

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**BUSINESS LIST (CHANCERY DIVISION)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 12 July 2019

Before:

**RICHARD SPEARMAN Q.C.**  
**(sitting as a Deputy Judge of the Chancery Division)**

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Between:

- (1) BUCKINGHAM HOMES LIMITED  
(2) MICHAEL JOSEPH ROSS

**Claimants**

- and -

- (1) PETER MALCOLM RUTTER  
(2) ALAN ROBERT GILMORE  
(3) STEPHEN GERARD CRAWFORD  
(4) GARY RAYMOND SYMES

**Defendants**

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**Jeremy Cousins QC** and **Peter Dodge** for the Claimants (instructed by David Woolfe Limited)

**Mark Harper QC** and **Nigel Hood** (instructed by Weightmans LLP) for the Defendants

Hearing dates: 15-18, 21-22 January 2019 and 14-15 February 2019

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RICHARD SPEARMAN Q.C.:

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## **INTRODUCTION**

1. This is a claim for breach of duty against the former directors of the First Claimant (“PADS”). It is brought at the instigation of the Second Claimant (“Mr Ross”), who became the ultimate beneficial owner of all the shares in PADS in consequence of a Share Purchase Agreement dated 8 March 2016. Schedule 1 to that Agreement identifies the sellers as Mr Ross and the Defendants. The buyer was Artaro Limited, a company which is owned and controlled by Mr Ross. Further claims brought by Mr Ross personally were abandoned by the start of the trial, and nothing more need be said about those claims, although they may give rise to costs arguments in due course.
2. PADS and Mr Ross were represented by Jeremy Cousins QC and Peter Dodge, and the Defendants were represented by Mark Harper QC and Nigel Hood. I am grateful to all of them for their extensive and helpful written and oral submissions.

## **THE DISPUTE IN OUTLINE**

3. PADS was incorporated on 20 October 1995 and has had various names. It was named PRC Professional Services Limited between 15 November 1995 and 20 July 2009, Professional and Development Services Limited between 20 July 2009 and 5 April 2016, and Artaro Development Services Limited between 5 April 2016 and 16 February 2017, before changing its name to Buckingham Homes Limited on 16 February 2017. It was named Professional and Development Services Limited throughout the time that is material to the present claim, and is referred to as PADS in contemporary documents. It is therefore convenient to refer to it as PADS for the purposes of these proceedings.
4. PADS was one of a number of associated companies (“the PRC Group”). PADS was a wholly owned subsidiary of PRC Holdings Limited (“PRCH”), which was dissolved on 8 November 2012. Another company in the PRC Group was PRC Architects Limited (“PRCA”), which provided architectural services, was at one time called PRC Fewster Architects Limited, and was dissolved on 13 January 2017. A further company in the PRC Group is PRC Architecture and Planning Limited (“PRCA&P”), which is a provider of engineering services, and which has previously been called PRC Engineering Limited and (for an intervening period) PRC Fewster Engineering Limited.
5. PADS owned a freehold property at 34, Victoria Road, Surbiton (“the Property”) as a result of a purchase which completed on 8 October 1999. On or about that date a Restructuring Note (“the Note”) was agreed between (so far as relevant to the present claim) the First Defendant (“Mr Rutter”), Mr Ross, the Second Defendant (“Mr Gilmore”), the Third Defendant (“Mr Crawford”), and the Fourth Defendant (“Mr Symes”). The Note provided for both a new board of directors of PADS (comprising Messrs Rutter, Crawford, Gilmore and Symes), and a new share structure pursuant to

which PRCH continued to hold the 2 ordinary issued shares in PADS and Messrs Ross, Rutter, Crawford, Gilmore and Symes would hold differing numbers of Redeemable Preference (“RP”) Shares. The principal relevant provisions of the Note are as follows:

(1) Clause 1 of the Note recorded that the general purpose of the RP Shares *“is to protect and preserve for the RP Shareholders ... the equity in [the Property] which [PADS] is purchasing (completion date 8 October 1999)”*.

(2) Among other things, Clause 2 defined:

*“Equity Value”* to mean *“the Value [as defined] of the Property at the relevant time”* less certain specified expenses including selling costs, amounts required to redeem loans for the purchase of the Property and financing costs of approved capital costs authorised by a Special Majority.

*“Minor Shareholder”* to mean any of Messrs, Crawford, Gilmore, Symes (as well as a Mr Douglas) *“who at the relevant time holds RP Shares”*.

*“Special Majority”* to mean:

*“a majority of votes of RP Shareholders in favour of a resolution where (a) at least one of the Minor RP Shareholders votes in favour of the resolution and (b) votes representing in excess of 50% of the then issued RP Shares are cast in favour of the resolution”*.

(3) Clause 3 provided that:

*“Dividends*

(a) *Dividends shall only be paid to the RP Shareholders in respect of net income arising from the Property or in respect of realised Equity Value from time to time and shall be for such amount as a Special Majority shall decide.*

(b) *No dividend shall be payable to ordinary shareholders in respect of net income arising from the Property or in respect of realised Equity Value from time to time.”*

(4) Clause 4 provided that:

*“Voting*

*Only a Special Majority shall determine any matter concerning the purchase ownership management or sale of the Property or the financing or re-financing of it. Ordinary shareholders shall not be entitled to vote in respect of these matters. Subject thereto each RP Shareholder shall have one vote for each RP Share held by him.”*

(4) Clause 5 provided that:

*“Winding up*

*On a winding up of the Company the Property shall be sold or distributed in specie in such manner as the RP Shareholders shall unanimously decide. The ordinary shareholders shall not participate in the assets of the Company in so far as they relate to realised Equity Value or net income.”*

6. The RP Shares were created pursuant to an ordinary resolution passed on 26 June 2000 and were allotted from that date. On the same day, by a special resolution, the memorandum and articles of association of PADS (“the Memorandum and Articles”) were amended. Among other things:

(1) In accordance with Article 6(b), every RP Shareholder was entitled to vote upon any matter *“relating to the purchase ownership management development alteration letting sale or other disposal of the Property”*.

(2) In accordance with Article 7, notice had to be given of meetings, and in the case of special business the general nature of that business had to be specified.

(3) Pursuant to Article 1, the formalities in relation to notice prescribed by paragraph 38 of Table A were incorporated into the Articles.

7. On 16 December 2009, a meeting or purported meeting of the board of directors and shareholders of PADS took place. In accordance with the minutes of that meeting (“the Minutes”) a number of resolutions were passed, the validity of which is at the heart of the present proceedings. It is Mr Ross’ case that, although the Minutes list him as being in attendance: (a) he was given no notice of that meeting; (b) he did not attend it; (c) he first learned of the Minutes when the Defendants provided disclosure of the same in these proceedings and *“was astonished”*; and (d) had he been aware of the meeting and what was going to be discussed, he would have objected to a number of those resolutions. For their part, although none of the Defendants claimed to have any positive recollection that Mr Ross was notified of, or was present at, the meeting, they nevertheless contend that Mr Ross is bound by those resolutions (a) because he was indeed present, alternatively (b) in accordance with the principle in *Re Duomatic Limited* [1969] 2 Ch 365. The following matters recorded in the Minutes are in issue:

(1) Paragraph 1(f) recorded that PADS had previously resolved to market the Property and that following the sale *“the net proceeds after discharging all borrowing and costs would be distributed (subject to tax) to shareholders and that each shareholder would at that time reconcile his respective financial position with:*

- (i) *The other shareholders; and*
- (ii) *[PRCA&P]; and*
- (iii) *In relation to any calls made upon Peter Rutter and Michael Ross in respect of the joint and several guarantee for £250,000 given by the two of them to Barclays Bank plc in respect of [PRCA] or upon Peter Rutter in respect of the £150,000 additional guarantee given by Peter Rutter to the said bank and in respect of the realisation of any security given by either of them in support of either guarantee”.*

(2) Paragraphs 1(g)-1(i) recorded that PRCA&P required an injection of £150,000 which would be provided by Barclays Bank plc (“Barclays”); that Barclays had indicated that it would lend £150,000 to PADS in return for a second charge on the Property, which PADS had agreed to provide; and that PADS had agreed to advance the sum of £150,000 to PRCA&P on terms to be agreed.

(3) Paragraph 2 recorded that:

*“Detailed discussion of the above background took place during which each director and shareholder disclosed his personal interest in the subject matter discussed. It was decided that the various proposals were (in so far as they concerned [PADS]) in [PADS’] best commercial interests as well as that of its shareholders.”*

8. At the start of the trial, I granted permission for PADS to amend its pleaded case. In light of that amendment, the principal claims may be summarised as follows:

(1) On or about 5 February 2010, PADS paid to PRCA&P by way of loan the sum of £150,000 which PADS had borrowed from Barclays. This borrowing, together with the arrangement fee, commission, and interest caused PADS a loss of £160,141.33. This loan to PRCA&P was unauthorised. It was not in the interests of PADS. Further, it benefitted Mr Rutter as the 73% shareholder in PRCA&P and Messrs Rutter, Gilmore and Crawford as directors of PRCA&P. It is not suggested that these factors increase the amount of the claim under this head, but they are relied on as part of PADS’ case of breach of duty against the Defendants.

(2) On 18 May 2011, contracts were exchanged for the grant of a long lease of part of the Property to 32, Victoria Road Limited (“32VRL”). PADS contends that this sale was unauthorised because it was not sanctioned by any Special Majority, and indeed that it did not comply with paragraph 1(f) of the Minutes in any event (because paragraph 1(f) related to a sale of the Property, not just part of it). The sale deprived PADS of the opportunity to develop that part of the Property. PADS contends that this part of the Property could and should have been retained and developed by PADS, that this would have generated a profit of over £1.6m

for PADS, and that it suffered a loss of that amount or, alternatively, the loss of a substantial chance to make a profit of that amount or some other substantial sum.

- (3) The proceeds of the above sale were paid to PADS as to £525,000 on 15 June 2011 and as to the balance of £475,000 (plus some further sums bringing that payment up to £477,036) on 20 July 2012. Out of those proceeds of sale, the total sum of £343,231.97 was paid to Barclays (as to £100,000 on 22 July 2011 and as to the balance on 24 July 2012). Those payments reduced the liability of PRCA to Barclays, and enabled Mr Rutter and Mr Ross to be released from the guarantee (for £250,000 plus interest) which they had given to Barclays on 9 April 2009. Those payments were unauthorised because they discharged an indebtedness which was not that of PADS. They also benefitted not only Mr Rutter (and Mr Ross) but also Messrs Gilmore, Crawford and Symes, who had assumed mutual liability for the guarantee liabilities proportional to their shareholdings in PRCA. These matters are not claimed to have increased PADS' loss under this head, but they are relied on as part of PADS' case of breach of duty against the Defendants.
9. The Defendants' primary line of defence to the claims summarised above is (a) that these transactions accorded with the resolutions recorded in the Minutes and (b) that Mr Ross attended the meeting on 16 December 2009 and is bound by those resolutions.
10. The Defendants' further principal lines of defence to those claims are as follows:
  - (1) The loan of £150,000 was in the interests of PADS, and was believed to be so by the Defendants. It was in the interests of PADS that PRCA&P should prosper, so as to be able to rent part of the Property from PADS on terms which were advantageous to PADS. Without that loan, PRCA&P would not have been able to do that, but with the benefit of the loan it was able to do that. Moreover, that in turn was instrumental in enabling PADS to rent out another part of the Property, in that a third party tenant was persuaded to take a lease partly because of the prospect of obtaining referral work from PRCA&P. In any event, PRCA&P repaid the loan in full, and therefore PADS has suffered no loss under this head.
  - (2) PADS was not at any material time in a position to carry out a development of the whole of the Property, and nor (if Mr Ross had challenged the validity of that decision) would the Defendants have been prepared to revoke the decision to sell part of the Property to 32VRL and to decide instead to cause PADS to develop it. On the contrary, if a Special Majority had not already made a valid resolution to sell, such a resolution would have been made if Mr Ross had raised the point. The Defendants had no motive to turn away from any development which seemed practicable and likely to yield greater profits than selling the Property. Indeed, they did in fact decide (in conjunction with Mr Ross) to retain and develop part of the Property. Moreover, that development was carried out through the medium of

another company, St Mary's Development (Surrey) Limited ("SMD"), and the same approach would have been adopted if the Defendants and Mr Ross had decided not to sell part of the Property to 32VRL but instead to develop that part as well. In those circumstances, any profit derived from retaining and developing that additional part of the property would not been received by PADS but would instead have been channelled into SMD or some other, similar, corporate vehicle. Accordingly, for all these reasons, causation is not made out. In any event, by the time the decision to sell to 32VRL was implemented Mr Ross had assented to or acquiesced in that decision, and the Defendants therefore had authority to sell.

- (3) Mr Ross took the benefit of the payment of £343,231.97 that was made to Barclays. Further, in accordance with Clause 3(a) of the Note those monies were "*realised Equity Value*" and were payable to the RP Shareholders as dividends; but it was open to a Special Majority to decide, and a Special Majority did in fact decide, to pay them to reduce the indebtedness of PRCA to Barclays and thus the exposure of the RP Shareholders pursuant to the guarantee given by Mr Rutter and Mr Ross and the indemnities given by Messrs Gilmore, Crawford and Symes. In any event, pursuant to the Note these monies fell to be distributed to the RP Shareholders by way of dividends, and if Mr Ross had raised the point a Special Majority would have resolved that they should be so distributed. Accordingly, any failure that may be established on the part of the Defendants to comply with the Note or the Articles was not causative of any loss to PADS, because it had no entitlement to retain these monies and they would have been paid out anyway.
- (4) The Defendants assert defences of laches and/or acquiescence to all of the claims.
- (5) If the Defendants are held to have acted in breach of duty in any way, they claim relief from liability pursuant to section 1157 of the Companies Act 2006 on the grounds that they acted honestly and reasonably and ought fairly to be excused.

#### **AMENDMENT OF THE PARTICULARS OF CLAIM**

11. The claim form in this case is dated 15 May 2017. The Particulars of Claim were served on 31 August 2017, and the Defence on 12 October 2017. In due course, the case was listed for trial with a day for pre-reading on 15 January 2019, to be followed, from 16 January 2019 onwards, by 5 or 6 days of evidence and closing submissions.
12. On 18 December 2018, the Claimants issued an application seeking permission to amend the Particulars of Claim in a number of respects, and permission to rely at trial upon a 5<sup>th</sup> witness statement of Mr Ross, dated 7 December 2018. A draft Amended Particulars of Claim was first served under cover of a letter dated 7 December 2018, although it would appear that a final version of the proposed amendments was not produced until 20 December 2018.



13. Because the application could not be disposed of earlier, it fell to be determined at the start of the trial. It generated two bundles of papers comprising almost 700 pages in all.
14. The application was not pursued in relation to the 5<sup>th</sup> witness statement of Mr Ross. Further, a number of the proposed amendments were uncontentious. Some were not resisted by the Defendants. Others appeared, on reflection, not to be needed. That left the proposed amendments set out in paragraphs 2.9A, 2.9B, 3.5A, 3.5B, and 3.9C.
15. In essence, paragraph 2.9A pleads the contents of the Minute. There is no dispute as to the contents of the Minute. Indeed, it was pleaded and relied upon by the Defendants in their Defence, as explained by their responses to a Request for Further Information.
16. Paragraph 2.9B picks up one aspect of the Minutes, namely the decision to borrow £150,000 and charge the Property as summarised in paragraphs 7(2)-(3) above. It is pleaded in paragraph 2.9B that this decision was implemented by payment of around £149,000 from PADS to PRCA&P on or about 5 February 2010 and the creation of a debenture in favour of Barclays over the assets of PADS. There did not appear to be any dispute as to the date or amount of that payment or the creation of that debenture.
17. The remainder of paragraph 2.9B pleads that this transaction was disadvantageous to PADS and that PADS has not been repaid the monies advanced to PRCA&P by PADS.
18. Paragraph 3.5A pleads that the Defendants acted in breach of duty in causing or permitting that advance to be made by PADS. Paragraphs 3.5B and 3.5C then plead an entitlement to compensation or restitution in respect of the amount of that advance and further disbursements amounting in total to just over £11,000, the dates and amounts of which I did not understand to be in dispute.
19. The net effect of the amendments which remained in issue was to add to the agreed List of Issues for trial, which otherwise numbered 14 in total including sub-issues, two further issues, namely (1) the fact of the above loan transaction involving PRCA&P and (2) whether the Defendants acted in breach of duty in relation to that transaction.
20. The principles that apply to contested applications for permission to amend were not in dispute, and are so well known as not to require detailed citation. A helpful summary was provided by Coulson J (as he then was) in *CIP Properties (AIPT) Limited v Galliford Try Infrastructure Limited* [2015] EWHC 1345 (TCC) at [19], based on a consideration of a number of recent cases, most of which post-dated the Jackson reforms to the CPR. It is clear from that summary that the determination of such an application is a multi-factorial exercise, in which different considerations will assume different significance in different cases. That summary (omitting citation) is as follows:

- “(a) *The lateness by which an amendment is produced is a relative concept. An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) which have been completed by the time of the amendment.*
- (b) *An amendment can be regarded as ‘very late’ if permission to amend threatens the trial date, even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason.*
- (c) *The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise. In essence, there must be a good reason for the delay.*
- (d) *The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly-drawn or focused.*
- (e) *The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being ‘mucked around’, to the disruption of and additional pressure on their lawyers in the run-up to trial, and the duplication of cost and effort at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments.*
- (f) *Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered. Moreover, if that prejudice has come about by the amending party’s own conduct, then it is a much less important element of the balancing exercise.”*

21. I received Skeleton Arguments from Mr Cousins and Mr Harper, as well as oral submissions which occupied approximately the 1.5 hours estimated in the Application Notice. I paid careful regard to all those submissions and to all the passages in the authorities to which I was referred, although I do not consider that it is necessary to set out all that material in this judgment.

22. Mr Harper focussed his submissions on the 4 factors identified by Hamblen J (as he then was) in *Brown v InnovatorOne plc* [2011] EWHC 3221 (Comm), and it is convenient to follow that approach. Those factors are:

- “(1) *the history as regards the amendment and the explanation as to why it is being made late;*

- (2) *the prejudice which will be caused to the applicant if the amendment is refused;*
- (3) *the prejudice which will be caused to the resisting party if the amendment is allowed;*
- (4) *whether the text of the amendment is satisfactory in terms of clarity and particularity.”*

23. As to first of those factors, Mr Harper set out the main steps in the proceedings in paragraph 21 of his Skeleton Argument. The amendment was clearly being made late. In particular, Mr Harper made the point that the Claimants plainly gave detailed consideration to their case not only when pleading it initially but also when seeking Further Information in early 2018. Moreover, the Minutes upon which the amendment was based were provided at the same time as the Further Information in January 2018. Accordingly, the Claimants could have applied to amend shortly after that date.
24. Mr Cousins candidly accepted that the amendments could have been pleaded at any time after the Minutes were disclosed to the Claimants. In essence, the explanation for the lateness of the application was attributable to a change of Counsel. Mr Cousins was only instructed in November 2018, and was given instructions to draft the amendments on 4 December 2018.
25. That is said by Mr Harper not to be a good reason. In *Wani LLP v Royal Bank of Scotland plc* [2015] EWHC 1181 (Ch), Henderson J (as he then was) recorded at [45] that it had not been in dispute before him that “*the instruction of new counsel is not in itself a good explanation for a late amendment*”. Mr Harper further submitted that absence of a good reason is fatal to the present application: see *CIP* at [19(c)].
26. In my judgment, the exercise of the discretion is more flexible than that: see, for example, *Swain-Mason v Mills & Reeve LLP* [2011] 1 WLR at [72]. Even if the Claimants bear a heavy onus to justify the amendment, the fact that the only reason why the amendment is being made late is attributable to the instruction of new Counsel does not lead inexorably to the conclusion that the application must fail regardless of the weight to be accorded to other factors (e.g. where refusal would lead to severe prejudice, and where allowing it would result in only insignificant “mucking around”).
27. Mr Harper placed reliance on a particular feature of the history in the present case, concerning events since early December 2018. On 4 December 2018, the same day as Mr Cousins was instructed to draft the amendments which are now in issue, the Claimants’ solicitors wrote to the Defendants’ solicitors saying that the Claimants were “*considering their position and their claims generally*” and that “*in an aim to narrow the issues, we confirm that Mr Ross does not intend to pursue his personal claim for*

*£45,000 as pleaded at section 4 of the Particulars of Claim*". On 5 and 6 December 2018 a hearing took place at which the Defendants sought an order that the Claimants should provide security for their costs. On 7 December 2018, Snowden J made an order requiring the Claimants to provide security in the sum of £120,000. If my understanding is correct, security in that amount essentially represented security for all or most of the Defendants' estimated costs from that date down to the end of the trial.

28. Mr Harper submitted, and I agree, that the letter of 4 December 2018 gave no indication that amendments to the Particulars of Claim which sought to enlarge the Claimants' claim were then actively under consideration. I also agree that if this had been intimated to the Defendants, it is likely that some consideration would have been given to the nature and extent of the proposed application at the security for costs hearing, and that Snowden J would have taken the likely costs of that application into account when deciding what sum the Claimants should be required to provide as security.
29. It is regrettable that the true position was not made clear by the Claimants' solicitors. However, I accept Mr Cousins' submission that I do not have the material to find, and that I should not find, that this was the product of a deliberate tactic to gain an advantage in the security for costs application, or indeed to gain any other advantage.
30. Once the complaint about prejudice at the security for costs hearing was raised by the Defendants, it was accepted in principle by the Claimants: see paragraph 18 of Mr Ross' 8<sup>th</sup> witness statement. The suggestion of agreeing a reasonable and proportionate additional sum did not, it seems, meet with any response from the Defendants.
31. I considered that prejudice was occasioned to the Defendants by this omission, but that it was capable of being remedied by requiring the provision of additional security for their costs as one of the terms on which permission to amend should be allowed.
32. There is another aspect of the history, which ameliorates the prejudice which the Defendants might otherwise be occasioned by these amendments, and that is that the amendments were served about a month before the start of the trial.
33. Moreover, the amendments are of limited compass. There is no dispute as to what the Defendants did, or as to the capacity in which they did it. In essence, the proposed amendments require them to explain their reasons for acting as they did, and in particular to state why they contend that their actions accorded with their duties. On the one hand, the amended case involves a significant new charge of breach of duty, and the Defendants are entitled to say that they were not previously required to prepare to meet this charge. On the other hand, the nature of the additional charge is quite simple, and in the real world it is hard to imagine that the Defendants would not have been giving consideration to the new allegations even though they had yet to be allowed in.

34. This ties in with another point, which is that the Defendants had already addressed the material facts in detail in their trial evidence: see, for example, paragraph 28 of Mr Rutter's 1<sup>st</sup> witness statement. Accordingly, the amendments require no more than an explanation of actions which are not in dispute and which have already been detailed.
35. Turning to the second factor identified in *Brown*, if the application is refused the Claimants will lose the prospect of obtaining relief in respect of a claim worth approximately £150,000. However, that is only one factor to be considered. Moreover, if, in the event that they suffer such prejudice, the Claimants are essentially the authors of their own misfortune, this factor does not weigh heavily in the balancing exercise.
36. As against that, in my judgment the seriousness of the new charge cuts both ways. The Defendants face serious allegations of breach of duty in any event. If those allegations are made out, and if in fact those breaches extend to an additional £150,000, it does not strike me as fair or in accordance with the overriding objective that the Claimants should lightly be deprived of relief to which, on that hypothesis, they are entitled on the basis of serious breaches of directors' duties, in essence because their current reading of the Minutes differs from the reading which was lit upon by their previous Counsel.
37. With regard to the third factor identified in *Brown*, in my judgment the prejudice to the Defendants if the application is allowed is an important consideration in the present case. This issue was dealt with in paragraph 31 of Mr Harper's Skeleton Argument in relation to the application for permission to amend, which included 12 sub-paragraphs. The matters there set out included, in brief, the actual or potential need for the Defendants (a) to plead to the new case (b) to produce additional witness statements (c) to defer cross-examination of Mr Ross on the new issues until after they had considered and prepared their response to the same (d) to consider the availability of arguments that the proposed new claim can be met by a defence of limitation and/or laches (e) to provide further disclosure (f) to provide instructions and receive advice on the new claim while the trial is progressing (g) to cope with the additional demands on their resources and the resources of their legal advisers arising from the new claim and (h) to produce a new costs budget and to seek additional security for their costs. Mr Harper also placed particular reliance on the judgment of Henderson J in *Wani* at [50] and [62]:

*“... Unless and until an application to amend was made, so as to bring the claimant's pleaded case into alignment with the evidence of its witnesses, the Bank was entitled to proceed on the footing that the issues remained those defined by the statements of case in their existing form. It puts matters the wrong way round, in my judgment, for the claimant to say that the Bank was now on notice of the “real” case that the claimant wished to advance. It is the function of the pleadings to define the issues, and evidence which does not go to the pleaded issues is, strictly speaking, irrelevant and liable to be struck out or disregarded accordingly...”*

*The prejudice that would be caused to the Bank, if the disputed amendments were allowed, is to a considerable extent linked with the factors which I have already examined. In view of the lateness of the amendments, and the significant failures to formulate them with appropriate clarity and particularity, the Bank would in my judgment be forced to investigate and respond to the claimant's new case under great pressure, at a time when it should be able to concentrate its time, resources and energy on preparing for the forthcoming trial in June. This is not a burden which any litigant (however well-resourced) should normally be compelled to undertake, and which orderly pre-trial directions are carefully designed to avoid ...”*

38. I readily accept the validity of those observations. However, Mr Cousins submitted that the significance of these factors in the present case had been exaggerated. I agree with that submission. Mr Cousins also submitted that the facts of the *Wani* case are far removed from those of the present case. I agree with that submission as well. That was a swaps case, and the factors which weighed with Henderson J in that case are set out at [63]. In my judgment, there is no real comparison with the facts of the present case.
39. I formed the view that the Defendants, and the Court, would be able to cope with the proposed amendment without sustaining any prejudice of a kind which militated against the grant of permission, either to the Defendants themselves or to other Court users.
40. In the result, I consider that this conclusion was justified by the events which followed. In brief, in accordance with the Order that I made when granting permission to amend, the Defendants served an Amended Defence, served further witness statements, and provided further disclosure, in the course of the hearing. Further, the Claimants were ordered to provide, and did in fact provide, additional security for the costs of the Defendants in the sum of £36,000 (relating to additional costs arising from the application to amend, and carrying out extra procedural steps in consequence of it). As the parties agreed that the hearing should be adjourned after 22 January 2019 for some time to allow for the preparation of written closing submissions, it was possible to add an additional day on to the adjourned hearing date to deal with the new evidence and new disclosure relating to the issues introduced by amendment in a manner that was fair and just to both sides. In this regard, I made clear that I would allow the Defendants to raise as part of their defence to the new claim a case that the £150,000 in question had been repaid, and that I would not accede to Mr Cousins’ suggestion that the determination of that defence should be adjourned to an inquiry at some future date before a different tribunal. I also made clear that the Claimants could not complain if it transpired that one consequence of being permitted to amend so late in the day was that the disclosure with which they were provided by the Defendants was less extensive than it might have been if the new case had been pleaded timeously. In fact, the Claimants provided a full lever arch file of additional disclosure very shortly before the adjourned hearing date. The Defendants protested about this, and took objection to a proposed 9<sup>th</sup> witness statement of Mr Ross, but those issues evaporated during the

course of the adjourned part of the trial. Overall, these matters were dealt with sensibly and proportionately, and seemed to me to cause no remarkable prejudice to either side.

41. Turning finally to the fourth factor identified in *Brown*, two main points were made by Mr Harper under this head.
42. First, it was submitted that part of the wording of the proposed amendment gave rise to issues concerning the provenance of the Minutes, the nature and extent of which were unclear. However, this point went during the course of the hearing, when Mr Cousins made clear that the text would be changed to remove the relevant part of the wording.
43. Second, Mr Harper submitted that the proposed amendment did not grapple with the issue of limitation, and that Particulars of Claim are always required to plead reliance on the grounds for avoiding a defence of limitation to a claim which is, on the face of it, time barred, as he contended applied to the new claim in the present case. In support of this submission, he relied upon *McGee, Limitation Periods*, 8<sup>th</sup> edn, paragraphs 21.015 and 21.017, and the judgment of Hidden J in *Driscoll-Varley v Parkside Health Authority* [1991] 2 Med LR 346. In my view, however, those materials are not authority for the proposition which Mr Harper sought to extract from them. I consider that, in the circumstances of the present case, it is not inappropriate, and neither does it render the text of the proposed amendment unsatisfactory in terms of clarity and particularity, for the Claimants to plead the primary facts on which they rely, and to leave it to the Defendants to raise such defences as they rely upon, including any limitation defence.
44. For these reasons, I decided to allow the disputed amendments, subject to minor re-pleading to remove references to “provenance” and any other wording which was no longer necessary or appropriate in light of all the submissions made by the parties, and subject also to the further terms which were set out my Order dated 17 January 2019.

## **THE EVIDENCE OF THE WITNESSES**

45. I heard oral evidence:
  - (1) On behalf of PADS, from Mr Ross, who trained as a chartered accountant, before becoming a consultant in corporate recovery and also a property developer.
  - (2) On behalf of the Defendants, who are all chartered architects save Mr Gilmore who was an architectural technician, from each of them, and from Deirdre O’Reilly (“Mrs O’Reilly”), who qualified as a chartered management accountant in 2008, joined PRCA in November 2004, and currently works for PRCA&P. (Sadly, Mr Gilmore died on 14 May 2019, before judgment in this case could be handed down. The judgment was delayed in part because the parties only decided

to obtain transcripts of the hearing after it had concluded. Thereafter, the parties, entirely understandably, wished to bolster their closing submissions by various references to the transcripts, and these were not sent to me until 2 April 2019.)

46. Mr Ross also relied on the evidence contained in the witness statement of Asher Miller (“Mr Miller”), who is a chartered accountant, a licensed insolvency practitioner, and a partner in David Rubin & Partners Limited. That evidence was not challenged.
47. Mr Cousins pointed out that the Defendants did not call (a) Craig Lockhart (“Mr Lockhart”), who was the Chief Operating Officer of PADS at the material times, (b) Robin Myddelton (“Mr Myddelton”) a partner in Batchelor Myddelton, the solicitors for PADS, and (c) representatives of 32VRL, who could speak to the reliability of the accounts of 32VRL which the Defendants prayed in aid in support of their case that the development of that part of the Property which was developed by 32VRL was not a profitable venture. Mr Cousins submitted, and Mr Harper disputed, that the Court should draw adverse inferences because the Defendants did not call these witnesses: see *Wiszniewski v Central Manchester Health Authority* [1998] PIQR P324.
48. I am satisfied that the Defendants and Mrs O’Reilly all gave honest evidence before me, although this does not mean that their evidence was necessarily reliable in every respect. I indicated at the end of the first part of the trial that this was my impression of the evidence of the Defendants. Mr Cousins accepted I was entitled to form that view.
49. I did not provide the same indication with regard to the evidence of Mr Ross, for two main reasons. First, because, in contrast to the position of the Defendants, who are alleged in certain respects to have acted dishonestly, there was no substantive issue in the proceedings as to whether he had acted honestly. Second, because I had some reservations about some of his evidence. Mr Harper noted that distinction, and submitted in closing that Mr Ross was not an honest witness for a number of reasons.
50. I do not consider it necessary to address all the points that were made by Mr Harper in this regard. I shall deal with such points as I consider material where appropriate below.
51. I have also not thought it necessary to address a number of allegations which were made against the Defendants, and in particular the late Mr Gilmore, concerning their dealings with PRCA and PRCA&P, essentially concerning the sale of PRCA’s assets to PRCA&P. These allegations focussed on the alleged diversion of invoices and understatement of work in progress concerning PRCA, which Mr Cousins submitted “*could not honestly be supported*”. It was accepted on behalf of PADS that the matters relied upon did not add to the quantum of PADS’ claims, and, further, that the alleged wrongful actions of the Defendants were not carried out by them in their capacity as directors of PADS. It was submitted, however, that the matters alleged shed light on the Defendants’ motivations and concerns at the material time, and showed a willingness



on their part to advance the interests of PRCA&P to the prejudice of the creditors of PRCA in a like way to their willingness to advance the interests of PRCA&P to the prejudice of PADS. It was also submitted that the diversion or understatement of PRCA's assets caused prejudice to PADS because PADS' assets were used to pay off a debt to Barclays which was greater due to under-recovery from PRCA's assets.

52. I did not find the exploration of these matters helpful in resolving the issues before me. Nor did they cause me to doubt the integrity or credibility of the Defendants in any material respect. If and to the extent that they or any of them were at any stage guilty in their capacity as directors of PADS of impermissibly confusing or mixing up the interests of PADS with their own interests or the interests of others such as companies with which they had an involvement, I am entirely satisfied that this was not due to any lack of honesty or any form of sharp practice on their part, nor any conscious effort to do down Mr Ross or act unfairly towards him or contrary to his (differing) interests.
53. It seems to me that the main significance of these issues relating to dealings with the affairs of PRCA is that they may explain the motive, or a significant part of the motive, of Mr Ross in causing the present proceedings to be brought. The resolution of financial issues involving Mr Ross and the Defendants arising from the collapse of PRCA gave rise to considerable correspondence and took some time to conclude. It may be that, having obtained a measure of personal benefit from the transactions about which PADS now complains, Mr Ross not only sees no reason why he should not benefit further as the ultimate beneficial owner of PADS if PADS has a legitimate basis for bringing the present claims but also considers that the obtaining of further sums in this way is no more than PADS', and his, just legal entitlement. However, it seems likely that suspicion and resentment arising from the Defendants' treatment of Mr Ross with regard to PRCA and PRCA&P have provided an additional spur for the present claims.
54. Naturally, these considerations do not affect the legal merits of the current dispute, or the proper resolution of the issues before me in accordance with applicable law and the evidence. However, they may help to explain why these proceedings have reached trial.

## **EVENTS IN LATE 2009**

55. In 2009, PRCA was in difficulties. The minutes of a management meeting held on 4 June 2009 record: "*Market has been difficult and cash collection has been difficult*". Various possible outcomes were discussed, including a CVA and "*full insolvency and liquidation*". In response to a question as to whether PRCA was solvent, Mr Ross confirmed that it was "*borderline solvent with a positive balance sheet and a potential positive trading position*". Mr Ross also states: "*The tipping point if it happens would be likely to be mid-August onwards coinciding with the end of the financial year*".

56. In the result, PRCA was unable to survive. At a meeting of the board of directors held on 1 December 2009, it was resolved that PRCA would invite Barclays to appoint administrators of PRCA, and that: *“Such invite and appointment should be with immediate effect”*. PRCA went into administration on 4 December 2009, and Begbies Traynor plc (“BT”) was appointed as the administrator at the instigation of Barclays.
57. In the meantime, the Defendants had resolved to carry on business together through the medium of PRCA&P, and to do so without the involvement of Mr Ross. An email from Mr Lockhart to Mr Ross dated 22 October 2009 records that Mr Rutter *“has spoken with you and told you that you are not in the new company”*.
58. Mr Ross’ evidence is that he was substantially excluded by the Defendants from the decision making throughout much of this period, that they ignored much of his advice, and that steps were taken which were adverse to his interests. These matters are reflected in an email dated 25 November 2009 that he sent to Mr Rutter. The trigger for that email was a conversation between Mr Ross and Darren Brown of Barclays. Mr Ross recorded in that email that this conversation had been awkward, that some of what Mr Ross had been told by Mr Brown was highly embarrassing, and that he had been unable to answer Mr Brown’s *“very searching questions”*. By this date, Barclays was on the verge of causing PRCA to be placed in administration. I consider that it is more likely than not that Mr Brown discussed with Mr Ross Barclays’ concerns about PRCA’s financial position and what Barclays might do about those concerns, and that this explains the reference to *“searching questions”* that Mr Ross felt unable to answer.
59. Consistent with this, Barclays called a meeting on 30 November 2009, which was attended by, among others, Mr Rutter, Mr Lockhart, and Mr Brown. At this meeting, Barclays stated that it intended to appoint BT as administrator of PRCA. Barclays also required Mr Rutter to provide an additional personal guarantee for £150,000, which would mean that PRCA’s total indebtedness to Barclays of £400,000 would be secured by guarantees. Mr Rutter’s evidence, which I accept, was that Barclays imposed a deadline of 12 noon on 1 December 2009 for terms acceptable to it to be agreed, Mr Rutter called Mr Brown at 11.50am to confirm he would agree to provide an additional guarantee for £150,000, and although the meeting was a blur and although he could not recall the words that were spoken, events around this time were *“extremely traumatic”*.
60. Mr Rutter’s telephone call to Barclays followed an emergency meeting in his office on the morning of 1 December 2009. This was attended by those who were able to attend at short notice, including the Defendants and Mr Lockhart, but not Mr Ross. In addition to the provision of Mr Rutter’s additional guarantee, and the agreement to BT being appointed as administrator of PRCA, which were requirements of Barclays, Mr Rutter states: *“A motion was proposed by myself and voted on that [the Property] should be sold to provide funds to shareholders in order to pay the individual debts to Barclays, all voted in favour. It was agreed that this was the only option to safeguard the loss of*

*control of the building which was therefore in the best interests of PADS*". The evidence of the other Defendants is to the like effect. For example, Mr Crawford states that the votes taken on 1 December 2009 were recorded in the Minutes and: *"It was concluded that this was the only option available to safeguard any loss of control of [the Property], achieve best value and was therefore in the best interests of [PADS]"*.

61. The Defendants' case is that the background to these matters includes the following. First, in order to purchase the Property, PADS had borrowed money from Svenska Handelsbanken AB ("Handelsbanken"). Second, PRCA was the sole tenant of the Property. Third, PADS (which did not trade) had no source of income other than the rent paid for the Property with which to make the payments due to Handelsbanken.
62. Accordingly, the Defendants argue that, in the difficult economic climate prevailing in December 2009, without instigating a sale of the Property there was no dependable means of ensuring the discharge of the indebtedness to Handelsbanken (of PADS) and to Barclays (of PRCA) and thus avoiding a sale at a time and on terms outside of their control. The Defendants (as well as Mr Ross) each had an interest not only in the first of these matters but also in the second. This is because the indebtedness of PRCA to Barclays was guaranteed not only directly by Mr Ross and Mr Rutter but also indirectly by the other Defendants pursuant to a Deed of Indemnity dated 7 April 2009. The effect of that Deed was that they agreed to indemnify Mr Ross and Mr Rutter in respect of any payments made under their guarantees, in the proportions set out in that Deed.
63. Moreover, when considering the decision to sell the Property, the Defendants contend that it is relevant to have regard to the fact that, in the event that they were called upon to discharge their liabilities as guarantor and indemnifiers otherwise than through a sale, they would have been entitled in accordance with the provisions of the Note - if not compelled by their own financial circumstances - to seek reimbursement by realising the interests in the Property to which they were entitled through the medium of the RP Shares. The Defendants commanded a Special Majority for the purposes of the Note, and it made no difference to them whether (a) they decided to sell the Property and distribute the proceeds of sale by way of dividends and then use part of their dividend receipts to meet their obligations as guarantor and indemnifiers, or (b) (assuming that they had the means to do so) they first met those obligations and then thereafter recouped the monies that they had expended on meeting those obligations by exercising their rights in accordance with the Note, or (c) they caused the Property to be sold and the proceeds of sale to be distributed only partly to them and partly directly to Barclays in order to discharge those obligations. It is true that that the indebtedness to Barclays was an indebtedness of PRCA, and not an indebtedness of PADS. However, the Defendants were exposed to personal liabilities under the guarantee and the Deed of Indemnity, and they had personal entitlements under the Note. The means by which they used those entitlements to discharge those liabilities made no difference to them.

64. It also made no long term difference to PADS, because, although the proceeds of sale of the Property belonged to PADS, in accordance with the provisions of the Note the RP Shareholders and they alone were entitled to participate in those proceeds, and the Defendants were able (with or without the agreement of Mr Ross) to vote that the proceeds should be paid to the RP Shareholders. It would have made a difference to PADS, or perhaps more accurately to the creditors of PADS, if (a) PADS had liabilities which it required the proceeds of sale of the Property to discharge, and (b) the route chosen by the Defendants meant that those monies were paid out to the RP Shareholders or for their benefit when they would not have been so paid out and instead would have been available to meet liabilities of PADS to third parties which required to be met in the time between the realisation of the value of the Property and the payment of dividends to RP Shareholders in accordance with a resolution by a Special Majority. However, PADS had no such liabilities, and that is not the basis of the present claim.
65. On 4 December 2009, Mr Myddelton sent an email to Mr Rutter regarding the provision of the additional guarantee for £150,000. Mr Myddelton expressed surprise at the idea of a guarantee being given for the indebtedness of PRCA when it was about to go into administration. At the same time, it appears from this email that Barclays required this additional guarantee as a condition of being prepared to provide facilities to a company (namely PRCA&P), which, it was hoped, would be able to purchase the assets of PRCA. At paragraph 7 of the email, Mr Myddelton stated: *“If [Mr Ross] is not to be involved in [PRCA&P] then you must bear in mind that he is a shareholder in [PADS] and the terms of [the Note]”*. At paragraph 9c, Mr Myddelton advised: *“Unless you can agree certain things via [BT] as to the purchase of assets by [PRCA&P] from [PRCA], you are unlikely to obtain any kind of commitment from Barclays that it will provide the required facilities to [PRCA&P]”*. According to a manuscript endorsement made on a copy of that email by Mr Rutter, at 3pm that day he asked Mr Myddelton to date the additional guarantee and deliver it to Barclays.
66. In my judgment, it is clear that the matters referred to in these documents were inter-related, alternatively (at the very least) that the Defendants could reasonably and honestly have formed the view that this was so. For example, finding a substitute tenant for PRCA was material not only to PADS’ ability to make repayments to Handelsbank, but also to the marketability of the Property. In due course, as recorded by Mr Rutter in his letter to Barclays dated 16 April 2010, all the available options for sale of the Property were *“dependent on income of letting of the office space”*. In addition, in May 2010 when Handelsbanken set out indicative terms for providing PADS with borrowing of £1,575,000 beyond a maturity date of 31 August 2011 to 30 June 2013, those terms included a requirement that *“The Rental Income [of the Property, for each quarter] shall be not less than 2.5 times the Interest incurred”*; and one condition precedent provided *“Completion of new lettings in relation to the Property, on terms acceptable to the Bank, generating minimum gross annual rents of not less than £180,000”*.

67. A report prepared for Barclays by Colliers CRE, chartered surveyors and property consultants, dated 11 December 2009 (“the Colliers Report”) expressed the opinion that the market value of the Property, subject to the lease with PRCA for 15 years from 25 December 1998 at a rent of £140,000 pa, but otherwise with vacant possession, was £2,300,000; and on the “*Special Assumption of vacant possession throughout*” was £2,050,000. The Colliers Report also stated (among many other things):

*“Although there are a number of requirements in the Surbiton area at present, many occupiers remain reluctant to commit to new space until the full impact of the recession on their core business is known ...*

*There have been comparatively few recent lettings of retail units within Surbiton ...*

*The property investment market has recently experienced its most severe downturn since reliable performance analysis commenced in 1981, with values having fallen consistently from June 2007 to July 2009. August 2009 however saw the first capital increase in over two years as values for prime assets in particular increased. Further increases followed in September and October ...*

*Property companies and companies wishing to raise finance also became sellers even at ‘discounted’ prices. Purchasers were few and far between, due to the lack of finance and the fear that prices would continue to fall ...*

*The first year of the downturn was largely confined to the finance and property markets. Since the summer of 2008, the wider economy has become affected and the UK, together with many other Western countries, entered a period of recession. Within the property market, this has resulted in a significant increase in insolvencies of tenants and therefore rental voids. The effects of this have been exacerbated by the removal of business rates relief on most vacant properties with effect from April 2008 ...*

*The impact of economic performance on tenant demand is still of great importance. Occupier demand has weakened for all three property sectors. Incentives in order to let properties have increased substantially and evidence of falling rental values is commonplace although to date this does not appear to be fully reflected in the IPD data. The impact of a slowdown in the wider economy on the property market could lead to further falls in rental values and an increase in voids as a result of tenant failures which will consequently impact on capital values ...”*

68. A valuation report in relation to the Property which was prepared by GL Hearn, Property Consultants, for Handelsbanken on 24 August 2010 (“the Hearn Report”) is to like effect. Although it was not prepared until several months later, the Hearn Report sheds light on: (a) market conditions relating to properties like the Property in late 2009, (b) how the rents that were in fact being obtained by the time that report was prepared compared to market rents, and (c) the state of repair and marketability of the Property, or parts of it. The contents of the Hearn Report include the following:

## **“Property Investment Market Overview**

...

- 6.2.9 *The slowdown in the recovery of the property market began back in May ...*
- 6.2.10 *However, values have now recovered by over 15% since the market bottomed out in June 2009, although this still leaves them approximately 30% below the peak in June 2007.*
- 6.2.11 *We expect values to gradually recover over the next few years, but this may be a bumpy ride for sub-prime assets ...*

### **7.1 Valuation considerations**

- 7.1.1 *The Property is situated in the affluent suburban location of Surbiton which has excellent rail links into Central London and to the south coast.*
- 7.1.2 *It is located in the primary commercial thoroughfare of Victoria Road, although provides inferior retail accommodation in comparison to other nearby premises.*
- 7.1.3 *The office accommodation is of reasonably modern specification, although could do with a cosmetic refurbishment to the second floor in particular. The biggest drawback of the space is the entrance off Victoria Road, which is restricted in size and would not therefore enable a security/reception desk to be installed. There is also only stair access from this entrance. In contrast, the rear entrance benefits from a lift but has exceptionally poor visibility.*
- 7.1.4 *Overall the building appears tired and is in need of a degree of refurbishment both externally and internally, although does provide reasonably modern office space with good car parking.*
- 7.1.5 *The offices have recently been let to [PRCA&P] and Michael Bradbrook on new 10 year leases ...*
- 7.1.6 *The current rents passing, based upon our net internal floor areas, appear to be inflated and above our opinion of rental value by approximately 20% overall.*
- 7.1.7 *We are aware that the borrower [i.e. PADS] is in discussion with Thorstone Land and Property Limited to sell the existing four flats and, subject to planning, the remainder of the third floor, a plot of*

*land to the rear of the building and the option to construct an additional fourth floor all for residential purposes ...*

7.1.8 *We understand that, as part of any sale, the borrower would then seek to fully implement the planning consent it currently has to move the main office entrance and re-configure the retail unit. This would not only improve the access to the offices but would also create a far more attractive retail unit.*

7.1.9 *However, until these works are undertaken, we consider it likely that the retail unit will remain unlet and non-income producing ...*

### **7.3 Market Rent**

...

7.3.2 *... The lease to [PRCA&P] of the part second floor and part third floor in the sum of £91,000 per annum, reflects a rate of £18.93 per sq ft. The lease to Michael Bradbrook of the part second and mezzanine floor in the sum of £55,700 per annum reflects a rate of £17.12 per sq ft.*

7.3.3 *In view of the above we consider that the passing rents are in excess of our opinion of the Market Rent of the office element of the property, which is in the order of £14.62 per sq ft (£157.34 per sq m) based on our opinion of the net internal floor areas, equating to an annual rent of £117,800 per annum. We have adopted a rate of £14.50 per sq ft to the second and third floors and £15 per sq ft to the mezzanine floor to reflect its refurbished nature ...*

### **7.4 Market Value**

...

7.4.5 *Our Valuation of the component parts is £2,525,000 ...*

### **7.5 Market Value on the Special Assumption of Vacant Possession**

...

7.5.4 *In view of the above, we are of the opinion that the Market Value of the subject premises, assuming vacant possession throughout, is in the order of £1,800,000 ...”*

69. Having regard to the circumstances in which and the purposes for which they were prepared, these Reports cannot be said to be partisan as between the two sides to this

litigation. Like most valuation reports, they are not necessarily reliable in every respect. However, I see no reason to doubt the accuracy of their contents so far as they relate to the material market conditions in late 2009, whether the rents that PRCA&P and the other commercial tenant which PADS secured for the Property (“Bradbrooks”) agreed to pay were higher than market rents, and the state of repair and marketability of the Property (at least in general terms). In my judgment, all of these matters are relevant when assessing not only the reasonableness and honesty of the actions of the Defendants in late 2009 but also the likelihood that Mr Ross agreed with the resolutions which the Defendants contend were passed to his knowledge and with his concurrence (but which Mr Ross contends that he did not know of, and would not have agreed with).

## **THE MEETING ON 16 DECEMBER 2009**

### *The parties’ submissions*

70. In support of the case that Mr Ross was not notified of the intention to hold the meeting that took place on 16 December 2009, and that he did not learn of that meeting until the Minutes were referred to and disclosed by the Defendants in these proceedings, PADS relied upon the following principal facts and matters:
- (1) There is no document, and nothing in the Defendants’ evidence, which supports the suggestion that the meeting was called, or that Mr Ross was notified of it.
  - (2) The Defendants’ witness statements make no mention of Mr Ross being present at this meeting, and nor did any of the Defendants say in evidence that they had any recollection of Mr Ross being present.
  - (3) There is no document, and nothing in the Defendants’ witness statements, which supports the suggestion that Mr Ross was ever provided with a copy of the Minutes, or that the resolutions recorded in the Minutes were mentioned to him as a reason for suggesting that it was too late for him to complain about matters.
  - (4) Mr Rutter’s oral evidence to the effect that he would have mentioned the meeting when he met Mr Ross a few days later should not to be accepted, because this was not mentioned in Mr Rutter’s witness statement. (I would add that it seems to me that there is a tension between this suggestion and the suggestion that Mr Ross attended the meeting, because if Mr Ross attended the meeting he would know about it and there would seem to be no point in mentioning it to him.)
  - (5) Even if (which is to be doubted, as no minute of an earlier meeting has been produced) there had been an earlier resolution to market the Property (as recorded



in paragraph 1(f) of the Minutes), there is no evidence that Mr Ross was notified about what was agreed at that earlier meeting.

71. In answer to these points, the Defendants contended as follows:

- (1) None of the Defendants conceded that Mr Ross was not at or did not receive notice of the meeting on 16 December 2009, and it is unsurprising that honest witnesses cannot recall or profess to recall more than 9 years after these events (a) whether Mr Ross was given notice or (b) whether Mr Ross attended.
- (2) The Minutes record that Mr Ross was in attendance at the meeting, and the Court should accord considerable weight to this aspect of a contemporaneous document.
- (3) This is particularly so as (a) the Word version of the Minutes which was retrieved from Mr Lockhart's computer was first created at 11.38am on 17 December 2009, and (b) in paragraph 11 of his 8<sup>th</sup> witness statement dated 9 January 2019 Mr Ross stated "*The explanation as to the production of the document concerned has been accepted*". Accordingly, it must follow that it was after this time that Messrs Rutter, Gilmore and Crawford signed the Minutes, and, in effect, verified the accuracy of the statement in the Minutes that Mr Ross was present at the meeting.
- (4) Having regard to what are suggested to be a number of reasons for doubting his credibility, Mr Ross' evidence to the contrary should be approached with caution and cannot be accepted as determinative.
- (5) The e-mail from Mr Ross to Mr Rutter dated 25 November 2009 strongly suggests not only (a) that Barclays told Mr Ross about the state of the negotiations between Barclays and Mr Rutter, but also (b) that Mr Rutter knew that Mr Ross knew these matters. In these circumstances, there would have been no reason for the Defendants to have excluded Mr Ross from the meeting on 16 December 2009, and it should be inferred that they did not do so.
- (6) The only explanation for Mr Ross' request to become a director of PADS that was made on 18 December 2009 is that it was provoked by the meeting two days earlier. This therefore supports the conclusion that Mr Ross attended the meeting.
- (7) The Defendants not only had no reason not to tell Mr Ross about the meeting, they also had good reason to do so. In particular: (a) the Defendants had Mr Ross' interest as a RP Shareholder and the terms of the Note well in mind because Mr Rutter had been reminded of these matters by the e-mail from Mr Myddelton dated 4 December 2009, (b) according to Mr Rutter, he was in regular communication with Mr Ross at this time and subsequently, (c) the Minutes themselves (by listing Mr Ross as one of those present) reflect an awareness that Mr Ross ought to have been at the meeting, and having regard to this knowledge there was no good reason as to why the Defendants would have not given Mr

Ross notice of the meeting, especially when he had complained on 25 November 2009 that he was being excluded from information, and (d) the Defendants also would have been aware that their plans would have been approved by a Special Majority whether or not Mr Ross was in attendance, and accordingly they had no reason to exclude him on the grounds that he might vote down their plans.

- (8) Mr Ross never asked the Defendants how, after the demise of PRCA, it was proposed that PADS would finance the payments due to Handelsbanken. This is consistent with Mr Ross knowing of, or agreeing with, the decisions taken at the meeting.
- (9) On 30 April 2010, Cornerstone Estates (UK) Limited (“Cornerstone”) sent a letter to Mr Rutter and Mr Ross at PADS in which Cornerstone offered to buy part of the Property for £850,000. This offer was expressed to have been made “*Further to our communications with Mr Ross*”. Mr Ross accepts that Cornerstone was introduced through him, and, indeed, that he intended to carry out the development of the Property as a joint venture with Cornerstone. Although Mr Ross stated in cross-examination that he entered into negotiations with Cornerstone only after he had received the letter from Barclays dated 31 March 2010, this evidence should be rejected, and in truth he had been taking steps to find interested parties for much longer than that (i.e. since 16 December 2009).
- (10) If Mr Ross had not been notified of and participated in the meeting on 16 December 2009, he would have complained to the Defendants that they were acting contrary to the terms of the Note (and/or the Memorandum and Articles) by deciding to sell the Property without allowing him to vote on that decision.

### *Discussion*

72. Mr Ross’ evidence is that the first time that he learned that the Defendants were proposing to sell the Property was when he received a letter from a manager at Barclays, Ian Douglas, dated 31 March 2010, and that until he received that letter it had not crossed his mind that the Barclays debt would be paid off from the disposal of the Property. That letter concerned the guarantee for £250,000 of the indebtedness of PRCA to Barclays which had been given by Mr Ross and Mr Rutter, and which was secured by a charge over a flat owned by Mr Ross. It had been preceded by a formal demand for repayment of the sum of £250,000, sent by Barclays to Mr Ross on 19 February 2010. The letter stated that it appeared likely that there would a shortfall in the recovery obtainable from PRCA. In the letter, Mr Douglas continued as follows:

*“... as I understand the position, your intention had been to sell [the Property] ... to clear the mortgage and liberate cash that could be used to discharge your guarantee liability.*”

*Is that still the case, and if so can you let me know what offers, if any, have been received via the Agents acting, Cattaneo Commercial? Conversely, if this is no longer your intention, please let me have your formal alternative proposal for clearing this obligation.*

*...I have of course sent a similar letter to Peter Rutter, so if you would prepare to compose a joint reply you are welcome to do so.”*

73. Mr Douglas had indeed sent a letter in substantially the same terms to Mr Rutter, also dated 31 March 2010.
74. It is clear from the terms of these letters that, prior to 31 March 2010, Barclays had been informed that PADS had instructed Cattaneo Commercial (“Cattaneo”) as agents in connection with attempts to sell the Property. It is not in dispute that Cattaneo were, indeed, instructed, and, at some stage, placed a sign board outside the Property. Mr Rutter stated in cross-examination that *“Well, anybody would have known that [the Property was being marketed for sale] because they would have seen the sign board outside the building, which was a Cattaneo sign board”*. A photograph of that board was disclosed by the Defendants, and a copy was provided after the trial, although not included in the trial bundles. The board states prominently: “FREEHOLD FOR SALE”.
75. Although there was no direct evidence as to when this board was first placed outside the Property, I consider it more likely than not that this occurred on or shortly after 2 February 2010 (the date on which, according to the agreed Chronology, Cattaneo were appointed as agents to market the Property). As set out above, on 1 December 2009 the Defendants had decided that the Property ought to be sold, and this decision was confirmed on 16 December 2009. Having made that decision, and bearing in mind that they had good reasons for not wanting to fall out with Barclays, they are likely to have been diligent in implementing the agents’ marketing plans. Cattaneo’s plans plainly involved putting the sign board in question outside the Property, and there was no evidence (and nor was it suggested in questions or submissions) that the plan relating to the sign board only emerged or was only implemented at some interval after they were first instructed. The sign board was prominent. Although by this time Mr Ross was more disengaged, he had not stopped visiting the Property altogether. Accordingly, I consider that it is more likely than not that Mr Ross saw this sign some considerable time before 31 March 2010. That contradicts his evidence as to when he first learned that the Defendants were proposing to sell the Property. Further, as he made no protest at the time, that supports their case that Mr Ross knew of and agreed with this proposal.
76. Mr Ross’ evidence is that he believed that the Property should not be sold, but that instead, and in accordance with (a) longstanding discussions about realising the development potential of the Property which dated back to the time before its purchase was completed in 1999, and also (b) the submission of various planning applications between 6 April 2000 and 8 May 2008, that it should be retained for development.

77. In particular, Mr Ross considered that a development which involved creating 11 new residential units in total (“the Main Development”) should be progressed for a number of reasons, including that *“It would yield a fantastic profit for PADS”*.
78. When Mr Ross saw Mr Douglas’ letter to him, according to his evidence he was aggrieved, because the Defendants had gone behind his back again, and, among other things: *“... the Barclays debt was the liability of PRCA, not PADS ... The Defendants were preferring the interests of themselves, PRCA and PRCA&P over PADS”*. Nevertheless, Mr Ross states in his witness statement dated 24 October 2018:

*“I decided to think about the letter dated 31 March 2010. At this stage it was only expressed as an intention and I was not aware of any active steps to market the Property ... Although I was aggrieved, I decided to keep my own counsel and see what developed in practical terms. After all, it might have turned out that a very good offer came in.”*

79. The response to Mr Douglas’ letters dated 31 March 2010 took the form of a letter to Mr Douglas from Mr Rutter dated 16 April 2010 on the writing paper of PRCA&P, which was copied to Mr Ross. This letter was headed *“Regarding the £250,000 plus interest guarantee in respect of [PRCA] and the further ‘top slice’ £150,000 guarantee”*. It stated *“As explained in my telephone call to you in April, Cattaneo Commercial are acting for ourselves in the sale of [the Property]”*. The letter then provided a *“summary of the current situation”* which included the following statements: *“There have been numerous viewings to the property and we have four expressions of interest; one being for outright purchase, another for the purchase of the residential element in the building and the other two involving us retaining an interest in the building. All of the options should achieve the sum required ... all of the options above are dependent on income of letting of the office space. To this end [PRCA&P] have identified their requirements and we have received an offer to take the balance of the office space from a firm of structural engineers”*. After giving these and other details, the letter stated *“It is our intention that we will clear our obligations through this route”*. In the letter, Mr Rutter also stated *“I have been talking with Michael Ross who will probably write to you separately”*. There is no reason to doubt that this contemporary statement about discussions between Mr Rutter and Mr Ross was true, especially as this letter was copied to Mr Ross and he did not challenge it at the time.
80. On 19 April 2010, Mr Douglas wrote separate letters to Mr Rutter and Mr Ross in substantially the same terms. The letter to Mr Ross began as follows:

*“Last Friday, I received a fax from Peter Rutter from which I noted that there are a number of possible routes for realising the equity in [the Property] but at this stage no firm decision has been taken. I’ve asked him to let me know when a decision has been taken on the way forward and also clarify what the expected time frame to receiving the funds will be.”*

81. In my judgment, Mr Rutter's letter dated 16 April 2010 contained clear representations to Barclays that the Property was being offered for sale, that there were various options under discussion as to how the sale might be effected but that each of them were expected to realise sufficient funds to satisfy the indebtedness owed to Barclays, and that Mr Rutter and Mr Ross intended to discharge their liabilities as guarantors by ensuring that the proceeds of sale of the Property were used to pay off that indebtedness. Even if Mr Ross considered that Mr Douglas' letter to him dated 31 March 2010 related to nothing more than an unconfirmed intention to sell the Property, and even if at the date of that letter he was unaware of any active steps to market the Property, neither of those propositions can have applied by the time the letter dated 16 April 2010 was sent. Moreover, it is clear that Mr Ross made no complaint to Mr Rutter (or anyone else) at this time about the proposal to sell the Property or about the representations that were being made to Barclays, even though it was plain that a sale would disable PADS from proceeding with the Main Development and even though he now contends that there were a number of grounds of objection to the sale. As set out above, these include that the sale preferred the interests of others over those of PADS.
82. Accordingly, considering Mr Ross' evidence in conjunction with the contemporary documents, I am faced with two possibilities. First, that Mr Ross is correct in claiming that prior to receipt of Mr Douglas' letter to him dated 31 March 2010, he knew nothing about any proposal to sell the Property, and was aggrieved by that proposal for the reasons that he gives, but that he nevertheless decided not to voice any objection to Mr Rutter (or any of the Defendants) and instead joined in representing to Barclays that he intended to discharge his liability as guarantor out of the proceeds of sale of the Property while in truth he was biding his time to see whether he wanted to exercise his right to object to that sale. Second, that, contrary to Mr Ross' evidence, but consistently with the contents of those documents and with the absence of any complaint by him at the time, he was well aware of the plans to sell the Property and use the proceeds to discharge the indebtedness to Barclays, and that he was happy for Barclays to be told these matters because they represented the truth and fitted in with his personal interests.
83. Faced with these two alternatives, I prefer the latter. In my view, the former would involve intentionally deceiving Barclays to its detriment, or, at the very least, commercially unacceptable conduct in the particular context in question. Accordingly, it would involve dishonesty in accordance with the objective standard of ordinary decent people (see *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, Lord Nicholls at 389-390; *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2018] AC 391, Lord Hughes at [74]). I would be reluctant to conclude that it is more likely than not that an individual of Mr Ross' standing and previous good character had behaved in this way (see *Brent LBC v Davies & Ors* [2018] EWHC 2214 (Ch), Zacaroli J at [59]).
84. I also find it hard to believe that Mr Ross would have voiced no objection at all at the time, but instead have resolved to say nothing and "keep his own counsel", if, as he

states in his evidence for trial, he knew nothing of the proposal to sell the Property, was aggrieved about the decision to sell, and considered it was open to serious objections.

85. The inherent improbability of this scenario is reinforced by the consideration that it is part of Mr Ross' case that, in recognition of their mutual exposure to Barclays, and at the insistence of Mr Ross because he was providing a flat which he owned as security, he and the Defendants executed a Memorandum on 7 April 2009 (the same date as they signed the Deed of Indemnity) whereby they agreed that they would all "*be party to all decisions which might reasonably be expected to impact significantly upon the ongoing cashflow and profitability of [PRCA] and associated companies*". It is also part of Mr Ross' case that PRCA and PADS were associated companies for these purposes. Therefore, in accordance with his case, and quite apart from his rights pursuant to the Note and the Articles, Mr Ross had an express right under a Memorandum that he had caused to be created for that very purpose, to participate in decisions relating to the Property. If, as Mr Ross now contends, this right had been and was continuing to be seriously and flagrantly transgressed by the Defendants, it would be extraordinary if he had done nothing to invoke it. The suggestion that this was because he decided to "*see what developed in practical terms*" is implausible and unconvincing, and I reject it.
86. However, if I am wrong about that, and Mr Ross' evidence is to be preferred to the picture that emerges from the contemporary documents, I consider that he is nevertheless bound by the decision to sell the Property that had previously been taken by the other RP Shareholders. On this hypothesis, Mr Ross was not notified of, and did not participate in, the meeting on 16 December 2009. On the face of it, that would mean that there was no valid vote by a Special Majority to sell the Property, and indeed that the meeting was invalid: see *Palmer's Company Law* Volume 2, para 7.534; *Smyth v Darley* (1849) 2 HL Cas 789; *Young v Ladies' Imperial Club Ltd* [1920] 2 KB 523; *POW Services Ltd v Clare* [1995] BCLC 435 (Ch D). Nevertheless, the requirement for all the RP Shareholders to vote upon any matter relating to the sale of the Property could be satisfied if all the other RP Shareholders participated in and voted at the meeting on 16 December 2009, and if Mr Ross thereafter either gave his approval to the resolution to sell the Property (as I consider that he did by participating in the correspondence discussed above and raising no objection to the sale of the Property at the time), or so conducted himself as to make it inequitable for him to deny that he had given his approval (as, in the alternative, I consider that he did for the same reasons).
87. The law is sufficiently stated in the following passage, upon which Mr Cousins relied, in *EIC Services Ltd v Phipps* [2003] BCC 931, Neuberger J (as he then was) at [122]:

*"Although the principle has been characterised in somewhat different ways in different cases, I do not consider that that is because its nature or extent is in doubt or the subject of debate. The difference in language is attributable of the fact that the principle will have been expressed by reference to the particular facts of the case. The essence of the Duomatic principle, as I see it, is that,*

*where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppel, and whether members of the group give their consent in different ways at different times, does not matter.”*

88. It is important to note that the material correspondence spells out not only the intention to sell the Property (or, in the alternative, to sell part of it, as appears from the various options that Mr Rutter explained in his letter dated 16 April 2010) but also the intention that the proceeds of sale should be used to discharge various liabilities to Barclays all of which, as Mr Ross plainly appreciated at the time, were not liabilities of PADS.
89. Moreover, these proposals were put forward to Barclays, with the knowledge and participation of Mr Ross, at a time when Mr Ross plainly knew not only that the Defendants were working together through PRCA&P (from which he had been excluded) but also that PRCA&P was renting as much of the Property as suited its requirements (leaving only a balance available to rent out to others).
90. In his above witness statement, Mr Ross recognises the existence of the letters dated 16 and 19 April 2010, but makes no attempt to grapple with their implications.
91. In his oral evidence, Mr Ross suggested that he was right to behave as he did as it would have been unhelpful to interfere with the relationship between Mr Rutter and Barclays. I was unimpressed by that evidence. I also consider that in light of the matters rehearsed above and the manner of his participation at the time there is a decidedly hollow ring to Mr Ross’ complaint in his above witness statement that *“The Defendants were preferring the interests of themselves, PRCA and PRCA&P over PADS”*.
92. If Mr Ross knew of the plans to sell the Property earlier than he has claimed in these proceedings, that raises the question of when and how he acquired that knowledge. Unsurprisingly, as he denies any knowledge prior to 31 March 2010, Mr Ross does not suggest any date or occasion between 16 December 2009 and 31 March 2010. Nor, in their witness statements, did the Defendants. In cross-examination, Mr Rutter said that he was positive that during discussions with Mr Ross (at the time when there were lots of meetings with Barclays) a whole load of issues were raised, including those which were the subject of the Minutes, and, further, that he could not believe that he would not have told Mr Ross on 18 December 2009 about what was decided on 16 December 2009. However, Mr Cousins challenged this evidence on behalf of Mr Ross, pointing out that there was no mention of these matters in Mr Rutter’s witness statement.

93. The significance of 18 December 2009 is that this was the date on which, invoking the provisions of the Note, Mr Ross applied for the first time to become a director of PADS. The Defendants contend that this was because Mr Ross knew of the decisions which had been taken on 16 December 2009 and wanted to protect his position in light of those decisions. According to Mr Ross' evidence in cross-examination, however, he was prompted to make that application because he was no longer an employee of any company in the PRC Group in consequence of PRCA having gone into administration.
94. In his witness statement, Mr Rutter states that at the meeting on 16 December 2009 "*the minutes produced by our solicitor Robin Myddelton were agreed*". Although it is possible to read this as meaning that minutes were agreed at the meeting which were subsequently produced by Mr Myddelton, in my view it suggests that the Minutes were produced before the meeting and were then agreed at it. I also consider that this is probable in any event. The Minutes comprise one and a half pages of text which is typed closely and in a small font, and it seems to me far more likely than not that they were prepared in advance and were then used as, in substance, a form of agenda for the meeting, than that the matters set out in them were recorded during the meeting and then relayed to Mr Myddelton to be turned into the Minutes after the meeting was over. This conclusion is also supported by the fact that the start and finishing times of the meeting have been left blank in the Minutes: if the Minutes had been prepared after the conclusion of the meeting, one would have expected these times to be filled in.
95. I do not consider it appropriate to draw any adverse inferences from the Defendants' decision not to call either Mr Lockhart or Mr Myddelton. However, without evidence from them, it is difficult to know what to make of the Word version of the Minutes which was retrieved from Mr Lockhart's computer. I suspect that it reflects some change to the text of the Minutes that was made by Mr Lockhart on 17 December 2009.
96. That may not matter much in any event, because I am prepared to assume that Messrs Crawford, Gilmore and Rutter did not sign the Minutes until after 16 December 2009. If they had signed the Minutes at the time of the meeting, it is hard to envisage why the Minutes would not also have been signed by Mr Symes, whose attendance was not in issue before me, and yet they were not signed by him. If it is right that the Minutes were finalised on 17 December 2009, and that Messrs Crawford, Gilmore and Rutter only signed them after that, this lends some support to the argument that Mr Ross was at the meeting, because otherwise (a) why was his name not removed when the amendment was made; and (b) why would those individuals sign Minutes which were inaccurate in recording that he was present? On the other hand, if the Minutes were drafted on the assumption that Mr Ross was expected to attend, but he did not in fact do so, it is possible that no-one paid any particular attention to this inaccuracy at the time. As I observed during the trial, the Minutes have assumed an importance in the litigation which may well not have been appreciated at the time of the events in question.



97. On balance, the other points made by both sides concerning the likelihood that Mr Ross attended the meeting on 16 December 2009 seem to me to come down in favour of his case. For example, there is no evidence that Mr Ross was notified in advance that the meeting was going to take place or what was going to be discussed at it, and I can readily see how he might not have been notified: he was not notified of the earlier meeting on 1 December 2009, and, according to his evidence, he was not spending much time at the Property during this period. By way of further example, I am doubtful that the Defendants would have been mindful to secure his attendance in light of the need to comply with the provisions of the Note (and/or the Memorandum and Articles), because I consider it more likely than not that it was their understanding that if they all agreed on the appropriate course of action concerning the matters which were discussed at the meeting on 16 December 2009 they could pass valid and binding resolutions without the need to consider the views of Mr Ross. Further, the points made about Mr Ross' credibility (for example, that he gained access to Mr Gilmore's office and forwarded to himself an email at 00.42 on 16 December 2009; that he took secret commissions from finance companies for introducing business to PRCA; and that he did not disclose his interest in the Cornerstone bid) did not lead me to conclude that he was deliberately lying when he denied that he was notified of, or attended, the meeting.
98. I also accept that, as he claims, Mr Ross first saw the Minutes when they were disclosed by the Defendants in these proceedings. There is no evidence to the contrary.
99. At the same time, however, I accept that there were frequent discussions between, in particular, Mr Rutter and Mr Ross about the financial affairs of PADS and the other companies in the PRC Group. Furthermore, I entirely reject any suggestion that the Defendants sought to conceal from Mr Ross, or indeed could realistically have hoped or expected to conceal from him, any of the matters the subject of the Minutes, and in particular the marketing of the Property. For example, and leaving entirely to one side the issue of the board stating "FREEHOLD FOR SALE" which Cattaneo caused to be placed outside the Property and which I have addressed above, I consider it probable that Mr Ross was concerned to know how, after PRCA went in to administration, PADS was going to finance the payments due to Handelsbanken. It is hard to see how any meaningful discussion about matters like that could take place without reference to the decisions recorded in the Minutes. If Mr Ross was not party to those decisions, and disagreed with being excluded from them and with their ramifications, it is to be expected that he would have taken issue with them. However, there is no suggestion that he did so. The findings that there were frequent discussions, and no concealment by the Defendants, therefore support the case that Mr Ross was party to those decisions.
100. Pulling all these strands together, and after very careful pause for thought, I have come to the conclusion that Mr Ross was indeed present at the meeting on 16 December 2009 and was accordingly a party to, and bound by, the resolutions recorded in the Minutes (which do, of course, cover each of the matters the subject of PADS' present claims).

101. As I have sought to explain above, my reasons for reaching this conclusion include, in particular, that Mr Ross knew of the decision to market the Property (and, indeed, to use the proceeds of sale to repay the indebtedness of PRCA to Barclays and, thus, discharge his and Mr Rutter's liabilities as guarantors) before he received the letter from Barclays dated 31 March 2010, and that he has not suggested any other occasion on which, or any other means by which, he learned of that decision prior to that date.
102. Rather than conclude that Mr Ross is deliberately lying about his participation in the meeting, I am inclined to think that, many years after the event, and in light of the formulation of various causes of action which embody coherent legal analysis but also seem to me to reflect significant elements of unreality as to the circumstances which prevailed at the material times, Mr Ross has persuaded himself of the validity of the claims in these proceedings and the accuracy of his evidence in support of those claims.
103. If that is wrong, however, and Mr Ross is correct as to his state of knowledge prior to 31 March 2010 and as to his disagreement with, and his reservation of rights to object to and prevent, the intended course of action which Mr Rutter explained to both him and Barclays, I regret to say that I consider that his conduct in March and April 2010 was not honest in accordance with the objective standard of ordinary decent people. In any event, by reason of his conduct at that time he either gave his approval or cannot be heard to deny that he gave his approval to the decision to sell the Property, and, I would add, the decision to use the net proceeds of sale to discharge the liabilities to Barclays.
104. Mr Cousins further submitted that, even if the meeting on 16 December 2009 was properly convened, and proper notification given to Mr Ross:

*“the purported resolutions would have been ineffective because [Clause 1 of the] Note ... provided that the purpose of the RP Shares was to protect and preserve for the RP Shareholders the equity in the freehold of the Property, [and this] purpose was defeated by the purported resolution which would serve (i) to charge upon the equity the additional liabilities contemplated therein, and (ii) impose a distribution to shareholders inconsistent with the provision for Dividends ... in accordance with [Clause 3 of the Note]. Those provisions ... were adopted in the version of the Company's Articles which were in force at all material times ... Still further, the [M]inutes show that only a sale of the freehold Property was contemplated, rather than the grant of a leasehold interest of part only.”* (This final phrase is a reference to the way in which, in time, events unfolded.)

105. In my view, these submissions are not well founded. They appear to proceed on the premise that, even if Mr Ross was party to the resolutions recorded in the Minutes, he would not and could not be bound by those resolutions because they contradicted the provisions of the Note and/or the Memorandum and Articles. However, the essential purpose of the Note was to make clear that the RP Shareholders alone were entitled to share in the Property and the income derived from the Property, and, in particular, that

only the RP Shareholders (and not ordinary shareholders) should be entitled to participate in income arising from the Property or in the assets of PADS in so far as those assets related to the equity in the Property or to income derived from the Property. The RP Shareholders were nevertheless entitled to vote by Special Majority both as to how the Property was dealt with and as to how income derived from the Property was dealt with. I consider that this is clear from the provisions of Clauses 3(a), 4 and 5 of the Note, and, moreover, is not precluded by any other provisions in the Note or the Memorandum and Articles. In my opinion, this is especially so if, as was true of the resolutions recorded in the Minutes, the decisions which were taken by the Special Majority were all taken for the purpose of distributing the net proceeds of sale of the Property to the RP Shareholders having “*reconcil[ed] [their] respective financial position[s]*”. The same applies to any later decision to deal with the Property other than by sale of the freehold, in which regard the words of Clause 4 of the Note seem to me amply wide enough to cover the grant of a leasehold interest of part of the Property.

106. These findings are sufficient to answer all three claims in favour of the Defendants. However, as all the issues were argued before me, and in case this litigation goes further, I will also address the Defendants’ secondary lines of defence to the claims.

### **THE CLAIM INVOLVING £150,000**

#### *The issues*

107. For the reasons set out above, I do not consider that the decisions that PADS should borrow £150,000 from Barclays and should lend the same sum to PRCA&P were unauthorised. That leaves two principal issues, if, contrary to that finding, and as PADS contends, these decisions were not authorised: first, whether the loan transaction was not in the interests of PADS; and, second, whether the loan caused loss to PADS.
108. The total loss now claimed by PADS is made up (a) loss suffered on 10 February 2010 in the sums of (i) a principal sum of £148,950 (ii) an arrangement fee of £1,500 and (iii) a related sum of £15, amounting to £150,465 in total, and (b) subsequent losses amounting to £9,691.33 in total in respect of interest charges incurred between 29 June 2010 and 28 June 2011 and a commission incurred on 28 June 2011. The grand total sought under this head is therefore £160,156.33. PADS also asserts that the Defendants obtained financial advantages, but does not suggest that this affects its measure of loss.

#### *The parties’ submissions – the first issue*

109. With regard to the first issue, Mr Cousins placed reliance on *Bristol & West BS v Mothew* [1998] 1 Ch 1 (“*Mothew*”), Millett LJ at pp18-19:

*“This leaves those duties which are special to fiduciaries and which attract those remedies which are peculiar to the equitable jurisdiction and are*

*primarily restitutionary or restorative rather than compensatory. A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work *Fiduciary Obligations* (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.*

*(In this survey I have left out of account the situation where the fiduciary deals with his principal. In such a case he must prove affirmatively that the transaction is fair and that in the course of the negotiations he made full disclosure of all facts material to the transaction. Even inadvertent failure to disclose will entitle the principal to rescind the transaction. The rule is the same whether the fiduciary is acting on his own behalf or on behalf of another. ...)*

*The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.*

*... Even if a fiduciary is properly acting for two principals with potentially conflicting interests he must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other: see Finn, p. 48. I shall call this "the duty of good faith." But it goes further than this. He must not allow the performance of his obligations to one principal to be influenced by his relationship with the other. He must serve each as faithfully and loyally as if he were his only principal.*

*Conduct which is in breach of this duty need not be dishonest but it must be intentional. An unconscious omission which happens to benefit one principal at the expense of the other does not constitute a breach of fiduciary duty, though it may constitute a breach of the duty of skill and care. This is because the principle which is in play is that the fiduciary must not be inhibited by the existence of his other employment from serving the interests of his principal as faithfully and effectively as if he were the only employer. I shall call this "the no inhibition principle." Unless the fiduciary is inhibited or believes (whether rightly or wrongly) that he is inhibited in the performance of his duties to one principal by reason of his employment by the other his failure to act is not attributable to the double employment.*

*Finally, the fiduciary must take care not to find himself in a position where there is an actual conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other: see *Moody v Cox and**

*Hatt [1917] 2 Ch 71; Commonwealth Bank of Australia v Smith (1991) ALR 453. If he does, he may have no alternative but to cease to act for at least one and preferably both. The fact that he cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability. I shall call this “the actual conflict rule.”*”

110. As to the first issue, PADS contends as follows:

- (1) The Defendants were in breach of both statutory and fiduciary duties to avoid conflicts of interest. They were seeking to serve both PADS and PRCA&P by the arrangements they made, but in so doing they clearly preferred the interests of PRCA&P in saddling PADS with the debt of money to be loaned to it. They were also guilty of dealing with their principal, PADS, on behalf of another. Reliance was placed on *Mothew* and on section 175(1) of the Companies Act 2006 (“CA 2006”): “A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.”
- (2) In behaving in this fashion, there was conscious disloyalty towards PADS.
- (3) There was a failure to exercise director’s powers, in entering into and advancing the transaction, in good faith so as to promote the success of PADS. The transaction harmed PADS, and was always manifestly likely to do so. Reliance was placed on *Mothew* and on section 172(1) of the CA 2006: “A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole ...”
- (4) The Defendants acted outside of their powers because the purported resolutions were non-effective. Reliance was placed on *Mothew* and on section 171(1) of the CA 2006: “A director of a company must (a) act in accordance with the company’s constitution, and (b) only exercise powers for the purposes for which they are conferred.”
- (5) In pursuing, collectively, their preferred course of assisting PRCA&P, the Defendants shut their minds to the need to consider the interests of and the case for PADS, and therefore failed to exercise independent judgment. Reliance was placed on section 173(1) of the CA 2006: “A director of a company must exercise independent judgment”.
- (6) The decision made was so incompetent that it betrayed a complete lack of care, skill, and diligence. Reliance was placed on section 174(1) of the CA 2006: “A director of a company must exercise reasonable care, skill and diligence.”

111. As to the first issue, the Defendants’ principal contentions were as follows:

- (1) There was no sustainable challenge to the evidence that the Defendants gave as to why they believed that these decisions (and the other material decisions) that they took in November and December 2009 were in the interests of PADS. In any event, the fact that the Defendants gave truthful evidence as to their state of mind at the time (i.e. that they were not deliberately acting in breach of duty and that they genuinely believed they were acting in the best interests of PADS) means that Mr Ross' allegations of bad faith and dishonesty must fail.
- (2) Suggestions that PADS could have obtained a tenant other than PRCA&P lacked credibility. The position of the Defendants at the relevant time that, first, the Property was situated in an area where the market for commercial tenants was still difficult, and, second, the terms agreed to by PRCA&P were significantly better than the terms which could have been negotiated with other tenants are supported by both the Colliers Report and the Hearn Report.
- (3) Further, obtaining PRCA&P as a tenant enabled PADS to secure Bradbrooks as a tenant. As Mr Crawford explained, Bradbrooks chose to become a tenant in the Property in part due to the opportunity to secure referral work from PRCA&P:

*“Bradbrooks were a civil and structural engineering practice and so we had professional dealings with them and Bob Cattaneo, our agent, our commercial agent at the time, put us together because Bradbrooks were being asked to leave their building. Now, Bradbrooks had been in the process of looking around the marketplace and had various buildings available to them. They had buildings available to them at cheaper rents and rent-free periods. They decided to come to our building. We were able to persuade them because of these professional links and because our work was changing from engineering through to architecture we were basically able to offer them commissions going forward, and it is only on this basis [that] we, above other local buildings, were able to secure them as a tenant.”*

- (4) There was no sustainable challenge to the Defendants' evidence as to what would have happened if these decisions had not been taken, namely (a) if PRCA&P had not received the loan of £150,000 from PADS, then PRCA&P could not have traded, (b) if PRCA&P could not have traded, it could not have entered into or honoured the obligations under the lease that it took from PADS, and (c) if PADS had not had the benefit of the lease with PRCA&P, then PADS would not have been able to honour its obligations to Handelsbanken, which in turn would have given rise to the prospect of default, re-possession and forced sale of the Property.
- (5) The decisions did not give rise to a gift or a transaction without consideration or even at any undervalue. On the contrary, they gave rise to a legally binding contract between PADS and PRCA&P. Moreover, the counterparty to that contract, namely PRCA&P, was an attractive tenant for PADS, because (leaving to one side the level of rent which PRCA&P agreed to pay): (a) it was prepared to rent more space than it actually needed, to the benefit of PADS, (b) it did not

have to be provided with concessions (such as a substantial rent free period) to be persuaded take on the lease, (c) it was a known quantity in terms of management, and (d) there was transparency in relation to financial matters concerning it, because the Defendants (who were also directors of PADS) knew every detail about the tenant's financial position and had control over its activities.

- (6) Compliance with the legal tests relied on by PADS involves a fact sensitive assessment. For example: (a) in accordance with section 175(4) of the CA 2006, the duty imposed by section 175(1) is not infringed “*if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest*”, (b) in the present case, the Defendants were not in a position of conflict as the interests of PADS and PRCA&P were aligned (to their mutual benefit), (c) this was plainly not a case of one company benefitting or potentially benefitting at the expense of the other, and (d) it was equally in the interests of both PRCA&P and PADS that the loan should be both made and repaid (as in due course it was) – in which regard, the Defendants were motivated to ensure repayment of the loan not only in their capacity as directors of PADS but also because, in accordance with the Note, in the case of default they would all lose out as RP Shareholders of PADS.

*The parties' submissions – the second issue*

112. As to the second issue, in her second witness statement, dated 1 February 2019, Mrs O'Reilly gave evidence by reference (in particular) to Inter-Company Ledger sheets. These showed that £148,950 was paid by PADS to PRCA&P in respect of “*Funding from Barclays*” on 5 February 2010. The same sheets show a year-end balance as at 31 August 2010 of £4,802.31, representing (according to her evidence) an overpayment in excess of the loan from Barclays made by PRCA&P, whether by payments to Handelsbanken on behalf of PADS or by way of payments made by PRCA&P to third parties on behalf of PADS. The same sheets show year end balances as at 31 August in 2011, 2012 and 2013 of £10,463.18, £99,943.64 and £1,549.47. Thereafter, there are negative year end balances as at 31 August in 2014, 2015 and 2016 of £1,682.55, £1,805.93 and £1,758.58. Finally, in respect of the year ended 31 August 2017, there is a zero balance. This zero balance is the product of an entry dated 30 June 2017 which bears the descriptions “*Wrote off balance of inter-co*” and “*Agree in lieu of work done by A&P staff*”, in respect of which the sum of £1,758.58 is credited to PRCA&P.
113. In his cross-examination of Mrs O'Reilly, Mr Cousins asked her, in particular, about three sums. As part of that exercise, Mr Cousins relied on documents contained in a 205 page exhibit to a proposed 9<sup>th</sup> witness statement of Mr Ross, dated 13 February 2019. PADS had obtained no permission to adduce, and Mr Cousins ultimately did not seek to put it in evidence. Instead, he based questions on these late-produced documents.
114. Mr Rutter and Mrs O'Reilly gave oral evidence at the adjourned hearing on 14 February 2019 concerning the Defendants' case that PRCA&P had repaid to PADS the

amount that PADS borrowed from Barclays. They had therefore had little time to consider these additional documents. Accordingly, I granted permission for the Defendants to serve further evidence to address some of the specific points raised by Mr Cousins in cross-examination on 14 February 2019. That resulted in the service of Mrs O'Reilly's third witness statement, dated 20 February 2019.

115. Naturally, other points were put to both Mr Rutter and Mrs O'Reilly in the course of cross-examination on the topic of the transactions involving £150,000. For example, Mr Rutter was asked whether he and the other Defendants had considered raising money for PRCA&P other than by borrowing from PADS. To this, Mr Rutter answered, in short, that he was fully stretched financially, and was in no position to inject £150,000 into PRCA&P. By way of further example, Mr Rutter was also asked a number of questions about the figures contained in other documents and how these compared with the Inter-Company Ledger sheets to which Mrs O'Reilly referred. One of these other documents was a schedule produced by Mr Gilmore on 24 August 2010 which showed that the "*Total sums paid out by [PRCA&P] on behalf of [PADS]*" amounted to £71,163.78 and which further stated "*This figure will increase monthly due to mortgage payments, rates, building insurance, utility bills etc by approx[imately] £9,500*". It was put to Mr Rutter that, taking account of other figures, £105,055.38 was the maximum sum that could properly be asserted as having been paid back to PADS by 31 August 2010. Mr Rutter had stated in earlier answers that even if the inter-company debt had not been repaid by 31 August 2010, it had been paid off by 2013.
116. Following this cross-examination, supplementary written closing submissions dated 15 February 2019 were produced on behalf of PADS.
117. These argued, in the briefest summary, that no reliable conclusions could be reached as to the state of account between PRCA&P and PADS at any time, and that the Defendants had only themselves to blame if they could not discharge the burden of proving that PRCA&P repaid PADS in full in circumstances where (among other things) they "*chose to eschew the normal system of issuing rent invoices and paying them in favour of a Byzantine system involving a plethora of apparently unissued invoices ... payments in kind and contra entries.*" While the primary submission was that the Court could not be satisfied that any repayment was made at all, it was also submitted "*as a matter of realism*" that it is likely that something was repaid by 31 August 2010 (a date to which Mr Cousins attached significance in light of aspects of the Defendants' evidence) but that "*it is difficult to be precise as to how much*".
118. In response, Mr Harper objected that these submissions unfairly took no account of the truncated manner in which issues concerning the sum of £150,000 had had to be dealt with, following a late amendment to add the relevant claim; that, in particular, it was inappropriate to challenge Mrs O'Reilly's evidence "*by way of written critique*" rather



than by cross-examination; and that Mrs O'Reilly's evidence was credible and ought to be accepted by the Court.

*Discussion*

119. I prefer the Defendants' case on both of these issues.
120. In particular, with regard to the first issue, the Defendants' evidence that it was advantageous to PADS to grant a lease to PRCA&P on the terms that were in fact agreed is supported by both the Colliers Report and the Hearn Report.
121. I also accept the evidence of the Defendants (a) that without an injection of finance in or around the amount that was in fact loaned by PADS (and in respect of which there was no evidence that this would have been forthcoming from any other source) PRCA&P would not have been able to carry on business; (b) that PRCA&P therefore would not have been able to make payments of rent to PADS; and (c) that such payments were in turn needed by PADS to enable it to service its own indebtedness.
122. As to this last point, in the course of his cross-examination of Mr Gilmore, Mr Cousins referred to an email from Peter Wylde of Handelsbanken dated 13 May 2010. The questions put by Mr Cousins were to the effect that the indicative terms for assisting PADS to re-finance its existing indebtedness with Handelsbanken and obtaining an additional advance "*to re-finance the Barclays debt*" would have involved PADS paying a total sum of about £150,000 to service payments of both interest and capital in respect of an increased facility of £1,575,000, and that the rent that could be obtained from the Property would provide PADS with a margin of more than £30,000 in excess of that £150,000. These questions were put in the context of exploring with Mr Gilmore whether there was any need for PADS to sell off all or any part of the Property, and whether the Defendants had revisited the decision to sell after December 2009. In my opinion, however, they reflect an underlying reality, namely that PADS was dependent on rent from the Property to service its indebtedness to Handelsbanken (even if the refinancing of the debt owed to Barclays by PRCA was taken out of the equation).
123. In making these observations about the underlying reality, I have not overlooked another point that Mr Cousins put in cross-examination, namely that the Defendants could have provided PADS with the wherewithal to service its indebtedness to Handelsbanken by other means. Mr Cousins suggested that, instead of borrowing £150,000 from Barclays and paying it to PRCA&P, the Defendants could have retained that £150,000 in PADS and then used it to meet PADS' liabilities to Handelsbanken until such time as PADS was able to find a different new tenant for the Property.
124. Leaving aside the uncertainty to which a wait to find another tenant would give rise, especially in the difficult market prevailing at the time, this suggestion seems to me to

be quite unreal. There is no evidence that Barclays would have agreed to lend £150,000 to PADS to enable PADS to service its indebtedness to Handelsbanken, and I consider it highly improbable that Barclays would have done so. Barclays was concerned about obtaining repayment of the debts owed to it arising out of the collapse of PRCA. Barclays was willing to provide some further finance to those who had been involved in running PRCA in order to further the prospects of obtaining repayment. At the same time, Barclays was concerned that in providing further finance it did not risk further exposure. That is why Barclays only agreed to provide further finance through the medium of PADS (which appeared to have the assets to secure repayment). As I see it, all that is a far cry from lending money to PADS not to be used in a way which increased the prospects of Barclays being repaid by those with whom Barclays had a banking relationship, but instead to enable PADS to service its existing indebtedness.

125. As to the second issue, as I have already indicated, I consider that Mr Rutter and Mrs O'Reilly were honest witnesses. Mrs O'Reilly dealt with the three specific sums relied on by Mr Cousins partly in oral evidence and partly in her third witness statement.
126. In respect of the two smaller sums, of £6,897.50 and £1,863.37, Mrs O'Reilly's evidence, in short, was that these related to liabilities which were the responsibility of PADS, although PRCA&P processed and paid the relevant invoices. In this regard, Mrs O'Reilly marked up a series of smaller payments, adding up to the sum total of those two figures (bar £140), on a SAGE spreadsheet which she exhibited. In giving evidence about these matters, Mrs O'Reilly was working with incomplete documents (the full records and books of PADS being no longer available to the Defendants) and was recalling events of several years ago. Making due allowance for these difficulties, I am not persuaded that her evidence concerning these sums is unreliable, and I accept it.
127. In respect of the larger sum, of £12,000, on the face of it, the documents produced by PADS on 13 February 2019 (comprising a hire purchase agreement dated 20 March 2009 and a cheque stub dated 8 April 2010) show that this sum was paid by PADS in respect of the hire purchase of equipment which was hired to PRCA. Mr Cousins therefore submits that this plainly became a liability of PRCA&P, and that it should never have been recorded in the inter-company debt reconciliation documents as a sum owed by PADS to PRCA&P. In answer to that, Mrs O'Reilly's evidence, in short, is that this was definitely not a PRCA&P debt, and that while the cheque in question may have been paid by PADS the reason why the entry for £12,000 appears in those inter-company documents as it does is that PRCA&P paid PADS the money to enable PADS to honour that cheque. Mrs O'Reilly also made a somewhat elliptical suggestion, based on the premise that the financial arrangements relating to the hire purchase of this equipment were made by Mr Ross, that, in fact, the supposed equipment did not exist. That is a serious suggestion, but, whether it is right or wrong, it does not seem to me to advance the debate about whether this sum ought properly to have been included as it was in the Inter-Company Ledger. I therefore decline to attempt to resolve it. Faced

with a choice between Mr Cousin's arguments based on the documents and Mrs O'Reilly's evidence, I consider that her evidence offers the better guide to the truth.

128. The wider point about these sums is that it is said by Mr Cousins that the way that they were dealt with casts doubt on the reliability of the Defendants' evidence about the repayment of the loan overall. Even if I had concluded that he was right about these particular sums (or any of them), however, I would not have accepted that argument.
129. In particular, the fact that a ledger may contain an error or even a number of errors does not mean that it is unreliable overall. I accept the Defendants' case that it was always intended that PRCA&P would repay this money to PADS, and that this was done not by a straightforward payment or series of payments directly back to PADS but instead in the manner reflected in the Inter-Company Ledger. On that basis, it would have been important to keep a record of what had been repaid and when, and I do not doubt that Mrs O'Reilly would have conscientiously striven to fulfil that task with accuracy. Even if I had been persuaded that some errors had crept into that process, my assessment of her as a witness would have led me to find it most unlikely that errors were widespread.
130. It is unfortunate that a case which started out as a relatively straightforward allegation of breach of duty, based on the contents of the Minutes and the premise that Mr Ross was denied participation in and knowledge of the relevant decisions, has resulted in pursuit of this kind of detail in the face of contemporary documents, which cannot credibly be said to have been fabricated, that support the Defendants' case that, even if a breach of duty did occur, it did not occasion loss to PADS of £150,000 (or any sum).

## **THE CLAIM INVOLVING THE SALE OF PART OF THE PROPERTY**

### *The parties' submissions*

131. Based on the premise that the grant of the long lease to 32VRL was unauthorised, PADS' arguments contains the following principal steps:
  - (1) Without authority to effect a sale, no part of the Property should have been sold, and therefore the part that was in fact sold in 2011 should still be with PADS.
  - (2) However, once a sale took place there could be no development of the part sold, and therefore with that disposal any chance of development of that part was lost.
  - (3) It then becomes a question of quantifying the value of what was lost to PADS.
  - (4) On the evidence, the Property could have been (a) wholly retained, and (b) profitably developed. As to (a), it is most unlikely that PADS would never have undertaken the development of that part of the Property and would have continued to hold it in undeveloped form. As to (b), while PADS accepts that no

precise assessment can now be made of the profit which could or would have been made from developing the part of the Property that was leased to 32VRL (“the 32VRL Part”) (whether on a stand-alone basis or as part of a wider development), any suggestions to the effect that development of the 32VRL Part would have been only marginally profitable or not profitable at all are without substance. As to how and when PADS would have developed the 32VRL Part, this would have occurred either on a stand-alone basis or as part of a wider development, and either at the time when development was in fact undertaken by 32VRL or “*at some other time and in some other circumstances*”, such as in 2014-2015 when PADS did, in fact, develop the part of the Property that it had not leased to 32VRL (“the Retained Part”). What was lost to PADS has resulted in either an actual loss or the loss of a substantial chance to make a large profit.

132. The like breaches of duty were relied upon in relation to these matters as were relied upon in respect of the transaction involving the sum of £150,000 discussed above. PADS contended that:

- (1) There was a breach of the duty, statutory and fiduciary to avoid conflicts of interest. The Defendants were seeking to serve their own interests by selling the Property and thereby achieve repayment of the PRCA&P liability, thus avoiding liability for themselves under their respective guarantees and indemnities. Reliance was placed on section 175 of the CA 2006 and *Mothew*.
- (2) In behaving in this fashion, there was conscious disloyalty so far as concerned PADS.
- (3) There was a failure to exercise director’s powers, in entering into and advancing the transaction, in good faith so as to promote the success of PADS. The transaction harmed PADS by depriving it of the development opportunity and was always manifestly likely to do so: see section 172 of the CA 2006 and *Mothew*.
- (4) The Defendants acted outside of their powers because the purported resolutions were non-effective: see section 171 of the CA 2006 and *Mothew*.
- (5) In pursuing, collectively, their preferred course of assisting PRCA&P, the Defendants appear each to have shut their minds to the need to consider the interests and case for PADS, and therefore to have failed to exercise independent judgment: see section 173 of the CA 2006.
- (6) The decision to enter into the sale was so incompetent that it betrayed a complete lack of care, skill, and diligence: see section 174 of the CA 2006.

133. The Defendants’ case, in sum, is to the opposite effect. Among other things, Mr Harper submitted that the claim failed on the basis that a valid resolution could and would have

been made if Mr Ross had raised the point that no valid resolution had been made on 16 December 2009, further or alternatively on the grounds of laches and/or acquiescence.

134. In addition to those arguments, the Defendants contended:

- (1) It was a matter for the RP Shareholders to decide what to do with the Property.
- (2) On the evidence, it is clear that a Special Majority existed which would not at any material time have resolved either (a) to retain the 32VRL Part (which is not the basis of PADS' pleaded case against the Defendants in any event) or (b) to have developed the 32VRL Part.
- (3) In particular, the Defendants were concerned that Barclays should be repaid and that their personal obligations to Barclays should be released, and were entitled to protect and advance those interests by exercising their rights as RP Shareholders in respect of the sale of the Property and distribution of the net proceeds of sale.
- (4) In addition, PADS lacked not only the support of a Special Majority but also the means to develop the 32VRL Part.
- (5) In any event, even if a Special Majority had resolved to develop the 32VRL Part, that would not have produced any financial gain (or any chance of financial gain) for PADS, because (a) the RP Shareholders would have resolved to arrange matters so that any such gain was realised not within PADS but instead within SMD or another similar corporate vehicle (as happened with the Retained Part) and (b) the best guide to whether the development by PADS of the 32VRL Part would have been profitable is provided by the accounts of 32VRL and, in accordance with those accounts, 32VRL made no profit on that development.
- (6) PADS has therefore not made out causation, whether of loss or loss of a chance.

### *Discussion*

135. There is no dispute that SMD was a special purpose vehicle ("SPV"), that the share ownership in SMD matched that in PADS, and that the Retained Part was separately developed between about May 2014 and March 2016 by SMD. It would appear that the decision that SMD, as opposed to PADS, should develop the Retained Part was driven by tax considerations. In essence, a lease of the Retained Part was sold by PADS to SMD for £1,050,000 (a price that was not suggested to be other than arm's length). SMD then carried out the development of the Retained Part, yielding £2,375,000 (or £1,830,000 net of corporation tax). SMD was also required to make a common parts contribution of £115,000. Once that development was completed, SMD was placed in members' voluntary liquidation, and the net profit was distributed to the shareholders. All this was conceived and implemented with the knowledge and involvement of Mr Ross as well as the Defendants. Mr Ross accepted in cross-examination that it was his

idea for the Defendants and him to pursue the development through SMD. The precise basis on which such a scheme gives rise to fiscal efficacy was not explored before me, but the use of a liquidation process appears to have been of importance in this regard.

136. In these circumstances, Mr Harper submitted that Mr Cousins' arguments to the effect that if PADS had not leased the 32VRL Part then PADS would have developed the 32VRL Part in the same way as PADS developed the Retained Part lacked foundation. In truth, PADS did not develop the Retained Part any more than PADS developed the 32VRL Part. On the contrary, both Parts were leased by PADS to other companies and were then developed by those other companies. The only difference is that PADS leased the 32VRL Part to 32VRL, and that PADS leased the Retained Part to SMD.
137. Moreover, having regard to the manner in which the Defendants and Mr Ross decided that PADS should deal with the Retained Part, Mr Harper submitted that if PADS had not leased the 32VRL Part to 32VRL, and the Defendants and Mr Ross had decided to share between themselves the fruits of developing the 32VRL Part, then the Defendants and Mr Ross would have decided that PADS should deal with the 32VRL Part in the same way as they in fact decided that PADS should deal with the Retained Part. Any profits flowing from the development of the Retained Part would therefore have been routed through the medium of SMD or another SPV, and never received by PADS.
138. I accept those submissions. Experience of commercial litigation demonstrates that for many people there are few, if any, more compelling motivations than the desire to avoid paying tax. The conduct of the Defendants and Mr Ross with regard to the Retained Part offers the most reliable guide as to how they would have caused PADS to deal with the 32VRL Part if, as PADS now contends, the Defendants ought to have retained the 32VRL Part for development instead of leasing the 32VRL Part to 32VRL.
139. In my opinion, it follows that PADS suffered neither a substantial loss nor the loss of a chance by reason of the grant of a lease of the 32VRL Part to 32VRL, for the following principal reasons. If the 32VRL Part had been retained by PADS and had not been sold or leased to an arm's length third party for that third party to develop (or not) as that third party saw fit but instead had been developed for the benefit of the RP Shareholders, whether before or after or at the same time as the Retained Part was developed by SMD, then nevertheless any profits from that development would not have been received by PADS but would instead have been received by SMD or some similar SPV. At the same time, no complaint is made in the present proceedings about the consideration which was paid to PADS by 32VRL for the lease of the 32VRL Part. Accordingly, the decision to deal with the 32VRL Part as it was in fact dealt with (as opposed to by causing it to be retained by PADS until it was developed just as the Retained Part was developed) caused no loss to PADS, either in respect of the sum that was paid to PADS for the 32VRL Part, or in respect of either a loss of profits for PADS or the loss of the chance to make profits for PADS by developing the Retained Part.

140. Although those findings provide a complete answer to this element of PADS' claims, it also faces other difficulties. The evidence of the Defendants, which I accept, included: (1) that they would not in any circumstances prevailing at any material time have taken the decision to develop the 32VRL Part, and (2) that the decision to develop the Retained Part was based on entirely different considerations and could not logically be prayed in aid of arguments to the effect that (a) it would or might have made economic sense to develop the 32VRL Part, or (b) Mr Ross might have persuaded them that this was so if they had not unreasonably and in breach of duty adhered to the decision they had taken in December 2009 (as modified thereafter) to lease out the 32VRL Part. This evidence was extensive. However, I consider that the main points sufficiently emerge from some of the answers given by Mr Crawford and Mr Rutter in cross-examination.
141. When asked about various options which Mr Ross was advocating in August 2010 in support of PADS' case that (as summarised by Mr Cousins) "*It is silly to sell the building. We would be far, far better off developing it and keeping the profit ourselves*" ), Mr Crawford said:

*"I understand that. The difference is that with any development comes risk. I heard you talking about development profit earlier and that's... that's grey, it's never guaranteed. At this time, this was the bottom of a recession. The property industry was in a very poor state. The very demise of [PRCA] that we'd been through was because of that situation.*

*I've spent 40 years as a commercial architect working with clients, very small, very big clients and they take a view based on where they stand at any one time ...*

*We took the same view that the risks are where the economy is at any one time, the construction and nature of the construction and we've heard several times how most of these schemes were straightforward, none of them were. This construction required a new roof across the building, for example. I personally worked on a number of schemes of that sort where you try and roof over a building while you have tenants in it and they have never worked successfully. I personally ended up in a scheme where there was a major influx of water with a very, very good, I thought at the time, a very big contractor and that ended up with several companies having to leave that building and one entering administration and a big claim.*

*Now, I looked at this. I thought this is a difficult construction and, sure enough, during the construction by [32VRL] we had two incidents with the roof which involved ingress of water which led to both [PRCA&P] and Bradbrooks' offices being washed out. I won't go into the detail of that but there was a large claim on behalf of PADS that we worked through whilst the two office tenants were able to negotiate a reduction in rent. So we have a risk of where the property market is and your outcome, you have a risk of construction, you have a risk on cost and the risk on that cost is do you believe the construction figures and I personally never believed the construction*

*figures that were put forward either by Mr Ross and, frankly, nor did I believe the figures that were put forward by [32VRL].*

*You also have to bear in mind how are you going to raise that money and we're talking significant sums of money, not £150,000, and finally there is timescale and something of this nature would take six months minimum in planning, in point of fact it took twelve with [a] section 106 agreement. We would be looking at 12, 18 months to build and then you'd be looking at maybe six months to market. So you're looking at a two to three year period which, frankly, we didn't feel we wanted to be on that journey."*

142. When asked about profit projections for the development of the entire Property and, later, about the fact that when the Defendants and Mr Ross carried out the development of the Retained Part through SMD they had achieved a profit, and, later still, about whether the Property was likely to be capable of being developed profitably particularly because PADS already owned the building, Mr Rutter said:

*"... if you go back to my Buckingham Homes, we did not make 20%, we made a loss. There was a risk. This was a very difficult enterprise to undertake as stated by Mr Crawford. To take a roof off, to do work to existing, to put new structures over it, over a bridge link, to build on the side with the tenants being in place, this was a very risky project ...*

*We did [make a profit through SMD] and there were good reasons for that. The good reasons, I do not think there was a land value attributed to that. At the time this was all within the structure that existed in the building. So the outside had been done for us. So we had the benefit of the outside facade. We had the benefit of the staircase being undertaken, the lift was sorted. So we had the rear entrance was created by [32VRL]. So we had all those things that we had the benefit from.*

*So the build cost, if you go back to the analogy of the net to gross, because that had been done our net to gross ratio was much, much better than it would have been. This was a very simple exercise and one would have expected to make 50%. This is totally different. We were not scaffolding the outside of the building, all the risks, people going up ladders, it was an internal fit out, not only that, but the building had been vacated, that there was nobody in the building. They were given the whole car park to use. All of it was a much simpler proposition. It is very, very difficult, impossible to put a comparison between one and the other, totally different.*

*... We were in a position where not ... If one moves forward, a number of things. We had all the cost to pay that I discussed before. We had to pay the costs of refurbishing the office, the entrance, the shop, all of those things, we had to keep the building going. All of those things we had to do. If we had moved forward the AST would have come up, Countrywide, who were [32VRL], had all the negotiations with the Browns. They had to buy them a new flat, had to find them a new flat, they had to give them the same rent, they had to give them a new AST and they sold it at auction at a significant loss, that would have occurred. There was a roof leak. When all these things are*



*put into place the requirement, the build cost, the build cost to keep it going, paying the mortgage, all these different things, paying, you know, the £400,000/£500,000 we had to spend on the building, monies were adding up to, you know, well over £2 million and the propositions put to us were, "Oh, I can put £150,000 in", it seemed de minimis at the time."*

143. One point made in support of PADS' case before me is that by 26 and 27 November 2010 it was made clear to the Defendants by Mr Ross that he objected to the proposed sale of part of the Property. Mr Ross' notes of a meeting between Mr Ross and the Defendants on 26 November 2010 record: "*Objective of Co. – Maximise for benefit of shareholders. Directors' duty*"; and, later: "*MR offer – Cash; Add[itional] security; Time*". These words would appear to reflect Mr Ross' position at that meeting. This accords with his email to the Defendants dated 27 November 2010, which states:

*"Further to our meeting yesterday, I wish to put on record my clear objection to the proposed sale of the residential element of [the Property].*

*As discussed in the meeting, [PADS'] financial position is now stronger due to the leases granted in respect of the office accommodation along with the very positive negotiations with Surbiton Cycles/Specialized in respect of the retail shop. I have also stated that I am prepared, subject to commercial agreement, to provide additional cash and/or security to assist [PADS] to progress the retail lease to completion and to progress the residential development and thereby generate additional profits for [PADS].*

*In the meantime I have made some enquiries of the financial status of your proposed purchaser. I have been shocked by the extended period over which the negotiation has been dragged out and the reduced level of the current offer.*

*I have been led to believe by the Board that your proposed purchaser is a property developer of substance. I attach the last filed balance sheet of Thorstone Land and Property Limited ... I am sure that I do not need to spell out the potential pitfalls of dealing with a small and insolvent company.*

*I therefore deem any sale to be a breach of the Board's fiduciary duties to the shareholders of [PADS]."*

144. Another point made in support of PADS' case before me is that contracts for the grant of a long lease of the 32VRL Part were not exchanged until May 2011, and, accordingly, the Defendants had not only from December 2009 until November 2010 but also right up to May 2011 to reflect on whether the decision they had taken to sell the Property (later modified to lease that Part) was truly in the best interests of PADS.
145. I see the force of those points, viewed both separately and cumulatively. In my opinion, however, when set in their proper context, they are outweighed by other considerations.

146. First, Mr Ross' notes of the meeting on 26 November 2010 also record Mr Gilmore as saying "*too late*" and Mr Crawford as saying "*Wolf at the door. Have to, not want to*". These observations were made after the points about the objective of PADS and "*Directors' duty*" had been ventilated. Moreover, as the expression "*Maximise for benefit of shareholders*" reflects, there was an alignment between the interests of PADS and the interests of the Defendants, in that extracting maximum financial benefit from the Property was to the advantage of all of them. I therefore consider these observations reflect that the Defendants could honestly and reasonably have taken, and did take, a different view to that taken by Mr Ross as to what accorded with their duty to PADS.
147. Second, the fact that the Defendants adhered to that view until May 2011 seems to me to support that it was honestly and reasonably held. As set out above, it was in their individual interests as well as in the interests of PADS to ensure that the Property was dealt with in the most financially advantageous manner. They were rational and professional men, and based on my observations of them as witnesses they were each sensible, balanced and straightforward. To my mind, the fact they chose to deal with the Property in a particular way when they had many months in which to reflect on that matter, and in spite of Mr Ross' clearly contrary views, underscores the likelihood that the approach that they adopted was one that seemed to them, and was, truly appropriate.
148. Third, although Mr Ross objected to the sale, and although he stated that he was prepared to offer financial support to PADS, it is right to note that his offers were "*subject to commercial agreement*" and, in any event, that they were only sufficient to "*assist [PADS] ... to progress the residential development*". These matters are not intended as criticisms of Mr Ross. However, they do serve to bring out that his proposals were neither unconditional nor sufficient to underwrite all development costs.
149. Further to these last two points, between 27 November 2010 and May 2011 the following events (among others) occurred:
- (1) On 29 November 2010, Mr Ross sent Mr Rutter an email with an attached spreadsheet, stating (among other things) that there was "*approximately £800,00 of potential borrowing capacity based on 60% of value*" and that "*The income to [PADS] from Bradbrook and [PRCA&P] covers mortgage capital and interest*".
  - (2) On 4 December 2010, Mr Ross sent Mr Rutter an email and attachment, stating "*the basics are covered*" on the footing of the following figures (among others): "*MJR loan £150k; Bank funding £408k; Total sales revenue £3.2m; Total construction £904k*".
  - (3) On 22 February 2011, Charlie Booth of Handelsbanken sent Mr Lockhart an email stating "*... both Peter and I are keen to try and find a way to fund the development ... it clearly makes sense to keep control of the property and its income if at all possible*", but going on to make clear that this was dependent on

(i) capital reductions in PADS' existing facility which were not up to date and which needed to be brought up to date (ii) PADS ensuring that *"we see all the rental income through our account"* (iii) PADS securing planning consent and (iv) the credit department of Handelsbanken approving additional facilities *"to re-finance Barclays and assist with the construction of Phase 1 ... [which] could be contentious ... [but which] with the support of the guarantees, we would be prepared to recommend to our credit colleagues"*.

- (4) On 24 February 2011, Mr Ross sent Mr Rutter an email (a) recording that they had both seen the *"negative"* of asking Handelsbanken to re-finance Barclays, (b) saying that Mr Rutter's proposal of asking Handelsbanken for *"£150,000 for non-development finance"* would be *"a little more palatable"*, (c) asking what guarantees Mr Booth had been referring to in his email of 22 February 2011, and (d) stating (perhaps partly contradicting some earlier parts of that email) that:

*"It is my very clear view that Handelsbank should be approached for development funding, and that [this] alongside funding from myself, would enable the full development by [PADS] and thereby enable the shareholders of [PADS] to maximise their returns"*.

- (5) On 7 April 2011, Mr Ross sent Mr Rutter a letter, complaining of lack of response from Mr Rutter since they had last met on 28 February 2011, stating:

*"I have consistently put forward my view that PADS should be progressing the planning application and development of its property in order to maximise the return for shareholders. The proposed meeting with Handelsbank was intended to pursue funding from them alongside funding that I am prepared to make available. As a significant shareholder in PADS I consider the present situation to be severely detrimental to my financial situation ..."*

*I request that matters concerning the development of [the Property] and the proposed meeting with Handelsbank be arranged as a matter of urgency."*

- (6) On 18 April 2011, Mr Rutter replied with *"An update in no particular order"*, addressing a number of topics, and concluding with the following statements:

*"8.0 Nick Parker is under pressure to pass the Files to the Collection Department. Whilst I have had numerous telephone calls with him we have not actually met him since a long time before Christmas. He seems to move the Goal Posts weekly, ideally he would like all the money from the Exchange, I keep telling him that Handelsbanken, build costs for the Shop, fees etc. have to be paid ..."*

*10.0 We have not as yet gone back to Handelsbanken. Steve spoke to Peter Wilde [sic] and did not have a very positive response ..."*

*Clearly there has been a breakdown of communications. I have been generally around in Surbiton albeit under pressure both work wise and with my Parents."*

*A resolution to the Building is imperative as it is gradually seeping my energy.”*

- (7) On 17 May 2011, Mr Ross sent an email to Mr Rutter stating that he had accepted an offer on the flat that he had provided as security to Barclays and that therefore Barclays might be paid shortly and *“as a consequence [Barclays] will not be looking to [the Property] for repayment”*. The email continued:

*“Once again I am strongly of the view that development profit can be maximised for all shareholders of PADS by carrying out the residential development ourselves, and not selling.”*

- (8) On 24 May 2011, Mr Rutter sent Mr Ross an email stating: *“Exchange has at long last occurred.”*

150. In my view, consistent with his evidence, these exchanges, as well as other contemporary documents, reflect the fact that, on the one hand, Mr Rutter was open to discussing with Mr Ross, and did in fact discuss with Mr Ross, various options relating to the Property, but that, on the other hand, he and the other Defendants remained unconvinced that development of the entire Property was a viable proposal for PADS.

151. The extracts from Mr Rutter’s email dated 18 April 2011 show that, by that date, exchange of contracts on the 32VRL Part was imminent (giving rise to a debate as to how much of the monies payable on exchange would be received by Barclays). Set in that context, Mr Rutter’s later reference to having *“not as yet gone back to Handelsbanken”* cannot have been intended as a reference to continuing or prospective negotiations with Handelsbanken concerning the funding of development of the 32VRL Part. It must, I think, either have been a reference to past approaches concerning the 32VRL Part, or as meaning that funding of the possible future development of the Retained Part had not been progressed because Handelsbanken had not provided an encouraging response to Mr Crawford (who was the main point of contact with it).

152. Mr Ross’ email of 17 May 2011 was sent on the eve of exchange of contracts, which took place on the following day. Mr Ross was unable to provide certainty that Barclays would not look to the Property for repayment, and it seems to me entirely understandable and reasonable that exchange was not put off in light of its contents. Mr Ross stated in evidence that the sale of his flat did not complete until 5-6 months later.

153. Going back over the history, among other things it was not apparent to the Defendants how PADS would be able to raise the finance necessary to carry out the development. As to that, Mr Cousins submitted:

*“The court is entitled to conclude that it is likely that [PADS] would have been able to obtain whatever finance might have been necessary in order to secure the advantages [of] undertaking a single development prospect. If there*

*is thought to be any doubt as to whether [PADS] would have been able to obtain finance, that could be addressed by applying a modest 'loss of a chance' discount to allow for the chance that finance might not have been obtainable."*

154. In my view, however, that is not the correct approach. On the contrary, on the evidence before me, PADS was simply unable to obtain the necessary finance. Leaving aside Mr Ross' proposed contribution, which was never formalised and which was plainly inadequate by itself, there is no suggestion that PADS had any source of material finance other than Handelsbanken. Yet Mr Booth's email of 22 February 2011 was subject to a number of significant *caveats*, and, moreover, did not come from the credit department of Handelsbanken. Further, Mr Rutter's email of 18 April 2011 records that the response of Mr Wylde of Handelsbanken was not very positive. In light of PADS' overall economic situation, which is partly reflected in the contents of the email of 22 February 2011, I regard that response as unsurprising. In my judgment, the appropriate conclusion in all the circumstances is that PADS was unable to develop the Property itself because it would have needed to raise finance in order to do so and, on the materials before me, it was unable to raise the necessary finance. In fact, it seems to me that the decision to sell the 32VRL Part and develop the Retained Part provided PADS with the most financially advantageous outcome which was prudently available to it, and one for which, viewed objectively, Mr Ross ought to be grateful, notwithstanding that he may sincerely believe that his perception of matters up to May 2011 was more accurate than that of the Defendants, and that they could all have made more money.
155. It is true that part of the difficulties faced by PADS revolved around the borrowing from Barclays, and the need for that borrowing to be re-financed as one element of Handelsbanken making further financing available. However, as set out above, I have rejected PADS' case that the borrowing from Barclays was incurred in breach of duty.
156. Even if that was not so, such that this part of the case ought to be approached on the premise that the borrowing from Barclays did not exist, I do not consider that this would warrant findings (a) that PADS could have obtained the necessary finance and/or (b) that the Defendants ought to have kept and developed the Retained Part. As a preliminary point, if the borrowing from Barclays did not exist then PRCA&P would not have been able to rent part of the Property, and Bradbrooks would not have become a tenant of another part of the Property, and it is unclear whether PADS would have been successful in finding a tenant or tenants, and, if so, on what terms. But even assuming that another tenant or other tenants could have been found on equally advantageous terms, it is apparent from the contemporary documents that PADS was having difficulties in meeting its obligations to Handelsbanken, and that Handelsbanken did not regard the re-financing of the Barclays borrowing as the only difficulty in the path of providing finance for the proposed development of the Property. Moreover, PADS' existing facility with Handelsbanken was due to expire on 31 August 2011. In these circumstances, it seems to me that it cannot be said that the Defendants would

have been in breach of duty in deciding that it was either not feasible or not prudent to attempt to retain and develop the entirety of the Property. The prospects that PADS would have defaulted on its obligations to Handelsbanken or have failed to secure a renewal of its facility were far from fanciful. The decision to proceed with the sale of the 32VRL Part warded off those problems, and allowed PADS to manage its borrowings, and to deal with the Retained Part to the benefit of all the RP Shareholders.

157. Fourth, and harking back to my findings in relation to the 16 December 2009 meeting, I consider that the terms of Mr Ross' letter of 27 November 2010 are more consistent with Mr Ross having known of and approved the decision to sell the Property at that time than the reverse. Thus, Mr Ross does not state that he objects to any sale, but rather that he objects to "*the proposed sale*". Further, Mr Ross does not state that he is shocked by any negotiation for sale having been entered into, but rather that he is shocked by "*the extended period over which the negotiation has been dragged out and the reduced level of the current offer*". Still further, his objections to the financial status of the proposed purchaser make more sense if viewed in the context of an objection to this particular sale than if viewed against a background of his objecting to any sale.
158. Finally, with regard to the loss which PADS is said to have sustained as a result of the decision to sell the 32VRL Part, Mr Cousins relied on a spreadsheet which showed a sum of £1,642,370 in respect of "*Expected profit by not selling to 32VRL and developing in 2014/2015*". This sum was made up of a number of elements:
- (1) Based on Mr Gilmore's evidence, the area of the 11 flats developed and sold by SMD was 8,278 sq ft, and the area of 2 additional flats developed and sold by PADS was 1,852 sq ft, producing a total area of 10,105 sq ft.
  - (2) Based on the material copy leases, the total sale proceeds of the 11 flats developed and sold by SMD were £4,534,000, and the total sale proceeds of the 2 additional flats developed and sold by PADS were £984,950, producing a grand total of £5,518,950.
  - (3) These figures yield an average sale price of £546.16 per sq ft.
  - (4) Based on total sales to the value of £4,534,000, and deducting the transfer price of the head lease to SMD of £1,050,000 and the cash remaining in SMD after all the above 11 flats had been sold of £2,375,000, the total cost of the development carried out by SMD was £1,109,000, which equates to £134.38 per sq ft.
  - (5) The total area of the flats which were developed and sold by 32VRL was 8,278 sq ft, and, therefore, if these flats had been sold at an average sale price of £546.16 per sq ft, the total sale price realised would have been £4,521,115.
  - (6) When subjected to a number of deductions which are detailed on the spreadsheet, this sum of £4,521,115 yields a net figure of £1,642,370.

159. In advancing these figures, Mr Cousins submitted that they incorporated “*various extremely cautious assumptions*”, as follows:
- (1) Allowance is made for the additional “common parts” works which are referred to in the evidence of Mr Rutter and Mr Gilmore.
  - (2) The new build element of the 11 flats has been inflated by 100% which is “*almost certainly being overly-cautious allowing for double the costs incurred by SMD*”. In this regard, a figure of 4,401 sq ft for the area of new build works to which this cost uplift has been applied has been arrived at by deducting from the area of 8,278 sq ft both (a) an area of 2,768 sq ft in respect of the 4 existing flats which were converted and (b) an area of 1,109 sq ft in respect of the roof extension office conversion.
  - (3) Nothing has been added to sales revenue to take into account (a) the superior format of the 32VRL flats or (b) the likely savings in terms of site management and overheads resulting from one larger comprehensive construction package.
  - (4) The cost of achieving vacant possession of Flat 4 has been calculated by taking (a) the implied cost of £75,000 allowed by Thorstone (being the difference between the sum of £1,075,000 and the amount of £1,000,000 actually paid) and (b) an additional suggested allowance of £100,000 to achieve vacant possession.
160. Mr Harper submitted that these figures could not be relied upon. They represent an exercise embodying elements of hindsight and theory which have no foundation in any events at the material times. The highly profitable development which is postulated in the spreadsheet does not accord with the level of interest which was shown by prospective purchasers when the Property was placed on the market, or with any actual or prospective proposal which was placed before the Defendants for consideration. In particular, in calculating the profit that PADS could have expected by developing the 32VRL Part the spreadsheet mixes up actual sales revenue and estimated build costs.
161. Mr Harper submitted that the best guide as to the profit that would be yielded by developing the 32VRL Part was to be found in the accounts of 32VRL, a SPV which was set up specifically to carry out that development. Those accounts show a profit as at 31 August 2015 of £4,916. That sum is negligible, and far removed from £1,642,370.
162. Mr Cousins took issue with the documents relied upon by Mr Harper, which comprised abbreviated accounts of 32VRL as at 30 April 2012, an unaudited financial statement for 32VRL for the period from 1 May 2013 to 31 August 2014, and an unaudited financial statement for 32VRL for the year ended 31 August 2015. Mr Cousins submitted that these documents should be treated with considerable care and that their contents could not properly displace the conclusions to be drawn from contemporary

documents, such as the Thorstone appraisals and Mr Rutter's annotations to those documents. In particular:

- (1) Those appraisals comprise detailed calculations relating to this particular development project, whereas the unaudited financial statements merely contain bald and un-particularised figures relating to all of the activities of 32VRL (whatever these may have been).
- (2) The figure for total sales in the unaudited financial statements, namely £4,123,748, is £208,752 less than what is known to be the total of the premiums payable on the grant of leases to the developed flats.
- (3) The difference between the total construction costs in the Thorstone appraisal, namely £1,252,801 (which Mr Rutter thought was too high) and what might purport to be the total construction costs shown in the unaudited financial statements for the period ended 31 August 2014, namely £2,177,801, is "*astonishing*". The latter figure is arrived at by deducting assumed total site costs of £1.1 million from the total of "Opening stock" and "Purchases" (£3,177,801).
- (4) Almost exactly half of the net profit before finance costs for the period ended 31 August 2014 are eaten up by loan interest and redemption fees of £335,344, whereas PADS would not have incurred costs of financing the acquisition of the Property. These costs are also dramatically more than in the Thorstone appraisals.
- (5) There is nothing in the statements to confirm that the reported transactions relate solely to the Property.
- (6) There is no detailed breakdown of the costs of sales, so that the costs of unrelated sales may have been put through the statements; and these might have included commissions to any introducer such as Thorstone.
- (7) "Other debtors" are shown as being £493,832 as at 30 April 2013, at a time when there was no declared revenue. The activity that generated these "debtors" is not explained.
- (8) The £40,000 rent for May 2013 to August 2014 is unexplained. It is difficult to see how it could relate to site operations, which would have been included in preliminaries.
- (9) The very large interest charge over the two accounting periods, namely £409,964, contrasts markedly with Thorstone's figure of £99,837. PADS would have had no need to take finance to acquire the site as PADS owned it.
- (10) Finally, reliance was placed on *Wiszniewski* and the failure of the Defendants to call personnel from 32 VRL.



163. I agree with Mr Cousins that the disparity between the figure for total sales in these documents of £4,123,748 and the equivalent figure derived from the material copy leases raises an issue as to the reliability of these documents. At the same time, the relatively close proximity of those two figures seems to me to support the Defendants' case that 32VRL's sole business concerned dealings with the 32VRL Part. In any event, in accordance with paragraph 2.20 of the Particulars of Claim it is PADS' own case that 32VRL "*was a company set up for the development by the property developers*".
164. I see no reason to prefer the Thorstone appraisals and Mr Rutter's annotations to these documents. None of those appraisals were tested in practice, and if they, or Mr Rutter's annotations on them, had been regarded as a reliable guide to the profitability of developing the 32VRL Part it is to be expected that Mr Rutter and the other Defendants would have attempted to ensure that matters were managed differently than they were. It is one thing to make calculations on pieces of paper and another thing to carry out a project in practice. As against the message, or hope, or prospect, conveyed by these appraisals it is necessary to consider the serious grounds for misgiving expressed by Mr Rutter and Mr Crawford (and for that matter Mr Gilmore and Mr Symes) in their evidence, and the fact that if the Defendants had believed that the retention and development of the 32VRL Part was likely to be profitable at any time before May 2011 they could and in my view would have reconsidered their earlier decision to sell.
165. I decline to draw any adverse inference from the Defendants' decision not to call witnesses from 32VRL, because I do not agree that they might reasonably have been expected to call such witnesses. As I see it, they were entitled to rely on the documents.
166. While I note the remainder of Mr Cousins' points, and while I do not discount the possibility that they may be correct, I do not consider that I am in a position to accept them. For example, even if Mr Cousins is right in his calculation that the total construction costs shown in the unaudited financial statements of 32VRL for the period ended 31 August 2014 are £2,177,801 in comparison to a Thorstone figure of £1,252,801, I do not consider that there is any material before me which would enable me properly to say that the 32VRL figure is grossly inflated or otherwise inaccurate.
167. One matter that I consider I can take into account is that the spreadsheet upon which Mr Cousins relies does not contain any separate figure for the costs of borrowing. It is said of the calculated figure for the total cost of the development carried out by SMD of £1,109,000 that "*As a balancing figure this must include all finance, selling and professional costs*", but no breakdown is attempted as between those elements. In any event, even if this development had been carried out by PADS as opposed to SMD, and even if the financing costs of this development could be segregated, it does not follow that they would provide a reliable guide to PADS' costs of financing the development of the 32VRL Part. When SMD developed the Retained Part, the monies realised by the sale of the 32VRL Part had already been received, and PADS' indebtedness had been

substantially reduced. If PADS had embarked on a development of both Parts at a time when those monies had not been received (because the 32VRL Part had not been sold) it would have been in a very different position financially than applied when SMD developed the Retained Part, and the costs of financing might well have been substantially different and higher than SMD's costs of financing (whatever they were).

168. At the end of the day, I do not consider that I can fairly or properly give more weight to the arguments of Mr Cousins and the spreadsheet and the underlying materials on which he relies than I can to the arguments of Mr Harper and the documents and the consonant evidence of the Defendants upon which he relies. It follows that PADS has failed to discharge the burden of proof either as to the actual loss that it sustained or as to the loss of a substantial chance to make profits by not developing the 32VRL Part.
169. In summarising PADS' case under this head above, I have expressed it as involving a claim that, in the alternative to be being developed, the 32VRL Part could (and should) have been retained. In my opinion, however, this alternative claim is not available to PADS on its pleaded case. The relevant part of the Amended Particulars of Claim is headed "*The selling of the development opportunity in [the Property]*", and it contains paragraphs numbered from 3.3 to 3.5. The complaint in paragraph 3.3 is of breach of duty in proceeding with the sale of the 32VRL Part when the Defendants "*knew or ought to have known that it would have been more profitable for PADS to undertake the development itself and that PADS was capable of so doing*". Paragraph 3.4 pleads that the Defendants acted in breach of duty in proceeding with that sale "*in that they were primarily motivated by their desire to clear themselves of the said debt owed to Barclays as opposed to PADS' best interests*". Paragraph 3.5 then pleads that the Defendants "*are liable to compensate and/or pay PADS that which PADS lost through not undertaking the development itself being a figure of the order of £1.6m*".
170. It is in any event difficult to see how a claim by PADS against the Defendants for losses occasioned to PADS arising from a failure to ensure that PADS retained the Property could sensibly be squared with subsequent events. If PADS had retained the Property, the Defendants would have had valuable rights as RP Shareholders which they would no doubt have been interested in preserving. They would therefore not have sold their shareholdings in PADS to Mr Ross or an entity owned or controlled by him (or at all), at least on the terms on which they in fact did so in March 2016. They would therefore have retained the right to vote by Special Majority to sell or develop the Property, which they would either have exercised (in which case the Property would have been disposed of without any basis for complaint against the Defendants) or not exercised (in which case they would have continued to retain their shareholdings, and they would not have caused PADS to bring a claim against them for breach of duty, and even if such a claim had been brought they would be the primary beneficiaries of it).
171. For all these reasons, this head of PADS' claim fails and must be dismissed.

172. In light of the conclusions that I have reached on the points discussed above, I have not thought it necessary to address every argument that was raised before me by the parties. In particular, I have not addressed the Defendants' arguments based on the premise that PADS suffered no loss because a Special Majority would have voted to deal with the Property as it was in fact dealt with if Mr Ross had made plain before May 2011 his complaint that no lawful and properly notified and constituted Special Majority resolution had yet been passed, or those based on laches, acquiescence and limitation. I consider it unnecessary to complicate and prolong this judgment by addressing those issues, and I have therefore not formed any concluded view about them. It is right to say, however, that my provisional view is that they do not further the Defendants' case.

### **THE CLAIM INVOLVING £343,231.97**

#### *The parties' submissions*

173. PADS contends that inextricably linked to the (as it submits) unauthorised sale of the 32VRL Part, but distinct from it, was the unauthorised misapplication of the proceeds of sale which belonged to PADS, for the purpose of paying off the liabilities of the Defendants arising from the guarantee obligations undertaken by Mr Rutter and Mr Ross in April 2009. This was not sanctioned, and was in the total sum of £343,231.97.

174. In relation to the payment to Barclays of this sum out of the sale proceeds, the defaults of the Defendants were akin to those of trustees paying away trust monies without authority to do so. The like points as are set out at paragraphs 110 and 132 above apply.

175. In short, the Defendants had no authority to do what they did, and their motives for acting as they did were informed by self-interest, or alternatively the grossest incompetence. In particular, it is clear from Mr Rutter's email to Barclays dated 1 July 2011 that the initial £100,000 payment and the later payment of the balance (not made, in the event, until 24 July 2012) in respect of the guarantee liability for the PRCA debt was consciously applied by the Defendants for that purpose while they also expressly acknowledged to Barclays that these sums represented proceeds belonging to PADS.

176. These breaches resulted in both (a) a loss to the Company, and (b) financial advantages gained by the Defendants. As to (a), the payment of £100,000 on 22 July 2011 reduced the then credit balance on PADS' account at Barclays from £176,922.16 to £76,922.16; and the payment of £243,231.97 on 24 July 2012 reduced the then credit balance on PADS' account at Barclays from £420,908.06 to £177,661.09. As to (b) if these sums had not been paid by PADS, indebtedness in the same amount would have remained outstanding to Barclays, which was guaranteed by Messrs Rutter and Ross to the extent of £250,000 plus interest; and if Barclays had enforced that guarantee, Messrs Gilmore, Crawford and Symes would have been liable to indemnify Messrs Rutter and Ross in accordance with the Deed of Indemnity dated 7 April 2009. On the basis of principal

indebtedness to Barclays of £250,000, the Defendants thus escaped potential liability (before interest) totalling £204,975, comprising (i) £142,175 in the case of Mr Rutter (56.87%); (ii) £32,400 in the case of Mr Crawford (12.96%); (iii) £14,425 in the case of Mr Symes (5.77%); and (iv) £15,975 in the case of Mr Gilmore (6.39%).

177. The Defendants repeated under this head the like arguments as they had advanced in respect of the sale of the 32VRL Part. In addition, they submitted that this limb of PADS' claims faced a fatal obstacle because (a) Mr Ross agreed to and took the benefit of the payment of £343,231.97 that was made to Barclays and (b) there was (if the same was required) unanimity between the RP Shareholders that the payment should be made to Barclays. In support of this submission, the Defendants relied, in particular, on:

(1) Email exchanges between Mr Rutter and Mr Douglas at Barclays which made clear that PADS' monies had been used and would be used to make payments to Barclays in respect of sums owed to Barclays by PRCA and guaranteed by Mr Rutter and Mr Ross so as to "*clear the outstanding debt*", which were copied to Mr Ross and were discussed between him and Mr Rutter, and which resulted in an email from Mr Ross to Mr Douglas (and copied to Mr Rutter) dated 31 August 2011. That email from Mr Ross was in the following terms:

*"I have spoken today to Peter Rutter and he has copied to me the emails below. Peter advised me that a letter in the form proposed by yourself has been sent to you today.*

*It is my understanding that Barclays is now releasing me from my obligations under the guarantee signed by Peter and myself and that the second charge over my property at 46, Clearwater Place will now be removed. I would be grateful if you will confirm how the process will take place and whether I have to do anything in this regard."*

(2) The answers given by Mr Ross in cross-examination. Among other things, it was put to Mr Ross that he did not voice objection to the proceeds of sale of the Property being paid to Barclays, and that this was because he was in agreement with that course of action. Mr Ross accepted that he was not sure that he would be reimbursed pursuant to the Deed of Indemnity. He further said:

*"Well, if it was pushed upon me, then my preference would be that I didn't subsequently have to go to the other shareholders looking for their share of that £250,000. I didn't want to have the grief of chasing them for £200,000 [sic]*

*... Well, it was the best of a bad bunch."*

178. The remainder of the Defendants' submissions may be summarised as follows:

- (1) The sum of £343,231.97 was (pursuant to the terms of the Note) “*realised Equity Value*” of the Property and it was therefore due to the RP Shareholders through dividend distribution (see Clause 3(a) of the Note). The RP Shareholders were entitled to, and did, decide on these monies instead being applied by way of reduction of the sums due to Barclays from PRCA and/or pursuant to the guarantee and the indemnities which they had provided.
- (2) Such a decision was taken by a Special Majority in accordance with the Note at the meeting on 16 December 2009. It was taken by the Defendants in their capacity as RP Shareholders and not in their capacity as directors of PADS. Once the decision had been taken by a Special Majority of the RP Shareholders, the Defendants, as directors of PADS, were obliged to implement the same.
- (3) If and in so far as (contrary to the above) the Defendants, acting in their capacity as directors of PADS, had any discretion regarding the payment, they reasonably and honestly considered that it was in the best interests of PADS. Similar considerations were engaged as applied to the decision to sell the 32VRL Part.
- (4) It would have been artificial to consider that these particular sums should be retained by PADS when, in accordance with the Note, they had to be distributed to the RP Shareholders in any event. Pursuant to the Note, these monies could not have been paid by dividend to any ordinary shareholder or used for any other purpose as might have been true in the case of a standard trading company which did not operate within the framework of the Note.
- (5) It would also have been artificial for the Defendants as directors to consider PADS in a vacuum. PADS was one of a number of companies in the PRC Group which had overlapping and connected interests. Considering the interests of the PRC Group as a whole was an entirely appropriate way to approach consideration of whether a particular act was in the best interests of PADS. It would be an unduly stringent test (which may on the facts of a particular case lead to absurd results) to require directors to address their minds to a specific group company in relation to each particular transaction. The proper test is whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances have reasonably believed that the transaction was for the benefit of the company. In support of these propositions, Mr Harper placed reliance on *Charterbridge Corporation Ltd v Lloyds Bank* [1970] 1 Ch 62, Pennycuik J at 74B-F:

*“... I must proceed to express a conclusion upon the contention that in creating the guarantee and legal charge, the directors were not acting with a view to the benefit of Castleford. That is a question of fact, and the burden of proof lies on the plaintiff company. As I have already found, the directors of Castleford looked to the benefit of the group as a whole and did not give separate consideration to the benefit of Castleford. Mr Goulding contended that in the absence of separate consideration, they*

*must, ipso facto, be treated as not having acted with a view to the benefit of Castleford. That is, I think, an unduly stringent test and would lead to really absurd results, i.e. unless the directors of a company addressed their minds specifically to the interest of the company in connection with each particular transaction, that transaction would be ultra vires and void, notwithstanding that the transaction might be beneficial to the company. Mr Bagnall for the bank contended that it is sufficient that the directors of Castleford looked to the benefit of the group as a whole. Equally I reject that contention. Each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interest of that company. This becomes apparent when one considers the case where the particular company has separate creditors. The proper test, I think, in the absence of actual separate consideration, must be whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company. If that is the proper test, I am satisfied that the answer here is in the affirmative.”*

- (6) If these sums had not been paid out as they were, it is inescapable that they would in any event have been paid out to the RP Shareholders by way of dividends and not retained by PADS, because that is what a Special Majority wanted all along.

#### *Discussion*

179. This part of the analysis has to proceed on the premise that I have not made my primary findings (a) that Mr Ross was a party to and is bound by the resolutions passed at the meeting on 16 December 2009, alternatively (b) that, in light of his participation in the events of March and April 2010, Mr Ross gave his approval or cannot be heard to deny that he gave his approval to both the decision to sell the Property and the decision to use the net proceeds of sale to discharge the liabilities of PRCA and others to Barclays.
180. Putting those findings out of mind, I would nevertheless uphold the Defendants’ first line of defence to this head of claim, on the following basis.
181. First, the sums of £100,000 and £243,231.97 which were paid out of PADS’ account at Barclays on 22 July 2011 and 24 July 2012 respectively constituted “*realised Equity Value*” within the meaning of the Note.
182. Second, the requirement for all the RP Shareholders to vote upon any matter relating to “*realised Equity Value*” could be satisfied if all the other RP Shareholders participated in and voted at the meeting on 16 December 2009, and if Mr Ross thereafter either gave his approval to the resolution to use the net proceeds of sale of the Property (or more precisely, as matters transpired, the 32VRL Part) to discharge the primary and secondary liabilities of PRCA, Mr Rutter and himself to Barclays, or so conducted himself as to make it inequitable for him to deny that he had given his approval.

183. Third, with full knowledge that the proceeds of sale of the Property would be paid by PADS to Barclays to the extent necessary to discharge those liabilities in full, Mr Ross not only raised no objection to that course being followed but also positively took advantage of such payment for his own personal benefit as appears in particular from his email to Barclays dated 31 August 2011.
184. Fourth, in these circumstances Mr Ross either gave his approval to the material payments being made to Barclays or so conducted himself as to make it inequitable for him to deny that he had done so (see *EIC Services Ltd v Phipps* [2003] BCC 931, Neuberger J (as he then was) at [122]).
185. Fifth, I consider that it was open to the RP Shareholders to decide to deal with these proceeds of sale in this way, and that this was not contrary to or precluded by the provisions of the Note or the Memorandum and Articles.
186. Sixth, in substance there was a distribution to the RP Shareholders of these proceeds of sale, albeit not by way of dividend; and that distribution occasioned no loss or damage to, and neither did it in fact cause any harm to the interests of, any third party (such as creditors of PADS), and related to monies which were payable to the RP Shareholders and which were never going to be retained by PADS in light of the terms of the Note.
187. As a matter of law, PADS and Mr Ross are different persons. PADS is therefore able to bring the present claims and seek remedies which might not be available to Mr Ross. Further, in my judgment Mr Cousins was right to submit on the topic of acquiescence that, as a minority shareholder who was not a director, Mr Ross could not acquiesce in the conduct of the Defendants which is complained of in these proceedings in a manner which binds PADS or affects PADS' rights (just as Mr Cousins was right to place reliance on the principle stated in *Jetivia SA & Anor v Biltta (UK) Ltd & Ors* [2016] AC 1, Lord Neuberger PSC at [8]: "*Where a company has been the victim of wrong-doing by its directors, or of which its directors had notice, then the wrong-doing, or knowledge, of the directors cannot be attributed to the company as a defence to a claim brought against the directors ... in the name of the company ... for the loss suffered by the company as a result of the wrong-doing, even where the directors were the only directors and shareholders of the company, and even though the wrong-doing or knowledge of the directors may be attributed to the company in many other types of proceedings.*"). However, in this case Mr Ross is the ultimate beneficial owner of PADS. In practical terms, therefore, he effectively stands to make duplicate recoveries if and to the extent that PADS' claims succeed in respect of acts of the Defendants complained of from which Mr Ross has already obtained personal benefits which do not fall to be brought into account when quantifying the relief to which PADS is entitled. These factors do not assist PADS so far as equitable considerations are concerned.

188. In light of that conclusion, which is already additional to my primary findings, I do not consider it necessary or appropriate to address the remaining points which were argued under this head of claim. As is also true of arguments which I have not addressed under other heads of claim, I have therefore not formed any concluded view about these points. My provisional view, however, is that they do not advance the Defendants' case.

## **THE DEFENDANTS' CLAIMS FOR RELIEF**

189. Section 1157 of the CA 2006 Act provides:

*“(1) If in proceedings for negligence, default, breach of duty or breach of trust against–*

*(a) an officer of a company ...*

*it appears to the court hearing the case that the officer ... is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit.”*

### *The parties' submissions*

190. If they are held to have acted in breach of duty, the Defendants seek relief on the grounds that they acted honestly and reasonably and ought fairly to be excused.

191. Mr Harper submitted that the Court should follow the guidance provided in respect of the equivalent provision in earlier legislation in *Re D'Jan of London Ltd* [1993] BCC 646, Hoffmann LJ (as he then was) at 649:

*“It may seem odd that a person found to have been guilty of negligence, which involves failing to take reasonable care, can ever satisfy a court that he acted reasonably. Nevertheless, the section clearly contemplates that he may do so and it follows that conduct may be reasonable for the purposes of [the section] despite amounting to lack of reasonable care at common law.*

*... I think that the economic realities of the case can be taken into account in exercising the discretion ...”*

192. Mr Cousins submitted that there are clear parallels between the discretion given to the Court by section 1157 of the CA 2006 and that given by section 61 of the Trustee Act 1925. However, the two provisions are not identical. The difference was considered in *Santander UK plc v RA Legal Solicitors* [2014] PNL 20, Briggs LJ (as he then was) at [32]-[33]. Briggs LJ endorsed the above observations as to oddity of Hoffmann LJ, and pointed out that *“No such oddity appears in [section 61 of the Trustee Act 1925]”*.



193. In *Santander UK plc v RA Legal Solicitors* [2014] PNLR 20 the defendant firm of solicitors was instructed in standard terms which required it to hold the building society's money on trust until completion, but was induced by fraud to part with the money without completion ever taking place, and was accordingly sued for breach of trust. Much of the judgment of Briggs LJ was concerned with discussing what type of "connection" was required by the judicial interpretation of section 61 of the Trustee Act 1925 which Briggs LJ cited with approval at [21]:

*"In the context of mortgage fraud, this court has interpreted [section 61 of the Trustee Act 1925] as requiring the trustee to prove that he acted reasonably only in relation to those aspects of his conduct which are connected with the beneficiary lender's loss. This is best expressed by Sir Andrew Morritt C in [Davisons (Solicitors) v Nationwide [2012] EWCA Civ 1626] at [48]:*

*"The section only requires [the trustee] to have acted reasonably. That does not, in my view, predicate that he has necessarily complied with best practice in all respects. The relevant action must at least be connected with the loss for which relief is sought and the requisite standard is that of reasonableness not of perfection."*

194. Mr Cousins submitted that the Defendants did not act honestly and reasonably, and that this was precisely why they were in breach of fiduciary duty. Accordingly, their applications for relief did not even get off the ground. Mr Cousins added that many of the recent authorities on section 61 of the Trustee Act 1925 concern what might be termed merely technical breaches of trust. However, that is not the present case.
195. Mr Cousins further submitted that where conduct by a director involving the misapplication of company property is prohibited by the Articles, the Court should not consider relief under section 1157 of the CA 2006 for the reasons explained in *Guinness plc v Ward* [1990] 2 AC 663, Lord Templeman at 695H-696A:

*"Mr Ward had no right to remuneration without the authority of the board. Thus the claim by Guinness for repayment is unanswerable. If Mr Ward acted honestly and reasonably and ought fairly to be excused for receiving £5.2m. without the authority of the board, he cannot be excused from paying it back. By invoking [the section] as a defence to the claim by Guinness for repayment, Mr Ward seeks an order of the court which would entitle him to remuneration without the authority of the board. The order would be a breach of the articles which protect shareholders and govern directors and would be a breach of the principles of equity to which I have already referred." (emphasis added)*

196. In response to that submission, Mr Harper submitted that *Guinness plc v Ward* [1990] 2 AC 663 is not authority for the proposition that Mr Cousins sought to extract from it. The relevant ruling concerned circumstances where monies had been directly paid to and retained by the party seeking relief. The facts of that case were very different to the present case. In relation to the claim in respect of the £150,000 loan transaction, the

Defendants did not themselves receive anything, and in any event the loan was repaid by PRCA&P. In relation to the claim based on the sale of the 32VRL Part, the Defendants also did not receive and retain anything. In relation to the discharge of the liabilities to Barclays, the Defendants again did not receive or retain anything, and insofar as they benefitted from the release of Mr Rutter's guarantee and the obligations arising under the Deed of Indemnity dated 7 April 2009 then so also did Mr Ross.

197. Finally, Mr Cousins submitted that if the Court were to get as far as considering the exercise of the discretion to grant relief in the present case, the Defendants were remunerated directors of a trading company and hence in a position analogous to that of professional trustees. In this regard, in *P & P Property Ltd v Owen White & Catlin llp and another; Dreamvar (UK) Ltd v Mishcon de Reya and another (Law Society intervening)* [2019] Ch 273, Patten LJ at [107] made reference to other authorities and stated: "*This strict approach to the position of professional trustees finds an obvious counterpart in the need to have regard to the effect of the breach on the beneficiaries.*"

#### *Discussion*

198. It follows from the findings that I have made above that, in my judgment, and even if I am wrong in my primary findings summarised in paragraph 179 above, the Defendants acted honestly and reasonably in relation to each of the three matters about which complaint is now made by PADS. If, contrary to my findings, they acted in breach of duty, I consider that the essence of the matter must be that they failed to pay sufficient regard to the differences that existed between their own interests and those of Mr Ross; and that this was reflected in, or translated into, a failure to act with single-minded loyalty towards PADS, in which Mr Ross as well as they was interested and concerned.
199. Although the Property was owned by PADS both legally and beneficially and was not held on trust for the RP Shareholders, the effect of the Note was that, for most practical purposes, those individuals had the clearest or closest interest in how the Property, net income arising from the Property, and "*realised Equity Value*" were dealt with.
200. As matters transpired, neither the £150,000 loan transaction nor the sale of the 32VRL Part caused loss to either PADS or the RP Shareholders – the former because the loan was repaid by PRCA&P and the security that had been obtained by Barclays was released; and the latter because, in accordance with my findings, PADS was not able to develop and would not have developed the 32VRL Part in any event (and, moreover, PADS has failed to establish that the development would have been a profitable one).
201. On the face of it, the payments amounting to £343,231.97 that were made to Barclays did cause loss to PADS, but all the RP Shareholders benefitted from those payments because they resulted in the release of their guarantees and indemnities, which they had entered into in support of PRCA, a company in which each of them had been involved.

(In addition, to allow PADS to now to effect a recovery from the Defendants in respect of that loss would lead to over-compensation for PADS' ultimate beneficial owner.)

202. Further, to the extent that the Defendants' *ex hypothesi* breaches of duty arose from not acting in accordance with the Note and/or the Memorandum and Articles, the Defendants could have procured the dispersal of those monies by PADS by complying with the material provisions and exercising their Special Majority rights (and I have no doubt would have done so if they had appreciated the existence of such *ex hypothesi* breaches of duty at the material time, as they had reached agreement at least between themselves in the terms recorded in the Minutes of the meeting on 16 December 2009).
203. Accordingly, the facts of the present case are indeed very different to those of *Guinness plc v Ward* [1990] 2 AC 663. Further, I do not consider that the reasoning in that case compels the result that relief must be refused to the Defendants in the present case.
204. For these reasons, if am mistaken in holding that the Defendants did not commit breaches of duty, I consider that I have jurisdiction to relieve them from liability pursuant to section 1157 of the CA 2006, and having regard to all the circumstances discussed above, I would exercise my discretion and wholly relieve them of liability.

## **CONCLUSION**

205. For all these reasons, this claim fails and there must be judgment for the Defendants.
206. I ask Counsel to endeavour to agree an order which reflects these rulings. I will hear submissions on any points which remain in dispute as to the form of the order, and on any other issues such as costs and permission to appeal, either when judgment is handed down, or else on an adjourned hearing on some other convenient date.