litigation, were not illegitimate. CPC did make two threats which I have held to be unjustified: the threat on 8 November 2011 to reveal the loan to Investec, and the threat in Wragges' letter of 2 February 2012 to advertise a statutory demand. But neither in my judgment had any substantive consequences. The threat to go to Investec did not cause Mr Holyoake to do anything (other than promise to repay the loan early); the threat of advertising a statutory demand was not the effective cause of Mr Holyoake signing up to the Supplemental Loan Agreement. That means that this claim is not made out.

412. Mr Stewart submitted that an illegitimate threat can consist of a threat to pursue vexatious litigation: see *Global Asset Capital Inc v Aabar Block SARL* [2016] EWHC 298 (Comm) at [181]-[195] where Walker J was concerned with whether a proposed amendment to a pleading was sufficient to allege the ingredients of the tort of intimidation. The proposed amendment alleged that litigation had been threatened when the person threatening the proceedings had known the litigation to be groundless. Walker J held that that was a sufficient plea of unlawful conduct as the bringing of litigation in those circumstances would be an abuse of process (see at [181]-[182]). That was not disputed before him but I have no difficulty with it: it is well established that it is an abuse of process for a claimant to issue proceedings where he knows of no facts to support the claim, and it must be even more abusive to bring litigation which is actually known to be groundless. But that has no bearing on the present case: at all times from when litigation was first threatened CPC did have a bona fide belief that it was entitled to bring a claim (and in fact given my findings it did have a good claim). I consider below the slightly different question whether the litigation was being pursued for a collateral object, but I am satisfied that there is no question of CPC threatening litigation that it knew to be groundless.

*Extortion under colour of due process*

413. This tort is usually referred to as abuse of process: see *Clerk & Lindsell on Torts* (21st edn, 2014) §16-62. It has its origin in the case of *Grainger v Hill* (1838) 4 Bing NC 212. It is a rare tort – there appears to have been only one other reported case in which such an action has succeeded, *Gilding v Eyre* (1861) 10 CB (NS) 592 (see *Clerk & Lindsell* at §16-64) – but its continued existence as a tort (and as a distinct tort from that of malicious prosecution of civil proceedings) was recognised by the Privy Council in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance Ltd* [2014] UKPC 17.

414. The essence of the tort is the abuse of the process of law to effect an object not within the scope of the process, or a purpose not within the scope of the action (that is, a *"collateral"* or more helpfully an *"improper"* purpose): *Crawford v Sagicor* at [56],

[62] per Lord Wilson. See also per Lord Sumption (dissenting in the result but not on this aspect of the case) at [149]:

> "The essence of the tort is the abuse of civil proceedings for a predominant purpose other than that for which they were designed. This means for the purpose of obtaining some wholly extraneous benefit other than the relief sought and not reasonably flowing from or connected with the relief sought. The paradigm case is the use of the processes of the court as a tool of extortion, by putting pressure on the defendant to do something wholly unconnected with the relief, which he has no obligation to do."

415. As to what counts as a collateral or improper purpose, in *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478, Bridge LJ said at 503E-F:

> "In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance. On the other hand, if it can be shown that a litigant is pursuing an ulterior purpose unrelated to the subject matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process."

This was not actually said in the context of a claim in tort but in the context of an application to stay proceedings as an abuse of process, but at a high level of generality the same principles are applicable to the tort: see *Land Securities plc v Fladgate Fielder* [2009] EWCA Civ 1402 (which was a claim in tort) at [89] per Moore-Bick LJ:

> "It seems to me that whether the question is one of staying or striking out the proceedings themselves or of the existence of a cause of action, the claimant must be able to establish that the defendant's predominant purpose in bringing the proceedings is not to obtain the remedy that the law offers (disregarding for this purpose the use he may seek to make of that remedy once he has obtained it) but to achieve some other object that lies outside the range of remedies that the law grants. At the level of this principle I see no difficulty in assimilating the decisions on abuse of process as a tort with the decisions concerning staying or striking out the proceedings."

416. In *Crawford v Sagicor* Lord Wilson at [63] described as a *"helpful metaphor"* that of a stalking-horse suggested by Isaacs J in the High Court of Australia in *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35 at 91, where he referred to the proceedings:

> "being merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim"

Lord Wilson continued:

> "The metaphor aids resolution of the conundrum raised by the example of a claimant who intends that the result of the action will be the economic downfall of the defendant who may be a business rival or just an enemy. If the claimant's intention is that the result of victory in the action will be the defendant's downfall, then his purpose is not improper: for it is nothing other than to achieve victory in the action,

> with all such consequences as may flow from it. If, on the other hand, his intention is to secure the defendant's downfall—or some other disadvantage to the defendant or advantage to himself—by use of the proceedings otherwise than for the purpose for which they are designed, then his purpose is improper."

Lord Wilson then makes the point at [64] (referring to what Bridge LJ had said in *Goldsmith v Sperrings Ltd*) that:

> "But the settlement of an action is often reached on terms which, had it proceeded, the court could not have ordered; and not infrequently claimants reasonably initiate actions in the hope that some such settlement might eventuate."

417. Mr Stewart submitted that the tort was committed by the Defendants in issuing the four sets of court proceedings. He also submitted that the threats of litigation, and in particular the threats that bankruptcy proceedings would be commenced and prosecuted against Mr Holyoake, were tortious.

418. I will start with the four sets of proceedings. The first was the Commercial Court claim issued on 19 March 2012 (paragraph 290 above). That was at a stage when (i) Mr Holyoake had neither provided security over the Ibiza property nor repaid £22.74m by 28 February as envisaged by the Supplemental Loan Agreement, and the loan had therefore become due; (ii) CPC however had no other security for the loan (except for a charge over the Blue Valley shares, of little value in itself); and (iii) CPC had approached Investec to take over the Investec facility, but had been rebuffed. In those circumstances the only real courses of action open to CPC to recover the loan were either to sue Mr Holyoake or to negotiate an agreement with him which would be likely to lead to repayment. What CPC actually did was issue the proceedings and then negotiate with Mr Holyoake, which led to a number of successive proposals (the novation of the loan, the distribution in specie, the SPA) and ultimately the Escrow Deed (paragraphs 324-326 above). Each of these was designed to lead to CPC being repaid without having to take the proceedings to trial.

419. Mr Stewart submitted, and I accept, that CPC was not itself keen on litigation: Mr Dean said in his witness statement that when he took over (at the end of March 2012) CPC was very cautious about progressing the litigation, the overriding concern being that Mr Holyoake's other creditors would step in, that that would lead to a collapse of Mr Holyoake's property ventures, and that CPC as an unsecured creditor would lose its money; there were also concerns about how quickly judgment could be obtained, and how any judgment might be enforced. He later referred to the *"four corners"* strategy, a set of guiding principles that he had discussed with Mr Christian Candy as to how best to handle Mr Holyoake, the fourth of which was to try to avoid litigation. I accept therefore that CPC were reluctant to press their proceedings to trial.

420. Nevertheless it seems clear from the authorities I have referred to that it is not abusive for a claimant to issue proceedings in the hope of settling them on suitable terms, unless he is seeking *"some wholly extraneous benefit … not connected with the relief sought"*, *"pursuing an ulterior purpose unrelated to the subject-matter of the litigation"*, or bringing proceedings as a *"stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim"*. CPC's legal claim was brought to enforce the loan to Mr Holyoake and the relief sought was repayment of

the £17.74m. CPC's aim in persuading Mr Holyoake to agree to some mechanism by which the repayment could be achieved without a trial seems to me well within the ambit of that legal claim. It is a good deal closer to the subject-matter of the litigation than the (alleged) facts in *Land Securities v Fladgate Fielder*. There the defendant firm of solicitors had brought judicial review proceedings challenging the grant of planning permission to the claimant on one site on the basis of a novel resolution allowing the claimant "credit" for affordable housing, not because they had any interest in that development as such but because their offices were very close to a second development site belonging to the claimant which could benefit from the affordable housing resolution, the alleged aim being to persuade the claimant to assist the firm in relocating. The Court of Appeal upheld a decision granting summary judgment to the defendants, Etherton LJ (with whom Mummery LJ agreed) doing so among other grounds on the basis (at [73]) that the deputy judge:

> "was fully entitled to conclude that the interest of the defendants in relation to their property relocation was insufficiently collateral to the judicial review proceedings as to render those proceedings abusive."

421. CPC's second claim was issued in the Chancery Division on 20 November 2012 (paragraph 344 above). That was at a stage when Mr Holyoake had defaulted in paying the first instalment due under the Extension Agreement. Mr Dean said in an e-mail to him of 7 November that that was particularly concerning because the agreement was predicated on a repayment profile that he had supplied; and in another on 8 November that there came a point when repeated failure to follow through with contractual terms he had agreed to undermined any value in new agreements. But the issue of proceedings did lead to the negotiation and agreement of the Second Extension Agreement and JMA (paragraph 345 above), and I infer that CPC's purpose in issuing them was indeed to make it more likely that Mr Holyoake would agree to sign new terms which would be to CPC's benefit. The Second Extension Agreement and JMA were to CPC's benefit not only because the JMA obliged Mr Holyoake to try and sell the property and gave CPC the restriction and step-in rights, but also because there was a cost to Mr Holyoake in terms of an Extension Fee of £2m.

422. Do these benefits make the proceedings abusive as being pursued for some ulterior purpose unrelated to the subject-matter of the litigation? In my judgment they do not. Apart from the Extension Fee of £2m the other benefits were all designed to make it more likely that in due course CPC would receive repayment of the (balance of the) £17.74m, which is exactly what the proceedings were designed to do.

423. The £2m Extension Fee is different because CPC had no existing claim to the £2m and could not have recovered it in the proceedings. But I do not think it was unrelated to the subject-matter of the litigation or outside the ambit of the proceedings. The claim in the proceedings (which was in fact well-founded) was that Mr Holyoake's failure to pay the first instalment under the Extension Agreement meant that the whole sum was due. What Mr Holyoake wanted, and in the event secured by the Second Extension Agreement, was more time to sell GGH (or refinance). That was valuable to him because he wanted to sell GGH with the benefit of planning rather than as it stood without it. It was evident that if agreement could not be reached then

CPC would have a right to litigate and would do so, as they had no other way of recovering their loan. So whether CPC had issued proceedings or not, the reality is that Mr Holyoake would have had to decide whether the price being demanded by CPC for an extension was too high or not. That is no doubt an example of CPC exercising its commercial muscle. But the agreement that was in fact reached, being an agreement to extend time for repayment of the loan on terms, seems to me well within the ambit of the proceedings.

424. CPC's third claim was issued on 20 May 2013 (paragraph 353 above). The claim was issued against the background of a failure by Mr Holyoake to satisfy CPC that the buyer under the Sherbourne contract was a bona fide arm's length buyer, and once Mr Holyoake had confirmed (falsely) that the buyer was the Al-Rajhi group, the claim was discontinued. No doubt it is a fair inference that CPC brought the proceedings to flush this point out; but that in my judgment is plainly well within the ambit of the proceedings – it was all directed at repayment of the loan.

425. CPC's fourth claim was issued on 3 September 2013 (paragraph 359 above). That was against the background of Mr Holyoake failing to complete the sale of GGH and raising the possibility of claims under the CCA, and the telephone call of 22 August in which Mr Dean had told him he either had to agree to settle or cleanse those claims or there would be litigation (paragraphs 357-358 above) and it led to Mr Holyoake agreeing to settle the CCA claims at the Bulgari Hotel meeting and in due course entering into the Settlement Agreement and the Second Supplemental Extension Agreement (with a further Extension Fee). As before I find that all these matters were well within the ambit of the proceedings, and the proceedings were not issued with an ulterior motive unrelated to the subject-matter of the proceedings.

426. There were a number of other occasions in the history when litigation was threatened, starting with Wragges' letter of 2 February 2012 (paragraph 203 above). I will deal with the threat of bankruptcy proceedings separately, but so far as the threat of taking proceedings is concerned, I see no reason to take a different view of these threats than of the actual proceedings brought. Mr Lord disputes that the tort of abuse of process can be committed where proceedings are threatened but not in fact issued, but even on the assumption that it can, CPC's purpose in threatening them was in general terms to persuade Mr Holyoake to enter into agreements which would be more likely to lead to repayment of the monies due to it, and this purpose was within the ambit of the threatened proceedings.

427. That leaves the threat, also in Wragges' letter of 2 February 2012, to bring bankruptcy proceedings and advertise them. I have already given some consideration to the threat to advertise (paragraphs 207-214 above), and concluded that it is inappropriate for a creditor to broadcast the fact of serving a statutory demand for the purpose of putting pressure on a debtor, and that to do so is likely to lead to a petition being dismissed. The present question is a different one, which concerns the use or threat of bankruptcy proceedings to extract, or seek to extract, a collateral benefit.

428. Mr Stewart relied on a line of authority which establishes that for a creditor to extract, or seek to extract, a collateral benefit from his debtor by the use or threat of bankruptcy proceedings may constitute extortion (and may do so even if the collateral

benefit is trifling by comparison with the amount of the debt) and that a creditor who has engaged in such conduct will not be allowed to make use of bankruptcy proceedings: see *Re Shaw, ex parte Gill* (1901) 83 LT 754, *Re a Debtor (883 of 1927)* [1928] Ch 199, *Re a Judgment summons (No 25 of 1952), ex parte Henleys Ltd* [1953] 1 Ch 195, *In re Majory, a Debtor* [1955] Ch 600. In the last case Evershed MR, giving the judgment of the Court of Appeal, made it clear (at 623) that extortion did not have any special meaning in the law of bankruptcy, and continued:

> "(3) The so-called "rule" in bankruptcy is, in truth, no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused.
>
> (4) On the other hand, having regard to what Jenkins L.J. called "the potent instrument of oppression" which bankruptcy proceedings (with their potential consequences upon property and status) provide, the court will always look strictly at the conduct of a creditor using or threatening such proceedings; and if it concludes that the creditor has used or threatened the proceedings at all oppressively, for example, in order to obtain some payment or promise from the debtor or some other collateral advantage to himself properly attributable to the use of the threat, the court will not hesitate to declare the creditor's conduct extortionate and will not allow him to make use of the process which he has abused."

429. As this citation illustrates these cases are concerned with the question whether the conduct of the creditor will mean that the Court will not allow him to pursue bankruptcy proceedings (*"disqualified from invoking the powers of the court…will not allow him to make use of the process which he has abused."*). In *Re Shaw, Re a Debtor (883 of 1927)* and *In re Majory* itself, the question in each case was whether a receiving order should be made on the creditor's petition; and in *Re a Judgment Summons* the question was whether the same principle applied to a creditor applying for an order under s. 5 of the Debtors Act 1867.

430. Mr Lord submitted that this line of authorities was quite distinct from the authorities concerned with the tort of abuse of process. I accept this submission. In *Land Securities v Fladgate Fielder*, the claimants had sought to rely on *In re Majory* as an example of the same principle that underlies the *Grainger v Hill* line of authority on the tort of abuse of process. That was rejected by the Court of Appeal. Etherton LJ said at [45]:

> "Evershed MR did not refer to *Grainger v Hill* 4 Bing NC 212. His observation was expressly limited to abuse which would disqualify a party from invoking court proceedings. It said nothing about a cause of action in tort for abuse of process."

And at [67], having said that both *Grainger v Hill* and *Gilding v Eyre* concerned a blatant misuse of a particular process within existing proceedings, and that statements describing a broader application of the test of abuse of process were all obiter, he continued:

> "In particular, *In re Majory* [1955] Ch 60, which has been cited in support of a wider formulation, was not a claim in tort, but of opposition to a receiving order… There was no reference to *Grainger v Hill*, and Evershed MR referred only to the sanction of prohibiting the abuser from invoking the power of the court by the proceedings he had abused."

And Moore-Bick LJ said of *In re Majory* at [82]:

> "The case is of interest mainly because of the discussion of the meaning of "extortion" in the context of bankruptcy, but it is clear that the court was not concerned with a claim of the kind considered in *Grainger v Hill*. Rather, the question was whether the creditor should be prevented from pursuing the proceedings because they involved an abuse of the process. I agree, therefore, that it does not shed any light on the question that we have to decide in this case."

431. It seems to me to follow that the bankruptcy cases, although no doubt based on the same broad public policy that proceedings should not be abused, are not directly applicable to the tort of abuse of process. In particular the very narrow identification in such cases of what constitutes a collateral advantage is not in my judgment relevant to the tort, where the test of whether the proceedings are being abused in such a way as to be tortious remains that identified in *Crawford v Sagicor* of being used for some wholly extraneous benefit, pursuing an ulterior purpose unrelated to the subject-matter of the litigation, and a stalking-horse to coerce the defendant entirely outside the ambit of the legal claim. Mr Stewart relies on Wragges' letter as seeking, under the threat of bankruptcy proceedings, two collateral benefits in the shape of (i) costs which he said went beyond those properly claimable under the Loan Agreement and (ii) a minimum of £20m under the Declarations of Trust. So far as the second is concerned, Wragges were not demanding payment of the £20m but reserving CPC's rights to it (paragraph 206 above) and I do not think it is a relevant collateral benefit at all; so far as the first is concerned, I do not propose to consider whether the claim for costs was justified or not – it was not in my judgment unrelated to the subject-matter of the litigation, or entirely outside the ambit of the legal claim. I therefore find that no tort was committed.

*Unlawful interference with economic interests*

432. The leading case which considers this tort is the decision of the House of Lords in *OBG Ltd v Allan* [2007] UKHL 1 (where it is referred to as "causing loss by unlawful means"). This decision covers a large number of different points on which their Lordships were not all agreed but for present purposes I can take the law from a convenient summary by the Court of Appeal in *Emerald Supplies Ltd v British Airways plc* [2015] EWCA Civ 1024 at [124]-[130] (where the tort is referred to as "interfering with business by unlawful means") as follows:

(1) In *OBG* Lord Hoffmann described the essence of the tort as:

> "(a) a wrongful interference with the actions of a third party in which the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant".

(at [124]).

(2) Their Lordships did not agree about what constitutes unlawful means for the purposes of this tort but the majority approved the analysis of Lord Hoffmann, who considered that the unlawful means must be actionable by the third party, or at least that they would be actionable if the third party had suffered loss as a consequence (at [126]).

(3) The tort as defined by Lord Hoffmann involves three parties (at [127]).

(4) Apart from the narrow formulation of unlawful means, there are two other limitations on the scope of this tort. First, Lord Hoffmann emphasised that in order to constitute relevant unlawful means, the unlawful means must affect the freedom of the third party to deal with the claimant. If that freedom remains, the tort is not committed even though the defendant acts unlawfully and thereby makes a profit at the expense of the claimant who therefore suffers damage (at [128]).

(5) The final limitation on the scope of the tort arises from the fact that the defendant must intend to injure the claimant.

433. The claim as advanced by Mr Stewart under this head is that the actions of the Defendants constituted wrongful interference in the activities of both Mr Holyoake and Hotblack; and that *"If it is right that the tort arises from wrongful interference in a third party with intention to harm the claimant"* then the Defendants' wrongful acts directed against Mr Holyoake harmed (and were intended to harm) Hotblack and hence are actionable by Hotblack; while their wrongful acts directed against Hotblack harmed (and were intended to harm) Mr Holyoake and hence are actionable by him.

434. Despite the conditional way in which this submission is expressed, it seems to me to follow from the way the Court of Appeal described the tort in *Emerald Supplies* that the tort does indeed require three parties. In simple terms the tort is made out where A uses unlawful means against B with the intention of causing loss to C, and enables C to sue A for the loss thereby caused to C. Thus the classic cases which exemplify the tort are where A uses unlawful acts to dissuade B from dealing with C: see the cases referred to by Lord Hoffmann in *OBG* at [6] of *Garret v Taylor* (1620) Cro Jac 567 (driving away customers of a quarry by unlawful threats) and *Tarleton v M'Gawley* (1794) Peake 270 (using cannon to drive away a canoe from approaching a rival trader's ship).

435. Mr Lord had a number of submissions in answer to this claim. One was that the wrongful acts relied on (which were the same threats, intimidation and coercion of Mr Holyoake which were relied on as constituting the tort of intimidation, together with the same extortion under colour of due process which was relied on as constituting the tort of abuse of process) were all said to have been directed against Mr Holyoake rather than Hotblack, so that Mr Holyoake cannot in any event have any claim for this tort. That seems to me to be right: Mr Holyoake is in the position of B, not C. The effective question therefore is whether Hotblack can bring a claim for unlawful acts committed against Mr Holyoake.

436. Mr Lord's primary submission however was there were no relevant unlawful acts. I accept this submission. The unlawful acts relied on by Mr Stewart are those that I have already considered for the purposes of the claims in intimidation and abuse of process, and for the reasons already given, I have found that none of these claims is made out; if they are not made out for the purpose of the two-party torts, I do not see on the facts of this case how they could establish the three-party tort of causing loss by unlawful means. As Lord Hoffmann explained in *OBG* at [49], there are cases, such as where A dissuades B from dealing with C by unlawful acts, where B suffers no loss but C does, so the fact that B has no claim does not prevent C having one. But the present does not seem to me a case like that: the effective question is whether Mr Holyoake was coerced by unlawful threats or intimidation or abuse of process, and if (as I have found) he was not, then Hotblack cannot have a claim either.

437. That makes it unnecessary to consider a further submission by Mr Lord that since Hotblack was effectively under the control of Mr Holyoake (and to all intents and purposes his alter ego) it makes no sense to say that anything done by the Defendants interfered with his and Hotblack's liberty to deal with each other, it being essential that the unlawful means *"must affect the freedom of [B] to deal with [C]"*: see paragraph 432(4) above. In those circumstances Mr Lord submitted that Mr Holyoake and Hotblack were not third parties in respect of each other for the purposes of this tort, but co-claimants, and that it would be a nonsense for the tort to be available to them in this way. That raises quite a difficult issue, and I am not sure it is right. One of the features of this case is that the Claimants alleged a number of wrongs directed against Mr Holyoake, but wished to claim damages for Hotblack's loss of profits, which on the face of it was a loss suffered by Hotblack, and I suspect that one of the reasons for introducing this tort into the pleadings was an attempt to overcome that potential difficulty. Had the facts been made out, I think there is much to be said for the view that Hotblack would indeed have had a claim on this basis. As it is, the point does not arise and I do not propose to resolve the issue.

*Unlawful means conspiracy*

438. I have referred to the conspiracy claim above (paragraphs 266-287). As there set out, the elements of the tort are: (i) a combination; (ii) to use unlawful means; (iii) with the intention of injuring the claimant by the use of those unlawful means; and (iv) the use of the unlawful means must cause a claimant to suffer loss or damage as a result: see eg *Digicel (St Lucia) Ltd v Cable & Wireless plc* [2010] EWHC 774 (Ch) per Morgan J at Appx I [2].

439. As also there set out the pleaded case is that the conspiracy had two purposes (1) to obtain by unlawful means GGH (or all or part of the benefit of it and the redevelopment opportunity it represented) for the benefit of CPC or the Defendants, or (2) to obtain substantial sums of money by unlawful means from the Claimants. I have already considered whether any conspiracy to acquire GGH by unlawful means came into existence at any time up to March 2012 and concluded that it did not (paragraph 287 above).

440. The next question is whether any such conspiracy came into existence in the remainder of the period up to the repayment of the loan. Again I conclude that it did

not. CPC's aim in entering into the successive agreements with Mr Holyoake was not to take over GGH for its own benefit but to recover the loan and all other sums due to it. The escrow agreements were designed to enable Mr Holyoake to refinance so as to be able to repay CPC; the extension agreements and JMAs were designed to ensure that GGH be sold (either by Mr Holyoake, or if he failed to do so by CPC) again to ensure repayment of CPC. There is nothing in this long series of agreements which suggests that the Defendants' agenda was to take the benefit of GGH for itself.

441. The other limb of the alleged conspiracy is that of obtaining substantial sums of money from the Claimants by unlawful means. Again I find that no such conspiracy came into existence at the outset of the loan in October 2011: the Defendants did negotiate the terms of the loan with the aim of getting generous returns, but I do not accept that they used, or agreed or combined to use, unlawful means to do so. Thereafter their efforts were directed at securing the sums due under the terms of the Loan Agreement. Although Mr Christian Candy suggested *"Bad Boy penalties"* as early as 12 March 2012, in fact no extra sums were demanded from Mr Holyoake until the Extension Fees which were first charged on 26 October 2012 (paragraph 343 above).

442. I accept that from then onwards Mr Christian Candy was keen for Extension Fees to be charged, and that Mr Dean implemented this, and that this is sufficient to amount to a combination between at any rate those two (and CPC itself, as I accept that a company can conspire with its directors: see *Belmont Finance Corp v Williams Furniture Ltd* [1979] Ch 250); it is not so clear that the other defendants had anything to do with this. Their intention was no doubt to benefit CPC, but it was to benefit CPC at the expense of Mr Holyoake and I will assume, without deciding, that this is sufficient to satisfy the requirement that their intention was to injure Mr Holyoake: compare the discussion in *OBG* of the similar mental element in the tort of causing loss by unlawful means (namely an intention to cause loss to the claimant) at [62]-[63] per Lord Hoffmann and at [167] per Lord Nicholls, particularly the latter's reference to the case where *"loss to the claimant is the obverse side of the coin from gain to the defendant"*. And the payment of substantial Extension Fees undoubtedly did cause Mr Holyoake loss.

443. That means that the critical question is whether they intended to use unlawful means to obtain the Extension Fees. I do not see that they did. I have not found any unlawful threats to have been made in the relevant period: the effective threat, deployed for example by Mr Dean on his telephone call of 22 August 2013 and at the Bulgari Hotel meeting on 6 September 2013, was to refuse any further time and enforce the existing agreement by litigation, which would be ruinous for Mr Holyoake, but which I have found not to be an unlawful threat. And I have also found that the Defendants did not commit the tort of abuse of process. CPC was not obliged to give Mr Holyoake any further time at all. Leaving aside for the moment the impact of the CCA, it could stipulate for whatever terms it wanted as the price of granting a further extension: as I have already said, that was no doubt an example of CPC using its commercial muscle, but I do not see that it was unlawful. In my judgment therefore this second conspiracy claim is not made out either.

444. That makes it unnecessary to consider the other questions argued in relation to this

tort. Mr Lord said that the conspiracy claim (in particular the combination of the Defendants, and the intention to injure Mr Holyoake) had not been properly put to the witnesses, but I do not propose to examine the evidence in detail on this point.

445. Mr Lord also said that many of the unlawful means relied on in support of the conspiracy were not capable in law of supporting it. A large number of these were relied on by Mr Stewart, most of which I have already considered. Taking them very briefly:

(1) Fraudulent misrepresentation. There was no agreement for Mr Williams to tell lies on 12 October 2011 and he did not do so. There was an agreement, at least between Mr Nicholas and Mr Christian Candy, that Mr Christian Candy should lie to Mr Holyoake on 8 November 2011, and he did so, but this was not designed to acquire GGH for CPC (or to extract money from Mr Holyoake); in any event he was not misled and these lies did not cause him (or Hotblack) any loss.

(2) Duress and actual undue influence. Mr Lord disputed that duress and actual undue influence could constitute unlawful means for the tort of conspiracy: he submitted that they were factors vitiating contractual consent not unlawful acts in themselves. I have considerable doubts about this submission but need not consider the question as I have found that there was no duress or actual undue influence in any event.

(3) Intimidation and unlawful interference with economic interests: Mr Lord submitted that as these torts themselves require the foundation of independently unlawful acts, there is no reason for them to be relied on for the purposes of unlawful means conspiracy as the underlying acts could themselves be relied on. Again I do not propose to discuss this point, as I have found that there was no intimidation or unlawful interference.

(4) Extortion under colour of due process (or abuse of civil process). I have found that this tort was not committed.

(5) Blackmail. I consider this below.

(6) "Extortion *simpliciter*". This is pleaded but was hardly explained. Mr Lord denies that there is any crime or civil wrong of extortion known to English law. Mr Stewart's written opening refers to it as a crime, and it certainly does not appear to be a tort ("extortion" does not appear in the index to *Clerk & Lindsell*, save in the context of extortion under colour of process (at §16-63)); but I was referred to no authority or textbook in support of the proposition that there is today such a crime. It appears that there was a crime at common law of extortion by colour of office or franchise, but this would be unlikely to apply to CPC and in any event it was abolished by s. 32(1)(a) of the Theft Act 1968. I propose to say no more about it.

(7) Unlawful processing of data contrary to the DPA and/or misuse of private information. I deal with these claims below, but in essence they refer to two

incidents: the approach to Investec between 9 and 12 March 2012, and the instruction of Mr Knuckey to carry out criminal record checks. As to the first, if CPC said anything to Investec about the loan to Mr Holyoake at all (see paragraphs 260-261 above) it was not significant and caused Mr Holyoake and Hotblack no loss; as to the second, what Mr Knuckey found out was that Mr Holyoake had no relevant convictions and it is again impossible to see that that caused him or Hotblack any loss at all.

446. The one alleged unlawful means about which I should say a bit more is blackmail. Blackmail is a crime (under s. 21 of the Theft Act 1968), and it is established that a crime may be relied on as unlawful means for the purposes of the tort of conspiracy: *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19. By s. 21 of the Theft Act, a person is guilty of blackmail if, with a view to gain for himself or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief (a) that he has reasonable grounds for making the demand and (b) that the use of the menaces is a proper means of reinforcing the demand. Mr Lord submitted that the allegation of blackmail was hopelessly unparticularised and should not be entertained; that there were no menaces sufficient to ground a charge of blackmail; and that in any event the Defendants had a sincere belief that the demands they made were warranted.

447. Mr Stewart in fact simply relied on the same threats and intimidation as were relied on in support of the claims in duress, actual undue influence and intimidation. He pointed out that blackmail does not require the threat to have been to do anything unlawful, as is shown by the example of the ordinary blackmailer who threatens to report his victim to the police unless he is paid off. I was not however addressed on what counts as "menaces" for the crime of blackmail, or whether it includes every threat. "Menaces" is no doubt an ordinary English word and in ordinary use it has overtones of something more sinister than a simple threat – for a creditor to tell a debtor that unless he agree to X the creditor will sue him is undoubtedly a threat but I rather doubt it would be ordinarily be regarded as menacing, even if the litigation were likely to be ruinous.

448. Be that as it may, in circumstances where I have rejected the claims in duress, actual undue influence and intimidation, it would I think be surprising if the same matters as were relied on amounted to blackmail, not least, as Mr Lord submitted, because the effect of the definition in s. 21 of the Theft Act is that whether a demand is unwarranted depends on the subjective belief of the person making the demand: *R v Harvey* (1980) 72 Cr App R 139. So for example, I have concluded that it was inappropriate for Wragges to threaten to advertise a statutory demand (paragraph 214 above). Even if however that were to be correctly characterised as "menaces", the Defendants would not be guilty of blackmail if they believed that they had reasonable grounds for making the demands in the letter, and that the threat to advertise was proper (which I have found that they did believe (paragraph 215 above)); and in criminal proceedings the onus would be on the prosecution to negative this if the issue were raised. In those circumstances I accept Mr Lord's submission that the allegation of blackmail is insufficiently particularised. Blackmail is a serious criminal offence – it carries a maximum term of 14 years' imprisonment – and if the Defendants are to

be accused of conspiring to commit it, I think it incumbent on the Claimants not only to identify each threat which is said to have constituted menaces, but to establish, in respect of that threat, that the Defendants agreed to it being made to reinforce a demand either without a belief that the demand was justified, or without a belief that the threat was a proper means of reinforcing the demand. That has not been done, and I do not think I can properly find that the Defendants agreed to commit blackmail.

449. Again to take an example, I have found that at the meeting in Guernsey on 6 April, Mr Christian Candy probably did tell Mr Holyoake that if he did not do what CPC wanted CPC would ring up all the banks who had lent to him and tell them that they intended to bankrupt him (paragraph 224(3) above). That was a threat, and may or may not have amounted to "menaces", but no attempt was made to establish that Mr Candy either did not believe that he had reasonable grounds for making the demands, or that he did not believe that the threat was proper. But if that was to be relied on as constituting blackmail, that was in my judgment what was required. (That is quite apart from the fact that I have found that the effective cause of Mr Holyoake entering into the Supplemental Loan Agreement was the threat of litigation which was not unlawful).

450. I conclude that the tort of conspiracy by unlawful means has not been established.

*Unlawful processing contrary to the DPA and misuse of private information*

451. These claims relate to two separate matters. The first is the approach by CPC to Investec between about 9 and 12 March 2012. The second is the instruction to Mr Knuckey to find out if Mr Holyoake (and Mr Wells although he is not a claimant) had any relevant criminal convictions.

452. As to the first, I have found that although the evidence does not really establish that Mr Candy said anything about CPC's loan to Investec, Mr Lord accepted that he did tell them about it (paragraph 261 above). This is said to have been unlawful data processing contrary to the DPA, specifically a breach of the duty in s. 4(4) of the DPA on a data controller to comply with the data protection principles.

453. The relevant provisions of the DPA are as follows:

(1) s. 4(4) imposes the relevant duty as follows:

> "Subject to section 27(1) it shall be the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller."

(2) That introduces a number of defined terms. The starting point is the definition of "data" itself, which is defined in s. 1(1) as follows:

> "*"data"* means information which—
>
> (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,

(b) is recorded with the intention that it should be processed by means of such equipment,

(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,

(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

(e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d);"

(3) Other relevant definitions in s. 1(1) are as follows:

*"data controller"* means , subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;

...

*"data subject"* means an individual who is the subject of personal data;

*"personal data"* means data which relate to a living individual who can be identified—

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

*"processing"*, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

(a) organisation, adaptation or alteration of the information or data,

(b) retrieval, consultation or use of the information or data,

(c) disclosure of the information or data by transmission, dissemination or otherwise making available, or

(d) alignment, combination, blocking, erasure or destruction of the information or data;

...

*"relevant filing system"* means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions

> given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible."

(4) The duty in s. 4(4) is to comply with the data protection principles. By s. 4(1) these are the principles set out in Part 1 of sch 1. The first principle, set out in para 1 of sch 1 is as follows:

> "Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—
>
> (a) at least one of the conditions in Schedule 2 is met…"

(5) Sch 2 sets out a number of conditions, one of which, at para 6(1), is as follows:

> "The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

454. It is now possible to apply these provisions to the facts. What Mr Candy disclosed to Investec was that CPC had made a loan to Mr Holyoake. If that information was *"data"*, there is no doubt it was *"personal data"* because it related to a living individual who was identifiable from the data; and there is no doubt that disclosing it to Investec was *"processing"* it, because this expressly includes disclosure of the data. The questions are (i) whether the information was *"data"* at all; (ii) whether the Defendants were *"data controllers"*; and (iii) whether the condition in para 6(1) of sch 2 was satisfied, that is whether the processing was necessary for the purposes of legitimate interests pursued by the data controller.

455. Mr Lord submitted that all that was disclosed was that Mr Holyoake had entered into a loan with CPC and there was no explanation as to why that was personal data. As I have said, there is no doubt that if that information was data, it was personal data, but I agree that the Claimants have not explained on what basis it was *"data"*. Mr Stewart simply submitted that the information was data, but without explaining how that fitted with the elaborate definition in s. 1(1). I received I think no submissions at all on this aspect of the case, but it is apparent from that definition that not all information held by one person about another is personal data, but only information that falls within one of the five sub-paragraphs (a) to (e). Of these (d) can be ignored (accessible record being defined by s. 68 in terms that plainly do not apply to CPC as it refers to health, educational, housing and social security records), as can (e), as CPC is not a public authority. Of the others I have not entirely understood what the precise scope of (a) and (b) is intended to be, but (a) would seem to be effective to catch computerised records of all sorts, as *"processing"* information expressly includes *"holding"* it, so a computerised record seems to me to be information which is being held, and hence which is being processed, by means of equipment operating automatically. I am not entirely clear what the precise purpose and effect of the

remaining words is, but if a computerised record is created, that would I think be an example of information being processed by the computer in response to instructions given to it for that purpose; (b) would then include manual records of information which was intended to be entered into a computer, and (c) manual records but only if they constituted a *"relevant filing system"* which requires that the information be structured in such a way that specific information in relation to a particular individual is readily accessible.

456. No attempt was I think made to explore in evidence what records CPC kept of the loan to Mr Holyoake or in what form. But there must have been some record somewhere, and I am prepared to assume that information about the loan would either have been recorded in a computerised record or in a manual record structured in such a way as to enable CPC and its directors to retrieve information about Mr Holyoake specifically. If nothing else, CPC no doubt had a copy of the Loan Agreement, which would have been either stored on a computer or in hard copy, and if the latter in such a way as to enable CPC to find it. It seems to me therefore that CPC must have held information about the loan to Mr Holyoake that was recorded in such a way as to be *"data"* and hence *"personal data"*.

457. What I have found much less straightforward is whether that means that CPC were processing that information when Mr Candy disclosed the existence of the loan to Mr Holyoake. By 12 March 2012 Mr Candy cannot have needed to look at CPC's records (computerised or manual) to discover that CPC had made a loan to Mr Holyoake: that was something that he was by then very well aware of as he was living with it every day. There is no doubt that disclosing data is processing it, and that data includes the information held in a relevant record, and in a straightforward case a person who looks something up on a computer, or in a manual filing system, obtains information from the record, and then discloses it, is processing that data. (There is in fact a provision in s. 1(2)(b) which provides that disclosing personal data includes disclosing the information contained in the data, although I have not understood why this is necessary or what it adds as data is itself defined as information, not as the record in which it is held). But Mr Candy did not do this: what he did is disclose information which was in fact the same information as was recorded in CPC's records but without taking the information from the record. That raises what, to my mind at any rate, is not a simple question which is whether he thereby disclosed the information in the record.

458. I have come to the conclusion that he did not. What in my judgment he disclosed was the information in his head, not the information in CPC's records, and the fact that the same information could in fact be found in CPC's records does not mean that what he was disclosing was *that* information. I should say that I can see arguments to the contrary and in the absence of any submissions, I am far from confident that I have reached the right conclusion; but I have to decide the point, and it seems to me that the purpose of the Act is to regulate what a data controller does with information stored in a relevant record, and it does not seem consonant with that for the Act also to regulate what a person does with information in his own head that has not been derived from the records.

459. In those circumstances I conclude that there was no breach of s. 4(4) of the DPA.

That makes it unnecessary to decide the other issues. I will however briefly say that if I am wrong (i) Mr Candy, as well as CPC, was in my view a *"data controller"* as he in practice was the person who decided whether to tell Investec about the loan and so was *"a person who … determines the purposes for which and the manner in which any personal data are, or are to be, processed"*; but (ii) the disclosure would have fallen within para 6(1) of sch 2 as being necessary for the purposes of legitimate interests pursued by the data controller: see paragraph 261 above where I concluded that if Mr Candy had disclosed the existence of the loan to Investec it could only have been because he thought he needed to do this to explain why CPC wanted to take over Investec's position, and that this would not have been in breach of the Loan Agreement. I also accept Mr Lord's submission that Mr Holyoake was not in fact prejudiced in any way by the disclosure: Investec were not interested in selling their position to CPC. I accept that damages for contravention of the Act are not limited to damages for pecuniary loss and can be awarded for distress: see *Vidal-Hall v Google Inc* [2015] EWCA Civ 311 where the Court of Appeal held that s. 13(2), which confines damages for distress to certain specific situations, should be disapplied on the grounds that it conflicted with rights granted by the Charter of Fundamental Rights of the European Union. But I would have taken some persuading that Mr Holyoake in fact suffered any distress requiring compensation: he was in fact very shortly afterwards buoyed up by the fact that Investec had supported him, describing it in oral evidence as having given him a spring in his step and a feeling of confidence.

460. Mr Stewart also relied on this as constituting the misuse of Mr Holyoake's private information. Since I have held that CPC was entitled to disclose the fact of the loan under the terms of the Loan Agreement in protection of their own interests, this does not seem to me to be made out.

461. The other matter in respect of which claims under the DPA are advanced is the instructions given by CPC to Mr Knuckey to find out if Mr Holyoake had any criminal convictions.

462. Two separate points are taken. One is based on the allegation that Mr Knuckey unlawfully accessed the PNC. For these purposes, the relevant data is the information recorded in the PNC and the relevant data controller is the police authority with responsibility for the records held on the PNC. Mr Knuckey is said to have committed an offence under s. 55 of the DPA (which makes it an offence for a person knowingly or recklessly to obtain or disclose personal data without the consent of the data controller) and the Defendants to have been guilty both of offences under s. 44 or s. 45 of the Serious Crime Act 2007 (which make it offences to encourage or assist someone else to commit an offence), and of s. 55 of the DPA themselves (on the basis that they had knowingly or recklessly obtained data without the consent of the relevant police authority, and disclosed it to each other). This claim fails because I have held that it is not open to the Defendants in this action to go behind the decision of Warby J that Mr Knuckey did not unlawfully access the PNC, and that even if it were, the allegation is not established (paragraphs 299-300 above). I proceed on the basis that Mr Knuckey obtained the information properly from some publicly available source, although no attempt was made to explain to me what that might be.

463. The other point that is taken is a further alleged breach by the Defendants of s. 4(4). This is based on the Defendants themselves being data controllers. Again this claim was not analysed in any detail before me, but the pleaded case proceeds on the basis that the information which Mr Knuckey obtained and disclosed to Mr Smith and which he then passed on to the other Defendants was Mr Holyoake's personal data. That was the information that he had no unspent criminal convictions: that was clearly recorded somewhere, and I accept that that information was therefore his personal data. It is then said that in obtaining that information, the Defendants were engaged in processing the data, *"processing"* being expressly defined to include *"obtaining"* data or information; and that by receiving and sharing the data they became data controllers.

464. I will assume this is right, although I have not quite understood if it is said that they became data controllers because they received information which formed part of a record held by someone else, or if the e-mails themselves are said to have been a new record held by CPC. Mr Lord relies again on para 6(1) of sch 2, submitting that CPC had a legitimate interest in knowing if Mr Holyoake (or indeed Mr Wells) had a criminal record as that information could obviously have been material to the approach taken to the recovery of the loan. I accept this submission, and it is not clear to me whether the claim for breach of s. 4(4) was dependent on the allegation that Mr Knuckey had accessed the PNC unlawfully (in which case the data would not have been obtained fairly and lawfully) or whether it was intended to be independent of that allegation. If the latter, then on the assumption that Mr Knuckey obtained the information properly from some public source, I do not see anything unfair or unlawful (or prejudicial to the rights and freedoms or legitimate interests of Mr Holyoake for the purposes of the exception to para 6(1) of sch 2) in CPC discovering that Mr Holyoake had no unspent convictions. Nor can this have caused him any damage, and it is difficult to see that it could have caused him any distress at the time when he did not know about it. Now that he does know about it, it is no doubt galling to discover that the Defendants thought he might have spent time in prison and wanted to find out if he had, but the discovery by Mr Smith that he had not, and his sharing that with the other Defendants, does not seem to me to be something that can itself have caused distress.

465. Mr Stewart again relied on this as constituting the misuse of private information. On the basis that Mr Knuckey must have obtained the information properly from some public source, there is no privacy in the information and this claim is also not established.

*Penalties*

466. The next claim pleaded is that certain provisions of the agreements were penalties. These were (i) cl 8.3 of the Loan Agreement providing for payment of the Redemption Amount on early repayment of the loan; (ii) the Extension Fees; and (iii) the provision for payment of interest (called the Double Interest Charge in the Particulars of Claim).

467. The law on penalties was comprehensively reviewed and restated by the Supreme Court in *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67. There are three

substantive judgments dealing with the general law on penalties, one by Lords Neuberger and Sumption (with whom Lord Carnwath agreed), a second by Lord Mance, and a third by Lord Hodge. Lord Toulson (who dissented in the result on one of the appeals) agreed with Lords Mance and Hodge on the general principles. Lord Clarke agreed with each of the three substantive judgments. On the principles relevant to the present case I do not detect any difference of substance between the three main judgments, but I have referred to each of them below. The relevant principles are as follows:

(1) In English law the doctrine of penalties applies only to contractual provisions operating on a breach of contract; the penalty rule regulates only the remedies available for breach of a party's primary obligations, not the primary obligations themselves: per Lords Neuberger and Sumption at [12]-[13], Lord Mance at [129], Lord Hodge at [241].

(2) The question whether a contractual provision is within the scope of the penalty rule depends on the substance of the term and not its form: per Lords Neuberger and Sumption at [15]. If the substance of the contractual arrangement is the imposition of punishment for breach of contract, the concept of a disguised penalty may enable a court to intervene: per Lord Hodge at [258].

(3) Nevertheless the Court recognised that the fact that the rule is limited to provisions operating on breach means that in some cases the application of the rule may depend on how the relevant obligation is framed in the instrument. The application of the penalty rule can thus turn on questions of drafting, or somewhat formal distinctions (per Lords Neuberger and Sumption at [14] and [43]); clever drafting may create apparent incongruities in some cases (per Lord Mance at [130]); the rule can be circumvented by careful drafting (per Lord Hodge at [258]).

(4) Where the rule applies, the test for whether a contractual provision is a penalty is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation (per Lords Neuberger and Sumption at [32]); what is necessary in each case is to consider first whether (and if so what) legitimate business interest is served and protected by the clause, and second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable (per Lord Mance at [152]); the correct test is whether the sum or remedy stipulated as a consequence of breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract (per Lord Hodge at [255]).

468. The first pleaded claim is that cl 8.3 of the Loan Agreement is a penalty in that it imposed a requirement to pay the Redemption Amount on early payment of the loan. The Redemption Amount was the whole interest that would have accrued by the end of the two year period. That was the sum of £5.74m (which added to the £12m loan

made up the £17.74m). As set out above (paragraph 132(5)) cl 8.3 simply provided that Mr Holyoake should pay the Redemption Amount at the same time as making payment under cl 8.2; and cl 8.2 gave Mr Holyoake an option to repay the Loan at any time (with an obligation on him to repay early on a sale before the end of the 2 year period). The short answer to this contention is that cl 8.3 is not a provision expressed to operate on breach. It is expressed to operate on repayment of the loan early. In effect the terms on which the loan was made were that if Mr Holyoake borrowed £12m, he would repay £17.74m, whether he repaid at the end of 2 years or chose to repay it earlier. In my judgment cl 8.3 was part of the primary obligations, both as a matter of form and as a matter of substance. It was not an imposition of a punishment for breach of contract. It is therefore not within the scope of the penalty rule.

469. There is a longer answer. This is that the £5.74m was not in the event paid under cl 8.3 at all. In terms cl 8.3 applied if the loan was repaid early. In December 2011 Mr Holyoake did indeed say that he intended to repay the loan early (paragraph 191 above) but he did not in fact do so. What happened instead is that he signed the Supplemental Loan Agreement on 10 February 2012 which, among other things, amended cl 11.1 to make it clear that in the event of a default the Redemption Amount became payable, something which was not clear before (paragraph 219(2) above). When Mr Holyoake defaulted in complying with the Supplemental Loan Agreement, the effect was that the £17.74m became payable under cl 11.1 as amended. That provision was indeed a provision which operated on breach, and so was within the scope of the penalty rule, but there are I think nevertheless three reasons why that does not entitle Mr Holyoake to relief.

470. First that is not the claim that is pleaded or that has been argued.

471. Second, in any event I think it clear that CPC had a legitimate interest in securing that the £17.74m should be payable in the event of a default, and that the express provision to that effect in cl 11.1 was not extravagant, exorbitant or unconscionable. Whatever might have been the position if cl 11.1 stood on its own and the Redemption Amount were payable only on a default (as to which see *The Angelic Star* [1988] 1 Ll Rep 122), here the agreed terms of the loan were such that if Mr Holyoake complied with his obligations, CPC would be bound to receive back the sum of £17.74m at some time – either at the end of 2 years or earlier. I see nothing extravagant in CPC stipulating that if he defaulted and the loan became due, CPC should be entitled to the same sum of £17.74m that would otherwise have been due from him; it would be surprising if by defaulting on his obligations, he could be liable for a lesser sum than if he simply wished to repay early. In my judgment therefore the express provision in cl 11.1 as amended by the Supplemental Loan Agreement that in the event of default he became liable to pay the Redemption Amount was not a penalty.

472. Third, Mr Holyoake did not in fact in the end repay the £17.74m under cl 11.1 of the Supplemental Loan Agreement. Instead he agreed in the Escrow Deed of 14 June 2012 that if he did not repay the debt and did not complete the SPA a new debt of £17.74m would arise (paragraph 328(4) above). On the face of it that was a new obligation, and since under the terms of the Escrow Deed he was not obliged either to complete the refinancing and repay the debt, or to complete the SPA, this new

obligation was itself not one that operated on breach, but on failure of a condition. That may be an example of clever drafting, but it seems to me that the effect is that Mr Holyoake agreed to pay the £17.74m not as a penalty for breach of contract but as a consequence of neither refinancing nor completing the SPA, and that that obligation was therefore not within the penalty rule. The debt was thereafter restated regularly, but if I am right that Mr Holyoake agreed to pay the £17.74m in the Escrow Deed in circumstances that it was not a penalty, nothing that thereafter happened made it one.

473. The next set of provisions that are said to be penalties are those charging the Extension Fees. The first Extension Fees were charged under the Extension Agreement of 26 October 2012 (paragraph 343 above). Under this agreement, two Extension Fees of £1.8m and £1.7m were payable, with provision for them to be credited against the debt if paid on time. In the event £1m of the first Extension Fee was not paid and was added to the debt (paragraph 344 above). The remaining Extension Fees were payable under successive agreements as follows: the Second Extension Agreement of 23 November 2012 (£2m), the Second Supplemental Extension Agreement of 15 October 2013 (£2m), the Fourth Supplemental Extension Agreement of 20 December 2013 (£1m) and the Final Supplemental Extension Agreement of 15 January 2014 (£1.5m) (paragraphs 345, 370, 375 and 376 above). These took the simpler form of being charged in any event. The total Extension Fees charged were thus £7.5m.

474. I will start with the latter four agreements, taking as an example the Second Extension Agreement. Here the position seems to me very simple. Mr Holyoake was in default under the previous agreement (the Extension Agreement) with the result that in accordance with its terms the whole debt had become due and indeed CPC had issued proceedings for it (paragraph 344 above). CPC agreed instead to give him more time for repaying in return for the Extension Fee of £2m. That is as I have already said the price that CPC demanded for the extension (paragraph 423 above). Mr Holyoake agreed to that price because he needed the extension. He therefore entered into the Second Extension Agreement under which payment of the Extension Fee was a primary obligation, payable in any event, not simply on default. As a matter of form therefore this provision did not operate on breach and did not engage the penalty rule. Nor in my judgment did it do so in substance either. It is true that the occasion which gave rise to the charging of the Extension Fee was the fact that Mr Holyoake was in breach of the previous agreement (the Extension Agreement), and in this loose sense the £2m can be regarded as the charge payable by him for his default – indeed it can be regarded as an example of the *"Bad Boy penalties"* Mr Christian Candy had referred to (paragraph 280 above). If the Extension Agreement itself had provided that on any breach a fee of £2m would be payable, the penalty rule would no doubt have been engaged. But it did not, and the £2m was not payable under the terms of the Extension Agreement: Mr Holyoake was not on 22 November 2012 under any obligation to pay it at all. What made it payable was not a provision of the Extension Agreement but Mr Holyoake's entry into the Second Extension Agreement under which he received an extension of time. That illustrates that in a real and substantive, and not just a formal, sense, this was a payment in return for consideration rather than a payment due under an obligation arising on breach. If that is so, the penalty rule is not engaged and the question of whether the price was an extravagant or exorbitant one does not arise. The penalty rule is not available to regulate the price payable

under a contract, only the obligations arising on default.

475. The same analysis applies to the three successive Extension Agreements.

476. That leaves the Extension Fees charged under the Extension Agreement of 26 October 2012. This is slightly different because here the Extension Agreement itself provides that if paid on time the Extension Fees are credited against the debt, as follows (cl 3.2):

> "In return for the extension of time granted in clause 3.1, MH shall pay to CPC an extension fee of £3,500,000 (the ***Extension Fee***), payable in two instalments of £1,800,000 and £1,700,000 respectively, the first instalment of which shall be payable by no later than 5.00 pm on 1st November 2012 and the second instalment of which shall be payable by no later than 5.00 pm on 30th November 2012, provided that if the relevant instalment of the Extension Fee is paid by no later than 5.00 p.m. on the relevant date for its payment it shall be set off against and reduce the principal amount of the Debt."

In form this is not an obligation arising on breach. But the same effect could have been achieved by providing that Mr Holyoake should make interim payments in respect of the debt with provision for the payments to be added to the debt if not paid in time. That would have been a provision operating on breach and engaging the penalty rule. The question therefore is whether in substance this is a disguised penalty.

477. I have come to the conclusion that it is not. The point does not seem to me entirely straightforward (and I have had no assistance on this question by way of submissions) as I can see the force of the argument that there is no real difference in substance between a provision which says "*you will pay me £x in reduction of your debt but if you do not pay on time, the debt will increase by £x"* and a provision which says *"you will pay me £x, and if you pay me on time, the debt will reduce by £x"*, and if the penalty rule is to have practical value, it should not be too easy to circumvent it by drafting. But the deciding factor is I think that the Extension Fee is expressly made payable in return for the extension of time. In general parties are I think free to decide what sums payable under a contract are payable for, at any rate as between themselves. That means that just as in the later Extension Agreements it was the price CPC demanded for the extension. If cl 3.2 had not contained the proviso for reduction of debt (in other words if it had stopped after *"30th November 2012"*) I would have held it to be valid for the same reasons as the later Extension Fees. In those circumstances, I do not see that the addition of the proviso (which was for Mr Holyoake's benefit) can turn the provision into one which is really a punishment for breach of contract. I therefore conclude, admittedly with some hesitation, that cl 3.2 is not in substance a provision operating on breach of contract and does not engage the penalty rule.

478. That leaves the Double Interest Charge. The complaint is that the £17.74m, which by cl 11.1 of the Loan Agreement (as amended by the Supplemental Loan Agreement) became due on default, already included interest calculated at the rate of 20% per annum on the £12m loan for the period of 2 years; but that each of the subsequent agreements contained provision for further interest to be charged (at 15% per annum)

on that sum, and hence included interest on interest.

479. In fact although each of the agreements did contain interest provisions, CPC did not charge any interest until the end of April 2013. The details are as follows:

(1) Under the Second Extension Agreement dated 23 November 2012, the debt was restated as £16.85m. That included the £5.74m interest that made up the Redemption Amount but did not otherwise include any interest. It was to be repaid by instalments, with a final payment of £13.6m due on 30 April 2013 unless a Qualifying Contract had been entered into by then, in which case the final instalment (of £11.6m) was not due until 1 October 2013. By cl 4.1 if any instalment was not paid when due, then the outstanding balance would be a New Debt payable on the next Business Day (the New Debt Date) and this New Debt would carry interest at 15% per annum compounded monthly from the New Debt Date.

(2) The next agreement was the Second Supplemental Extension Agreement of 15 October 2013. The background to this was that Mr Holyoake had paid the instalments due up to 3 April 2013 in accordance with the Second Extension Agreement, thereby reducing the outstanding debt to £13.6m, but had not paid anything on 30 April 2013. CPC had asserted that Hotblack had not by then entered into a Qualifying Contract with the result that the entire £13.6m became due as a New Debt on the next business day, namely 1 May 2013. At the time Mr Holyoake disputed that (although it is now accepted that CPC were right), but since an instalment of £750,000 was due on 30 April 2013 even if Hotblack had entered into a Qualifying Contract, and that was not paid, it did not make any difference as the £13.6m would have become due on 1 May 2013 in any event (as indeed pleaded by CPC in its fourth claim issued on 3 September 2013). The Second Supplemental Extension Agreement gave Mr Holyoake an extension to pay until 24 January 2014 (with an obligation to make two interim payments). By that stage the £13.6m had been reduced to £13.3m, but the Debt was restated not as £13.3m but as £13.3m together with all interest that had accrued on the debt under the Second Extension Agreement. That was, or should have been, interest on £13.6m (reducing to £13.3m) from 1 May 2013 at 15% compounded monthly: the figure which it is agreed was in fact charged was £970,299, and no attempt has been made to challenge that as a matter of calculation. By cl 4.4 interest was payable on the Debt at 15% per annum from the Effective Date, which was 18 October 2013. The effect of that was interest started to accrue both on the £13.3m and the £970,299 from 18 October.

(3) The next agreement was the Third Supplemental Extension Agreement of 8 November 2013. That restated the Debt to include both the interest payable under the Second Extension Agreement (the £970,299) and that payable under the Second Supplemental Extension Agreement (calculated from 18 October at £127,042), bringing the total Debt to £16,397,341. By cl 4.2 interest accrued on the Debt from the date of the Agreement at 15% per annum.

(4) Similarly under the Fourth Supplemental Extension Agreement of 20

> December 2013 the Debt was restated to include the interest payable under the Third Supplemental Extension Agreement (calculated from 8 November 2013 at £281,070) and interest on that amount then accrued from the date of the agreement; and under the Final Supplemental Extension Agreement of 15 January 2014 the Debt was restated to include the interest payable under the Fourth Supplemental Extension Agreement (calculated from 20 December 2013 at £185,537) and interest on that amount again accrued from the date of the agreement.

480. I accept that the practical effect of this was to charge interest on interest. The initial interest charge of £970,299 was calculated on an outstanding debt of £13.6m reducing to £13.3m which itself was a figure calculated using the £17.74m as a starting point. The interest charges under the successive Extension Agreements were all calculated on the basis of the Debt outstanding under the previous agreement, which included the successive interest charges. In effect therefore the interest was compounded every time there was a new agreement.

481. Were these interest charges payable under contractual provisions operating on a breach of contract? I will start with the Second Supplemental Extension Agreement. This provided for an extension of time to repay the Debt as defined until the Final Repayment Date of 24 January 2014 (or earlier sale), subject to the payment of interim repayments, with a provision in cl 4.4 that interest would run in the meantime from 18 October 2013, that is from 3 days after the agreement. That was not dependent on there being a breach of the agreement: even if Mr Holyoake had kept scrupulously to the timetable for repayment laid down in the Second Supplemental Extension Agreement, he would have had to pay interest at 15% per annum (simple, not compounded) from 18 October under cl 4.4. In fact Mr Holyoake defaulted in making the interim repayments required by the Second Supplemental Extension Agreement, but he was not charged any more interest under cl 4.4 than if he had not defaulted. It seems to me, consistent with the analysis I have adopted in relation to the Extension Fees, that in those circumstances cl 4.4 was neither in form nor in substance a provision that operated on breach of contract. It was simply part of the price of CPC agreeing to the new repayment profile set out in the agreement.

482. The same analysis applies to the Third, Fourth and Final Supplemental Extension Agreements. In each case the fact that Mr Holyoake had defaulted in complying with the previous agreement gave CPC the opportunity to demand a new price for a further extension which in practice consisted of not only charging an Extension Fee but of restating the Debt to include the interest accrued under the previous agreement. Each new agreement then provided that interest should accrue from the date of the agreement. Again that was not dependent on breach, and Mr Holyoake would have been liable for it whether or not he had complied with the new timetable laid down. Those provisions were not, it seems to me, either in form or in substance, provisions that operated on breach of contract, and they did not engage the penalty rule.

483. That leaves the interest of £970,299 charged under the Second Extension Agreement. That seems to me slightly different. Unlike the later agreements, the Second Extension Agreement did not contain any provision for interest to accrue on the Debt if the timetable for repayment were adhered to. Instead the Debt (at that stage

£16.85m) could be repaid in accordance with one or other of the repayment schedules (either by 30 April 2013 if no Qualifying Contract had been entered into, or by 1 October 2013 if one had). Those repayment schedules were each calculated to lead to the repayment of precisely £16.85m and if Mr Holyoake had adhered to them, he would not have been charged any further interest. The interest that was charged was charged under cl 4.1 which provided as follows:

> "If (i) any part of any Debt Repayment is not paid to CPC on the relevant date specified in the Debt Repayments Schedule or (ii) the whole of the Debt has not been repaid by the Long Stop Date (as defined in the Joint Marketing Agreement) or (iii) any steps are taken by or on behalf of an [*sic*] security holder to enforce any security granted by the Company over the Property, then the Debt shall be released and the portion of the sum of £16,850,000 that has not been repaid shall be a new debt owed to CPC (the ***New Debt***) and shall be paid in cleared funds to CPC by no later than 5.00 p.m. on the next Business Day (***New Debt Date***) without set off or withholding or deduction. Interest will accrue on the New Debt from the New Debt Date until final payment at the rate of 15% per annum compounded monthly on the last day of each month."

484. It can be seen that the first of the events which trigger the clause is a failure to keep to the repayment schedule, which is undoubtedly a breach of the agreement, and that was the event relied on by CPC in its fourth claim. That seems to me to have the effect that the interest actually charged was pursuant to a contractual provision operating on breach such as to engage the penalty rule.

485. That then raises the question whether the provision was extravagant or exorbitant or unconscionable. It is not I think in doubt that the onus on this is on the person alleging that it is (cf *Cavendish Square Holding BV v Makdessi* at [100], [133], [143] and [309]). No submission was made that a default rate of 15% per annum compounded monthly was an extravagant or exorbitant rate for a commercial agreement (and indeed it was less than the rate of 20% per annum for the loan, first suggested by Mr Holyoake himself). The pleaded case and submission was that it was penal because Mr Holyoake was being charged interest not only on the principal but also on the interest included in the £17.74m.

486. I am not persuaded that it was. I have already held that there was nothing penal about the £17.74m becoming payable on default. By the time of the Second Extension Agreement on 23 November 2012 CPC were entitled to payment of the £17.74m – indeed they had had a good claim to the £17.74m since 28 February 2012 under the terms of the Supplemental Loan Agreement, but had repeatedly given Mr Holyoake more time in the series of Escrow Deeds and then the Extension Agreement. In the Second Extension Agreement, CPC again gave more time for repayment in accordance with a repayment schedule while stipulating that if there were a default, the balance of the debt would all become due and interest would thereafter be payable. It is not suggested that it was penal to stipulate for the balance to become due on default, and I do not see how it could have been: such provisions are standard in agreements for payment of liabilities by agreed instalments, and CPC were already entitled to payment of the whole sum in any event: see *The Angelic Star* [1988] 1 Ll Rep 122 at 125 col 2 per Lord Donaldson MR (*"the mere fact that the capital sum becomes immediately repayable upon a failure to comply with the conditions upon*

*which credit was extended cannot constitute a penalty"*). So the only question is whether, if the balance became due, it would be penal to stipulate for interest in addition. That too seems to me to be a standard provision in commercial loan agreements: once the debtor is in default, the creditor is not only being kept out of his money but running an enhanced credit risk: see the approval in *Cavendish Square Holding BV v Makdessi* of the decision of Colman J in *Lordsvale Finance plc v Bank of Zambia* [1996] QB 752. I have already said that no challenge was made to the rate as such, but only to the principle; but once the £17.74m (or the balance of it) was due, I do not see that it was penal to require the defaulting debtor to pay interest if it was not paid, however the £17.74m had originally been made up.

487. Quite apart from this, the interest was not in fact charged until the Second Supplemental Extension Agreement of 15 October 2013 when Mr Holyoake agreed that it should be included in the Debt. That agreement was part of the suite of agreements agreed as part of the Settlement Deed which settled all existing claims between the parties. So far as the settlement of claims by Mr Holyoake was concerned, it provided at cl 4.1(a) for a full and final settlement of *"all actual or potential claims and causes of action, past, present and future, whether known or unknown"* which he might have against CPC, and that seems to me wide enough to include a claim that the interest charged under cl 4.1 of the Second Extension Agreement was a penalty. Instead of challenging the interest, Mr Holyoake agreed to pay it as part of the Debt. That seems to me a fresh payment obligation, in return for further consideration, and even if the interest had been penal, Mr Holyoake would have thereby become contractually obliged to pay it.

488. In these circumstances I find that none of the impugned provisions amount to penalties.

*The CCA*

489. Mr Holyoake's remaining claims are under the CCA. These claims are only advanced by Mr Holyoake personally and not by Hotblack.

490. I can take the law almost entirely from a convenient account given by Hamblen J in *Deutsche Bank (Suisse) SA v Khan* [2013] EWHC 482 (Comm) at [341]-[346] as follows:

> "341. Sections 140A-D CCA (headed "Unfair relationships") were inserted into the CCA by the Consumer Credit Act 2006 in substitution for the regime that previously governed "extortionate credit bargains" (sections 137 to 140, now repealed). Unlike much of the CCA the Unfair relationships regime is not confined to agreements made with "consumers", nor is it limited to lending up to a specified monetary threshold. It is, however, restricted to credit agreements entered into with natural persons; this reservation is accomplished by section 140C which defines a "Credit Agreement" as meaning:
>
> > "any agreement between an individual (the 'debtor') and any other person (the 'creditor') by which the creditor provides the debtor with credit of any amount".

342. The core features of the Unfair relationships provisions are that section 140A provides that a Court may make an order under section 140B in connection with a Credit Agreement if it determines that the relationship between the creditor and the debtor arising out of the Credit Agreement (or the Credit Agreement taken together with any "related agreement") is "unfair" to the debtor because of one or more of the following:

    (1) any of the terms of the agreement or of any related agreement;

    (2) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement; or

    (3) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

343. The CCA does not prescribe the factors which the Court can or should take into account in making this determination, instead it simply directs the Court to "have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)" (s.140A(2) CCA). Once a debtor alleges that the relationship is unfair, the burden lies on the creditor to prove the contrary: section 140B(9).

344. The consequences of a finding of unfairness are potentially draconian. The orders under section 140B may include discharging the debtor's indebtedness in whole or in part and/or requiring the creditor to repay some or all of the sums paid by the debtor under the Credit Agreement or any related agreement.

345. In considering the test of unfairness guidance is provided by the following authorities in particular: *Maple Leaf Macro Volatility Master Fund & Aor v Rouvroy & Or* [2009] EWHC 257 (Comm) (*"Maple Leaf"*); *Paragon Mortgages Ltd v McEwan-Peters* [2011] EWHC 2491 (Comm) (*"Paragon Mortgages"*); and *Rahman & Ors v HSBC Bank Plc & Ors* [2012] EWHC 11 (Ch) (*"Rahman"*).

346. These authorities suggest that the matters likely to be of relevance include the following:

    (1) In relation to the fairness of the terms themselves:

        a. whether the term is commonplace and/or in the nature of the product in question (*Rahman* [277]);

        b. whether there are sound commercial reasons for the term (*Rahman* [278]);

        c. whether it represents a legitimate and proportionate attempt by the creditor to protect its position (*Maple Leaf* [288]);

        d. to the extent that a term is solely for the benefit of the lender, whether it exists to protect him from a risk which the debtor does not face (*Maple Leaf* [289]);

e. the scale of the lending and whether it was commercial or quasi-commercial in nature (*Rahman* [275]) (a court is likely to be slower to find unfairness in high value lending arrangements between commercial parties than in credit agreements affecting consumers); and

f. the strength (or otherwise) of the debtors bargaining position (*Rahman* [275]);

g. whether the terms have been individually negotiated or are pro forma terms and, if so, whether they have been presented on a "take it or leave it" basis (*Rahman* [275]);

(2) In relation to the creditor's conduct before and at the time of formation:

a. whether the creditor applied any pressure on the borrowers to execute the agreement (if an agreement has been entered into with a sense of urgency it will be relevant to consider to what extent responsibility for this lay with the debtor, as distinct from the creditor) (*Maple Leaf* [274]);

b. whether the creditor understood and had reasonable grounds to believe that the borrower had experience of the relevant arrangements and had available to him the advice of solicitors (*Maple Leaf* [274]);

c. whether the creditor had any reason to think that the debtor had not read or understood the terms (*Maple Leaf* [274]); and

d. whether the debtor demurred at the time of formation over the terms he now suggests are unfair (this point has particular force if he did complain over other terms) (*Maple Leaf* [274]; *Rahman* [276]).

(3) In relation to the creditor's conduct following formation and leading up to enforcement:

a. whether any demand was prompted by an "improper motive" or was the consequence of an "arbitrary decision" (*Paragon Mortgages* [54(b)]);

b. whether the creditor has shown patience and, before leaping to enforcement, has taken steps in the hope of reaching some form of accommodation (for example by attending meetings, engaging in correspondence and/or inviting proposals) (*Rahman* [280–281]); and

c. whether the debtor has resisted attempts at accommodation by raising unfounded claims against the creditor (*Rahman* [280–281]).”

491. It was not disputed that there are in principle three stages in the application of these provisions:

(1) Do the provisions apply to the relationship between the parties?

(2) If so, should the Court determine that the relationship is unfair?

(3) If the Court determines that the relationship is unfair, what order (if any) should the Court make under s. 140B?

492. As to the first question, save for one point there was no dispute that the provisions applied to the relationship between Mr Holyoake and CPC. The original Loan Agreement was a credit agreement as defined in s. 140C(1) as it was an agreement between Mr Holyoake, an individual, and CPC by which CPC provided Mr Holyoake with credit (itself defined in s. 9(1) as including a cash loan, and any other form of financial accommodation). The subsequent agreements such as the Supplemental Loan Agreement, the various Escrow Deeds, and the Extension Agreements were all either themselves credit agreements or related agreements.

493. The one point in issue between the parties concerns the Settlement Deed. Mr Stewart's submission was that this too was either a credit agreement or a related agreement within the meaning of the CCA; Mr Lord's submissions were (i) that this argument was not open to Mr Stewart on the pleadings; (ii) that the Settlement Deed is neither a credit agreement nor a related agreement and cannot itself be reopened under the CCA; and (iii) that as a bona fide settlement of the CCA claims, it either could not or should not be reopened.

494. The Settlement Deed, dated 15 October 2013, was entered into against the background of CPC's fourth claim issued on 3 September 2013 (paragraph 359 above). The relevant provisions are as follows:

(1) Recital (A) recites CPC's fourth claim (referred to as **"the Proceedings"**)

(2) Recital (C) recites the fact that Mr Holyoake had intimated that he might defend the claims in the Proceedings by reference, among other things, to the CCA.

(3) Recital (D) referred to the parties having agreed a settlement of the Proceedings by entering into: the Second JMA in the form attached at Appendix 1; the Second Supplemental Extension Agreement in the form attached at Appendix 2; the Settlement Deed itself; and a consent order discontinuing the Proceedings.

(4) Cl 3.1 provided as follows:

> "The Parties hereby
>
> (a) enter into this Settlement Deed
>
> (b) release to each other signed counterparts of the Second Joint Marketing Agreement (subject to its terms)
>
> (c) release to each other signed counterparts of the Second Supplemental Extension Agreement (subject to its terms)
>
> (d) agree to forthwith lodge at Court signed copies of a consent order in the form attached at Appendix 3."

(5) Cl 4.1 provided for a mutual settlement of all claims in these terms:

> "Subject to clause 4.2 the Parties agree to a full and final settlement of:
>
> (a) all actual or potential claims and causes of action, past, present and future, whether known or unknown, foreseeable or unforeseeable, arising out of or related to or in connection with the Proceedings which MH and/or the Company or their Associates have or may have against CPC or its Associates, including but not limited to breaches or non-performances of contract or indemnities, tortious acts (including, without limitation, negligence and misrepresentation and all economic torts), breach of fiduciary duty, breach of statutory duty, for contribution, or for interest and/or costs, and any such liabilities are hereby discharged, including all claims for or arising out of or related to deliberate wrongdoing or breach of any obligation, dishonesty, bad faith, economic duress or fraudulent misrepresentation; and
>
> (b) all actual and potential breaches of contract which CPC has against MH and/or the Company in respect of the contracts referred to in the particulars of claim served in the Proceedings;
>
> (all such actual or potential claims and causes of action referred to in (a) or (b) above being the "Released Claims")."

(6) Cl 4.2 provided that the Released Claims should not include claims arising exclusively out of conduct after the date of the Settlement Deed, including claims or causes of action arising under the Settlement Deed, Second Supplemental Extension Agreement and the Second JMA.

495. Mr Stewart accepted that the terms of cl 4.1 were wide enough to settle Mr Holyoake's claims under the CCA up to the date of the Deed. It is a little curious that cl 4.1, which lists a large number of potential types of claim individually, does not expressly refer to the CCA, but I agree that the wording *"all claims and causes of action"* is wide enough to include Mr Holyoake's claim to invoke the Court's powers under s. 140B of the CCA, especially as recital (C) had expressly referred to the potential CCA argument. Mr Stewart accepted therefore that unless he could set aside the Settlement Deed itself, Mr Holyoake could not pursue any CCA claim in respect of matters up to the date of the Deed, although cl 4.2 makes it clear that he could pursue CCA claims in respect of matters occurring thereafter. He had in fact three arguments for setting aside the Settlement Deed, but the first two were that it was voidable for duress or actual undue influence, which I have already rejected. That left his remaining argument that it was either a credit agreement or related agreement and he could ask the Court to reopen its terms under the CCA.

496. Mr Lord's first answer was that this was not open on the pleadings. The Re-Amended Particulars of Claim, having pleaded (at paragraph 195) that the Loan Agreement was a credit agreement within s. 140C(1) of the CCA, continued (at paragraph 196):

> "Likewise, the Supplemental Loan Agreement and all the First Schedule Agreements by which the debt owed to CPC by Mr Holyoake was restated and/or amended were also "credit agreements" under ss. 140C(1) or, alternatively, were linked

> transactions for the purposes of s. 140A-C and/or otherwise fall within s. 140C(4) and/or s. 140C(7) and/or 140C(8) of the Act."

The First Schedule listed all the agreements between Mr Holyoake and CPC, including the Settlement Deed. But Mr Lord said that it was not an agreement by which the debt owed to CPC was restated or amended, and hence was not referred to in paragraph 196.

497. That is a narrow reading of the pleading and I do not accept it. As a matter of language the phrase *"by which the debt owed to CPC by Mr Holyoake was restated and/or amended"* can be read either (as Mr Lord would have it) as intended to define a sub-set of the First Schedule Agreements (such of the agreements as restated or amended the debt), or as a description of (all of) them. It would have been much clearer that the latter sense was intended if the phrase had been marked off by commas (*"all of the First Schedule Agreements, by which the debt owed to CPC by Mr Holyoake was restated and/or amended, were also credit agreements"*), but the failure to do so does not mean that the only way in which it can be read is in the former sense. Paragraph 197 pleads that:

> "the relationship between CPC as creditor and Mr Holyoake as debtor arising out of the Loan Agreement, the Supplemental Loan Agreement and all the First Schedule transactions was unfair for the purposes of ss. 140A(1) of the Act"

and that I think makes it tolerably clear that the latter sense was intended. I therefore interpret paragraph 196 as intended to embrace all the First Schedule Agreements, including the Settlement Deed, not just a sub-set of them. It appears to have been read that way by the Defendants' own legal team as the Defence pleaded that paragraphs 195 and 196 were admitted as regards the Loan Agreement *"and all agreements other than the Compromise of October 2013"*, the Compromise referring to the Settlement Deed, the Second Supplemental Extension Agreement and the Second JMA. Moreover Mr Stewart made it clear in opening that he was relying on the Settlement Deed being an agreement that could be reopened under the CCA, and although Mr Lord took issue with that, he did not then take the pleading point. In my judgment the argument that the Settlement Deed is a credit agreement or related agreement is open to Mr Stewart.

498. Mr Lord's second point was that the Settlement Deed was not a credit agreement as it did not itself provide any financial accommodation, and that Mr Stewart had not explained why it was a related agreement. I do not accept this submission either. One of the provisions of the Settlement Deed was cl 3.1(c) by which the parties agreed to release to each other signed counterparts of the Second Supplemental Extension Agreement. That agreement extended time for repayment of the debt from 1 May 2013 to 24 January 2014 or earlier sale. I think that was clearly the provision of *"financial accommodation"* and hence *"credit"* and that there is no doubt that the Second Supplemental Extension Agreement was itself a credit agreement within the meaning of s. 140C(1). The remaining question is whether the Settlement Deed is also an agreement under which CPC provided Mr Holyoake with credit. Since the effect of cl 3.1(c) was that CPC agreed to enter into the Second Supplemental Extension Agreement (by releasing a signed counterpart to Mr Holyoake), I do not see

why that provision did not amount to an agreement by CPC to provide Mr Holyoake with credit, namely the financial accommodation set out in that agreement. In my judgment therefore the Settlement Deed was itself a credit agreement.

499. If I am wrong about that, it was in any event in my judgment a related agreement. By s. 140C(4) an agreement is *"related"* to a credit agreement (the *"main agreement"*) if, among other things, it is a *"linked transaction"* in relation to the main agreement; by s. 140C(5) in the case of a credit agreement which is not a regulated consumer credit agreement, a transaction is treated as a linked transaction in relation to that agreement if it would have been had the agreement been a regulated one; and by s.19, a transaction is a linked transaction in relation to a regulated agreement, among other things, if it is an agreement entered into by the debtor with the creditor, the creditor initiated the transaction by suggesting it to the debtor, and the debtor enters into it for a purpose related to the principal agreement: see s. 19(1)(c)(ii), (2)(a). That rather tortuous definition seems to me to be satisfied here: the Settlement Deed was an agreement entered into by Holyoake with CPC; it was initiated by CPC (Mr Dean and Mr Christian Candy having told Mr Holyoake the agreements had to be cleansed); and Mr Holyoake entered into it for a purpose related to the principal agreement, namely to obtain CPC's agreement to the Second Supplemental Extension Agreement (which was itself a credit agreement). The Settlement Deed was therefore a linked transaction and a related agreement.

500. Mr Lord's third submission was that the Settlement Deed was a bona fide compromise of the CCA claims and if it could be unpicked, it would never be possible to settle a CCA claim. That cannot have been intended by the legislature. There appears to be no relevant authority on the CCA itself, but he referred, by way of analogy, to *Binder v Alachouzos* [1972] 2 QB 151. The plaintiff had sued the defendant on a number of loans, the defendant defending the action on the grounds that the plaintiff was an unregistered moneylender. The action was compromised shortly before trial, the defendant agreeing to abandon the contention that the plaintiff was a moneylender and to pay the plaintiff various sums. When he defaulted and the plaintiff sued him on the compromise agreement, the defendant contended that it was not binding, again relying on the Moneylenders Acts. The Court of Appeal held that he was bound by the agreement. Lord Denning MR said that the Moneylenders Acts were for the protection of borrowers and the judges would not therefore allow a moneylender to use a compromise as a means of getting round the Act; but it was important that the courts should enforce compromises agreed in good faith between lender and borrower (at 158A-B, D-F):

> "If the court is satisfied that the terms are fair and reasonable, then the compromise should be held binding. For instance, if there is a genuine difference as to whether the lender is a moneylender or not, then it is open to the parties to enter into a bona fide agreement of compromise. Otherwise there could never be a compromise of such an action. Every case would have to go to court for final determination and decision. That cannot be right….
>
> In my judgment, a bona fide compromise such as we have in the present case (where the dispute is as to whether the plaintiff is a moneylender or not) is binding. It cannot be reopened unless there is evidence that the lender has taken undue advantage of the situation of the borrower. In this case no undue advantage was

> taken. Both sides were advised by competent lawyers on each side. There was a fair arguable case for each. The case they reached was fair and reasonable. It should not be reopened."

Phillimore and Roskill LJJ agreed. Phillimore LJ said that it was plain that it was a bona fide compromise, the terms of the agreement were not to be described as colourable, and the court (at 159D):

> "ought to be very slow to look behind an agreement reached in circumstances like these."

Roskill LJ said that while it has always been the policy of the courts not to allow the Moneylenders Acts to be evaded (at 160B-C):

> "it is the law of this country, as Lord Denning MR has said, where there is a bona fide compromise of an existing dispute and that compromise includes a compromise of what, as Mr Joseph said, is basically an issue of fact, namely whether there had in fact been unlawful moneylending, especially where the compromise has been reached under the advice of counsel and solicitors, that that compromise is enforceable against the party seeking subsequently to repudiate it."

501. There is an obvious danger in holding that any agreement settling CCA claims is effective to oust the Court's powers under ss. 140A-C of the CCA, as it would open the way to lenders routinely requiring borrowers to settle any possible CCA claims, which would run the risk, as Mr Stewart submitted, of driving the proverbial coach and horses through the protection afforded by the CCA.

502. Moreover, in *Binder* the Court of Appeal appears to have laid emphasis on the fact that what was involved was a bona fide compromise of a genuine issue of fact as to whether the Moneylenders Acts applied at all. That principle has been applied to other statutory provisions: cf *Foskett on Compromise* (8th edn) at §7-32 (although parties cannot contract out of the protection of the Rent Acts, that does not prevent a bona fide compromise of a genuine dispute of fact as to whether a statutory provision applies); *A-G v Trustees of the British Museum* [2005] EWHC 1089 (Ch) at [28] per Morritt V-C (a bona fide compromise could be made of the question whether a statutory prohibition on disposal of objects vested in the trustees as part of the museum's collection applied); and *FPH Law v Brown* [2016] EWHC 1681 (QB) at [29] per Slade J (a bona fide compromise of an issue as to the enforceability of a CFA). But if that is the principle, it does not directly assist CPC. There was no issue, or none at any rate that has been identified, as to whether the agreements preceding the Settlement Deed were credit agreements such that the CCA applied. What was compromised was not any genuine issue of fact which went to the applicability of the CCA. What was compromised was any claim that Mr Holyoake had under the CCA.

503. I proceed therefore on the basis that the Settlement Deed does not act as a jurisdictional bar to the Court considering whether the relationship between the parties was unfair, both in the period up to and including the entry of the Deed and in the period thereafter.

504. On the other hand that does not mean the Settlement Deed is just to be ignored as if it

did not exist. The policy considerations referred to in *Binder* – that it is the policy of the Court to encourage good faith compromises, and to enforce compromises when they are made – seem to me to continue to apply. In considering whether the relationship between the parties is unfair, or in considering what order, if any, to make in the exercise of the discretion in s. 140B, it seems to me highly relevant that the parties have reached a compromise of that issue, and for this purpose the matters referred to by the Court of Appeal in *Binder* – was there a genuine dispute, was there a fair arguable case on each side, was the compromise bona fide or were its terms colourable, are the terms fair and reasonable, has the lender taken undue advantage of the borrower, were both sides advised by competent lawyers – are just as applicable. Roskill LJ gave an example at 160D-E of a liquidator seeking the sanction of the court to a compromise where there is a moneylending defence:

> "Is the court to investigate the whole matter, or can it look at the matter broadly and see whether a bona fide compromise should be arrived at or has been arrived at? In such a case it seems to me clear that the court should encourage and when appropriate enforce any bona fide compromise arrived at, especially one arrived at under legal advice."

That is not directly applicable but is consistent with the idea that the Court should look at the matter broadly to see if a bona fide compromise has been reached on legal advice, and if it has should be very slow to go behind it.

505. The next question is whether the relationship between the parties was unfair, it being for CPC under s. 140B(9) to prove that it was not. I propose to consider this separately in relation to the period up to and including the Settlement Deed, and the subsequent period.

506. Five specific matters are pleaded as making the relationship unfair. One is the threats, intimidation and coercion relied on for the duress, actual influence and intimidation claims. The other four arise out of the terms of the agreements, namely (i) the provision in the Supplemental Loan Agreement making the whole debt plus all accelerated interest repayable; (ii) the Extension Fees; (iii) the Double Interest Charge; and (iv) the fact that Mr Holyoake was compelled to market GGH and sell it pursuant to the JMAs before it could be developed.

507. In relation to the earlier period, I do not propose to consider these one by one. I am satisfied that there was something to be said on both sides. On the one hand, it is not obviously fair on the face of it that in return for a loan of £12m in October 2011, CPC should be entitled on default not only to 2 years' interest immediately, making the total repayable £17.74m, but in addition further interest on the both the £12m and the £5.74m from May 2013 when they have already had (or at any rate become entitled to) interest up to October 2013. And although I have held that the pressure exerted by CPC was not unlawful, I accept that that the combination of the risks of litigation and the personal liability of Mr Holyoake did put pressure on him to agree to CPC's demands.

508. On the other hand this was high value lending between commercial parties, where the Court is likely to be slower to find unfairness. More significantly to a very large extent Mr Holyoake was the author of his own misfortune. He agreed to buy GGH at

a time when he did not have finance in place, lying to the vendor in order to do so. That put him under pressure to agree CPC's terms for the loan, including the term in cl 8.3 that the entire interest should be payable if the loan were repaid early. He approached the Candys on the basis that he needed their loan as a back-up for other financing that had fallen through, and allowed them to proceed in the belief that they were his mezzanine funders, not telling them about the Oscarone loan and successfully deceiving them about it throughout the period of the loan. If Mr Christian Candy had known about Oscarone he would not have lent at all. He told the Candys he had £120m in net assets when he knew that that was, even on the most generous view, a stretch, and did so because he thought he could if necessary talk his way out of any allegation of breach, without reckoning on the tenacity and persistence of Mr Christian Candy and CPC in pursuing the point. He charged properties to Aeriance and lied about that to CPC as well. From December 2011 onwards he repeatedly promised repayment of the full £17.74m when he in fact had no intention of repaying, and he then got Mr Pym to lie about the £13.5m having been drawn down when it had not been. He allowed CPC to enter into a whole series of Escrow Deeds in the belief that he was genuinely considering completing the SPAs when he had no such intention. He lied about Sherbourne being an arm's length third party to his own solicitor, and to CPC about the Sherbourne contract being a Qualifying Contract. These matters would all be likely to go both to the question whether the relationship was unfair and to the question whether relief should be granted to him under the CCA.

509. In those circumstances, I am satisfied that the Settlement Deed was a bona fide compromise. In my view it should be given effect to and not disturbed. Taking the matters I have referred to above from *Binder*: there was indeed a genuine dispute whether Mr Holyoake had any viable CCA claims, there was a fair arguable case on each side, the compromise was bona fide and its terms were not colourable, and Mr Holyoake entered into it after receiving legal advice. Lord Denning MR also refers to whether the agreement reached was fair and reasonable, but this cannot require the Court to undertake a detailed examination of the underlying merits of the claims, as the whole purpose of the compromise is to avoid the necessity for that. That is why Roskill LJ referred to taking a broad view, and, taking a broad view, I consider that the terms were fair and reasonable. In return for giving up his CCA claims, Mr Holyoake not only obtained CCA's release of its claims under the existing contracts, but also the withdrawal of the proceedings (in which, as Mr Lord submitted, the Qualifying Contract deception would have come to light) and a significant extension of time to sell GGH.

510. In relation to the period covered by the Settlement Deed, I therefore decline to go behind the Settlement Deed. That includes not only the settlement of the CCA claims, but also the terms of the Second Supplemental Extension Deed and the Second JMA as they were part of the same compromise. That therefore covers not only the fact that the £17.74m became payable on default, but also the Extension Fees charged up to and including the Second Supplemental Extension Deed (totalling £5m), the interest charged under the Second Extension Agreement (of £970,299) and the obligation in the Second JMA to market GGH. I do not think it matters whether technically I find that the relationship was not unfair because the parties had agreed to compromise that issue; or whether I say that even if unfair, I decline to make any order in these respects under s. 140B. The practical result is the same: I dismiss these

claims.

511. The remaining claims are only those that arise after the date of the Settlement Deed. Of the five matters pleaded (paragraph 506 above), the first is the threats, intimidation and coercion, but there are none relied on which took place after that date. The second is the acceleration of the debt and interest but this had already taken place under the Supplemental Loan Agreement, and was accepted by Mr Holyoake in the Second Supplemental Extension Agreement. The fourth is the obligation to pay interest not only on the principal amount of the debt but also on the accelerated interest; this too was accepted by Mr Holyoake in the Second Supplemental Extension Agreement which provided for interest on the entirety of the Debt (hence including the accelerated interest) from 18 October 2013. The fifth was the obligation to market and sell GGH under the JMAs; this was accepted by Mr Holyoake in the Second JMA. As I have already said the Second Supplemental Extension Agreement and Second JMA were themselves part of the compromise embodied in the Settlement Deed, and I do not think these features of the relationship can be regarded as unfair for the remainder of the period of the loan; or if they are, I decline to make any order under s. 140B in respect of them.

512. That leaves the Extension Fees. Only two Extension Fees were thereafter charged: £1m in the Fourth Supplemental Extension Agreement, and £1.5m in the Final Supplemental Extension Agreement. The Fourth Supplemental Extension Agreement was entered into on 20 December 2013 when Mr Holyoake was unable to pay an instalment of £750,000 due on that day under the Third Supplemental Extension Agreement, and by its terms he was given until 10 January 2014 to pay it and until 20 January 2014 to repay the Debt (paragraph 375 above). At the time he was in the process of attempting a sale of GGH to a purchaser called City Developments Ltd (**"CDL"**). The Final Supplemental Extension Agreement was entered into on 15 January 2014 after Mr Holyoake only paid £333,000 of the £750,000 on 10 January, and by its terms he was given until 14 February to pay both it and the balance of the Debt, provided contracts for the sale of GGH were exchanged by 22 January 2014 (paragraph 376 above). That was to enable him to sell GGH to the ultimate purchaser (Key Platinum). In each case, if he had not agreed the terms of the extension, the whole Debt would have become due on the next Business Day after his default (23 December 2013 and 13 January 2014 respectively), and under the terms of the relevant JMA CPC would also have been entitled to exercise step-in rights.

513. Are these fees unfair? Or, to be more precise, has CPC shown that the relationship was fair despite the charging of these fees? I propose to consider this question first by reference to the checklist set out by Hamblen J in *Deutsche Bank (Suisse) SA v Khan* at [346].

(1) In relation to the fairness of the terms themselves:

a. whether the term is commonplace and/or in the nature of the product in question – I accept that commercial lenders routinely charge fees for lending and that an extension fee is simply an example of a fee charged for further lending

b. whether there are sound commercial reasons for the term – there is a reasonable commercial rationale for lenders to charge fees to borrowers who are in default and ask for more time

c. whether it represents a legitimate and proportionate attempt by the creditor to protect its position – an extension fee in principle is a legitimate attempt by a creditor to protect its position, but whether it is proportionate depends on the size of it

d. to the extent that a term is solely for the benefit of the lender, whether it exists to protect him from a risk which the debtor does not face – I do not think the fees are designed to protect against risks; they are the price of an extension

e. the scale of the lending and whether it was commercial or quasi-commercial in nature – the lending was a high value lending arrangement between commercial parties

f. the strength (or otherwise) of the debtors bargaining position – Mr Holyoake's bargaining position may not have been strong but he did have one: if CPC had asked too much for an extension, he could have refused. That would entitle CPC to sue him and exercise step-in rights, but CPC would still have to sell GGH, or alternatively obtain a judgment and enforce against Mr Holyoake's assets before it realised any money, and litigation carried risks for CPC: in an e-mail of 8 January 2014 for example, Mr Dean referred to the risk that it might spook CDL (Mr Holyoake's then intended purchaser), which itself might put off other purchasers, and/or that CPC could end up litigating for years with other creditors

g. whether the terms have been individually negotiated or are pro forma terms and, if so, whether they have been presented on a "take it or leave it" basis – the terms were not pro forma and were individually negotiated, but CPC was unwilling to move on them: in relation to the £1m for the Fourth Supplemental Extension Agreement, Mr Holyoake tried to negotiate it down to £500,000 or £750,000 but Mr Dean would not budge, and Mr Holyoake agreed to proceed at £1m, and in relation to the £1.5m for the Final Supplemental Extension Agreement, Mr Holyoake initially offered £250,000 and then £500,000 and £750,000, but Mr Candy insisted on the £1.5m which Mr Holyoake then agreed.

(2) In relation to the creditor's conduct before and at the time of formation:

a. whether the creditor applied any pressure on the borrowers to execute the agreement – the pressure was the risk of CPC litigating and Mr Holyoake losing the prospective sales. CPC did not however press Mr Holyoake to agree to the extensions – it was he who wanted them and requested them and they simply set out the terms they would require

b. whether the creditor understood and had reasonable grounds to believe that the borrower had experience of the relevant arrangements and had available to

him the advice of solicitors – Mr Holyoake did have both experience and access to solicitors as CPC understood

c. whether the creditor had any reason to think that the debtor had not read or understood the terms – Mr Holyoake understood the terms very well

d. whether the debtor demurred at the time of formation over the terms he now suggests are unfair – Mr Holyoake did protest at the size of the fees and try to negotiate them down, unsuccessfully.

(3) In relation to the creditor's conduct following formation and leading up to enforcement:

a. whether any demand was prompted by an "improper motive" or was the consequence of an "arbitrary decision" – CPC did not make any demands for payment after entering into the agreements, but added the Extension Fees to the Debt

b. whether the creditor has shown patience and, before leaping to enforcement, has taken steps in the hope of reaching some form of accommodation – CPC had shown over the long period of the relationship with Mr Holyoake a great deal of patience in the face of Mr Holyoake's repeated promises of payment which were not kept, although that was primarily because they thought that more likely to lead to full recovery for them than pursuing Mr Holyoake to judgment. In the result that paid off for them and they did not need to enforce the agreement

c. whether the debtor has resisted attempts at accommodation by raising unfounded claims against the creditor – this does not apply.

514. I have set all this out at length in deference to the analysis of Hamblen J, but in the end I think the position is very simple. CPC were justified in seeking an extension fee as a price for granting Mr Holyoake a further extension, which he needed in each case because he had defaulted in making payments that he had agreed he would make, and he agreed to the price CPC demanded in each case in order to buy more time to achieve a sale. It was no doubt in his commercial interest to do so. What however this analysis does not establish is whether the actual fees demanded were fair or not.

515. Mr Lord submitted that the Court's role was not to regulate returns simply because they were large on their face. He referred to *Khodari v Tamimi* [2008] EWHC 3065 (QB) where the claimant had made loans to the defendant, a wealthy businessman who was a heavy and compulsive gambler and needed money for that purpose. The loans were for a few days or even overnight, and the claimant charged a 10% fee. The defendant argued that a 10% return on lending which might be only outstanding for a few days was manifestly unfair, but Blair J held that it was not, saying (at [46]):

> "The size of the charge is plainly very large compared to the short period of the loan, but this has to be seen in the light of the credit risk assumed in making the loan, as this litigation shows very clearly."

The Court of Appeal dismissed an appeal: [2009] EWCA Civ 1109.

516. Mr Lord submitted that the fee of 10% overnight would yield an annualised return of 3,650%, much higher than CPC's returns, but was held to be lawful. I do not find this point of any assistance: the 10% fee was not a charge for the time value of money, but a charge, as Blair J held, for the credit risk involved, which is a risk borne by the creditor whether the loan is for one day or for one year, and there is no real basis for extrapolating an annualised return in this way.

517. Nor do I accept that *Khodari v Tamimi* is authority for the proposition that the Court's role is not to regulate large returns, and that the mere size of the charge is not enough to attract the attention of the Court. The size of charges made by a creditor to a debtor for further accommodation seems to me to be plainly something that can be taken account of in assessing the fairness of the relationship. Indeed s. 140B(1)(a) and (c) expressly confer powers on the Court to require the creditor to repay part of a sum paid by the debtor or to reduce any sum payable by the debtor, and the obvious circumstances in which that would be appropriate would be if the Court thought that a particular charge that had been paid or was payable (a fee, or a rate of interest) was unfairly high. In giving the leading judgment in the Court of Appeal in *Khodari v Tamimi* Wilson LJ said (at [40]):

> "these were unsecured loans to a person resident outside England and Wales; the judge accepted evidence that a fee of 10%, or even more, for loans made in analogous circumstances was fairly normal…"

It is not apparent to me on what basis Wilson LJ said that Blair J had accepted evidence that a fee of 10% was fairly normal: Blair J did refer to the evidence of a witness to this effect, but this was in the course of referring to the claimant's submissions, and, unless I have missed it, he did not expressly say that he accepted it (see [2008] EWHC 3065 (QB) at [31]). But Wilson LJ clearly regarded such evidence as supporting the conclusion that it was not unfair, which suggests that charging a fee that was out of line with normal fees could be unfair.

518. In my judgment therefore it is relevant to consider whether the fees of £1m and £1.5m were unfairly large. The first secured an extension from 23 December 2013 to 20 January 2014, the second from 13 January 2014 to 14 February 2014. Mr Stewart's suggestion to Mr Dean in cross-examination (below) that the latter fee only secured an extension of four working days was therefore an exaggeration. But it remains the case that the extensions were comparatively short, and on the face of it the sums of £1m and £1.5m seem high for extensions of one month or so.

519. No real attempt was made by Mr Christian Candy or Mr Dean to explain how the sums had been arrived at: in relation to the first fee of £1m, Mr Candy's evidence was as follows:

> *"Q. Your position as at December 2013 at 6.16 in the morning was: "I suggest we issue a claim form, get him to pay a further extension fee of £1 million and then withdraw the claim form."*
>
> *A. Yes.*

> *Q. This was, was it not, your tactic by then? You were simply getting additional sums of money from Mark Holyoake without reference to any objective criteria at all?*
>
> *A. No, my Lord. What was happening here was again Mark Holyoake, the expert at buying for time -- what he was doing is he could have taken a lower price from City Developments Limited but with his greed or whatever it was, he wanted more time. So I'm like, "If he wants more time, charge him an extension fee. If he doesn't, we will issue a claim form".*
>
> *Q. It was more than that, wasn't it? Issue a claim form, get another £1 million and then withdraw the claim form?*
>
> *A. Perfectly legal, my Lord."*

It can be seen that although Mr Candy denies that he was simply getting additional sums from Mr Holyoake without reference to any objective criteria, he does not explain how he alighted on the sum of £1m, nor does he seek to justify it other than that if Mr Holyoake wanted an extension he would have to pay for it and that was legal. Legal it may have been, but that is not necessarily the same as being fair.

520. So far as Mr Dean is concerned, he was asked about the fee of £1m, and he said that would have been in the light of the Arlington fees of £3.5m. That is a reference to the fact that Arlington was proposing to charge total fees of £3.5m (£1.5m initial fees and £2m exit fees) on a facility of £53.5m for 9 months. I do not think that Mr Dean was seeking to justify the fee by comparison with that charged by Arlington, and if he had been, it is apparent that there is little comparison with fees charged for a loan of £53.5m for a 9 month facility and fees charged for an extension of a month for a debt of what was then some £17m or so. (Interestingly, although no reliance was placed on this by either side, the Arlington facility contained provision for extension of the facility for 3 months in return for an extension fee of 100 basis points of the loan, which I take to mean 1% or £535,000). Rather, I think Mr Dean was referring back to something he had said earlier when asked about the £2m Extension Fee charged by the Second Supplemental Extension Agreement, as follows:

> *"Q. How was the extension fee of £2 million determined, please?*
>
> *A. I believe Arlington -- and it is in our defence – if you look at the back section of our defence there is a summary of the Arlington loan, and I think that there were fees due under that of 2 million and 1.5 million, and I'm pretty sure that the 2 million that was proposed here was simply because Mark was avoiding having to pay the 3.5 and instead was paying 2 to buy valuable time so that he could move forward with a sale."*

That suggests that what Mr Dean meant was that because Mr Holyoake would not have to pay Arlington £3.5m in fees, CPC decided to ask him to pay some of it to them instead. That tends to confirm that there was no particular science to the size of the fee other than what CPC thought Mr Holyoake would pay.

521. In relation to the final fee of £1.5m, Mr Dean's evidence was as follows:

> *"Q. There was an extension fee of £1.5 million in relation to an extension of seven days, four working days?*
>
> *A. Yes, so that Mr Holyoake could secure a sale at a substantially higher level than he had under the CDL proposal. I don't know where the CDL price ended up, but he was being chipped endlessly in respect of rights of light and all sorts of elements."*

That explains why Mr Holyoake wanted the extension, but not why the fee charged was £1.5m.

522. In the circumstances I am left with little explanation justifying the sums other than that they were the price required by CPC, and no attempt has been made to show that the fees charged were in line with norms in the industry, or calculated by reference to the risks borne by CPC. If the question had been whether the extension fees were high for the extension of the loan for one month, I would conclude that they were, or at any rate that they had not been shown not to be.

523. But that is not the statutory question. The statutory question under s. 140A(1) is whether the Court determines that the relationship is unfair, and in assessing that the Court can have regard to anything it considers relevant under s. 140A(2). The matters that seem to me most relevant are as follows. Mr Holyoake was not a naïve consumer who did not understand what he was doing, but was a sophisticated borrower who had borrowed money for commercial purposes in order to try and make a profit from a business venture. He understood exactly what sums CPC were stipulating as the price for the extensions. He was only in the position of having to ask for extensions because of his defaults, which were the latest in a very long line of broken promises. Although he protested at the sums demanded, he agreed to them: as Mr Lord submitted, he was obviously willing to pay the price, and if he thought the price was too high, he could have refused. What he was buying was not so much credit for a few more days, but the opportunity to continue to try and achieve a sale, first to CDL, and then at a significantly higher cash price to Key Platinum (CDL's final position had been a sale for £78m cash, with a retention of £11m until a rights of light issue had been resolved, and apartments worth £7m, whereas the sale to Key Platinum was a straight sale at £90m). That was a price that Mr Holyoake considered worth paying, and Mr Holyoake was no doubt right, as if he had not paid the price CPC required, it is doubtful if either of those sales could have been completed and there was a real risk that if CPC had sued him or exercised its step-in rights, a sale would have been much less advantageous. In effect therefore what CPC was doing, as Mr Candy effectively admitted, was taking advantage of the fact that Mr Holyoake, having failed to keep to the timetable he had agreed to, needed extensions to sell GGH, and putting a price on that which they judged, correctly, Mr Holyoake would find it commercially worth his while to pay.

524. In those circumstances I am persuaded, accepting that the onus is on CPC, that even though the extension fees may have been steep, the relationship between the parties was not unfair. I do not think the CCA was in general intended to enable the Court to intervene in what is effectively a commercial negotiation between parties who are well able to look after themselves.

525. That conclusion makes it unnecessary to consider whether I would have exercised my discretion under s. 140B(1) had I determined that the relationship between the parties was unfair. Mr Lord submitted that in that event the Court should refuse relief because of Mr Holyoake's repeated dishonesty: cf *Ketley v Scott* [1981] ICR 241, a decision on the previous provisions in ss. 137-140 CCA where Foster J, having found that the interest charged was not extortionate, said he would have refused to reopen the transaction in any event in view of four deceitful acts of the borrower. Although the point does not now arise, I think it very likely that I would have taken the same view in the present case. In particular, if Mr Holyoake had not pretended that the Sherbourne contract was a Qualifying Contract, the debt would have fallen due on 1 May 2013 and CPC would have acquired step-in rights to sell GGH. It is impossible to know precisely what would have happened, but I think it is probable that CPC would have stepped in and sold GGH. That would be likely to have realised less than the ultimate sale to Key Platinum, and there would be no question of the Extension Fees of £1m and £1.5m. In those circumstances I do not think it would have been appropriate to reopen the payment of Extension Fees which Mr Holyoake would probably not have paid if he had not been deceitful about the Sherbourne contract, and which probably enabled him to realise more on a sale of GGH than would then have been the case.

### *Conclusion*

526. I have now considered all Mr Holyoake's and Hotblack's claims and found none of them established. It follows that I dismiss the claim.