Neutral Citation Number: [2021] EWHC 2055 (Ch)

Case No: BL-2018-002028

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (CH D)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 July 2021

Before :

Tom Leech QC (sitting as a Judge of the Chancery Division)

- -

Between :

BARROWFEN PROPERTIES LIMITED	**Claimant**
-- and –	
(1) GIRISH DAHYABHAI PATEL **(2) STEVENS & BOLTON LLP** **(3) BARROWFEN PROPERTIES II LIMITED**	**Defendants**

- -

Lexa Hilliard QC and **Tim Matthewson** (instructed by **Withers LLP**) for the **Claimant**
Roger Stewart QC, Angharad Start and Joshua Folkard (instructed by **Reynolds Porter Chamberlain LLP**) for the **Second Defendant**

Hearing dates: 1-5, 8-12, 15, 16, 25 and 31 March 2021 and 1 April 2021

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment is handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30 am on 21st July 2021.

Tom Leech QC:

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I. Preliminary Matters

1. The Claimant is Barrowfen Properties Ltd ("**Barrowfen**"), a limited company, which was incorporated in England and Wales on 6 July 1984 and registered under company registration no. 01830742. Since 6 May 2019 all of the issued share capital of Barrowfen has been legally and beneficially owned by Asian Agri Investments Ltd ("**Asian Agri**").

2. For most of the period with which this action is concerned Barrowfen's registered office was 57 Gorst Road London NW10 6LS ("**Gorst Road**"). Its registered office is now First Floor Kirkland House 11-15 Peterborough Road Harrow Middlesex HA1 2AX.

3. Barrowfen formed (and still forms) part of an international group of businesses owned by four brothers: Rajnikant Patel born in 1945 ("**Rajnikant**"), Yashwant Patel born in 1947 ("**Yashwant**"), Girish Patel born in 1952 ("**Girish**"), who is married to Nina Patel ("**Nina**"), and finally Suresh Patel born in 1953 ("**Suresh**"), who is married to Shila Patel ("**Shila**"). The parents of the four brothers were Mr Dahyabhai P Patel and Mrs Prabhavati D Patel.

4. Each of the four brothers has two children. The members of the next generation who are relevant to this dispute are Rajnikant's sons, Prashant Patel ("**Prashant**") and Ilesh Patel ("**Ilesh**"), Girish's children, Kiraj Patel ("**Kiraj**") and Vanisha Patel ("**Vanisha**"), and Suresh's children, Chirag Patel ("**Chirag**") and Prayag Patel ("**Prayag**"). The parties referred to Patel family members throughout the trial by their given names both orally and in writing and I adopt that convention.

5. The Patel family originated from Ode in Gujarat in India before moving to Singapore. Rajnikant now lives in Australia, Prashant lives in Malaysia, Yashwant lives in New York, Girish lives in London and Suresh lives in Singapore. In July 1985 Girish, who is the First Defendant, was appointed to be a director of Barrowfen and he remained a director until 16 February 2016 when he resigned. The present directors of Barrowfen are Suresh and Prashant. Barrowfen's principal asset was (and remains) the freehold of commercial

premises at 180 to 216 Upper Tooting Road London SW17 7EW (the "**Tooting Property**").

6. The Second Defendant, Stevens & Bolton LLP ("**S&B**"), is a firm of solicitors who acted for Barrowfen and Girish in relation to a range of matters. The client relationship partner was Mr Richard King. Ms Katie Philipson and Mr Andrew Dodds were at the time senior associates and Mr Dodds is now a partner.

7. The Third Defendant, Barrowfen Properties II Ltd ("**Barrowfen II**"), was incorporated in England and Wales on 2 November 2015 and registered under company registration no. 09852391. The issued share capital of Barrowfen II was 1,000 £1 ordinary shares and its original shareholders were Kiraj and Vanisha. The directors of the company were Kiraj and Mr William Radmore, a chartered surveyor, who had worked as a consultant for Barrowfen since 2004. On 20 February 2020 the board of directors approved dormant accounts for the three years ended 30 November 2016 to 30 November 2019.

8. The ownership of the shares in Barrowfen forms an essential part of the background to this action and in Appendix 1 to this judgment ("**Appendix 1**") I set out a detailed history of the company's shareholders and its operations prior to the events which give rise to the claims in this action. The business relationship between the Patel family members and the litigation which took place in a number of jurisdictions also forms part of that background and in Appendix 2 to this judgment ("**Appendix 2**") I set out a detailed history of the relationship and the litigation. Where necessary, I have made findings in relation to those facts.

9. Mr Justice Birss heard an application to strike out parts of the claim and in addition to the trial of the substantive claims, I also heard a number of applications in this action as well as conducting the pre-trial review. In Appendix 3 to this judgment ("**Appendix 3**") I set out a detailed procedural history of the action to the extent that it is relevant to the determination of the substantive claims.

10. Ms Lexa Hilliard QC and Mr Tim Matthewson instructed by Withers LLP ("**Withers**") appeared for Barrowfen at the trial of this action (as they had done

on the earlier applications before me). Girish appeared at the trial in person (as he had done before). Mr Roger Stewart QC, Ms Angharad Start and Mr Joshua Folkard appeared for S&B at the trial instructed by Reynolds Porter Chamberlain LLP ("**RPC**"). Mr Stewart and Ms Start had appeared either individually or together on the earlier applications. Barrowfen II was unrepresented and played no part in the trial. Where I refer to the written and oral submissions of Ms Hilliard and Mr Stewart in this judgment, I recognise that those submissions were the joint product of the very hard work and expertise of both teams of solicitors and counsel.

11. At the request of all parties I heard the entire trial remotely over 15 days. Girish had attended earlier hearings by mobile phone and his position was that he did not have access to a laptop or the internet or a functioning email address. (I add that this was a position which Barrowfen did not accept.) At the PTR I took the view that it would not be possible for him to participate in the trial fairly unless he was given access to a laptop and was able to attend the trial which was being managed by Opus 2 on Zoom. Withers provided him with a laptop and temporary internet access and he was able to participate fully in the trial.

12. Girish had a number of medical conditions to which he drew my attention. He made it clear in his letters to the court that these were personal matters and he did not wish me to make them public. I am satisfied that it is unnecessary for me to set out or explain those medical conditions. I am also satisfied that Girish was able to give his evidence without any obvious disadvantage with the benefit of the technical assistance with which he was provided. I also encouraged Girish to tell me when he felt tired or unable to continue and I made allowances by sitting for short days and taking breaks.

13. Barrowfen makes four claims against Girish and S&B (which I will call the "**Company Claims**") relating to the corporate governance of the company between November 2013 and July 2015. It claims that between November 2013 and July 2015 Girish committed a number of breaches of his statutory duties as a director in order to prevent Suresh and Prashant taking control of the company away from him. It also claims that S&B committed breaches of fiduciary duty

and its contractual and tortious duties by preferring Girish's interests over those of the company itself.

14. Barrowfen also makes a fifth claim in relation to the administration of the company between October 2015 and February 2016 which I will call the "**Administration Claim**". It advances a number of causes of action but in broad terms it claims that Girish designed and implemented a plan to put Barrowfen into administration to enable him to buy the Tooting Property and that S&B and Barrowfen II assisted him to do so. It also claims that Mr King and Girish made a fraudulent misrepresentation at a meeting on 9 December 2015.

15. In relation to causation and quantum, Barrowfen's case is that the breaches of duty committed by Girish and S&B delayed the development of the Tooting Property significantly. In relation to the Company Claims Barrowfen's case is that those breaches of duty caused a delay of 55 months and in relation to the Administration Claim a delay of 39 months. The assessment of any loss is also affected by changes in the development scheme.

16. Wandsworth Borough Council ("**Wandsworth**") originally granted planning permission for 83 hotel bedrooms and 75 student rooms and on 17 April 2014 Barrowfen and Wandsworth entered into a section 106 agreement for this scheme (to which I will refer as the "**Original Development Scheme**"). On 17 July 2014 an application was made to vary this scheme to 78 hotel bedrooms and 99 student rooms and on 16 October 2014 this scheme was approved by Wandsworth. I will refer to this scheme as the "**Amended Original Development Scheme**".

17. In September 2016 Barrowfen came out of administration and it was advised to adopt a new scheme which substituted residential development for the student accommodation. On 22 August 2017 Barrowfen submitted a revised planning application and in June 2018 planning permission was approved. On 10 August 2018 Barrowfen entered into a new section 106 agreement with Wandsworth and demolition began. By end of March 2021 the revised development was nearing completion. I will refer to this scheme, which Barrowfen ultimately implemented, as the "**Revised Development Scheme**".

18. This judgment sets out my decision and reasons on all issues of liability and quantum apart from certain issues on the assessment of damage which are reserved for determination. In broad terms I deal with all issues of liability in relation to each one of the four Company Claims and then issues of liability in relation to the Administration Claim. I deal next with the assessment of damage in relation to both the Company Claims and the Administration Claim. Finally, I deal with the defences of illegality and compromise and set out a summary of my findings and conclusions.

II. The Facts

Introduction

19. The principal facts upon which Barrowfen relies in support of its claims really begin in August 2013 with a request by Prashant to be appointed a director of Barrowfen. I begin with the directors and shareholders of Barrowfen in August 2013 together with a brief description of the legal and financial position relating to its principal asset, the Tooting Property, before embarking on a narrative of the principal facts.

Directors

20. From 20 December 2004 onwards Girish and Suresh were the only directors of Barrowfen. On 20 January 1994 the board of directors of Barrowfen (which did not then include Suresh) had passed a resolution delegating all of their powers to Girish in wide terms and this resolution remained in force in August 2013. It was common ground that Girish had acted as the de facto managing director of Barrowfen during the intervening period although the extent to which he kept the other directors and the family informed about his activities was in dispute.

21. On 1 July 1984 Girish had been appointed the company secretary of Barrowfen and on 1 July 1985 he was appointed a director. He remained both a director and the company secretary until May 2014 and held both positions in November 2013. On 7 May Ms Amrit Wahiabharaj ("**Amrit**") replaced Girish as the company secretary. She assisted Girish as a bookkeeper and administrative assistant and worked at Gorst Road.

Shareholders

22. The shareholders of Barrowfen had originally included a number of different families. But by 2013 the Patel family had acquired 100% of the shares. Although I deal with the ownership structure in greater detail in Appendix 1, for present purposes it is sufficient to record that from December 2006 onwards the share capital of 180,000 ordinary £1 shares were owned by the following parties:

    i) The Trustees of the Mrs PD Patel Discretionary Settlement (the "**Mrs PD Patel Trust**"), a trust governed by Guernsey law, were Suresh and Yashwant and they held 60,000 shares on trust for Girish's children.

    ii) The Trustees of the Mr DP Patel Discretionary Settlement (the "**Mr DP Patel Trust**"), a trust governed by English law, were Yashwant and Girish and they held 60,000 shares on trust for Suresh's children.

    iii) Bedford Development Ltd ("**Bedford**") held 60,000 shares. I deal with the ownership of Bedford in more detail in Appendix 1 but Prashant's evidence was that in March 2013 Rajnikant gave him Bedford and that by August 2013 he and his wife, Tejal Jasani, were its directors.

The Register

23. I use the term "owner" in a loose sense because the legal ownership of shares in a private company depends on the registration of the holder of those shares in the register of members of the company. The register of Barrowfen's members (the "**Register**") was kept in an old-fashioned ledger and it contained a separate page for each shareholder. The penultimate and last pages of the Register were the pages for the Mrs PD Patel Trust and the Mr DP Patel Trust and each page recorded that on 6 August 2002 the trust had been allotted or had acquired 60,000 £1 shares. However, neither page recorded the individual trustee who was registered as the holder of the shares.

24. In 2014 Ms Philipson made a photocopy of the Register but unlike the position of the trusts, it did not contain a page for Bedford at all. Ms Ruzin Dagli of

Withers made a video of the Register during the course of the trial and it confirmed that the original page in the Register for Bedford was missing (although a new page had by then been stuck in by Ms Philipson following court proceedings). One of the primary facts which the court had to decide, therefore, was whether Bedford was ever registered as a member of Barrowfen. In Appendix 1 I refer to other corporate documents which bear on this issue and describe the other pages in the Register (which record that in 2002 a number of shareholders had transferred their shares to Bedford). I was told that these entries relating to Bedford had been made in pencil not ink.

The Tooting Property

25. The Tooting Property is registered under title no. 238680 and title no. 293048. According to S&B's instructions to counsel dated 22 December 2014 (below) Barrowfen originally paid £1,095,000 for the Tooting Property with the benefit of a loan of £700,000 from the Bank of Baroda and it consisted of a cluster of buildings, including warehouses, but had been principally used as a Co-op supermarket.

26. By a legal charge dated 30 March 1990 (the "**Charge**") Barrowfen charged the property to a new lender, Allied Dunbar Assurance plc ("**Allied Dunbar**"), to secure a loan of £1,250,000 (the "**Loan**") and on 19 April 1990 the Charge was registered at Companies House. In 1998 Zurich Assurance Ltd ("**Zurich**") acquired Allied Dunbar and I will refer to the lender either as Allied Dunbar or as Zurich depending on the date. By letter dated 13 October 2004 Allied Dunbar agreed to increase the facility to £2,250,000 but by October 2015 the amount of the outstanding loan had been reduced to approximately £850,000.

The London Meeting on 18 to 20 January 2013

27. In Appendix 2 I describe the discussions between the Patel family members which took place over a number of years. On 18 and 20 January 2013 a meeting took place in London between Rajnikant, Yashwant and Girish. Minutes of the meeting were prepared (as they often were for family meetings of this kind) and they record that Barrowfen was discussed although only in the context of trying to resolve a dispute with Mr Nitin Amin ("**Mr NM Amin**") and Mr Prabakhar

Amin ("**Mr PM Amin**") over the repurchase of shares from a company called Seiko Trading Sdn Bdh ("**Seaco**"). I deal with the background to Seaco's involvement in the company in Appendix 1.

28. The correspondence which followed that meeting illustrates the divisions which had already arisen in the family. By email dated 5 June 2013 Yashwant wrote to Girish proposing a further meeting to resolve the many outstanding family issues. In that email he referred to the family's "ongoing problems and discussions". He also asked Girish to provide "updated accounts and valuations as promised".

29. By email dated 19 July 2013 Rajnikant also wrote to Girish stating: "I wish to inform you that I have passed on M/s Bedford Development to Prashant." He requested the financial statements for the financial years 2010, 31 March 2011 and 31 March 2012 for both Barrowfen and Makita Corporation Ltd ("**Makita**"), another company holding land in England, and asked the identity of the company secretary of each company. He also asked for some information about the Tooting Property. Girish did not reply to this email until 9 December 2013 (below).

30. By email dated 24 July 2013 Suresh wrote to Prashant copying in both Girish and Yashwant. He also made the following observation about Barrowfen, Makita and Aum Commodities (UK) Ltd ("**Aum UK**") all operating in London:

> "The said companies are solely run by Mr. G. D. Patel in London and the other partners have very little information on the current status of the said company. Request for more information has been constantly ignored which leaves us deeper in a state of uncertainty."

Requests for Appointment as a Director

31. By letter dated 23 August 2013 Prashant wrote to Girish on Bedford's notepaper stating that he wished to be appointed a director of both Barrowfen and Makita. He enclosed a letter in which he consented to act as a director of Barrowfen. In the letter he made a number of other requests and inquiries including a further request for the financial statements of both companies for the previous three

years. He also asked why the company had not let out Gorst Road and continued to occupy it.

32. On 6 September 2013 an exchange of emails took place between Prashant and Girish in which Prashant requested that Girish communicate with him in relation to family business matters and Girish told Prashant that his father, Rajnikant, remained his partner and that he would resolve any issues directly with him.

33. By email dated 11 October 2013 Suresh wrote to Girish complaining that he had taken no steps to deal with an unpaid rates demand for Gorst Road. By letter dated 23 October 2013 Suresh wrote to Girish summarising what he described as "the ongoing differences and struggles that exist in the family partnership for both the on-shore and offshore companies".

34. Two of the subjects which the letter addressed are relevant in the present context. First, in this letter Suresh addressed in some detail Girish's complaint that he had extracted significant sums from a family company by using the device of "washout invoices" (which I explain in more detail in Appendix 2). Secondly, Suresh repeated his complaint that Girish had failed to deal with unpaid business rates of £39,702.54 relating to Gorst Road and that Shila (in whose name the property had been registered) had received a number of notices from Ealing Magistrates Court and the bailiffs.

35. By letter dated 26 November 2013 Suresh wrote to Girish again stating that it was proposed that Prashant be appointed a director of Barrowfen. He enclosed another letter from Prashant consenting to act as a director and written resolutions which he had signed as a director. He asked Girish to sign and return them and stated that if he did not hear back from Girish within seven days he would requisition a general meeting to appoint a new director.

36. Under cover of a letter dated 9 December 2013 Girish sent Rajnikant copies of the abbreviated accounts of Barrowfen for the years ended 31 March 2008 to 31 March 2012. They were addressed to him and to Bedford care of Agromin Australia Pty Ltd ("**Agromin**"), one of the Patel family's principal companies in Australia. He also stated that: "in respect request for resolution related to tenancies dispute this is operational matter and do not require the same [sic]".

37. Prashant's evidence was that by now he had placed Barrowfen on a Companies House "watch list" and that he received an alert stating that a form TM01 notice of termination had been filed. He obtained a copy of the notice which stated that on 11 December 2013 the form had been filed stating that Suresh had resigned as a director. By email dated 12 December 2013 he wrote to Suresh (copied to Girish) asking for a copy of the resignation letter. Prashant's evidence was that he knew that Suresh would not have resigned and that the email was designed to embarrass Girish.

The Suresh Resignation Letter

38. The TM01 was dated 11 December 2013 and it stated that Suresh had resigned on 11 November 2013. The form also stated that it had been filed by a director, secretary or other officer of the company. It is unclear whether any evidence of Suresh's resignation had been filed with the notice.

39. On 16 April 2014 Girish provided S&B with a letter dated 11 November 2013 (the "**Suresh Resignation Letter**") in which the following text appeared above the signature of Suresh: "Having considered the matter in relation to the letter of Mr GD Patel dated 5th August 2011 and the importance of maintaining corporate governance for the company, I hereby tender my resignation with immediate effect." Suresh's evidence was that the signature on the letter was his but that he did not write the text of the letter or resign as a director.

40. On 16 April 2014 Girish also sent the Register to S&B with a copy of Prashant's email dated 12 December 2013 (above) and a copy of his own letter dated 5 August 2011 (which I describe in more detail in Appendix 2 and in which Girish raised his concerns about sums which Suresh had taken out of the partnership). In his covering letter he described this letter as "very secretive within the three brothers' family". He also stated that under no circumstances did he want the letter to become a public document.

41. At some point before 10 July 2014 Girish also produced to S&B a letter dated 21 November 2013 which he signed on behalf of Barrowfen and in which he stated: "We acknowledge receipt of your letter dated 11th November 2013." His evidence was that he did not send this letter by email or by fax or special or

recorded delivery but that it was posted to Suresh in the ordinary course of business.

Rectification of the Register

42. By letter dated 20 December 2013 Suresh wrote to Companies House stating that he had not signed any resignation letter or informed the directors of Barrowfen that he intended to resign. He enclosed an application for rectification on form RP02A which stated that any resignation letter was a forgery.

43. By letter dated 3 January 2014 the Registrar of Companies wrote to Suresh stating that rectification of the register would take place unless there was an objection within 28 days. There was no objection (whether from Girish or from anyone else) and by letter dated 7 February 2014 the Registrar of Companies wrote to Suresh stating that the TM01 had been removed. The letter gave as the reason for rectification: "The information on the form is factually inaccurate or is derived from something factually inaccurate and is forged." Girish did not challenge this finding.

The First Notice

44. By letter dated 22 January 2014 Prashant wrote to Girish referring to what he described as "your recent stunt on removing Sureshkaka as a Director of Barrowfen without receiving a signed resignation letter from him". He also reminded Girish of his duties under the Companies Act 2006 (the "**Act**") and asked for a complete copy of the whole of the register of members under section 116. In paragraph 8 he concluded as follows:

> "Lastly, we are still awaiting the lodgement of resolutions for my appointment as a Director of Barrowfen. Should the appointment not be lodged with Companies House within 7 days of this letter, Bedford Development will requisition a Members meeting to affect the same."

45. By email dated 20 February 2014 Withers, who were now acting for Prashant, wrote to Girish enclosing four documents all of which were dated 12 February 2014 and had been signed by Prashant on behalf of Bedford: a requisition for a

general meeting to appoint him a director, special notice of the general meeting to be held within 28 days, a request for a complete copy of the Register and a further consent to act as a director. The covering email stated that they had been delivered by hand to Barrowfen's registered office at Gorst Road.

46. Girish now took advice from S&B for the first time. On 24 February 2014 Mr King recorded that he met Girish for an hour. By email dated 28 February 2014 he reported that Bedford had been recorded as a shareholder in Barrowfen's annual returns since at least 2003, that the repurchase of 37,500 shares had taken place in 2006 and that since that date Bedford had been recorded as the owner of 60,000 shares in the annual return. He then recorded his preliminary views:

> "Whilst I thought we might have been able to argue that the annual returns were mistaken and it was never intended that BDL should have been given shares, I cannot see how we can credibly take that position given the company buy back in 2006. It must have been recognised in 2006 that BDL held shares, otherwise the buyback is meaningless. It may well be the case that the register of members does not record BDL as a shareholder, and indeed that no share certificate has been issued, but that will probably be regarded as administrative omission. In the circumstances, whilst technically we might resist calling a general meeting and supplying a copy of the register of members, tactically I doubt that is a wise move. What I think would be better to do is update the register of members and supply a copy, call the general meeting and at the general meeting vote not to appoint Prashant as a director."

The First Engagement Letter

47. Mr King enclosed a draft engagement letter with his email which was also dated 28 February 2014 confirming S&B's instructions (the "**First Engagement Letter**"). In the first line of the letter he stated: "Thank you for your instructions to act for Barrowfen Properties Limited (the "Company")". In the first and second numbered paragraphs he also stated:

> "**Scope of the engagement**
>
> You have instructed Stevens & Bolton LLP to advise the Company in relation to requests made by BDL to appoint a director to the board of the Company and in connection with the register of members. At this stage there is no formal dispute with BDL and we have agreed that we may advise the Company. In

> the event that a dispute between the shareholders arose, we would at that point need to reconsider whether we would continue to advise the Company or whether we would need to be instructed by the shareholders.
>
> **Who we will be acting for**
>
> We will be acting for the Company on this matter and we have agreed that our instructions will be given by you or such other person as you may nominate."

48. By letter dated 3 March 2014 Girish wrote to Rajnikant informing him that he had received the requisition and other documents from Withers but stating that Barrowfen would be unable to respond within 28 days because there had been a break-in at Gorst Road. He did not respond to Prashant at all. In cross-examination Girish was taken to the insurance claim and it was suggested to him that the burglary was not as extensive as he represented in this letter and that this was not a genuine excuse for failing to respond to the requisition.

49. By letter also dated 3 March 2014 Girish wrote to Mr King enclosing a number of other documents. He also gave the following explanation about Bedford and asked whether Barrowfen could refuse Bedford's request for a meeting:

> "6. As advised, Barrowfen Directors have over the past years requested information from MR R D Patel on Bedford Development Limited, an off shore company owned by MR R D Patel; as it has been used as a vehicle by a mother trading company Agromin Australia Pty Ltd to park it [sic] profits over the past two decades. The writer is a partner in the said company and no annual accounts details have been rendered. Can Barrowfen Directors demand details of its operation under UK regulatory rules as this is what is required by all institutions when an investors [sic] wants to invest funds in UK entity. This must be prima facie requirement prior to its recognising Bedford shareholdings. Please advice [sic].
>
> In light of above can you kindly advise if Barrowfen and the writer can refuse to recognise Bedford Developments Limited calls for a meeting. Are there any alternatives for the writer! This would be a tremendous help to resolve other partnership matters in the Far East."

50. By email dated 7 March 2014 Mr King replied setting out his understanding of the position. He then advised Girish that if Bedford was not registered in the Register, it was not strictly speaking a shareholder. He then stated:

> "Based on the documents I have seen, my preliminary view is that there is a reasonable prospect that BDL would succeed in an application to rectify the register of members as there does at least seem to be an understanding that shareholdings should reflect partners' interests (see point 7 above), regardless of whether it was always understood that partners would have no position on the board of directors apart from in the case of companies within their region. The annual returns and the company buy back also reflect an understanding that BDL should be registered as a shareholder.
>
> Of course, looking at the position practically, it's possible that if you refused to call a general meeting on the grounds BDL is not a registered shareholder, it may be that BDL would not take further action. To mount a court action seeking an order that the register of members should be rectified would be a major legal step to take and your brother/your nephew may have limited appetite to escalate the dispute to the level of formal court action. If that was the view you took, it may well be preferable simply to deny BDL has any entitlement to call a general meeting."

51. By email dated 13 March 2014 Girish wrote back to Mr King indicating that Rajnikant had been unwilling to provide information about Bedford in relation to the finance of the development of the Tooting Property:

> "It was in this connection that Barrowfen was advised in it [sic] discussion with various banks of information and references in relation to the shareholders its activities and people who operate those business that would be required by the banks. As Barrowfen was aware of the activities that was [sic] taking place in BDL, was advised verbally by Mr R D Patel that such disclosure would lead to scrutiny not only in UK but also in Australia and Malaysia of its affairs where Mr R D Patel is resident and, that he was unable to provided [sic] the disclosure of those information requested. Mr R D Patel then provided names of employees who work in Malaysia office as officers bearer of the company (BDL). The share buy back documents were executed by the said employees."

52. In that email Girish referred to an earlier email dated 30 July 2010 (which was actually dated 31 July 2010) in which he had written to Rajnikant stating that Barrowfen's bank, solicitors and accountant had been chasing for identity documents for two years. On 2 August 2010 Rajnikant had forwarded this email to Prashant and by email dated 5 August 2010 Prashant had sent Girish a copy of the identity card of Mr Nokiah A/L Sanassi ("**Mr Nokiah**"), who was Bedford's sole director, and the passport and identity card of Rajnikant, who

was its sole shareholder. I describe Mr Nokiah's role in greater detail in Appendix 2.

53. By email dated 27 March 2014 Mr King wrote to Girish again repeating similar advice. He recorded Girish's instructions that "BDL was not recorded on the register of members of BPL" and advised Girish that it would be sensible for S&B to send a formal response to Withers. By letter dated 3 April 2014 S&B wrote to Withers stating that the firm had been instructed by Barrowfen and that their instructions were that Rajnikant was the ultimate beneficial owner of Bedford and that it was a "fundamental understanding" that individual family members should have operational control of the businesses in the jurisdictions in which the member resided. S&B then continued:

> "It is consistent with that understanding that BDL is not a member of the Company and that Mr RD Patel/BDL have no representation on the board of the Company. Moreover, we understand that it was contemplated that at one time shares might have been issued to Mr RD Patel but he did not wish to take up any shares in the Company. Our client is unaware that this position has changed.
>
> In the circumstances, it appears that your client has no standing to requisition a general meeting of the Company and has no rights under section 116 of the Companies Act. In these circumstances, our client does not intend to respond further to the requisition and the request enclosed with your letter."

The Second Notice

54. On 11 April 2014 Bedford gave written notice that a general meeting of Barrowfen would be held on 8 May 2014 for the purpose of considering a resolution that Prashant be appointed a director. Mr King's evidence (which was not challenged) was that Withers served the second notice by hand at Gorst Road. By letter dated 11 April 2014 Withers also wrote to S&B stating as follows:

> "2. Bedford has never received any indication that its status as a shareholder in the Company has been questioned in any way. Indeed, Bedford has been sent, and signed, documents in its capacity as a shareholder (including written resolutions which have been filed at Companies House); 3. Bedford last received a request from the Company for corporate information in August

> 2010, and this request was complied with in full. Bedford's structure is well known to Girish Patel, but if the Company's bankers require any information regarding Bedford then it will be happy to provide this directly;……"

55. On 24 April 2014 Mr King sent an email to himself as an aide memoire or attendance note to record his views. After a brief chronology of the correspondence he set out a series of conclusions which included the following points:

> "2. How should BPL respond? Technically can resist requisitions under section 303 and section 305 on grounds BDL not a member BUT very likely BDL has a beneficial interest and will be able to apply for rectification of register of members. That gives rise to likely costs implications of any court application – indemnity costs even – evidence is quite overwhelming unless we can bolster the fundamental agreement point. And why was the other shareholder registered? We need details of the trust arrangements and why BDL was not accepted as a shareholder. Or do we agree to appointment of Prashant – what if RD Patel agreed to that? Would that be acceptable to GP? And what are the implications of the change of trustees
>
> 3. What response do we give to Withers? Depends on 2 but assuming GP does not want to allow Prashant as a director, ideally send Withers register of members and explain more fully what BDL is not a member for which we will need details – we do have difficulties in explaining the Annual Returns etc though – what is the story there? Letter should be full if we are to try and protect our position and it will not look good if proceedings are commenced. On the other hand, does GP want to do the work now if getting the story out? Always a danger of inconsistency with later statements of case…."

56. By email dated 28 April 2014 Mr King wrote to Girish advising him that although the meeting would be invalid, he was concerned to avoid giving any arguments to Bedford that an effective resolution had been passed. He advised Girish that it would be an "uphill struggle" to deny that Bedford was entitled to be treated as a shareholder and that it would be sensible to block the resolution to appoint Prashant.

57. On 28 April 2014 Mr King also asked Ms Philipson to assist him in relation to the Barrowfen matter. Ms Philipson made a number of notes when reading in and preparing to assist Mr King and she also annotated Barrowfen's Articles of

Association. In her notes she recorded: "60,000 shares each Trusts x 2 & BDL. In 2006 we bought back shares from BDL – had 97,500 » OSP » 60,000. OSP in 2004. BDL signed as shol. March accts 180,000 in issue". In cross-examination Ms Philipson explained that "OSP" meant "Own Share Purchase" and "as shol" meant "as shareholder". She also explained that she was summarising the documents which she had seen in the records filed at Companies House.

58. Ms Philipson also recorded in her notebook: "GP intention – get message across to say can't get on board". It was put to her that her clear instructions were to get the message across to Prashant that he could not get on Barrowfen's board. Ms Philipson accepted this and replied: "That was part of it, Yes."

59. By letter dated 7 May 2014 S&B replied to Withers' letter dated 11 April 2014 enclosing a copy of the Register. I have already described its contents above and in their covering letter S&B pointed out that Bedford was not recorded as a member. S&B also stated that Suresh had resigned as a director on 11 November 2013 and that if the meeting on 8 May 2014 was to proceed, Girish would attend it in his capacity as the Chairman and a director of Barrowfen, sole trustee of the Mr PD Patel Trust and one of the two trustees of the Mrs DP Patel Trust (and without prejudice to his position that the meeting had not been validly called).

60. S&B also stated that even if Bedford was a member of Barrowfen and entitled to requisition a general meeting, it would not be able to secure the requisite majority to pass the resolution to appoint Prashant as a director for the following reasons:

> "1. Girish Patel is the current trustee of the PD Patel Discretionary Settlement. Your client's notice was served on the former trustees rather than the current trustee. The former trustees have erroneously attempted to appoint a proxy for the meeting….2. Girish is one of the two trustees of the DP Patel Discretionary Settlement. The other trustee is Yashwant Patel. 3. Girish Patel, in his capacity as trustee for both the PD Patel Discretionary Settlement and DP Patel Discretionary Settlement, intends to oppose the resolutions your client is seeking to pass."

61. By letter dated 7 May 2014 Withers replied immediately. They stated again that Bedford's understanding was that it was a member of Barrowfen. After challenging a point taken by S&B about the fee for a copy of the Register, they stated as follows under the heading "**Duty to update the Register of Members**":

> "Whilst we appreciate that the register of members is determinative as to who is legally a member of the Company, Bedford is concerned that the Company may either have supplied an extract of the register of members rather than a full copy or may not have complied with its obligations under the Companies Act 2006 to update the register of members within the requisite period. As you will know, failure to update the register within the requisite time period is a criminal offence. Given Bedford's understanding that it is entitled to have its name in the register of members as the holder of 60,000 Ordinary Shares, it wishes to proceed with the meeting tomorrow and would expect the Company to have updated the register of members to show Bedford as a member or otherwise confirm that the full register does show Bedford as a member."

The Trustee Resignation Documents

62. The identity of the trustees of the two family trusts had been causing tension for some time because Girish was a trustee of the Mr DP Patel Trust for the benefit of Suresh's family and Suresh had been a trustee of the Mrs PD Patel Trust for the benefit of Girish's children. By email dated 3 September 2013 Prashant wrote to Suresh reminding him that two signatures were required to execute any documents. He also stated:

> "When I request your proxy for London matters, you will have to hand me proxy for GDP's Trust. I recommend you take steps to make an application to the relevant Courts to have the beneficiaries petition to remove GDP as a trustee of your Trust. Otherwise your Trust will forever remain in limbo."

63. On 11 February 2021 and shortly before trial Barrowfen disclosed another email from Prashant to Suresh dated 25 September 2013 pursuant to an order for disclosure which I made on 5 February 2021: see Appendix 3. In that email Prashant asked for a copy of the Mr DP Patel Trust. He also stated:

> "My interim thoughts are you date his resignation as of today, and correspond to GDP that his letter is accepted. Simultaneously, provide him your resignation letter from his Trust. Also recommend that you appoint a neutral person such as Haridass to replace GDP."

64. Prashant's evidence was that Suresh had told him that he had a resignation letter which Girish had signed but not dated and that he took advice from Withers and was told that if Suresh had authority to date it, he could date it and rely on it provided that he informed Girish. Suresh's evidence was that he had a made a mistake. He thought that he held a signed letter but when he looked in the relevant folder he discovered that it was a draft and unsigned.

65. I deal with the question of late disclosure in the context of the credibility of both Prashant and Suresh below. But it is unnecessary for me to decide whether Suresh held a signed letter from Girish resigning as a trustee of the Mr DP Patel Trust because Suresh never sought to rely on such a letter or argue that Girish had agreed to resign when required to do so.

66. Of greater importance are the documents upon which S&B relied in their letter dated 7 May 2014. Those documents were a letter and written resolutions dated 2 December 2013 which bore the signatures of of both Suresh and Yashwant. The text of the letter stated: "We the undersigned hereby tender our resignation as Trustee of Mrs P D Patel Discretionary Settlement." The written resolutions purported to record that Suresh and Yashwant had appointed Girish to be an additional trustee and then that their resignation was accepted. I will refer to these documents as "**The Trustee Resignation Documents**".

67. In his letter dated 16 April 2014 Girish informed S&B that Yashwant and Suresh had resigned on 2 December 2013 and that he had been appointed a trustee in their place. It was Mr King's unchallenged evidence that Girish gave him the original Trustee Resignation Documents at the meeting on 8 May 2014 (although he may have seen copies before then).

The Meeting on 8 May 2014

68. On 8 May 2014 Girish met Withers with Mr King and Ms Philipson. It was agreed that the general meeting of the company could not take place and that S&B would review Barrowfen's books and records and update Bedford by 5 June 2014. By letter dated 23 May 2014 Withers wrote to S&B setting out a detailed analysis of the Register and challenging S&B's authority to act for Barrowfen. By letter dated 4 June 2014 S&B wrote back stating that it would now take until 26 June 2014 to complete their review. They addressed the question of their authority as follows:

> "We note you have queried our authority to act for the Company. We have seen a copy of the resignation of Suresh Patel as a director of Barrowfen. The resignation has been accepted by the Company and duly minuted. Girish Patel is therefore the sole director of the Company and we take instructions from him on the Company's behalf. In those circumstances, we do not accept that there are any grounds for challenging our appointment to act for the Company but your client's position is noted."

69. On 10 June 2014 Withers served a Letter of Claim on S&B stating that Bedford intended to bring a claim against Barrowfen in the event that it failed to confirm that Bedford had been duly entered in the Register as the holder of 60,000 shares. Withers also asserted that it appeared to have been carefully updated from time to time (including the cross-references to transfers of shares to Bedford) and that it was reasonable to infer that the relevant page had been deliberately removed.

70. On 17 June 2014 a second TM01 was received by Companies House stating that Suresh had ceased to be a director on 11 November 2014. The notice did not specify who had filed it at Companies House. But it stated that it had been authorised by a director or the company secretary or another officer of the company.

71. On 18 June 2014 Fox Williams LLP ("**Fox Williams**") also served a Letter of Claim on S&B on behalf of Yashwant and Suresh in their capacity as trustees of the Mrs PD Patel Trust. They asked for copies of the Trustee Resignation Documents and also for the whereabouts of the originals. They also asked for Yashwant and Suresh to be registered as members of Barrowfen rather than the trust itself.

72. By letter dated 26 June 2014 S&B replied to Withers denying that Suresh was a director and stating that "a further filing has been made in relation to Suresh Patel's resignation at Companies House to remove him from the record". S&B also stated that it was neither correct nor reasonable to draw the inference that the page recording Bedford as a shareholder had been removed from the Register:

> "Whilst writing we take this opportunity to confirm the Company's position on the suggestion that a page from the Register of Members has been removed. That is not correct nor is it a reasonable inference for your client to make. If you check the Register of Members as against the Companies House filings you will in fact see that your client is not the only alleged member not currently recorded in the Register of Members.
>
> Finally, whilst we note that your client has pointed to certain circumstantial evidence in support of its claim, it has not provided copies of any instruments of transfer in its favour evidencing receipt of shares in the Company. Could your client please provide copies of any such instruments which would be evidence of the transfer of shares to it in accordance with section 770 of the Companies Act 2006. We make this request pursuant to paragraph 4.2(7) of the Annex A to the Pre-Action Protocol and look forward to hearing from you shortly."

73. By letter dated 4 July 2014 S&B responded in detail to Fox Williams confirming that the originals of the Trustee Resignation Documents were kept at Barrowfen's offices. By letter also dated 4 July 2014 Withers wrote to S&B stating that the Suresh Resignation Letter was not valid and had been taken from a previously blank document. They did not allege in terms that Girish had forged it.

74. By letter dated 10 July 2014 S&B replied to Withers enclosing a copy of the letter of acknowledgment dated 21 November 2013 and Prashant's email dated 12 December 2013. They stated as follows:

> “So far as the Company is concerned there were, and are, no grounds to doubt the genuineness of your client’s resignation from the board and it intends therefore to object to the second form RP02A which your client has now filed at Companies House. In doing so, our client is mindful that the day after the resignation of your client was filed at Companies House, Prashant Patel (son of Rajnikant Patel – Suresh and Girish's elder

> brother – and who we understand provides you with instructions on behalf of Bedford Development Limited) took issue with Suresh over his resignation (see the enclosed email dated 12 December 2013 from Prashant to Suresh). It would appear that Suresh, realising that his resignation was not in the wider family's interests given the ongoing cross-jurisdictional family dispute between Girish and his brothers, Rajnikant and Suresh, sought to change his mind. Whether this is the case or not, it does not affect the authenticity of the resignation. However, it does cast doubt on the bona fides of the serious allegations that are now being made against the Company and its officers.
>
> In all of the circumstances it appears that the appropriate forum for the resolution of the present issues (insofar as your client continues to maintain that there is one having considered this letter) is the High Court pursuant to an application under section 1096 of the Companies Act 2006. Moreover, given the seriousness of the allegations now made against the Company and its officers, we ask that your client provides us with a copy of his reply to the email from Prashant Patel and to any subsequent written communications between them and others in relation to this issue.
>
> Finally, for the avoidance of doubt, we are acting for the Company, not individual officers of the Company."

The Second Engagement Letter

75. On 23 June 2014 Mr King sent a second engagement letter to Girish (the "**Second Engagement Letter**") in which he stated: "This letter supersedes our earlier engagement letter with BPL which we sent to you in draft on 28 February 2014 and under which we have been acting for BPL to date". On 14 July 2014 Girish signed and dated it on behalf of himself, Barrowfen and Aum UK for whom S&B had also agreed to act.

76. The Second Engagement Letter described the scope of S&B's retainer from Barrowfen to give advice: "in relation to requests made by [Bedford] to appoint a director to the board of the Company and in relation to the updating of its statutory books". It also contained the same qualification as the First Engagement Letter in relation to a formal dispute between the shareholders.

Junior Counsel's Advice

77. On 11 July 2014 S&B sent instructions to Mr Matthew Parfitt of Erskine Chambers, a specialist in company law. S&B asked him to give advice on the question whether the books could be validly "written up" pending resolution of the question whether Suresh was a director. S&B specifically requested Mr Parfitt's advice in relation to "writing up" the Register to record Bedford as a member and the trustees of the two trusts.

78. On 29 July 2014 Mr Parfitt gave advice in conference to Girish, Mr King and Ms Philipson. His general advice was that the court has disapproved of companies amending their share registers although a self-help remedy is possible where the issue is straightforward. However, it was his specific advice that "this is not the case here" and that an application should be made by Barrowfen under section 125 of the 2006 because it could not proceed with the development without further funding. He also advised that the court would look at the "substance not the form". S&B's attendance note records that one of the further steps which he recommended was as follows:

> "The Company can be separately represented and the Company can say we need the issue to be resolved quickly and impartially to continue business. Arrange meeting for GP and Jonathan Porteous for further steps."

79. By letter dated 31 July 2014 S&B wrote to Withers stating that the firm had taken its investigations as far as it could and that Barrowfen had been advised that it should not make any amendments to the Register in the absence of an application under section 125. By letter also dated 31 July 2014 S&B wrote to Fox Williams in similar terms.

80. By email dated 5 August 2014 Ms Philipson wrote to Girish (with a copy to Mr King) setting out the structure of a witness statement to be made by Girish and on the same day she wrote to Mr King setting a work plan of all of the work which S&B needed to carry out. On 19 September 2014 Mr King sent Girish a two page letter summarising the advice which S&B had given in relation to the range of matters on which it was acting together with an agenda for a meeting on 23 September 2014.

The Third Engagement Letter

81. On 23 September 2014 Mr King also sent Girish a third engagement letter (the "**Third Engagement Letter**") and on the same day Girish signed and dated it. Although Mr King was the client relationship partner, the engagement related to the proposed development of the Tooting Property and its scope was limited to non-contentious matters. Again, Mr King stated that S&B would be acting for Barrowfen.

82. On 23 September 2014 a meeting took place at which Girish, Mr King and Ms Philipson were present and a long and detailed attendance note was taken. The attendance note recorded that Girish had told S&B a week before that the Mr DP Patel Trust had been set up at the same time as the Mrs PD Patel Trust but by that time Mr DP Patel had already died and the deed of settlement purported to bear his signature. In relation to rectification of the Register the attendance note recorded as follows:

> "The rectification of a register of members of Barrowfen was discussed and it was agreed that we would leave on hold all work relating to this for the time being. Suresh's position as regards a director is untenable in light of all the facts and matters that we are now aware of. It is clear there are lots of legal problems that are facing the family which will not get any better through litigation and a global settlement of all issues needed to be found."

83. By letter dated 15 October 2014 S&B wrote to Withers stating that Barrowfen was still considering the possibility of an application to court for the rectification of the Register. The letter also asserted that Bedford had failed to provide any evidence to substantiate its claim to be included on the Register. It was put to Ms Philipson that this letter was not true in the light of the attendance note and the decision to put all work on rectification of the Register on hold.

The Bedford Rectification Claim

84. On 13 November 2014 Withers served a Letter of Claim on S&B stating that they had been instructed in relation to the continuing failure of Barrowfen to take steps to rectify the Register. They also stated that they had been instructed to make claims against Barrowfen for a declaration that Suresh's resignation was

invalid, rectification of the Register and claims against Girish personally for breach of fiduciary duty and unlawful interference.

85. On 18 November 2014 Fox Williams also served a Letter of Claim on S&B on behalf of Yashwant and Suresh stating that they intended to bring claims against Barrowfen and Girish for declarations that they were and had been at all times trustees of the Mrs PD Patel Trust and that the Trustee Resignation Documents were not valid or authentic. However, they made it clear that no substantive relief was claimed against Barrowfen.

86. On 24 November 2014 Withers issued a Claim Form on behalf of Bedford against Barrowfen and Girish seeking rectification of the Register under section 125 of the Act to register Bedford as the holder of 66,000 shares from 29 May 2002, as the holder of 97,500 shares from 6 August 2002 and as the holder of 60,000 shares since 27 December 2006 (the "**Bedford Rectification Claim**"). The Claim Form also sought an order that Girish (rather than Barrowfen or both Defendants) should pay the costs of the application.

87. The Claim Form was issued under CPR Part 8 and Prashant made a witness statement in support also dated 24 November 2014. He set out the detailed background and explained the equalisation of shareholdings and share reduction which had taken place in 2006. He gave evidence that the share transfers would have been given to Girish and for that reason he could not produce them. He also stated that "the page of the register in respect of Bedford's shareholding appears to be missing". He asked the court to order that the costs of the application be borne by Girish personally on the basis that he had unreasonably resisted rectification.

The Fourth Engagement Letter

88. On 24 November 2014 Mr King sent Girish a fourth engagement letter which Girish counter-signed and returned to S&B. The letter recorded that Girish had instructed S&B to give advice both to him and to Barrowfen. In paragraph 1 it set out the scope of the engagement and in paragraph 2 it dealt with "Who we will be acting for":

> "1. You have instructed Stevens & Bolton LLP to advise you and, as necessary and provided that we are able to do so without conflicts of interest arising (and please see paragraph 2 below), BPL in relation to the claims being made by Suresh Patel in relation to his resignation as a director of BPL. The claims are set out in a letter of claim from Withers LLP dated 13 November 2014.
>
> 2. We will be acting for you personally on this matter and, as necessary and provided we are able to do so without conflicts of interest arising, BPL and we have agreed that our instructions will be given by you on behalf of yourself and BPL or such other person as you may nominate on behalf of BPL. We will be keeping carefully under review whether we are able to act for both you and BPL in this matter. If we feel unable to do so, because of a perceived conflict of interest, we have agreed that we will continue to act for you and we will assist in arranging independent legal representation for BPL."

89. On 27 November 2014 Mr King and Ms Philipson held a telephone conference with Mr Parfitt at which he advised that it had been correct to bring proceedings under CPR Part 8. He also described Prashant's evidence as "prima facie coherent" and advised them that: "If we are unable to mount a good defence, the court will likely grant the application." One of the action points arising out of the conference was that S&B should take instructions from Girish whether he intended to defend the claim.

Acknowledgment of Service

90. By email dated 28 November 2014 Mr King wrote to Girish setting out his thoughts on Prashant's witness statement and the future of the claim. He advised that it was possible to persuade the court that there were issues of fact to be determined and that although it might not be possible to defeat the claim it "might enable us to prolong the progress of the claim (tactically that could be attractive to you)". He then gave the following advice:

> "Can I ask you please to reflect on this point? Yes, we may be able to prolong the claim but do we have a case that ultimately defeat it [sic]? If not, should we be consenting now to the claim and limit the costs exposure for you? Of course, if we accept Bedford as a shareholder, and subject to how the allegations about Suresh's resignation as a director and trustee work out, we have to face the prospect that you may not ultimately be able to maintain control of Barrowfen. That in turn gives rise to

> concerns about the current proposed development and, in particular, if you lost board control and the development stalls, the implications that could have for you under any personal guarantees."

91. Mr King's evidence was that Girish wanted time to reflect but that on 10 December 2014 he gave instructions to S&B not to contest the application. On 10 December 2014 S&B filed Acknowledgments of Service stating that Barrowfen and Girish did not intend to contest the claim. Mr King signed the statement of truth himself.

Mr Rodé's Reports

92. Suresh's evidence was that in the 1990s he and Girish exchanged several blank "pre-signed" sheets of papers which they had each signed to cut down the time and expense of couriering and posting documents to each other. He also gave evidence that with blank pre-signed papers or letterheads, the procedure was that the required text would be printed or typed around the original signature and the letter would then be issued. But he also said that at all times it was agreed that consent would be sought from – and given by – the original signatory before the blank signed letters would be used and then dispatched.

93. On 27 August 2014 and 8 December 2014 Mr Maurice Rodé, a distinguished handwriting expert, produced two forensic reports considering the authenticity of the Suresh Resignation Letter on the instructions of Withers. In the second report he expressed the following conclusions:

> "47. The Letter of Resignation dated 11/11/2013 had been produced on paper with a 'conqueror and castle' watermark which ceased production in December 1993. The paper was less than A4 in length, having been trimmed along its top edge. It is understood that the 'conqueror and castle' watermark was used on two paper sizes: A4 – 210 x 297mm and SRA2 – 450 x 640mm."
>
> 53. It was notable that the Girish Patel reference documents 17 and 18, while dated 11 April 2014 had been produced on paper with a 'conqueror and castle' watermark which ceased production in December 1993 and the telephone code in the letterhead was phased out in the 1990s. The letterhead had been commercially printed. It was therefore evident that Girish Patel continued to utilise 1990s paper/stationery in 2014.

> 55. The Girish Patel reference documents demonstrated that paper/stationery from the 1990s continued to be available and used in 2014. The style of the Suresh Patel signature together with the visualisation of indented impressions of his signature in a similar style in the vicinity of the ink signature continued to lend support for the opinion expressed in paragraph 35 of my report dated 27 August 2014, that being, that the evidence was consistent with the signature having been made in the 1990s."

94. On 2 October 2014 and 25 November 2014 Mr Rodé also produced forensic reports in relation to the Trustee Resignation Documents on the instructions of Fox Williams. He reached similar conclusions. On 17 October 2019 Deputy Master Linwood granted permission to Barrowfen to rely on the report dated 25 November 2014 in this action. That report contained the following findings:

i) The Trustee Resignation Documents were made on Conqueror paper with a 'horse & rider' watermark which ceased production in April 2001.

ii) They were composite productions with different typescripts and printer ink being used to produce them.

iii) There were indentations on them consistent with the signing of other documents in a pile above them.

iv) There was strong evidence that Suresh's signatures on the Trustee Resignation Documents were in the style of his signature in the 1990s and not in the style of his signatures in 2013 and 2014.

Leading Counsel's Advice

95. On 22 December 2014 S&B sent detailed instructions to Mr Jonathan Russen QC (now His Honour Judge Russen QC) to give advice in relation to a range of matters. Paragraph 1 of the instructions stated that Mr Russen was instructed on behalf of both Barrowfen and Girish personally, that Girish was the sole director of Barrowfen and that he gave instructions to S&B on behalf of Barrowfen and himself. Mr Russen's instructions enclosed six lever arch files of documents including copies of the Register and (at least) one of Mr Rodé's reports.

96. *The Register*: S&B stated that the Register had been properly maintained, that the entries in relation to the two trusts were erroneous because they referred to the trusts not the individual trustees and that there was no page recording Bedford (or two other shareholders). S&B stated:

> "Historically, Rajnikant had not wished to be recorded as a shareholder in a UK company. Accordingly, Girish did not record Bedford (his corporate vehicle) into the Register of Members. Bedford has, however, been included in annual returns. For many of the reasons set out in the witness statement of Prashant Patel it was felt that the Rectification Proceedings could not be contested as Bedford (or at least Rajnikant) does at least have a beneficial interest in Barrowfen."

97. *The Tooting Property*: S&B also stated that the redevelopment of the Tooting Property would cost in the region of £18m and would include a Premier Inn, student accommodation comprising 100 bedrooms, a Waitrose store and four smaller shops. S&B also set out Girish's concerns that the actions of his brothers might prevent the redevelopment proceeding and continued as follows:

> "83. From the recent correspondence it is clear that Suresh and Rajnikant are intent on having an additional director appointed to the board – that was the reason Bedford requisitioned a general meeting which was then delayed due to the rectification issue. A further general meeting is expected to be sought immediately after an order for rectification.
>
> 84. The importance of the votes attaching to the shareholders' shares is therefore critical and is at the heart of the issues connected with the 2 Claim Letters….The position regarding voting appears to be as follows:
>
> (a) unless Girish can control the vote of the 2 trusts (or at least one trust and then block the other trust from voting on the basis that the trustees cannot agree how to vote), Bedford will have a majority at any shareholders' meeting; and
>
> (b) if Suresh remains a director he will be able to outvote Girish on the board and halt the redevelopment with potentially disastrous consequences for Barrowfen and Girish personally."

98. *The Suresh Resignation Letter*: S&B analysed the evidence in relation to the Suresh Resignation Letter. They recorded that Girish had denied at all times forging or falsifying the letter and "had been pressed by Instructing Solicitors

on this". They also recorded that Girish had no recollection of having blank signed notepaper from Suresh or giving Suresh pre-signed notepaper himself.

99. *The Trustee Resignation Documents*: S&B also analysed the evidence in relation to the Trustee Resignation Documents. Again, they recorded that Girish had at all times denied forging or otherwise falsifying the Trustee Resignation Documents. They asked Mr Russen to consider the question of jurisdiction and also whether Girish's children, Kiraj and Vanisha, should become involved in any proceedings.

100. *Partnership*: Earlier in their instructions S&B had stated that the Patel family business had evolved into an informal partnership and then provided a summary of its development. S&B also asked Mr Russen to express a preliminary view on whether there might be any scope for seeking an order to wind up the partnership as a whole and, if so, whether this could be sought through the English courts.

101. *Summary of Advice sought*: Finally, S&B set out a summary of the advice which they sought from Mr Russen on behalf of Barrowfen and Girish. In particular, he was asked to advise: "what, if anything, Girish might do in relation to maintaining operational control of Barrowfen".

102. On 8 January 2015 Mr Russen circulated some "Outline Points". He pointed out that Barrowfen's Articles incorporated the 1948 Table A (as amended) and that Regulation 7 provided that no trusteeship should be recognised. He also drew attention to Regulation 63 which provided that in the case of joint shareholders the vote of the senior person should be accepted and that seniority was determined by the order in which the names of the shareholders stood in the Register. He then stated (original emphasis):

> "If Girish (as reputed sole director) now amends the Register of Members (in relation to the trusts) without bringing rectification proceedings then there will be certain outcry from Withers and Girish should assume that it will prompt a challenge in legal proceedings (possibly including….an application to restrain the exercise of voting rights). Also, such a step will increase Girish's exposure to the costs of the existing rectification proceedings:… But Girish is in the business of buying time (and avoiding early

> loss of control of Barrowfen) in relation to the Tooting development,….."

103. He also advised that Girish was personally exposed to the costs of the Bedford Rectification Claim and advised Girish that he had two options: (1) to cross-apply in the rectification proceedings in relation to the trusts' shareholdings or (2) to amend the Register in respect of all three shareholdings without a court order. After summarising the advantages and disadvantages of both options he expressed the following conclusion:

> "Subject to further discussion in conference, JR's present view – bearing in mind that the risk of litigation (which Option (2) will surely precipitate) is already very high – is that Option (2) is probably to be preferred in the interests of capitalising, for so long as possible, upon Girish's *de facto* control of Barrowfen and putting the burden on Suresh/Yashwant to displace that control."

104. On 12 January 2015 Mr Russen saw Girish, Mr King, Ms Philipson and Ms Bonnie Drury of S&B in consultation. He identified three main issues: first, rectification; secondly, the Letters of Claim from Withers and Fox Williams (which dealt with the Suresh Resignation Letter and the Trustee Resignation Documents respectively); and, thirdly, other issues including whether there was an overarching partnership and, if so, whether it was a good thing for Girish from a commercial perspective.

105. *Rectification*: Mr Russen did not agree fully with Mr Parfitt's view that it was necessary to obtain the court's sanction before the Register could be rectified. He identified two approaches which Girish might take: the "prudent" approach and the "self-help" approach. S&B recorded as follows in relation to the "self-help approach":

> "2.10 Counsel explained that such an approach would be based on Girish using his current control of Barrowfen to rectify the company books himself (as would be consistent with his role as a director).
>
> 2.11 In addition to writing up Bedford, Girish could also correct the entries representing the trusts' shareholdings (*i.e*. write up himself and Yashwant in their capacity as trustees of the DP Patel Trust, and himself in his capacity as trustee of the PD Patel Trust). Of course, this would be challenged, but until the Court

> orders otherwise, Girish would at least have preserved his position as director.
>
> 2.12 This approach would be of particular advantage in respect of the DP Patel Trust shareholding. According to Table A, Reg 63, in the case of joint shareholders (here, Girish and Yashwant), the senior vote stands. Seniority is determined by the order in which the joint shareholders are named in the Register of Members, with the senior shareholder being named first.
>
> 2.13 Currently, neither of the trustees of the DP Patel Trust has been written up as shareholders. In the settlement document, Yashwant is named before Girish. There is, therefore, a real danger that, if we were to allow rectification proceedings to continue, the Court would order that Yashwant be named first in the Register of Members. It would be better (although, of course, riskier) for Girish to write up the trustees of the DP Patel Trust, naming himself first."

106. *The Letters of Claim*: Mr Russen did not give any merits advice in relation to the claims that the Suresh Resignation Letter and the Trustee Resignation Documents were not authentic although there was some discussion about Girish obtaining his own expert evidence. These disputes were left on the basis that Ms Philipson would prepare Letters of Response.

107. *Partnership:* Mr Russen advised that it would be difficult to argue that there was a partnership now that only one family was involved. He also pointed out that if there was a partnership, then Barrowfen was an asset and that a claim to wind up the partnership was likely to result in the appointment of a receiver and this was a clear commercial reason not to allege the existence of a partnership. The final paragraph of the attendance note recorded as follows:

> "Counsel further advised that we need to take positive action in respect of the rectification proceedings (i.e. to write up the Barrowfen company books) to give Girish a fighting chance of preserving operational control. Girish will likely have to bear costs of rectification proceedings."

Guernsey Law

108. By email dated 14 January 2015 Ms Philipson wrote to Mr King stating that there was a serious problem under Guernsey law about the Trustee Resignation Documents. She referred to section 13(1) of the Trusts (Guernsey) Law 1989

which Mr Russen had given to her at the end of the consultation. (At that time the section provided that a trust should not have less than two trustees unless (a) only one trustee was originally appointed; (b) a corporate trustee resident in Guernsey is acting; or (c) the terms of the trust provide otherwise.) She also stated that she had read through the trust deed and had not seen anything to suggest that there could be a sole trustee.

109. Shortly afterwards Ms Philipson recalled the email. Her oral evidence was that she did so within about half an hour because she realised that she had made a mistake. It was also her evidence that she asked Ms Drury to do a thorough review of the trust deed and that she pointed out provisions of the trust which permitted a sole trustee. She said that she was left in no doubt that Girish was entitled to act as a sole trustee.

110. By email dated 19 January 2015 Mr King wrote to Girish stating that he would shortly be providing a full attendance note of the conference but wanted to provide a summary of the steps which had been discussed and the decisions which needed to be made. He advised Girish that it would be difficult for him to resist a costs order in the Bedford Rectification Claim and that it would be better to submit to a costs order rather than fight the application for costs. In relation to writing up the trustees of the Mr DP Patel Trust in the Register his advice was as follows:

> "10. I am afraid there is no easy answer here. A cautious approach would favour Yashwant's name being entered first, because he is the first named in the deed. Your name being entered first will also be inevitably inflammatory and would be regarded as driven by a desire on your part to hold onto control of the company rather than the simple administrative updating of the company books. One consequence of entering your name first is that a second set of proceedings may be commenced against the company and you to have the Register of Members rectified in order to have Yashwant named first with potential costs' exposure for you personally….
>
> 12. The alternative approach floated by Counsel is to write up the Register of Members now and name you as the first trustee for the DP Patel trust as well as the trustee for the PD Patel trust and then notify the other parties. Inevitably, there will be a hostile reaction from Bedford and Suresh as mentioned above. However, you would at least through that route stop, for the time

> being, Bedford taking immediate control of Barrowfen. It is a high risk approach but, in all the circumstances, it does seem to offer at least a practical, albeit potentially short term, option for holding onto control of Barrowfen, and it remains possible that an overall settlement may yet be achieved over the coming months."

111. On 20 January 2015 S&B served a Letter of Response on Fox Williams on behalf of both Girish and Barrowfen denying that the Trustee Resignation Documents had been fabricated or were invalid and arguing that Yashwant and Suresh were not fit or proper persons to be trustees of the Mrs PD Patel Trust and should be replaced under section 69 of the Trusts (Guernsey) Law 2007.

The Consent Order dated 3 February 2015

112. By letter dated 22 January 2015 S&B made an offer to consent to an order that Barrowfen (rather than Girish) should pay Bedford's costs of the Bedford Rectification Claim on the standard basis. Bedford accepted this offer and on 3 February the parties entered into a consent order providing that Girish should immediately rectify the Register to record the shares which Bedford had held (and continued to hold). It also provided that Barrowfen should pay Bedford's costs on a standard basis.

113. On 16 February 2015 the consent order was sealed by the court. Following the order, Ms Philipson used the S&B template for statutory registers to produce a new page for Bedford which she taped into the Register recording it as the holder of 60,000 shares. On or shortly after 6 March 2015 she also produced a share certificate for Bedford and in March 2015 she returned the Register itself and the share certificate book to Girish.

The Board Meeting on 5 February 2015

114. On 3 February 2015 Ms Philipson prepared and sent draft minutes to Girish in relation to writing up the Register and on 5 February 2015 Girish held a meeting of the board of directors at which he alone was present and signed the minutes. He resolved to instruct the company secretary to write up himself as the trustee of the Mrs PD Patel Trust and then himself and Yashwant as the trustees of the Mr DP Patel Trust in the Register. Paragraph 4 referred to Regulation 63 of

Table A and recorded that Girish considered that he and not Yashwant should be regarded as the senior joint holder of the shares held on the Mr DP Patel Trust for the following reasons:

> "4.3.1 Girish Patel and not Yashwant Patel had represented the DP Patel Discretionary Settlement from when the settlement had first become a shareholder and had historically exercised votes on the settlement's behalf; 4.3.2 Yashwant had no involvement in the company and very limited knowledge as to its affairs whereas Girish Patel was involved in the day to day operations of the company and had full knowledge of its affairs; 4.3.3 Yashwant was named first in the settlement deed simply because he was the elder brother and not for any other reason. Given his lack of involvement in the company it was never understood or intended that Yashwant (who has at all times lived in the United States), rather than Girish, would exercise voting control over the settlement's shareholding."

115. By email dated 5 February 2015 Ms Philipson wrote to Mr Russen informing him about the consent order and the board meeting. She stated that S&B's current thoughts were not to alert the other parties but wanted to check with him that he was comfortable with this approach. On the same day Mr Russen replied stating that he was happy to keep the announcement in abeyance for the time being.

The Suresh Resignation Claim

116. On 13 February 2015 Withers issued a Claim Form on behalf of Suresh claiming a declaration that the Suresh Resignation Letter was not authentic and that Suresh had not resigned as a director (the "**Suresh Resignation Claim**"). Barrowfen was originally named as the sole Defendant but at a directions hearing on 16 April 2015 Girish was also ordered to be joined as a Defendant. Registrar Barber also made an order that Barrowfen should not take an active part in the defence of the claim without further order.

117. On 13 April 2015 S&B served a Defence on behalf of Barrowfen. Registrar Barber's order also provided that subject to him re-verifying it in his own right, it would stand as his Defence. On 17 April 2015 Girish confirmed that it should stand as his own Defence and in it he denied that he produced the Suresh Resignation Letter or that it was inauthentic or that Suresh had not resigned as

a director and he relied on the letter acknowledging receipt dated 21 November 2013. He also relied on a conversation which he claimed to have had with his uncle, Mr Amin, in June or July 2013 and which I consider in more detail below.

The Experts' Joint Report

118. In May 2015 the parties exchanged experts' reports. Mr Rodé had sadly died by this time and Withers had instructed Mr Robert Radley on behalf of Suresh. By this time S&B had also instructed Dr Audrey Giles on behalf of Girish. On 8 June 2015 they signed a joint report in which they agreed as follows:

i) The style of Suresh's signature on the Suresh Resignation Letter was more similar to examples of his signature for the period between 1990 and 1997 than examples from the period between 2013 and 2014.

ii) There was strong evidence to support the proposition that the questioned signature was not signed in 2013 but at a much earlier date typified by the "early dated" comparison material from 1990 to 1996.

iii) The paper used for the letter had been cut from an original A4 sheet which had been produced by Wiggins Teape prior to 1994.

iv) The text had been produced by an inkjet printer utilising Arial type font. This font was very common.

v) Girish used the same brand of watermarked paper from the pre-1994 period for some of his correspondence in 2013 albeit that the papers presented were of a different colour.

vi) There were documents presented in Girish's name which had been produced using the same very common font type as the Suresh Resignation Letter.

vii) There were signature impressions on the Suresh Resignation Letter which were consistent with signatures of Suresh which had been signed on various documents whilst resting on top of it. These impressions appeared to be in his "early dated" style and their appearance and

position were consistent with a number of sheets of notepaper being signed by him one after another in a pile.

119. Mr Radley and Dr Giles also agreed that certain typographical characteristics were not found within the documentation originating from Suresh in 2013 but that some of these features were found within correspondence bearing Girish's signature. They also agreed that these features did not positively identify Girish as having produced the letter. They did agree, however, that both the top and the bottom edge of the document had been cut inaccurately to a degree not expected from a commercial process and that it could have originated from a document cut down to remove a header and footer. At the end of their report they expressed the following overall conclusion:

> "In summary, we are agreed that, from a consideration of the combination of the above factors, there is strong evidence to support the proposition the document in question was not created in 2013. The evidence is wholly consistent with, and is regarded strong, in support of the proposition that the document in question has been derived from one of a number of sheets of paper signed in the 1990's in blank which has subsequently had a header and footer section removed and the current text added."

120. By letter dated 12 June 2015 S&B wrote to Withers on a without prejudice save as to costs basis stating that Barrowfen and Girish would consent to the relief which Suresh was seeking. They summarised the position as follows:

> "As we have said above, the outcome of these proceedings is by no means certain. Moreover, the case suggested against Girish is one that is based on inference and insinuation. The proceedings were, of course, never commenced against Girish in the first place, no doubt a reflection of the fact that your client recognised there was no sustainable case against Girish, and it was Girish who later applied to join the proceedings. He did so in response to the suggestion made by your client that he had fabricated the resignation letter and he was understandably concerned to clear his name.
>
> It is therefore totally unreasonable to expect Girish to consent to an order to pay your client's costs (which we note are at an eye-watering £200,000), let alone on an indemnity basis and from the commencement of proceedings."

121. They then stated that Girish was mindful of the significant costs which would be incurred and that it was in the interests of all parties to bring the proceedings to an end and offered to compromise the claim on the basis that Barrowfen should pay the costs:

> "Notwithstanding the above points, our clients are mindful of the significant costs that will be spent between now and the trial of this claim at the end of this month. Given these costs, it must be in the interests of all parties to bring the proceedings to an end. Therefore, without any admission of liability on the part of Barrowfen or Girish personally, they will consent to the relief your client is seeking with minor modifications. To avoid the issue of costs being a block on any settlement, they are also willing to consent to an order that Barrowfen pays your client's costs of the claim on a standard basis, to be assessed if not agreed."

The Consent Order dated 29 June 2015

122. Suresh was not prepared to accept the offer on costs made by S&B in their letter and Girish ultimately agreed to pay the costs personally. By a consent order dated 29 June 2015 Mrs Justice Proudman made an order by consent declaring that the Suresh Resignation Letter was not an authentic letter of resignation and that the Claimant had not resigned as a director. She also ordered Girish to pay Suresh's costs of the claim on the standard basis.

123. Immediately after the consent order had been made Suresh wrote to Girish asking for access to Barrowfen's records and documents: see his letter dated 30 June 2015. He also a raised a number of detailed questions in relation to the Tooting Property and the company's administration which required detailed access to documents. In the course of that letter he stated: "I have repeatedly stated to you and to Stevens & Bolton that I fundamentally disagree with the Development proposals for the Company's key asset, 180-210 Upper Tooting Road, London".

124. By letter dated 13 July 2015 Girish replied. Rather than dealing with the individual queries he invited Suresh to come to Barrowfen's offices at Gorst Road to inspect documents at 10 am on 23 July 2015. However, he refused to give an assurance that both directors had to act together and continued to rely

on the resolution dated 20 January 1994 as giving him delegated authority to act as the only director resident in the UK.

125. In July 2015 Suresh instructed Kingsley Napley LLP ("**Kingsley Napley**") to act for him in his capacity as a director of Barrowfen. On 3 and 7 July 2015 they wrote to S&B asking for a list of matters and their files. By letter dated 13 July 2015 S&B wrote back asserting that Suresh did not have authority to inspect these files. By letter dated 21 July 2015 Kingsley Napley responded challenging the continuing validity of the resolution dated 20 January 1994. They also stated that even if it continued to be valid, Suresh had now revoked the resolution.

126. Suresh's evidence was that he travelled to England to attend the meeting at Gorst Road on 23 July 2015 but on the day before Girish cancelled the meeting: see his email timed at 4.33 pm. Kingsley Napley corresponded with S&B with a view to rearranging the meeting before Suresh went back to Singapore or obtaining copies of the documents. But Girish did not agree to either course of action and in a letter dated 24 July 2014 S&B wrote to Kingsley Napley asking them to put forward dates to inspect documents from 1 September 2015 onwards.

127. By letter dated 30 July 2015 Kingsley Napley wrote to S&B setting out the documents which Suresh needed to see in order to discharge his responsibilities as a director. They also proposed that the documents be sent to their offices for inspection and copying (and that Suresh would pay the costs) or that electronic copies be sent instead. In paragraph 5 they stated as follows:

> "You will note that Suresh Patel is open to consider whether it is in the best interests of the Company to develop the Property. His approach will be to assess any development proposals, bearing in mind cost and benefit analyses and the interests of the members of the Company, to ensure good corporate governance. Our client will compare the risks and benefits of development against the risks and benefits of selling the Property and distributing the net proceeds to the members of the Company. To that end, our client requisitions that the Company obtain a valuation of the Property in its current state with planning permission."

128. By letter dated 10 August 2015 S&B replied to Kingsley Napley's letters dated 21 July 2015 and 30 July 2015. They refused to accept that Suresh had revoked the resolution dated 20 January 1994 stating as follows:

> "The purported revocation of Girish Patel's delegated authority form [sic] the Board contained in your letter of 21 July 2015 is ineffective. Suresh's powers as a director do not entitle him to pass a resolution revoking the delegated authority unilaterally. It is surprising to Girish that Suresh now seeks to revoke his delegated authority, when he has never previously taken any interest in the running of the Company. By his consistent inaction, he has endorsed the decision to grant Girish delegated authority, which only the Board can revoke. Insofar as your letter suggests that actions taken by Girish Patel in the interests of the Company have been taken without authority, this is not accepted.
>
> As regards your requests that we list actions that have been taken and provide Girish Patel's proposals for the Property these are all matters to be addressed by the directors. It is wholly inappropriate for Suresh to seek to conduct his duties as a director through solicitor's letters. We suggest that Suresh raises these issues direct with his co-director who can respond….
>
> …….You have asked how we "purport" to be acting for the Company. We were first instructed to act for the Company, many years ago, by Girish Patel who has delegated authority to carry out all powers capable of exercise by all or any of the directors."

129. In July 2015 Kingsley Napley also obtained a copy of the Charge from the Land Registry. The terms of the Charge are relevant to what took place at the meeting on 9 December 2015 and Prashant accepted that in July 2015 he had a copy of the Charge and that its terms were available to him. He also accepted that at that stage he was not interested in the details of the Charge (as opposed to the terms of the Loan itself).

The Mrs PD Patel Trust

130. It was Suresh's evidence that it was not necessary to bring proceedings in Guernsey to establish that they remained the trustees of the Mrs PD Patel Trust because Girish conceded that his appointment had been invalid. By letter dated 31 July 2015 Collas Crill, who were acting for Girish, Kiraj and Vanisha, wrote to Carey Olsen, who were acting for Yashwant and Suresh, confirming that their

clients accepted that Yashwant and Suresh were the trustees of the Mrs PD Patel Trust and that Girish was not and had never been a trustee.

131. In that letter, however, Collas Crill noted that Yashwant and Suresh had accepted that they should no longer act as trustees and maintain control of the assets of the trust and asked them to give undertakings that they would not act without the express agreement of all of the beneficiaries. By email dated 13 August 2015 Carey Olsen wrote back to Collas Crill confirming that Yashwant and Suresh undertook not to exercise their position as trustees of the Mrs PD Patel Trust without the prior approval of the court.

The Mr DP Patel Trust

132. It was also Suresh's evidence that Chirag and Prayag, who were the beneficiaries of the Mr DP Patel Trust, issued proceedings in England to remove Girish as a trustee. I was taken to the order made by Master Clark on 7 December 2015 in which the court approved the settlement of the claim. The order recited that the Claim Form had been issued on 10 September 2015 and that Girish had consented to his removal as a trustee before the hearing had taken place.

The Resolution dated 7 August 2015

133. On 7 August 2015 (and once Collas Crill had confirmed that Yashwant and Suresh were the trustees of the Mrs PD Patel Trust) Prashant, Yashwant and Suresh signed a resolution on behalf of Bedford and the Mrs PD Patel Trust respectively appointing Prashant to be a director of Barrowfen. Under cover of an email also dated 7 August 2015 Suresh circulated it to Yashwant, Prashant and Girish.

134. However, Girish still refused to accept the validity of Prashant's appointment. By letter dated 19 August 2015 he wrote to Bedford on Barrowfen's notepaper challenging the validity of the resolution on the grounds that Yashwant's signature was not genuine and that the board of directors had not resolved to approve the circulation of the resolution.

135. By letter dated 22 August 2015 Suresh wrote to Girish pointing out that there had been substantial correspondence about his right as a director to obtain and review company documents. He also protested that he was unable to properly consider whether it was in the best interests of Barrowfen and its members to develop or sell the Tooting Property until he was able to review the company documents requested in his letter dated 30 June 2015. He also enclosed a written resolution to be signed by himself, Prashant and Girish appointing a valuer to value the Tooting Property.

136. By letter dated 26 August 2015 Kingsley Napley wrote to Barrowfen enclosing a letter from Yashwant confirming that his signature on the resolution was valid. The letter had been witnessed by a commissioner for oaths on 15 August 2015. By email dated 28 August 2015 Kingsley Napley also wrote to Companies House complaining that Girish had failed to file the form AP01 to register Prashant as a director.

137. By letter dated 10 September 2015 Girish wrote to Suresh conceding that he was entitled to review company documents but asserting that he was not able either to appoint a proxy or to request copies. He also stated that the documents remained open for Suresh to inspect upon notice. But he did not agree to a valuation of the Tooting Property and he was not prepared to give Suresh keys to Gorst Road.

138. By letter dated 11 September 2015 S&B wrote to Kingsley Napley withdrawing the original offer to permit them to inspect documents at Gorst Road and now taking the same position as Girish. By letter dated 16 September 2015 Kingsley Napley protested that Suresh had been prevented from reviewing Barrowfen's documents and asking for further co-operation:

> "Our client has been effectively prevented from reviewing the documents by your client's refusal (1) to allow representatives of this firm to take copies of the Company documents and (2) to provide copies of the Company documents requested by our client in correspondence to send to Suresh Patel. Correspondence relating to this issue has been both protracted and unnecessary. All good sense would point to your client providing copies of the requested Company documents to us, as agents for Suresh Patel. As you are fully aware, an agent has the

> power to exercise the duties, and is bestowed with the powers of the principal."

Girish's Email dated 6 October 2015

139. On 6 October 2015 at 9.33 am Girish sent an email to Mr King with a copy to Ms Philipson and Ms Sarah Murray of S&B reporting the following discussion with an insolvency practitioner in the context of a letter which he was about to send to his brothers:

> "The discussion was in relation to the best way to place Barrowfen into liquidation at the same time to keep a control over the sale of the property. I briefed him the background and his suggestion was to be in the shoe [sic] of the Allied Dunbar who has a fixed and floating charge on the property. This would entails [sic] paying of Allied Dunbar their loan and obtain the assignment of the charge they have on the property. This would enable the initiation of the LPA in relation to the property and carry out the sale to a third party on a basis on an independent valuation undertaken under the umbrella of the LPA. Attached herewith the Allied Dunbar Charge document that was executed by Barrowfen in 1990 for your perusal. Can we have a discussion when you have a chance to consider if this may be a way to have control over the sale of the property and conduct a buy back of the property if my brothers do not give way in relation to the purchase of their shares."

140. Girish could not identify the insolvency practitioner to whom he spoke or recall what the term "LPA" meant in this context. But it is possible that he spoke to Mr Dermot Coakley on S&B's recommendation and that Mr Coakley advised him that it would be possible to appoint a receiver under the Law of Property Act 1925 if he took an assignment of the Loan and the Charge.

Girish's Letter dated 6 October 2015

141. On 6 October 2015 at 11.21 am Girish sent a letter to Rajnikant, Prashant and Suresh by email with a copy to Yashwant. He stated that he was writing on his own behalf as a director of Barrowfen and on behalf of Kiraj and Vanisha as beneficiaries of the Mrs PD Patel Trust. He made the following points and proposals:

i) It was a fundamental principle of the family partnership that the brother residing in a particular jurisdiction would have operational control of the relevant business and since the early 1990s he had been the de facto managing director of Barrowfen with minimal involvement or interest from Rajnikant and Suresh.

ii) Before the current dispute had arisen they had intended and he had expected that their shares in Barrowfen would be transferred to him. This was agreed in 2003 and in 2011 Rajnikant had informed him that he and Suresh still wished to dispose of their shares in Barrowfen.

iii) On the understanding that he should have operational control of Barrowfen, he had been pressing ahead with the development of the Tooting Property and he remained firmly of the view that it was in Barrowfen's interests to do so.

iv) He had concluded that it was their intention to deliberately upset the development which he had worked so hard to achieve in order to bring pressure to bear on him in relation to the impasse reached in relation to the separation of the family's wider interests and the subsequent litigation.

v) He enclosed a letter from Zurich requiring him to provide full written proposals no later than 30 October 2015. He inferred that if no proposals for payment were provided, action would be taken to enforce the loan which currently stood at about £850,000.

vi) He also enclosed an email dated 17 September 2015 from Liberata UK Ltd ("**Liberata**") which managed the collection of rates on behalf of Wandsworth demanding payment in full of £130,540.85 by 25 September 2015 and stating that a number of summonses had previously been issued.

vii) In expectation of the development proceeding, he had lent Barrowfen £438,500 since 2014 as working capital and received no remuneration for acting as managing director.

viii) Although on a balance sheet basis Barrowfen should be able to meet all of these liabilities, it had no immediate funds to do so and it was hard to see how a creditors winding up could be avoided unless agreement could be reached about the future of the company.

ix) He remained willing to purchase their shares in Barrowfen based on an independent valuation (and he set out a process for obtaining the valuation). He asked for confirmation whether this offer was acceptable in principle within 14 days.

142. By letter dated 14 October 2015 Kingsley Napley wrote to S&B replying on behalf of Suresh and Prashant in their capacity as directors of Barrowfen. They complained about Girish's failure to provide their clients with information and that they were extremely concerned to learn about Girish's mismanagement. In particular, they complained about Girish's failure to provide their clients with information relating to the repayment of the Zurich loan, the rates liability and the personal loan by Girish. They concluded by stating that Girish's position as a director was now untenable and they asked him to resign.

143. By letter dated 21 October 2015 Kingsley Napley wrote again to S&B stating that in their view it was in the best interests of Barrowfen and its shareholders to enter into a members' voluntary liquidation ("**MVL**"). They also asked S&B to confirm that Girish's children would consent to Yashwant and Suresh voting in favour of an MVL in their capacities as trustees of the Mrs PD Patel Trust. The principal reason which they gave for Suresh and Prashant to support an MVL was so that they could sell the Tooting Property and a liquidator could distribute the net proceeds of sale.

144. By letter dated 23 October 2015 S&B replied to Kingsley Napley's letter dated 14 October 2014. S&B asserted again that Girish was running Barrowfen pursuant to the resolution dated 20 January 1994 and stated that Girish had regularly updated Suresh and Rajnikant. The letter continued:

> "10. Moreover, your clients' recent requests to inspect the Company's documents have been answered. We refer to our letters/emails to you dated 24 and 31 July, 4 and 10 August 2015

> and 11 and 18 September 2015. You already have these letters so we have not provided further copies.
>
> 11. As is apparent from the above, your clients have been kept informed of the development plans of the Company and they have been offered the opportunity to inspect the Company's documents (including the bank statements about which you wrote on 16 October 2015 and the Company's accounts to which you refer in your letter). It is your clients who have failed to take up the offer made.
>
> 12. In case it assists, although you as legal advisers are not entitled to inspect the Company's documents (the right is a personal one to a director), our client is willing to renew the offer he previously made that representatives of your firm may attend the Company's offices (on a date to be arranged through us) to inspect the documents and flag up any documents you may wish to have copied. This was of course an offer made before by our client, an offer which your clients failed to take up."

145. By letter dated 21 October 2015 Kingsley Napley also wrote to Zurich and on 26 October 2015 Ms Karen Carter of Zurich replied enclosing the most recent correspondence, which confirmed that the term of the loan had expired in 2010, that Zurich had extended the term until 31 December 2013 and that it had given Barrowfen a further six month period to pay (which had expired well over a year before). Ms Carter continued:

> "I understand you are in receipt of our letter dated 22 September 2015. You are therefore aware that repayment of our loan is considerably overdue and we needed to receive a written response by 30 October 2015.
>
> As requested, I'm enclosing copies of previous correspondence for your information. It is imperative that Barrowfen Properties immediately inform us of their repayment proposals. Whilst we appreciate the deadline of 30 October 2015, is now unrealistic for your clients, we do need a full written response no later than 13 November 2015. At this point, we will consider legal action to recover our loan."

Meeting on 26 October 2015

146. By email dated 19 October 2015 Mr King wrote to Ms Rebecca Walker, who was a senior S&B insolvency lawyer, setting out the background and informing her that he had recently discussed the possibility of putting Barrowfen into

liquidation. In the first paragraph he stated: "We act for Barrowfen Properties Limited and we have done so for many years."

147. By email dated 22 October 2015 Girish also wrote to Mr King asking him to speak to Zurich and obtain its consent to the payment of the Loan and assignment of the Charge. He continued:

> "Please also advise if you would like to speak to the insolvency practitioner that I have been seeking advice [sic] and will arrange a meeting at your office. As discussed we need to get the terms of reference very clear who ever wee [sic] appoint as administrative receiver."

148. By email dated 23 October 2015 Ms Walker wrote to Mr Coakley asking him to attend a meeting on Monday 26 October 2015 at S&B's offices. In the first sentence of her email she repeated Mr King's statement: "We act for Barrowfen Properties Limited and we have done so for many years." She also stated that the purpose of the meeting was "to discuss strategy options with Girish for obtaining control of the Tooting site". She then identified the two options under consideration: first, to allow Barrowfen to enter into an MVL and, secondly, to approach Zurich to see if it was prepared to assign the benefit of the Loan and Charge to Zurich.

149. On 26 October 2015 that meeting took place at which Girish, Mr King, Ms Walker and Mr Coakley were all present. Ms Walker took notes of the meeting under various headings which included the following:

i) *Rates:* She recorded that for the period before April 2015 the liabilities were subject to agreement and that there should be no liability at all. She also recorded that: "Wandsworth BC cannot seem to provide schedule of what is owed + for what period. Are using agency which is working on commission."

ii) *Allied Dunbar*: She recorded that there was no formal agreement to renew the loan and that Zurich had made noises that it wanted its money back. She also recorded that Barrowfen was fully servicing the debt and

that the interest was being paid but the principal was unpaid. She also recorded that Girish was owed about £400,000.

iii) *Seaco*: She recorded that Seaco was an unsecured creditor for £250,000, that its shares had been bought back in 2005 but it refused to accept the cash for shares and remained an unsecured creditor.

iv) *Next Steps*: She recorded four steps "(1) check enforceability of charge, (2) Approach Allied Dunbar – express interest in assignment, (3) Then approach Dermot re taking appt on enforcement, (4) [ ] negotiation re MVL at same time."

150. In his disclosure to creditors dated 16 February 2016 Mr Coakley recorded that he had first been contacted by Girish in his capacity as de facto managing director of Barrowfen in around early October 2015. He also recorded that he attended the meeting on 26 October 2015 and then continued:

> "At the meeting, we discussed in broad terms the various insolvency procedures which may be appropriate for the Company. In particular, I informally advised the Company with regard to its financial position generally, together with the implications and practicalities of administration.
>
> I did not have any further contact with the Company until around 4 December 2015 when I was advised by Stevens & Bolton LLP that the charge in favour of Allied Dunbar had been assigned to Barrowfen Properties II Limited (BPIIL), a company connected to the Company. I was informed by Stevens & Bolton LLP at that stage that there was a possibility of BPIIL placing the company into administration. No fee was paid by the Company in respect of this pre-insolvency engagement."

Incorporation of Barrowfen II

151. By email dated 27 October 2015 Ms Walker reported to Girish that she had discussed with Mr King setting up two new companies, one to acquire the Loan and Charge and the other to acquire the Tooting Property. In an email dated 28 October 2015 Girish then approached Mr Radmore to become a director:

> "This has reference to our telephone conversation on the subject of setting up a UK company with view of taking a registered fixed and floating charge of Allied Dunbar Bank by way of

> assignment of the existing Allied Dunbar charge on the property 184-214 Upper Tooting Road, London SW17 and paying the bank off their loan.
>
> In this respect as discussed of my request of your assistance in becoming a Director of the Company along with my son Kiraj Patel as myself as per advise [sic] of Stevens & Bolton will have conflict of interest being a Director of Barrowfen and to be Director of the new vehicle that will take over the charge."

152. By email also dated 28 October 2015 Mr Radmore replied asking a series of questions. Question 1 asked whether the directorship was intended for the short term until Barrowfen was dissolved. Question 2 asked who would run the company on a day to day basis and Question 5 was whether the company intended to progress the development of the Tooting Property. By return Girish answered those questions as follows:

> "1. At the moment the company will hold the assignment of the charge from Allied Dunbar. After which to appoint a special receiver who will undertake a valuation under instruction from the company Directors and arrange a sale of the Property. It is my intention to have you as an officer of the company which will undertake the development once I am free from my family grip.
>
> 2. The day to day affairs will be managed by myself and the registered office will be at Stevens & Bolton or an accountant firm. The duties of Director is at some stage appoint a receiver under the terms of the charge and value the property and sell the same to nominated party….
>
> 5. The nominated party will progress the development. At the moment the idea is to get control of the property."

153. On 2 November 2015 Barrowfen was incorporated and registered at Companies House. Prashant received an alert and by email dated 4 November 2015 he wrote to Rajnikant and Suresh stating: "Please note that GDP has set up a new company called Barrowen Properties II Ltd".

S&B's Project Plan

154. On 4 November 2015 S&B also produced a "Barrowfen Project Plan" which it updated from time to time. The original version recorded a workstream called "Insolvency Advice" and that its current status was "Barrowfen to be placed into administration, appointment of administrative receiver (Dermot Coakley)". It

also recorded that the tactical aim was to preserve Girish's control of Barrowfen. These details remained unchanged in the version of the plan which was updated on 30 November 2015.

The Rates Dispute

155. By email dated 15 October 2015 Mr Christopher Hay of Liberata wrote to Barrowfen again demanding payment of unpaid rates of £130,580.85. By letter dated 29 October 2015 Wilkin Chapman LLP, a firm of solicitors who were now acting for Wandsworth, also wrote to Barrowfen making a formal demand for £111,068.66 in relation to a number of unpaid liability orders made by the Lavender Hill Magistrates Court and threatening to issue a winding up petition.

156. By letter dated 6 November 2015 S&B wrote to the Lavender Hill Magistrates Court stating that the firm had been instructed by Barrowfen and seeking to apply to set aside the liability orders. The principal basis which S&B gave for disputing liability was that four of the premises were shops and that Barrowfen was not liable for the rates. When he was asked about this dispute Mr King gave the following evidence:

> "Q. Just to clear up something: I am right in thinking that actually you were right to dispute the business rates, weren't you, because actually it should have been the tenants of the various properties that should have been paying the rates, not the company. A. Yes, I am afraid I don't really know the detail of it, because I wasn't involved and also the new solicitors took over dealing with the matter, but I think the issue focused on whether or not there was a tenant liability or a company liability, but I think certainly by the time of the administration, Wandsworth Borough Council was still claiming rates from the company."

157. Mr Stewart submitted that I should exercise care in relation to any concession made by Mr King in passing when he was not the partner handling the dispute. Nevertheless, I am satisfied that Mr King was right both about the nature of the dispute and that Wandsworth was continuing to claim unpaid rates when Barrowfen entered administration. As I explain below, however, the amount for which Barrowfen accepted liability and for which Wandsworth submitted a proof of debt was no more than £39,632.91.

Mr Tamlyn's Advice

158. On 5 November 2015 Ms Walker wrote to Mr Dodds asking him to assist with the assignment. To bring him up to speed, she forwarded a copy of her email dated 23 October 2015 to Mr Coakley. On 6 November 2015 Mr Dodds produced a first draft of the deed of assignment and on 10 November 2015 Ms Walker provided her comments stating (in respect of certain clauses): "My concern is that this might highlight to the bank's lawyers that we intend to enforce."

159. By email dated 12 November 2015 Ms Walker also sent detailed instructions to specialist insolvency counsel, Mr Lloyd Tamlyn, to advise whether the Charge remained enforceable. By email dated 13 November 2015 Mr King reported his advice to Girish and advised him that subject to certain points it seemed still worth proceeding with the assignment. He added that there was "an additional point which Counsel mentioned and which I must raise with you":

> "Counsel mentioned that he had another concern, which he had not fully considered as he had not been asked to advise on it, but he thought he would raise it anyway so we could consider with you whether to take it further. The concern is whether you were acting within your authority as a director of the company in agreeing the extensions to the loan, and making payments of principal and interest under the loan, if you were doing so without having the agreement of the other directors. If you were acting outside your authority, then arguably all of Barrowfen's actions in relation to the loan from 2000 (when the loan originally fell due for repayment) are invalid. Following this argument through, this would mean that any action in respect of recovery of the loan would be statute-barred as more than 12 years has passed since the loan fell due for repayment. While Counsel is very doubtful that this would affect the rights of Allied Dunbar, as it is a third party which was entitled to assume that you were acting within your authority, it might affect your rights (or indeed Barrowfen Property II Limited's rights) to enforce the charge once you take assignment of it as you are not a third party and so do not have the same protections as Allied Dunbar.
>
> This is potentially a complex issue. Of course the question of your authority as a director of Barrowfen has been questioned already in the various disputes, On the other hand, plainly you have acted as de facto managing director of the company for many years and my initial reaction is that it would be something

> of an uphill struggle for your brothers to challenge your authority. We could consider asking Counsel to look at this point again but I fear the factual background is sufficiently complicated and indeed unclear that I doubt any clear legal opinion could be given on the point. I think we will therefore have to accept that there is a risk that your brothers might seek to run such an argument in order to challenge your rights to enforce the charge, although on balance my current view is that it is unlikely such a challenge would succeed."

Ms Walker's draft email dated 13 November 2015

160. Ms Walker had earlier prepared a draft of an email of advice to send to Girish. That draft covered a number of different points from the version which Mr King finally sent. It also contained the following paragraphs (which Mr King did not include in the final version either):

> "I attach our engagement letter in relation to this matter and would be grateful if you could return a signed copy to me. [RWK – I am going to look at this now so it is not attached.
>
> It has occurred to us that now may [be] an appropriate time for us to cease acting for Barrowfen and instead to act for you personally. It seems to us that we cannot act for both Barrowfen and you in circumstances where you are considering taking action against Barrowfen. By ceasing to act for Barrowfen, we would also be comfortable that we could act for you on the purchase of the Tooting property from Barrowfen (please note that Dermot as administrator/liquidator of Barrowfen would need to be separately represented)."

Rajnikant's Email dated 16 November 2015

161. By email dated 16 November 2015 Rajnikant replied to Girish's letter dated 6 October 2015 (above). He had earlier sent a draft to Prashant and he copied the final version to Nina, Kiraj and Vanisha. He expressed the hope that it was not too late to stop all legal action and find a solution and he proposed that Prashant and Kiraj should meet to negotiate a solution. At this time Girish was proceeding both with the Seychelles Claim and the Probate Claim and also the associated application in Malaysia: see Appendix 2.

162. By email dated 19 November 2015 Kiraj replied expressing gratitude for the proposal and suggesting that Prashant should get in touch to arrange a date to

meet and reach a solution. Internal emails between Prashant and Suresh show that Prashant was reluctant either to go to arbitration or to deal directly with Girish. But by email dated 30 November 2015 Kiraj wrote to Prashant directly proposing an immediate end to the litigation and an independent valuation of all of the businesses. By email dated 2 December 2015 Ms Payal Chatani, a US lawyer and cousin of Prashant and Kiraj, also offered to write to Kiraj and get involved in this process. In the event Prashant and Kiraj met on the evening of 9 December 2015 (as I explain below).

Kingsley Napley's Inspection

163. During November Kingsley Napley made a number of further requests to inspect Barrowfen's documents: see, in particular, their emails dated 16 and 18 November 2015 to Mr King and his reply dated 19 November 2015. On 26 November 2015 Kingsley Napley finally attended at Gorst Road and were able to review 13 files or envelopes of documents.

164. By letter dated 27 November 2015 they wrote to S&B recording the categories of documents which they had inspected and expressing disappointment about their historic nature. They stated that it was not clear who Girish's preferred developer was or who was financing the project or whether the architects, Chetwoods, remained in place. They also stated that on his visit to England, Prashant intended to hold meetings with the preferred developer, financier and architect on 9 and 10 December 2015.

Completion of the Assignment

165. By email dated 30 November 2015 Mr Dodds wrote to Kiraj and Mr Radmore stating that Girish wanted to complete the assignment the following day and providing signing instructions. On 2 December 2015 the assignment was completed and both Zurich and Barrowfen II gave notice in writing to Barrowfen. A copy was sent to Withers and Kingsley Napley on 4 December 2015 (see below) but Prashant became aware of it because he received a Land Registry alert that S&B had lodged a priority search to protect a pending charge in favour of Barrowfen II. By email dated 1 December 2015 he wrote to Rajnikant, Yashwant and Suresh informing them and stating: "What is likely to

occur is that GDP will appoint a receiver for the company and then engineer a quick fire sale of the property to his new company".

Board Meeting on 1 December 2015

166. On 1 December 2015 a meeting of the board of directors of Barrowfen took place by telephone at which Suresh and Prashant were present and Girish sent his apologies. The board resolved to revoke the resolution dated 20 January 1994 delegating all powers to Girish and to remove S&B as solicitors for the company. By email dated 2 December 2015 Prashant wrote to Mr King terminating S&B's appointment and instructing him to cease all work which the firm was currently conducting for Barrowfen.

167. By email dated 4 December 2015 Mr King replied confirming that S&B had complied with those instructions. He told Prashant that he should be aware that S&B was involved in negotiations with Wandsworth in relation to the rates liability and that there was an outstanding standard auditors' enquiry. He also stated that the board's decision was not supported by Girish and concluded as follows:

> "This firm has acted for the company for many years and has built up valuable knowledge and experience of the company's business. It is also in the middle of handling important matters for the company (notably the rates liability). In Girish's view, the decision of the board to change solicitors is not in the company's interests and appears rather to be motivated by the other directors perceived personal interests."

168. On 4 December 2015 S&B sent a number of letters to Kingsley Napley. In their second letter they replied to the letter dated 27 November 2015 indicating that Barrowfen had no preferred contractor or architects. S&B also stated that there had been an initial positive reaction from RBS to funding the development but that Barrowfen had been unable to provide the necessary information about Bedford and the shareholder dispute had made it unviable to approach the bank further. In their third letter (copied to Withers) S&B stated that Girish remained willing to consider purchasing the interests of Prashant and Suresh. The letter also stated as follows:

> "If, however, the other shareholders remain unwilling to sell their shares, our client would be willing to consider a MVL, as a second option. He would be though be [sic] interested in acquiring the assets of the Company so that he could proceed with the development through an alternative vehicle. This would of course have to be at a fair value. It is primarily for this reason that Barrowfen Properties II Limited was incorporated.
>
> There is of course some urgency regarding the future of the Company. As you will know, and as we have written to you about in our first letter of today's date, the Company has been threatened with winding up proceedings for unpaid business rates. The Company has contested the liability and there is a pending application to set aside the Liability Orders on which the winding up proceedings were based. The Company was also threatened with enforcement action by Zurich, the first charge holder. However, that charge has been bought out and has been assigned to Barrowfen Properties II Limited (see the attached notice of assignment) so there is no immediate threat to wind up the Company from Zurich."

169. By email also dated 4 December 2015 Prashant wrote to Girish stating that he was concerned that Barrowfen was cashflow insolvent and asking Girish to update him on creditors due in the next 90 days, the current cash position and the status of a £5m financing facility and whether it was still in place. On 5 December 2015 Mr King also circulated a detailed memo considering Girish's options in advance of the hearing before Master Clark on 7 December 2015 to remove Girish as a trustee of the Mr DP Patel Trust. The first possible option which he identified was as follows:

> "Appointment of the administrator – we are doing that but it will take a bit of time. Rebecca has it in hand. If notice of a MVL is given on Monday, we will be pushed to appoint in 5 days but it is doable."

S&B's Advice dated 7 December 2015

170. By email dated 7 December 2015 Ms Walker wrote to Girish updating him on the position after the hearing before Master Clark. She stated that the effect of his removal as a trustee of the Mr DP Patel Trust was that it would be possible for Barrowfen to pass a shareholders' resolution for an MVL without his consent. She continued:

> "That said, now that the assignment of the loan and charge to BPL II has completed, BPL II is now considered to be a "qualifying floating charge holder" and would be entitled to receive five business days' notice prior to the passing of a shareholders' resolution to place Barrowfen into MVL.…The five day period will give you/BPL II a small window in which to take matters into your own hands by, for example, enforcing the charge and appointing an administrator."

171. She then identified a number of "Points to Note". Under the headings "Your position as a director" and "Administration over other insolvency processes" she gave the following advice:

> "To date, we have been comfortable that you may remain as director of Barrowfen as you have been putting the interests of Barrowfen ahead of your own interests. However, as soon as BPLII takes steps to enforce the charge, we consider that you will be putting your (indirect) interests as charge holder ahead of the interests of Barrowfen and ought therefore at that point to resign. The exact point at which you resign ought, in my opinion, to be immediately prior to serving the letter of demand."
>
> "I have referred above to the appointment of an administrator and not to the appointment of a receiver or administrative receiver. The reason I think administration would be the most favourable route in these circumstances is because it carries with it the benefit of a moratorium against creditor action which the other insolvency processes do not. This means that, once an administrator is appointed, it would not be possible for the shareholders to pass a resolution to place Barrowfen into MVL or any other type of liquidation process; nor would it be possible for Wandsworth council to present a winding up petition – its claim against Barrowfen would be stayed. The downside is that the administrators would owe duties to creditors as a whole and not just to BPLII; however, as BPLII is the sole secured creditor and therefore ranks ahead of all other creditors, in practice its interests would be put first…."
>
> "….I suggest that we commence the administration appointment process now to ensure that we have all our ducks in a row should we receive notice of Barrowfen's intention to pass a shareholders' resolution to place Barrowfen into MVL. If you agree, I will let Dermot know to contact you direct regarding his engagement letter and monies on account."

The Administrators' Engagement Letter

172. Under cover of an email dated 8 December 2015 Mr Coakley sent an engagement letter to Mr Radmore in his capacity as a director of Barrowfen II to cover "certain pre-appointment matters" relating to the potential appointment of himself and Mr Michael Bowell both of MBI Coakley Ltd ("**MBI Coakley**") as joint administrators of Barrowfen. I will refer to Mr Coakley and Mr Bowell both as the "**Administrators**". On 14 and 15 December 2015 Kiraj and Mr Radmore signed the engagement letter and Mr Radmore sent it to S&B to be held to their order pending receipt of funds.

The Meeting on 9 December 2015

173. By letter dated 9 December 2015 Withers wrote to S&B stating that Prashant had informed them about the assignment of the benefit of the Loan to Barrowfen II. They also stated that no steps had been taken to inform the board of directors of Barrowfen that any discussions with Zurich were taking place and objected in the strongest possible terms to the assignment. In the same letter they recorded that a meeting was to be held at S&B's offices at 2 pm that day and that Ms Sophie Le Breton of Withers would be attending to take a note.

174. On 9 December 2015 a meeting took place at S&B's offices at which Prashant, Girish, Mr King and Mr Daniel Baker of S&B and Ms Le Breton of Withers were present. Although the meeting was expressed to be without prejudice, all parties were agreed that evidence of what was said at the meeting was admissible and I was taken to two attendance notes of the meeting. The first was prepared by Mr Baker and approved by Mr King. The second was prepared by Ms Le Breton and it was Barrowfen's case that she was there solely in a note-taking capacity and that Barrowfen and Prashant were not otherwise legally represented at the meeting.

175. Because of the significance of this meeting I quote at length from S&B's attendance note. There was no real dispute about what was said until the very end of the meeting and even then no real dispute about the words used. The S&B note of the meeting is fuller and more detailed than the Withers note. However, I have compared both notes and I am satisfied that the corresponding passages in the Withers' note are entirely consistent with the material which I

quote from the S&B note. When I come to deal with the disputed part of the meeting, I set out the relevant passage from each note in full.

176. After some introductory remarks, Prashant proposed that the meeting be held on a without prejudice basis and stated that he had asked Withers to be present to provide assistance with a note. Mr King agreed that the meeting would be held on a without prejudice basis but also stated that it would not be treated as a directors' or shareholders' meeting but an "interested parties" meeting. The S&B note then records the following exchanges:

> "4. RWK said that as far as Barrowfen Properties' future was concerned, Girish had always taken a consistent view, Girish was happy to buy out the shareholders in recognition of their relative involvement and proximity to the UK based company. P said that there was no issue regarding difficulties with his side involving themselves in the UK company. P said that he was quite able to divide his time equally between his other business interests as well as the UK company. RWK said that GP would be happy to consider other terms whereby shareholders can realise their interests but one of the principle issues would was price [sic] — GP thinks any such buyout or sale must take place at a fair price.
>
> 5. P replied and said yes they would be but it would have to be at a fair price, however his side simply did not believe they would receive a fair price. P said that if the parties were to talk terms and a proper price agreed then they would be interested in selling. P said he expected an initial low offer, and that they might be prepared to buy out GP but as of now there had been no offer received as regards price. RWK replied and said that certainly there had been an intention that a fair price would be offered and that a figure could be put forward to P's side. If this figure is not accepted a valuation could be arranged through an expert, so that a mechanism could be put in place if price cannot be agreed between the parties.
>
> 6. P replied and said that he agreed that there must be a valuation and recalled that one had been completed three or so years ago but added that he thought it would need updating. P said that if terms were agreed on the valuation and the valuation was a fair valuation, then his side would consider any such offer, however P said that all of this would be subject to GP having the financial capability to pay for any offer. P said if GP had the finances then this would be acceptable, however if there was a delay and GP did not have the money then his side would continue with the litigation. RWK added that if the parties could not agree another option would be to liquidate Barrowfen. P replied and said either

> that or his side simply buys out GP's interests - the very last option as far as his side was concerned would be to liquidate the company.
>
> 7 P said that if his side felt that GP's offer was too low then there may be an option for his side to buy GP out at a fair price. RWK added and said that if there is no agreement on price GP could either buy out P's side or P's side could buy out GP's side. Failing that, then the option and route of liquidation would have to be pursued……
>
> 8 P said on another point, the litigation on the Bedford rectification and the Suresh resignation proceedings had left a very bitter taste. P said that his side paid two thirds of many of the costs but that he understood that as far as the Bedford proceedings were concerned, these were costs borne by BPL, as were costs for the Suresh proceedings and these fees were a particularly sore point for his side. P said his side simply believe they should not pay for these fees and this must be addressed before any buyout takes place. RWK replied and said that costs were billed personally to GP and that BPL had not picked up these fees. P said that he sought clarity from the company and it was as a principle that the company should not be paying for these fees. P said that if the parties could address this point then there would be greater scope to move forward in a positive way."

177. Both attendance notes then record that a detailed discussion took place about the basis on which both the shares and the assets ought to be valued and the mechanics of the valuation process. The S&B note then continues:

> "13….RWK said it would be beneficial to reflect on the precise terms as they clearly would not agree the terms now. The parties would need to consider each other's terms, specifically P's side's terms and wish for a valuation on a fully let basis as this may not be a fair approach. P said that the intention would be that it would be valued on a fully let basis. RWK replied and said that usually the valuation is conducted on an assumption that planning permission has either been obtained or has not been obtained and that there may also be a hope value attached to certain of these valuations, although to value the property on a fully let basis would be difficult. RWK continued and said that if the parties were unable to agree, then the more sensible approach would be for the parties to have two liquidators acting for one party and then one for another and then they might work together and this simply might just be the best way forward. RWK added that it may also be quicker. RWK suggested reflecting on these discussions but added that it was sensible to be considering a buyout.

> 14 P said that the option was with GP. P said that his side were looking for security/certainty and were looking for GP to confirm that he has the money, secondly to have the property valued on a fully let basis. RWK said that this was something to discuss with the valuer but it seemed to him that the parties were agreed that any buyout should take place at fair value and at market value and GP added that he recognised this.
>
> 15 RWK asked P whether there was anything else he wished to raise. P said that he would like to discuss managing the company's finances for the next two months, if the route of the MVL is to be avoided. P said that he had no information as regards to creditors, so he required some sensible input from GP as to requirements of meeting debts falling due within the next six months. P said one such approach to address this may be pushing forward with a rights issue, whereby each shareholder puts in a certain amount of money to ensure that the company can continue to meet its debts as they fall due. GP said that there was approximately £1,900,000 worth of existing liabilities and that future liabilities depended upon future strategic direction and commitments regarding valuation. GP said that there was enough money to pay salaries and expenses such as electricity for the next two to three months.
>
> 16….P said that he needed figures in terms of what the company must pay. P said that he would need meaningful figures to show that the company was not cash flow dependent and this is why shareholders may need to put up some funds. RWK queried this and said that a buyout would take place not a rights issue. P said that there could be a time period of six months or more and during this time he would not want a risk of another creditor winding up the company...
>
> 17 RWK added that one of the main creditors was of course GP. P said he understood this. RWK said that this may be something that would have to be addressed, especially if shareholders are going to put funds in and an offer or price might need to reflect this. P said that he and his side would need visibility as regards GP and GP's ability to raise finances. P said that his side simply believe that GP does not have the money. P said that a liquidator could be put in place or it would be for GP's side to put a sensible offer forward and P's side could reflect on that offer."

178. Both attendance notes record next that there was discussion about a wider settlement of the family disputes and whether the parties might agree either to a moratorium or to mediation. Both notes record that Mr King said that he understood that there was mistrust on both sides but that he promoted the idea of mediation as a constructive solution to all of the disputes. The S&B note then continues:

> "24 P said that unfortunately this was not something that his side would seriously look at. P said that his side would be looking for a court to resolve certain matters and at this stage there are certain things that require courts input and order. RWK replied and said that he did not think there is anything simply requiring court order. P said that he had made it clear that there would be no holistic settlement because of the mistrust. P reiterated that if individual proposals are put forward to resolve each matter then his side would address them. P said resolving the BPL matter would assist with restoring some trust and would be one way to build up confidence and trust. RWK said that he did not disagree with starting with modest building blocks and asked P whether there are any other issues he wished to rise [sic]? P said as regards BPL's cash, he asked RWK and GP for a statement of cash flow. RWK said yes this could be provided to P. P said that this was a real concern as clearly the company was close to insolvency RWK interrupted and said well no not balance sheet insolvent, however to date the company has been heavily reliant on the support of GP. P said that he wanted full visibility.
>
> 25 P said that as regards to the loan assignment to Barrowfen Properties 2, P asked whether he could see the terms of the loan and asked whether there is a particular position as regards to this assignment. RWK said that there was nothing in particular to tell P about this, accept that Zurich was pushing for payment. RWK said that within the context of an MVL, GP's side see the proposal of a buyout as the most attractive option and the assignment of the loan was a measure taken to prevent Zurich from enforcing the loan, which it looked certain to do. P said that he wanted to see the terms of the original Zurich loan and was interested in seeing the interest terms, as he did not want this to continue to be a liability and to potentially place the company into difficulty. RWK said that of course it was not a new loan. P said that he did not want a situation where the company defaults as a result of the assignment. RWK said that he could put forward a cash flow statement to show all the loans."

179. In the Withers' note of the meeting Ms Le Breton tried to keep a record of what each person said and then when her notes were typed up they were put into tabular rather than narrative form. The parts of the Withers' note which corresponded to paragraphs 23 to 25 of the S&B note recorded as follows:

> "P Unfortunately that's not something we will be looking at this stage. There are certain things the court
> needs to get involved with in that they couldn't be resolved without a court order.
> R I don't think there is anything subject to litigation which couldn't be resolved without the court.

> P I won't descend holistic mediation as there is too much mistrust but again there is litigation on foot at the moment but if you want to make proposals regarding each litigation I am happy to address one by one.
> G I have nothing much more to say.
> R Let's focus on issues relating to Barrowfen.
> P And that might help us to regain trust and confidence. That's the way I would propose going forward.
> R I do not disagree with starting off in this way and getting building blocks in place.
> P I would agree, it has to be building blocks at this stage.
> R Anything else?
> P In terms of cash required for Barrowfen, could we obtain statements of cash flow?
> R Yes.
> G Yes.
> R We can consider cash flow statements so you know what cash is needed.
> P That is at the moment a concern. I do not want to be running a company that is insolvent. R It is obviously not balance sheet solvent but has to date been solvent by G's support.
> P But if that support is withdrawn, we will need to consider something quickly. I would also like to address the loan which has been assigned to the new Barrowfen. Could we also see the terms of that loan? Is there a demand payment provision? What is the position?
> R There is no particular story. Zurich were pressing for payment as you are aware. This is within the context of a members' voluntary liquidation taking place. In order to prevent Zurich from taking steps the loan has been bought out at full value.
> P I understand, but want to see the terms of the loan.
> R It's the same terms as Zurich loan.
> P Can I have these? The company should not be defaulting on this loan and otherwise it will become payable immediately.
> R It is not a new loan, its only been assigned not novated.
> P I don't want a situation where the company defaults on payments to the new Barrowfen as a result of the loan being assigned.
> R I can certainly put together cash flow statement. Anything else?
> P No I think we have got through a lot today and have got everything on the table and what our thoughts are. I want to work together to get everything resolved as soon as possible.
> R Thank you. We will come back to you with thoughts following meeting."

180. By email dated 10 December 2015 Prashant also wrote to Rajnikant, Suresh and Yashant recording the major points of the meeting himself. It is clear that this email was prepared and sent before he had received Withers' note of the

meeting. In the email Prashant summarised the discussion by stating that the first option was for Girish to make an offer to buy out his brothers and Prashant failing which they would make an offer to buy him out and that if there was no agreement the company would be put into liquidation. The following parts of his email roughly correspond to paragraphs 24 and 25 of the S&B note and the extracts which I have quoted from the Withers' note:

> "- GDP then spoke again and requested a stop to all litigation until we could enter into a mediation. I said there will be no stopping of any litigation. If GDP wants to stop it, he can withdraw his claim or make us a proposal within the individual claim to put it to an end.
> - I told him that if they can resolve Barrowfen and agree terms, this will give us confidence to move to the next one. The next one being the personal partnerships of Anglo-Dutch, Pacific Rim, Invesco. If this got resolved, we could move on to the next one.
> - Richard agreed to this approach which would provide building blocks to solve the whole thing.
> - My major feeling coming out of the meeting is that GDP's behaviour has not changed and his agenda is still to undervalue the UK properties and make us pay the most amount in Malaysia. Throughout the meeting, Richard kept mentioning that GDP always wants to give us fair value and that we were the ones that were not sensible in entering mediation.
> - The ball now rests with him to see if he wants to now properly agree terms about Barrowfen and the other companies."

181. In the same email Prashant recorded what had been said at a meeting which he had held with Kiraj on the same day and after the meeting at S&B's offices. At this meeting Prashant and Kiraj discussed the settlement of the wider family disputes and, in particular, the dispute over Barrington Development Ltd ("**Barrington**"), a company incorporated in the Seychelles. I explore that dispute in Appendix 2.

The meeting on 3 January 2016

182. On 22 December 2015 Ms Walker prepared her handover notes. In relation to Barrowfen, she advised Mr King that a letter of demand would need to be served on Barrowfen before the appointment of the Adminstrators. She also stated that this had already been drafted and that Charles Russell Speechlys LLP ("**CRS**"),

who were acting on behalf of the Administrators, had no comments. Finally, she also stated:

> "There is no notice period that has to be given, so the idea is that the letter of demand will be served by hand (using a process server) and we will then give Barrowfen a matter of hours to comply with the demand before appointing administrators."

183. On 3 January 2016 Mr King met Mr Tim Carter, an insolvency partner, and Ms Helen Wheedon, a property partner, to brief them about Barrowfen. Ms Catherine Penny took notes of the meeting at and the foot of the first page of her notes she recorded: "GP = shadow dir of BPII + director of B = conflict, but so what?" Following that meeting Mr King also wrote to Girish stating as follows:

> "One final comment, we do need to consider the impact of what we plan to do with Barrowfen – might it change attitudes on Suresh and Prashant's part and scupper the emerging deal with the partnership accounts (which, if achieved, might open the door to a settlement of the ownership of the partnership companies)? This is a difficult call to make but a factor we should take into account. How important is the immediate future of Barrowfen to you compared with a possible resolution of the partnership accounts?"

Prashant's Correspondence with the Auditors and Mr Radmore

184. By email dated 8 February 2016 Prashant wrote to Mr Balvant Patel of the auditors (with a copy to Girish) stating that at the board meeting held on 1 December 2015 it was resolved that he had the authority to deal with them and provide instructions. He also stated that Barrowfen was, in his opinion, cash flow insolvent and that he intended "to call a shareholder rights issue" based on the value of the company as at 31 March 2015. By email dated 9 February 2016 he wrote to the auditors again raising a number of detailed questions about the accounts and suggesting a number of amendments.

185. By email also dated 8 February 2016 Prashant wrote to Mr Radmore asking about the progress of the development. On the same day Mr Radmore forwarded Prashant's email to Girish setting out a draft reply. By email dated 9 February 2016 Girish responded (original emphasis): "Please <u>do not reply</u> any email to

Prashant." In his witness statement Mr Radmore accepted that he agreed not to respond.

The Memorandum of Agreement

186. On 10 February 2016 Girish and his three brothers entered into a memorandum of agreement (the "**Memorandum of Agreement**") in which they agreed to distribute the funds which they held in a number of partnership accounts either personally or through three investment companies, Anglo-Dutch Investments Ltd ("**Anglo-Dutch**"), Pacific Rim Plantations Ltd ("**Pacific Rim**") and Invesco Corporation Ltd ("**Invesco**") (which were also parties to the agreement). The agreement provided that both Girish and Suresh were entitled to over US $4m each although Suresh had already received almost all of the funds to which he was entitled.

187. By email dated 12 February 2016 Mr King wrote to Girish stating: "I am hoping that we can let you have a checklist on Monday of the steps to be taken to enforce the loan." He also stated that all of the documents that needed to be signed had already been drafted. By email also dated 12 February 2016 Mr Dodds wrote to Mr King and Mr Girish setting out the total amount which Barrowfen II had incurred in taking an assignment of the Loan.

Girish's Letter dated 12 February 2016

188. Under cover of an email dated 12 February 2016 Girish sent a letter to Rajnikant and Suresh (on his own behalf and on behalf of Kiraj and Vanisha as beneficiaries of the Mrs PD Patel Trust). He stated that he had heard nothing from them or their solicitors since the meeting on 9 December 2015 and that it was impossible for the company to continue under its current ownership and management structure. He continued as follows (original emphasis):

> "In view of the current position, and what I regard as the complete mismanagement of the company by Prashant, I am seriously concerned about the future of the company, both as a director and one third beneficial owner of the company. It is in my view imperative that we address the obvious conflict between board members and shareholders once and for all. Failure to do so will jeopardise the future of the company and

> the interests not only of the shareholders but of the creditors as well. As you know I am a substantial creditor of the company under loans including interest I have advanced to the company in the sum of £469,550.00 to date.
>
> Accordingly, I must ask for your unequivocal response to the proposals I have previously made regarding the purchase of your families' shares in the previous letters referred to above and, in the alternative, a MVL. If I do not have a clear response **from both of you** by no later than **10 am on Monday 15 February 2016 London Time**, I will be forced to consider whether I can continue to act as a director of the company and I may have to take steps to protect my interests as a substantial creditor of the company."

189. The copy of this email which Girish forwarded to Mr King shows that he sent the letter at 19.30 on Friday 12 February 2016. The native copy disclosed by Barrowfen shows that Prashant received it at 3.30 am local time on Saturday 13 February 2016. By email dated 15 February 2016 and timed at 11.45 am local time Prashant then wrote to Girish stating that he wished to take legal advice on the letter and that he would revert shortly. By letter dated 15 February 2016 Suresh also replied stating that in view of the allegations in the letter, he wished to take legal advice too.

190. However, Girish had already given instructions for Barrowfen II to appoint administrators on the previous Friday 12 February 2016 and without waiting for a response. By email dated 15 February 2016 and timed at 1.12 pm Mr King wrote to Girish setting out the detailed steps which needed to be taken. In the opening paragraph he stated as follows:

> "Following the confirmation of your instructions last Friday for Barrowfen Properties II Limited (BFII) to appoint administrators over the Company, we detail below the steps which need to be taken with a view to both serving the demands and appointing the administrators tomorrow (Tuesday) – logistically and for reasons of short notice, it makes sense to arrange to do both steps tomorrow although we need to complete some of the documentation today."

191. Mr King told Girish that the demands were to be served on Barrowfen at Gorst Road and asked him: "please ensure that Amrit will be at the premises to accept service of both demands on the basis that we understand that otherwise it is now

unoccupied". Mr King also confirmed that only a few hours needed to elapse between the service of the demand for repayment and the appointment of the Administrators and that S&B was lining up its London agents to file the necessary appointment documentation for the afternoon of Tuesday 16 February 2016.

192. Finally, by email dated 15 February 2016 and timed at 6.32 pm Mr Dodds forwarded to Ms Walker the email which Mr King had sent to Girish on 13 November 2015 in which he had reported Mr Tamlyn's concerns about the enforceability of the Loan. In his own email, Mr Dodds stated:

> "Yellow highlighted text relates to the point about the validity of the assignment and GP acting as director of BPL while at the same time planning for BPL II "loan to own". GP took a view. Also, it was always open to BPL to repay the loan so as to ensure no security enforcement."

Board meeting on 16 February 2016

193. Barrowfen produced minutes of two meetings which took place on 16 and 17 February 2016. The first set of minutes record that on 16 February 2016 at 4 pm in Singapore Prashant and Suresh held a board meeting by telephone without Girish. In December 2015 Prashant had appointed a firm of solicitors, Mills & Bann, to act for Barrowfen in place of S&B in relation to the rates dispute with Wandsworth. The minutes record the position which they had reached in negotiations with Wandsworth:

> "The Council had taken the position that they would consider the same if the Company could demonstrate that rent had been paid into its account from the tenants. The Board had received bank statements from NatWest Bank for a period up to 11 November 2015. Pursuant to the tenancy agreements, occupation by the tenants was to commence on 1 April 2015. However, there were no entries of any rent payments into the NatWest bank account at any time in 2015.
>
> Prashant explained that on 8 February 2016 he spoke to the Company auditor, Mr. Balvant Patel, who saw several shops open for business in the Tooting property. In light of this, it was agreed that Prashant would obtain the latest bank statements from NatWest bank to confirm if rent had now been paid after the signatory powers are changed. It was also resolved that Mills

> & Bann should formulate a response to Wandsworth Council depending on what the bank statements reveal.
>
> In light of the Council threatening to wind up the Company, Prashant suggested that the Company pay the Council first once the liquidity issue is resolved, and that the Company recover the same from the tenants once the status of their tenancy is established. It was resolved that Wandsworth Council be paid immediately upon cash injection from the shareholders."

The Letters of Demand and Resignation

194. Under cover of an email dated 16 February 2016 and timed at 15.01 S&B sent Kingsley Napley a letter enclosing two letters of demand and a letter of resignation all dated 15 February 2016 and stating that they had been served at Barrowfen's registered office that day. The first letter was a demand by Girish for repayment of £473,859.37 in respect of the personal loan which he had made to Barrowfen. The second letter was a letter of demand by Barrowfen II for repayment of the sum of £853,300.88. The third letter was a letter of resignation in which Girish resigned as a director of Barrowfen with immediate effect.

195. By email dated 16 February 2016 and timed at 13.41 Girish also wrote to Mr Radmore enclosing a copy of the letter of demand from Barrowfen II. In the covering letter, he instructed Mr Radmore to send it to the email addresses of Prashant and Suresh with a covering email as follows: "Please see attached letter of Demand dated 15th February 2016 for your attention." In his witness statement Mr Radmore stated: "I forwarded the letter as instructed by GDP to the requested email addresses." The time of the email was 14.11 in the UK or 22.11 in Malaysia and Singapore.

The Appointment of the Administrators

196. On 17 February 2016 Barrowfen II gave notice that the Administrators had been appointed under the Charge and the notice was filed at court at 11.14 am that day. Under cover of a letter also dated 17 February 2016 CRS wrote to Barrowfen stating that they were acting for the Administrators and serving the notice of appointment. The letter indicates that it was sent by post rather than by email to either of the directors.

Board Meeting on 17 February 2016

197. Barrowfen also produced minutes which record that on 17 February 2016 at 10 am in Singapore Suresh and Prashant held another board meeting without Girish and this time after the demand from Barrowfen II had been received. The minutes record as follows:

> "The Board considered the letter of demand for repayment of a loan assigned to Barrowfen Properties II Limited from Zurich Assurance Limited. It was noted that Girish's son is a director and his children are the two shareholders of Barrowfen Properties II. The Board noted that no Board approval was sought or given to assign the loan to Barrowfen Properties II, and Girish had not declared his connection to Barrowfen Properties II. Moreover, it was noted that Girish Patel did not seek to refinance the loan with a commercial bank nor explore whether the shareholders of the Company or another entity in the family group of companies would repay the loan. The draft accounts of 31 March 2015 referred to a loan in the sum of £825,000. It was resolved that Prashant would write to Barrowfen Properties II to request confirmation of the breakdown of the figure and applicable interest rate. It was also resolved that Prashant would approach NatWest and other commercial banks to put a loan facility in place with appropriate terms."

The Bedford Loan Offer

198. By letter dated 19 February 2016 Kingsley Napley wrote to CRS contesting the assignment and the appointment of the Administrators and stating Suresh and Prashant had at their disposal sufficient funds to repay the Loan and other debts and expenses at short notice (although they did not accept the validity of Girish's director's loan). On 9 March 2016 Prashant met the Administrators with Kingsley Napley and by letter dated 5 April 2016 they made a loan offer of £3,513,055.39 on behalf of Bedford to rescue Barrowfen as a going concern. On 4 April 2016 Kingsley Napley had also sent copies of the board minutes of the meetings on 16 and 17 February 2016 to CRS.

The Statement of Affairs

199. On 10 March 2016 Prashant, who was managing Barrowfen after Girish's resignation, completed the Statement of Affairs for Barrowfen. He recorded

outstanding proceedings for £50,000 against S&B for overcharging of which Mr Stewart was highly critical (since no claim had been issued). He identified a number of creditors all of whom were included in the lists which Mr Coakley set out in his witness statement (below). S&B placed great reliance upon the fact that he admitted that Barrowfen owed £39,632.91 to Wandsworth.

The Administrators' Proposals

200. On 11 April 2016 the Administrators gave notice of their proposals to all creditors under the Insolvency Act 1986. They indicated that Bedford had been asked to increase the amount of the loan and they stated that the objective of the administration would be met if the loan was accepted. By letter dated 13 April 2016 Kingsley Napley made an increased loan offer of £3,760,000 on behalf of Bedford.

201. By email dated 14 April 2016 Mr Bowell wrote to Girish informing him that if the Bedford loan offer was accepted, Girish's director's loan would not be repaid or dealt with by the Administrators but only dealt with by Barrowfen after termination of the Administration. By email dated 15 April 2016 Girish replied as follows:

> "Myself and the other creditors are extremely concern (sic) at the tone of your email and the agreement reached with Dermot in conjunction with Stevens & Bolton last year in relation to your appointment as administrator. I had specifically agreed with Dermot on the exercise that Barrowfen was entering into and the role MBI Coakley will provide. Dermot had agreed to this. Your email is contrary to the agreement reached and myself had again checked with Stevens & Bolton officer who had confirmed that your firm fully understood the end exercise to be achieved by myself."

202. By email dated 15 April 2016 Mr Bowell replied denying that there had been any "back deal". By email dated 6 May 2016 Mr King wrote to Mr Carter reporting that Girish was unhappy with Mr Coakley (whom S&B had recommended). He stated:

> "Girish remains very unhappy with Dermot and there is implicit criticism of us that we ever recommended him. Girish was not happy with him on the Sivayogam matter and was keen to use

> someone else but we persuaded him to use Dermot, Girish feels in the expectation that through our relationship, Dermot would ensure that Girish's interests were looked after. I also feel some sense of responsibility for the current position because it was us who hatched the plan of the administration and, as it stands, Girish will potentially be materially worse off than had we never gone down that route."

The Creditors' Meeting

203. By letter dated 4 May 2016 S&B wrote to CRS on behalf of Barrowfen II and Girish objecting to the proposal. They put forward an alternative proposal that the Tooting Property should be sold on the open market or that the Administrators should revisit the prospects of an MVL. On 9 May 2016 the first creditors' meeting took place and was adjourned for further consideration of the Bedford loan offer.

204. On 13 May 2016 Bedford increased the loan offer to £4m and on 17 May 2016 the adjourned meeting of the creditors took place. Barrowfen II, Girish and S&B all voted against the proposal to accept the Bedford loan offer and the proposal was rejected. Girish held 66% of the value of the admitted claims.

Application for Directions

205. On 25 May 2016 Bedford made a revised offer and on 3 June 2016 the Administrators applied to court for directions. In his witness statement in support of the application Mr Coakley identified the undisputed debts of Barrowfen (which had been admitted to proof) as follows:

i) *Barrowfen II*: £858,594.08;

ii) *Bedford*: £5,000;

iii) *Shila*: £14,695.89;

iv) *Wandsworth*: £39,982.84 (although no proof of debt had been filed);

v) *Amrit*: £8,491.88; and

vi) *John Cumming Ross Ltd* (the auditors): £4,050.

206. Mr Coakley also identified a number of debts which had been disputed (although by 3 June 2016 the first two were considered to be undisputed and the third partially undisputed):

i) *Mr S Bharje*: £42,396 (overpaid service charges);

ii) *Mr J and Mr P Panesar*: £12,339.58 (overpaid service charges);

iii) *Mr L and Mr R Hanif*: £50,000 (overpaid service charges of which £15,602.23 was not disputed);

iv) *Abdul Khalik Amejee*: £60,745 (overpaid service charges);

v) *Girish*: £655,458.92;

vi) *S&B*: £7,868.05 (unpaid legal fees); and

vii) *Seaco*: £1,854,885.41.

207. Girish's claim consisted of remuneration of £180,000 and director's loans of approximately £475,000. Those loans were not made by him directly but by Hambros Investments Ltd ("**Hambros**"), a company incorporated in the Bahamas, through which he also owned shares in other family companies: see Appendix 2. The claim by Seaco related to the payment which Barrowfen agreed to make to buy back shares in 2004: see Appendix 1.

208. Mr Coakley stated that it was the Administrators' duty to rescue Barrowfen as a going concern and that it was "clearly balance sheet solvent" at the date of the administration although it did not have "available cash flow reserves to meet its liabilities". He also stated the Administrators were alive to the fact that a sale of the Tooting Property with the benefit of planning permission was likely to result in a surplus and that the company could then be handed back to shareholders. He continued:

> "However, it was considered by us that if suitable loan terms could be agreed with Bedford (together with a satisfactory agreement in relation to dealing with the Company's debts and liabilities), then this would be the preferred option and would achieve the primary objective in the Administration (i.e. a

> survival of the Company as a going concern), enabling the directors to continue to develop the Tooting Property and potentially achieve a greater profit on a future sale…..
>
> ……In considering the above strategy, we are mindful of our duty under paragraph 4 of Schedule B1 of the Act to exercise our functions as quickly and efficiently as is reasonably practicable. It is our view that if we are able to secure funding on satisfactory terms then this would be preferable to forcing a sale of the Tooting Property as the Company would be able to develop the property to maximum commercial advantage rather than selling it in its current condition. It is also considered likely that a loan would release funds more quickly than would be the case if the Tooting Property were marketed and sold. Equally, with regard to the fact that there is an imminent planning permission deadline for the Tooting Property (16 April 2017), we are of the view that there is considerable sense in returning the Tooting Property to the directors as soon as possible to enable them to get on with the development and/or extending the planning permission, as necessary."

209. Mr Coakley also stated that at the first meeting of creditors on 9 May 2016 S&B (who were acting for Barrowfen II, Girish and the firm itself) stated that it was preferable that the Tooting Property be sold rather than Barrowfen accepting a loan from Bedford. He also recorded that S&B followed this up with a letter raising concerns about the source of Bedford's funds.

The Order dated 8 June 2016

210. On 8 July 2016 Registrar Derrett made an order directing the Administrators to accept Bedford's revised loan offer and authorising them to pay Barrowfen's debts and the expenses of the administration in order to terminate their appointment. Although it had not done so by the date of the application or the order, on 2 August 2016 Wandsworth submitted a proof of debt for £39,632.91. In the covering letter Wandsworth stated that the proof related to "unpaid rates". There was no suggestion that it was still claiming the balance of the £130,580.85 referred to in Mr Hay's email dated 15 October 2015.

Termination of the Administration

211. On 16 September 2016 the Administrators gave notice of the end of the administration and submitted their final progress report. They reported that on

14 September 2016 agreement had been reached with Bedford and that on 15 September 2016 they had been put in funds. They also reported that the debt to Barrowfen II had been settled in full for £909,664 and that undisputed creditors worth £152,764 had also been paid.

212. It is common ground that Barrowfen did not repay Girish or Hambros and the report does not identify the individual creditors who had been paid. But I draw the inference that all of the undisputed creditors were paid (including Wandsworth) and that the Administrators agreed and paid all of the other creditors (including S&B) apart from Girish and Seaco. Mr King did not suggest that S&B were still owed any fees after the completion of the administration.

The Revised Development Scheme

213. Waitrose Ltd ("**Waitrose**") had agreed to become the anchor tenant under both the Original and Amended Original Development Schemes. However, shortly after the Administrators' application to court for directions Waitrose withdrew its support and by email dated 6 June 2016 Prashant wrote to Mr Ivan Everitt of Brasier Freeth LLP ("**Brasier Freeth**"), a firm of property consultants, stating that he had spoken to Waitrose and it had confirmed that it had no further interest in the Tooting Property.

214. By email dated 10 September 2016 Prashant wrote to Brasier Freeth again stating that Barrowfen was likely to submit a new planning application to replace the student with residential accommodation. He stated: "The figures don't stack up anymore for Premier Inn or student accommodation. Residential valuation has pulled far ahead."

215. The Administrators had also instructed Lambert Smith Hampton Ltd ("**LSH**") to provide a valuation of the Tooting Property and by email dated 22 October 2016 Prashant wrote to Mr Paul Proctor of LSH looking to instruct him again. He summarised the planning position as follows:

> "As it stands, Barrowfen cannot proceed with the 2014 approved application as firstly Waitrose have now pulled out due to delays and a slight redesign would be necessary again to remove the large loading bays that were put in for them. Also, the student

> accommodation operator has advised that another operator has just opened up 700 beds down the road from us and our expected rents will drop 20%. However, this is a secondary issue.
>
> The primary issue why we are not finalising a rapid amendment application is that we believe Girish and William Radmore (a chartered surveyor that structured the development) choose [sic] the wrong design. Whilst a hotel and student accommodation may have been the right design that maximised property value in 2008, we believe this changed by 2011/2012. We have found no evidence of Girish/William performing any feasibility studies to test the GDV if an all residential development was chosen in 2011."

216. There was some mystery about the rival operator and a student complex with 700 beds. Both Mr Richard Alford (Barrowfen's expert) and Mr Peter Clarke (S&B's expert) thought that this might have been a reference to the Furzedown Student Village and both gave evidence about local alternative accommodation. Mr Alford gave evidence that Furzedown Village had 368 beds and neither of the experts nor Prashant was able to identify any other local accommodation providing 700 student bedrooms.

217. By December 2016 Prashant had obtained revised valuations of the Tooting Property and by email dated 27 December 2016 he wrote to Rajnikant and Suresh proposing a mixed development of a hotel and residential apartments based on a gross development value ("**GDV**") of £21,873,000. I add that I was told by Ms Hilliard that LSH had also carried out a valuation which gave a GDV of £27.92m.

218. Prashant's evidence in relation to the Revised Development Scheme was largely unchallenged. Following the decision to adopt the mixed residential, hotel and retail scheme, he negotiated and agreed terms with Lidl as the new anchor tenant and negotiated a supplemental agreement with Premier Inns Hotels Ltd ("**Premier Inns**"). On 22 August 2017 the revised planning application was submitted and in June 2018 planning permission was granted. On 10 August 2018 Barrowfen entered into a new section 106 Agreement with Wandsworth. Prashant described the process in greater detail and it was not suggested that the steps or time which he took to obtain planning permission were unreasonable.

219. In early August 2018 demolition works commenced and I was told at trial that the development was nearing completion and would be completed in April 2021 or soon after. The total construction costs which Barrowfen had incurred were £24,134,391 and the legal and professional costs of obtaining planning permission and negotiating with tenants and contractors was £339,992.67. Again, these costs were not challenged. Finally, it was Prashant's evidence that Suresh and he intended to retain the Tooting Property as an investment with the exception of the affordable housing element which was required to be sold (and Barrowfen had already received an offer of £2.9m for that element of the scheme).

Meeting in Tawau on 16 and 17 July 2018

220. On 16 and 17 July 2018 a meeting took place between Rajnikant, Prashant, Suresh and Chirag at Tawau in Malaysia to consider a settlement of outstanding issues. The minutes of the meeting recorded that the demolition of the Tooting Property was to be carried out by the end of July 2018 and that the development would be concluded after a further 100 months. They also recorded that £4.5m of equity was to be raised from Aumkar Plantations Sdn Bhd ("**Aumkar**") (the Patel family's flagship company in Malaysia) and a loan of £20.75m taken from Barclays Bank plc ("**Barclays**") at an interest rate of 3.75% over LIBOR with a commitment fee of 1.25%. The minutes continued as follows:

> "Presently the total construction cost for the development of Tooting property stands at Sterling Pounds 25 million which will be finance [sic] by way of loan from Barclays Bank, London of Sterling Pounds 20.75 million and an injection of equity from shareholders of Sterling Pounds 4.35 million. The equity of Sterling Pounds 4.25 million plus other incidential [sic] cost of Sterling Pounds 750,000.00 will be arranged from OCBC Bank, Kuala Lumpur, Malaysia loan which is being arranged by M/s Aumkar Plantations Sdn Bhd."

221. Aumkar was one of the major sources of the Patel family's wealth. It was also at the heart of the family dispute: see Appendix 2. It was unclear from the minutes whether Aumkar was expected to make an equity injection and also arrange of loan of £4.25m or whether the term equity was intended to be a reference to a cash injection by Aumkar. Prashant was asked in cross-

examination about this and he confirmed that there was no injection of capital and that the minutes (which he thought were taken by Suresh) were referring to loans which Aumkar made to Barrowfen in 2018. He also confirmed that a standby letter of credit was arranged through the Bank of Singapore.

222. Prashant was also asked about detailed calculations which showed an overall settlement with a balance of £4,652,414.47 due from Girish to Rajnikant. Those calculations assumed that Girish would purchase Barrowfen for £25,690,000 and the text identified a proposal that Kiraj would take over the Tooting Property after completion of the development. Prashant said in evidence that there was "sentiment to give something back to Girish". However, it was put to him that the settlement formed part of an overall scheme to deprive Girish of his partnership entitlement:

> "Q. What is being done is to consider dealing with Makita in the Cayman Islands, Barrowfen in London, Aumkar in Malaysia, with an overall member's settlement statement at 6139. And the consequence being that after balancing off the amounts in terms of the purchase of Aumkar and Makita shares against Mr Patel's purchase, a net amount due, taking account of the loan to Aumkar, is from Mr Girish Patel; correct? A. These are hypothetical calculations that were worked out. Q. And what we see here is you seeking to put into effect the scheme which we discussed yesterday at the meeting which took place where you had indicated that you were not prepared to have a situation where there was a net payment going to Girish Patel, but rather you wanted a payment to come from Girish Patel to yourself? A. No, that's incorrect. I can't recall having a feeling of that nature."

The Share Transfers dated 16 July 2018

223. Although Yashwant was not present at the meeting in Tawau, two share transfers were executed by Yashwant and Suresh on the first day of the meeting in their capacity as trustees of the Mrs PD Patel Trust. By the first transfer they transferred 30,000 shares in Barrowfen to Suresh and by the second transfer they transferred 30,000 shares to Prashant. Mr Stewart asked Prashant whether the trustees had complied with the undertaking dated 13 August 2015 (above) before executing these transfers and his evidence was as follows:

> "Q. Here we see you, don't we, taking 60,000 shares, splitting them 30,000 to yourself, 30,000 to Suresh? Was there an agreement both from Kiraj and from Vanisha that you could do that despite the undertaking or not? A. There was an agreement from Kiraj. He authorised me to proceed with this transfer and I believe he also had -- he also acted -- had the authority of his sister as well to proceed with this. Q. So as far as you were concerned you had his binding agreement to do that; is that correct? A. Yes, and they are the two beneficiaries of the trust. Q. And did you have any communication with Vanisha at all? A. No, I did not."

The Barclays Facility

224. As the minutes of the Tawau meeting record and Prashant confirmed in his witness statement, Barrowfen also obtained a loan from Barclays in addition to the capital injection by Aumkar. I was taken to the indicative terms upon which Barclays was prepared to lend up to £20,750,000 and which were signed by Prashant (but undated). They included the following terms:

i) Barrowfen was to provide support for cost and interest overruns by providing a standby letter of credit from the Bank of Singapore for no less than £2,500,000.

ii) The facility was to be repaid in full within 60 months and was split between a construction or development loan facility of 34 months and an investment facility of 26 months (although these timings were subject to confirmation).

iii) The facility could be extended by two years and subsequently one more year subject to certain conditions.

iv) The development facility had an upper limit of £20,750,000 and the investment facility was the lower of £18,000,000 or 50% of the development value or the amount required to fully refinance the development facility.

v) The facility was subject to the satisfaction of a number of conditions precedent. These included litigation advice from Barclays legal advisor to confirm that the shareholder dispute with Girish had been fully

> resolved and that he had "no ownership claim or future ability to claim, and any indebtedness directly or indirectly to, or from the Borrower had been fully extinguished".

225. I was also taken to two chains of emails passing between Prashant and Barclays. In the first dated 7 August 2018 Prashant asked for an update on the credit approval process. In that email he stated: "The shareholders of Barrowfen have changed to Suresh and myself and this is updated on Companies House." In the reply also dated 7 August 2018 Mr Ian Foster of Barclays also asked: "Has the loan to Girish been extinguished as well as the shareholder charge?" The second email chain dated 31 August 2018 suggests that the loan agreement was on the point of being signed.

The Loan Agreement dated 23 August 2018

226. I was also taken to an agreement dated 23 August 2018 and made between Kiraj (acting on behalf of Girish) and Barrowfen in which the parties agreed to vary an existing loan agreement dated 15 February 2015 so that each loan made by Girish carried interest at 5% per annum and was to be repayable within 10 weeks of Barrowfen or its directors informing Girish that it had obtained a loan facility for the repayment of the loan. Prashant's evidence was that this agreement was not required by Barclays and was executed so that Barrowfen could put "this matter to rest".

The Settlement Agreement dated 6 March 2019

227. On 17 December 2018 Prashant sent Mr Andrew Wainwright of Barclays a court order. The order itself was not in evidence. But I was told that by this date Girish lacked capacity and that the order authorised Kiraj and Vanisha to enter into the settlement agreement (below). In the covering email Prashant stated:

> "I attach an Order pertaining to the settlement of past family disputes. The agreement is now being executed by all parties. A copy of the signed agreement will be provided to your solicitors. I can confirm it addresses all past matters and includes a clause that no party or their related parties can bring a future claim against another. Please also find attached Barrowfen's financials as at 31/3/18. Also as previously advised, Girish's loan to the

company has now been repaid with the parties agreeing a 5% interest rate."

228. On 6 March 2019 Girish, Kiraj, Yashwant, Rajnikant, Suresh and Prashant (together with other members of the Patel family) entered into a settlement agreement on very wide terms and settling most of the disputes which I consider in Appendix 2. It provided as follows:

i) Recital (C) recorded that Nina and Kiraj held various powers of attorney in relation to some of the disputes and Recital (D) recorded that Kiraj had been appointed as Girish's litigation friend in relation to certain of the claims.

ii) In clause 1 the term "**Released Claims**" was defined to include all litigation in the widest possible terms subject to certain express exceptions. Clause (f) of the definition excepted three matters: (i) the Barrowfen Claim (i.e. the present action), (ii) the Criminal Proceedings (which I define in Appendix 2 as the "**Private Prosecution**"); and (iii) the Partnership Accounts Dispute (which related to sums due under the memorandum of agreement dated 10 February 2016).

iii) In clause 2.1(a) the parties agreed that a claim in the Seychelles (which I define in Appendix 2 as the "**Seychelles Claim**") should be withdrawn on the terms of an agreed Minute of Order and affirmed that Yashwant was the sole legal and beneficial owner of Barrington.

iv) In clause 2.1(d) the parties agreed that the 60,000 shares in Barrowfen held by the Mrs PD Patel Trust should be transferred to Suresh and Prashant and copies of the executed transfers were attached.

v) Clause 2.2 provided that following the transfers of those shares Yashwant and Suresh irrevocably agreed to resign as trustees of the Mrs PD Patel Trust in favour of Kiraj and Mr Dariuz Krysztof Fordon subject to the terms of an agreed deed of appointment.

vi) Clause 4 provided for the dismissal of the remaining claims, clause 5 contained a release of the Released Claims and clause 7 contained an

agreement not to sue. Clause 11 provided that the settlement agreement should not be represented or construed by the parties as an admission of liability or wrongdoing.

229. By email dated 27 March 2019 Prashant wrote to Mr Wainwright asking for an increase in the facility to £22m. On the same day Mr Wainwright wrote back stating that the bank would begin looking through the revised cashflow figures which Prashant had provided. It is clear from this exchange that the loan had not been drawn down until after the execution of the settlement agreement although there was no indication that the settlement was a condition of drawdown.

Asian Agri

230. On 11 December 2017 Asian Agri was incorporated and a written resolution dated 13 March 2018 shows that Prashant and Suresh are its directors. On 29 April 2019 its shareholders and directors agreed to acquire the shares in Barrowfen at a price of US $120 per share and on 6 May 2019 the transfer of those shares was completed. By email dated 30 April 2019 Ms Nicole Young of Integrated Agents Trust Ltd ("**IATL**"), the company formation agents and secretarial services provider in Malaysia, wrote to Prashant enclosing a draft deed of assignment by Aumkar to Asian Agri of the loan made by Aumkar to Barrowfen. Barrowfen's balance sheet as at 31 July 2019 also recorded a loan of £6,032,063.36 from Asian Agri (as well as the Hambros loan of £347,746.89).

The Hambros Application

231. Although the settlement agreement dated 6 March 2019 was very wide, none of the parties suggested that it extinguished the debt owed by Barrowfen to Hambros. In May or June 2019 Hambros must have demanded repayment of the loan from Barrowfen and threatened to wind it up because on 2 August 2019 Barrowfen applied to restrain the presentation of a winding up petition. On 26 September 2019 that application was heard by Chief ICC Judge Briggs and on 2 October 2019 he delivered judgment: see [2019] EWHC 2548 (Ch).

232. The judgment records that Barrowfen had paid £115,000 but disputed £160,000 of the debt and the amount of interest. The judge dismissed the application although it was not necessary for him to decide the total amount outstanding. The judge recorded that the Barrowfen had tendered a cheque for £462,746.89 but that Girish did not cash it because it was made out to him personally and the amount of interest was wrong.

233. The judge also recorded that counsel had submitted to him that S&B had deliberately made a false entry in its ledger and in reliance upon this S&B's Skeleton Argument suggested that Barrowfen had previously made allegations of dishonesty against S&B. Mr Stewart corrected this in opening and I was taken to the transcripts which show that counsel did not make an allegation of dishonesty.

III. The Witnesses

A. Approach

234. Both Barrowfen and S&B submitted that I should adopt the guidance given by Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 at [15] to [22]. Ms Hilliard also drew my attention to the way in which the *Gestmin* guidance has been applied in *AB v Pro-Nation Ltd* [2016] EWHC 1022 at [30] to [32], *Lachaux v Lachaux* [2017] 4 WLR 57 at [35] to [37], *Blue v Ashley* [2017] EWHC 1928 at [65] to [69] and *Khan v General Medical Council* [2021] EWHC 374 at [71]. Although it has been cited many times, I set out part of the *Gestmin* guidance at [22] which is:

> "to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in

> his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

235. This guidance was particularly valuable in the present case because there was a clear documentary record of the primary facts contained both in S&B's files and in the emails and letters passing between Prashant, Suresh and Girish. I was able to draw the necessary inferences from those documents in order to find the relevant facts without placing undue or heavy reliance on the oral evidence of any of the witnesses. Moreover, the contentious questions which I had to decide was not what the witnesses did or said to each other but the motivation for their actions. It was also important for me to assess how Mr King and Ms Philipson saw the dispute between Girish and his family both in the narrow context of the company issues and in the wider context of the Patel family dispute.

236. Although he relied on the *Gestmin* guidance, Mr Stewart submitted that I should not rely on documents created by the Patel family unless they were accepted as authentic. I set out his submission in full:

> "In light of both: (i) the proven and alleged allegations of fabrication of documents; and (ii) Barrowfen's serious disclosure failures, S&B submits that the correct approach to evidence in this case ought to be as follows: 11.1 The Court should approach S&B documents as authentic documents which were put forward contemporaneously at the relevant time; 11.2 With regard to documents created by Patel family members, the *Gestmin* approach should be applied only where documents: (a) Are expressly accepted by all parties as authentic; and (b) The Court can be satisfied that they were not created for the purpose of "papering the file" in order to create an apparently legitimate record.11.3 Save as aforesaid, the Court ought to place little or no weight on Patel family documents as reflecting what those family members actually intended or were thinking at the time (and should not apply the *Gestmin* approach); and 11.4 The Court should only be prepared to accept the oral evidence of: (i) Prashant; (ii) Suresh; and (iii) Girish where it can be corroborated or it constitutes admissions against interest."

237. It is obvious that the authenticity of the Suresh Resignation Letter and the Trustee Resignation Documents was central to the Company Claims. I have also identified other documents the authenticity of which either Girish or S&B challenged and made my findings in relation to those challenged documents

elsewhere in this judgment. In relation to other documents, I accept S&B's submission that the firm's own documents were an accurate record. But I reject the submission that where S&B did not challenge the authenticity of documents (such as emails passing between Prashant and Suresh) I should treat them as unreliable and generated for the purpose of creating a false record. Prashant was the particular object of Mr Stewart's criticism and I deal with his emails below.

238. S&B also challenged Barrowfen's disclosure. Mr Stewart submitted that the "evident disclosure failures and the consequent requirement for S&B to fight a case of such gravity with one hand tied behind its back is a very serious matter". They also sought to persuade me that Barrowfen had adopted "an inappropriate approach" to disclosure and failed to disclose a number of documents which they ought to have disclosed "according to the most basic principles".

239. I also reject those submissions. I am not satisfied that Barrowfen failed to comply with its disclosure obligations or that it did so in the way articulated by S&B. In particular, I am not satisfied that Barrowfen deliberately chose not to disclose documents which either Prashant or Suresh or Withers knew they should disclose. Nor am I satisfied that they adopted an inappropriate approach to disclosure either by adopting the DISCO platform or in relation to choice of custodians, search terms, date ranges or review procedures. In closing Ms Hilliard reminded me of the scope and cost of Barrowfen's disclosure exercise and that it had volunteered to carry out searches from a wider date range than those originally ordered by the Deputy Master.

240. I remind myself that a "keys to the warehouse" approach to disclosure may sometimes involve an attempt to disguise or bury key documents. But I am satisfied that this was not the case here. Moreover, I am not satisfied that there were gaps in Barrowfen's disclosure from which I could properly draw the inference that individual custodians or Withers had suppressed documents or chosen search criteria designed to avoid the disclosure of adverse documents. The primary example upon which S&B relied was the settlement agreement between Barrowfen and Mr Radmore. But S&B accepted that he was an honest witness and asked him very few questions indeed. Mr Radmore himself was understandably keen to keep the settlement confidential (if he could) and it is

not a document upon which I have placed any reliance in this very lengthy judgment.

241. Ms Hilliard urged me not to make findings in relation to what she described as collateral issues and submitted that it would be wrong to make findings where those issues had not been the subject of disclosure. However, apart from the issue of "wash out" invoices, I found it important to decide most of those issues (and, for the most part, I have done so and set out my findings in Appendix 2). I am also satisfied that all parties had given sufficient disclosure to enable me to make reliable findings of fact.

B. Prashant

242. Mr Stewart made a sustained attack on the credibility of Prashant's evidence. He put this in a number of ways in his written closing submissions but he summarised his position in his oral closing submissions by describing Prashant and Suresh as "sophisticated crooks who are prepared to deliberately lie to courts when it suits them".

243. The principal basis for this attack was Prashant's involvement in the decision to backdate two letters dated 23 February 2015 and 20 July 2015 which Yashwant exhibited to an affidavit sworn on 26 October 2015 and which Prashant also confirmed in his own affidavit sworn on 1 April 2016: see Appendix 2. Prashant admitted the back-dating of these letters without hesitation and he did not attempt to downplay his own involvement. He also expressed his regret and apologised to the Court. I accept that this expression of regret was genuine.

244. S&B also attacked Prashant's evidence on the basis that he failed to upload his emails dated from before 1 January 2014 to the DISCO e-disclosure platform. Having heard Prashant cross-examined at length on this issue, I am satisfied that this was not deliberate attempt to suppress documents but a mistake which Prashant and Withers had rectified by the time he was recalled to give evidence. Prashant himself and Mr Stephen Ross and Ms Ruzin Dagli of Withers made detailed witness statements which I accepted for the purpose of S&B's renewed applications for disclosure: see Appendix 3.

245. In particular, it is telling that Prashant uploaded emails from Suresh's email account which included his draft email dated 4 October 2013 and Yashwant's response to it dated 5 October 2013. It is highly improbable that he would have done so if he had taken a conscious decision not to upload his own emails from before 1 January 2014 to avoid giving disclosure of the very same emails. Moreover, when he finally uploaded the relevant emails from his own account, the only additional document which he disclosed was an email dated 7 October 2013 which he sent to Ilesh forwarding Yashwant's earlier email without comment. As Ms Hilliard submitted, it is hardly likely that Prashant deliberately suppressed this blank forwarding email, when he had already provided the emails dated 4 October 2013 and 5 October 2013 from Suresh's inbox to Withers for the disclosure review.

246. Mr Stewart also relied upon Prashant's participation in the GUC Claim, the Shanta Petition and the Shanta Conspiracy Proceedings. I define those proceedings in Appendix 2 where I have found that Rajnikant, Suresh and Girish backdated documents and misled the Malaysian court (although what they said may have been literally true). I have also found that Rajnikant, Suresh, Yashwant and Prashant denied Girish his 30% interest in Aumkar by relying on the fact that he had registered the shares in Barrington in Mrs PD Patel's name.

247. For these reasons I approached my assessment of Prashant's evidence with considerable caution. But in the event I accepted his evidence both because it was consistent with the contemporaneous documents and because it was consistent with his actions. On the question whether Suresh and Prashant would have proceeded to develop the Tooting Property if they had obtained control of Barrowfen in either 2014 or 2016. I accepted Prashant's evidence because of his conduct when the company was put into administration. My approach to his evidence might have been very different if Suresh and he had abandoned the development of the Tooting Property. But they did not.

248. On the question whether Mr King made a fraudulent misrepresentation to him at the meeting on 9 December 2015, Prashant impressed me as a reliable witness. In his witness statement he gave evidence that he must have been misled. But in cross-examination I found him more measured and thoughtful.

He gave a factual account of the meeting and did not try to persuade me that he could really say much more than was in the documents.

249. Finally, Prashant's internal emails to family members displayed a candour – sometimes a naïve candour – which suggested that I could rely on them as an honest reflection of his own perceptions at the relevant time. Moreover, when he was cross-examined on them he accepted most of their contents without hesitation and where he did qualify what he said at the time, I tended to accept his evidence as both cogent and reasonable. For instance, I accepted Prashant's account of the GUC Claim and the subsequent sale by GUC to the New Shareholders in his draft email dated 4 October 2013 as accurate and his description of those events as "shameful" as a reflection of what he thought at the time.

C. Suresh

250. I began by treating the evidence of Suresh with the same caution as I treated the evidence of Prashant. Although he was not involved in back-dating the correspondence with Yashwant, he was directly involved with Rajnikant and Girish in back-dating the share sale agreement and the minutes dated 22 June 2007: see Appendix 2.

251. However, I had no hesitation in accepting Suresh's evidence that he did not send the Suresh Resignation Letter or the Trustee Resignation Documents applying the *Gestmin* guidance and testing that evidence against the contemporaneous documents. I also accepted his evidence on the question whether he and Prashant would have proceeded with the Original Development Scheme if they had obtained control of Barrowfen at an earlier stage given his reaction to the administration and his conduct after it.

252. I add that I have made no findings about the "wash out" invoices issue. I accept Ms Hilliard's submission that this was a purely collateral issue and that I should accept Suresh's answers as final. The relevant events took place in 2006, Girish has never brought proceedings in any jurisdiction against Suresh and any claim would have been the subject matter of final settlement in 2019. Moreover, the determination of this issue would not have affected my approach to the

credibility of Suresh's evidence on key issues such as whether the Suresh Resignation Letter and the Trustee Resignation Documents were forged and what he would have done if he and Prashant had assumed control of Barrowfen at an earlier time.

D. Girish

253. On 8 March 2021 Girish gave evidence in chief. He told me that he had been assisted by his solicitors in the Private Prosecution to prepare a statement which he then made. He told me that Count 14 in the indictment was going to be the subject of legal argument and Count 15 had not been put to him. He also stated that he had not pleaded to matters which were the subject of the Private Prosecution and that his failure to do so should not be taken as an admission of any of those matters. Finally, he told me that he wished to rely on the privilege against self-incrimination and he asked me to warn him if the answer to any question might incriminate him.

254. Neither of the represented parties had addressed me on the scope of the privilege against incrimination and I invited submissions from them both on whether section 13 of the Fraud Act 2006 prevented Girish from relying on the privilege against self-incrimination. Both parties made written submissions. It was clear from their submissions that section 13 gave rise to some complex issues and since neither of them made the positive submission that the section applied in the present case, I decided that the safest course was to permit Girish to rely upon the privilege against self-incrimination.

255. Because Counts 1 to 14 in the Private Prosecution cover all of the claims made against Girish I did not hear him give detailed evidence on any of the claims. The issue therefore arose how I should approach Girish's evidence and Ms Hilliard referred me to *Clydesdale Bank plc v Stoke Place Hotel Ltd* [2017] EWHC 181. In that case Nugee J (as he then was) gave the following guidance at [34] which I adopt:

> "In these circumstances Mr Dhillon invoked the privilege and, on the advice of Mr Cutting, declined to answer a series of questions put to him by Mr Wilson, who appeared for the Bank. Mr Wilson accepted that no adverse inference should be drawn

> against Mr Dhillon from the fact that he invoked the privilege. I did not hear any argument on the point but that seems to me to be right: a non-answer is not evidence of anything, and to draw an adverse inference might tend to undermine the privilege. On the other hand, the result of his invoking the privilege is that I have no evidence from him on these questions. That means that I have nothing to set against the inferences to be drawn from such other evidence as there is. In short, I proceed on the basis that Mr Dhillon is entitled to refuse to give any explanation in answer to the various questions asked, and that that is not to be held against him; but that if he chooses to do this, the result of his declining to answer is inevitably that I have no explanation from him in relation to such matters."

256. Although I gave Girish the warning on each occasion on which I considered that he was at risk of being asked questions which might incriminate him, on a number of occasions he chose to answer Ms Hilliard's questions. He also submitted short closing submissions dated 30 March 2021 in which he denied all of the allegations against him. When he chose to answer, I was unable to accept his evidence. The explanations which he gave were implausible and inherently improbable. His assertion that Rajnikant did not want Bedford to be recorded in the Register as a shareholder of Barrowfen but was content for Girish to file annual returns recording that it was, was wholly implausible. Girish's explanation for Suresh's resignation was equally implausible.

257. In my judgment, the overwhelming probability is that Girish forged both the Suresh Resignation Letter and and removed Bedford's page from the Register. Only he or Amrit (on his instructions) could have filed the TM01s in respect of Suresh's resignation and either he or Amrit had custody of the Register. Moreover, Girish had a strong motive for taking matters into his own hands in this way.

258. Having concluded that Girish forged both the Suresh Resignation Letter and tampered with the Register, I drew the inference that he forged the Trustee Resignation Documents. Girish offered no other explanation and nobody else had the motive or opportunity. He had been found to have forged his mother's will and been held in contempt for giving false evidence. Finally, given these conclusions I was unable to accept Girish's evidence on other contested issues unless it was clearly supported by the documents.

E. S&B's Witnesses

259. Mr King has been a qualified solicitor since 1984. He trained at the respected London firm Church Adams Tatham and since 1994 he has been a partner at S&B. He was head of litigation from 1997 to 2017 and has been managing partner of the firm since 2017. I formed the impression that he was a highly experienced solicitor and capable of managing complex litigation involving company law and trusts.

260. Ms Philipson trained at S&B and in 2002 she qualified into the dispute resolution team. In 2008 she was promoted to Senior Associate. She had 11 years of experience as a solicitor when she was first instructed by Girish in 2014 and I formed the impression she was an experienced and capable solicitor. Mr Andrew Dodds qualified in 2006 and joined S&B in 2015 specialising in banking and finance. He became a partner in 2019. He too came across as an experienced solicitor.

261. I found Mr King, Ms Philipson and Mr Dodds to be honest witnesses and I had no hesitation in reaching the conclusion that Mr King had not made a fraudulent misrepresentation at the meeting on 9 December 2015. However, it was clear that both he and Ms Philipson were very familiar with their files and had studied them a number of times both in preparing their witness statements and in preparing for trial. Ms Hilliard criticised their evidence for the following reasons:

> "They were advocates for S&B's case. S&B's Skeleton repeatedly accuses Prashant and Suresh of "creating a story" to retrospectively fashion a case. The reality is that Mr King and Ms Philipson have retrospectively created a story or version of events in an attempt to justify their actions in relation to Barrowfen. Under the pressure of the powerful litigation biases referred to by Leggatt J in the *Gestmin* case and the tendency for people to remember past events involving themselves in a self-enhancing light referred to by Leggatt J in *Blue v Ashley* they have managed to persuade themselves that the reasoning and justifications now advanced for S&B's conduct were ones that they considered and applied at the time. But the reasonings and justifications now advanced for S&B's conduct are not true, in the sense that they do not reflect the intentions and motivations at the time."

262. In my judgment, there was some justification for this criticism. I am satisfied that S&B's witnesses were not consciously acting as advocates for S&B's case. But I found that when Mr King and Ms Philipson (and to a lesser extent Mr Dodds) were asked by Ms Hilliard to explain their reasons for giving particular advice or a particular course of conduct, they gave detailed reasons with conviction which could not have been based on genuine recollection but was clearly based on reflection and reconsideration of the documents over time.

263. Moreover, I found it difficult to accept some of the reasons which Mr King and Ms Philipson gave to justify their conduct. On a number of occasions these explanations seemed to me to be inconsistent with the contemporaneous documents and to have been reconstructed with the benefit of hindsight. I also found Mr King's reasons for rejecting the existence of a conflict or potential conflict between the interests of Barrowfen and Girish unconvincing and found it difficult to accept that he went through the thought process at the time.

264. Finally, I also found it difficult to accept Ms Philipson's reasons for failing to take Guernsey law advice or her explanation for the very different approach which she took to writing up the Register in relation to Bedford on the one hand and the trustees of the two trusts on the other (or that the reasons which she gave for doing so were her reasons at the time).

265. I therefore approached the evidence of S&B's witnesses on the basis that their internal documents provided the best evidence of their thought processes at the time and that I should scrutinise their evidence with care where it was inconsistent with the documents or there was no documentary evidence that the relevant point was considered at all.

F. Other Witnesses

266. Girish and S&B barely challenged any of Mr Radmore's evidence and S&B accepted that he was an honest witness. I therefore accept his evidence in its entirety. Barrowfen also called Ms Dagli to show a video of the Register and to give evidence about what she found. I also accepted her evidence. The only other witnesses called by either party were the experts and I deal with their evidence in detail below. They were both honest and reliable expert witnesses

and at the end of their evidence I thanked them for the assistance which they had given the court and congratulated them because they had been able to agree a number of difficult issues. The issues which I had to resolve were matters on which two reasonable experts might be expected to differ.

IV. The Law

G. Directors' Duties

267. Girish was a director of Barrowfen and until 1 December 2015 he was the individual director to whom the board of directors had delegated management of the company. Section 170(1) of the Act provides that the duties specified in sections 171 to 177 are owed by a director of a company to that company. Section 170(2)(a) also provides that a person who ceases to be a director continues to be subject to the duty to avoid conflicts of interest in section 175 as regards the exploitation of any property, information or opportunity of which he became aware at a time when he was a director.

(1) Duty to act within powers

268. Section 171 imposes a duty upon a director of a company (a) to act in accordance with the company's constitution and (b) only to exercise powers for the purposes for which they are conferred. A number of authorities have considered the extent to which a director may exercise his or her powers either to assist or to fight off "corporate raiders". In *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 the Privy Council held that directors who had issued new shares in order to dilute the shareholdings of those shareholders who opposed a takeover bid had exercised their powers for an improper purpose. It is the paradigm case in which the court has held that it is improper for directors to exercise their powers to favour the interests of one group of shareholders over the interests of another in a takeover battle.

269. In *Eclairs Group Ltd v JKX Oil & Gas Plc* [2016] 1 BCLC 1 the Supreme Court held that directors who imposed restrictions upon a number of shareholders voting at general meetings to prevent what they believed to be a takeover by aggressive corporate raiders had exercised a power in the Articles for an

improper purpose. The function and purpose of the specific article are not relevant. But Lord Sumption JSC (with whom all of the members of the Court agreed on this point) made the following general observation in relation to cases like *Howard v Ampol* at [37]:

> "The rule that the fiduciary powers of directors may be exercised only for the purposes for which they were conferred is one of the main means by which equity enforces the proper conduct of directors. It is also fundamental to the constitutional distinction between the respective domains of the board and the shareholders. These considerations are particularly important when the company is in play between competing groups seeking to control or influence its affairs…But there is nothing particularly special in this context about a decision to issue a restriction notice under a provision such as article 42. The directors' task is no more difficult than it was in the many cases like *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 in which other fiduciary powers, such as the power to issue shares, have been held improperly exercised because in the face of pressures arising from a battle for control the directors succumbed to the temptation to use their powers to favour their allies. I would agree with the majority of the Court of Appeal that in that situation the board would naturally wish to have the predators disenfranchised. That is precisely why it is important to confine them to the more limited purpose for which their powers exist. Of all the situations in which directors may be called upon to exercise fiduciary powers with incidental implications for the balance of forces among shareholders, a battle for control of the company is probably the one in which the proper purpose rule has the most valuable part to play."

270. *Howard v Ampol* has generated lasting controversy because the board of directors had mixed or multiple purposes. They genuinely wished to raise capital as well as dilute the opposing shareholders. However, Street J held that their primary purpose was to dilute the shareholdings of those who opposed the takeover bid and Lord Wilberforce was prepared to adopt that test: see [1974] AC 821 at 832F–H and *Eclairs* at [24] (Lord Sumption JSC). The law is not settled on the effect of a decision taken by directors with mixed concurrent purposes and Lord Mance and others reserved their position on that issue in the *Eclairs* case: see [50] to [55].

271. Ms Hilliard submitted that it was an abuse of a director's powers to exercise them with an intention to defeat the ambitions of a group of shareholders even

if the director believed that they were not acting in the best interests of the company. Initially, I was concerned that this submission required me to decide the issue which the Supreme Court left open in the *Eclairs* case. But on the facts of this case the issue does not arise and I accept Ms Hilliard's submission in that context and to the following extent.

272. It is for the shareholders to appoint the directors in general meeting and it is the duty of the directors to decide what is in the best interests of the company and exercise their powers and judgment accordingly. One director cannot, therefore, exercise his powers for the purpose of preventing the shareholders from exercising their rights to appoint other directors or for the purpose of preventing those directors from exercising their powers. Moreover, it is no justification for that director to prevent shareholders and directors from exercising their rights because he or she disagrees with them about what is in the best interests of the company.

(2) Duty to promote the success of the company

273. Section 172 also imposed a statutory duty upon Girish to promote the success of the company. Because the duty is qualified by a duty to creditors which arises in certain circumstances I set out the section in full:

> "(1) 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, and in doing so have regard (amongst other matters) to– (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company.
>
> (2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.
>
> (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain

> circumstances, to consider or act in the interests of creditors of the company."

274. Ms Hilliard reminded me that the test for compliance with section 172 is a subjective one and not an objective one. In *Regentcrest plc v Cohen* [2000] 2 BCLC 80 Jonathan Parker J (as he then was) stated as follows (at [120]):

> "The duty imposed on directors to act bona fide in the interests of the company is a subjective one (see Palmer's Company Law (Sweet & Maxwell), para. 8.508). The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test."

275. The opening words of the section make it clear that the duty to promote the success of the company requires a director to act for the benefit of the members as a whole (rather than a section of the members). Ms Hilliard also placed particular reliance on section 172(1)(f) which recognises a need to act fairly as between the individual members. In her written closing submissions Ms Hilliard submitted that this must include ensuring that the members of a company may exercise their statutory rights to call an extraordinary general meeting under sections 303 to 305 and, if they choose to do so, to vote to replace the directors of the company under section 168.

276. I also accept that submission. Section 304 imposes a statutory duty upon the directors of a company to call a meeting if the requirements of section 303 are satisfied. In my judgment, one director who deliberately ignores or frustrates a valid request under section 303 in order to prevent shareholders legitimately exercising their powers to appoint or remove other directors commits a breach of the duty to promote the success of the company. Again, it is not an answer to a claim for breach of section 172 that the director believed himself to be acting

in the commercial interests of the company if he knew or believed that he was not acting fairly as between the individual members.

277. Section 113 of the Act also imposes obligations upon the company itself to maintain its register of members. The provisions of the section (so far as they are relevant to this action) are as follows:

> "(1) Every company must keep a register of its members. (2) There must be entered in the register–(a) the names and addresses of the members, (b) the date on which each person was registered as a member, and (c) the date at which any person ceased to be a member. (3) In the case of a company having a share capital, there must be entered in the register, with the names and addresses of the members, a statement of–(a) the shares held by each member, distinguishing each share–(i) by its number (so long as the share has a number), and (ii) where the company has more than one class of issued shares, by its class, and (b) the amount paid or agreed to be considered as paid on the shares of each member….(5) In the case of joint holders of shares or stock in a company, the company's register of members must state the names of each joint holder. In other respects joint holders are regarded for the purposes of this Chapter as a single member (so that the register must show a single address)."

278. If a company defaults in complying with this section an offence is committed by both the company and every officer who is in default: see section 113(7). Moreover, as Ms Hilliard pointed out, it is a feature of a director's duty to act in good faith and in the interests of the company to disclose his own misconduct: see *Item Software (UK) Ltd v Fassihi* [2005] 2 BCLC 91. See also *Stubbins Marketing Ltd v Stubbins Food Partnerships Ltd* [2020] EWHC 1266 (Ch) at [649] where Trower J stated that now this duty is normally treated as an aspect of the duty under section 172. In my judgment, a director who commits a criminal offence under section 113(7) by defacing or removing pages from the register of members comes under a duty to report that misconduct to the company.

279. In *Sequana SA v BAT Industries plc* [2019] EWCA Civ 112 the Court of Appeal considered when the duty of a director to promote the interests of the company itself are displaced by the "creditors interests duty" in section 172(3). After an

authoritative discussion of the relevant authorities David Richards LJ reached the following conclusions (at [220] to [222]):

> "Judicial statements should never be treated and construed as if they were statutes but, in my judgment, the formulation used by Sir Andrew Morritt C and Patten LJ in *Bilta v Nazir*, and by judges in other cases, that the duty arises when the directors know or should know that the company is or is likely to become insolvent accurately encapsulates the trigger. In this context, "likely" means probable, not some lower test such as that adopted by Hoffmann J in construing the statutory test for the making of an administration order: see *Re Harris Simons Construction Ltd* [1989] 1 WLR 368.
>
> I am therefore satisfied that the judge was correct to reject BTI's case that the applicable trigger for the creditors' interests duty was a real, as opposed to a remote, risk of insolvency.
>
> As I have earlier mentioned, an important issue is whether, once the creditors' interests duty is engaged, their interests are paramount or are to be considered without being decisive. This is not straightforward, and there has been a good deal of discussion about it in some of the cases and in the academic literature. It is not an issue that arises on the facts of this case and, in my view, it should be addressed on the facts of cases where it must be decided. I therefore express no view on it, save to say that where the directors know or ought to know that the company is presently and actually insolvent, it is hard to see that creditors' interests could be anything but paramount."

280. Mr Stewart submitted that the duty arises where a company is either cashflow insolvent (and unable to pay its debts as they fall due) or balance sheet insolvent or a combination of both: see section 123(1) and (2) of the Insolvency Act 1986. Ms Hilliard did not dispute this proposition and I accept it (although I did not hear any detailed argument on the point). I also accept that where a reputable insolvency practitioner has considered the test and accepted appointment, this is strong evidence that the test is satisfied.

281. None of the parties addressed on me whether the duty is to consider the interests of the creditors as a whole or whether it is necessary to consider the interests of individual creditors. In many cases this distinction makes little difference because the breach of duty in question usually involves payments out of company funds which favour the shareholders or directors or prefer one creditor over the others.

282. In the present case, however, the distinction matters because the principal creditor was Barrowfen II whose interests were different from other creditors to the extent that there was an identity between its interests and Girish's own interests. Ms Hilliard did not submit that I should ignore the interests of Barrowfen II because of Girish's personal interest in the company. I therefore approach section 172(3) on the basis that I must consider the interests of the body of creditors as a whole although I may take into account the interests of different creditors (where relelevant).

283. Finally, none of the parties suggested that the test for compliance with section 172(3) was different from the test for compliance with section 172(1) and that the test was objective rather than subjective. I therefore adopt the *Regentcrest* approach to section 172(3) and direct myself that the relevant question is whether the director honestly believed that his act or omission was in the interests of the creditors.

(3) Duty to exercise reasonable care, skill and diligence

284. Section 174 also imposed a duty of care upon Girish. Although Barrowfen's case against him was primarily based on conscious and deliberate breaches of duty, it is important not to lose sight of his duty of care not least because S&B could have been expected to be aware of that duty. Section 174 imposed a duty in the following terms:

> "(1) A director of a company must exercise reasonable care, skill and diligence. (2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with–(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and (b) the general knowledge, skill and experience that the director has."

(4) Duty to avoid conflicts of interest

285. Finally, section 175 imposed a duty upon Girish to avoid conflicts of interest and that duty continued after he ceased to be a director as regards the exploitation of any property, information or opportunity of which he became aware at a time when he was a director: see section 170(2)(a) (above). The section provides as follows:

> "(1) 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) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity). (3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company. (4) This duty is not infringed– (a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or (b) if the matter has been authorised by the directors. (5) Authorisation may be given by the directors– (a) where the company is a private company and nothing in the company's constitution invalidates such authorisation, by the matter being proposed to and authorised by the directors; or (b) where the company is a public company and its constitution includes provision enabling the directors to authorise the matter, by the matter being proposed to and authorised by them in accordance with the constitution. (6) The authorisation is effective only if– (a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and (b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted. (7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties."

286. Again, none of the parties suggested that the test for compliance with section 175 was different to the test for compliance with section 172 and that it was objective rather than subjective. I therefore adopt the *Regentcrest* approach to section 175 and direct myself that the relevant question is whether the director knew that a situation within section 175(1) had arisen but took no steps to avoid it or whether he or she honestly believed that no such situation had arisen. However, if the director relies on section 175(2)(a) and argues that the situation could not reasonably be regarded as likely to give rise to a conflict of interest, then in my judgment the test is an objective one for the court.

287. I bear in mind that Girish had no direct personal interest in Barrowfen except as a director. He was a shareholder in his capacity as a trustee of the Mr DP Patel Trust. But the beneficiaries were Suresh's children and not his own children. Furthermore, he was not a beneficiary of the Mrs PD Patel Trust. His children were beneficiaries but there is nothing to suggest that the trustees ever added him as a beneficiary. Nevertheless, section 175 is in wide terms and none of the parties submitted that I should not treat Girish as having a one third interest in Barrowfen (through his family's trust).

288. Section 172(7) provides that any reference to a conflict of interest includes a conflict of interest and duty and a conflict of duties. The conflicts which Barrowfen alleged to exist in this case were conflicts between Girish's duties as a director of Barrowfen and his duty as a shadow director of Barrowfen II and between S&B's duties to different clients. Nevertheless, the parties used the term "conflict of interest" in their submissions and in cross-examination in the wider sense used in section 172(7) and in this judgment I do so too.

(5) The interests of the company

289. There was a significant difference between the parties in their approach to the interests of Barrowfen and, in particular, whether there was a conflict between Girish's personal interests either as a creditor (through Hambros and Barrowfen II) and the interests of the company. Ms Hilliard argued that whatever the commercial interests of Barrowfen, the company's "overriding best interests" were for the Register to be written up promptly and for any corporate governance dispute to be resolved properly. She continued:

> "The interests of a company in being governed with the consent of the majority of its shareholders, in accordance with the company's constitution and the law, must trump anything that an acting sole de facto director for the time of the company considers is best for the operational future of the company."

290. Ms Hilliard also relied on the fact that S&B had admitted that it was in Barrowfen's interests for the "Bedford membership issue" to be resolved properly and in accordance with its constitution and that both Mr King and Ms

Philipson admitted that it was in Barrowfen's interests for the Register to be written up properly. For example, Mr King gave the following evidence:

> "Q. Now, Barrowfen's interests are to have its register of members properly written up, aren't they? That's in Barrowfen's interests? A. Yes, to have the register correct is in the company's interests. There are lots of other things that are in the company's interests, but I would agree with you, yes, you wouldn't want to have your register incorrect. Q. No, because Barrowfen needs to know, right, who has an entitlement to participate in the company and the company's constitution; correct? A. Yes. Yes, I would agree with that, yes."

291. Mr Stewart argued that no conflicts of interest ever arose because Girish's actions were at all times in Barrowfen's best interests. However, he defined those interests primarily by reference to its commercial interests. For example, he submitted that the Bedford Rectification Claim was in Barrowfen's interests because it resolved an important matter for the company in a manner which did not unnecessarily interfere with the development of the Tooting Property. He relied on Ms Philipson's evidence that Girish's agenda which was to keep the development on track was "completely in alignment" with Barrowfen's best interests.

292. None of the parties suggested that the interests of a company are a matter of law and none of them cited any authority which provided me with any detailed guidance. It seems to me therefore that whether a particular course of conduct was in Barrowfen's interests or in conflict with those interests is a simple question of fact. But in addressing that question I bear in mind the "constitutional distinction between the respective domains of the board and the shareholders" which Lord Sumption described in *Eclairs*. In my judgment, it is no justification for a director to prevent a shareholder from exercising the rights which fall within his or her domain on the basis that it is for the greater good of the company. If it were, section 171 would be deprived of much of its force.

(6) The Patel Family Partnership

293. Ms Hilliard submitted that I should approach the evidence by looking only at the conduct of Barrowfen and not at the conduct of Prashant and Suresh whilst they were acting in any other capacity. Mr Stewart submitted that I should look at their wider conduct. He placed particular reliance upon the Patel family partnership and the conduct of the partners in relation to the wider family dispute. Although Mr Stewart set out his submissions fully in writing, he captured them very well orally first in his cross-examination of Prashant on Day 3 and then in his closing submissions on Day 14:

> "My Lord, this goes to two issues. The first issue is a very simple one and I'm going to go through the history in relation to Barclays in order to demonstrate that what was required was a complete end to the dispute between the parties before any lending could take place, and that will be used in support of a submission that the idea that the development could have gone ahead as said with the shareholder disputes back in 2014 is simply not tenable. The second point, however, is that in relation to the pressure which is being exerted, my case is and remains that from 2013, right the way through until these proceedings, Mr Prashant Patel was part of a scheme which was designed not as he says to assist the interests of Barrowfen, but was intended to confiscate Mr Girish Patel's assets in which scheme he has succeeded and that the case now being put forward back in these pleadings that what was -- he was concerned with was anything other than that is not the case. I'm going to be showing that what has happened as a result of these proceedings is that Mr Prashant Patel has deprived Mr Girish Patel of funds which he knew were Mr Girish Patel's. Those include not merely the funds in relation to Barrington, but other matters as well, I'm using these documents for those purposes. Of course, these matters also go to credit, but that is, as it were, by the by."
>
> (Day 3)

> "DEPUTY JUDGE LEECH: So let's assume either that there was a formal partnership, or that Barrowfen was a sort of quasi partnership company, so built on a trust and confidence. Does that affect the claim against Stevens & Bolton in any way? MR STEWART: It affects it in this way: that when you look at the understandings and statements made by particularly Mr King as to his understanding of Mr Girish Patel's motives and the backdrop, it makes those understandings far more credible; and when one says, as we do, that Barrowfen was a small part of the overall whole, it makes that submission more credible. To elaborate in two more sentences: I spent what your Lordship may have thought was an inordinate amount of time going back into

> the mists of history in relation to the New York, Kuala Lumpur and London meetings. I was doing that to attack the proposition that the situation at Barrowfen had been a central part of the dispute between the parties. It simply wasn't. Barrowfen was proceeding quite happily until the rest of the disputes arose, and what then happened is that, because of the disputes about the washout invoice, the allegations of bad faith, what I submitted were the declarations of war, effectively on both sides, in August and September of 2013, these parties went to war, and what that then led to was a situation where Barrowfen was caught up in that war. The idea that you could have settled Barrowfen without an overall resolution at that time, in my submission, is fanciful. The reality was that on the one hand Prashant Patel wanted to capture all the assets and then deal as he thought fit and fairly; Girish Patel was concerned about the overall position, but actually in order to buy out Prashant Patel and Suresh Patel, almost certainly needed money from the overall deal in order to do so. So you really had got a complete position of deadlock between the parties. My learned friend said there wasn't a deadlock in the sense that, you know, you've got two-thirds ownership on one point and the other, but that doesn't really meet the point. First of all, you've got a situation where you couldn't have a members' voluntary liquidation without the consent of effectively all of the three shareholding parties. Secondly, until the point that Girish had gone, there wasn't any willingness either to give Girish money or to fund or participate in the development of the Tooting property; quite the contrary, as admitted, they all wanted to sell it. Therefore, from the point of view of the solicitors acting for the company, they're left with the frustrating position that they can see the company has got a valuable asset, they've got a client who is telling them, "This is being frustrated, the development, by my brothers and my nephew," and that all appears to be completely true, and all of that is supported by the overall structure being that of a partnership, as we say was the position, because you've got breakdown of the fundamental partnership structure which had been taking place since the nineteen -- well, for a very long period of time. That's the relevance of it, my Lord."
>
> (Day 14)

294. I accept Mr Stewart's submission in relation to the admissibility and relevance of the family partnership and the family dispute. I am satisfied that the conduct of Prashant and Suresh in relation to other companies and assets within the Patel family partnership are directly relevant to the issues which I have to decide and, in particular, whether that conduct provides a defence to the claims against both Girish and S&B or any excuse or justification for actions which would

otherwise have been a breach of duty. In my judgment, that conduct also goes to the issue of causation and, in particular, whether Prashant and Suresh would have been prepared to fund Barrowfen and complete the development if Girish had remained a director and the company had not gone into administration or, indeed, before the end of the family dispute.

295. Having reached this conclusion, I set out the detailed facts and evidence in relation to the Patel family partnership and the subsequent dispute in Appendix 2. I also set out my detailed findings in relation to that dispute. However, I add one caveat. Mr Stewart submitted that the family business was partnership as a matter of law. Ms Hilliard disputed this proposition and relied on advice given by Mr Russen in consultation that it was difficult to analyse the business as a partnership, primarily, because of the incorporation of so many companies in different jurisdictions.

296. I have held that the conduct of Prashant and Suresh and other family members is admissible on – and relevant to – the issues which I have to determine. I am also satisfied that their conduct is admissible and relevant whether or not there was a formal partnership. In my judgment, that conduct would have been relevant to an unfair prejudice petition brought by Girish under section 994 of the Act and whether or not there was a legal partnership and I approach the present case in the same way.

297. In the light of that conclusion, it is unnecessary for me to decide whether the Patel family partnership was legally enforceable under the Partnership Act 1890. I am also concerned that it would have been almost impossible for me to decide that issue. I am far from satisfied that it was an English partnership or that there was just one partnership which was capable of extending to assets and corporations in a number of different jurisdictions. I was not addressed on any of these issues and I was not asked to admit any evidence of foreign law.

298. In the remainder of this judgment I use the expression "the Patel family partnership" or "partnership" to describe the association between family members which I have explained in greater detail in Appendix 2. I use that term because the parties used it themselves to describe that association and both

Prashant and Suresh accepted that description of it in cross-examination. However, I use it as a convenient label and subject to the caveat which I have now explained.

H. Solicitors' Duties

(1) Fiduciary Duties

299. Barrowfen and S&B both relied on *Bristol & West BS v Mothew* [1998] Ch 1 as the leading authority on the modern law of solicitors' fiduciary duties. In that case a firm of solicitors acted for both lender and borrower in relation to the purchase of residential property. Millett LJ (as he then was) set out the following principles at 18H to 19B and 19E-H:

> "A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal may conflict with his duty to the other: see *Clark Boyce v Mouat* [1994] 1 AC 428 and the cases there cited. This is sometimes described as "the double employment rule." Breach of the rule automatically constitutes a breach of fiduciary duty…..
>
> That, of course, is not the end of the matter. 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) 102 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.""

300. In *Mothew* itself the solicitor inaccurately completed a report on title and admitted negligence. However, this conduct did not give rise to a breach of fiduciary duty. Because the lender had instructed the solicitor in the knowledge that he was also acting as the borrower's solicitors there were limits on his obligations under the retainer. He did not infringe the actual conflict rule and it was not alleged that he had deliberately concealed the relevant information. Millett LJ stated this (at 20G-H):

> "In my judgment, the defendant was never in breach of the actual conflict rule. It is not alleged that he acted in bad faith or that he deliberately withheld information because he wrongly believed that his duty to the purchasers required him to do so. He was not guilty of a breach of fiduciary duty."

301. One question which *Mothew* leaves open is whether a breach of the no inhibition principle or the actual conflict rule give rise to an actionable claim by themselves. In most cases this will not matter for one of two reasons: first, in a standard real estate transaction it will be pretty clear to the solicitor what obligations arise out of the retainer from each client. If the solicitor chooses not withdraw but to continue to act for both clients, the failure to report information will usually involve a conscious and deliberate breach of duty.

302. Secondly, it is clear that both principles operate to prevent a solicitor from relying on his or her obligations to client A in order to justify a breach of duty to client B. Classic examples are *Moody v Cox* [1917] 2 Ch 71 and *Hilton v Barker Booth & Eastwood* [2005] 1 WLR 567. In *Hilton*, for example, a solicitor was not entitled to rely on his duty to client A to keep certain information confidential as a defence to a claim by client B that he was in breach of a conflicting duty to disclose the information. In that case, however, he was

held liable for committing a breach of contract and the actual conflict rule operated to prevent the solicitor from relying on the competing engagement. It was no answer to the claim by client B that he owed competing obligations to client A because he should never have got himself into that position in the first place.

303. The position is not so clear cut, however, where (as here) a firm of solicitors is engaged in a series of complex disputes where the conflicts may not be so obvious. It is altogether possible that an actual conflict will arise but the solicitor mistakenly considers that it is permissible to continue acting. The present case is also complicated by the fact that the firm of solicitors was acting for client A (Girish) but also taking instructions from him on behalf of client B (Barrowfen). Moreover, S&B was not responsible for the situation in which potentially conflicting instructions might be given by the same person. It was the resolution of the board of directors in 1994 to delegate its powers to Girish (which remained in place 20 years later) which created this situation.

304. In argument, I asked both Ms Hilliard and Mr Stewart whether it was necessary for Barrowfen to establish that S&B committed a conscious or deliberate breach of its duties to the company before a breach of fiduciary duty would be established. Both accepted that in principle this was necessary. In my judgment, they were right to do so and that a breach of the no inhibition principle or the actual conflict rule will give rise to a breach of fiduciary duty but only where the solicitor goes on to commit a conscious breach of duty.

305. Barrowfen and S&B also relied on the SRA Code of Conduct 2011 (the "**Code of Conduct**") which came into force on 16 September 2011 and remained in force throughout the relevant period (although it was modified from time to time). Outcome 3.3 required that a firm of solicitors should have systems and controls for identifying client conflicts which were appropriate and enabled the firm to assess all relevant circumstances. Outcome 3.5 also imposed a duty not to act if there was a client conflict or a significant risk of a client conflict (subject to certain exceptions). The Glossary defined "client conflict" as follows:

> "any situation where you owe separate duties to act in the best interests of two or more clients in relation to the same or related

> matters, and those duties conflict, or there is a significant risk that those duties may conflict"

306. Outcomes 3.6 and 3.7 provided that a solicitor could act where there was a client conflict if the clients had either a substantially common interest in relation to a matter (Outcome 3.6), or they were competing for the same objective (Outcome 3.7) provided that the solicitor had complied with certain safeguards. The solicitor had to explain the relevant issues, the clients had to consent in writing and the solicitor had to be satisfied that it was reasonable to act for all the clients, that it was in their best interests and that the benefits to the client of doing so outweighs the risks.

307. Neither Barrowfen nor S&B submitted that the Code of Conduct applied directly or that S&B owed a contractual or equitable duty to comply with it. However, in the present case it provides useful assistance in identifying the situations in which it was (and may still be) permissible for a firm of solicitors to act for both clients where there was (or is) a client conflict. This is particularly important in the present case where S&B recognised at various times that such a conflict existed.

308. There is little (if any) difference between the approach which the SRA adopted to client conflicts in the Code of Conduct and the approach taken by the courts. In *Boardman v Phipps* [1967] 2 AC 46 the House of Lords adopted the test advanced by Lord Cranworth LC in *Aberdeen Railway v Blaikie* [1854] 1 Macq 461 (at 471), namely, whether a reasonable man would think that there was a real sensible possibility of conflict: see 124C. In *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 Upjohn LJ emphasised (at 637-8) that:

> "[A] broad rule like this must be applied with common sense and with an appreciation of the sort of circumstances in which over the last 200 years and more it has been applied and thrived. It must be applied realistically to a state of affairs which discloses a real conflict of duty and interest and not to some theoretical or rhetorical conflict."

(2) Negligence

309. There was no dispute that S&B owed a duty to Barrowfen exercise the skill and care required of a reasonably competent solicitor whilst it was retained by the company. Ms Hilliard submitted that if a solicitor makes a mistake or omission where he or she is acting for two parties with opposed interests, the court will "more readily castigate the error as negligent": see Jackson & Powell Professional Liability 8th ed (2017) at 11—107.

310. I do not accept that submission, at least without some qualification. It may well be that an actual conflict of interest will lead the solicitor to give negligent advice. But the court will not find that the advice was negligent unless that advice also failed to meet the standard of care required of the solicitor. If the advice met that standard, then the solicitor will not be liable for negligence because he or she had clients with competing interests.

311. Ms Hilliard also relied on *Newcastle International Airport Ltd v Eversheds LLP* [2014] 1 WLR 3073. In that case a firm of solicitors was instructed to prepare new service contracts for executive directors of a company by the directors themselves. The contracts contained unusually large bonuses and the members of the company's remuneration committee approved them without receiving any separate advice. The company brought a claim for negligence on the basis that the solicitors ought to have provided advice directly to the chair of the committee. The judge at first instance dismissed the claim because the directors had authority to give instructions and take advice.

312. The Court of Appeal held that even though the directors had authority to give instructions, the solicitors ought to have provided a separate memorandum of advice directly to the chair of the committee. Rimer LJ (with whom the other members of the court agreed) expressed surprise that the solicitors were prepared to accept instructions at all (at [68]):

> "The fact that Eversheds were prepared to, and did, take their instructions from the executives, primarily Mr Parkin, came as a surprise to me. Eversheds knew their client was NIAL and that they were not acting for either executive. Yet the matter in which they were retained was the redrafting of service agreements between NIAL and the executives. There was an obvious conflict of interest between the parties to each contract."

313. Having dealt with the directors' authority, he stated that the case was not about authority but about the scope of the solicitors' duty and whether it required them to give separate advice to the chair. He then stated this (at [80]):

> "I readily accept that in a conventional case in which a company authorises one of its executives to instruct a solicitor in relation to a company matter, being one in which the executive has no personal interest conflicting with that of the company but can simply be regarded as a human organ of the company, there will ordinarily be no need for the solicitors to give advice as to the matter the subject of their instruction to anyone other than the executive. Advice to him will stand as advice to the company."

314. He held that on the special circumstances of this particular case, the solicitors owed a duty to send the finished drafts of the service contracts to the chair of the remuneration committee with "a memorandum explaining in user-friendly language" the relevant changes: see [79] to [85]. For present purposes, the key part of his reasoning is at [83]:

> "I accept that Mr Gorringe was entitled to regard Mr Parkin as authorised to provide the instructions he needed. But since Eversheds' task was to produce drafts for separate review by Ms Radcliffe and the RC—that is, by reviewers looking at them exclusively with NIAL's interests in mind—I also regard it as plain that the proper discharge of Eversheds' duty of care to NIAL required them at the conclusion of the drafting process to take reasonable steps to ensure that such reviewers properly understood the effect the drafts created on Mr Parkin's instructions. That is because advice to Mr Parkin in the course of the drafting exercise could not, in the particular circumstances, be regarded as equivalent to advice to NIAL itself; and Eversheds' duty was to ensure that NIAL itself was properly advised."

I. Other Claims

(1) Deceit

315. There was no dispute either about the ingredients of a claim in deceit: see *Eco 3 Capital Ltd v Ludsin Overseas Ltd* [2013] EWCA Civ 413 at [77]. The four ingredients are: (1) D makes a false representation to C. (2) D knows that the representation is false, alternatively, he or she or is reckless as to whether it is

true or false. (3) D intends that C should act in reliance on it. (4) C acts in reliance on the representation and in consequence suffers loss.

316. It was common ground that a half-truth or "fragmentary statement of fact" may amount to a fraudulent representation if withholding information makes the facts as stated "absolutely false": see *Derry v Gurney* (1873) LR 6 HL 377 at 403. In *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 Lord Steyn stated (at 274) that: "It has rightly been said that a cocktail of truth, falsity and evasion is a more powerful instrument of deception that undiluted falsehood. It is also difficult to detect."

317. Ms Hilliard submitted (and I accept) that in approaching a claim for deceit based on a half-truth it is helpful to use the test adopted by the Court of Appeal in *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2018] 1 WLR 3529 at [130], namely, whether "a reasonable representee would naturally assume that the true state of facts did not exist and that, had it existed, he would in all the circumstances necessarily have been informed of it". Ms Hilliard also submitted (and I accept) that a solicitor may be liable in deceit to a third party who is not his or her client: see, e.g., *Henry Ansbacher & Co Ltd v Bins* [1998] PNLR 221.

(2) Dishonest Assistance

318. In *Group Seven Ltd v Notable Services LLP* [2020] Ch 129 the Court of Appeal set out the elements of a claim for dishonest assistance. That case involved a claim against a solicitors firm for dishonest assistance in a breach of a directors' duties (although the individual alleged to have been dishonest was an accountant rather than a solicitor). The court set out those elements at [29]:

> "In a little more detail, it is agreed that in order to find a person liable for dishonest assistance of a breach of trust, it is necessary to establish that: (a) there was a trust in existence at the material time; (b) the trustee committed a breach of that trust; (c) the defendant assisted the trustee to commit that breach of trust; and (d) the defendant's assistance was dishonest. It is also agreed that the same principles apply, mutatis mutandis, to a claim for dishonest assistance of a breach of the fiduciary duties which are owed to a company by its director in relation to dealings with the company's asset."

319. A firm of solicitors may be liable for dishonest assistance to a party who is not a client of the firm provided that the firm has provided assistance of more than minimal importance: see, e.g., *Baden v Société Générale Pour Favoriser le Developpement du Commerce et de L'industrie en France SA* [1993] 1 WLR 509 at [246] (Peter Gibson LJ). In *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 Lord Nicholls set out the test for dishonesty at 389C-E:

> "…….in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour."

320. *Tan* was a decision of the Privy Council and in *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391 the Supreme Court approved both *Tan* and the refinement which Lord Hoffmann made to the test in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476 (also a decision of the Privy Council): see [62] and [74]. Lord Hughes JSC then continued at [75]:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to

> be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

(3) Unlawful Means Conspiracy

321. In *Kuwait Oil Tanker Company SAK v Al Bader (No 3)* [2000] 2 All ER (Comm) 271 Nourse LJ (giving the judgment of the court) stated at [108] that the tort of conspiracy to injure by unlawful means contained the following elements:

> "A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

322. Ms Hilliard pointed out that a difference of view has been expressed in the recent authorities whether it is also necessary to establish that D knew that the conduct complained of was unlawful: see *Stobart Group Limited v Tinkler* [2019] EWHC 258 (Comm) at [548] to [573] and *Racing Partnership Ltd v Done Bros (Cash Betting) Ltd* [2019] 3 WLR 779 at [258] to [287]. This issue does not arise for decision in the present case and I express no view.

323. The principal issue which I had to determine was whether Girish and S&B had an intention to injure. In relation to that element, Ms Hilliard relied on a statement by Lord Nicholls in *OBG Ltd v Allan* [2008] 1 AC 1. I set out that statement below but it is also useful in the present context to consider the facts of one of the conjoined appeals in that case. In *Mainstream Properties Ltd v Young* two officers of a company had diverted an opportunity to develop a property to a joint venture between themselves and a third party. The judge held that they had acted in breach of their contractual and fiduciary duties but dismissed a claim against their co-venturer, Mr De Winter, for inducing breach of contract. Lord Hoffmann set out his findings at [67] and [68]:

> "The judge found that Mr Young and Mr Broad could not have acquired the property without Mr De Winter's financial assistance. His participation was therefore causative. He also knew that they were employed by Mainstream and that there was

> an obvious potential conflict between their duties to Mainstream and their participation in the joint venture. But the judge found that Mr De Winter was a cautious man who had raised the question of conflict of interest with Mr Young and Mr Broad and had received an assurance that there was no conflict because Mainstream had been offered the site but refused it. This was untrue but Mr Winter genuinely believed it. He had been given a similar (and more truthful) assurance concerning another project which Mr Young and Mr Broad had brought to him in the previous year and that, said the judge, "was now proceeding smoothly without objection". On these findings of fact the judge found that Mr Winter did not intend to procure a breach of the contracts of employment or otherwise interfere with their performance. The claim against him was therefore dismissed."

324. Both the Court of Appeal and the House of Lords dismissed an appeal. Lord Hoffmann held that Mr De Winter did not have the necessary state of mind because he honestly believed that assisting Mr Young and Mr Broad with the joint venture would not involve them in the commission of breaches of contract: see [69]. Ms Hilliard relied on the following passage from the speech of Lord Nicholls at [167]:

> "Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort."

325. However, Lord Nicholls also dismissed the appeal on the grounds that Mr De Winter did not have the necessary intention. In particular, he rejected a submission that Mr De Winter had come to the wrong legal conclusion at [201] and [202]:

> "Mr Randall sought to avoid the difficulty posed by the judge's findings by drawing attention to Mr De Winter's written statements. These showed that Mr Broad told Mr De Winter that Mainstream was not interested in buying the land at Findern. Mr De Winter believed what he was told. On this basis he believed the joint venture would not entail a breach by the others of their

> contracts with Mainstream. This, submitted counsel, was not good enough. The matters on which Mr De Winter relied did not, as a matter of law, leave Mr Broad and Mr Young free to compete with Mainstream over the development of the Findern land while still working as full-time executives of the company in that area. Mr De Winter was relying on his own, erroneous, legal conclusion. He was not entitled to escape liability by relying on his own mistaken assessment of the legal position.
>
> I cannot accept this. An honest belief by the defendant that the outcome sought by him will not involve a breach of contract is inconsistent with him intending to induce a breach of contract. He is not to be held responsible for the third party's breach of contract in such a case. It matters not that his belief is mistaken in law. Nor does it matter that his belief is muddle-headed and illogical, as was the position in *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479."

J. Damages or Equitable Compensation

(1) Loss of a Chance

326. There was no dispute between the parties about the principles applicable to the assessment of damage or compensation where the outcome depends on the hypothetical conduct of a third party or third parties. In *Perry v Raleys Solicitors* [2020] AC 352 Lord Briggs JSC set out the principles at [20] and two important consequences which flow from the application of those principles at [23] and [24]:

> "For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation……
>
> …..Two important consequences flow from the application of this balance of probabilities test to the question what the client would have done, in receipt of competent advice. The first is that it gives rise to an all or nothing outcome, in the usual way. If he proves upon the narrowest balance that he would have brought the relevant claim within time, the client suffers no discount in the value of the claim by reason of the substantial possibility that

> he might not have done so: see Stuart-Smith LJ in the *Allied Maples case [1995] 1 WLR 1602*, 1610. By the same token, if he fails, however narrowly, to prove that he would have taken the requisite initiating action, the client gets nothing on account of the less than 50% chance that he might have done so.
>
> The second consequence flows directly from the first. Since success or failure in proving on the balance of probabilities that he would have taken the necessary initiating step is of such fundamental importance to the client's claim against his advisor, there is no reason in principle or in justice why either party to the negligence proceedings should be deprived of the full benefit of an adversarial trial of that issue. If it can be fairly tried (which this principle assumes) then it must be properly tried. And if (as in this case) the answer to the question whether the client would, properly advised, have taken the requisite initiating step may be illuminated by reference to facts which, if disputed, would have fallen to be investigated in the underlying claim, this cannot of itself be a good reason not to subject them to the forensic rigour of a trial. As will appear, this has an important bearing on the extent of the general rule that, for the purpose of evaluating the loss of a chance, the court does not undertake a trial within a trial."

327. Although the principles are clear, it is not so easy to apply them in this case where I have to assess the hypothetical conduct of three directors, one of whom resigned and is now a defendant and the other two did not become directors until after the relevant damage is alleged to have been suffered. To assist me, Ms Hilliard advanced four propositions:

i) The question what steps Bedford would have taken to ensure that Barrowfen came under the control of Prashant and Suresh are the hypothetical actions of a third party and are to be assessed on the basis of loss of a chance principles.

ii) The question whether Girish would have taken or acted upon S&B's advice or the advice of any independent solicitors or counsel are also to be assessed on loss of a chance principles because the acts of a director are not attributable to the company where the company is itself the victim of the director's wrongdoing: see *Bilta (UK) Ltd v Nazir (No.2)* [2016] AC 1.

iii) The question what steps Prashant and Suresh would have taken as directors of Barrowfen to progress the development of the Tooting are to be assessed on the balance of probabilities because they are hypothetical acts of Barrowfen itself.

iv) Finally, to the extent that the question whether the development would have gone ahead depends on the conduct of third parties (e.g. banks or lenders), the answer to that question is to be assessed on the basis of loss of a chance principles.

328. Mr Stewart did not challenge any of these propositions and the only one about which I had some hesitation was the second proposition. I accept the general proposition that Girish must be treated as a third party. Where the question is how he would have acted if he had been advised to take independent legal advice on behalf of the company, it is arguable at the very least that I should assess his conduct on the balance of probabilities. As this very issue arises on the findings which I make, I have approached that issue on alternative bases.

(2) Collateral Benefits

329. The only other issue of law which arose in relation to the assessment of damages or equitable compensation was whether Barrowfen should give credit for any increase in the capital value of the Tooting Property as a result of implementing the Revised Development Scheme. The general principle is that a claimant must give credit for any benefit which is also attributable to the cause of the loss. In *Tiuta International Ltd v De Villiers Surveyors Ltd* [2017] 1 WLR Lord Sumption JSC stated the general principle and gave the following guidance at [12]:

> "The general rule is that where the claimant has received some benefit attributable to the events which caused his loss, it must be taken into account in assessing damages, unless it is collateral. In *Swynson Ltd v Lowick Rose LLP* [2018] AC 313, para 11, it was held that as a general rule "collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss." Leaving aside purely benevolent benefits, the paradigm cases are benefits under distinct agreements for which the claimant has given consideration independent of the relevant legal relationship with the defendant, for example insurance

> receipts or disability benefits under contributory pension schemes. These are not necessarily the only circumstances in which a benefit arising from a breach of duty will be treated as collateral, for there may be analogous cases which do not exactly fit into the traditional categories. But they are a valuable guide to the kind of benefits that may properly be left out of account on this basis."

330. Ms Hilliard relied on *Fulton Shipping Inc of Panama v Globalia Business Travel SAU* [2017] 1 WLR 2581. In that case charterers redelivered a vessel in repudiatory breach of contract and the owners accepted the breach as terminating the charterparty and sold the vessel for US $23.7m. The owners claimed damages for the loss of hire during the remainder of the charterparty and the charterers argued that they should give credit for the difference between the sale price of the vessel (US $27m) and its actual value (US $7m) value at the end of the charterparty. The Supreme Court held that the owners were not required to do so.

331. Lord Clarke JSC, who gave the leading judgment, held that the relevant link between the breach of duty and the benefit must be one of causation. The benefit to be brought into account must have been caused either by the breach of the charterparty or by a successful act of mitigation: see [30]. He rejected the argument that there was a causal connection between the breach of the charterparty and the sale for the following reasons:

> "As I see it, the absence of a relevant causal link is the reason why they could not have claimed the difference in the market value of the vessel if the market value would have risen between the time of the sale in 2007 and the time when the charterparty would have terminated in November 2009. For the same reason, the owners cannot be required to bring into account the benefit gained by the fall in value. The analysis is the same even if the owners' commercial reason for selling is that there is no work for the vessel. At the most, that means that the premature termination is the occasion for selling the vessel. It is not the legal cause of it. There is equally no reason to assume that the relevant comparator is a sale in November 2009. A sale would not have followed from the lawful redelivery at the end of the charterparty term, any more than it followed from the premature termination in 2007. The causal link fails at both ends of the transaction.

> For the same reasons the sale of the ship was not on the face of it an act of successful mitigation. If there had been an available charter market, the loss would have been the difference between the actual charterparty rate and the assumed substitute contract rate. The sale of the vessel would have been irrelevant. In the absence of an available market, the measure of the loss is the difference between the contract rate and what was or ought reasonably to have been earned from employment of the vessel under shorter charterparties, as for example on the spot market. The relevant mitigation in that context is the acquisition of an income stream alternative to the income stream under the original charterparty. The sale of the vessel was not itself an act of mitigation because it was incapable of mitigating the loss of the income stream."

332. Ms Hilliard placed particular reliance on *Fulton* because the court rejected a causal link between an income loss (the hire of the vessel) and a capital benefit (the proceeds of sale). However, it is important recognise that *Fulton* was concerned with a breach of contract (and a special kind of contract) and not a claim for professional negligence. It is also important to note that Lord Clarke rejected the distinction between types of loss. He agreed with Popplewell J at first instance that there was no requirement that the benefit must be of the same kind as the loss being claimed or mitigated before credit must be given (although he accepted that a difference in kind may be indicative that the benefit has not been legally caused by the breach): see [29] and [30].

333. In *Primavera Ltd v Allied Dunbar Assurance Plc* [2003] PNLR 12 the Court of Appeal had to consider a similar issue in the context of a professional negligence claim. In that case C invested in an executive retirement plan on the negligent advice of D, his financial adviser, and it turned out to be worth less than it should have been. D also advised C that he would trigger a tax liability if he tried to access the funds. He decided to keep the plan for a further five years although he made no further payments before cashing it in. The issue for the court was whether he was required to give credit for the increase in its value over that period. Simon Brown LJ framed the question as follows (at [14]):

> "This is the real issue on the appeal and I do not pretend to have found it an easy one. At what date does the respondent's loss fall to be assessed? If 1995, then his agreed loss is £101,000, the reduced value of the fund through having lost the tax advantage

> that would have come from making qualifying payments. If, however, the date for assessment is November 2000 when finally a lump sum of £500,000 became available tax free in the fund, it is an agreed fact that the benefits by then accrued (namely the enhanced value of the fund, which allowed not only for the payment of £500,000 but also for a substantially larger annuity) extinguished the losses sustained during the previous five and-a-half years whilst the respondent received no annuity and had to continue servicing his debt. The respondent, of course, contends for 1995, the appellants for 2000."

334. In *Primavera* all three members of the court held that C was not required to give credit for that increase and all of them based their decision on a detailed analysis of the facts. It was a particular feature of the case that D had continued to give negligent advice after C had suffered the original loss. But Latham LJ also gave the following reasons for rejecting D's arguments:

> "However, it seems to me that these arguments ignore the purpose of the original transaction. It was to enable the respondent to raise a loan of £500,000 which he could redeem in 1995. The respondent had not intended the transaction to continue beyond that. And he paid no further premiums into the policy after 1995. He had a number of choices when it became apparent that the scheme had not worked. He could have simply crystallised his entitlement to a lump sum and taken the annuity; he could have decided that since he was now in the pension scheme, he would continue to fund it and find some other way to raise the £500,000. As it was, as a result of his own efforts, or to be more exact the efforts of advisors on his behalf, he discovered that it was possible to use the policy to unlock £500,000. But in so doing, he was not continuing with the original scheme. That had failed because of the breach of duty of the appellant. He was using the assets that he had to his best advantage, in the same way as the plaintiffs in Hussey v Eels . The fact that he has not used the £500,000 to pay off the debt underlines the fact that essentially he was making an investment decision in 1997 which only had an historical connection with the original scheme. Had that investment decision proved disadvantageous, he would not have had any claim for such loss against the appellants arising out of the breach of duty alleged. The corollary is that the appellants are not entitled to take advantage of any benefits that may have been obtained by the respondent to reduce or extinguish the undoubted loss which he sustained in 1995."

335. Like *Fulton*, the facts of *Primavera* are in some ways analogous to the present case. Although it was not concerned with income losses and capital gains, it is

a case in which C suffered a loss because D's negligent advice prevented him from taking action some years before the asset was realised. It is also useful because Simon Brown LJ found the guidance of Sir Andrew Morritt V-C in *Needler Financial Services Ltd v Taber* [2002] 3 All ER 501 at [24] particularly useful (as do I):

> "In my view the authorities to which I have referred establish two relevant propositions. First, the relevant question is whether the negligence which caused the loss also caused the profit in the sense that the latter was part of a continuous transaction of which the former was the inception. Second, that question is primarily one of fact."

(3) Equitable Compensation

336. Although Ms Hilliard cited a number of well-known authorities in relation to the assessment of equitable compensation, neither she nor Mr Stewart submitted that I should approach the assessment of damages and equitable compensation differently in circumstances where I found Girish liable for breach of his duties as a director and S&B liable for negligence (or, for that matter, if I found S&B liable for both negligence and breach of fiduciary duty). In the present case, therefore, I have not drawn such a distinction. Given that there was no defence of contributory negligence, it may make no difference in the present case.

K. Illegality

337. In *Patel v Mirza* [2017] AC 467 the Supreme Court adopted a new approach to the defence of illegality. Lord Toulson JSC identified a "trio" of considerations which the court must balance against each other. After stating that this was not an issue which can be determined mechanistically he stated this (at [101]):

> "So how is the court to determine the matter if not by some mechanistic process? In answer to that question I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due

> sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations can be found in the case law."

338. In *Grondona v Stoffel & Co* [2021] AC 540 C induced a building society to lend her money by making fraudulent representations in her application form. The Supreme Court held that C's mortgage fraud did not provide a defence to a claim for negligence against Ds, her solicitors. I set out Lord Lloyd-Jones' observations on the test more generally when dealing with Barrowfen's application to strike out parts of the Amended Defence (see [2021] EWHC 200 (Ch) at [57]) but he summarised his conclusions on considerations (a) and (b) at [35]:

> "I pause at this point in the process of addressing Lord Toulson JSC's trio of relevant considerations. To permit the respondent's claim in the particular circumstances of this case would not undermine the public policies underlying the criminalisation of mortgage fraud and could, indeed, operate in a way which would protect the interests of the victim of the fraud, i e the mortgagee. Furthermore, to deny the respondent's claim would run counter to other important public policies. It would be inconsistent with the policy that the victims of solicitors' negligence should be compensated for their loss. It would be a disincentive to the diligent performance by solicitors of their duties. It would also result in an incoherent contradiction given the law's acknowledgment that an equitable property right vested in the respondent. In these circumstances, it is not strictly necessary to go on to consider the third of the trio of considerations, namely whether denial of the claim would be a proportionate response to the illegality, but I shall nevertheless do so."

339. Having decided the appeal on considerations (a) and (b), Lord Lloyd-Jones went on to deal with consideration (c). In *Grondona* the issue of proportionality largely turned on the extent to which C's illegal conduct was central to the claim. He held that the need for C to rely upon the illegality still remains relevant and that on the facts of the case the essential facts of the claim could be established without any reference to the illegality. C's claim for breach of duty against Ds was conceptually entirely separate from her fraud on the mortgagee.

340. *Grondona* provides important guidance in the present case. It was a claim against a firm of solicitors in which they acted for two clients, the lender and

borrower, one innocent and one fraudulent. The principal guidance which I take from the decision is that the public policy in ensuring that solicitors comply with their duties is not necessarily undermined by allowing C to succeed in a claim for negligence, especially where it is unnecessary for C to rely on the fraudulent conduct and the loss flows from D's negligence rather than the fraud itself.

V. The Bedford Claim

L. Girish

(1) Barrowfen's claim

341. Barrowfen's claim against Girish is that in breach of his directors' duties he deliberately removed the page recording Bedford as a member from the Register in order to maintain sole control of the company and prevent Bedford from appointing Prashant to the board of directors. Whether or not he removed Bedford from the register, Barrowfen also claims that Girish prevented or delayed the reinstatement of Barrowfen to the Register. I will call this claim and the claim against S&B the "**Bedford Claim**".

(2) Removal of Bedford from the Register

342. Girish accepted in evidence that Bedford was always a shareholder in Barrowfen and that he told S&B that Bedford was a shareholder. He also accepted that he either signed or authorised Barrowfen's annual returns recording Bedford as a shareholder from 2006 onwards. The annual return which Girish completed and signed himself on 14 September 2007 recorded that Bedford owned 60,000 shares and the annual return for 2008 recorded that Bedford had disposed of 37,500 shares in the period beginning on 1 January 2007 and that it owned 60,000 shares. Finally, the annual return dated 22 August 2013 continued to record that Bedford held 60,000 shares: see Appendix 1.

343. In his witness statement Girish gave evidence that in 2002 he allocated the shares between the members of the Patel family partnership and allocated Rajnikant's shares to Bedford. He also gave evidence that Rajnikant was furious and told him in no uncertain terms that he did not want Bedford recorded as the

registered owner of the shares. He also said that he respected those wishes and did not write up Bedford as a member in the Register. In cross-examination Girish stood by this evidence. When it was put to him that Bedford had been on the Register his evidence was as follows:

> "Q. But you know, don't you, that Bedford was on the register of members? A. So I'm saying that because I have always pointed out that it was specific instruction from Rajnikant that Bedford should not be shown on to the books of Barrowfen Properties and so as a result I could not do anything about the annual returns, but basically the name was not entered on the register of members of Barrowfen, and that's -- that's why (inaudible) I have pointed out to you a number of times, but that's what the position is."

344. Ms Dagli's video of the Register gave the clear impression that pages had been torn out and removed and she confirmed that in its current condition the damage was obvious. The original pages of the Register were a green colour and the video also gave the clear impression that a number of plain white pages had been stuck back into the Register using sticky tape. Ms Philipson also confirmed that pages had been stuck into the book when she received it. When Ms Hilliard asked Girish about the condition of the Register, he relied on the privilege against self-incrimination and chose not to comment. I was given no explanation, therefore, for the condition of the Register.

345. I reject Girish's evidence that Rajnikant gave him instructions not to write up Bedford in the Register and I find that the annual returns which he signed or approved from 2006 until 2013 were accurate and represented the true position, namely, that Bedford was registered as a shareholder. I do so for the following reasons:

i) There is no documentary evidence that Rajnikant ever gave instructions to Girish not to write up Bedford either in 2002 or at any time thereafter. In cross-examination Mr King confirmed that he was aware of no letter or email from Rajnikant confirming that he did not want Bedford to be registered as a member.

ii) In his letter dated 3 March 2014 to Rajnikant and Mr King, Girish did not refer to the instructions which he claimed to have received from Rajnikant and in the letter dated 3 April 2014 S&B gave Withers a different explanation, namely, that Rajnikant did not wish to take up any shares in Barrowfen. The difference, although not great, is significant. It shows that Girish did not give a consistent explanation when the issue first arose in 2014.

iii) In his letter dated 3 March 2014 to Mr King Girish also suggested that he had not registered Bedford because Rajnikant had failed to provide him with information about its operations. However, when Girish asked Rajnikant to supply the identity and addresses of the shareholders and directors on 31 July 2010, Prashant provided him with that information and copies of the relevant identity documents within a few days. Moreover, in reply to S&B's open letter dated 3 April 2014 Withers pointed out that Bedford had last received a request for company information in 2010 and that it had complied with this request in full.

iv) There are also a number of historic documents which are inconsistent with Girish's evidence that Bedford was never registered as a member. For example, he gave notice of annual general meetings to Bedford and on one occasion (at least) Bedford appointed him to be its proxy. Bedford also signed at least one company resolution as a shareholder. Moreover, the Register itself contains pencil annotations which strongly suggest that Bedford was registered as a member.

v) But in any event the instructions which Girish claimed to have received from Rajnikant make no sense whatever. It made no sense to submit annual returns to Companies House recording that Bedford was registered as the holder of 60,000 shares but not to record this in the Register. Indeed, the principal purpose of the annual returns was to make public what was on the Register. If Rajnikant was concerned that Bedford's ownership of shares in Barrowfen should not be made public (and Girish offered no other explanation), he would not have permitted Girish to file annual returns showing that it was.

vi) Finally, it was Prashant's evidence that he understood from his father that he did not give such instructions to Girish. Although this evidence was hearsay and of limited weight, it was consistent with the documentary evidence to which I have referred and also the inherent probability that the annual returns were accurate. I therefore accept it.

346. I go on, therefore, to consider the condition of the Register. In my judgment, the obvious inference to draw is that Girish removed a number of pages including the page recording Bedford as a member of Barrowfen, that he made photocopies of the other pages and that he stuck them back into the Register. The Register was in Girish's possession or control until he sent it to S&B on 16 April 2014. Moreover, he had a strong motive for denying that Bedford was a shareholder. His relationship with Suresh and Rajnikant had broken down and he wished to maintain control of Barrowfen.

347. Girish relied on the privilege against self-incrimination and neither he nor S&B offered any other explanation for the Register's condition. In the absence of any other explanation, I draw that inference and find that Bedford was recorded in the Register as the holder of 60,000 shares as at 22 August 2013 and that at some point in time between that date and 29 April 2014 Girish removed the page recording Bedford as a member (and its acquisition and disposal of shares).

348. Ms Hilliard put it to Girish that he acted dishonestly in tampering with the Register. Again, in the absence of any explanation by him for doing so, I find that this conduct was dishonest. I find that Girish removed the page to frustrate or prevent Bedford from exercising its rights as a shareholder and, in particular, its right to requisition a meeting to appoint Prashant as a director. I also find that he knew that it was not honest or reasonable for a director to treat a shareholder in this way. Accordingly, I find that Girish removed the page in breach of his statutory duty under section 172 of the Act.

(3) Failure to register Bedford

349. Given my findings in relation to the removal of the page from the Register, Barrowfen was in default of its statutory duty under section 113(1) of the Act to maintain the Register from the date of its removal until March 2015 when Ms

Philipson taped a new page for Bedford into the Register pursuant to the consent order dated 16 February 2015. Throughout that period both Barrowfen and Girish were liable to be prosecuted for committing a criminal offence under section 113(7).

350. In his email dated 28 February 2014 Mr King advised Girish to write up the Register and provide a copy to Prashant. Girish was an experienced company director and had been in sole operational control of Barrowen for twenty years. He had also been the company secretary for almost thirty years and had dealt with all company formalities during that period. In my judgment, a reasonably diligent person with Girish's general knowledge, skill and experience would have accepted that advice and instructed S&B to record Bedford as a member in the Register. I find, therefore, that Girish failed to accept and act on that advice in breach of his duty under section 174 of the Act.

351. Moreover, in his letter dated 3 March 2014 Girish asked Mr King to advise him if Barrowfen and he could refuse to recognise Bedford's calls for a meeting because: "This would be a tremendous help to resolve other partnership matter in the Far East." I find that Girish did not accept and act on Mr King's advice because there was an actual conflict between Barrowfen's interests and his own personal interests. It was in the company's interests to comply with section 113 of the Act and avoid a criminal prosecution. But it was in Girish's personal interests to prevent Bedford from being registered as a member and appointing Prashant as a director. It was in Girish's interests to resist this because his relationship with his brothers and nephew had completely broken down and it would enable him to retain control over Barrowfen and gain leverage in the wider partnership dispute.

352. However, Girish took no steps to comply with his duty under section 175 and avoid this conflict between 28 February 2014 and March 2015 when Ms Philipson recorded that Bedford was a member in the Register. In my judgment, an honest and reasonable director would have taken steps to comply with his or her duty under section 175 during that period and I find that Girish was in breach of his duty in failing to do so.

353. Finally, given my findings in relation to the removal of the page from the Register, I also find that Girish owed a duty under section 172 to report to Barrowfen that he had removed the page from the Register. In the circumstances, the only authorised representatives of the company to whom he could have reported this information were Suresh (as the only other director) and S&B (as the company's solicitors). I find that in breach of his duty under section 172 Girish failed to do so.

(4) Costs

354. Mr Russen advised Girish that he was likely to be ordered to pay the costs of the rectification proceedings: see paragraph 6.8 of the attendance note. Mr King also advised him that he shared counsel's view and that it would be difficult for him to resist a costs order: see paragraph 3 of his email dated 19 January 2015. However, Girish did not take that advice. On his instructions S&B offered to settle the Bedford Rectification Claim on terms that Barrowfen paid the costs and Bedford accepted this offer and later agreed to accept a sum of £28,000.

355. In my judgment, there was a clear conflict between Barrowfen's interests and Girish's interests and Girish failed to take any steps to avoid that conflict in breach of section 175 of the Act. It was in his interests for Barrowfen to pay the costs of the Bedford Rectification Claim and in the company's interests for him to pay them. Moreover, he was advised by both S&B and counsel that an order for costs was likely to be made against him personally and a director exercising reasonable care, skill and diligence would have accepted that advice. I find that Girish failed to accept and act on that advice in breach of section 174 of the Act.

M. S&B

(1) Barrowfen's claim

356. Barrowfen's pleaded case was that in breach of fiduciary duty S&B acted where there was a conflict of interest and intentionally preferred the interests of Girish over the interests of Barrowfen. Its alternative case was that S&B failed to advise Barrowfen or its shareholders that there was a conflict of interest and that the company should take independent advice.

(2) Breach of Fiduciary Duty

357. In hindsight there was a clear conflict between the interests of Girish and the interests of Barrowfen given my finding that Girish had removed the page from the Register. However, the issue which I have to decide is whether this conflict of interest either was or, alternatively, should have been apparent to Mr King and Ms Philipson. After written and oral closing submissions there was little (if any) dispute on the facts or about the evidence given by the witnesses and I therefore summarise the position as briefly as I can:

i) It is common ground that S&B was acting for Barrowfen under the terms of the First Engagement Letter. The scope of S&B's retainer was to advise the company (not Girish) in relation to Bedford's request to appoint a director and "in connection with the register of members".

ii) Mr King's evidence was that his instructions from Girish were that Bedford had a one third beneficial interest in Barrowfen but that Rajnikant did not want it to be registered as a shareholder. In cross-examination he accepted that Bedford was entitled to be registered as a shareholder:

> "Q. It was not -- it could never be in Barrowfen's interests to refuse to register a company, Bedford, who was clearly a shareholder? A. There were grounds, I accept there were grounds and there was -- the evidence indicated that -- in my own mind, that if Bedford was to apply to rectify the register of members, that there was a likelihood it would succeed. I accept that. But it was not in the best interests of the company at that time simply to accede to that request and the company was concerned to ensure that the development stayed on track. Q. I mean, Girish had instructed you, had told you that Bedford was a shareholder, hadn't he? A. I think there is sometimes -- you know, the use of terminology can be a bit misleading. In my own mind, right already/wrongly, I make a distinction between a shareholder that I would see as a registered shareholder, someone on the register of members, and someone else who is a beneficial owner, who may have an entitlement to be registered on the register of members, but I wouldn't see that that is how -- that is how I would distinguish the two."

iii) Mr King's preliminary advice was that it was better to update the Register and record Bedford as a member: see his email to Girish dated 28 February 2014.

iv) In response to Girish's letter dated 3 March 2014 and his plea for advice that he could refuse to recognise Bedford's calls for a meeting, Mr King's preliminary view was that Bedford had a reasonable prospect of succeeding on an application to rectify the Register. But he advised Girish to refuse to recognise that Bedford had any shareholder rights: see his emails to Girish dated 7 March 2014 and 27 March 2014. Girish's instructions were to take that position and S&B did so: see both of their letters to Withers dated 3 April 2014.

v) It was obvious to Mr King from the beginning of the retainer that Bedford now wished to be registered as a member and to exercise its rights to call a meeting and appoint Prashant as a director: see, again, his email dated 28 February 2014.

vi) In their letter dated 11 April 2014 Withers stated that Bedford believed itself to be a shareholder and in their letter dated 7 May 2014 Withers raised concerns that Barrowfen had failed to comply with section 113. Moreover, in their Letter of Claim dated 10 June 2014 Withers asserted that the page recording Bedford as a member of Barrowfen had been deliberately removed.

vii) On 29 July 2014 Mr Parfitt advised S&B that an application to rectify the register under section 125 of the Act was necessary. However, no application was made before Bedford issued the Bedford Rectification Claim on 24 November 2014. Neither Barrowfen nor Girish contested the claim and on 16 February 2015 the parties settled the claim by consent on terms that Barrowfen paid Bedford's costs.

viii) Mr King did not suggest either in his written evidence or in cross-examination that he considered it necessary for the Court to scrutinise the application before Barrowfen could consent to rectification or that

> Deputy Master Garwood (who made the order) should be asked to bless the company's decision.

358. Ms Hilliard subjected Ms Philipson and Mr King to a searching cross-examination about the reasons why they did not advise Girish to rectify the Register immediately and record Bedford as a member. This point was put to them in relation to a number of documents and each time their answer was essentially the same. They thought that it was in the wider interests of Barrowfen to resist the hostile takeover by Prashant and Suresh. I cite two passages from Mr King's cross-examination and one from Ms Philipson's cross-examination:

> "Q. You advised this, you know, I respectfully say, entirely sensible and cautious route of calling a general meeting, but then you conclude the email by advising Girish that he should write to Bedford refusing to recognise that Bedford has any shareholder rights, and that Girish should start asserting his rights in relation to Agromin. That's what you say at the end of the paragraph. A. Yes. Again, this needs to be sort of seen in context, where the company was being faced with the prospect of a hostile director being appointed to the board. That was something that certainly Girish did not think, and I thought he would be reasonable to think this, would be in the best interests of the company, because the interests of Prashant was to stymie the development and to sell the company. Q. No, what is in the best interests of the company, Mr King, and you know that, is what is in the best interests of the majority of shareholders of the company, isn't it? A. If the majority -- well, at this stage we were talking about Bedford being one-third. Girish was managing the company. He was the one with the duties to manage the company for the best interests of the company and the members as a whole. Of course, if you have a shareholder or in this case a beneficial owner who wishes to appoint a hostile director that is going to thwart the company's plans or you believe it will thwart the company's plans, then that is something obviously of concern to the company and to Girish. Q. Look at the last paragraph of your recommendations. Having advised a cautious approach, your recommendation is that you should write to Bedford's solicitors refusing to recognise that Bedford has any shareholder rights -- not even a beneficial right, apparently -- and start asserting your rights in relation to Agromin. Now, this is advice that you're giving to Girish personally, isn't it, because what you finish saying is that ultimately that may provoke a reaction which might lead to more constructive discussions? A. Yes, but that did not -- the advice to the company was in my view the advice that

was not being -- was not in conflict with the comments made at the end. We weren't advising Girish particularly in relation to the Agromin issue at that time. But there was a broader context that we couldn't ignore, and undoubtedly if there was possible for all the parties to resolve their disputes, that would be of interest to Barrowfen as well as to the individuals."

"Q. Yes. Now, Barrowfen's interests are to have its register of members properly written up, aren't they? That's in Barrowfen's interests? A. Yes, to have the register correct is in the company's interests. There are lots of other things that are in the company's interests, but I would agree with you, yes, you wouldn't want to have your register incorrect. Q. No, because Barrowfen needs to know, right, who has an entitlement to participate in the company and the company's constitution; correct? A. Yes. Yes, I would agree with that, yes. Q. And this advice, the advice that you're giving on 27 March, was completely contrary to that, wasn't it? Basically it's saying: hold on because Bedford may well be reluctant to take court action. So you end up with 180,000 shares in issue, only 60,000 of the shares are registered on the company's register, and what you're recommending is don't do anything, because Bedford may not want to incur the cost of a court action and therefore Barrowfen will avoid the so-called hard argument that it would otherwise be forced to make. That advice is solely in Girish's interests, isn't it? A. No. No, not at all. I don't see that there's anything to do with -- Girish had no personal interest here. Q. Oh, Mr King. A. I mean, I have never understood why it's been said that this is in Girish's personal interest. Girish was the director of the company, he was trying to keep the development on track faced with the possibility of a hostile director being appointed to the board. That was something that he had to take into account and try and deal with it as best he could. However, he -- he would have to -- if Bedford was to bring an application to rectify the register of members, he would have to whether that should be agreed to, which I ultimately did, and the register was amended. Q. The director is only hostile if he loses the support of the shareholders, isn't he? A director only acts with the support of shareholders. It's not for an individual director to say, well, I know what's best for the company, all the rest of the shareholders can just -- they're irrelevant. That's not the law, is it? A. I think you have to, again, see this in context. At that stage it was Girish's belief that the -- that Bedford was seeking to appoint Prashant to the board to stop the development and to force a sale of the property as part of the broader plan to put pressure on Girish in relation to the wider dispute. But that didn't alter the fact that we were advising the company on what it should do faced with the lack of any registration on its register of members."

(Mr King)

> "Q. And you must have known that the company's -- Barrowfen's best interests were for its register of members to be written up properly and with expedition so that the shareholders could exercise their statutory rights? A. I do understand that, but there is a tension between books -- the requirements of the Companies Act in circumstances where a client hasn't maintained the books, versus the requirements of the Companies Act where it is a legal requirement to have a certain piece of paper before you can write them up. I was piggy in the middle for that. Q. You must have realised that there was a conflict of interest between Girish's wish to keep Prashant Patel off the board and the company's interests in needing to have its books accurately written up as quickly as possible? A. We were advising the company here. We weren't acting for Girish personally at this point, we had no files open for Girish Patel personally at this point in time. Q. That doesn't really matter, I suggest to you, Ms Philipson, because you were taking instructions from Girish and it was clear that his instructions were that he had a personal agenda to keep Prashant Patel off the board? A. Girish's agenda was to keep the company's development on track as something that he had been working for, for a long time. That was completely in alignment with the company's best interests and the shareholders' best interests, to not waste the effort, time and money the company had expended on the redevelopment project to date. Q. What's in the shareholders' best interests is for them to decide, isn't it, Ms Philipson? A. Well, a director of the company acts in the best interests of the company. Q. But if the shareholders consider that it's in the company's interests to have an extra director on the board, the fact that a single director disagrees with that, even though it may objectively not be in the company's best interests, is irrelevant, isn't it? A. That's -- it is irrelevant, but the fact is they weren't in the books."
>
> (Ms Philipson)

359. Ms Hilliard argued that this evidence showed that Mr King was influenced by and then deliberately preferred Girish's interest in maintaining control of Barrowfen to the company's interest in having the Register written up. By contrast, Mr Stewart relied on this evidence as showing that S&B believed that it was in Barrowfen's best interests for the development to proceed.

360. I have held that it is necessary for Barrowfen to prove not only that the actual conflict rule was engaged but also that Mr King and Ms Philipson understood this and then consciously preferred the interests of Girish to the interests of the company. Unless Mr King and Ms Philipson consciously appreciated that they

were acting against Barrowfen's interests, then in my judgment they did not commit a breach of fiduciary duty. However, I accept their evidence that they honestly believed that it was in Barrowfen's wider interests to refuse to recognise Bedford's rights as a shareholder. In my judgment, therefore, they did not have the relevant state of mind.

(3) Negligence

361. Nevertheless, I must go on and consider whether Mr King or Ms Philipson ought to have appreciated that there was a conflict between Girish's interests and those of Barrowfen. In my judgment, they should have appreciated this well before the general meeting called for 8 May 2014 and advised Girish that Barrowfen should take independent advice. I have reached this conclusion for the following reasons:

i) In their letter dated 11 April 2014 Withers stated that Bedford believed that it held shares in Barrowfen and in their letter dated 7 May 2014 they specifically drew attention to section 113 of the Act and raised a concern that Barrowfen had not complied with its obligations under that section.

ii) Mr King and Mr Philipson knew that Girish had been in operational control of Barrowfen and in possession of the Register. If, therefore, Withers were right and Bedford should have been recorded in the Register as a shareholder, then it should have been obvious to Mr King Girish was responsible for that default and that both he and the company were liable to criminal prosecution.

iii) In those circumstances a reasonable solicitor would have appreciated that there was an actual conflict between Girish's personal interests and the interests of Barrowfen and that they could not continue to rely on his instructions to refuse to recognise Bedford as a shareholder. In particular, it should have been obvious to Mr King that Girish might face a personal claim from the company.

iv) Moreover, Mr King did not ask Withers to confirm his instructions from Girish at any time before 7 May 2014. When this was put to him, he

suggested that it was not for him to ask and that Rajnikant should have come forward himself:

> "Q. No, because Rajnikant was no longer a director and no longer owned Bedford. It was -- honestly, the company, you, for the company -- Girish Patel as a director of the company, the obvious advice for you to give to Girish Patel was: look, this requisition is not made by Rajnikant. It's made by Prashant Patel as a director of Bedford. As far as we can see, Bedford isn't on the register. Let's find out whether they want that to continue to be the case. A. We - Q. It was an obvious question to ask, wasn't it? A. We didn't know who all the directors of Bedford were, or who all the owners of Bedford were. It seemed to be a sensible thing to do that if, as Girish had said that Rajnikant had said that the company didn't want to be registered on the register of members, the sensible thing to do is if that is no longer the case, Rajnikant could have said, and he never did; we never heard anything from Rajnikant."

v) I found this an unsatisfactory explanation. It should have been obvious to Mr King from 11 April 2014 that Withers' instructions were that Bedford was a shareholder and wanted to be registered. But in any event it was reasonable to expect Mr King to grasp this on receipt of their letter dated 7 May 2014 and immediately before the meeting on 8 May 2014.

vi) Finally, in their letter dated 10 June 2014 Withers first stated that the page recording Bedford as a shareholder had been removed from the Register. Again, it should have been obvious that a very serious allegation was being made against Girish and that he was in an acute position of conflict. But S&B still took no action. Mr King and Ms Philipson just could not see Girish's conflict of interest.

362. Although I have found that Mr King and Ms Philipson should have appreciated that Girish was in a position of conflict, it does not follow that they were negligent in failing to resolve it. They gave a number of different reasons why they took no action which I must now examine: first, they relied on counsel who advised that a court application was necessary before the Register could be rectified; secondly, it was not possible to register Bedford without a share

transfer or transfers; and thirdly, the firm kept conflicts continually under review and considered it unnecessary to take action.

(4) Counsel's Advice

363. Barrowfen's case was that S&B failed to instruct Mr Parfitt properly in relation to the Bedford issue and that although he advised that an application to court under section 125 of the Act was necessary, the matter was straightforward and the Register could have been written up without a court application. In cross-examination Ms Hilliard suggested this to Mr King whose evidence was that Mr Parfitt's advice was to make a court application. I accept that evidence.

364. In my judgment, this was a case in which it was reasonable for S&B to take the view either that the Register could be written up immediately or that an application to court was necessary. Mr King took the first view in his email dated 28 February 2014 but the substance of Mr Parfitt's advice was that an application was necessary. That advice reflected the decision of the court in *Re Derham and Allen Ltd* [1946] Ch 31 where Cohen J (as he then was) stated this:

> "In the present case the company has taken upon itself to rectify the register without any motion to the court for that purpose, and in justification of this procedure I was referred to the judgment of Jessel M.R. in *In re Poole Firebrick and Blue Clay Co Ltd* and to *In re Reese River Silver Mining Co Ltd* which constitute authority for the proposition that where a person on the register of members has a right to rectification, and the company itself recognizes that right, it is not essential for a valid rectification of the register that an order of the court should be sought and obtained. I wish to say nothing to encourage directors to carry out rectification of a company's register without an order of the court being obtained in proceedings in which the right to rectification is duly established. The protection of the court's order is in the ordinary case essential to any rectification of the register by the removal of the name of a registered holder of shares, but in this case it was inevitable that the matter should come before the court, because it involved the sanction of the court to the issue of shares at a discount. I am satisfied that no one will be prejudiced, and I shall not require what would be a mere formality, that is to say, a motion to rectify the register. I will make the order asked for, sanctioning the issue by the company of 3,000 of its 1l. shares at a discount of 5s. 4d. per share."

365. The present case did not involve the removal of a shareholder or the issue of shares at a discount and there was no reason to suppose that the trustees of either the Mrs PD Patel Trust or the Mr DP Patel Trust had any valid grounds for opposing rectification. On the other hand, it would have been both reasonable and prudent to advise Girish to obtain counsel's advice and, if so advised, to make an urgent application to Court to rectify the Register in order to resolve his position of conflict and to give Barrowfen the protection of a court order.

366. However, no such application was ever made. Mr King and Ms Philipson explained the delay on the basis that they had started working on the application and preparing evidence but that it was an extremely busy period and they were dealing with a wide range of matters for Girish. I am not satisfied that this was a reasonable or adequate explanation for a delay of almost a year for a number of reasons:

i) On 24 February 2014 S&B was instructed but the firm did not take counsel's advice until 29 July 2014. Even then, no application had been issued by 24 November 2014 when Withers commenced proceedings. Finally, the consent order was not made until 16 February 2015.

ii) In cross-examination Ms Philipson accepted that there was no urgency in resolving the issue:

> "A. I think your question also referred to whether that was done with any urgency, and the answer to that is no. It wasn't done with any urgency. But equally it was open to Bedford to bring that application. Q. Well, we've got a situation here where the company's register has not been properly kept; correct? A. Yes. Q. Mr Parfitt said the shareholder register was a mess? A. Yes. Q. And the director that was responsible for that was Girish? A. Yes. Q. And he'd failed to maintain the company's register? A. Yes. Q. So you're advising -- you're advising Girish as a director of the company and yet you do not say, Girish, as a director of the company we need to get into court as soon as possible to correct and get an order rectifying the register so that you're no longer committing a criminal offence? A. Well -- Q. (overspeaking) You didn't give that advice, did you? A. I don't think we ever said -- used the word "urgency" as I have already agreed, but within days we were set -- I believe I had

> set out the outline of a witness statement that would need to be used for that application."

iii) Moreover, the attendance note of the meeting with Girish on 23 September 2014 recorded that it had been agreed that S&B would put all work in relation to the rectification of the Register on hold. Ms Philipson accepted this even though S&B told Withers that Barrowfen was still considering the possibility of an application to rectify the Register in a letter dated 15 October 2014.

iv) It is also clear from Mr King's email dated 28 November 2014 why there was no urgency and why the application had been put on hold. S&B had prolonged the resolution of the issue in order to assist Girish to maintain control of Barrowfen and to prevent the development from "stalling". Mr King fully accepted this in cross-examination:

> "Q. What is in the interests of Barrowfen to prolong a claim by a shareholder to rectify the register? How can it possibly be in the interests of a company to deliberately prolong, to deliberately deny a claim by a shareholder? A. At that stage the company was trying to progress the development. There were concerns that the development would be effectively scuppered if Prashant was appointed to the board because he was opposed to the development. And there had also been suggestions of -- well, we were concerned there might potentially be an injunction taken out against the company itself, and that was discussed with Jonathan Russen in the January. So tactically it could have been advantageous to Barrowfen, not to Girish but to Barrowfen, to advance the development. Q. But it wasn't in the interests of Barrowfen, was it, to deny shareholders the right to appoint another director to the board if that is what the shareholders wanted? A. That shareholder, however, was hostile to Barrowfen's best interests. Q. You say that. It was not for you -- it's not for you to determine, first of all, what is in Barrowfen's best interests. It's the shareholders that determine what is in Barrowfen's best interests, isn't it? A. I was -- Q. Ultimately -- A. I would say it is in the -- it is for the director of the company to determine what is in the best interests of the company. Q. And you describe Prashant Patel as a hostile director. I mean, that really is bizarre when Bedford was a third owner of Barrowfen. Why would Bedford be hostile to Barrowfen when it had a third interest in Barrowfen's fortunes? A. Because Prashant was opposed to the development. He made that very clear, in fact even in his

> witness statement in the Bedford -- I think in the Bedford or the Suresh rectification proceedings. He made it very clear that there was no interest in developing the property. That Girish felt was against the best interests of the company and I can see why Girish took that view."

v) Although I have found that Mr King honestly believed that he was acting in the interests of Barrowfen, in my judgment this was not a reasonable attitude for a solicitor acting for the company to adopt. It was not for Mr King to decide what was in the commercial interests of Barrowfen or to take sides with Girish or to assist him to resist Bedford exercising its rights as a shareholder. Indeed, less than two weeks later both Barrowfen and Girish had admitted Bedford's claim.

(5) The need for Share Transfers

367. On a number of occasions Ms Philipson gave evidence that it would not be possible to record Bedford as a member without a properly executed stock transfer form and she relied on section 770 of the Act. That section provides as follows:

> "(1) A company may not register a transfer of shares in or debentures of the company unless– (a) a proper instrument of transfer has been delivered to it, or (b) the transfer– (i) is an exempt transfer within the Stock Transfer Act 198, or (ii) is in accordance with regulations under Chapter 2 of this Part. (2) Subsection (1) does not affect any power of the company to register as shareholder or debenture holder a person to whom the right to any shares in or debentures of the company has been transmitted by operation of law."

368. Ms Hilliard argued that this was wrong as a matter of law and that Ms Philipson's evidence involved a very recent attempt by her to find a justification for her failure to write up the Register. She relied on the fact that S&B had never pleaded this point, Ms Philipson had not made the point in her witness statement (and Mr King had not referred to it either) and that the point was not mentioned in S&B's Skeleton Argument for trial. Mr Stewart argued that whatever the legal position she held an honest and reasonable belief that a stock transfer was required and that was the end of the matter.

369. I did not hear full argument on the point of law and in my judgment it is not necessary for me to decide it. Whether or not section 770 prevented Girish from registering Bedford as a member as a matter of law, an original stock transfer form (or even a copy of it) would have provided the best evidence of Bedford's entitlement to be registered and this is the point which S&B took in their letter to Withers dated 26 June 2014. Moreover, this letter provides contemporaneous support for Ms Philipson's evidence that she had considered section 770 and I therefore accept it. I find that soon after Mr King involved her in the matter she formed the view that a stock transfer form was necessary before Bedford could be recorded in the Register.

370. However, if (as I have found) Ms Philipson formed the view that it was not possible to register Bedford without a share transfer, this made it all the more important for Barrowfen to issue an application under section 125 as soon as possible. But there is no suggestion that she ever raised this with Mr King or Girish or advised that an application should be made as a matter of urgency. Indeed, she accepted that there was no urgency at all.

371. I also remind myself that Barrowfen's pleaded case is not that S&B was negligent in failing to appreciate that section 770 did not prevent Girish registering Bedford as a member but that it failed to advise Barrowfen that Girish was in a position of conflict and to take steps to resolve the position. Although I accept Ms Philipson's evidence, I am not satisfied that it is an answer to Barrowfen's case. Indeed, it made Girish's position of conflict more acute and it even more important for S&B to advise Barrowfen to take steps to resolve it.

(6) Monitoring Conflicts

372. Mr King's evidence was that his practice was to constantly keep conflicts in mind and to keep the issue under review as an instruction progressed. But he also said that he did not see any conflict in acting for Barrowfen. It is clear that the issue was considered at the conference with Mr Parfitt on 29 July 2014 and he advised that Barrowfen could be separately represented and that the issue needed to be resolved quickly and impartially to enable it to continue in business.

373. Ms Philipson also accepted in her witness statement that there was some discussion at the conference about Barrowfen taking a neutral stance and that it might be separately represented through a "post box solicitor". But apart from the discussion at the conference with Mr Parfitt, I was not taken to any documentary evidence which recorded that S&B ever considered whether Girish had a conflict of interest and how it should be resolved before the consent order was made on 16 February 2016.

374. I have reached the conclusion that Mr King saw no conflict because he and Ms Philipson did not take reasonable care to consider whether Girish was in a position of conflict and, if so, how that conflict should be resolved. Even when Mr Parfitt prompted consideration of this issue, they gave no real consideration to it. If Mr King and Ms Philipson had considered this issue carefully, they would have kept a record to explain why they could continue to act on Girish's instructions on behalf of Barrowfen. They did not do so.

375. Moreover, no evidence was put before the court of S&B's conflicts procedure or, indeed, to show that the firm had a dedicated procedure for considering and resolving them. If the firm had such a procedure, I would have expected it to require Mr King to consult the risk management partner or another partner in order to obtain an independent view on the question whether Girish had a conflict and whether S&B could continue to act for Barrowfen. But even if S&B had such a procedure, there was no evidence that Mr King or Ms Philipson ever considered or applied it.

376. Finally, I have reached the conclusion that Mr King and Ms Philipson saw no conflict because they were inhibited by their loyalty to Girish and wanted to do their best to assist him in the wider family dispute. As a consequence, they failed to appreciate that Barrowfen's paramount interest was to resolve the question whether Bedford was entitled to be registered as a shareholder and that once this issue was resolved, it was for the board of directors (and not Girish alone) to set the long term strategy of the company.

(7) Costs

377. Mr King's evidence was that although he prepared a without prejudice offer to Withers the terms of which required Girish to pay the costs of the Bedford Rectification Claim, Girish would not agree to this and he put forward an offer that each party should bear their own costs. When Bedford refused to accept this, he put forward an offer that Barrowfen should pay the costs. He described this as a "pragmatic solution" and said that it did not seem a "wrong outcome" for the shareholders to bear the costs. Bedford accepted that offer and Mr King also gave evidence that he believed that all of the parties were agreed that this was an acceptable outcome.

378. Mr King cannot be criticised for the original advice which he gave (that Girish should pay the costs). I also accept his evidence that once the initial offer had been refused, he considered the revised offer to be a pragmatic solution and in the interests of all parties to bring the litigation to an end. I therefore dismiss the claim that he acted in breach of fiduciary duty in relation to the costs of the Bedford Rectification Claim.

379. In my judgment, it was not reasonable to expect S&B to take that action once Bedford had accepted the offer and consented to the order. Withers could have refused the offer on the grounds that Girish had a conflict of interest and insisted that he either pay the costs personally or that the court decide the issue. They obviously considered it pragmatic to draw a line under the issue too.

(8) Conclusion

380. Although I have found that Mr King and Ms Philipson honestly believed that they were acting in the best interests of Barrowfen, I have also found that they acted in breach of the "no inhibition" principle and allowed themselves to be inhibited by their loyalty to Girish. In the present case, the breach of the principle does not lead to finding of breach of fiduciary duty but it does lead to a finding of negligence. In my judgment a reasonable solicitor would have recognised that Girish was in a position of conflict before the general meeting on 8 May 2014 and would have taken prompt and immediate steps to resolve it. I deal with those steps in greater detail below after I have considered the other Company Claims.

VI. The Writing up the Register Claim

N. Girish

381. At the board meeting on 5 February 2015 Girish approved the writing up of himself as the trustee of the Mrs PD Patel Trust and of himself and Yashwant as the trustees of the Mr DP Patel Trust and the Register was then written up in this way. Because Girish was written up as the first-named trustee of the Mr DP Patel Trust, Regulation 63 of Table A provided that he was the senior holder of the shares and that his vote (in person or by proxy) should be accepted to the exclusion of Yashwant's vote.

382. Girish adopted therefore the "self-help" approach rather than the "prudent lawyer" approach. He also passed the resolution to write up the Register in this way even though he had notice that Yashwant and Suresh disputed the authenticity of the Trustee Resignation Documents and Yashwant was the first-named trustee in the Mr DP Patel trust deed: see Appendix A.

383. Barrowfen's case is that Girish caused the Register to be written up without an order of the Court and that he ignored the way in which the trusts should have been written up to maintain his personal control over Barrowfen (when Bedford was about to be reinstated on the Register). Ms Hilliard put this to Girish a number of times but he refused to accept it. I call this claim and the claim against S&B the "**Writing up the Register Claim**".

384. I reject Girish's evidence and find that he passed the resolution on 5 February 2015 for the purpose of the preventing the trustees of the Mrs PD Patel Trust and the Mr DP Patel Trust from exercising their rights as shareholders and to maintain personal control over the company. I do so for the following reasons:

    i) In their instructions to Mr Russen dated 22 December 2014 S&B stated that the "importance of the votes attaching to the shareholders' shares is critical" and asked Mr Russen to advise on "what, if anything, Girish might do in maintaining operational control of Barrowfen".

ii) In his "Outline Points" dated 8 January 2015 Mr Russen drew attention to Regulation 63 and gave Girish two options the second of which was to amend the Register without a court order.

iii) At the consultation on 12 January 2015 Mr Russen explained the "self-help approach" and gave advice that it would be of particular advantage in relation to the Mr DP Patel Trust because of Regulation 63. He also explained that it would be better for Girish to write up the trustees of the trust naming himself first.

iv) Mr Russen identified the very significant risks associated with writing up the Register himself and, in particular, the risk that Girish might face an application for an injunction to restrain him from exercising the voting rights. Despite this advice, Girish passed the resolution at the board meeting on 5 February 2015 and he was written up as the first-named trustee of the Mr DP Patel Trust.

v) Mr King advised Girish that it would be "inevitably inflammatory" to write up the Register with his name first and that it was a "high risk approach": see his email dated 19 January 2015.

vi) The obvious inference which I draw from the instructions to counsel, counsel's advice and Mr King's advice is that Girish asked for and obtained advice to assist him to maintain control over Barrowfen and chose to follow that advice despite the significant risks associated with that course of action.

385. I am also satisfied that this was an improper purpose as a matter of law and that Girish passed the resolution in breach of his duty under section 171 of the Act. I also find that Girish adopted the "self-help approach" despite the risks which Mr Russen identified because there was an actual conflict between Barrowfen's interests and his own personal interests. In my judgment, it was in the company's interests to take the prudent lawyer approach and to obtain a court order and damaging to the company's interests to take the risks which Mr Russen identified. Accordingly, I find that by adopting the self-help approach Girish failed to avoid a situation of conflict in breach of his duty under section 175.

O. S&B

(1) Barrowfen's claim

386. Barrowfen's case was that S&B acted in breach of fiduciary duty by preferring the interests of Girish (to maintain control) over those of Barrowfen (to have the register of members written up properly and in accordance with the law) in advising Girish to write up of the Register. I have relied on S&B's instructions and the advice which both they and Mr Russen gave in making my findings in relation to the claim against Girish. I now consider them again in relation to the claim against S&B.

(2) Breach of Fiduciary Duty

387. Ms Hilliard took both Ms Philipson and Mr King to Mr Russen's advice and suggested to them that their instructions and the advice for which they were asking were intended to prevent the shareholders from exercising their rights and to assist Girish to maintain control. Both of them denied this:

> "Q. Paragraph 46 of your witness statement, something that you've already referred to before, you say that you justified the writing-up of the register, or one of the justifications of writing up the register of members that -- in the way in which Girish subsequently resolved was that, as regards the DP Patel trust, Girish was in any event bound to act unanimously with Yashwant. But that was not your thought process at the time, was it? A. It was. He'd been advised that, beginning, middle and end. Q. Well -- A. (overspeaking) on 8 May. It had been discussed in the conference with Matthew Parfitt, it had come up at the conference with Mr Russen, and -- and thereafter. Q. Well, I mean, why I say that is because if one goes back to paragraph 2.11 of the note of the conference with Jonathan Russen, it's quite clear that the reason for putting Girish first on the DP Patel trust is so that he will have preserved his position as a director. Well, you know as well as I do Yashwant would have never have agreed to act unanimously with Girish in relation to the trust. A. Well, then the trust can't vote. Q. No, that was the concern. The trust wouldn't be able to vote and there was a real risk that the PD -- that Girish's appointment in relation to being trustee of the PD trust wouldn't be valid, and therefore -- that's what this is all about. A. Well -- Q. So that the only party that would be able to vote would be Bedford. That's what this is all about. That's what the advice is all about. A. The advice is saying in addition to writing up Bedford, it should correct the entries. I mean, it would

> be wrong to leave the trusts in limbo, unable to exercise their voting powers, and have only one -- one shareholder out of three that could vote.."
>
> (Ms Philipson)

> "Q. It's clear that that is what they wanted to do. And what these instructions were all about, and what Mr Russen advised you, was how to stop that, how to stop shareholders exercising their constitutional right to change the constitution of the board? A. No, I disagree. I don't think that -- we were not asking advice for how the company's constitution could be arranged in such a way that the shareholders would be prevented from exercising their rights."
>
> (Mr King)

388. Like Ms Philipson Mr King also asserted that Girish had no personal interest in writing up the Register because the trustees were bound to act unanimously. Ms Hilliard then took him to his email dated 19 January 2015. She took him carefully through the sections which I have set out in full (above) and the following exchanges then took place:

> "Q. So what you're talking about writing up, it's all to do with Girish's loss of control. It's nothing to do with Girish being written up first because Yashwant is a retired doctor? A. No, but I think if you look at the -- that is what -- well, we can see the words that are there, but if you look at the minutes that we prepared which pretty much gave advice to Girish as to what the options were, then we were looking at -- it wasn't about control as such. Q. Well, that was just window-dressing, wasn't it, to hide the fact that what you were trying to do is preserve Girish's control; that's all it was? A. Not at all. Girish was -- was presented with the options of the self-help or the prudent approach and we told him as a director it was his decision which to go down, and we minuted what were the key considerations that he had to take into account as a director. Q. Did you explain to him that his responsibility as a director-to-to the company was to ensure that the company took a cautious approach and didn't take an approach that would be inevitably inflammatory? Did you explain that to him that that was his responsibility, his fiduciary duty to the company? A. He had -- he was given the two options. What was termed the prudent approach was one that would have put the company -- would have involved further applications to the court and is quite likely to have resulted in exactly the same outcome. I mean, these were alternatives. Yes, it would have been seen as inflammatory. We recognised that.

> But that was not a reason that the company should not act in the way that it did just because it may be seen as inflammatory. We were throughout constantly sort of treading on egg shells because there was a very bitter shareholder dispute going on, or partnership dispute."
>
> "Did you advise Girish Patel that by -- that adopting a high risk approach by naming himself as first trustee in relation to the DP Patel trust and sole trustee in relation to the PD Patel, that it was in the interests of Barrowfen to do that? A. He was advised of the two options and it was for him to make a commercial judgment of what was the right option given where matters stood. Let us just remind ourselves here, we're talking about -- we had to address the issue of the trusts. As things stood, Bedford would be the only shareholder able to vote and it was important that the trusts were addressed and addressed properly. Q. So you didn't advise Girish in his capacity as a director how to act in the best interests of Barrowfen, did you? A. Well, we did in the sense that we -- he was provided with the option. He was told it was his commercial -- well, it was his decision as a director to make that choice. Q. Your evidence is, if I may respectfully say so, Mr King, unreal. We know that there were three interested parties in this company. If you like, there was a party of Girish's family, a party of Prashant's family and a party of Suresh's family. The effect of what you advised Girish to do was effectively disenfranchise Suresh's side of the family and give control -- and give control to Girish. That was the effect of the advice that you gave, wasn't it? A. I disagree. What we were doing was to address -- this was all to do with writing up the company books. They had to be written up and we -- we went to leading counsel and we took advice as to what might be the most appropriate way for the books to be written up and he identified the two approaches which were put to Girish and he adopt opted for the self-help propose. By doing that, if he had adopted the so-called prudent approach, that inevitably would have involved more litigation. Q. Litigation that he would have lost; yes? A. I don't know. There was nothing -- I mean, there are allegations flying around at that period of time, but nothing had been proved. There are allegations flying round in circumstances where there was a bitter dispute between the brothers. Q. It's crystal clear, Mr King, you were advising Girish so that he could further his own personal interests in holding on to Barrowfen when the majority of those interested in Barrowfen didn't want him to be able to retain control? A. No, I -- I disagree. There was no personal interest for Girish."

389. I am unable to accept the evidence of Ms Philipson and Mr King on this issue and I agree with Ms Hilliard's observation that it was unreal. It is clear from their instructions to counsel that Mr King and Ms Philipson were concerned to

identify a course of action which would enable Girish to keep control of Barrowfen and when Mr Russen identified two alternatives Mr King advised Girish that the self-help approach would provide him with an option "for holding onto control of Barrowfen".

390. Even if I had not been convinced by the contemporaneous documents, there were four additional reasons why I was unable to accept this evidence. First, by email dated 5 February 2015 Ms Philipson told Mr Russen S&B's current thoughts were not to alert the other parties about the decision to write up the Register. She could offer no sensible explanation for this and in my judgment the reason why she did not want to alert them (or their solicitors) to the board resolution was the one put to her by Ms Hilliard, namely, that "all hell would break loose".

391. Secondly, one of the obvious reasons why the other parties would have taken such strong objection to Girish's actions was that he had resisted writing up the Register to record Bedford as a member. When this inconsistency was put to both Ms Philipson and Mr King, neither had a reasonable explanation for advising Girish to write up the Register (when it was in his interests) but advising him not to (when it was contrary to his interests). Both sought to justify the different treatment on the basis that writing up the trustees was "administrative" only and that it was not the same as adding or removing an entirely new party. Ms Hilliard described this as a "cigarette paper difference" and I agree.

392. Thirdly, the Mrs PD Patel Trust was governed by Guernsey law and S&B failed to advise Girish to take local advice before resolving to write up the Register. If Girish had taken Guernsey law advice, he would have been advised that his appointment was invalid and that it was not possible to appoint a sole trustee in place of Yashwant and Suresh. Mr Russen had raised the question of Guernsey law at the end of the consultation and Ms Philipson identified this as a "serious problem" in an email dated 14 January 2015. Her evidence was that she recalled the email shortly afterwards and after a review of the trust deed she was satisfied that there was no problem.

393. None of the parties called expert evidence on Guernsey law and I was not asked to decide whether the conclusion which Ms Philipson reached was either correct or a reasonable one for her to reach in the circumstances. Nevertheless, there is no provision in the Mrs PD Patel Trust deed which expressly states that the trustees may resign and appoint a single trustee in their place and in my judgment, it would have been reasonable to expect a solicitor acting for Barrowfen to want the company to take Guernsey law advice before writing Girish up as the registered holder of the trust's shares.

394. The failure by Mr King and Ms Philipson to advise Girish to take Guernsey law advice was in marked contrast to the almost excessive caution which they showed in relation to writing up Bedford as a member. They were not prepared to act at all until they had taken counsel's advice and then once they received it they were not prepared to act until they obtained a court order. The obvious reason for the difference in attitude was that it was in Girish's interests to write himself up in the Register as quickly as possible.

395. Fourthly, and finally, Mr King and Ms Philipson did not suggest that Girish or they should get in touch with Yashwant to confirm that he agreed that Girish should be written up as the senior holder of the shares held on the Mr DP Patel Trust. If the reasons given in the minutes for writing up Girish first were accurate and this was no more than an administrative exercise, a reasonable solicitor acting for the company could have been expected to advise Girish to consult Yashwant and obtain his consent. When Ms Hilliard put this to Mr King, he said that the trusts were not exercising any voting rights and this was not something which required the consultation of the trustees. Again, that was a very fine distinction which, to use Ms Hilliard's metaphor, was no more than the width of a cigarette paper.

396. I have carefully considered whether, in the light of these conclusions, I should conclude that Mr King and Ms Philipson deliberately gave false evidence in order to cover up the fact that they had consciously and deliberately preferred Girish's interests to the interests of the company in advising Girish to write up the Register and assisting him with the formalities. I am not satisfied that this

would be a fair or reasonable conclusion. Overall, I was impressed by the honesty of both Mr King and Ms Philipson.

397. I am satisfied that neither would have continued to act for Girish if they thought that he was acting contrary to the interests of Barrowfen and that they assisted him to write up the Register because they thought it was in the best interests of Barrowfen as well as Girish himself to prevent deadlock between the trustees. I am also satisfied that in looking closely at the documents again and preparing their evidence they have convinced themselves that they had sound reasons for taking this view which are not reflected in their instructions to counsel, their advice and their actions at the time. Accordingly, I find that S&B is not liable for breach of fiduciary duty.

(3) Negligence

398. Nevertheless, I find S&B liable for negligence. In my judgment, Mr King and Ms Philipson ought to have appreciated that there was a clear conflict between Girish's interests and Barrowfen's interests before 5 February 2015. Mr King's evidence was that he was not concerned that Girish might choose the self-help approach rather than the prudent lawyer approach for the wrong reasons:

> "DEPUTY JUDGE LEECH: Can I just ask a question, if I may. Mr King, both you and Ms Philipson rely on the fact that Mr Russen gave Girish effectively a choice, either the prudent lawyer approach or the self-help approach. You have just said now that he was given that choice and it was for him to decide. Did you have any concerns about what reasons he might have for choosing one rather than the other? A. What we did, my Lord, is that after the conference and I have set out the various issues arising from it in the email we have just been looking at, we then -- we spoke to Girish and said, you know, there are these two options. And I think actually I can recall -- I might struggle to immediately find it, but I recall some handwritten notes from Ms Philipson where she says you are making this decision as a director of the company, and it was down to him to make that, and the -- if you like, the pros and cons of the various routes that he had to take into account as a director were covered obviously both in the conference, but also explained in the minutes as to what was the benefits if he went down the self-help route -- the benefits -- the reasons why he might go down self-help route and they were all relatively non-controversial, but it's all to do with the practicalities of the -- who would be sensibly named as first

> named trustee. Just as much, I would say, my Lord, if the position had been -- if we'd been looking at the same position in relation to the PD Patel trust, then it would have made perfect sense for Suresh to be the first named trustee. Yashwant was purely a family member. He had no interest in the trust himself, but he was a -- effectively a neutral on both -- for both trusts so they could have the two trustees. But one was Suresh's trust. One was Girish's trust. It's just that they happened to be representing each other's trusts, although the trustee swap that I proposed would have meant that Girish would have been trustee of his family trust and Suresh would have been trustee of Suresh's family trust. DEPUTY JUDGE LEECH: Did you think he was inhibited in any way in weighing up those considerations by his own personal interests? A. No, not at all, my Lord. This was -- I don't see that there was any personal interest of Girish. This was sorting out the company books and it's not as if by putting himself as first named trustee he would then be able to exercise greater rights than he would if Yashwant had been the first trustee. They had to vote together. So to that extent it was neutral, but we needed to make a decision as to which one should be put forward. DEPUTY JUDGE LEECH: I see. A. He would have been in breach of trust, and he would have known that, and I suspect that we advised him if we went through all the papers, he would have been in breach of trust if he had voted those shares without consulting with Yashwant. DEPUTY JUDGE LEECH: But, you know, given all the other issues between the parties, you can't have thought it was terribly realistic that they would be able to agree about the way in which they would vote these shares? A. No, my Lord, I think it's right that we were at that stage, the wider family dispute was having its impact and it was preventing any form of consensual resolution or any form of running the family businesses was being compromised through the dispute, because it was a business that was dependent upon mutual co-operation and trust. It was a family business that had always been run in those ways. It lacked the shareholder agreement, it lacked the formality that we typically find in a global business, and as soon as the shareholder -- well, the wider family dispute took hold, it was preventing all of them from getting on with the business, which is why I fear it ended up in litigation across jurisdictions. That was what was happening within Barrowfen as well."

399. In my judgment, it should have been obvious to Mr King that Girish would choose the self-help approach rather than the prudent lawyer approach and to further his own interests rather than the interests of the company. Indeed, Mr King himself pointed out the personal benefits to Girish in his email dated 19 January 2015. It should also have been obvious to Mr King that it was not in

Barrowfen's interests to take any of the risks spelt out very clearly by Mr Russen. In particular, he advised that writing up the Register would be challenged; that there was a real danger that the Court would order Yashwant to be named first for the Mr DP Patel Trust; and that there was a risk that an application would be made for an injunction to restrain Girish from voting the trusts' shares until the deadlock was resolved by the court.

400. It should also have been obvious that none of these consequences (or the paralysis which would have accompanied them whilst it was the subject of hostile litigation) was in the interests of Barrowfen itself and that if Girish chose the self-help approach there was a significant risk that he was doing so for an improper purpose. In those circumstances, Mr King and Ms Philipson ought to have advised Girish that he had a conflict of interest and proposed measures to resolve that conflict.

401. Again, I have reached the conclusion that Mr King and Ms Philipson saw no conflict because they were inhibited by their loyalty to Girish and wanted to do their best to assist him in the wider family dispute. It is clear from the answers which King gave in the last passage which I have set out (above) that the impact of the wider family dispute and his hope of putting pressure on the other members of the family to reach a settlement influenced his advice to Girish.

(4) Counsel's Advice

402. It will be clear from my analysis of the evidence that Mr King and Ms Philipson brought independent thought to bear on the question whether Girish should write up the Register. However, in their evidence they also relied from time to time on Mr Russen's advice. In closing submissions Mr Stewart and his team submitted that Mr Russen's advice was a complete defence to the claim:

> "Whilst Barrowfen cross-examined both Mr King and Ms Philipson for a great deal of time on this issue, the matter is a simple one. S&B sought Mr Russen QC's advice. He advised that one permissible approach was simply to write up Girish's name in the Register of Members as the sole Trustee of the PD Patel Trust (referred to as the 'self-help' approach). Following that advice, S&B advised Girish that this was a possible option **[F/2/2793]** and Girish instructed S&B to pursue it. That is a

> complete answer to Barrowfen's complaints against S&B on this issue."

403. I reject that submission. Mr Russen did not advise that it was permissible to write up the Register. He was instructed to give advice both to Barrowfen and Girish and he was asked in terms to give advice on "what, if anything, Girish might to do in relation to maintaining operational control of Barrowfen". He gave that advice. But he also gave clear advice about the risks associated with Girish taking matters into his own hands. Having received that advice, it was for Girish to decide what course of action to take with the benefit of further advice from S&B. In my judgment, this was not a case in which counsel advocated or blessed the course of action which the client took and it should have been obvious to both Girish himself and S&B that it was not in Barrowfen's interests to take the risks associated with the self-help approach.

(5) Conclusion

404. I have found that Mr King and Ms Philipson honestly believed that they were acting in the best interests of Barrowfen but that they acted in breach of the "no inhibition" principle and allowed themselves to be inhibited by their loyalty to Girish. However, as with the Bedford claim I find that breach of the principle does not lead to finding of breach of fiduciary duty but to a finding of negligence. In my judgment a reasonable solicitor would have recognised that Girish was in a position of conflict and would have taken prompt and immediate steps to resolve it.

VII. The Suresh Resignation Claim

P. Girish

405. Barrowfen's case is that Girish forged the Suresh Resignation Letter by taking Suresh's signature from a blank pre-signed page provided in the 1990s and creating a false letter of resignation around it. It is also Barrowfen's case that he relied on it to maintain his sole control over Barrowfen in breach of his directors' duties. For convenience I also use the term the "**Suresh Resignation**

Claim" for this claim and the claim against S&B (as well the underlying court proceedings).

406. Suresh unequivocally denied signing the Suresh Resignation Letter or authorising Girish to produce it. This evidence was not challenged by either S&B or by Girish and I accept it. It was consistent with the expert evidence of Mr Rodé, Mr Radley and Dr Giles (which S&B and Girish did not challenge either). Moreover, Girish did not contest the Suresh Resignation Claim but consented to an order declaring that the letter was not authentic and that Suresh had not resigned as a director.

407. To explain why he relied on the letter, Girish gave evidence that in June or July 2013 he spoke to Mr Amin, his maternal uncle, and told him that he wanted Suresh to resign as a director and Yashwant and Suresh to resign as trustees of the Mrs PD Patel Trust. I reject that evidence for a number of reasons:

i) There is no documentary record of such a conversation taking place and Mr Amin denied that it took place in his witness statement in the Suresh Resignation Claim. In cross-examination Girish could not provide a motive for Mr Amin to give false evidence.

ii) Girish did not ask Suresh to resign directly. If he had told Mr Amin that he wanted Suresh to resign as a director, and Yashwant and Suresh to resign as trustees, he could have been expected to write to them both after this conversation and ask them to do so.

iii) However, the email correspondence which did pass between them is entirely inconsistent with Mr Amin having told Suresh that Girish wanted him to resign. Ms Hilliard relied on an email dated 11 October 2013 in which Suresh raised concerns about the non-payment of the rates. He did this in his capacity as a director.

iv) By email dated 26 October 2013 Suresh also wrote to all family members enclosing a detailed letter to Girish addressing the family dispute. In that letter, Suresh made no mention of being asked to resign or having any

intention to do so. If he had been asked to resign and had decided to do so in order bring about a family reconciliation, he would have said so.

408. When Ms Hilliard suggested to him that he forged the Suresh Resignation Letter, Girish generally relied on the privilege against self-incrimination. However, on one occasion he chose to answer the question and definitely denied that he had forged it. I reject that evidence and I find that Girish forged the letter for the following reasons:

i) Suresh's evidence was that he gave pre-signed blank papers to Girish in the 1990s from which Girish would have been able to generate the Suresh Resignation Letter. Although Girish denied this in cross-examination, I accept Suresh's evidence. A fax dated 8 January 1997 from Suresh to Girish provides direct contemporaneous evidence that Suresh provided Girish with signed letterheads and Girish admitted that he had given signed letters to Suresh.

ii) The joint expert statement of Mr Radley and Dr Giles dated 8 June 2015 provides strong evidence that the Suresh Resignation Letter was not created in 2013 and was derived from one of a number of sheets of paper signed in the 1990's in blank. It also provided strong evidence that the header and footer were subsequently removed and then the text added.

iii) There is no dispute that on 16 April 2014 Girish produced the letter to S&B. He later accepted that the letter was not authentic and that Suresh had not resigned. But he offered no explanation for how it came to be in his possession.

iv) He also produced the letter dated 21 November 2013 in which he purported to acknowledge the Suresh Resignation Letter. However, he claimed to have sent it by post rather than by fax or email even though he sent an email to Mr Nokiah in Malaysia on the same day. Nor did he keep any record of posting the letter (and there was no electronic "footprint" to show when it was created).

v) If Girish had received the Suresh Resignation Letter through the post on 11 November 2013 and acknowledged receipt on 26 November 2013, I have no doubt he would have responded to Suresh's letter dated 26 November 2013 seeking the appointment of Prashant as a director protesting that Suresh had just resigned as a director. But he failed to do so.

vi) The obvious inferences to draw, therefore, are: (a) that Girish forged the Suresh Resignation Letter and submitted it to Companies House when he received Suresh's letter dated 26 November 2013 to prevent Prashant's appointment; and (b) that he also forged the letter of acknowledgement to give the impression that the Suresh Resignation Letter was genuine and that he had received it before Suresh's request to appoint Prashant. In the absence of any explanation from Girish, I draw those inferences and find that Girish forged both letters.

vii) Girish had the only obvious motive to forge the Suresh Resignation Letter, namely, to prevent the appointment of Prashant as a director and to maintain personal control of Barrowfen. That motive was a strong one for the reasons which I have given.

409. The text of both TM01 forms show that they could only have been filed by a director or the company secretary. In December 2013 Girish was both a director and the company secretary and only he could have filed the first TM01. In June 2014 the second TM01 could have been filed by him or by Amrit, who was now the company secretary. I find that Girish filed the first TM01 and that he either filed the second TM01 or instructed Amrit to do so.

410. I also find that Girish forged the Suresh Resignation Letter and filed the TM01s (or gave instructions for the second TM01 to be filed) to frustrate or prevent Suresh from exercising his power as a director to call a meeting to appoint Prashant. I also find that Girish knew that this was not honest or reasonable conduct for a director. Accordingly, I find Girish forged the letter and filed (or caused to be filed) the forms in breach of his statutory duty under section 172 of the Act.

Q. S&B

(1) Barrowfen's claim

411. Barrowfen's case is that S&B intentionally preferred the interests of Girish over those of Barrowfen, by acting for both Barrowfen and Girish in relation to the Suresh Resignation Letter. In particular, Barrowfen's case is that S&B ought to have advised that Barrowfen should take independent advice through the appointment of an independent director and that it should accept at an early stage the clear evidence that Suresh had not resigned.

(2) Breach of Fiduciary Duty

412. S&B's primary defence to the claim was that it advised Girish that Barrowfen should remain neutral and although it continued to act for Girish, he paid the firm's costs and ultimately paid the costs of the Suresh Resignation Claim. Mr King's evidence was that Girish's instructions were that the letter had been received and that Amrit confirmed that she had opened the envelope. When it was put to him that there was an obvious conflict his evidence was as follows:

> "Q. But you knew by that time that the majority of those interested in Barrowfen didn't any longer want Girish to have sole control of the company; yes? You knew that by that time, didn't you? A. I think certainly -- do you mean sole control, what, at board level? Q. Yes, at board level. They didn't want Girish controlling the company -- A. I accept that Bedford was seeking to appoint Prashant to the board, and Suresh was maintaining that he had not resigned. Q. Yes, exactly. So did you not think that there was a conflict of interest there, and you were continuing to act for Barrowfen and Girish in circumstances where the majority of those interested in the company were saying, "We don't want Girish in sole control. We want Suresh back on. Suresh, we want his directorship confirmed and we want Prashant Patel as a third director"? A. Well, the Suresh resignation letter on my instructions from Girish was disputed. He did not accept that that was forged. In any event, as far as a conflict was concerned, we took the view that that issue was best addressed by the company remaining neutral in any proceedings. And that is why in our letter of response to the letter of claim, we made it very clear that in our view Barrowfen should not be involved in these proceedings and should remain a neutral party, and that the dispute really was between Girish and Suresh."

413. Ms Hilliard then put to Mr King the letter dated 12 June 2015 which S&B sent to Withers shortly before the Suresh Resignation Claim was settled. She suggested to him that by putting forward an offer that Barrowfen should pay the costs of £200,000 he was hardly being neutral. She then suggested to him that either he preferred Girish's interests over the company or that he had been negligent. Because this was the sequence of questions in which Ms Hilliard formally put her case to Mr King in relation to the Company Claims I set it out in full:

> "Q. When you say at paragraph 122 of your witness statement that you did not at any stage prefer Girish's interests, that is just plain wrong, isn't it? This letter gives the lie to that? A. I disagree. That is not the case. Q. I think -- just for the avoidance of doubt, Mr King, I think you know the case I have been putting to you yesterday and this morning. It is basically in relation to each of the Bedford claim, the writing up of the register and the Suresh resignation proceedings, Barrowfen's claim against you is that you and your firm deliberately preferred the interests of Girish to those of Barrowfen. A. Well, I disagree, for all the reasons that have been given in relation to the Bedford proceedings that we went through yesterday and in relation to the Suresh resignation proceedings. The substantive issues in that case, we advised Girish, we advised the company it should take a neutral role. That was agreed to by the court and it did, in relation to the substantive issues, take a neutral role. So -- not preferring the interests of Girish over the company. Q. No, what you did, Mr King, is that you provided advice that furthered Girish's interest in maintaining control over Barrowfen for his benefit, and the advice was against the interests of Barrowfen in its proper corporate governance. And for its register of members to be written up properly and with due expedition? A. The Suresh resignation proceedings were all to do with whether or not a letter of resignation was authentic or not. That was the sole issue that we were concerned with. We obviously had to take instructions from Girish in relation to the factual aspects, and on the factual aspect, it appeared that the letter of resignation was genuine. It is just that the expert evidence, although not conclusive at all, but the assessment I had was that if this case had gone to trial, I thought it was more likely than not that a declaration would be made that the letter of resignation would be held to be inauthentic and on that basis, I advised Girish that it was better to settle the proceedings rather than take them all the way through to trial. Q. In acting for Barrowfen and Girish at the same time, you breached your fiduciary duty to act in Barrowfen's best interests. A. Well, I disagree. We were acting in substance -- we were acting in substance for Girish in relation

> to the Suresh resignation proceedings. I think we did absolutely the right thing, and this was endorsed by leading counsel who agreed with the approach, that the company should remain neutral in those proceedings. That avoided a conflict of interest, enabled the proceedings to take place, despite the fact -- and we made this very clear in the letter of response, but notwithstanding that we said you should be issuing against Girish, Suresh commenced the proceedings against the company. He fed the company into a position where it had to act at the very beginning of the case. That should never have happened.
>
> Q. And you acted negligently, didn't you, in the advice that your firm gave to Barrowfen? A. No. Q. Because you failed to take reasonable care to look after its interests? A. I think we looked after the interests of Barrowfen. Q. And that there was at all times, I suggest to you, an actual conflict of interest between Barrowfen and Girish, but you failed to do anything about it. You failed to get Barrowfen's consent in writing to acting for both Girish and Barrowfen when there was an actual or potential conflict of interest? A. Well, I don't see how you can say that because we addressed the issue of who we were acting for in the engagement letters. And we had instructions. At that time, we had to take instructions from Girish who was the sole -- as it appeared was the sole executive director of the company. Q. And your firm failed to advise that there was a conflict of interest, or at the very least a potential conflict of interest, and you failed to cease acting, which is what the SRA code requires? A. There was no conflict of interest because we took the -- because we advised the company that it should remain neutral in the proceedings, given that the allegations all related to issues that Girish was going to have to defend. There was no conflict. And leading counsel also thought there was no conflict."

414. I accept that Barrowfen became a neutral party after the order made by Registrar Barber on 16 April 2016. However, I do not accept that S&B advised Barrowfen to remain neutral or that it did so at any time before that date. I reach this conclusion for the following reasons:

i) In the letter to Withers dated 10 July 2014 S&B stated that it was acting for Barrowfen and not Girish. However, it contained no suggestion that Barrowfen was neutral and, to the contrary, S&B dismissed the claim that Suresh had not resigned in an aggressive tone.

ii) In the Fourth Engagement Letter dated 24 November 2014 S&B agreed to act for both Barrowfen and Girish in relation to resignation of Suresh. There was no suggestion in the letter that Barrowfen should be neutral

or should play no part in any proceedings. Indeed, S&B acted for both parties in the Suresh Resignation Claim pursuant to the retainer created by this letter.

iii) In his email dated 19 January 2015 Mr King advised Girish that "we have little alternative other than to contest the claims vehemently". Moreover, I am satisfied that S&B took that position on behalf of both Girish and Barrowfen until Registrar Barber's order.

415. Although S&B did not advise Barrowfen to take a neutral position, I am not prepared to find that Mr King deliberately preferred the interests of Girish over the interests of Barrowfen for the same reasons which I have given in relation to the first two Company Claims. He struck me as an honest witness who would not have consciously acted against the interests of Barrowfen.

(3) Negligence

416. Nevertheless, I find that there was a clear and acute conflict between Girish's interests and the interests of Barrowfen which should have been obvious to S&B on receipt of Withers letter dated 4 July 2014. It was in Girish's personal interests to deny that Suresh was a director and it was in Barrowfen's interests to resolve this issue as quickly as possible. Moreover, for the reasons which I have set out above, S&B could not safely act on the instructions of Girish alone until this issue was resolved.

417. I am satisfied that Mr King failed to consider this conflict of interest and whether S&B could continue to act for Barrowfen before he replied on 10 July 2014. In my judgment, he ought to have advised Girish that S&B could no longer act for Barrowfen and that it should be separately represented. Instead Mr King replied dismissing Suresh's claim.

418. I am also satisfied that Mr King failed to consider carefully the question whether S&B could properly accept instructions to act for both Barrowfen and Girish before sending out the Fourth Engagement Letter. In my judgment, there was an actual conflict of interest and S&B should not have acted for both parties under the SRA Code of Conduct 2011 or in accordance with the terms its

retainer. In those circumstances, Mr King should have advised Girish that if he wished to instruct S&B personally, Barrowfen should act separately and also be separately represented.

419. I am not satisfied, however, that Mr King should have advised Barrowfen to admit that Suresh had not resigned either before or after he ceased to act for Barrowfen. Although Suresh had obtained the expert evidence of Mr Rodé and had supplied at least one of his reports to S&B by January 2015, Mr Russen's advice was that it was not "categorical in its conclusions".

(4) Conclusion

420. In my judgment, Mr King was negligent because he was inhibited by his loyalty to Girish and, as a consequence, he failed to take an obvious conflict of interest seriously or take steps to address it. I am satisfied that by 10 July 2014 a reasonably competent solicitor who was not inhibited by loyalty to Girish would have had very serious concerns about whether the company could function and whether he or she could properly act for Barrowfen on any instructions given by Girish at all.

VIII. The Trustee Resignation Claim

421. The final Company Claim relates to the Trustee Resignation Documents. Barrowfen claims that they were forged by Girish in a similar way to the Suresh Resignation Letter by creating false documents around signatures that had been provided to him in the 1990s. I call this the "**Trustee Resignation Claim**". However, no separate claim is made against S&B.

422. Suresh denied signing the Trustee Resignation Documents or authorising Girish to produce them. He also gave evidence that Yashwant denied signing them or authorising them (and he denied doing so in 2014). This evidence was not challenged by Girish (or by S&B) and I accept it. It was also consistent with the expert evidence which Girish did not challenge either.

423. Although Girish generally relied on the privilege against self-incrimination, he also gave evidence denying that he forged the Trustee Resignation Documents.

I reject that evidence and I find that Girish forged those documents for the following reasons:

i) I have accepted Suresh's evidence that he gave pre-signed blank papers to Girish in the 1990s and that evidence is supported by the fax dated 8 January 1997.

ii) Mr Rodé's expert report dated 25 November 2014 provides strong evidence that the Trustee Resignation Documents were not created in 2013 and were composite documents derived from sheets of paper signed in the 1990s.

iii) There is no documentary "footprint" in relation to these documents. If they had been genuine, Suresh, Yashwant and Girish would have taken legal advice in relation to them and there would have been additional documents supporting them, e.g., vesting deeds or transfers of assets. Girish produced no such documents.

iv) By email dated 27 March 2014 Mr King wrote to Girish stating that he understood from one of their recent conversations that it was likely that "the other shareholder" would vote with Bedford. Barrowfen submitted that this was a reference to the Mrs PD Trust and that there is a strong inference that as at that date Girish had asserted no claim that he had replaced Suresh and Yashwant as trustee of the Mrs PD Trust. I accept that submission.

v) On 16 April 2014 Girish informed S&B that Suresh and Yashwant had resigned. However, they appointed a proxy for the meeting on 8 May 2014 and Ms Hilliard submitted that it was clear both from this and from Withers' letter dated 7 May 2014 that they were unaware that he had made that claim. Again, I accept that submission. Moreover, in cross-examination Girish could not recall any communication with Suresh and Yashwant about their resignation prior to that letter of 7 May 2014.

vi) Girish had an obvious motive to forge the Trustee Resignation Documents, namely, to prevent Yashwant and Suresh exercising their

> rights as the trustees of the Mrs PD Patel Trust to appoint Prashant a director and to enable him to maintain personal control of Barrowfen.

424. I also find that Girish knew that it was not honest or reasonable for a director to forge these documents for such a purpose and that he did so (and then relied upon them) in breach of his statutory duty under section 172 of the Act. In the Skeleton Argument for trial Ms Hilliard summarised her conclusions in relation to the Company Claims as follows:

> "In summary, Barrowfen claims that Girish's conduct in the period November 2013–July 2015 was all of a piece: it was a consistent and dishonest course of conduct involving the fabrication of documents and the improper removal of Bedford from and writing up of the register of members in furtherance of his plan to maintain control of Barrowfen for his own benefit. This involved serious and consistent breaches of his directors' duties owed to Barrowfen."

425. After hearing the evidence and determining the Company Claims I am satisfied that this was an accurate description of the period between November 2013 and July 2015. I am also satisfied that during that same period S&B lost sight of the best interests of Barrowfen because of their loyalty to Girish although I have found that this resulted in negligence rather than any breaches of fiduciary duty.

IX. The Administration Claim

R. Deceit

(1) Barrowfen's claim

426. Barrowfen's case is that at the end of the meeting on 9 December 2015 Prashant asked about the purpose of the assignment to Zurich and that it was obvious from his enquiries that he wanted to know whether there was any risk that Barrowfen II might take precipitate action to enforce the Charge. It is also Barrowfen's case that Mr King's fraudulently misrepresented that there was nothing to tell about the assignment, that Barrowfen II (and Girish) had no plans to take such action and that the reason why Barrowfen II had taken the assignment was to prevent enforcement action being taken.

(2) The Representation

427. Both attendance notes record what Mr King said in very similar terms. The S&B note records that he said: "there was nothing in particular to tell P about this". The Withers' note records that he said: "There is no particular story." What Mr King said, therefore, is really captured by the modern expression: "There is nothing to see here." The critical issue, therefore, is what Prashant was asking him and, perhaps, even more importantly the context in which he framed the question.

428. Here also there is no real difference between the two attendance notes each of which record that Prashant asked two questions:

i) Both notes record that Prashant asked whether he could see the terms of the loan.

ii) The S&B Note then records that Prashant asked whether "there was a particular position as regards the assignment". The Withers note records that he asked: "Is there a demand payment provision?" and "what is the position?"

429. In order to make good its case Barrowfen has to satisfy the court that Prashant's second question was directed not at the terms of the loan itself but at the attitude of the creditor and whether there was a risk that it would take "precipitate action". Moreover, Barrowfen also has to satisfy the court that Mr King understood his second question in that way and then deliberately misled him.

430. None of the witnesses had an independent recollection of these questions and the answer. Prashant made no mention of them in the email which he sent on the day after the meeting and his evidence was based on the S&B note which he had seen for the first time approximately five years after the meeting. He gave evidence that it was "implied at the meeting that there would be no exercise of the charge". But in his subsequent answers, he confirmed that the specific questions which he asked were about the terms of the loan:

> "MR STEWART: You knew, didn't you, that there was no assurance at all of any kind that Barrowfen II or Girish Patel

> would not exercise the powers under the charge of which you were aware? A. No, I don't agree. It was -- at the meeting it was implied that there would be no exercise of the charge. I mean, why else would we be working towards looking at this buy-out exercise? For me it was implied that there would be no enforcement. Q. Implied? A. Yes. I'm sorry, I missed the question. Q. Implied from what? A. From our discussions. From -- from the questions I was asking, from our discussions. From just the general sentiment of the meeting that the parties were now going to work together to look at a cross disposal exercise and agree terms. That's -- you know, from that I believed that the company was safe. And I'd asked Mr King and Girish -- I had asked them for three things. One, the cash flow statement showing what was due over the next few months, because if I saw that it was forecasted in January or in March that the interest payment was due, then I would be taking steps to pay that interest statement off. I was asking for the demand payment provision, so I knew if the loan was demanded how many days I had to pay this off. And I was asking for the terms of the loan as well because there was two things in my head that -- I mean, I was being told the original terms, but in my head I was wondering whether there was a variation of the terms because Girish was unilaterally acting as a director up until 1 December, and whether there had been any addendum to that, whether there was some sort of amendment to that. So what I was asking for was the full terms of what this loan is, and I can see -- I mean, Mr King was saying to me that it's not a new loan, it's the old loan. But what I was asking was: give me the full terms. I want to know everything about this loan, this assignment that's happened. Q. Just pausing there, Mr King did tell you that it was the same terms as the original loan and you knew from that, didn't you, that its terms had expired? A. Yes, I did. Q. And you knew, didn't you, that therefore Barrowfen II was in the same position as Zurich had been? A. That's correct. Q. And you knew that Zurich had been threatening to wind up the company? A. That's correct, yes. Q. You believed, as we see from the 1 December email, that Barrowfen II had the right to appoint a receiver? A. That's correct, yes. Q. And there was nothing said at the meeting which changed any of those facts, was there? A. No, there wasn't."

431. I put both attendance notes to Girish in re-examination. But he could not recall the exchange and could add nothing to them. It was also clear from Mr King's evidence that he had also tried to reconstruct what had taken place by looking at both notes of the meeting:

> "Q. Mr King, the assignment of the loan was not a measure taken to prevent Zurich from enforcing the loan. It was an assignment taken by a vehicle of Girish Patel to further his own interest, to

put himself in the driving seat if his brothers didn't give way in relation to the purchase of the shares? A. There was absolutely no unfairness at all in what was being proposed. The assignment of the loan, I think it is wrong to characterise the assignment as having one single purpose. The company was in a position where Zurich were threatening to enforce the loan and the company was in stasis, as I have described. And the option of taking the charge had the dual purpose of being able to deal with the sense of stasis that the company was in and secondly, to prevent a premature creditors' winding-up or a receivership. Q. You deliberately gave a misleading impression, didn't you, that there was nothing to tell about the assignment? A. I do not believe that at all, and I think we do need to look at the other note, because I think it is unfair- Q. We will come on to that. Can -- the sooner you answer my questions, we will get on to the other note. A. As long as you do put that note to me. Q. I will, I will. A. A misleading impression? No, I don't think so at all, because we had made it clear that Girish, if we can go back to the note -- DEPUTY JUDGE LEECH: Can we go back to the original attendance note, not the second one. The one you are looking at. MS HILLIARD: The original one. A. I have considered this very carefully because where we had reached in the meeting, we had already talked about creditors, and we had also talked about the cashflow needs, and this was just at the end of the meeting, and I had, I think -- well, I said: is there anything else. Well, at various stages I said: is there anything else that Prashant wished to raise, and he specifically raised the loan assignment, and he asked whether he could see the terms of the loan. Now, this wording: "... and asked whether there is a particular position as regards to this assignment…" I am afraid in reading that, I don't know what that really means, but I believe at the time he was simply trying to find out whether or not there are any particular terms to that assignment. He was not questioning whether -- he was not asking questions as to whether or not it was the intention of Barrowfen Properties II to enforce the loan at that stage and -- Q. Look at -- A. Sorry, I am going to finish. Q. Go on. A. It is consistent with what we have subsequently seen in his email of 1 December, which I hadn't seen before the institution of these proceedings, and disclosure in these proceedings, where it is quite clear that he is happy for the loan to be enforced. I don't think he was worried about that. I don't think he was interested. But in any event, at the meeting I believe that those notes just show that he was asking questions about the terms of the assignment and then secondly -- and sorry, I probably am repeating myself, had that question been asked, is it your intention to enforce the loan, I would have answered that openly. We weren't trying to hide anything. We had told them about the loan. Notice of the assignment had been given. Everyone knew that insolvency was on the cards for this company if a buyout couldn't be agreed.

> And there was absolutely no reason why I would not have answered him in that way."

432. I accept Mr King's evidence on this issue. Based on the two attendance notes, it is more likely than not that Prashant's questions were directed at the terms of the loan rather than the risk of enforcement by Barrowfen II. I place particular reliance on the Withers' note and on Prashant's evidence in which he accepted that he asked Mr King about the demand payment provision. I find, therefore, that on a balance of probabilities the two attendance notes were recording a question by Prashant about the terms of the loan and, in particular, whether it required a demand to be served and Mr King's reply that there was nothing unusual or significant about its terms.

433. Barrowfen placed particular reliance upon Prashant's statement (as recorded in both notes) that he did not want a situation where the company defaulted on loan payments to Barrowfen II. If anything, this undermines Barrowfen's case. It is clear from both notes that Mr King did not give Prashant any assurances in response to that statement but offered only to provide him with a cashflow statement. I am satisfied that Prashant left the meeting with comfort that Barrowfen II would not enforce the Charge but in my judgment he did not do so in reliance upon a misrepresentation by Mr King (or adopted by Girish). Accordingly, I dismiss the claim for deceit on the basis of my finding that Mr King did not make the pleaded representation.

(3) Knowledge or recklessness

434. I add that Mr King freely accepted that if Prashant had asked him about Barrowfen's intentions and he had answered that there was nothing to tell, that would have been a half truth. He also said with some conviction that if he had been asked that question he would have given a very different answer. I accept that evidence and I am satisfied that whatever question Prashant asked and however he answered it Mr King did not make a false statement knowing it to be untrue or reckless as to its truth or falsity.

(4) Inducement

435. S&B placed great reliance upon the fact that Barrowfen applied to amend to advance the deceit claim on the basis of the attendance notes and that Prashant had no independent recollection of relying upon any assurance given by Mr King. They used the term "**Retrospective Construct**" to describe the allegation and reminded me that Birss J had considered this a strong point on the strike out application for permission to amend: see [2020] EWHC 1145 (Ch) at [68]. They also submitted that Prashant had created a story and put forward a dishonest claim.

436. Barrowfen submitted that because Mr King's half-truth was a powerful instrument of deception it was unsurprising that Prashant was unaware that he had been misled until he saw the notes of the meeting because Barrowfen was not put into administration until two months later and when proceedings were served he was focussed on the entry into administration in February 2016. It also submitted that it is unsurprising that reliance by S&B on the notes of the meeting caused Prashant to reflect upon what Mr King had said.

437. I accept Barrowfen's submission that a half-truth may be a powerful instrument of deception and that it may only become apparent that the representee has been misled by it long after the event. I also accept that upon reading the attendance notes of the meeting Prashant became convinced that he had been misled by Mr King and Girish at the meeting. On any view, neither of them was open or frank with him at the meeting about the steps which they had already taken in preparation for putting Barrowfen into administration. I therefore reject the submission that Prashant made up a dishonest claim against Mr King.

438. However, if Mr King had represented to Prashant that there was no risk (or a very small risk) of Barrowfen II putting Barrowfen into administration at the meeting on 9 December 2015, I would have expected him to record it in his email to Rajnikant, Suresh and Yashant setting out the major points from the meeting a day later. Likewise, I would have expected him to express some sense of grievance about being misled before seeing the attendance notes of the meeting. The fact that he did neither fortifies my conclusion that Mr King did not make a material misrepresentation to him at the meeting on 9 December 2015. I am also satisfied that whatever Mr King said towards the end of the

meeting in answer to Prashant's questions, it did not influence his conduct or the conduct of Barrowfen.

(5) Conclusion

439. Both parties made detailed submissions in relation to a number of other points arising out of the deceit claim. In the light of my findings in relation to the principal issues it is unnecessary for me to deal with any of those points and I dismiss the claim for deceit for the reasons which I have already given. I return to the outcome of the meeting on 9 December 2015 in the context of the other causes of action (below).

S. Other Claims: Findings of Fact

440. Apart from the claim for deceit, Barrowfen advanced a number of different claims against both Girish and S&B. Although there was only one claim against them as joint tortfeasors (i.e. the claim for conspiracy) there were a number of different issues of fact which were common to both claims. I therefore set out first my findings in relation to the common issues of fact before addressing each claim separately.

(1) The Plan

441. Barrowfen submitted that Girish conceived a plan to step into the shoes of Zurich, to enforce the Loan and to acquire the Tooting Property and Ms Hilliard relied heavily on Girish's email dated 6 October 2015 to Mr King which I have set out in full (above). Barrowfen also submitted that the steps which Girish and S&B took after the meeting on 26 October 2015 provided strong evidence that by that date he had made a decision to take an assignment of the Loan and Charge (through a separate corporate vehicle).

442. Although Girish began by denying the existence of the plan, he was at greater pains to stress that he wanted to buy the Tooting Property at a fair price and towards the end of his evidence he accepted that administration was an alternative way to buy the Tooting Property:

> "Q. So it was in your mind by 6 October to take an assignment of the Zurich charge so that you personally or another company you controlled could buy back the Tooting property? A. This is not correct. I think what I had basically had discussion with this person was the fact that what is the process and how it is done. The concern that I had was the fact that if the liquidation takes place by Allied Dunbar then it would be a distressed sale, and how to -- I was concerned as a shareholder and as a director of Barrowfen Properties Limited in the interests of the company to ensure that we get a maximum value of -- maximum value for the property. So I did not want the sale of the property to be in a distressed condition, which was my main, main concern all along I was a director. And this basically -- just the fact that I -- because I didn't know whether Richard had known or not, but I just passed on the information of my telephone conversation that I had, and I just made the notes of what this telephone conversation relayed this message to Richard. Q. But look at the last two lines of this email, please, Mr Patel. You say you want -- A. I have looked -- I have looked at it. As I said, the reason why -- when I said -- Q. Can you wait until I finish my question? A. Yes, please. Q. So you say you asked Mr King to consider: "... if this may be a way to have control over the sale of the property and conduct a buy back of the property if my brothers do not give way in relation to the purchase of their shares." A. Yes. So what I'm saying is that -- that we did not want the matter to be in a distressed sale. We wanted it to be at an independent market valuation basis, a fair market value, and if there was any way that the property -- this route can be bought back, because we were -- I think -- in fact my memory serves me correct, if there was -- if Stevens & Bolton was drafting the letter on a basis of purchase of share, it's maybe an alternative way to basically buy the -- buy the property, which is what my brother wanted to sell it to me at that time, and since 2003 they have always expressed interest all along that they basically would prefer to sell the property to the operational director who is residing in that country."

443. I am satisfied that after the meeting on 26 October 2015 it was Girish's intention to take an assignment of the Loan and the Charge and to put Barrowfen into administration and that his purpose or "tactical aim" (to use the language of the project plan) was to preserve his control over Barrowfen and its principal asset, the Tooting Property.

444. I make this finding of fact subject to two qualifications. First, I accept Mr King's evidence that at that stage it was not Girish's intention to take these steps if a "consensual solution" could be achieved and, in particular, if he could negotiate

a purchase of the shares in Barrowfen owned by Bedford and the Mr DP Patel Trust. Secondly, I accept Girish's evidence that the purpose of the plan was not to acquire the Tooting Property at an undervalue or as a distressed purchase.

445. I also find that Girish's overriding motive was to keep control of the business and the development of the Tooting Property either by buying the other shareholders out or, if necessary, by putting the company into administration and buying the Tooting Property from the administrators. As Mr King told Ms Walker and she noted in her detailed email dated 23 October 2015 to Mr Coakley, Girish wanted to preserve the business for his children and did not want Prashant and the other members of the family to use it as a weapon or leverage in the wider family dispute.

446. Ms Hilliard submitted that it was a necessary element or incident of the plan that Girish should not disclose its existence to the other directors, Prashant and Suresh. It was put to Girish that he knew that he had a duty to tell his fellow directors that he planned to put Barrowfen into administration (and that he did not tell them). Girish chose not to answer those questions relying on the privilege against self-incrimination.

447. I consider whether Girish committed a breach of fiduciary duty and, if so, whether he knew that it was a breach of duty in the context of the claims against him (below). However, I am satisfied that it was a necessary part of Girish's plan not to disclose to Prashant and Suresh that he intended to put Barrowfen into administration and I have reached this conclusion for the following reasons:

i) Both Prashant and Suresh gave evidence that they were not told about the plan. I accept that evidence. Mr Stewart suggested to Prashant that he was fully aware of the risk that Barrowfen II might enforce the Charge (and I have set out the relevant passage above in the context of the deceit claim). But he did not suggest to Prashant that Girish or S&B disclosed Girish's plan to put Barrowfen into administration.

ii) Mr King stated in his witness statement that it would not have been in Girish's interests "to have volunteered at the meeting [on 9 December 2015] any plans for the possible appointment of administrators and he

was my client." Moreover, when it was put to Mr King that he never told Prashant and Suresh that Girish planned to put Barrowfen into administration (or advised Girish to tell them), he did not suggest otherwise.

iii) Neither Girish nor Mr Stewart pointed to any documents in which either Girish or S&B had disclosed the existence of Girish's plan to either Prashant or Suresh.

(2) Agreement with the Administrators

448. Barrowfen did not submit or suggest to Girish that he reached an agreement with Mr Coakley (whether binding or otherwise) to sell him the Tooting Property on 26 October 2015. Nevertheless, on the basis of his emails dated 22 October 2015 and 15 April 2016 Ms Hilliard suggested to him that he believed that he had reached such an agreement. He denied this:

> "Q. What was the end exercise that you thought that you'd agreed with the administrators? A. So again I repeat, I think that I may have misused the word "agreement". The procedure or the process on which the matter was describing to at the meeting was the fact that the property will be marketed in open market basis with the brochures, and the proceeds from that sale of that property will then be paid off to the creditors, and eventually the balance of it will be paid out to the shareholders. That was the kind of procedure. Maybe the word "agreement" is incorrectly used there, but the procedure and the process of which the administration will be undertaking the sale of the marketing and paying off the creditors. We didn't realise what -- first of all, didn't realise that the -- probably I may not have understood this law on insolvency and so on, but I think the suggestion here is basically that the company is being taken out of administration and so this is an email in response to that, and maybe -- I may have submitted without my knowledge that this is a possibility and I'm just basically sending that particular email."
>
> "Q. You thought you had an agreement with the administrators that they'd sell the property to you, didn't you? That's what you thought. A. That is -- so again I repeat, and I basically -- I basically want to rest my answer to that, to your question. I've got nothing further to add."

449. Mr King was cross-examined about Ms Walker's notes of the meeting and he also gave evidence that no agreement was made with Mr Coakley at the meeting

on 26 October 2015. I accept the evidence of both Girish and Mr King that they did not reach agreement with Mr Coakley that on his appointment as administrator he would sell the Tooting Property to Girish (or a company controlled by him).

450. I also accept Girish's evidence that he was critical of the Administrators because they had not explained to him that the administration might be reversible and that they might take Barrowfen out of administration without the Tooting Property being sold at all. Indeed, Mr King's evidence in his witness statement (which Barrowfen did not challenge) was that he did not expect that Suresh and Prashant would ever have looked to repay the Loan with a view to continuing the development.

(3) Girish's Resignation

451. Although it was not really in dispute, I find that Girish remained a director of Barrowfen until 16 February 2016. Under cover of an email timed at 15.01 S&B sent his letter of resignation to Kingsley Napley. Although the letter was formally delivered by hand to Gorst Road, neither he nor Mr King could have anticipated that it would come to the attention of either Suresh or Prashant, who were the other directors, until after S&B's email to Kingsley Napley.

(4) Barrowfen II

452. There was no real dispute either that Girish was a shadow director of Barrowfen II from its incorporation. Mr Radmore's evidence was that he was asked by Girish to become a director and that he agreed to do so on terms that Girish gave him an indemnity against all liabilities. The substance of his evidence (which was unchallenged) was that he had very limited involvement in the operations of Barrowfen II and that he acted on Girish's instructions either directly or communicated to him through S&B. In particular, in his witness statement he gave the following evidence:

> "I did not have any input as to the timeframe for the repayment of the loan by Barrowfen, the details of which were in the letter dated 15 February 2016 which had already been signed by Kiraj Patel. I would with hindsight say that a request to repay a loan of

> this size in less than a day was unreasonable in the circumstances. I was not made aware that this was part of the Barrowfen II's strategy until I received the Letter of Demand signed by Kiraj. I do not recall discussing or considering any time periods at the relevant time."

453. When Ms Hilliard put to Girish his second email to Mr Radmore dated 28 October 2015 (in which he stated that he would have day to day control of Barrowfen) Girish declined to answer relying on the privilege against self-incrimination. However, Mr King had to accept that Girish was a shadow director of Barrowfen II:

> "Q. The point that I wanted to put to you, Mr King, is that Girish was clearly acting either as the de facto or shadow director of Barrowfen II, wasn't he, during all this time? A. There always seems to be something in my own mind slightly loaded about the concept of a shadow director, although I understand there is actually nothing wrong in -- there is nothing unlawful in -- Q. It's an individual in respect of which the directors that have been properly appointed, they act on that individual's instructions. A. Yes. No, I do understand the concept of a shadow director, and you can categorise them how you wish, but you know, as far as I am concerned, yes, Girish was giving instructions, or was asking Bill Radmore and Kiraj to do certain things, but that didn't -- I just make the point that that didn't absolve them from their duties as directors of Barrowfen Properties II, but I don't think there were any problems at all in relation to directors' duties within Barrowfen Properties II."

454. I am satisfied that from the date of its incorporation until at least 16 February 2016 Girish was a shadow director of Barrowfen II and I find this as a fact. I also find that Girish gave instructions for the incorporation of Barrowfen II and that he directed Barrowfen II to take an assignment of the Loan and Charge on 30 November 2015 and to serve the letter of demand on Barrowfen on 16 February 2016.

(5) The Demand

455. On 16 February 2016 at 14.11 in the UK (and 22.11 in Malaysia and Singapore) Mr Radmore served the letter of demand on Prashant and Suresh requiring repayment of £853,300.88. At 15.01 S&B also served it on Kingsley Napley. At 11.14 on 17 February 2016 the appointment of the Administrators was sealed

by the Court. The demand was served without warning and gave Barrowfen between about four and six working hours to repay the Loan in full.

456. Mr King accepted that the Loan became repayable and the Charge became enforceable upon demand for repayment. He also confirmed that there was no provision for a particular time period to elapse before payment was due. Moreover, it is clear from Ms Walker's handover notes dated 22 December 2015 that the letter of demand had already been drafted by that date and that Girish's instructions were that only a few hours should be given to Barrowfen to comply with it.

457. In the course of his evidence I asked Mr King what the purpose of the demand was and how he considered a demand for repayment within a few hours to be in the interests of Barrowfen. He confirmed that it was no more than a step towards administration:

> "A. There was a provision in the charge, I understand, my Lord, that a demand had to be made before the charge could be enforced, but there was no provision for any particular time period, which is why Rebecca's note refers to "you just need to leave a matter of hours". We in fact left longer than that because we wanted to raise the point that we were still interested in an MVL. But this was not -- as I say, the intention to appoint administrators was not seen as a hostile act to the company. It was actually to help the company and to protect the creditors at the time. DEPUTY JUDGE LEECH: That is all I am really raising an eyebrow about, I suppose, because what you are asking the company to do is in fact to pay £853,300.88. That is what you are asking the company to do in this letter. It has to find the money to meet this demand. A. Yes, and equally, my Lord, it could have been possible that there was not a need to demand, in which case administrators could have been appointed straightaway. There was a need to give a demand, but certainly we didn't see that there was -- we didn't see this as a "pay up within X number of days otherwise we appoint administrators". We saw this as moving towards administration so that the company could then have insolvency practitioners who could manage the company at that time. And it was critical because of the concern over the loss of the planning permission. DEPUTY JUDGE LEECH: What I am struggling with at the moment is the idea that the service of this demand was in the interests of the company. A. Well, my view at the time, my Lord, is that administration was in the interests of the company."

458. In the light of this evidence, Ms Walker's notes and the timing of the demand itself I find that neither Girish nor Mr King ever had any intention of giving Barrowfen sufficient time to comply with the demand and always intended to give the company no more than a few hours to pay. It is clear from Ms Walker's notes that this idea was fully formed in the minds of Girish and Mr King before 22 December 2015 and I draw the inference that from an early stage it formed an integral part of Girish's plan that a demand for repayment within a few hours or days would be given.

(6) Timing

459. Ms Hilliard submitted that by 12 January 2016 there was a settled intention to place Barrowfen into administration but that a decision was taken to wait until the settlement of the personal partnership accounts had been finalised. I accept that submission and I find that although Girish and S&B had taken a final decision to put Barrowfen into administration, they chose to wait until the Memorandum of Agreement was signed before doing so.

460. I draw this inference from the contemporaneous documents and, in particular, the Memorandum of Agreement itself (which was signed on 10 February 2016), the emails sent by Mr King and Mr Dodds on 12 February 2016 and Girish's letter also dated 12 February 2016. Moreover, Mr King effectively conceded in evidence that Girish and he were ready to serve the letter of demand and execute the plan by 12 January 2016. He was asked about this in the context of Ms Penny's handwritten notes of the meeting on 3 January 2016 which recorded: "GP = shadow dir of BPII + director of B = conflict, but so what?" I set out the entire passage here because I return to it below:

> "Q. So, do you see that, Mr King? "GP shadow director of Barrowfen II. And director of Barrowfen. Conflict but so what?" A. Yes, I can see that. Q. That was your firm's attitude to the conflict that Girish had, wasn't it; so what. A. No, no. I don't think that is the case at all. I believe that these notes were prepared by Catherine Penny, who was a solicitor within the litigation team at that time, and Catherine had been asked to prepare the letter of demand that was going to be used for the purposes of the administration, and I think -- I can't speak to her note. I can only give you my view of what I think she was saying. I think she was just there referring to the fact that Girish, as a

> potential shadow director of Barrowfen Properties II and also a director of Barrowfen, had a potential conflict in demanding the loan, and I think the reference to "so what?", one can read what one would like into that but I think all she was saying is: does it matter? Well, it didn't matter because Girish was resigning as a director at that time because he was at that time putting his interest as a creditor above his interest as a director. So that was -- Q. That was dated 13 January 2016. A. Yes, that's right. Q. So actually, it wasn't. It was quite a few days, wasn't it? A. I am sorry, I don't quite follow. Q. It was quite a few days before the demand was served, wasn't it? A. Yes, but we were by early -- well, by that time in January -- in fact I think I had already sent a draft letter to Girish, I think on 12 January. The intention was that the company would need to be placed into administration, so that's what we were looking at at that time."
>
> "Q. So it was a three-partner meeting, and at the bottom of the page, you have got "so what?", and I put it to you, that was your attitude about conflict. So what if Girish has a conflict. So what if Stevens & Bolton have a conflict. It doesn't matter? A. That is wrong. I have explained that Catherine -- these, I believe, are Catherine's notes, and she has merely -- because she was the one tasked with preparing the letter of demand, and she was, I would suggest -- I can't give evidence on her behalf, but I would suggest that what she had in mind there was concern over the potential conflict between Girish as director of Barrowfen and Barrowfen Properties II making the demand. But of course we would not be making that demand with Girish as a director. He would be resigning as a director at that point, and therefore there would be no conflict."

461. Mr King also accepted that the reason why he failed to send Prashant a cashflow statement after the meeting on 9 December 2015 was that the position had changed in January 2016. By this I understood him to mean that Girish was no longer willing to negotiate with Prashant and Suresh and had made a final decision to put Barrowfen into administration:

> "Q. Can we just go down to the last two bits of the note of the meeting as you place reliance on it. You can see again you are saying: "I can certainly put together a cashflow statement." And then you ask: "Anything else?" And Prashant responds: "No, I think we have got through a lot today and have got everything on the table and what our thoughts are. I want to work together to get everything resolved as soon as possible." And you finish with: "Thank you. We will come back to you with thoughts following the meeting." And that never happens, does it, Mr King? A. No, it doesn't, doesn't happen on either side. I think the meeting ended. There was -- it had been a difficult meeting at

> various stages, but I think, you know, it looked as if there might be the option to move forward on a consensual basis at that stage. And there was every intention that we would do so. But the position changed. Q. Mr King, you say: "We will come back to you with thoughts following the meeting." But neither you nor Girish Patel do come back to Prashant with thoughts, do you? A. We were considering, and I think I wrote to Girish before the Christmas break, to say that we should consider in the new year going back on the MVL, and then events really overtook us in the new year."

(7) Girish: Conflicts of Interest

462. In his first email to Mr Radmore dated 28 October 2015 Girish said that S&B had advised him that he would have a conflict of interest if he were a director of both Barrowfen and Barrowfen II. When he was asked to confirm this, he relied on the privilege against self-incrimination. When the same point was put to Mr King, he did not deny that S&B had given this advice although he suggested that the advice might have been given in slightly different terms:

> "Q. So, when Girish Patel informed Mr Radmore in his email of 28 October that you had advised him that he couldn't be a director of Barrowfen II while he was a director of Barrowfen, is it your case you didn't give him that advice? A. I am sorry. I may have slightly misunderstood your question but the reason why Girish was not appointed as director is because there could have been -- I think in relation to both the envisaged SPVs, one was taking the assignment of the charge and the other would have been taking the assignment of the property, if that was ever to have happened. And as Girish was a director of Barrowfen Properties Limited, not Barrowfen Properties II, there could have been a potential conflict further down the line. I don't think there was anything more in it than that."

463. When he was cross-examined about Ms Penny's notes and the fact that there was a conflict between Barrowfen's interests and his personal interest or duty as a shadow director of Barrowfen II, Mr King said that it did not matter because Girish intended to resign as a director before the demand was served and "he was putting his interest as a creditor above his interest as a director": see [460] (above).

464. I find that S&B advised Girish that there would be a conflict between Barrowfen's interests and his personal interests if Girish were appointed to be a

director of Barrowfen II. I also find that Girish's reaction to that advice was to appoint Kiraj and Mr Radmore as *de jure* directors but with the intention to control the company himself through them.

465. Mr King accepted that Girish was a shadow director of Barrowfen II and that he knew this. In reliance on Ms Penny's notes I find that he also knew that there was a continuing conflict between Girish's duty to Barrowfen and his interest in Barrowfen II. I also find that he did not think that this conflict of interest mattered because Girish would be resigning and "putting his interest as a creditor above his interest as a director".

466. There was no evidence that Mr King advised Girish himself that there was a continuing conflict and Ms Hilliard did not explore this issue because Girish relied on the privilege against self-incrimination. The inference which I draw, therefore, is that Mr King explained to Girish that there was a continuing conflict and that for this reason he had to resign as a director of Barrowfen before the demand for repayment was made.

467. This inference is consistent with Ms Walker's email of advice dated 7 December 2015 and with Mr King' view that S&B was "comfortable" with Girish remaining a director of Barrowfen for the time being "because he was putting the interests of Barrowfen ahead of your own interests". Although Ms Walker did not state in terms that Girish had a continuing conflict, this must have been obvious to him because otherwise it would not have been necessary for him to resign.

(8) S&B: Conflicts of Interest

468. It was common ground that S&B continued to act for Barrowfen until 1 December 2015 when Barrowfen terminated the firm's retainer. However, there was a dispute about the scope of that retainer. Mr King's evidence was that once the dispute relating to the Register was resolved, S&B ceased to act for Barrowfen except in very limited circumstances:

> "Q. So we are just looking at paragraph 168A.1 where you deny that there was a plan or a proposal to place Barrowfen into administration at any material time when Stevens & Bolton were

> acting for Barrowfen in any of their limited and specific retainers. Yes? A. That's right. I mean, as far as I was concerned, we had ceased acting in any substantive way. We had ceased acting for Barrowfen once the register of members was dealt with. Q. So -- A. The books had been written, and we didn't act for Barrowfen after that, apart from in one very limited circumstance which was in relation to the urgent matter of the rates, where the company was being -- there was a threat to wind up proceedings -- Q. And an auditors' enquiry as well. A. There was a standard auditors' enquiry which we never dealt with anyway, and that was just the yearly annual, provide details. But we never dealt with that."

469. Mr King was then taken to the email dated 19 October 2015 which he sent to Ms Walker. He could not explain why he had said that S&B was acting for Barrowfen and suggested that it was a mistake:

> "Q…..this is an internal email from you to Rebecca Walker, copied in Tim Carter and Katie Philipson and Sarah Murray. You say there: "We act for Barrowfen Properties Limited and have done so for many years." And you provide some background, is that right? A. Yes. I have explained in my statement that I appreciate -- I think I was mistaken in writing at the beginning there, "we act for". What I should have said is "we have acted for Barrowfen Properties". I am not even sure at that stage, I would need to check, whether we had been instructed on the Wandsworth Borough Council rates issue. We knew it was a live issue, but I don't think we had been instructed to act for it. I don't know. I would need to check that. I can't be sure, I am afraid."

470. Ms Hilliard also asked Mr King about the conflicts position. She took him to Ms Walker's draft email dated 13 November 2013 and asked him about the passage in which Ms Walker suggested that S&B should cease acting for Barrowfen:

> "Q. Now, the email that you do eventually send on the same day to Girish Patel takes out the reference to ceasing to act for Barrowfen, doesn't it? A.…Yes, Rebecca had produced a draft email which was -- I have explained this at some length in my witness statement. I am happy to explain it again, but it is covered in my witness statement. She was setting out all the options. I didn't necessarily disagree with anything she said, though we were not acting for Barrowfen at that stage, save in relation to the Wandsworth Borough Council rates issue. There was no general retainer for acting for Barrowfen or anything like

> that. Q. Can I understand this, is it your position that you can act for a director against his company as long as you haven't got a retainer with that company in relation to the same matter? Is that what you are saying? A. No, no. What I am saying is it is a question of who you are advising. We were advising Girish as a director in relation to what was the best way of addressing the difficulties that Barrowfen had at that time. We weren't acting against the -- I don't think we at any stage were acting against Barrowfen. We were looking at -- the company was in a position where it was not moving forward. It was in stasis with a wasting asset, and I think all parties by that stage, by November, agreed that the company had to go into liquidation. And what we were doing is we were advising Girish, who was a director and also a creditor of the company, what was the best way to address Barrowfen's position. But the retainer with Wandsworth Borough Council, in relation to the Wandsworth Borough Council matter, was simply one that we entered into to address what was a very urgent position, whereby there was a potential creditors' winding-up, which I think everyone recognised, it was preferable for Barrowfen to avoid a creditors' winding-up.

471. Ms Hilliard also asked Mr King to address Ms Walker's instructions to Mr Tamlyn dated 12 November 2015 and the advice which she received. Mr King's evidence was that the instructions were sent to Mr Tamlyn on behalf of Girish in his capacity as a director of Barrowfen and I accept that evidence. It was consistent with the email itself and the terms of Mr Walker's instructions. However, Mr King also accepted that the advice could equally have been given directly to the company:

> "DEPUTY JUDGE LEECH: -- you have said a number of times, Mr King, that you clearly drew a distinction and draw a distinction between giving advice to Girish in his capacity as a director of the company, and giving advice to the company directly. Can you just explain to me what the basis for that distinction is, how you saw it? A. Yes, how I saw it, my Lord, is that the – as I explained earlier, I think I saw the company as being in stasis at that time. And it couldn't remain as it was. It was not in the interests of anyone for it to remain as it was. The directors were not working together. They were in dispute, and a very bitter dispute, a broader dispute, as well as potentially a dispute about the direction of the company. And we were advising -- I saw us advising Girish as a director of the company. I think the engagement letter that we had with Girish at that time made that clear, as to -- and we had been throughout the summer as well in relation to his responsibilities as a director of the company. So we -- I didn't see us advising the company at that

> stage. It was merely Girish as a director. That is not to say that I saw any non-alignment of the advice that was being given to Girish with advice that could have been given to the company. This was advice that could equally have been given to the company because the advice that was being given, I considered was in the interests, the best interests of the company. But I didn't view the company as our client at that time."

472. I deal with the advice itself and whether S&B ought to have disclosed it to Prashant and Suresh below. When it came to the question whether that advice placed S&B (as opposed to Girish himself) in a position of conflict, Mr King's evidence was as follows:

> "Q. You had a conflict, Mr King. You had a conflict. You were wanting to give advice to and you were giving advice to Girish about how he could best enforce the charge. That was in conflict of a potential defence that Barrowfen had to enforcement of the charge. You should have advised that Barrowfen needed to get independent advice on it. It wasn't for you when you had a conflict to decide for Barrowfen that it had no defence, was it? A. You see -- well, I disagree. I saw no conflict at that time. This -- the action that was being proposed was in the interests of Barrowfen. I would accept that there might be a point if this was simply a receivership issue, and all that Girish was doing was to enforce his rights as creditor and he was a significant creditor, but we did not go down that route. It was not the route that -- it was a route that was open to Girish, but in putting in place the administration, should it be required, he was only doing what I believed any director, fulfilling his duties as a director, should have been doing. You couldn't just leave -- I think it would have been a breach, frankly, of Girish's duties, had he just simply left the company as it was. The company was going nowhere at that stage."

473. I accept Mr King's evidence that there was no general retainer from Barrowfen. But I do not accept his evidence that S&B had otherwise ceased to act for Barrowfen before the rates dispute. If S&B's retainer had come to an end, I would have expected the firm to have written to Barrowfen to confirm that it was closing the files and enclosing a final bill. I would also have expected the firm to open a new file and issue a new engagement letter in relation to the rates dispute. However, my attention was not drawn to any documents of this nature.

474. Moreover, in their letter dated 10 August 2015 S&B stated that the firm was acting for Barrowfen in dealing with Kingsley Napley's requests for

information. Both Ms Sarah Murray and then Mr King himself continued to deal with the inspection and copying of documents up until 26 November 2015. In doing so, they must have been acting on behalf of the company. Finally, it is clear from Ms Walker's draft email dated 13 November 2015 that no engagement letter had yet been sent to Girish and that she believed that S&B was currently acting for Barrowfen in providing insolvency advice.

475. In the light of those documents I do not accept Mr King's evidence that between October and December 2015 S&B was only acting for Barrowfen in relation to the very limited but urgent issue of the rates dispute. I am not satisfied either that he made a mistake in his email dated 19 October 2015. If this had been a slip of the pen or a simple error, Ms Walker would not have repeated it in the email dated 23 October 2015 which she sent to Mr Coakley or Mr King would have picked it up himself (since it was copied to him).

476. I find therefore that S&B was acting for Barrowfen in relation to (a) the rates dispute, (b) the correspondence with Kingsley Napley in relation to the inspection and provision of documents and (c) the provision of insolvency advice until 1 December 2015 when the firm's retainer was terminated. There was no dispute that S&B was acting for Girish personally or that the firm incorporated Barrowfen II on his instructions. There was no dispute either that after its incorporation S&B acted for Barrowfen II in relation to the assignment of the Loan and the Charge.

477. In my judgment, there was significant risk of a same matter conflict arising between Girish's personal interests and the interests of Barrowfen from 6 October 2015 onwards when Girish reported his conversation with the insolvency practitioner to Mr King. It was obvious from that conversation that Girish was contemplating enforcement action against Barrowfen.

478. But in any event I am satisfied that at and after the meeting on 26 October 2015 there was a significant risk of a same matter conflict arising because Girish had decided to put Barrowfen into administration (if he could not negotiate acceptable terms). I am also satisfied that a same matter conflict had actually arisen by 2 November 2015 when Barrowfen II was incorporated. S&B was

acting for Barrowfen II and its sole function was to acquire the Loan and Charge and then to put Barrowfen into administration.

479. Moreover, even if I had been persuaded that S&B's retainer was limited to the rates dispute, I would have found that there was a significant risk of a related matter conflict between the interests of Girish and the interests of Barrowfen. Wandsworth was a creditor of Barrowfen and had threatened to wind up the company. Girish had chosen to stop funding the company (and he was perfectly within his rights to do so). But it was also in his interests that the debt remained unpaid so that he could put Barrowfen into administration and acquire the Tooting Property.

480. I am satisfied that these conflicts were not "theoretical or rhetorical" and that a reasonable man would be satisfied that there was a real sensible possibility of conflict. Indeed, it is difficult to think of a more obvious conflict between the interests of a creditor and the interests of a debtor apart from, perhaps, opposing parties to litigation. Moreover, Ms Walker clearly appreciated that there was a significant risk of a conflict arising because she stated in her draft email dated 13 November 2015 that S&B could not act for both Barrowfen and Girish where he was considering taking action against the company.

(9) Barrowfen's Interests

481. I have held that the question whether a particular course of action was in the interests of Barrowfen is a question of fact not law. S&B submitted that I should find as a matter of fact that the buyout of the Loan was "manifestly in the interests of Barrowfen given Zurich's threat to enforce". I reject that submission for the simple reason that Girish's plan (as I have found) was to give Barrowfen no more than a few hours or days to repay the Loan with the tactical aim of ensuring that it went into administration.

482. Even if Zurich had been threatening to take immediate enforcement action, I have no doubt that it would have given Barrowfen a realistic time to pay off the entire debt and, if necessary, to refinance it. In reaching this conclusion I have relied on Ms Carter's letter to Kingsley Napley dated 26 October 2015 in which she gave Barrowfen a further two to three weeks to provide written proposals.

Even then she stated that Zurich would consider its position: "At this point, we will consider legal action to recover our loan." Moreover, at the meeting on 26 October 2015 Ms Walker recorded that Zurich had made noises that it wanted its money back. But there was no suggestion that either Girish or Mr King thought that the enforcement action was imminent. Indeed, Ms Walker recorded that the debt was being fully serviced.

483. In my judgment, it would be exceptional for the court to find that it was in the interests of a debtor to be given no time to pay before insolvency action is taken. Moreover, it would only be in the debtor's interests to have no time to pay if the insolvency action was also in the interests of the debtor. I therefore turn to consider S&B's parallel submission that it was also manifestly in Barrowfen's interests that it should be placed in administration.

484. I reject that submission too. I do so for essentially the reasons given by Mr Coakley in his witness statement dated 3 June 2016 in support of the application to the Court for directions. Barrowfen was not a trading business and had one asset, the Tooting Property. It was balance sheet solvent although it did not have sufficient cash in reserves to meet its ongoing liabilities. However, if its shareholders were prepared to fund its ongoing liabilities, then it could survive as a going concern (which, as Mr Coakley stated, was the primary objective of the administration) enabling the directors to continue to develop the Tooting Property. This in turn would enable Barrowfen either to make a greater profit on a sale or to keep the development as an investment.

485. In my judgment, therefore, it was not in the interests of Barrowfen for Barrowfen II to put the company into administration without giving the board of directors the opportunity to consider whether they were prepared to refinance the Loan and fund the company's ongoing liabilities. Of course, if the directors and shareholders had been unwilling or unable to refinance the Loan and fund Barrowfen's ongoing liabilities, then it might well have been in its interests to enter Administration. But Girish did not give them that opportunity and he never intended to do so.

(10) The Creditors' Interests

486. S&B also submitted that because Barrowfen was cashflow insolvent by the time of the administration, Girish's duty to promote the success of Barrowfen had been displaced by his duty to consider or act in the interests of its creditors: see section 172(3) of the Act. S&B also submitted that he was acting in their interests in putting the company into administration. I therefore turn to consider whether the administration was in the interests of Barrowfen's creditors.

487. There was a certain artificiality in S&B's submission because the principal creditors of Barrowfen were Barrowfen II, Hambros and Girish who claimed in the administration for £858,594.08, £475,458.92 and £180,000 respectively. If the amount owed to Seaco for the repurchase of its shares is ignored, then the total amount for which other creditors (including Wandsworth, S&B and the disputed creditors) had submitted proofs of debt in the administration was £245,570.11.

(a) Barrowfen II, Hambros, Girish and S&B

488. I accept that Girish believed that it was in his interests as a creditor to put Barrowfen into administration. He thought that it was in his interests because he expected that it would enable him to buy the Tooting Property and, as I have found, he directed Barrowfen II to take an assignment of the Loan and the Charge for that very purpose. For the same reasons I accept that he believed the administration to be in the interests of Barrowfen II and Hambros. I also consider that it was in S&B's interests because they supported Girish and acted for him throughout the administration.

(b) Bedford and Shila

489. Bedford and Shila were also creditors of Barrowfen for £5,000 and £14,695.89. I consider the motive of Prashant and Suresh in making the loan to Barrowfen after the company had been placed in administration below. In the light of those findings, I conclude that Prashant and Suresh (and Shila as Suresh's wife) did not believe the administration to be in their interests as creditors.

(c) Wandsworth

490. S&B described the debt owed by Barrowfen as "a matter of key significance" because it had been outstanding for some time and Wandsworth was threatening a compulsory winding up petition. I accept that in their letter dated 29 October 2015 Wilkin Chapman had threatened to issue a winding up petition. But no petition was issued and in their letter dated 6 November 2015 S&B had formally challenged the liability orders. Moreover, the minutes of the board meeting record that on 16 February 2016 Wandsworth was waiting for Barrowfen to respond with evidence that tenants had paid rent into its bank account. There was no suggestion that Wandsworth was still threatening to issue a winding up petition.

491. S&B also relied on the fact that Prashant admitted the debt to Wandsworth in the Statement of Affairs dated 10 March 2016 and Mr Coakley admitted it in his witness statement dated 3 June 2016. However, the amount of the debt which Wandsworth now claimed had been reduced from either £130,580.85 or £111,068.66 to £39,982.24 and on the very day on which Barrowfen II served its demand on Barrowfen Prashant and Suresh resolved to pay the debt once Barrowfen's liquidity issue had been resolved.

492. Furthermore, there was no evidence that Wandsworth considered that it was in its own interests to put Barrowfen into administration. Indeed, Wandsworth did not submit a proof of debt until 2 August 2016 (i.e. after the application to approve the Adminstrators' proposals had been heard and determined) and did not appear at or vote at either of the creditors' meetings. This strongly suggests that Wandsworth was not aware that Barrowfen had been put into administration until some months after it had taken place or did not care about it one way or the other as long as the debt was paid within a reasonable time (as it was).

493. I am not satisfied, therefore, that Wandsworth believed it to be in its interests for Barrowfen II to enforce the Charge and put Barrowfen into administration in February 2016. Furthermore, I am not satisfied that either Girish or Mr King were motivated by the interests of Wandsworth or any of the other creditors or had any concern to protect them when Barrowfen II served the demand on 16 February 2016. As I have already found, Girish was ready to enforce by 12 January 2016 but did not do so until after the Memorandum of Agreement was

executed on 10 February 2016. If he had been concerned to protect the interests of the creditors, he would have taken action immediately.

(d) Seaco

494. The position of Seaco was highly unusual. It submitted a proof of debt for £1,854,885.41, most of which related to a disputed claim for interest claimed on the purchase price of £234,600 which Barrowfen agreed to pay for its shares in 2004: see Appendix 1. I accept Girish's evidence that Barrowfen sent a cheque for the purchase price to Seaco but Mr NM Amin chose not to present it (although Seaco had taken no steps to enforce the debt for 10 years). Seaco voted in favour of the Administrators' proposals to accept the loan from Bedford. But it took no action to enforce the debt once the administration had come to an end.

495. There is no evidence that Seaco believed it to be in its interests to put Barrowfen into administration. It is impossible to draw any clear inference about why Seaco chose not to accept payment for its shares in 2004 or 2005 or why it took no action at all either to challenge the purchase of the shares or to enforce the debt either before or after the company was in administration.

(e) Other Creditors

496. This leaves Amrit, the auditors and four tenants who were claiming for overpaid service charges. Apart from the audit fees which were £4,050, the inference which I draw is that all of these debts arose as a consequence of the administration. The tenants would not have claimed the repayment of service charges and Amrit would not have submitted a proof for arrears of pay, pay in lieu of notice and a redundancy payment if Barrowfen had continued to trade. Accordingly, I am not satisfied that any of these creditors believed that it was in their interests to put Barrowfen into administration.

(f) The interests of the creditors as a whole

497. In my judgment it was not in the interests of the creditors as a whole to put Barrowfen into administration. For the reasons which I now explain, I am

satisfied that the creditors (including Barrowfen II) would have been repaid in full and much sooner if Barrowfen II had not enforced the Charge and appointed the Administrators. Moreover, apart from Seaco, the only creditors whom the Administrators declined to pay were Girish himself and Hambros. It can hardly be said that the administration turned out to be in their interests either.

(11) Prashant and Suresh: their motivation

498. What underpinned S&B's case both in relation to the interests of Barrowfen and the interests of creditors was the contention that Prashant and Suresh had no intention of funding Barrowfen before it went into administration and only offered to do so because Girish was no longer involved. S&B's case was that their attempt to take control of Barrowfen was simply part of the war with Girish and that they were not concerned by the interests of the company or its creditors themselves.

499. This submission was closely related to S&B's submissions on causation which I deal with in section X (below). But it also formed the basis for S&B's argument that Girish did not act in breach of his duties under section 172 and I therefore address it separately. I am unable to accept the submission that Prashant and Suresh would not have supported Barrowfen if it had not gone into administration for four principal reasons:

i) On 19 February 2016 (i.e. within two days of the appointment of the Administrators) Kingsley Napley wrote to the Administrators stating that they had at their disposal sufficient funds to repay the Loan and other debts and expenses at short notice. By 5 April 2016 they had made a formal loan offer.

ii) Suresh and Prashant increased that offer until it was accepted by the Administrators and then entered into a loan agreement and advanced the funds to Barrowfen. If Suresh and Prashant had not made the offer or increased it or made the loan and then carried out the development, then I might have had taken a very different approach to this issue. Moreover, one of S&B's principal themes throughout the trial was that Prashant was

always creating a story. But in this instance his actions speak much louder than any of his words.

iii) Moreover, Girish's family retained its one third interest in Barrowfen until the settlement agreement in March 2019. Although Girish had resigned as a director and was no longer a trustee of either trust, the Mrs PD Patel Trust remained the owner of one third of the shares (and continued to do so for some time). If Suresh and Prashant were only motivated by a desire to destroy Girish and capture his assets, they had no reason to bail out Barrowfen and then invest in it themselves. They would have let the Administrators sell the Tooting Property and then carry on the battle with Girish over the net proceeds of sale.

iv) Finally, I attach significant weight to the minutes of the board meetings on 16 and 17 February 2016 at which Suresh and Prashant had signalled their intention to support Bedford by funding the payment of the Wandsworth debt and then by obtaining a loan facility from a commercial lender. I also attach weight to the minutes of the first meeting because it took place before Suresh and Prashant had notice of the demand.

500. Mr Stewart took Prashant to the minutes of the meeting on 17 February 2016 and asked him whether a board meeting had genuinely taken place on that date. Prashant confirmed that it did take place and that a version of the minutes had been signed. In closing S&B suggested that the meeting on 17 February 2016 never took place and the minutes were an attempt to "paper" the files in anticipation of litigation. I reject that submission. S&B did not challenge the authenticity of either set of minutes and they were clearly in existence by 4 April 2016 when Kingsley Napley sent them to CRS.

(12) Suresh and Prashant: why did they take no action until February 2016?

(a) Control

501. Mr Stewart also relied heavily on the fact that Prashant and Suresh took no action before February 2016. It was his submission that they had control of

Barrowfen's board of directors with effect from Prashant's appointment on 1 August 2015. I cannot accept that submission either and I find that Prashant and Suresh only took control of the board of directors of the company at the board meeting on 1 December 2015 (when they revoked the resolution dated 20 January 1994 giving delegated authority to Girish).

502. Mr Stewart's submission was in marked contrast to the position which S&B took at the time and before the board meeting on 1 December 2015. In the letter to Kingsley Napley dated 10 August 2015 S&B asserted that Suresh could not revoke the resolution and the firm continued to assert thereafter that Girish was entitled to act as de facto managing director: see, e.g., the letter to Kingsley Napley dated 23 September 2015.

503. Girish also continued to resist the appointment of Prashant as a director of Barrowfen even after the consent order dated 29 June 2015 when he finally accepted that the Suresh Resignation Letter was not authentic. On 19 August 2015 he challenged the validity of Prashant's appointment as a director on the basis that Yashwant's signature was not genuine (although this issue was resolved fairly quickly).

(b) Information: 2010 to 2013

504. There were a number of issues between the parties over the question whether Girish stopped providing information to his brothers and Prashant and, if so, when and why he did so. Ms Hilliard drew my attention to an email from Girish dated 1 June 2010 in which Girish provided details of local press coverage and submitted that after that date Girish provided no further updates about the Tooting Property.

505. I accept that submission. It is telling that in his witness statement Girish referred in some detail to the information which he circulated before that date but he did not refer to any further information or updates after that date. Moreover, Prashant gave evidence (which was not challenged) that he only discovered about the withdrawal of the planning application and the new planning application from searches on the internet.

506. Both Prashant and Suresh suggested in their witness statements that Girish had failed to provide them with adequate information about the Tooting Property and, in particular, why the planning application had been withdrawn. Prashant also stated that he told Girish that if he needed funds, the Malaysian businesses would have been able to provide it. Finally, he also stated that he would have been interested to run Barrowfen if Girish had not wanted to take full ownership.

507. S&B challenged this evidence and it is of note that Prashant did not state any of these things in his report on the Kuala Lumpur meeting dated 28 June 2011. The relationship between Girish and Suresh was undoubtedly strained by the time of the meeting in Kuala Lumpur. But I am not satisfied that either Suresh or Prashant had any real concerns about the information which Girish was providing to them or that Prashant had any real interest in funding or running Barrowfen until 2013.

(c) Information: 2013 to 2015

508. Ms Hilliard submitted, however, that over time the other members of the family became increasingly frustrated by Girish's failure to provide information. I accept that submission. It was supported by the contemporaneous documents and, in particular, emails dated 5 June 2013, 19 June 2013 and 24 July 2013 from Yashwant, Rajnikant and Suresh and also Prashant's letter asking to be appointed as a director.

509. When he was asked about his email to Prashant dated 24 July 2013, Suresh would not accept that this was the first occasion on which he had complained that requests for information had gone unanswered. But I accept that this was the first occasion on which such a complaint had been made in writing. I am also satisfied that this concern about lack of information was one of the principal reasons why Prashant and Suresh wanted Prashant to be appointed a director of Barrowfen.

510. From August 2013 Girish resisted the appointment of Prashant as a director and from April 2014 to June 2015 he refused to recognise Suresh. However, once the consent order had been agreed and Girish had to recognise Suresh as a director, Suresh and Prashant or their solicitors began to ask for information.

On a number of occasions they (or their solicitors) stated that this information was required to enable them to decide whether it was in the best interests of Barrowfen to proceed with the development. I take those requests and the reasons for them at face value and I consider Mr Stewart's alternative, namely, that Prashant was attempting to create a false narrative wholly implausible.

511. Ms Hilliard also submitted that Girish was uncooperative and unwilling to provide information. Again, I accept that submission because it is borne out by the documents. I have identified the relevant correspondence above and either set out or summarised the key passages in the correspondence. I am satisfied that both Girish and S&B resisted the provision of information to Suresh and Kingsley Napley for as long as they could. I am also satisfied that the description of the correspondence which Kingsley Napley gave in their letter dated 16 September 2015 (which I have also quoted) was accurate. Girish had effectively prevented Suresh from reviewing the documents or permitting Kingsley Napley to take copies.

512. Moreover, I am fortified in this conclusion by the evidence of Ms Philipson, who candidly accepted in her second witness statement that she struggled to get instructions from Girish to agree to the inspection on 23 July 2015 and that he needed "stern encouragement" from her to accommodate an inspection after that and before September 2015.

513. I am also satisfied that S&B's description of that correspondence in their letter dated 23 October 2015 was inaccurate and partial. Apart from providing a list of matters, the firm had not answered any of Suresh's requests and it withdrew the offer of inspection once Girish had decided to take the point that Suresh had to inspect the documents personally. I found this letter particularly troubling given that in their letter dated 10 August 2015 S&B had confirmed that the firm was acting for Barrowfen and it was now writing to solicitors acting for one of its directors.

(d) December 2015 to February 2016

514. Prashant's evidence was that after the meeting on 9 December 2015 he expected Girish to put forward an offer to buy out the shares owned by Bedford and the

Mr DP Patel Trust. That evidence was consistent with both attendance notes of the meeting and, in particular, paragraphs 6 and 13 of the S&B note. It was also consistent with his email to Suresh and Rajnikant dated 10 December 2015 and, in particular, his statement that the ball now rested with Girish.

515. Mr Stewart submitted that there was no clear statement by Mr King that Girish would revert with an offer. I accept that submission. Both notes record Prashant as saying that it was for Girish or his side to put forward a sensible offer. But the Withers' note records Mr King as saying no more than: "We can reflect on that." When I put paragraph 6 of the S&B note to Girish in re-examination, he also stated that when he left the meeting it was definitely for Prashant to set the ball rolling.

516. Mr Stewart also tried to persuade me that what the parties were considering was an offer to settle the litigation rather than an offer to purchase the shares in Barrowfen. However, I reject that submission. It is clear from both notes that the parties were considering an offer for the shares in Barrowfen. Moreover, both notes record that Prashant stated clearly that the litigation would proceed in each jurisdiction whilst the negotiations for a buyout continued.

517. I am not satisfied that it is necessary for me to determine whose account of the meeting is correct on this point and it is quite likely that both Prashant and Girish left the meeting in the expectation that the other would make the first move. But whether or not Girish and Mr King believed otherwise, I accept Prashant's evidence that he expected Girish to make an offer after that meeting. I also accept his evidence that he expected Mr King to provide him with a cashflow statement setting out when payments on the loans and other expenses fell due. Both notes record Mr King as saying that he could put together or put forward a cashflow statement (although he never did so).

518. Although I have dismissed the claim for deceit, I am also satisfied that Prashant left the meeting without appreciating that there was an immediate risk or threat that Barrowfen II would enforce the Charge and put Barrowfen into administration. I say this for the following reasons:

i) In the letter dated 4 December 2015 S&B had stated that although Wandsworth had threatened to wind up Barrowfen, it had contested liability. The letter also stated that there was no immediate threat to wind up the company from Zurich because the Charge had been assigned to Barrowfen II.

ii) At the meeting Girish had said that there was enough money to pay salaries and expenses for the next two or three months: see paragraph 15 of the S&B note. Mr King had also agreed to provide a cashflow statement.

iii) Prashant had also made it clear to both Mr King and Girish that he did not want the risk of another creditor winding up Barrowfen or a situation in which the company defaulted as a result of the assignment: see paragraphs 17 and 25 of the S&B note. There is no record of dissent from either of them.

iv) Prashant had also taken a number of preparatory steps to take over the active management of the company and to promote the development of the Tooting Property. I return to these steps (below).

T. Girish

(1) Barrowfen's Case

519. Barrowfen's case was that Girish acted in dishonest breach of his directors' duties by designing and implementing the plan to force Barrowfen into administration without disclosing the plan to his fellow directors. It was also Barrowfen's case that there was a conflict between Girish's role as a director of Barrowfen and his role as a shadow director of Barrowfen II when he was directing Barrowfen II to take active steps to enable him to force Barrowfen into administration without providing reasonable notice.

(2) S&B's Case

520. S&B did not advance a positive case on Girish's behalf in relation to the Company Claims. Given the nature of the allegations against the firm itself,

however, S&B advanced a positive case on Girish's behalf in relation to the Administration Claim. In particular, it submitted: (1) that the buyout of the Loan was in Barrowfen's interests because of Zurich's threat to enforce it; and (2) that putting Barrowfen into administration was manifestly in the company's interests. As a consequence, so S&B submitted, Girish was acting at all times in the interests of either the company itself or the interests of its creditors in accordance with his duties under section 172.

(3) Girish's Duties

521. S&B also submitted that Girish owed no duty to Barrowfen itself during the period in which Barrowfen II placed the company into administration. It was unclear to me whether this was just a pleading point. But in any event I accept that submission in part. In particular, I accept that Girish ceased to owe Barrowfen the duties in sections 171 to 174 upon his resignation. However, he continued to owe the duty to avoid conflicts in section 175 as regards the exploitation of any property, information or opportunity of which he became aware at a time when he was a director.

522. Girish became aware of the Loan and Charge and the opportunity to acquire them whilst he was a director of Barrowfen. He also became aware of Barrowfen's financial position whilst he was director of the company. I find, therefore, that Girish continued to owe the duty set out in section 175 after he resigned as a director on 12 February 2016.

(4) Breach of duty: section 172

(a) Duty to act in Barrowfen's interests

523. I have found that by 12 January 2016 Girish had a settled intention to put Barrowfen into administration but that Barrowfen II waited to demand repayment and appoint the Administrators until after the Memorandum of Agreement was executed on 10 February 2016. I have also found that Girish did not disclose this plan to Prashant and Suresh, as the other directors of Barrowfen, at any time after 12 January 2016 and before he resigned as a

director on 12 February 2016. Finally, I have also found that it was not in Barrowfen's interests for it to be put into administration on 17 February 2016.

524. Barrowfen's case was that Girish made a conscious and deliberate decision not to disclose the plan to put Barrowfen into administration to either Prashant or Suresh in the knowledge that it was contrary to the company's interests and Ms Hilliard put her case fully to Girish. He chose not to answer her questions but relied on the privilege against self-incrimination:

> "MS HILLIARD: So, Mr Patel, I was talking to you about the administration. What I want to put to you is the reason why you wanted to force Barrowfen into administration is because you thought that you would be able to purchase the Tooting property for a cheaper price from the administrators than the price that you would have to pay for the shares. A. I have no comment. Q. And the reason why you thought that is because Prashant had made it clear in the 9 December meeting that any valuation had to take into account the development value of the property; yes? A. I have no comment. Q. And you thought that if you made an offer for the purchase of the shares you would end up having to pay a higher price because of the basis upon which Prashant wanted the valuation to take place than if you bought the property from an administrator? A. I have no comment. Q. But the administration -- you are -- you said earlier that you thought the administration was in the interests of Barrowfen, didn't you? A. I said administration was in the interests of all the stakeholders…..MS HILLIARD: What you should have done, Mr Patel, is that you should have talked to your fellow directors about what you were proposing to do. A. I have no comment on that. Q. What you should have done is to say to them: look, if you don't agree a price to buy my shares, I'm going to use the charge that I have taken from Zurich and I'm going to put Barrowfen into administration. You should have told them that, shouldn't you? A. I have no comment. Q. And you should have given them a reasonable time to decide what they were going to do about that, what they were going to do about your threat to put Barrowfen into administration. A. As I say, I have no comment on that, but I have never threatened anybody in my life. Q. Well, you gave them less than a few hours, your fellow directors less than a few hours to respond to the demand that you had caused Barrowfen to serve on them. That's right, isn't it? A. I have no comment. Q. You actually agreed with Stevens & Bolton that you would give them only a few hours to respond. That's correct, isn't it? A. I have no comment. Q. And what your plan was -- your plan was not to help your fellow directors to develop the property for the benefit of Barrowfen. That wasn't your plan, was it? A. I have no comment. Q. But what your plan

> was between October and -- October 2015 and February 2016 was to actually bring about a situation where you obtained the valuable Tooting property for yourself. That was your plan, wasn't it? A. I have no comment. Q. And how, Mr Patel, could that possibly have been any benefit to Barrowfen? A. I have no comment."

525. I am satisfied that Girish made a conscious and deliberate decision not to disclose the plan to put Barrowfen into administration to either Prashant or Suresh. In my judgment this is the obvious conclusion to draw from Girish's pattern of conduct and the documents themselves. In particular:

i) On 9 February 2016 Girish instructed Mr Radmore not to reply to Prashant's email dated 8 February 2016 asking for information about the progress of the development. When it was put to Girish that he did not want Prashant to have any information about the development, he suggested that they had already received this information:

> "Q. That is not true, is it, Mr Patel? You didn't want Prashant to have any information about the development, did you? A. This is not true. I didn't -- I think the information with Prashant was already there prior to that many, many months before by way of instruction by Kingsley Napley. They came to the office and I remember there were tonnes and tonnes of files and boxes of files that they had gone through in search of information that probably they were instructed by the directors. Q. Well, they complained, both Suresh and Prashant, they complained that you provided them with no information whereby they could make a meaningful decision about progressing the development. A. As I said, Kingsley Napley were provided, I think, by Stevens & Bolton a list of all the files, and I think I remember there was a day where they came to the office to inspect all the files in relation to whatever information they were wanted to procure. And subsequently I think they did ask for copies and they were sent copies. I can't -- but I'm sure that they did ask for copies, and I think Amrit, my assistant, probably gave them all the copies that they were required. So they had information already by that stage in 2015, by the second half of 2015."

ii) I reject that evidence. I have already found that Girish resisted the provision of information between August and December 2015. Moreover, even if he had provided Prashant and Girish with detailed

information at an earlier stage, that is no reason why he should have instructed Mr Radmore not to update Prashant.

iii) Girish had a strong motive not to reveal his plan to put Barrowfen into administration between 12 January 2016 and 10 February 2016. Mr King articulated this motive in his email to Girish dated 13 January 2016, namely, that the plan should not "scupper the emerging deal with the partnership accounts". When this was put to him Girish denied it and stated that the future of Barrowfen was "completely different" and denied that there was such a plan.

iv) Again, I reject that evidence. Mr King admitted, and I have found, that Girish had a settled intention to put Barrowfen into administration by 12 January 2016. In my judgment, it was no coincidence that the Memorandum of Agreement was signed on 10 February 2016 and on 12 February 2016 Barrowfen II took immediate steps to give effect to that intention.

v) In his letter dated 12 February 2016 Girish justified his actions by relying on the "complete mismanagement of the company by Prashant". When Ms Hilliard challenged this, he asserted that they had been in control since August 2015. But when she pointed out to him had S&B asserted that he was entitled to operational control, he could give no coherent explanation for his criticism:

> "Q. Mr Patel, Mr Patel, you're being very unfair. You have been -- you were working towards developing this property for something upwards of 12 years. It started way back in 2004, I think. So to criticise your brothers for -- your brother and your nephew for not getting on with it for four months is a very harsh judgment, isn't it, Mr Patel? A. Again, I don't agree with you. So I'm just basically setting out that we -- the planning permission that was progressed over the last ten years or so, eight and nine years or so, was -- basically the fruits of that work, the money that Barrowfen has spent, was all realised by achieving the planning permission, what need to be done. Fortunately that particular planning permission and development was already in the domain of both my brothers which I have kept them in touch and everything else. So all the paperwork was there, everything was there.

> The question was how to take Barrowfen to the next stage. And the question was three things: one was a KYC in terms of the shareholders; secondly was the finance that was needed to address the issues of outstanding loans and outstanding liabilities of Barrowfen; and thirdly, the funding was there. I think between August -- after they took over control of the board of directors, nothing was addressed in respect of this issue, and right up to that meeting of 9 December. And again that meeting basically discussed relation to loans and so on rather than discussing how Barrowfen will prosper under their new authority of having a control over board of directors. Yes, I was operational director, but at the end of the day that was just the operation of the company that I was looking after. In terms of moving forward strategically of that company, nothing more was coming forward. So I rest my answer to that."

vi) I also reject that evidence. There is no evidence that Girish conceded strategic control of Barrowfen to Prashant or Suresh or even consulted them about its strategic direction at any stage before 12 February 2016. Moreover, I have found that he resisted them taking control by relying on his delegated authority and frustrated their attempts to obtain information from (and about) the company.

vii) But in any event I am satisfied that the letter dated 12 February 2016 (which S&B drafted) was no more than window dressing and that Girish had no intention to address the conflict between directors and shareholders consensually. He sent this letter after giving instructions to put Barrowfen into administration and did not respond when both Prashant and Suresh stated that they wanted to take legal advice.

526. I would have had little hesitation in finding that a director who failed to disclose to his fellow directors a plan to put his company into administration for his own personal ends was acting in breach of section 172 and must have known that he was acting against its interests. However, S&B argued that Girish was not acting in breach of section 172 because he was discharging his duty to the creditors under section 172(3). I turn, therefore, to consider this argument.

(b) Duty to act in the interests of creditors

527. Mr Stewart relied on *Sequana* in his closing submissions. He submitted that the "creditors' interests duty" was engaged and Girish's duty shifted from Barrowfen to the creditors. He also submitted that the duty had arisen because Barrowfen was cashflow insolvent and relied upon the fact that reputable insolvency practitioners considered that the test was met. Because of the strength with which Mr Stewart advanced this argument I set out the relevant paragraphs from his closing submissions (references omitted):

> "For those reasons it cannot be argued that placing Barrowfen into administration was a breach of Girish's duties under s 172 as Barrowfen most recently contended. It was not for Girish to leave Barrowfen's creditors to the mercy of its other directors and majority shareholders who notably made no offer to provide funding to satisfy Barrowfen's creditors. Many months went by with neither Prashant nor Suresh attending to the interests of creditors. It is fiction to suggest they were ready to fund Barrowfen as they now wish to allege whilst Girish remained in place. That they did so thereafter was as a result of the protective step Girish took and precisely because he was no longer involved:…"

> "Prashant and Suresh had seized control but for months the board refused or failed to have any regard for Barrowfen's creditors. Barrowfen is alert to this in its attempts to cross-examine to suggest the only real creditor was Girish. That was simply not the case as the Coakley witness statement and Prashant's own Statement of Affairs show. It is imperative for the Court to understand that at the relevant times the directors' duties to the Company were not to Prashant and Suresh's shareholders but to the £3.5m of creditors as a whole. Prashant and Suresh knew about Zurich and did nothing. They knew about WBC and did nothing. They knew Barrowfen was cashflow insolvent and did nothing at all because, contrary to the "story", in 2015 and early 2016 they had no real concern for Barrowfen's best interests with its wasting asset of planning permission due to expire in April 2017."

528. Prashant accepted S&B's pleaded case that by the meeting on 9 December 2015 Barrowfen was cashflow insolvent and that the family disputes had led directly to its cashflow insolvency with threats of enforcement. Although I did not hear full argument on the point, I am prepared to assume in favour of Girish and S&B that the test in *Sequana* was satisfied by that date and that the creditors' interests duty was engaged under section 172(3).

529. However, I reject S&B's argument that Girish was acting in the best interests of the creditors by putting Barrowfen into administration. The principal fallacy in this argument was that it assumed that Girish was acting in his capacity as a director of Barrowfen when he gave instructions for Barrowfen II to serve a demand and appoint the Administrators. On the contrary, he had deliberately resigned as a director in an attempt to avoid discharging his duties to Barrowfen. In giving those instructions he was acting as a shadow director of Barrowfen II.

530. Moreover, section 172(3) imposed a duty upon all three directors of Barrowfen requiring them "to consider or act in the interests of creditors". I have found that it was not in the interests of the other creditors individually or the creditors as a whole to put Barrowfen into administration and that their interests would have been better served if Girish had engaged with Prashant and Suresh to consider the creditors' interests and given them a reasonable time to repay the Loan.

531. Again, I am prepared to assume in favour of Girish and S&B that the test for breach of section 172(3) is a subjective rather than an objective one and that Girish did not commit a breach of the creditors' interests duty if he honestly believed that his acts or omissions were in the interests of the creditors (as opposed to the company).

532. I am also prepared to accept the evidence of Girish and Mr King that they did not expect Prashant and Suresh to react to the appointment of the Administrators by offering to repay Barrowfen II and meet the other liabilities and that they honestly believed that the alternative to administration was liquidation (whether by the members or a creditor). Indeed, Mr King stated that the liquidation of Barrowfen seemed to him to be inevitable.

533. But because Girish believed that Barrowfen would end up in liquidation if he did not execute his plan, it does not follow that he honestly believed that his actions were in the interests of its creditors (or its other creditors). Indeed, I am satisfied that he put his own interests first and did not care whether his interests coincided with their interests or whether his actions helped or harmed them. I have reached that conclusion for the following reasons:

i) I have found that Girish's plan was to put Barrowfen into administration and not to disclose that plan to the other directors. I have also found that it was an integral part of the plan to give Barrowfen no more than a few hours or days for repayment and that the timing of the demand was dictated by the execution of the Memorandum of Agreement.

ii) Those findings alone would justify the inference that Girish was not concerned with the interests of the creditors. But Ms Hilliard also pointed out that there were no contemporaneous documents to show that Girish ever considered the interests of the creditors or took any steps to protect their position. Mr Stewart did not suggest otherwise.

iii) Moreover, at the meeting on 9 December 2015 Prashant asked to discuss Barrowfen's finances for the next two months to avoid an MVL. He also suggested a rights issue. When Girish told him that there was enough money to pay salaries and expenses for the next two to three months Prashant asked for the figures and a cashflow statement (which Mr King agreed to provide).

iv) It was obvious to Girish that Prashant wanted to ensure that Barrowfen paid its creditors whilst any further negotiations continued. In my judgment any honest and reasonable director would have wanted to explore with his fellow directors whether it was possible for Barrowfen to avoid insolvency and raise the relatively modest funds to meet its debts and liabilities as they fell due.

v) However, Girish did not do this. He did not give Prashant the information for which he had asked. Nor did he give Prashant and Suresh any warning that Barrowfen II was going to serve a demand. I find that he acted in this way because he did not want Barrowfen to avoid insolvency or raise those funds if it would prevent him from putting the company into administration and buying the Tooting Property.

vi) Finally, I am satisfied that Ms Walker's email dated 7 December 2015 accurately reflected the attitude of both Girish and S&B to the interests

of Barrowfen's creditors. It was a "downside" of the plan to them that the Administrators had to act in the interests of Barrowfen's creditors.

(c) Conclusion

534. Accordingly, I find that from 12 January 2016 until he resigned as a director Girish failed to disclose his settled intention to put Barrowfen into administration in breach of his duty to promote the interests of the company under section 172. I find that he did so consciously and deliberately, knowing that it was not in Barrowfen's interests and indifferent to the interests of its other creditors or its creditors as a whole.

(5) Breach of duty: section 175

(a) Section 175(1)

535. I have found that by 26 October 2015 it was Girish's intention to take an assignment of the Loan and the Charge and to put Barrowfen into administration and that his purpose or tactical aim was to preserve his control over Barrowfen and its principal asset, the Tooting Property. On 2 November 2015 Barrowfen II was incorporated and on 2 December 2015 the assignment of the Loan and Charge were completed. By 12 January 2016 Girish had also formed the firm intention to put Barrowfen into administration.

536. I am satisfied that from 26 October 2015 there was a situation in which Girish had a direct or indirect interest which conflicted with Barrowfen's interests or might possibly conflict with those interests. In particular, Girish was a shadow director of Barrowfen II and its interests as a potential assignee of the Loan and Charge were adverse to Barrowfen's interests or likely to become adverse to those interests. In my judgment, therefore, section 175(1) was engaged from that date and Girish owed a duty to avoid the situation which I have just described.

537. However, Girish did not take any steps to avoid that situation. He remained a director of Barrowfen and a shadow director of Barrowfen II and on 2 December 2015 an actual conflict of interest arose because Barrowfen II became a secured

creditor of Barrowfen. I also find that from 12 January 2016 that conflict became an acute one because Girish decided to put the company into administration contrary to its own interests and the interests of its other creditors.

538. I have also found that S&B advised Girish that there would be a situation of conflict if he were appointed a director of Barrowfen II and that Mr King advised him that there was a continuing conflict which would only be resolved by his resignation as a director. Assuming in favour of both Girish and S&B that it is necessary to show that Girish knew that there was a conflict of interest, I am satisfied that he was fully aware that there was a situation of conflict between 26 October 2015 and 16 February 2016 (when he resigned).

(b) Section 175(4)

539. Section 175(4) of the Act provides that the duty to avoid conflicts of interest is not infringed (a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest or (b) if the matter has been authorised by the directors.

540. Mr King's evidence was that he saw no conflict because Girish's plan was in the interests of Barrowfen. For the reasons which I have set out above, I have found otherwise. But even if I had been persuaded that administration was in Barrowfen's interests, I would not have been satisfied that the situation fell with section 175(4)(a) or that it absolved Girish from compliance with his duty to avoid situations of conflict in section 175(1).

541. It was not for Girish or Mr King to decide whether the wider interests of Barrowfen justified his failure to take steps to avoid a conflict of interest or a possible conflict of interest. It was for Girish to put the matter before the board of directors and for them to decide whether to authorise the conflict (as contemplated by section 175(5)(b)). If Girish was not prepared to do so, he had a choice: either to give up his plan to put Barrowfen into administration or to resign immediately. Moreover, even if he had resigned on 26 October 2015, he would not have been able to exploit the opportunity to take an assignment of the Loan and Charge without the authority of the board: see section 170(2)(a).

(c) Conclusion

542. Accordingly, I find that from 26 October 2015 Girish failed to avoid the conflict between his interests as a shadow director of Barrowfen II and the interests of Barrowfen in breach of section 175 of the Act. I also find that although Girish believed that Barrowfen was bound to go into liquidation if Barrowfen II did not put Barrowfen into administration, this was not a situation which fell within section 175(4)(a).

U. S&B

(1) Barrowfen's claim

543. Barrowfen's case was that S&B acted in breach of fiduciary duty and its duty of care by giving advice to Girish and Barrowfen II in relation to the plan to force Barrowfen into administration (and then to further that plan) without informing or advising the other directors.

(2) Breach of Fiduciary Duty

544. S&B acted for Barrowfen, Girish and Barrowfen II between 6 October 2015 and 2 December 2015. I have found that there was a significant risk of a conflict between the interests of Girish and the interests of Barrowfen from 6 October 2015 and an actual same matter conflict between the interests of Barrowfen II and Barrowfen from 2 November 2015. I am satisfied, therefore, that from 6 October 2015 the actual conflict rule was engaged and that S&B should not have been acting for all three parties.

545. The issue which I have to determine is whether Mr King understood that such a conflict existed but continued to act in circumstances in which he knew that he could not discharge his duties to Barrowfen. In his third witness statement Mr King stated that he did not consider that at any stage a position of conflict was reached. He also stated that he did not see a requirement for Barrowfen to obtain separate advice. In cross-examination he stood by this evidence.

546. Although Mr King was a very experienced solicitor and in my judgment this conflict ought to have been obvious to him, I accept his evidence. In doing so, I take into account a number of factors:

i) Mr King was in a difficult situation taking instructions from Girish on behalf of Barrowfen, Barrowfen II and himself. As I have already indicated, this was not a situation of Mr King's making. The directors of Barrowfen had created this situation by the 1994 resolution.

ii) Mr King believed that Barrowfen was cashflow insolvent and if Girish did not support it (which he was not bound to do), it would go into voluntary or compulsory liquidation. He also believed that Girish's actions were necessary to preserve the prospects of development because the planning permission required the commencement of works by April 2017.

iii) He also believed that Barrowfen was mixed up in a bitter family dispute and that Prashant and Suresh were hostile aggressors who had no interest in promoting the success of Barrowfen but were interested in destroying Girish and capturing his assets (if necessary by unlawful means).

iv) Mr King believed that any conflict to which this gave rise could be cured if Girish resigned as a director before putting Barrowfen into administration. This was the evidence which he gave in relation to Ms Penny's note of the meeting on 3 January 2016 and although I return to it below, I accept that evidence.

547. I also have to consider whether Mr King deliberately chose not to reveal Girish's plan to Prashant and Suresh or to enable Barrowfen to act on that information in some other way. Ms Hilliard put it to Mr King that it was obvious to him that Girish was acting in breach of his fiduciary duties by failing to disclose his plan and that by continuing to assist Girish he acted dishonestly:

> Q. You knew, Mr King, as an experienced solicitor, that by not telling his fellow directors about what Girish was intending to do in relation to Barrowfen II, that Girish was acting in the clearest breach of his director's duties. A. I do not believe that in

> circumstances where a company is in stasis, is cashflow insolvent, I do not consider it is in breach of a director's fiduciary duties to arrange for administrators to be appointed. Q. And your firm, notwithstanding that you knew he was acting in breach of duty, continued to assist Girish with this course of conduct, of not informing the company that he was a director of, of what he was doing and what he was up to? A. We advised Girish in relation to the administration, including the appointment of the administrators. Yes, we did. Q. And by doing that, you acted dishonestly; you dishonestly assisted Girish Patel to breach his fiduciary duties to the company? A. I completely deny that. There was, number one, no dishonesty whatsoever. And number two, we did not consider and I still don't consider that Girish was acting in breach of his fiduciary duties."

548. Again, I accept Mr King's evidence on this issue. I accept that he did not believe that either Girish or he were acting dishonestly or in breach of their duties. Although I have rejected his evidence on the scope of S&B's retainer and found that S&B had an actual conflict, I found Mr King to be an honest witness and I am satisfied that he would not have deliberately committed what he knew to be a breach of his professional obligations to a client.

(3) Negligence

(a) Conflicts of Interest

549. Although I am satisfied that Mr King did not deliberately ignore the conflict and prefer Girish's interests to Barrowfen's interests, I am equally satisfied that he ought to have appreciated that there was a same matter conflict from 6 October 2015 and without question by 26 October 2015. As I have stated, it is difficult to think of a more obvious conflict of interest than the conflict between the interests of a creditor and the interests of the debtor against whom it is seeking to enforce a private loan.

550. I accept that Girish did not take a final decision to enforce the Loan and Charge until 12 January 2016 (when S&B had ceased to act for Barrowfen). But it should have been obvious to Mr King from Girish's email dated 6 October 2015 onwards that there was a significant risk that Girish might give S&B instructions to acquire and then enforce the Charge. This conflict of interest had become obvious to Ms Walker by 13 November 2015 and in my judgment she was

correct to state that: "we cannot act for Barrowfen and you in circumstances where you are considering taking action against Barrowfen". I would have expected this conflict to become obvious to Mr King, who was a very experienced solicitor, a good deal earlier.

551. I am also satisfied that Mr King failed to give adequate consideration to either Girish's conflict or his firm's conflict of interest either upon receipt of the email dated 6 October 2015 or at any time thereafter. I say this for the following reasons:

i) Ms Hilliard put three documents to Mr King which ought to have prompted him to consider both conflicts very carefully. When each of them was put to him he could not provide a rational or coherent explanation for his failure to recognise these conflicts or to resolve them.

ii) When Ms Walker sent her draft email to Girish on 13 November 2015 Mr King took out the last paragraph stating that S&B could no longer act for Barrowfen. He gave as his reason for doing so that S&B was not in substance "acting against" Barrowfen because all parties were agreed that it would be put into liquidation. Even if that had been accurate (which it was not), this was not an acceptable reason for continuing to act for both clients.

iii) In my judgment, no reasonable solicitor could have formed the view that a creditor seeking to enforce a secured loan shared a common interest with the defaulting debtor or that they were competing for the same objective. It should therefore have been obvious that neither of the exceptions in O(3.6) or O(3.7) applied. In any event, Mr King made no effort to comply with the safeguards required by each of those outcomes.

iv) Ms Hilliard also put Mr Tamlyn's advice to Mr King and asked him why he did not advise Girish that Barrowfen should take independent advice. He gave as his reason that administration was in Barrowfen's best interests. But he also accepted that the position would have been different if it had been "a receivership issue" and "all that Girish was doing was to enforce his rights as a creditor". In my judgment, this was

a distinction without a difference. Both administration and receivership would have involved Barrowfen II demanding repayment of the Loan and enforcing its rights under the Charge.

v) Finally, in relation to Ms Penny's note of the meeting on 3 January 2016 I have found that Mr King knew that there was a continuing conflict but that he did not think it mattered because Girish would be resigning and "putting his interest as a creditor above his interest as a director".

vi) In my judgment again, no reasonable solicitor could have come to the conclusion that it was permissible for Girish to act as a shadow director of Barrowfen II (if he could not be a *de jure* director) or that it was acceptable for him to resolve that conflict by resigning immediately before the demand. Girish had only become aware of the Loan and the Charge and the opportunity to exploit that information when he was a director of Barrowfen. Moreover, S&B made all of the preparations to enforce the Charge and appoint the Administrators whilst he was still a director. Any experienced litigation solicitor should have known that the timing of Girish's resignation only served to make his conduct look even worse.

vii) Finally, I was not taken to any contemporaneous documents which recorded that Mr King considered the Code of Conduct or section 175 of the Act or that he invoked any procedure for resolving conflicts of interest or spoke to any other partner in the firm.

552. I am satisfied, therefore, that Mr King negligently failed to address the conflicts of interest of both Girish and the firm. I am also satisfied that on 6 October 2015 he should have advised Girish that S&B could not act for him personally in relation to the acquisition of the Loan and the Charge or that Barrowfen should be separately represented (if he wanted to continue to instruct S&B personally).

(b) Counsel's Advice

553. By 13 November 2015 the Suresh Resignation Claim had been resolved and Prashant had been appointed a director of Barrowfen. Although S&B continued

to assert that Girish had delegated authority to manage Barrowfen without consulting his fellow directors, there was no longer any dispute about the validity of their appointments.

554. I have accepted Mr King's evidence that S&B sent instructions to Mr Tamlyn on behalf of Girish acting in his capacity as a director of Barrowfen and that S&B were advising him in that capacity. I have also found that S&B was acting for Barrowfen itself. Mr King accepted that he did not communicate this advice to Suresh or Prashant. His initial explanation was that "there was no doubt in our minds that the extensions had been agreed with the authority of the company":

> "Q. And then you say this is potentially a complex issue. Yes? Now, if counsel's concern was right, this would have been a good defence for Barrowfen to a claim by Barrowfen II to enforce a charge, wouldn't it? A. Yes, I mean -- there was -- the issue that this goes to is whether the charge, once assigned, would be enforceable and when we say enforceable, what we are talking about there is whether administrators could be appointed, and the administrator would have required and did require advice that the charge could be – that the administrators could be appointed pursuant to the charge. So this was an issue that simply went to the historic position of whether extensions that were agreed in relation to the loan were done with the authority of the board. Counsel had raised that point. We thought it was probably fine because Girish was acting as sole executive director at the time. And provided he had effectively agreed to the extensions, that that shouldn't be a problem. Q. Mr King, if counsel's concern was right, that was a very valuable piece of information for Barrowfen to know about, wasn't it? Barrowfen might well have had a defence to any enforcement of the charge by Barrowfen II. Yes? A. There was in our -- there was no doubt in our minds or the administrator's minds that the extensions had been agreed with the authority of the company, through Girish as the sole executive director."

555. However, when I asked him about the next paragraph in his email, his evidence was less clear cut although he stood by his assessment that his view as at 13 November 2015 was "that it is unlikely such a challenge would succeed":

> "DEPUTY JUDGE LEECH: Before we leave that, can we look at the second paragraph, Mr King. You say this is potentially a complex issue and you give a fairly sanguine explanation. You say: "The factual background is sufficiently complicated and

indeed unclear that I doubt any clear legal opinion could be given on the point." And then you say: "I think we will therefore have to accept that there is a risk that your brothers might seek to run such an argument in order to challenge your rights to enforce the charge, although on balance, my current view is that it is unlikely such a challenge would succeed." So, reading that paragraph, you didn't consider the point to be clear cut. Is that right? A. Counsel had raised the point, my Lord, and ultimately, it would involve a detailed investigation of the factual position. So what I have said in that email I would stand by, and I am not seeking to say that what I said there was in any way wrong. But we had formed a view that it was an argument that was unlikely to succeed. Q. Well, wasn't that for the -- you say there is a risk that your brothers might seek to run such an argument in order to challenge your rights to enforce the charge. Didn't you think that that was something that Suresh and Prashant were entitled to know, that you had received this advice as directors of Barrowfen, that you -- you said a moment or two ago you told me that you were advising him in his capacity as a director of Barrowfen. In that capacity, did you think it was something that he was obliged to disclose to Prashant and to Suresh? A. What I saw Girish's duties were, were to the company and what was right for the company. We couldn't ignore the context in which advice was happening, and indeed the context probably caused the problems that the company was in, and provided that the path that Girish was following was in the interests of the company, I didn't feel that it was necessary to tell Suresh and Prashant that this advice had been obtained. What was important in our view was that the administration could proceed, if it was necessary to do so. Girish's duties -- it is always obviously problematic when you have a dispute, a board room dispute. But provided the director is acting in the best interest of the company, I saw no reason why this advice -- I mean, the reality is probably, my Lord, we didn't really think about disclosing that advice at that stage, but I don't think there is any reason why we should do so, provided what Girish was doing was in the interests of the company. In other words, he was not breaching his fiduciary duties to the company. Q. And that never crossed your mind at the time? A. No, I think not, my Lord, because he was -- what he was doing was trying to -- well, as I say, he was looking to act in the best interests of the company. He was not acting in breach. We certainly did not see -- I didn't see at the time that he was breaching his fiduciary duties by looking to have the option. It was an option only of placing the company into administration. It was the right thing, we considered, and it was certainly a view that was shared by the insolvency practitioners. It was the right thing for the company to be placed into administration if an alternative route could not be found. As it was, the company was just in a position where it was -- with the development not proceeding and the dispute at both board and shareholder level,

> which was preventing anything happening in terms of moving the company forward, and steps had to be taken to address the position that the company at that stage found itself in, with threats from creditors to wind it up and so on."

556. I am unable to accept Mr King's evidence that there was no doubt in his mind that Barrowfen had no defence to a claim by Barrowfen II. I find that his views were accurately reflected in the advice which he gave to Girish in his email dated 13 November 2013. In particular, I find that Mr King believed that the point raised by Mr Tamlyn was potentially complex and that there was a real risk that Prashant and Suresh would challenge the enforcement of the Charge (if they became aware of the point). I accept, however, that it was also Mr King's view that, on balance, it was unlikely that they would succeed.

557. In my judgment, Mr King ought to have advised Girish to pass on Mr Tamlyn's instructions and his advice to Suresh and Prashant. Girish had received this advice in his capacity as a director of Barrowfen and he owed a duty to communicate it to them under section 172 in order to promote the success of the company. It was plainly in Barrowfen's interests to be aware of any defence which it might have to the enforcement of the Charge.

558. I note that Mr King did not seek to justify his failure to give this advice or to communicate it directly to Prashant or Suresh on the basis that Girish had delegated authority to receive it on behalf of Barrowfen and he was right not to do so. The duty to give advice to other representatives of a company does not depend on whether the individual giving the instructions had authority to give them or to receive the advice but on whether they were in a situation which gave rise to a conflict: see *Newcastle International Airport Ltd v Eversheds LLP* (above) at [79] to [85]. To adapt the language of Rimer LJ, Mr King could not regard advice to Girish as the equivalent of advice to Barrowfen itself and it was the duty of both Girish and S&B to ensure that the company itself was properly advised.

559. For the same reasons I am also satisfied that if Girish had refused to pass on Mr Tamlyn's instructions and advice to Prashant and Suresh, then it was S&B's duty to send them to Prashant directly. S&B were also acting for Barrowfen and if

Mr King had become aware that Girish would not discharge his duty as a director, then it was Mr King's duty to do so for him. Moreover, it is no defence that this was not in Girish's personal interests or the interests of Barrowfen II. As I have found, the actual conflict rule was engaged and S&B had put themselves in the position where they could not comply with their duties to both clients.

V. Other Claims

(1) Dishonest Assistance

560. Barrowfen advanced claims for dishonest assistance against both S&B and Barrowfen II. The allegation pleaded against both parties is that they assisted Girish to commit breaches of his duties as a director. The Re-Re-Amended Particulars of Claim did not, however, identify the individual or individuals whose conduct or state of mind should be attributed to Barrowfen II.

(a) Trust

561. Girish was a director of Barrowfen until his resignation on 16 February 2016. There was no issue, therefore, that the first limb of a claim for dishonest assistance was made out.

(b) Breach of Trust

562. I have found that from 12 January 2016 until he resigned Girish failed to disclose his settled intention to put Barrowfen into administration in breach of his duty under section 172. I have also found that from 26 October 2015 he failed to avoid the conflict between his interests in Barrowfen II and the interests of Barrowfen itself. Although both of these breaches of duty were non-custodial and did not involve the misappropriation of company assets or funds, I am prepared to accept that a claim for dishonest assistance may be made in those circumstances and Mr Stewart did not suggest otherwise. I hold, therefore, that

the second limb was made out (although I make it clear that I did not hear full argument on the point).

(c) Assistance

563. There is no doubt that S&B assisted Girish to put Barrowfen into administration and was instrumental in preparing and serving the documents. Indeed, Mr King accepted in his email dated 6 May 2016 that S&B "hatched the plan of the administration". I also accept that Barrowfen II assisted Girish to put Barrowfen into administration by taking an assignment of the Loan and the Charge, making a demand and appointing the Administrators. However, I have also found that Girish did not commit a breach of his duties as a director by putting Barrowfen into administration. In my judgment, therefore, S&B's conduct in relation to the planning and implementation of the administration is irrelevant for these purposes.

564. I have found that Girish committed breaches of his duties under section 172 and 175 of the Act. Ms Hilliard did not submit that Barrowfen II assisted Girish in any way to commit those breaches of duty. I have found that S&B were negligent in failing to advise him that both he and the firm had conflicts and to disclose Mr Tamlyn's instructions and advice. But I would be very reluctant to find that a solicitor can be liable for dishonest assistance for the failure to give advice to a client. This is not a case in which a solicitor has allowed his or her client account to be used for money laundering. I am not satisfied, therefore, that the third limb is made out against either Barrowfen II or against S&B.

(d) Dishonesty

565. *S&B*: But in any event I have accepted Mr King's evidence that he did not consider that Girish was acting in breach of his fiduciary duties. Moreover, Ms Hilliard suggested no motive for Mr King to act dishonestly. Finally, it seems to me that Mr Stewart's submission that I should take into account the wider family dispute carries the strongest resonance in the context of this claim and the conspiracy claim. I have found that Mr King lost sight of his duties to Barrowfen but I am also satisfied that he did not do so because he was dishonest.

In January and February 2016 the landscape looked very different to Mr King for the reasons which I have set out above.

566. *Barrowfen II*: It was no part of S&B's case that Mr Radmore or Kiraj acted dishonestly and if such an allegation had been made, I would have insisted that they be joined as parties or that the allegation was withdrawn. It follows, therefore, that Barrowfen's case against Barrowfen II depends upon proof not only that Girish acted dishonestly but also that his dishonesty should be attributed to Barrowfen II.

567. Barrowfen's pleaded case was that Barrowfen II dishonestly assisted him to commit breaches of fiduciary duty knowing that it was assisting him to do so. In support of this allegation, Barrowfen relied on the factual material set out earlier in the statement of case. In the relevant paragraphs Barrowfen pleaded that Girish was a shadow director and that "the knowledge and intentions of Girish are to be attributed to Barrowfen II".

568. Barrowfen also pleaded that Girish deliberately failed to inform Suresh or Prashant about the plan to enforce the Loan and Charge. But it did not plead that this failure or Girish's state of mind should also be attributed to Barrowfen II or, indeed, why. When she cross-examined Girish, Ms Hilliard put her case very fully to him (as I have set out above). But she did not suggest to him that he was acting for Barrowfen II or put to him the conduct which should be attributed to Barrowfen II or that it was dishonest.

569. Girish was acting as a director of Barrowfen when he committed the breaches of section 172 and 175 of the Act. I am not satisfied that his state of mind in committing those breaches can also be attributed to Barrowfen II at the same time. Moreover, I am not satisfied that such a case was properly pleaded or put to Girish. Given the nature of the allegation and that Barrowfen II was unrepresented, I decline to make a finding of dishonesty against Barrowfen II.

(e) Conclusion

570. I therefore dismiss the claim for dishonest assistance against both S&B and Barrowfen II. I do so because they did not assist Girish to commit the breaches

of fiduciary duty which I have found. I also dismiss the claim against S&B because I have found that Mr King was not dishonest and against Barrowfen II because Girish's state of mind cannot be attributed to Barrowfen II and no relevant case of dishonesty was put to him.

(2) Unlawful means conspiracy

(a) Combination

571. I find that between 26 October 2015 and 17 February 2016 Girish acted in concert with S&B and Barrowfen II to put Barrowfen into administration. I have found that Girish was a shadow director of Barrowfen II and I also find that his instructions to S&B and Mr Radmore to prepare and take the necessary steps to put Barrowfen into administration should be attributed to Barrowfen II. However, I have also found that there was no agreement between Girish and the Administrators and Ms Hilliard did not suggest that Mr Radmore or Kiraj were parties to the conspiracy. Any actionable combination was, therefore, limited to Girish, S&B and Barrowfen II.

(b) Unlawful means

572. I have dismissed the claim for deceit against both Girish and S&B and the claim for dishonest assistance. If it were necessary to do so, I would have found that Girish used unlawful means to put Barrowfen into administration by committing breaches of his duty under section 172 and 175 of the Act. I would also have held that those breaches of duty were instrumental in causing Barrowfen to go into administration and that if Girish had given Barrowfen time to comply with the demand, it would have done so.

(c) Intention to Injure

573. Barrowfen originally alleged that Girish intended to acquire the Tooting Property at an undervalue. This allegation was withdrawn and Barrowfen amended to plead that the intention of the conspirators was to acquire the Tooting Property at a lower price than the majority shareholders would have been prepared to accept or at a distressed value.

574. Girish declined to answer questions about the plan to put Barrowfen into administration. But Mr King answered this allegation fully (and even before it was put to him):

> "A. Let me finish. I appreciate it might be very different if Girish was looking to harm the company in some way, for example acquiring property at an undervalue. That was never the case. There was no intent to injure or harm the company. He was simply taking steps that in our view a responsible director should be taking. Q. He wanted to -- A. Sorry, can I finish. Q. Go on. A. Faced with the position that the company was in at that time. Q. He wanted to acquire the property at a price that he thought he could get which was below what the shareholders would be willing to sell the property to him at. That is what he wanted. That is what he thought he would get by an administration? A. Not at all, and it was always made clear that there would be proper marketing of the property. It would have been no different whether the property had been sold through -- by the administrators or whether it had been sold through the mechanism that we had also proposed, whereby the shareholders would -- well, one shareholder would buy the other shareholder out. There was always going to be a fair market valuation. There was never any intention of trying to acquire the Tooting property at an undervalue. Had that ever been the suggestion, we could not have acted, and I would never have advised Girish to do that. Q. But I am putting to you that that is what Girish thought he was going to get. He was going to be able to acquire this property for a lower price than the shareholders, or at least the majority shareholders, were willing to sell their shares to him for, otherwise, why didn't he make an offer for the shares? A. Well, that is an entirely different subject about making offers for shares and so on, but Girish -- I do not believe that Girish intended to acquire the Tooting property at an undervalue. He was advised by us, very clearly, and advised very clearly by the administrators there would have to be a proper marketing process. He knew that. He simply wanted the opportunity to be able to acquire the property, alongside any other interested bidders, which could have included of course Prashant and Suresh."

575. I accept Mr King's evidence that he had no intention to injure Barrowfen. I have found that there was no agreement between Girish and the Administrators to enable him to buy the Tooting Property before Barrowfen went into administration or at an undervalue. I have also held that Girish's motivation was to keep control of the business and the development rather than to acquire the

property and that Girish would have been prepared to pay the market value of the Tooting Property.

576. I am not satisfied either that this is a case where Mr King must have known that Barrowfen would be damaged because Girish's gain and Barrowfen's loss were inseparably linked or because Girish could not have achieved that gain without causing damage to Barrowfen. In my judgment, Mr King's state of mind was analogous to that of Mr De Winter in *Mainstream* and that he did not believe that Girish was acting in breach of his duties (muddled though that may have been).

577. Girish was entitled to refuse to answer Ms Hilliard's questions and having accepted Mr King's evidence, I am not prepared to draw the inference that Girish had a different state of mind and an intention to injure Barrowfen. Although I have found that he knowingly committed a breach of his fiduciary duties in failing to disclose the plan to Prashant and Suresh, it does not follow in my judgment that he intended to injure Barrowfen. As I have found, his purpose in putting Barrowfen into administration was to prevent Prashant and Suresh from taking control and preserve the business rather than to acquire the Tooting Property at an undervalue.

(d) Conclusion

578. I therefore dismiss the claim for unlawful means conspiracy. I do so on the grounds that neither Mr King nor Girish had the necessary intention to injure Barrowfen. In those circumstances, it is unnecessary for me to consider the issue of damage.

X. Causation

W. The Company Claims

(1) Girish

579. I have held that Girish removed the page from the Register recording that Bedford was a member and that he forged the Suresh Resignation Letter and the Trustee Resignation Documents. I have also held that he wrote up the Register

to record himself as the first-named trustee of both the Mrs PD Patel Trust and the Mr DP Patel Trust for the improper purpose of preventing the trustees of both trusts from exercising their rights to appoint new directors. If Girish had not committed those breaches of duty and had complied with his statutory duties, I am satisfied that Prashant would have been appointed a director of Barrowfen at the extraordinary general meeting on 8 May 2014.

(2) S&B: what advice should the firm have given?

580. I have also found that S&B ought to have appreciated that Girish had an actual conflict of interest and advised Girish that Barrowfen ought to take separate legal advice before the meeting on 8 May 2014. Ms Hilliard submitted that S&B ought to have provided separate advice either to Suresh or to the shareholders directly or ceased to act. In support of this submission she relied upon *Newcastle International Airport plc v Eversheds LLP* (above).

581. Ms Hilliard also submitted that if S&B had taken either course, then in all likelihood Bedford, Prashant and Suresh would have insisted upon proceeding with the meeting on 8 May 2014 (and put the burden on Girish to challenge Bedford's right to vote) or they would have brought immediate proceedings to rectify the Register. Prashant's evidence (which was not challenged and which I accept) was that he only agreed not to proceed with the meeting because S&B agreed to carry out an investigation which he thought at the time would quickly establish Bedford's rights.

582. The situation in which Mr King and Ms Philipson found themselves before the meeting on 8 May 2014 was not the same as the *Eversheds* case but it gave rise to the same problem, namely, that the person from whom they were taking their instructions had a personal conflict. I am not satisfied, however, that Ms Hilliard's solution would have resolved this problem because Girish was also asserting that Suresh had resigned as a director and the trustees of both trusts had not been written up as shareholders either.

583. In my judgment, Mr King ought to have advised Girish to take independent legal advice on behalf of Barrowfen from specialist company solicitors and, if necessary, counsel in advance of the meeting on 8 May 2014. I am also satisfied

that if Girish had refused to accept that advice, Mr King should have terminated the retainer and declined to act further for Barrowfen (and written to Withers notifying them that S&B was no long acting for the company).

(3) Control: Would Prashant and Suresh have taken control and, if so, when?

584. It is therefore necessary for me to consider what advice Barrowfen should have been given, whether Girish would have taken and followed it in his capacity as a director acting for Barrowfen and, if so, what the likely outcome or outcomes would have been. In approaching this exercise, I apply loss of chance principles not only to the actions of third parties and the court but also to Girish as the wrongdoing director for the reasons which I set out above.

(a) First counter-factual: independent advice

585. If Girish had instructed independent solicitors and counsel on behalf of Barrowfen, in my judgment it is likely that he would have been advised to adjourn the general meeting on 8 May 2014 and make an urgent application to court to rectify the Register to record Bedford as a shareholder and to obtain directions whether to write up Yashwant as the senior shareholder of the Mr DP Patel Trust.

586. This was in substance the advice which Mr Parfitt gave on 29 July 2014. He also advised Girish and S&B that the issue needed to be resolved quickly and that Barrowfen could be separately represented. I agree. Both Barrowfen itself and Girish owed a duty to enter in the Register the particulars under section 113 of the Act and in my judgment it was the failure to comply with this duty not the disagreement between the shareholders which generated the "stasis" (as Mr King described it).

(b) Second Counter-factual: court application

587. If such an application had been made, I am also satisfied that it is probable that the court would have ordered rectification of the Register to record Bedford as a shareholder and to write up Yashwant as the senior shareholder of the Mr PD Patel Trust. S&B advised Girish not to contest the Bedford Rectification Claim

and it was Mr Russen's advice that there was a "real danger" that the court might order that Yashwant would be written up as the senior shareholder. Again, I agree.

588. Such an order would, of course, have given Prashant and Suresh sufficient votes to pass an ordinary resolution to appoint Prashant as a director (and, if necessary, re-appoint Suresh) at the adjourned general meeting. It is possible that Girish would have tried to resist counting any vote cast by Yashwant on the basis the trustees could only act unanimously and that he opposed Prashant's appointment. However, he would have been advised by independent counsel that no notice of any trust may be entered on the register: see section 126 of the Act. He would also have been advised that the Register is the only evidence of a member's right to vote: see *Pender v Lushington* (1877) 6 Ch D 70.

589. I also take the view that any court application would have thrown the spotlight on Girish's claim to be the sole trustee of the Mrs PD Patel Trust. The extract which I have cited from *Re Derham and Allen Ltd* (above) indicates that the court would have been concerned to establish the attitude of the other shareholders before granting rectification. I have also held that S&B ought to have advised Girish to take Guernsey law advice in early 2015. By 7 May 2014 Withers had challenged the Trustee Resignation Documents and in my view Barrowfen's independent advisers would have advised the company to obtain Guernsey law advice and, if it had done so, it would have been advised that Girish's appointment was invalid.

590. I am far less confident, however, that the court would have been prepared to make an order for rectification of the Register to write up Yashwant or Suresh as the senior shareholder of the Mrs PD Patel Trust, particularly, on an urgent application unless Girish had been prepared to consent to such an order himself. I therefore turn to what seems to me to be the most difficult question, namely, whether Girish would have taken and then followed this advice.

(c) Third Counter-factual: would Girish have taken independent advice?

591. Would Girish have accepted and followed any of this advice? Ms Hilliard submitted that he would have done. When she asked him whether he would have

followed advice from Mr King to write up Bedford as a member, he said he would have done. He also said that if S&B had advised him to write up Yashwant first, he would have followed their advice:

> "Q. Did Mr King ever advise you that it was your duty as a director to maintain the register of members of Barrowfen? A. I cannot recall that. Q. Did Mr King ever advise you that if you as a director of Barrowfen failed to maintain the register of members, you would be committing a criminal offence? A. I don't think so. Otherwise I would have -- I would have acted. I mean, I don't think at any time these sort of words have ever been told to me. Q. So if Mr King had advised you that you could be convicted of a criminal offence by failing to maintain the register of members and that it was better that you wrote up Bedford as a member, would you have accepted that advice and acted on it? A. Yes, of course, of course. If that was advice I received, of course I would -- I would not like to break any law."
>
> "Q. Because the prudent lawyer approach would have resulted, so Mr Russen said, in all likelihood that Yashwant's name would be directed by the court to be named first as the shareholder in relation to both trusts. That's what he advised you. A. Okay. I -- I mean, I can't recall exactly what happened, but whatever that is there would have been what Stevens & Bolton would have advised me, and accordingly I would have taken their step, because this was a company matters and I have very little legal knowledge on these matters. These are all very legalistic things, so I would have depended on Stevens & Bolton for advice."

592. This evidence was obviously self-serving and I attach little weight to it. Nevertheless, I have reached the conclusion that there was real and substantial chance amounting to a strong likelihood or probability (i.e. well above 50%) that Girish would have followed S&B's advice and the advice of any independent counsel for the following reasons:

i) If Girish had been faced with the prospect that S&B might terminate its retainer and notify Withers, I have no doubt that he would have been alarmed by the prospect of Barrowfen having no legal representation. This would have increased the risk that Bedford and Suresh might take legal action. There was also a risk that Suresh might try to appoint solicitors of his own on behalf of the company.

ii) Likewise, if Girish had refused to follow the independent advice and make an application to court, it was very likely that Bedford and Suresh would have applied to court themselves for rectification of the Register. They would also have challenged both the Suresh Resignation Letter and the Trustee Resignation Documents. I have no doubt that Girish wanted to avoid the court scrutinising any of these documents or asking for an explanation about the condition of the Register if he could avoid it.

iii) If Girish had refused to accept Yashwant's vote at the adjourned meeting, it also likely that Bedford, Suresh and Yashwant would have applied to the court for an injunction compelling him to do so. Again, I have no doubt that he would have wanted to avoid a contested application both because the spotlight would be shone on the forged documents and the condition of the Register and also because he would have been advised that such an application was likely to succeed.

iv) Indeed, I am satisfied that Girish would have consented to an order that Bedford and Yashwant should be written up as members of Barrowfen rather than have the substantive application heard. When Bedford finally issued the Bedford Rectification Claim and Suresh issued the Suresh Resignation Claim, he consented to the relief sought to avoid a contested application or claim. In my judgment, he did so not because he always followed S&B's advice but because he did not want well-founded allegations of forgery and tampering with the Register to be aired in court.

593. I am satisfied, therefore, that there is a real and substantial chance that Girish would have accepted, taken and followed both the advice of S&B and any independent advice which he would have been given. If it is necessary for me to do so, I would go further and find that on a balance of probabilities Girish would have accepted, taken and followed that advice.

(d) Fourth counter-factual: how long before the adjourned meeting?

594. On 28 November 2014 Bedford issued the Bedford Rectification Claim and on 16 February 2015, less than three months later, a consent order was made. On

13 February 2015 Suresh issued the Suresh Resignation Claim and on 29 June 2015, less than five months later, a consent order was made. Using these proceedings as a rough yardstick, I am satisfied that Barrowfen could have obtained an order for rectification within four months and that the adjourned general meeting could have taken place by early September 2014.

(e) Fifth counter-factual: what would have happened at the meeting?

595. I am also satisfied that at the meeting Prashant would have been appointed a director. If Girish had continued to maintain that the Suresh Resignation Letter was genuine, it also seems very likely to me that Bedford and Yashwant would have tabled a resolution that Suresh should be re-appointed as a director if the board of directors was not prepared to accept that he had not resigned. I am satisfied that Suresh would have been appointed a director either because Girish would have backed down or because Bedford and Yashwant would have passed an ordinary resolution to that effect.

596. In broad terms, therefore, I accept Ms Hilliard's submissions on causation. I am satisfied that if Girish had been properly advised and had acted on that advice, Prashant and Suresh would have been appointed directors of Barrowfen at the adjourned meeting. I am also satisfied that they would have convened a directors' meeting immediately and revoked the resolution dated 20 January 1994 (as they did on 1 December 2015).

(4) The Original Development Scheme

(a) The Planning Position

597. By September 2014 the Original Development Scheme was well advanced. As I have stated in my preliminary remarks on 17 July 2014 an amended planning application was lodged and on 16 October 2014 it was approved by the planning committee. Mr Alford accepted that no formal planning permission was ever granted because Barrowfen never entered into a revised section 106 Agreement. But Mr Clarke also accepted that the outstanding issues were fairly straightforward and that it was more likely than not that it would have been possible to get the revised planning permission in place by January 2015.

(b) Construction

598. By November 2014 Barrowfen had accepted a tender from Gilbert Ash Ltd ("**Gilbert Ash**") and a letter of intent had been prepared. It was Mr Radmore's evidence that the full contract could not be issued but only because there was no certainty over funding.

(c) Tenants

599. It was the evidence of both Mr Radmore and Mr Alford that agreements had been reached to let all of the key elements of the scheme. In particular, agreements had been reached with Premier Inns for the hotel, CRM Students Ltd ("**CRM Students**") for the student accommodation and Waitrose as the anchor tenant for the supermarket. Agreements had also been reached to let two retail units to Turtle Bay Restaurants Ltd and Costa Ltd ("**Costa**").

600. There were two principal differences between the Original Development Scheme and the Amended Original Development Scheme: first, on 19 February 2014 Barrowfen had terminated the agreement for lease with the hotel group Travelodge ("**Travelodge**") and in the same month had agreed heads of terms with Premier Inns for a rent of £6,500 per annum. Secondly, the number of student bedrooms for which Barrowfen had applied for planning permission had increased from 75 to 99.

(d) Funding

601. It was also Mr Radmore's evidence that by September 2014 outline funding terms had been agreed with RBS plc ("**RBS**") subject to due diligence and agreement over the amount of equity which Barrowfen was to inject into the scheme. The term sheet to which Ms Hilliard referred me showed a GDV of £26.13m and a profit of 22% or £4.63m (excluding the exit fee and the sales costs). It also showed that RBS put a site value of £4m on the Tooting Property and required a cash contribution of £3.52m.

602. Investec Bank plc ("**Investec**") had also provided Barrowfen with indicative heads of terms which required Barrowfen to inject no extra capital. The heads

of terms show that Investec put a site value of £5.15m on the Tooting Property but did not require any further equity injection. However, it did require Barrowfen to pay an exit fee of £1.2m.

(e) Developer's Profit

603. Mr Alford calculated the developer's profit on the Original Development Scheme as £10,154,916 and the developer's profit on the Amended Original Development Scheme as £12,048,442. (He made a correction to one of his figures in the first valuation but it had no overall effect on the final figure.) Mr Clarke calculated the developer's profit on the Original Development Scheme as £7,162,482. He did not calculate the profit on the amended scheme. For the reasons which I set out below, I find that the developer's profit on the Amended Original Development Scheme would have been £10,120,130. It is clear, therefore, that the development of the Tooting Property would have been significantly more profitable than its sale (which was the alternative).

(5) The development: would Prashant and Suresh have proceeded?

604. Prashant gave evidence that if he had been appointed as a director of Barrowfen at the general meeting on 8 May 2014 or some time after he would have appraised the development proposals and concluded that it was in the best interests of the shareholders to proceed with the development (as he ultimately did when he took control). He also gave evidence that he would have raised the necessary equity of £3.52m either by a rights issue or by a loan from Aumkar. Suresh supported that evidence (and Mr Stewart did not challenge their evidence that they would have been able to raise the money).

605. Mr Stewart challenged Prashant's evidence on two grounds in closing submissions: first, because no lender would have been prepared to fund the development until the final resolution of the family dispute. He also submitted that RBS or Investec would have required full information about the shareholders (which Prashant and Suresh would not have been prepared to give). Secondly, he challenged that evidence on the basis that Prashant had no intention to develop the Tooting Property until Girish resigned as a director. I deal with each submission in turn.

(a) Availability of Funding

606. In 2018 Barclays agreed to fund the Revised Development Scheme. Prashant accepted that it was a condition of the facility that Barclays had to be satisfied that the shareholders' dispute had been resolved. He was also shown the correspondence with Barclays and the share transfers dated 16 July 2018. Mr Stewart challenged the authority of Yashwant and Suresh to make those transfers and explored the background to the settlement agreement dated 6 March 2019.

607. Prashant was then taken to the email dated 17 December 2018 which he sent to Barclays confirming that the family dispute had been settled. Mr Stewart then suggested that Barclays would not have permitted Barrowfen to draw down its facility without this assurance. He also suggested that the position would have been the same in 2014:

> "Q. There was no prospect, was there, of borrowing £20 million or anything approaching it from any bank while there was a live shareholder dispute between a one-third shareholder and two-third shareholders? That was never realistic, was it? A. What shareholder dispute? In 2018, who was in dispute with whom? Nobody. All that was happening in 2018 was that Kiraj and Vanisha were negotiating a trustee swap which Yashwant and Suresh had agreed to all the way, and it was Collas Crill that had delayed providing us the instrument of transfer. What dispute was there in 2018? Nothing. Q. Please listen to my question, Mr Patel. There was no prospect, was there, of any bank lending £20 million while there was a live and acrimonious shareholder dispute between you and Suresh on the one hand and Girish on the other? A. No, incorrect. Totally incorrect. Q. So why was it then that even after, as you said, the dispute had come to an end, Barclays were insisting on the provision of this information as a term of their lending? A. They wanted to see the settlement going through, because I had been -- by that stage, I had said that this is the basis on which the dispute is being settled. If there was no settlement agreement, I would have talked to them in a different manner and the legal advice that their team was doing would have provided that advice. But, I mean, in 2018 there was no dispute anymore. Bedford had been settled. And if Kiraj and Vanisha remained the shareholders, then we would continue in that manner. I mean, I didn't push for anyone. It was Kiraj that approached me and said we want to enter into this. He was saying -- well, I won't go on into that because that's without prejudice. But he said that he wants a settlement agreement. And so I then

> took it to Barclays in that manner. If it didn't, I would have taken it in another manner. I had no problems with obtaining lending from the finance house, the mezzanine finance house that it approached me just when the interest rate was high. UOB was saying, not a problem, but the interest rate was high, and CIMB indicated the same thing as well. I was shopping around for the best interest rate, is what I was doing. This was a profitable development. And all -- a lot of banks were interested in it. It's bread and butter construction finance."

608. Mr Stewart also suggested to Suresh that there was no prospect of doing the development until Girish was out of the way or borrowing many millions of pounds when the shareholders were at loggerheads:

> "Q. There was no prospect, was there, of doing any development until you'd got Girish out of the way? A. No, that is not true. The intentions were very clear when he met Mr Richard King and subsequently the intentions were always very distinct that he would make an offer to us with, you know, proper terms and conditions, etc, and we had also made it very clear that either of us can buy us each out. Subsequent to that, the shock came to us when the company went into administration without informing us at all. And after that, we had worked something like six, seven months relentlessly, it was a lot of funds and a lot of expenses to bring the company out of administration. And then we have developed this thing. By the same token, I mean, I can also say that, look, you know, Girish had a lot of opportunities in the sense that, you know, he's been saying he wants to redevelop this property from 2005. Right. We are in 2015, we are ten years now, and we have not developed. All -- again, I would also say on the flip side of it, okay, Girish says he had the 1994 resolution, and because of the 1994 resolution, you know, he had the sole and whole authority. If he was sincere and he wanted to do the development, he should have just called an EGM, do a rights issue. He had all the powers with him, but unfortunately he didn't do. Q. There was no prospect, was there, of carrying out any development without borrowing many millions of pounds? A. Yes, there were loan facilities available to him. But he didn't want to do it the correct way. Q. No, sorry. In order to carry out a development, whether by you or Girish, it would be necessary to borrow many millions of pounds; do you agree? A. Yes. Q. There was no prospect of borrowing many millions of pounds when the shareholders of the company were at loggerheads? A. I agree with you. I agree with you that the shareholders of the company were loggerheads. But he has not made any attempt -- he has not made any attempt morally, socially, or for that matter correctly, to approach the shareholders correctly, sit down and try and get this thing going. The current shareholders, myself,

> Rajnikant and himself, we have been here and have been in this property since 1984. We have come all these years, holding this property. Why would we want to, you know, what do you call, not do the development?"

609. Ms Hilliard submitted that the position in 2014 would have been very different from the position in 2018 and that the hypothetical situation which I have to consider is the one in which Girish and S&B had fulfilled their respective duties. She also reminded me that in 2018 Barclays would have known that Barrowfen had been put into administration by Barrowfen II. Finally, she submitted that the trustees of the Mrs PD Patel Trust would have supported the development because of the profitable nature of the Amended Original Development Scheme.

610. Behind these submissions was a more difficult question, namely, what assumptions the court should make about the factual situation in 2014. I accept that for the purposes of the claim against him personally, I should assume that Girish had complied with his duties as a director. However, I do not accept that this is the correct assumption for the purposes of the claim against S&B. The assumption which I must make is that S&B had not committed the breaches of duty which I have found (but no more). Making that assumption I am satisfied that Prashant would have been able to satisfy either RBS or Investec that the board of directors could authorise Barrowfen to enter into the Amended Original Development Scheme and that this action would be supported by a majority of the shareholders (Bedford and Yashwant).

611. But what of the third shareholder, the Mrs PD Patel Trust? I have found that Girish should have been advised to take Guernsey law advice and that if he had done so, he would have consented to an order that Yashwant or Suresh be written up as the senior shareholder of the trust. Accordingly, I am satisfied that Prashant would have been able to satisfy RBS or Investec that all of the shareholders supported the development. In those circumstances, it also seems very likely that Girish would have fallen into line and supported the development. I say this for three reasons:

    i) The Amended Original Development Scheme was highly profitable and Girish (above all) would have been aware of this fact. It is possible that

he would not have been prepared to support a sensible commercial decision to proceed because of the personal animus between him and other family members but I consider it unlikely.

ii) Both Girish and Hambros were substantial creditors of Barrowfen and Girish had been funding the company for some time. It was much less likely that they would be repaid quickly or without difficulty if he opposed the development. It would also have been in Barrowfen's interests to give him comfort that Hambros would be repaid.

iii) It is less likely that he would have been able to reach agreement with his brothers over the partnership's investment funds if he had opposed the development. In early 2016 he delayed putting Barrowfen into administration to avoid "scuppering" the Memorandum of Agreement (to use Mr King's word).

612. I therefore accept Ms Hilliard's submission that Prashant would have been able to satisfy either RBS or Investec that there was no shareholders dispute by the end of 2014. I can dispose of the second point which Mr Stewart made about the availability of funding much more quickly. He relied on Girish's evidence that neither RBS nor Investec would have been prepared to lend without full KYC information about the shareholders. I agree that Girish gave that evidence. But, as Ms Hilliard pointed out, he also accepted that he failed to pass on RBS's request for that information to Prashant and Suresh.

613. I am satisfied that Prashant and Suresh would have provided the evidence which RBS needed if Girish had asked them to do so. On the other occasion on which Girish asked for evidence of identification, Prashant arranged for Rajnikant to provide it immediately. Moreover, Suresh and he satisfied the Administrators and the Court to accept Bedford's loan offer over the strong objections of both Girish and S&B.

(b) The Family Dispute

614. Mr Stewart also submitted that I should reject Prashant's evidence on the basis that until February 2016 Prashant was opposed to the development of the

Tooting Property. Ms Hilliard argued that it was not open to S&B to advance this case because it was never put to him that he would have opposed the development if he had taken operational control in 2014. I reject that submission and I am satisfied that Mr Stewart put his case to Prashant very clearly:

> "Q….It is a fact, isn't it, and you accept that at all times from 2013 up to and including the appointment of administrators in February 2016 you were opposed to the Tooting site being developed and instead you considered it should be sold? That was your position, wasn't it? A. No. That was not the position. We had mentioned on occasion it was to be sold because of the -- what was happening in Barrowfen. However, we didn't have the inclination. We were also seeking the information about the development. All Girish had to do was call an EGM and put the documents in front of us and our minds would have been changed instantly. I didn't see the construction costs and Gilbert Ash wouldn't propose the tender. I didn't see a development appraisal. I hadn't seen professional costs. None of that. It would have taken an hour for him to put it in front of us and my view would have changed instantly. So I don't accept that it was my absolute view that this should not be developed. I didn't have the documents in front of me. Q. I'm going to try a third time. For whatever reason, including let us assume that you were positively misinformed -- let's put it that high -- your actual position was that the Tooting site should not be developed but should be sold. That was what your position was, wasn't it? A. It was mentioned in correspondence that that was the -- Q. Let's be clear about this. You never indicated any willingness at all during that period to have the Tooting site developed, did you? A. We didn't have the documents in front of us. We didn't -- Q. Sorry, please answer the question. A. The question -- Q. You never indicated any willingness to have the Tooting site developed? A. No, I believe that's incorrect. There was Suresh's letters where he was saying that if you provide the documents, we will be willing to look at this development."

615. Mr Stewart also put it to Prashant that his conduct in relation to Barrowfen formed part of a scheme to capture Girish's assets. He relied on Prashant's conduct and the conduct of his father and uncles in relation to the litigation over Barrington and Girish's shares in Aumkar. He also relied on the "undocumented arrangement" under which Yashwant, Suresh and Prashant agreed to divide up the shares in Barrington between them. Mr Stewart pulled all of these strands together in the following sequence of questions:

> "Q Now, your position was, wasn't it, and had been for a very considerable period of time, that you were not prepared to divide up the family assets on a fair and equitable basis, you wanted to capture them all and then decide what, if anything, you gave Girish and his family. A No. I don't agree with that. We were -- the suits that were in place needed to sort things out, and we needed court orders to finally work out who were the legal and the beneficial owners and then after that we were always going to come back to dividing the assets, and that was because there was always sentiment for that, and particularly from my father. Q Sorry, what was the sentiment from your father? A That, you know, whatever happens, you know, for the sake of family unity we should divide up something. Q You didn't want to give them anything did you. That was your position? A No. That's not true. I was happy to -- I followed the wishes of my father and Suresh, but it was just that in December 2015 it was not time to get into the nitty-gritty because nobody understood but me all the various lawsuits. I was co-ordinating all of them, and, you know, no one could understand the stress that I was going through in dealing with them, and so my position was a lot more harder. I was always ready to follow the wishes of my father and my uncles. Q You were orchestrating, you accept, all of the litigation? A I was not orchestrating it, I was defending myself with the documents that Girish brought out of thin air."

616. I have set out my findings in relation to the wider family dispute in Appendix 2. In summary, I have found that Yashwant, Suresh and Prashant were prepared to use the Seychelles Claim to deprive Girish of his one third share in Aumkar (albeit entirely lawfully and by exploiting Girish's decision to put his shares in Barrington in the name of his mother). I have also found that Prashant and Yashwant back-dated documents to mislead the court in Malaysia.

617. These findings provided strong support for Mr Stewart's submission. But after weighing up all of the evidence I accept the evidence of Prashant and Suresh on this issue and I find on the balance of probabilities that they would have proceeded with the development. I have reached that conclusion for the same reasons that I found that they would have supported Barrowfen and proceeded with the development even if the company had not gone into administration.

618. I also accept Prashant's explanation that Girish did not provide him or Suresh with the information to decide whether it was in Barrowfen's interests to proceed with the development before it went into administration. I have found that after the consent order was signed on 29 June 2015 Suresh and Prashant began to ask

for information about the development and in their letter dated 30 July 2015 Kingsley Napley made it clear to S&B that Suresh was open to consider whether the development was Barrowfen's best interests. I have also found that both Girish and S&B resisted the provision of information for as long as they could (although Suresh was a director and S&B were acting for the company).

619. Finally, it seems to me that the rhetorical question which Suresh asked in answer to Mr Stewart's questions was a good one: see [608] (above). Why would Rajnikant and he turn down the opportunity to develop the Tooting Property after their families had owned one third each of Barrowfen for thirty years? The obvious answer is that they would have been prepared to support the development if it had been profitable and likely to increase the value of those shares considerably. I find, therefore, on a balance of probabilities that Prashant and Suresh would have proceeded with the development by January 2015 if they had taken control of Barrowfen by the end of September 2014.

(6) Loss of a Chance

620. For the reasons which I have given I must approach the hypothetical question whether Prashant and Suresh would have proceeded with the development on a balance of probabilities. I have found that they would have done. I have also found that there was a very strong chance (i.e. well above 50%) that Girish would have taken and followed independent legal advice on behalf of the company. Alternatively, I have found that on a balance of probabilities he would have done.

621. I have also found that there was a real and substantial chance that Prashant and Suresh would have taken control of Barrowfen by the end of September and proceeded with the Amended Original Development Scheme by January 2015 if Girish had taken and followed independent legal advice. I am also satisfied that there was a real and substantial chance that RBS or Investec would have provided the funding to enable the development to proceed even though the family dispute was not finally settled until March 2019.

622. In my judgment this is not a case in which it is appropriate to assess each counter-factual separately and attribute a percentage chance to it. I say this

because they were all steps which would have led to a single outcome, namely, that Prashant and Suresh would have taken control of Barrowfen and then proceeded with the development. In my judgment, the appropriate course is to assess the overall percentage chance or likelihood of this final outcome. For the reasons which I have given I consider that there was a high probability of this outcome and I assess it at 60%.

X. The Administration Claim

623. I have held that on or after 26 October 2015 Girish failed to avoid a situation of conflict and that on or after 13 November 2015 S&B failed to advise him to disclose Mr Tamlyn's instructions and advice to Prashant and Suresh. I have also held that on or after 12 January 2016 Girish failed to disclose his settled intention to put Barrowfen into administration.

624. The obvious way for Girish to avoid a situation of conflict was to reject the plan to take an assignment of the Loan and Charge. However, he could also have avoided a situation of conflict if he had made full disclosure of the plan to Prashant and Suresh before the incorporation of Barrowfen II and completion of the assignment and had asked for authorisation of the board. On 2 December 2015 the assignment was completed and it would, therefore, have been necessary for him to provide disclosure and obtain authorisation before that date.

625. By the same token, if S&B had advised Girish to disclose Mr Tamlyn's instructions and advice to Suresh or Prashant (or, if he had refused to accept that advice, and they had disclosed this information themselves), then Prashant and Suresh would also have been aware both of Girish's plan to put Barrowfen into administration and the potential defence which Mr Tamlyn had identified during the second half of November 2015. Given the timing of both hypothetical disclosures I consider the causative effects of the breaches of duty committed by Girish and S&B together.

626. Prashant's evidence was that Suresh and he could have raised sufficient funds to repay Barrowfen II if they had been given reasonable notice of the demand for repayment. He also stated that they could have obtained a loan on two days'

notice from Aumkar (if necessary) or that the funds could have been raised within two weeks from an accelerated rights issue. I accept that evidence. I have already found that Suresh and Prashant would have supported Barrowfen and proceeded with the development even if the company had not gone into administration and Mr Stewart did not challenge their ability to raise the funds.

627. I find, therefore, that on a balance of probabilities Suresh and Prashant would have raised sufficient funds to repay Zurich in full by or soon after 1 December 2015 which was the date on which they took control of Barrowfen. I also find that there is a real and substantial chance amounting to strong likelihood that Barrowfen would have repaid the Loan and discharged the Charge soon afterwards with the consequence that it would have avoided administration. I say this for the following reasons:

i) I have no doubt that Suresh and Prashant would have refused to authorise the assignment of the Loan and the Charge and would instead have tendered repayment to Zurich.

ii) I accept that Girish was prepared to take the risk that the Loan and Charge were unenforceable when Prashant and Suresh were unaware of Mr Tamlyn's advice. But I consider it highly unlikely that he would have been prepard to take that risk or continue with his plan once they had been made aware of it and the potential defence which Mr Tamlyn had identified.

iii) But in any event I also consider it highly unlikely that Zurich would have accepted Girish's offer to take an assignment of the Loan and Charge in circumstances where Barrowfen was offering to repay the Loan in full. Indeed, Zurich would have been advised that it had a legal duty to accept Barrowfen's tender of repayment.

iv) Finally, even if the assignment had been completed and Barrowfen II had demanded repayment (whilst Suresh and Prashant had considered the position and taken advice), I consider it highly likely that Barrowfen would have obtained an injunction to restrain enforcement by relying both on Mr Tamlyn's defence and Girish's breach of section 175.

628. Ms Hilliard also submitted that once Prashant and Suresh had removed the threat of administration and examined the development proposals, Barrowfen would have proceeded with the Amended Original Development Scheme. I accept that submission and I find on a balance of probabilities that it would have done so. By February 2016 there was over a year remaining before the existing planning permission expired and there was time to submit or re-submit the section 73 application.

629. I am also satisfied that there was a real and substantial chance amounting to a strong likelihood that Barrowfen would have commenced the development of the Amended Original Development Scheme by April 2016. I say this for the following reasons:

i) Based on the evidence of Mr Clarke (above), I consider it highly likely that Barrowfen and Wandsworth would have executed the outstanding section 106 agreement.

ii) Heads of terms had been agreed with Waitrose and it did not withdraw from the project until June 2016 (and then because of lack of progress). Again, I consider it highly likely that Waitrose would have remained the anchor tenant and entered into an agreement for lease.

iii) I also consider it highly likely that RBS or Investec (or an alternative funder) would have provided the necessary finance. It was a highly profitable development and Barrowfen would have been injecting substantial equity (including the site value of the now unencumbered site).

iv) On 7 December 2015 Girish had been removed as the trustee of the Mr DP Patel Trust. The board of directors would, therefore, have been able to satisfy a funder that all of the shareholders supported the development.

630. Again, in my judgment this is not a case in which it is appropriate to assess each counter-factual separately and attribute a percentage chance to it. For the reasons which I have given I consider that there was a high probability of this outcome which I assess at 80%. I consider that there was an even stronger

likelihood that Barrowfen would have avoided administration and begun the Amended Original Development Scheme by April 2016 because Suresh and Prashant had already taken control of Barrowfen by 1 December 2015 whereas my assessment of the chances of them beginning the development by January 2015 takes account of the uncertainty associated with them taking control in 2014.

XI. Quantum

Y. Barrowfen's Losses

(1) The Issues

631. I have found that if Girish and S&B had complied with their duties, there was a real and substantial chance amounting to a strong likelihood that Barrowfen would have implemented the Amended Original Development Scheme in January 2015. I have also found that Barrowfen would have avoided administration and implemented the Amended Original Development Scheme in April 2016.

632. It was common ground between the experts that the construction period for the Amended Original Development Scheme was 20 months (whether the development started in January 2015 or April 2016). It follows that the development would have been completed by September 2016 if development had begun in January 2015 (and by the end of December 2017 if it had begun in April 2016).

633. It was also common ground that a construction period of 22 months was reasonable to complete the Revised Development Scheme and that 28 months was a fair and reasonable period for making the change from the Amended Original Development Scheme to the Revised Development Scheme. The last day of the trial was 1 April 2021 and the evidence was that the Revised Development Scheme was close to completion and would be completed during April 2021. Given this common ground the Defendants did not submit that Barrowfen had failed to mitigate its loss (or incurred avoidable losses) by

changing scheme or that the time taken to complete the Revised Development Scheme was unreasonable.

634. Barrowfen case was, therefore, that as a consequence of the Defendants' breaches of duty, the development had been delayed and it had received no income from the Tooting Property. It claimed the net monthly rents which it would have received if it had completed the Amended Original Development Scheme by the end of August 2016 (or, alternatively, December 2017) to the end of trial, i.e. 55 months (or, alternatively, 39 months). It also claimed (a) the costs and expenses of the administration, (b) the additional costs of changing from the Amended Original Development Scheme to the Revised Development Scheme, (c) the costs of enforcement of the Charge, (d) legal fees paid to S&B and (e) the costs of the Bedford Rectification Claim which it paid to Bedford.

635. S&B disputed all of these heads of loss. However, it also argued that if any of these losses were recoverable, Barrowfen should give credit for the increased developer's profit which it has made as a consequence of changing schemes. S&B applied to amend to take this point during the trial and in deciding to permit the amendment I held that it was arguable that Barrowfen should give credit for any additional profit. I must now determine that issue finally.

(2) The Expert Evidence

636. Barrowfen called Mr Alford to give evidence and S&B called Mr Clarke. As I have already stated, I found them both to be impressive witnesses with a depth of experience and knowledge. Although they gave valuable assistance to the court by agreeing almost all of the valuation issues, there were bound to be some points on which they differed and, for the most part, they were the sort of points on which one might expert two reasonable expert valuers to differ. However, I had to decide between them on those points and where necessary I briefly set out below my reasons for preferring the opinion of one over the other.

(3) Monthly Rental Income

637. Mr Alford and Mr Clarke were agreed on the net monthly rental income which Barrowfen would have received under the Amended Original Development

Scheme on the retail, hotel and community elements of the scheme and differed only on the student accommodation element. Both their agreement and difference of opinion were reflected in the following table (which was based on the 54 month period which had elapsed at the date of their joint statement):

Months	**Retail**	**Hotel**	**Community**	**Student Housing**	
				RA	**PC**
0-4	£0	£0	£0	£0	£0
4-6	£0	£84,500	£0	£94,905	£0
6-12	£233,677	£253,500	£29,000	£284,715	£176,266
12-24	£467,353	£507,000	£58,000	£569,430	£352,531
24-36	£467,353	£507,000	£58,000	£569,430	£352,531
36-48	£467,353	£507,000	£58,000	£569,430	£352,531
48-54	£233,677	£253,500	£29,000	£284,715	£176,266
Total	**£1,869,413**	**£2,112,500**	**£232,000**	**£2,372,625**	**£1,410,125**
Monthly	**£34,619**	**£39,120**	**£4,296**	**£43,937**	**£26,113**
Grand Total				**£6,586,538**	**£5,624,038**

638. There were a number of differences between the experts in relation to student accommodation: (a) Mr Alford adopted a rent of £210 per week for studios and £165 per week for "cluster" bedrooms whereas Mr Clarke adopted £170 and £145 respectively; (b) Mr Alford assumed that the student accommodation would be let for 46 weeks each year whereas Mr Clarke assumed 41 weeks; and (c) Mr Alford assumed a rent free period of 4 months whereas Mr Clarke had assumed a period of 6 months.

(a) Rents

639. I prefer Mr Alford's evidence on this issue. His figures were taken from the budget which CRM Students had prepared for the development. Mr Stewart suggested to Mr Alford that this was no more than a marketing pitch. But in my judgment, it represented the best evidence of rents at which the student accommodation could be let in the market and Mr Alford supported it by reference to a report prepared by LSH which supported the figures put forward by CRM Students and showed that they were in line with average rents for student accommodation in London in 2016 to 2017.

640. Moreover, Mr Clarke's original valuation for the student accommodation under the Original Development Scheme was £210 for studios and £180 for clusters. He reduced those figures for two reasons: first, because of the increase from 75 to 99 rooms under the Amended Original Development Scheme and, secondly, because he understood that a competing scheme offering 700 bedrooms had opened nearby. I was not convinced that there was solid evidence to support either reduction for the following reasons:

i) It was Mr Clarke's evidence that the gross internal area of the student accommodation was 38,858 square feet under the Original Development Scheme. Ms Hilliard submitted that even after a 25% deduction for the net internal area, this led to an average bedroom size of 293.4 square feet which was much larger than the average student studio of 144.23 square feet published by the Statista Research Department on 15 February 2021.

ii) Mr Alford also confirmed in his evidence that under the Amended Original Development Scheme the average bedroom size was likely to be much higher than 144 square feet and possibly as high as 169 square feet.

iii) Mr Clarke had based his evidence about the competing scheme on the reference by Prashant in his email dated 17 June 2016 to a 700 bed student housing complex opening around the corner from the Tooting Property. But I cannot be satisfied that Prashant was correct. Neither of the experts had been able to identify this accommodation.

iv) I am not satisfied either that Prashant was referring to the Furzedown Village. That complex had been opened in the 1960s and refurbished in 2012 but Mr Alford's evidence was that Furzedown only had 364 beds. But even if Prashant was referring to the refurbishment of the Furzedown Village, I am not satisfied that it was legitimate for Mr Clarke to make a reduction in rents because CRS Students would have been aware of Furzedown before preparing their budget for the Tooting Property.

(b) Occupancy Period

641. Mr Alford had originally adopted an occupancy period of 51 weeks based on the CRS Students budget but then reduced it to 46 weeks. Mr Clarke originally adopted a 38 week period but increased it to 41 weeks. I prefer Mr Clarke's evidence on this issue. Given the length of student terms, Mr Alford's valuation assumed that Barrowfen would be able to let the entire 99 rooms for most of each vacation. However, I consider this to be too optimistic because the planning permission only permitted Barrowfen to let the accommodation to students. Mr Clarke's occupancy period also took into account the competition which the Tooting Property might face from the Furzedown Village.

(c) Rent free period

642. There was little to choose between the rent free periods adopted by each expert. But I prefer Mr Clarke's period of 6 months on the basis that the fit out of the entire development was likely to take a considerable period of time and its completion might not coincide with the beginning of the university term.

(d) Running and Mobilisation Costs

643. The budget prepared by CRM Students showed that the scheme provided for 6 studios and 93 clusters. Mr Alford also adopted the running costs of £184,454 shown in the budget and deducted "mobilisation" costs of £19,900. In the joint statement Mr Clarke also accepted both of those figures. Looking at the heads of expenditure itemised in the budget, it is unlikely that overall running costs would have been significantly affected by a reduction in occupancy periods. I therefore adopt the same figures.

(e) Conclusions

644. On the basis of these findings I calculate that the net annual rent of the student accommodation under the Amended Original Development Scheme would have been as follows:

i) *Studios*: £210 x 41 x 6 = £51,660;

ii) *Clusters*: £165 x 41 x 93 = £629,145;

iii) *(Running Costs*: £184,454

iv) *Mobilisation Costs*: £19,900)

v) ***Total*: £476,451**

645. I find, therefore, that the net monthy rental income for the student accommodation would have been £39,704.24. Adopting the figures agreed between the experts for the retail, hotel and community elements of the scheme, the net monthly income for the whole Tooting Property would have been £117,739.25, say, £117,740. Finally, Ms Hilliard accepted that £34,950 had to be deducted from the total monthly rental income for financing costs (and Mr Stewart did not challenge this figure). After deducting finance costs, I find that Barrowfen would have received net monthly income of £82,790 under the Amended Original Development Scheme.

646. I find, therefore, that if Barrowfen had commenced the Amended Original Development Scheme in January 2015 it would have received rental income of £82,790 per month for the 55 months from September 2016 until trial: a total of £4,553,450. I am also satisfied that if it had commenced the scheme in April 2016 it would have received rental income of £82,790 per month for the 39 months from January 2018 until trial: a total of £3,228,810.

647. In order to arrive at a final figure, however, I must also deduct the six month rent free period which Barrowfen would have granted for the student accommodation: £238,225.44 (6 x £39,704.24), say, £238,230. Ms Hilliard also accepted that Barrowfen must give credit for the rent of £249,000 which it actually received. These credits produce final figures of £4,066,220 and £2,741,580 respectively.

(4) Costs

(a) The administration

648. Barrowfen claimed costs totalling £401,864.73 as the costs and expenses of the administration. S&B accepted the breakdown of that figure and Girish did not challenge it. However, S&B argued that these sums were not recoverable

because Barrowfen would have gone into insolvency and incurred costs of a similar order. I reject that submission. I have found that if S&B had properly advised Barrowfen or, if necessary, Prashant and Suresh, then there was a real and substantial chance that Barrowfen would have avoided insolvency altogether. Accordingly, I find that these costs are recoverable.

(b) The Revised Development Scheme

649. Barrowfen also claimed costs totalling £324,468.67 as the legal and professional costs of amending the planning application and implementing the Revised Development Scheme. Barrowfen produced all of the invoices for these costs and Prashant gave evidence about the nature of the expenditure. S&B and Girish did not challenge any of these costs or this evidence. Nor did they argue that these costs were unreasonable or that they had not been incurred in relation to the Revised Development Scheme. Accordingly, I find that these costs are also recoverable.

(c) Costs of Enforcement of the Charge

650. Barrowfen also claimed Barrowfen II's costs of enforcement of the charge which totalled £30,243.69. Again, there was no challenge to those costs and I have found that if Girish and S&B had complied with their duties, there was a real and substantial chance that the company would have avoided enforcement altogether. Accordingly, I find that these costs are also recoverable.

(d) Legal Fees

651. Barrowfen also claimed to recover legal fees of £63,291.76 which it paid for the legal advice which S&B gave in relation to Bedford's claim to be a member and writing up the Register. Barrowfen claimed to be entitled to recover them for three alternative reasons: first, S&B ought to have declined to act; secondly, the advice which the firm gave was to further Girish's interests and he should have paid them; and, thirdly, Barrowfen is entitled to an account of profits for breach of fiduciary duty.

652. I reject that submission. I have not found that S&B is liable for breach of fiduciary duty or that Mr King or Ms Philipson consciously preferred Girish's interests to the interests of Barrowfen. Moreover, on the basis of the findings which I have made, it is obvious that S&B would have given some advice and that it would have been necessary for Barrowfen to take independent advice from another firm of solicitors (and, if necessary, counsel). I am not satisfied that the company would have avoided paying £63,291.76 and I, therefore, reject this claim.

(e) The Bedford Rectification Claim

653. Finally, Barrowfen claimed the costs which it paid to Bedford to compromise the Bedford Rectification Claim. I have found that S&B's advice was not negligent and I therefore reject this claim too.

Z. Developer's Profit

(1) The Revised Development Scheme

654. Both Mr Alford and Mr Clarke produced residual valuations to calculate the developer's profit on the Revised Development Scheme as at the date of trial in March 2021. I set out their respective valuations in the following table:

Element	**Mr Clarke**	**Mr Alford**
Retail	£8,688,885	£8,118,754
Community	£717,930	£623,315
Hotel	£9,450,044	£9,463,181
Residential	£22,298,733	£21,343,480
GDV	£41,155,591	£39,548,730
Development Costs	£27,219,388	£27,585,064
Developer's profit	**£13,936,203**	**£11,963,666**

(a) Retail

655. The only difference between the experts in relation to the retail element was the yield which they applied. Mr Clarke adopted a yield of 7% and Mr Alford a

yield of 7.5%. In relation to the Original Development Scheme both had adopted a yield of 6%. Both experts pushed out their yields because of the change in market conditions due to the pandemic. But Mr Alford pushed his out further. This was, as Mr Stewart acknowledged in his cross-examination of Mr Alford, a question of judgment. But I have to choose between the two judgments.

656. On this point I prefer Mr Clarke's evidence. The effect of an adjustment of 0.5% was to reduce the capital value of the retail element by £500,000. Although the effect of the pandemic has been to put "retail shops under assault from online shopping and the recession" (as Ms Hilliard put it), I would need stronger evidence to support a fall in value of £1.5 million and the economy has now begun to recover. I therefore adopt Mr Clarke's figure for the retail element.

(b) Community

657. Again, the difference between the experts in relation to the community element was the yield which they applied. Mr Clarke adopted the same yield of 6% for both the Original and the Revised Development Schemes but Mr Alford, who had agreed a yield of 6% for the Original and Amended Original Development Schemes, pushed his yield out to 7%. Again, on this point I prefer Mr Clarke's evidence. Ms Hilliard justified this by reference to the "expected increase in working from home". But there was no reliable evidence that the pandemic would have had such a marked effect on community space in Tooting. Again, I adopt Mr Clarke's figures for the community element.

(c) Hotel

658. The experts were agreed on a yield of 6.5% for the hotel element and the difference between them was, so far as I was able to tell, solely attributable to their different models. I therefore adopt Mr Alford's figure of £9,463,181 purely for pragmatic reasons. Barrowfen can hardly complain if I adopt its figure and since it assists the Defendants, they cannot complain either.

(d) Residential

659. The principal difference of opinion between the experts in relation to the Revised Development Scheme was the capital value of the residential element which consists of 32 apartments. Mr Alford's evidence was that the 32 apartments broke down into 7 one bed, 22 two bed and 3 three bed apartments and he had identified an impressive number of comparables (which Mr Clarke accepted as the best evidence of rental values). Mr Alford's analysis of those comparables produced the following figures:

i) One bedroom flats: £800 to £840 per sq ft;

ii) Two bedroom flats: £740 to £800 per sq ft; and

iii) Three bedroom flats: £700 to £760 per sq ft.

660. Mr Alford was also able to obtain details of the floor areas and layouts which had not been available to Mr Clarke. Mr Alford's final valuation was £21,343,480 (including social housing) based on an average of £767.89 per square foot. After some adjustments, Mr Clarke's final valuation was £22,298,733 (including social housing) based on an average of £804.68. He also broke down that figure as follows:

i) One bedroom flats (4,200 sq ft in total): £1,076.19 per sq ft;

ii) Two bedroom flats: (18,700 sq ft in total): £641.18 per sq ft; and

iii) Three bedroom flats (3,000 sq ft in total): £696.67 per sq ft.

661. The difference between the two valuations in percentage terms was only 3.7% and Mr Alford quite properly accepted that both valuations were reasonable. However, this small variation in percentage terms produced a difference in capital values of almost £1m and I have to decide between them. On balance, I prefer Mr Alford's evidence on this point. His average of £767.69 was very close to the mid point of the entire range of comparable figures. Given that almost 70% of the total floor area consisted of two bedroom flats, Mr Clarke's average of £804.68 looked a little high.

662. Moreover, Mr Clarke's valuation of the one bedroom flats exceeded Mr Alford's range of comparables by £236.19 per sq ft. If Mr Clarke had adopted a figure of £840 per sq ft for one bedroom flats (which was Mr Alford's upper figure), this would have reduced his valuation by £991,200 (using Mr Clarke's total floor area of 4,200 sq ft) which accounts for almost the entire difference between the two valuations.

(e) Development Costs

663. Mr Clarke adopted a figure of £27,219,388 for the total development costs which the experts had agreed in the joint statement. Mr Alford, however, adopted a revised figure of £27,585,064 which now included sales costs of £364,941. Ms Hilliard submitted that it was necessary to deduct the additional costs of the sales of residential flats before calculating the developer's profit and I accept that submission. It was not necessary to deduct the costs of sales on the Original Development Scheme or the Amended Original Development Scheme because they did not include a residential element. I therefore accept Mr Alford's figure of £27,585,064.

(f) Conclusion

664. I therefore find that the developer's profit for the Revised Development Scheme as at March 2021 was as follows:

Element	**Amount**
Retail	£8,688,885
Community	£717,930
Hotel	£9,463,181
Residential	£21,343,480
GDV	£40,213,476
Construction Cost	£27,585,064
Developer's profit	**£12,628,412**

(2) The Amended Original Development Scheme

665. Mr Alford carried out a residual valuation for each of the Original Development Scheme and the Amended Original Development Scheme. Mr Clarke only carried out a residual valuation of the Original Development Scheme. I record their different valuations in the table below (which I gratefully take from Ms Hilliard's closing submissions):

Element	**Unamended Original Development**	**Unamended Original Development**	**Amended Original Development**
	Mr Clarke	**Mr Alford**	**Mr Alford**
Retail	£7,565,556	£7,577,857	£7,578,194
Community	£938,910	£940,478	£940,479
Hotel	£8,818,707	£10,094,342	£9,502,618
Student Housing	£7,026,481	£8,729,424	£11,214,324
GDV	£24,349,654	£27,342,101	£29,235,614
Development Costs	£17,187,793	£17,187,793	£17,187,793
Developer's Profit	**£7,162,482**	**£10,154,916**	**£12,048,442**

666. The only two issues between the parties were (a) the rental value of the student accommodation and (b) the appropriate yield for the hotel accommodation. Since I have determined the rental value of the student accommodation, the only outstanding issue was the yield for the hotel.

(a) Retail

667. The retail figure was almost agreed. But I was not given a reason for the difference of £12,301. Whilst in context, this was a very small difference, it is nevertheless more than negligible. I adopt Mr Clarke's figure of £7,565,556 for the pragmatic reason that I adopted Mr Alford's figure on the previous occasion.

(b) Community

668. The difference between the experts on the community space was even narrower. I adopt Mr Alford's figure of £940,478 because I have adopted Mr Clarke's figure for the retail element.

(c) Hotel

669. Mr Alford adopted a yield of 5.25% in relation to the hotel whereas Mr Clarke adopted a yield of 6%. I prefer Mr Alford's evidence on this issue. It was

supported by comparable evidence and the historic valuation report prepared by LSH dated 13 May 2016. Moreover, Mr Clarke was unable to offer any evidence to the contrary. He accepted in evidence that he had adopted a yield of 6% on the assumption that Travelodge would be the tenant. Travelodge had been the subject of CVAs in 2012, 2016 and 2020 and had a much weaker covenant strength than Premier Inns. Mr Clarke conceded that he had not carried out a valuation on the assumption that Premier Inns would be the tenant and although he did not accept Mr Alford's yield of 5.25% he was prepared to accept that it was possible. I therefore adopt Mr Alford's figure of £9,502,618.

(d) Student Accommodation

670. I have already determined that the annual rent for the student accommodation was £476,451. The experts conveniently agreed that the appropriate yield for this element of the development was 5% or 20 years purchase, which must be deferred for 6 months to take account of the rent free period. Mr Alford's residual valuation of the Amended Original Development Scheme assumed a rent free period of four months whereas Mr Clarke's residual valuation assumed a rent free period of six months. I therefore adopt Mr Clarke's deferral rate of 0.9759. Accordingly, I find that the capital value of the student accommodation would have been £9,299,371 (i.e. £476,451 x 20 = £9,529,020 x 0.9759).

(e) Conclusion

671. I therefore find that the developer's profit for the Amended Original Development Scheme would have been as follows on completion of the development in September 2016:

Element	**Amount**
Retail	£7,565,556
Community	£940,478
Hotel	£9,502,618
Student Housing	£9,299,371
GDV	£27,308,023
Development Costs	£17,187,793

Developer's Profit	**£10,120,230**

672. The difference between the developer's profit for the two schemes is £2,508,182. I find that the Revised Development Scheme has produced a developer's profit of £2,508,182 more than the Amended Original Development Scheme would have done if Barrowfen had implemented it in January 2015 or April 2016. I must, therefore, go on and consider whether that increase in profit was caused either by the breaches of duty of the Defendants or a successful act of mitigation.

(3) Was the Revised Development Scheme a collateral benefit?

673. Ms Hilliard submitted that Barrowfen, acting by Prashant and Suresh, took a commercial decision at its own risk to change to the Revised Development Scheme and that any additional profit was caused by their hard work. I reject that submission. In my judgment the Residential Development Scheme formed part of a single continuous transaction of which the breaches of duty committed by Girish and S&B were the inception (to use the formulation of Sir Andrew Morritt V-C in *Needler Financial Services Ltd v Taber*). I have reached this conclusion for the following reasons:

i) In considering this issue, it is important to keep in mind that Barrowfen's claim is that the Defendant's conduct delayed the development of the Tooting Property. This is not a claim, thefore, for loss of profits (as in *Fulton*) or even the diminution in value of an asset (as in *Primavera*). It is for the loss of income caused by delay.

ii) It is also important to keep in mind that Barrowfen's case (on which it has succeeded) is that the delay only came to an end on completion of the Revised Development Scheme in March or April 2021. Since Barrowfen has claimed (and recovered) damages for delay for the period right up until the date of trial, it would be unjust if it did not have to give credit for any benefits which it had received in the meantime.

iii) Moreover, it was Barrowfen's own case and Prashant's unchallenged evidence that both the delay in carrying out the Residential Development

Scheme and the additional costs which it incurred were caused by the Defendants' breaches of duty. This was set out most clearly in Ms Hilliard's opening submissions:

> "Barrowfen would not have incurred these legal and professional costs if it had proceeded with the Original Development Scheme. These legal and professional costs have therefore been caused by both the attempts to maintain control of Barrowfen (in that, as explained above, but for these breaches Barrowfen would have pursued the Original Development Scheme) and by the entry into administration (if the Court finds that but for these breaches there is a real and substantial chance that Barrowfen would have pursued the Original Development Scheme, as explained above)."

iv) In my judgment, Ms Hilliard cannot have it both ways. If Barrowfen incurred both the delay and the costs caused by changing from one scheme to the other, then the Revised Development Scheme formed part of a continuous transaction of which the Defendants' conduct was the inception. However, if the decision to change from one scheme to the other was not caused by that conduct, then Barrowfen is not entitled to recover damages either for the additional period of delay or the additional costs.

v) In any event, I am satisfied that both schemes formed part of a continuous transaction on the facts. It is clear that the principal factors which led Barrowfen to adopt the Revised Development Scheme were Waitrose's decision to withdraw from the Original Scheme in June 2016 (before Barrowfen had come out of administration) and the professional advice which Prashant received that residential flats would be more profitable than student accommodation. He took advice and made the decision in December 2016 (only two months after Barrowfen had come out of administration).

vi) Finally, the experts were agreed that the period of 28 months to revise and implement the new scheme was a reasonable one and that the construction period of 22 months was also reasonable. I am satisfied therefore that there was no significant hiatus or gap between the decision

> to terminate the first scheme and the decision to adopt the second scheme.

674. Ms Hilliard also submitted that Barrowfen should not have to give credit for the increased developer's profit on the Revised Development Scheme because Barrowfen intended to keep the development as an investment and it was not appropriate to set off a notional capital gain against the income losses which it had suffered. I also reject that submission. In *Fulton* Lord Clarke made it clear that the question whether a claimant must give credit for a benefit does not turn on the type of benefit concerned.

675. Morever, in many professional negligence cases a claimant will recover damages from a defendant to compensate for the diminution in value of an asset. He or she will also have to give credit for any income which the asset has produced as a result of the Defendant's breach of duty. I can see no reason why the position should not be the same with income losses and a capital appreciation. Finally, I consider that the answer to Ms Hilliard's point was put both succinctly and eloquently by Mr Stewart in his opening submissions (which I adopt). He said this (referring to Barrowfen's claim):

> "It is dependent on alleging that but for the events of which complaint was made, an alternative development would have taken place. It then seeks to compare this with the absence of rent for a period whilst an alternative development was undertaken. Both developments were or would have been undertaken for capital appreciation. It is therefore misconceived to take the rental claim as being a measure of loss without taking account of capital outlay and capital value."

676. I therefore hold that Barrowfen must give credit for the sum of £2,508,182. However, none of the parties addressed me on the next issue, which arises as a consequence, namely, whether Barrowfen should give credit against the full amount of the damages before I apply the "loss of a chance" percentage or whether I should apply the "loss of a chance" percentage before I set off the credit for the capital appreciation of the Revised Development Scheme.

677. My provisional view is that I should apply the credit for capital appreciation before I apply the loss of a chance percentage. My reasoning for reaching that

view can be stated briefly. Suresh and Prashant are entitled to damages for a lost opportunity to develop the Tooting Property and to place a value on that lost opportunity I must first assess all of the financial consequences taking into account both the potential losses and the potential benefits before applying the percentage chance which I have found. However, because this conclusion could have very significant financial consequences for the parties and I did not hear argument on it, I will give them an opportunity to make further submissions on this issue.

AA. Assessment

(1) Primary Case

678. I have found in Barrowfen's favour on its primary case and held that Barrowfen lost the chance of receiving the following net rents and avoiding the following costs:

i) Net rents for the 55 month period from September 2016 to March 2021: £4,066,220;

ii) Administration costs: £401,864.73;

iii) Revised Development Scheme costs: £324,468.67;

iv) Enforcement costs: £30,243.69; and

v) **Total: £4,822,797.09**.

679. Based on the provisional view which I have expressed above, I deduct the capital appreciation of the Tooting Property of £2,508,182 and I find that Barrowfen has suffered a net loss of £2,314,615.09. I have also found that the percentage chance of Barrowfen avoiding that loss was 60%. Accordingly, I award damages of £1,388,768.05.

(2) Alternative Case

680. I have also found in Barrowfen's favour on its alternative case and held that Barrowfen lost the chance of receiving the following net rents and avoiding the following costs:

i) Net rents for the 39 month period from January 2018 to March 2021: £2,741,580;

ii) Administration costs: £401,864.73;

iii) Revised Development Scheme costs: £324,468.67;

iv) Enforcement costs: £30,243.69; and

v) **Total: £3,498,157.09**.

681. Again, based on the provisional view which I have expressed above, I deduct the capital appreciation of the Tooting Property of £2,508,182 and I find that Barrowfen has suffered a net loss of £989,975.09. I have also found that the percentage chance of Barrowfen avoiding that loss was 80%. Accordingly, I would have awarded Barrowfen damages of £791,980.07 on its alternative case. Given my overall findings, it is my provisional view that these claims are true alternatives and that they do not overlap. But I will give Ms Hilliard an opportunity to address the court further on this issue too.

(3) Reserved Matters

682. I gave permission to S&B to amend the Defence to plead that it was entitled to set off the capital appreciation of the Tooting Property on terms that if I found in S&B's favour, I would give Barrowfen an opportunity to call further evidence on the additional financial costs to Barrowfen of the Revised Development Scheme. In the event, I have found in S&B's favour on this issue and I therefore grant permission to Ms Hilliard to call that evidence and argue for a reduction in the capital appreciation.

683. Given my conclusions (above) I also give permission to both parties to argue the question whether the deduction for the capital appreciation of the Tooting Property should be made before or after the loss of a chance percentage is

applied to the quantum of damages. I also give Barrowfen permission to argue whether, on the findings which I have made, any part of the alternative award of damages which I have made is cumulative rather than alternative.

XII. Illegality

684. On 3 February 2021 I struck out S&B's defence of illegality based on what it called the "**Aumkar Fraud**" (a term which S&B used to describe the process by which GUC acquired Shanta's shares in Aumkar): see [2021] EWHC 200 (Ch). In particular, I rejected Mr Stewart's submission that Barrowfen's claim was tainted by illegality because it was necessary for it to borrow the money from Bedford to repay the loan made by Barrowfen II and Bedford was tainted by the fraud: see [67].

685. In the course of his evidence Prashant confirmed that Barrowfen borrowed £4.25m from Aumkar to fund the Revised Development Scheme (as I have set above). This evidence prompted S&B to renew its submission that Barrowfen's claim was tainted by illegality. Since I have heard the evidence and made detailed findings of fact and since S&B has applied for permission to appeal against my judgment on the strike out, I reconsider the question whether Barrowfen's claim was tainted with illegality. Moreover, if I were satisfied that Barrowfen ought not to be entitled to bring its claim after weighing up the trio of considerations in *Patel v Mirza*, then it is at least arguable that I should dismiss the claim whether or not I had permitted S&B to plead the defence of illegality.

686. I set out my detailed findings in Appendix 2. In particular, I find that Rajnikant, Suresh and Girish orchestrated the Fochem offer for the purpose of buying out Shanta and that they ultimately controlled GUC. I also find that when Shanta transferred the shares pursuant to the order dated 28 November 2006, Rajnikant transferred funds from his personal bank account to buy his proportion of the shares. Although there was no evidence about the corporate entity through which he bought them, I draw the inference that it must have been Bedford. I do so because Girish paid the sum of £571,40 to Bedford as part of the reconciliation between the Patel family partners in 2008.

687. I also find that the share sale agreement dated 15 May 2007 and the minutes dated 12 June 2007 were backdated, that they were signed no earlier than 6 July 2007 and that the affidavits which Rajnikant, Girish and Suresh swore in the Shanta Petition were literally true (in that they were not shareholders of Aumkar) but were made in order to mislead the court and to disguise the fact that they were beneficial owners of the company. However, I also find that the New Shareholders did not pay any cash for the shares. In substance, the New Shareholders replaced the Former Shareholders and both sets of shareholders were ultimately owned and controlled by the four Patel brothers.

688. Finally, I do not conclude that the GUC Claim or the acquisition of Shanta's shares involved a conspiracy to defraud Mr NM Amin and PM Amin. There was no evidence that the Fochem offer or the GUC Claim involved any fraud and the Patel brothers did not pay an unfair price for Shanta's shares (through GUC). Moreover, Mr NM Amin was recorded in the minutes of the meeting on 20 January 2005 as having agreed to accept the Fochem Offer. Finally, the Malaysian court dismissed the Shanta Conspiracy Claim.

689. Mr Stewart put his case very high in closing submissions. He argued that the loan which Aumkar made to Barrowfen was tainted by illegality because Shanta's shares were stolen:

> "To be clear, Aumkar is tainted because the Amin's shares were stolen. For money laundering purposes the consequence of the Amin's shares (criminal property) being redistributed amongst the Patel shareholders has the effect that the entirety of the Aumkar shares are tainted and any funds derived from the same equally so."

690. On the strike out application Mr Stewart relied on section 340 of the Proceeds of Crime Act 2002 ("**POCA**"). He submitted that S&B was entitled to rely on the defence of illegality because the shares in Aumkar and the funds which it lent to Barrowfen were criminal property and that section 340 was very wide:

> "(1) This section applies for the purposes of this Part. (2) Criminal conduct is conduct which— (a) constitutes an offence in any part of the United Kingdom, or (b) would constitute an offence in any part of the United Kingdom if it occurred there. (3) Property is criminal property if— (a) it constitutes a person's

> benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and (b) the alleged offender knows or suspects it constitutes or represents such a benefit. (4) It is immaterial— (a) who carried out the conduct; (b) who benefited from it; (c) whether the conduct occurred before or after the passing of this Act. (5) A person benefits from conduct if he obtains property as a result of or in connection with the conduct. (6) If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage."

691. Despite the width of section 340 I am not satisfied that the funds which Aumkar advanced to Barrowfen or Bedford constituted criminal property for the purposes of section 340 and I have reached this conclusion for the following reasons:

i) Neither Bedford nor Rajnikant, Suresh or Girish were charged with criminal offences relating to GUC's acquisition of the shares in Aumkar. Nor were they charged with perjury or conspiracy to pervert the course of justice (or any equivalent offences under the law of Malaysia).

ii) Mr Stewart placed greatest reliance on the affidavits made by Rajnikant, Suresh and Girish in the Shanta Petition. I agree with him that those affidavits were intended to mislead the Court and that is a serious matter. But those affidavits were not sworn in answer to the GUC Claim but in answer to the Shanta Petition which was dismissed. Neither the High Court nor the Court of Appeal nor the Federal Court made any finding of fraud against GUC or Bedford or any of Rajnikant, Suresh or Girish in relation to the acquisition of Shanta's shares.

iii) On 20 December 2017 Judge Paramaguru dismissed the Shanta Conspiracy Claim. Mr Stewart's point was that if he had been aware that Rajnikant, Suresh and Girish had perjured themselves, he would have reached a different conclusion. But having heard the evidence and examined all the documents, I am not satisfied that this is correct. It would have been open to Mr NM Amin to put those affidavits before the Court hearing the Shanta Conspiracy Claim and to argue that they had misled the court hearing the Shanta Petition (and for all I know this point

may very well have been taken). All of the documents to which I was taken would have been available on disclosure in those proceedings.

iv) But let it be assumed that Rajnikant, Suresh and Girish committed perjury and conspired to pervert the course of justice by giving false evidence in their affidavits and by procuring that GUC transferred Aumkar's shares to the New Shareholders by backdating the share sale agreement and minutes. Even then, I am not satisfied that the shares in Aumkar which Shanta transferred to GUC fall within the definition of "criminal property".

v) In particular, they were not a "benefit from criminal conduct" nor did they represent such a benefit. On or shortly after 7 December 2006 Shanta transferred the shares to GUC pursuant to the order dated 28 November 2006. Moreover, Rajnikant (and, indeed, Girish and Suresh) paid for those shares out of their own private funds and although the GUC Claim went to the Federal Court, the price which they paid was never found to have been unfair.

vi) Finally, even if I had reached the conclusion that Shanta's shares in Aumkar were criminal property, I find it impossible to conclude that the funds which Aumkar transferred to Barrowfen or Bedford also constituted criminal property. Aumkar's assets and retained profits did not represent (either directly or indirectly) the proceeds of the sale by Shanta to Bedford or any of the other Former Shareholders. Shanta held only 9.99% of the shares and Rajnikant and his brothers paid full price for them (not the other way round).

vii) Moreover, those assets and retained profits were not derived from the proceeds of the onward sale by the Former Shareholders to the New Shareholders. There was some suggestion to this effect in the evidence which S&B put forward in answer to the strike out application. But after hearing the evidence, I am satisfied that this was not the case. In his email dated 23 August 2013 Prashant stated that there was no "cash

considerations" for the share transfers by GUC and this was never challenged.

viii) Finally, there is the difficulty presented by the addendum to the minutes of the meeting on 20 January 2005 and Prashant's evidence about what Mr NM Amin said at the back of the court during the GUC Claim. That evidence was not challenged and I am driven to the conclusion that Mr NM Amin had actually consented to the sale of the shares and that the real issue was whether he could be required to sell them at the price of 2.05 RM per share.

692. I have well in mind Lord Neuberger's comments in *Patel v Mirza* (above) at [185] (which I cited in my judgment on the strike out application: see [60]). I accept that I should not be influenced by the fact that the criminal authorities have not invoked POCA (or the equivalent in Malaysia). But in the present case I consider the absence of any criminal prosecution and criminal findings to be particularly important for two reasons.

693. First, the criminal conduct upon which Mr Stewart relied was committed in another jurisdiction and an English court should be very diffident about finding that the criminal law of another jurisdiction has been broken without clear evidence to that effect. I accept that this is not a complete answer because conduct which may be lawful in another jurisdiction may be treated as unlawful under POCA. But it is a reason for caution (especially where no action has been taken in either jurisdiction).

694. Secondly, on the facts of the present case the precise nature of the conduct which is alleged to have been committed is crucial to the finding that the funds advanced by Aumkar to Barrowfen are criminal property. In my judgment, it was not enough for Mr Stewart to appeal to the general nature of the bad behaviour in question in the hope that it would carry him home. A rigorous analysis of the detailed facts would have been required before I would have been prepared to make such a finding and that analysis was lacking both on the strike out application and at trial.

695. Finally, even if I am wrong and the loan made by Aumkar to Barrowfen was criminal property, I am not satisfied that a defence of illegality should bar the present claim by applying the *Patel v Mirza* approach. On considerations (a) and (b) I am not satisfied that there are any policy considerations which would lead to a different outcome from *Grondona* in the present case. Although it involved claims against a firm of solicitors retained in relation to a number of contentious matters rather than conveyancing, I see no reason why refusing a remedy to Barrowfen would enhance the protection of the public in the present case where it did not in *Grondona*.

696. On consideration (c) I accept that it is important for the court to condemn unlawful conduct. But I am satisfied that any unlawful conduct by Rajnikant and Suresh in inducing Shanta to transfer its shares to the Former Shareholders was not central to the claim. The fact that Aumkar was the source of the funds which Barrowfen used to fund the development was relevant to the question of causation and S&B did not suggest that it was unlawful for Aumkar to make the loan. It was, therefore, unnecessary for Barrowfen to plead or rely on any of the circumstances in which Bedford acquired shares in Aumkar.

697. Further, Shanta had only owned only 9.99% of the shares in Aumkar and Bedford had only acquired a third of those shares and ten years before the facts giving rise to this claim. Finally, Bedford was only a one third shareholder in Barrowfen at the time of the facts giving rise to this claim. Although Barrowfen shared a common director, Prashant, the claim was brought by Barrowfen and not by Bedford. For all of these reasons I do not consider that it would be harmful to the integrity of the legal system to allow Barrowfen's claim. I therefore reach the same conclusion as I did on the strike out application.

XIII. Compromise

698. The final point with which I must deal is Girish's defence of compromise. He pleaded that some of the claims against him have been compromised by the "Settlement Agreement of 2018". Ms Hilliard accepted that this must have been a reference to the settlement agreement dated 6 March 2019. But she also submitted that this defence was misconceived because Barrowfen's claims

against Girish were expressly excluded from the Released Claims. I accept that submission and I hold that the settlement agreement is no defence to the claims against Girish by Barrowfen in this action.

XIV. Summary of Findings

The Bedford Claim

699. *Girish:* I find that between 22 August 2013 and 29 April 2014 Girish removed the page recording Bedford as a member from the Register. I find that this was dishonest and in breach of duty and that Girish's failure to write up Bedford thereafter was also a breach of duty. I also find that Girish placed himself in a position of conflict and refused to accept S&B's advice that he should pay the costs of the Bedford Rectification Claim personally.

700. S&B: I find that S&B is not liable for breach of fiduciary duty because Mr King and Ms Philipson honestly believed that it was in Barrowfen's wider interests to refuse to recognise Bedford's rights as a shareholder. But I also find that they were negligent in failing to recognise Girish's conflict and allowed themselves to be inhibited by their loyalty to him. However, I dismiss the claim for costs in relation to the Bedford Rectification Claim.

The Writing Up the Register Claim

701. *Girish*: I find that in breach of duty Girish adopted the "self-help approach" and passed the resolution on 5 February 2015 to write up the Register and that he did so for the purpose of the preventing the trustees of the Mrs PD Patel Trust and the Mr DP Patel Trust from exercising their rights as shareholders and to maintain personal control over Barrowfen.

702. *S&B:* I find that S&B is not liable for breach of fiduciary duty because Mr King and Ms Philipson honestly believed that they were acting in the best interests of Barrowfen. But I also find that they were negligent in failing to recognise Girish's conflict and allowed themselves to be inhibited by their loyalty to him.

The Suresh Resignation Claim

703. *Girish*: I find that in breach of duty Girish forged the Suresh Resignation Letter and filed the TM01 forms (or gave instructions for the second form to be filed) and that he did so to frustrate or prevent Suresh from exercising his power as a director to call a meeting to appoint Prashant. I also find that Girish knew that this was not honest or reasonable conduct.

704. *S&B*: I find that S&B is not liable for breach of fiduciary duty but that Mr King was negligent because he was inhibited by his loyalty to Girish and failed to take an obvious conflict of interest seriously or take steps to address it.

The Trustee Resignation Claim

705. I find that in breach of duty Girish forged the Trustee Resignation Documents and that he knew that this was not honest or reasonable conduct for a director.

The Administration Claim

706. *Girish*: I find that between 12 January 2016 until he resigned as a director and in breach of duty Girish failed to disclose his settled intention to put Barrowfen into administration and that he did so consciously and deliberately knowing that it was not in Barrowfen's interests and indifferent to the interests of its other creditors or its creditors as a whole.

707. *S&B*: I find that S&B is not liable for breach of fiduciary duty. But I find that Mr King negligently failed to address the conflicts of interest of both Girish and the firm from 6 October 2015 onwards. I also find S&B liable for negligence because Mr King ought to have advised Girish to pass on Mr Tamlyn's instructions and his advice to Suresh and Prashant or, if he failed to do so, to pass them on directly.

708. *Other Claims:* I dismiss the claim for deceit against Girish and S&B, the claim for dishonest assistance against both S&B and Barrowfen II and the claim for unlawful means conspiracy against Girish, S&B and Barrowfen II.

Equitable compensation or damages

709. I find that these breaches of duty caused Barrowfen loss. In particular, I find that there was a real and substantial chance that Prashant and Suresh would have taken control of Barrowfen in September 2014 and then implemented the Amended Original Development Scheme. In the alternative, I find that there was a real and substantial chance that they would have avoided administration and implemented the same scheme by April 2016.

710. I assess both equitable compensation and damages on loss of a chance principles and subject to the determination of the reserved matters (above), I find that Barrowfen is entitled to recover damages of £1,388,768.05 on its primary case and £791,980.07 on its alternative case. In assessing damages, I hold that Barrowfen must give credit for the capital appreciation of the Tooting Property as a result of the Revised Development Scheme. I assess that at £2,508,182 by reference to the difference between the developer's profit on the Revised Development Scheme and the Amended Original Development Scheme.

Illegality

711. Finally, I have reconsidered the issue of illegality and after considering the evidence and the documents, I am satisfied that I came to the correct conclusion on the strike out application and that there is no illegality which should prevent the court from giving effect to Barrowfen's claim. I also dismiss Girish's defence of compromise.

XV. Disposal

712. I therefore find that Barrowfen succeeds on its claim and provisionally award damages of £1,388,768.05. Following the hand down of judgment, I encourage the parties to agree directions for a further hearing to determine the reserved matters, interest and costs and any other consequential orders which they seek.

Appendix 1

BARROWFEN:

SHAREHOLDERS AND OPERATIONS

Incorporation

713. On 6 July 1984 Barrowfen was incorporated and registered at Companies House under company registration no. 1830742. It adopted the Articles of Association set out in Table A of Schedule 1 to the Companies Act 1984 (as amended by the Companies Act 1980). Regulations 7 and 63 are relevant to the Writing up of the Register Claim and they provided as follows at the relevant time:

> "7. Except as required by law, no person shall be recognised by the company as holding any share upon trust, and the company shall not be bound by or be compelled in any way to recognise (even when having notice thereof) any equitable, contingent, future or partial interest in any share or any interest in any fractional part of a share or (except only by these regulations or by law otherwise provided) any other rights in respect of any share except an absolute right to the entirety thereof in the registered holder."

> "63. In the case of joint holders the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members."

714. Regulations 93 and 97 of Table A are relevant to the Bedford Claim and the Suresh Resignation Claim and they provided as follows at the relevant time:

> "93. No person other than a director retiring at the meeting shall unless recommended by the directors be eligible for election to the office of director at any general meeting unless not less than three nor more than twenty-one days before the date appointed for the meeting there shall have been left at the registered office of the company notice in writing, signed by a member duly qualified to attend and vote at the meeting for which such notice is given, of his intention to propose such person for election, and also notice in writing signed by that person of his willingness to be elected."

> "97. The company may by ordinary resolution appoint another person in place of a director removed from office under the immediately preceding regulation, and without prejudice to the powers of the directors under regulation 95 the company in general meeting may appoint any person to be a director either to fill a casual vacancy or as an additional director. A person appointed in place of a director so removed or to fill such a vacancy shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected as a director."

Share Capital

715. By ordinary resolution passed on 23 July 1985 Barrowfen increased its share capital from 500 ordinary £1 shares to 500,000 ordinary £1 shares. According to S&B's instructions to counsel dated 22 December 2014 the shares were originally owned by four different families including two different Patel families. Barrowfen's annual return dated 14 August 2001 recorded that the company had issued 375,000 shares and that its shareholders were as follows (and I reproduce the table set out in the note which Withers sent to S&B on 23 May 2014):

Name of shareholder	**Number of ordinary shares held**
Cherub Butch International Ltd	28,500
Josten Development Inc.	30,000
Korrigan World Investments S.A.	5,500
Mantrust NV	85,500
G D Patel	1,500
P D Patel	500
T D Patel	500
Y N Patel	1,500
Transglobal International Investments Ltd	220,500
A R Vora	333
M R Vora	333

716. The Register records that on 29 May 2002, 29 July 2002 and 5 August 2002 a series of share transfers took place. It also contains a number of handwritten comments in pencil which suggest that 60,500 of the issued shares were acquired by Bedford. S&B's instructions to counsel dated 22 December 2014 record that following the exit of the other family groups Bedford owned 66,000 shares.

717. A further reorganisation of the Patel family holdings took place in 2002 and by 6 August 2002 Bedford was recorded as owning 97,500 shares. Barrowfen's annual return filed on that date, S&B's instructions to counsel and Withers' note dated 23 May 2014 all record that as at 6 August 2002 the shareholders were as follows:

Name of shareholder	**Number of ordinary shares held**
Mrs K N Patel	97,500
Bedford	97,500
Mrs P D Patel Trust	60,000
Mr D P Patel Trust	60,000
Seaco	60,000

718. Mrs KN Patel was the wife of Mr NS Patel and the mother of Mr Yogendra Patel, who were founding members of the Patel family partnership (although they were not related to Mr DP Patel). Seaco was a company controlled by Mr NM Amin, one of three brothers of Mrs PD Patel and the maternal uncles of Rajnikant, Suresh, Girish and Yashwant.

719. On 22 January 2003 Girish gave notice to Bedford of the AGM to be held at Gorst Road on 17 February 2003 and on 17 February Mr Yogendra Patel voted on behalf of Bedford at the AGM. If Bedford had not been registered as a shareholder, it would not have been entitled to vote.

First Capital Reduction

720. By written resolution dated 8 November 2004 Barrowfen resolved to buy back 97,500 shares from Mrs KN Patel for £3.94 per share. The resolution was signed

by Girish on behalf of Barrowfen and signed on behalf of Bedford (although it is difficult to make out the identity of the signatory).

721. The written resolutions also contained a second resolution by which Barrowfen resolved to buy back Seaco's 60,000 shares. The resolution recorded at Companies House has been struck through but it appeared to be common ground between all parties that the buyback took place. For example, S&B's instructions to counsel dated 22 December 2014 record both that the buyback took place and that it was properly recorded at Companies House.

722. Further, by letter dated 16 December 2004 Girish wrote to a firm of solicitors called Picton Howell LLP recording that Barrowfen had dated the two share purchase agreements (which had been annexed to the written resolutions) that day and that Barrowfen had that morning made payments to Mrs KN Patel and Seaco. Prashant's evidence was that the purchase of the shares was completed and Girish's evidence was that a cheque was sent to Mr NM Amin for £250,000 but never cashed.

723. This was consistent with Barrowfen's annual return dated 21 July 2005 which recorded the re-purchase of the shares and that Seaco was no longer a shareholder. It is also consistent with Mr Coakley's witness statement dated 3 June 2016 in which he stated that Seaco was a creditor for £234,600. (There may well have been a small typo in his evidence because the purchase price of 60,000 shares at £3.94 per share would have been £236,400.)

724. On 20 April 2006 Girish gave notice to Bedford that the AGM would be held on 26 May 2006 enclosing a proxy form appointing him as Bedford's proxy (and asking for it to be left unsigned). Again, if Bedford had not been recorded as a shareholder in the Register, it would have been unable to vote or to appoint Girish as its proxy.

725. On 29 July 2006 Girish signed and returned Barrowfen's annual return as both a director and the company secretary of the company. It recorded that Barrowfen's issued share capital was 217,000 ordinary shares of £1 each and that Bedford held 97,500 of them.

Second Capital Reduction

726. By written resolution dated 27 November 2006 and signed by Girish on behalf of Barrowfen, the company resolved to buy back 37,500 shares from Bedford at £3.94 per share. Appendix A to the resolution consisted of a share purchase agreement which had also been signed by Girish on behalf of Barrowfen and by letter dated 20 December 2006 Girish wrote to Bedford stating that the purchase price of £147,750 had been paid into Bedford's account at Deutsche Bank AG in Singapore.

727. The effect of the second buyback of shares was to reduce Barrowfen's capital to 180,000 ordinary shares of £1 each and to leave 60,000 shares in the hands of the two branches of the family headed by Girish and Suresh. If Bedford was also registered as a shareholder, then it also left 60,000 shares in the hands of Rajnikant's family. With effect from 20 December 2006 the following shareholders held the following shares in Barrowfen (on the assumption that Bedford was a shareholder):

Name of shareholder	**Number of ordinary shares held**
Bedford	60,000
Mrs P D Patel Trust	60,000
Mr D P Patel Trust	60,000

Other Records

728. On 14 September 2009 Girish completed in manuscript and then signed Barrowfen's annual return for 2008 in his capacity as both a director and the secretary of the company. It recorded that the company had issued 180,000 shares, the shareholders were Bedford, the Mrs PD Patel Trust and the Mr DP Patel Trust and that each shareholder owned 60,000 shares. It also recorded that Girish and Suresh were the directors.

729. From 2008 onwards Barrowfen's annual returns were filed online and on 2 September 2008 Girish filed Barrowfen's annual return in his capacity as the company secretary. It recorded that Bedford held 60,000 shares as at 6 August

2008 and had disposed of 37,500 in the period beginning on 1 January 2007. On 22 August 2013 Girish also filed Barrowfen's annual return in his capacity as the company secretary. It continued to record that Bedford held 60,000 shares.

730. On 24 April 2009 Girish gave notice to Bedford that the AGM would be held on 22 May 2009 enclosing a proxy form appointing him as Bedford's proxy (and asking for it to be left unsigned). Again, if Bedford had not been recorded as a shareholder in the Register, it would have been unable to vote or to appoint Girish as its proxy.

Annual return dated 24 September 2014

731. On 24 September 2014 Amrit, who was now the company secretary, filed Barrowfen's annual return. It stated that Bedford held 60,000 shares "subject to rectification". By this time Barrowfen was being advised by S&B. Mr Philipson's evidence was that S&B's role included writing up the statutory books and filing amended annual returns.

Bedford

732. Bedford is a company registered in the British Virgin Islands. Mr Coakley exhibited a certificate of incumbency to his witness statement dated 3 June 2016 which had been certified by Newhaven Corporate Services (B.V.I.) Ltd, Bedford's registered agent. By email dated 31 July 2010 Girish wrote to Rajnikant asking him for the identity and addresses of the shareholders and directors of Bedford and by email dated 5 August 2010 Prashant informed Girish that Mr Nokiah was Bedford's sole director and that Rajnikant was its sole shareholder. He also provided a copy of Mr Nokiah's identity card or driving licence and Rajnikant's passport and identity card or driving licence.

733. In evidence Prashant confirmed that on 28 September 2012 his wife, Tejal Jasani, was appointed to be a director and on 21 March 2013 he was also appointed to be a director. He also confirmed that the issued shares of Bedford were bearer shares and that Rajnikant held them until 2010 or 2011 when he became the sole shareholder.

The Mrs PD Patel Trust

734. By a deed of trust dated 15 December 1997 and made between Mrs Prabhavatiben Dahyabhai Patel (1) and Suresh and Yashwant who were defined as the "**Original Trustees**" (2) Mrs Patel declared that she held the Trust Fund of £1,000 on trust for herself, Kiraj and Vanisha. Elsewhere, I have defined this trust as the "**Mrs PD Patel Trust**". The term the "**Trustees**" was defined as "the Original Trustees or other the trustee or trustees for the time being hereof" and clause 3 provided that the proper law of the trust was to be the law of the Island of Guernsey. The trust was a fully discretionary trust with powers of maintenance and advancement and power to add to the class of beneficiaries.

735. Clause 15 conferred various powers to appoint new or additional trustees upon the persons specified in the Fifth Schedule: (1) the surviving or continuing Trustees, (2) the trustee or trustees desiring to be discharged, (3) the liquidator or personal representative of the last surviving trustee and (4) the Royal Court of Guernsey. Clause 15 did not expressly provide that a sole Trustee could continue to act on the retirement of any other Trustees. But there was no expert evidence on this issue and I was not asked by any of the parties to decide whether as a matter of Guernsey law Girish could be appointed to act as a sole Trustee.

736. By a letter of wishes dated 15 December 1997 Mrs Patel wrote to the Original Trustees stating that she Kiraj and Vanisha were the beneficiaries of the trust although they also had the power to add beneficiaries at their discretion. She also stated that during her lifetime she would like them to consider her the principal beneficiary of the trust and after her death to consider Girish as the principal beneficiary. On 29 September 2011 Mrs Patel died (and I deal with her contested will in Appendix 2). But there was no suggestion by any of the parties that Girish was added as a beneficiary after that date.

The Mr DP Patel Trust

737. By a deed of trust dated 1 July 1991 and made between Mr Dahyabhai Purshottam Patel (1) and Yashwant and Girish as the "**Original Trustees**" (2) Mr DP Patel declared that he held the Trust Fund of US $5,000 on trust for

himself, Chirag and Prayag. Elsewhere, I have defined this trust as the "**Mr DP Patel Trust**". Clause 2 provided that the proper law of the trust was the law of England and Wales. Again, the trust was a fully discretionary trust with powers of maintenance and advancement and power to add to the class of beneficiaries.

738. On 7 July 1992 Mr DP Patel died. In the trust deed his address was stated to be Bawaji Khadki Post Ode Gujarat India and the address of the Original Trustees as 4 Shillingford Street London Islington London N1 2DP, the address of Arvind & Co. Girish's evidence was that the trust was created after Mr DP Patel's death and then backdated. Mr Stewart put this to Suresh and suggested that Arvind & Co, whom I understood to be a firm of accountants, did not move to the address given in the trust deed until 1997. Suresh accepted that the trust was not activated until 2000 but it was also his evidence that Girish dealt with Arvind & Co and that it was genuinely set up in 1990.

739. Suresh accepted, however, that the shares in Fine Sun ("**Fine Sun**") (a company incorporated in either the British Virgin Islands or the Cayman Islands) were registered in the name of Mr DP Patel after his death. His evidence was that this was a mistake and the shares should have been registered in the name of the trustees of the Mr DP Patel Trust. Mr Stewart also suggested to him that it could not be a mistake because the address of the shareholder was given as Mr DP Patel's family home in Ode and because Girish had adopted the same or a similar device in the same jurisdiction.

Company Operations

740. Before the principal events described in the body of the judgment Girish also provided Rajnikant and Suresh with the following information about Barrowfen's operations:

i) By letter dated 28 April 2005 he wrote to them enclosing a development scheme which he was discussing with Wandsworth at the time.

ii) By email dated 27 March 2007 he wrote to them again updating them about the scheme. He stated that because it had not been possible to secure a long term lease for the residential units, the scheme now

included a budget hotel and he had obtained confirmation from Travelodge that it would take a 35 year lease.

iii) By email dated 13 April 2007 he also sent them an offer for finance from Investec and stated that a similar offer had been received from RBS.

iv) By email dated 9 October 2007 he informed them that Barrowfen had spent over £200,000 on consultants and secured possession of about 60% of the units and was involved in litigation with three tenants.

v) At the New York meeting on 15 November 2008 (discussed in Appendix 2) Girish reported that Barrowfen was in the process of obtaining planning clearance for its proposed new development including residential appartments and a hotel. He also explained that two tenants had accepted offers to vacate and that the original development was for five stories (although Wandsworth would only approve three stories). He also advised them that 100% finance would be needed to fund the development but that this would be revisited once Wandsworth had approved the final design.

vi) By email dated 19 October 2009 he wrote to them stating that the final investment scheme would consist of retail units, a 76 room budget hotel and student hostel accommodation consisting of 72 studio apartments.

vii) By email dated 2 December 2009 he sent them an article from Bloomberg News reporting the demand for student accommodation and identifying a number of recent developments.

741. In 2010 Barrowfen applied for planning permission to demolish the existing building and to redevelop the site as a 76 bedroom hotel, student accommodation of 11 shared flats of 74 bedrooms, commercial premises and communal facilities. On 15 June 2010 Barrowfen withdrew this application after objections were made to it.

742. In 2012 Mr James Lees RICS carried out a "Red Book" valuation of the Tooting Property and in a report dated 12 April 2012 he valued the property at

£3,730,000 as an investment on the basis of its current and potential rental income.

743. On 8 November 2012 Barrowfen lodged a revised planning application and on 17 April 2014 Barrowfen and Wandsworth entered into a section 106 Agreement and Wandsworth approved a revised planning application for a hotel (83 bedrooms), student accommodation (75 rooms), car park (60 spaces) four new shops for use within classes A1 to A5 and premises for non-residential, community use.

Appendix 2

THE PATEL FAMILY DISPUTE

The Patel Family

744. As exhibit GP3 to his fifth witness statement dated 22 October 2020 Girish produced a schedule in which he set out the detailed history of the Patel family partnership and, in particular, the transmission of shares in Aumkar and his beneficial interest in the company. Where the facts stated in that schedule were not contested I have adopted them, particularly, in relation to the early history of the family's affairs.

745. Girish's evidence was that the Patel family came from Ode, a small town in India, where his father was involved in the family farming business. The family later relocated to Singapore and he became involved in commodity trading with Mr Manilal Amin, his wife's father. In 1957 Mr DP Patel had a stroke and took no further part in the business. Mr Manilal Amin also had one son, Mr Hasmukhray Amin, and two nephews, Mr PM Amin and Mr NM Amin.

746. On reaching working age Rajnikant, Suresh and Girish all became involved in the commodities business established by Mr Amin. Yashwant was never directly involved in the family business and trained as a doctor in New York. However, from time to time he was involved in family meetings and acted as an informal mediator.

747. Girish's evidence was that Mr NS Patel was the "senior partner" of the Patel family partnership (below) although he was not related to Mr DP Patel. Mr NS Patel's wife was Mrs KN Patel who held shares in Barrowfen: see Appendix 1 (above). His son was Mr Yogendra Patel. I will continue to refer to members of the Amin family and the NS Patel family by their family names to distinguish them from the DP and PD Patel family.

The Patel Family Partnership

748. On 3 April 1989 Mr NS Patel, Rajnikant, Girish, Suresh, Mr NM Amin and Mr PM Amin (who described themselves as the "**Continuing Partners**") entered

into an agreement with a number of other members of the Amin family (who described themselves as the "**Retiring Partners**") to resolve their differences and terminate their partnership on terms that the Continuing Partners paid US $500,000 and transferred a London property to them valued at US $750,000.

749. This document is important for a number of reasons: first, it shows that the initial partnership consisted of a number of families and individuals although they operated through twenty companies in different jurisdictions. Secondly, it shows that from 1989 onwards the Continuing Partners were the only members. Thirdly, it shows that Barrowfen was regarded as an asset of the partnership. Fourthly, it demonstrates that even in 1988 the assets and liabilities of the partnership were already very substantial. Fifthly, and finally, it confirms Girish's evidence that the source of the original partnership dispute was the losses which the partners had incurred on the collapse of the Tin market.

750. On 31 March 1990 the Continuing Partners agreed to wind down the companies in what was described as the "**Manilal Group**". This document is also useful because it shows that Rajnikant and Mr NS Patel each owned 26% of the group and Girish, Suresh and the two Amin brothers each owned 16%. The holding company of the group was Manilal Holdings Sdn Bhd ("**Manilal Holdings**") and the principal operating company of the Manilal Group was Manilal & Sons (Malaya) Sdn Bhd ("**Manilal Malaya**"). I was taken to the minutes of a meeting in Penang on 28 to 30 September 1997 which show that the partners were still trying to liquidate the group and wrestling with a number of issues almost a decade later.

751. I was also taken to a memorandum of agreement dated 19 April 1993 in which Rajnikant, Girish and Suresh agreed to form a company in the BVI through the Fiducior Trust to hold shares, bonds stocks and cash with Mr NS Patel and Mr NM Amin. The minutes of the meetings on 28 to 30 September 1997 also record that the partners were building up a portfolio of offshore investments.

752. At a meeting on 30 June 2003 Girish briefed the Continuing Partners about Makita, Barrowfen and the offshore investments. The minutes record that by 2003 the Continuing Partners now had portfolios with Deutsche Bank, Goldman

Sachs, JP Morgan as well as the Fiducior Trust. The minutes go on to suggest that Girish was entitled to a share of 25% of the profits above a particular benchmark for the London investments.

753. On 8 January 1997 Suresh wrote to Girish stating that the balance held by Citibank for Invesco was US $375,998.47. I have already considered this document in the context of the signed letterheads provided by Suresh to Girish. For present purposes, it shows that by 1997 Girish and Suresh had also established Invesco as a separate long-term vehicle for holding their investments including a subscription for partnership interests in a fund called the Asia Enterprise II Offshore LP. The subscription agreement dated 11 October 2004 showed that Girish and Suresh were Invesco's two directors.

754. A balance sheet headed "Mr Girish D Patel/Mr Suresh D Patel Partnership" and dated 31 December 2002 shows that Girish and Suresh had pooled their investments (at least for some purposes). Their investments were worth US $5,246,398 and £3,497,598. A statement of account dated 30 May 2006 but recording the position at 31 December 2005 also shows that they were holding assets through Pacific Rim including over 4.5m shares in Aumkar.

755. On 7 April 2006 the members of the partnership became reduced yet again. Rajnikant, Girish and Suresh (who described themselves again as the "**Continuing Partners**") bought out the estate of Mr NS Patel and his family for £1,731,437 with effect from 31 March 2003. By this time Rajnikant, Girish and Suresh were in dispute with the Amin family: see further below.

Agromin

756. Over time Rajnikant's focus of operations moved to Australia. By a letter of understanding and agreement dated 4 February 1988 Rajnikant, Girish, Suresh and Mr NS Patel all agreed that an investment in Agromin should be held on trust for them in the following percentage shares: Rajnikant (45%), Mr NS Patel (25%), Girish (15%) and Suresh (15%).

757. By fax dated 26 May 1988 Rajnikant wrote to Suresh setting out the capital contributions which each beneficial owner was required to make. It recorded

that he had made a capital contribution of US $75,000 and that the balance of US $14,950 had been taken from Manilal Malaya. By letter dated 19 June 1989 Girish wrote to Rajnikant enclosing his capital contribution of US $10,600.

758. The audited financial statements for the year ended 30 June 2005 recorded that Rajnikant was the sole director and that Agromin made an operating profit of A$706,281.79 in the year ended 30 June 2004 but an operating profit of A$103,117.15 for the subsequent year. They also recorded that Agromin had net assets of A$1,069,403.12 including substantial cash reserves and publicly listed shares. The principal activity of the company was stated to be the export of grain.

759. Girish suggested to Suresh in cross-examination that Rajnikant and he had been guilty of money laundering through Agromin. He relied on distributions of US $10,000 and US $140,000 which Suresh instructed him to make from Singapore on 8 May 1999 and 28 May 2003. The second instruction stated that the sum of US $140,000 held by Invesco and Girish relied on Invesco's balance sheet as at 31 December 2008 to show that substantial sums were received by Invesco from Agromin. Suresh was unable to recall or explain these payments.

Aum Commodities

760. Suresh remained in Singapore and operated through a company called Aum Commodities Pte Ltd ("**Aum Commodities**") and the email address which he used for the relevant period was aumcom@signet.com.sg. Suresh was operating through Aum Commodities by the late 1980s and I was taken to a letter dated 24 March 1988 which Girish sent to Suresh at Aum Commodities enclosing his investment return on Agromin.

761. The audited financial statements of Aum Commodities for the year ended 31 December 2003 showed that Suresh owned 200,000 shares and that Girish and he were the directors of the company. The notes to the financial statements state that the company's business was to export, import and deal in commodities of every kind. The balance sheet as at 31 December 2003 showed that Aum Commodities had net assets of US $2,178,892.

762. On 11 September 2012 Suresh produced a draft letter to Haridass Ho & Partners ("**Haridass**"), his solicitors, for Rajnikant and Yashwant in which he summarised the companies held by the Continuing Partners. Rajnikant had made amendments to the draft in manuscript (as Prashant confirmed in his evidence). I return to this document below. But for present purposes its relevance is that Suresh recorded that he and Girish owned 40% each of Aum Commodities and that Rajnikant owned the remaining 20%.

763. Girish's evidence was that Suresh exercised sole executive control over Aum Commodities but in 2006 he found out that Suresh had been involved in a practice to artificially reduce its revenue by using what he described as "washout invoices". His evidence was that Suresh admitted this practice to him after a raid by the Malaysian tax authorities and that he prepared a contemporaneous note in which he recorded as follows:

> "On arrival at the office, Juliana handed over a large white envelope containing number of documents [sic] that included contracts, washout invoices, bank payments, copies of drafts. SDP went on to explain that the envelope contains washout invoices and other documents created in the past years where funds have been taken out and place [sic] in personal entities. SDP went on to explain part of the method utilised was to first make an application for bank draft/transfer in the name of the company in whose name the loss had been taken, as this would satisfy the auditors requirement and subsequently few days later advised [sic] the bank that the payee required payment in another name and substitute the payee name to SDP's personal vehicle entity. When GDP asked why the funds are not placed [in] Invesco Corporation, SDP replied that similar practice is being carried out by RDP in relation to Agromin's trading profits. When asked as to status of the funds SDP replied that the funds are held by banks in fixed deposit."

764. Juliana was an employee. Girish also produced an example of a "washout invoice". It was dated 15 August 2002 and issued by Agrocorp Plantation Services Sdn Bhd ("**Agrocorp**"), a company owned or controlled by Rajnikant, and it related to the purchase of 2,250 metric tonnes of RBD palm stearin (a kind of solid palm oil) for US $607,500 and its onward sale for US $871,875.

765. What is unusual about the invoice is that it was not for the purchase or sale of the commodity itself but for the profit or margin of US $264,375. The invoice

was headed "Washout Invoice" and was accompanied by a letter which stated: "We enclose herewith BNP Paribas Draft No. 019444 for US $264,375.00 being full and final settlement against your Washout Invoice No. 0021/02." Girish also produced a trading analysis for Aum Commodities for the five years from 1999 to 2004 which showed that its profit before tax ranged from US $65,621 to US $140,709 (whereas the profit on the single trade recorded in the invoice dated 15 August 2002 was US $264,375).

766. The issue of the washout invoices formed the first topic of a letter dated 5 August 2011 which Girish sent to Suresh and Yashwant. He enclosed a copy of his note of the meeting in 2006 and asked Suresh to render a full account of the sums which he had received. Girish also stated that Suresh had behaved in an unwarranted and uncivilised manner by shouting at him at the meeting in Kuala Lumpur in 2011 (below).

767. Suresh was cross-examined by Mr Stewart at some length about this issue. He accepted that the Malaysian tax authority in Tampoi, Johore, wanted to carry out a tax audit in relation to a company called Aumcom Oils Sdn Bhd. But he denied that he had diverted funds to defraud the tax authorities or his partners including Girish. He said that he agreed to pay something to Girish because Rajnikant and Yashwant persuaded him to do so and because he wanted to move on. But he also said that Girish kept increasing his demands from US $400,000 to US $1.5m. Suresh also accepted that the question of the washout invoices was a primary source of disagreement between them.

768. Girish also cross-examined Suresh on this issue by reference to a letter dated 8 November 2012 from Haridass Ho & Partners. Girish quoted from this letter in his fourth witness statement and suggested to Suresh that it contained admissions that he had laundered funds through Aum Commodities and washed out the profits. Suresh denied both of these allegations and also Girish's interpretation of the letter.

Aumkar: 1978 to 2004

769. Girish described the Aumkar palm oil plantations in Malaysia as the flagship business of the Patel family partnership. They consisted of the plantations

themselves, a milling processing plant and also a recycling plant. In October 2013 Prashant placed a value of £90m on the business. Aumkar, the company, was incorporated in 1978. Rajnikant and Mr PM Amin were the original subscribers but soon after incorporation the shares were transferred to Manilal Holdings. In 1981 and 1982 shares were also issued to Manilal Holdings, Manilal Malaya and a local businessman, Shaik Alauddin, as nominee for Manilal Malaya.

770. In 1996 and 1998 there were rights issues which enabled both the Continuing Partners and two employees, Mr Vanialingam A/L Tharumalingam ("**Mr Vanialingam**") and a Mr Arulananthan, to purchase additional shares in Aumkar. By 2000 the partners and one remaining employee held shares in Aumkar in the following percentages through the following companies (or, in the case of Mr Arulananthan, personally):

i) Rajnikant (27.53%) through Bedford; Rajpat Sdn Bhd ("**Rajpat**"), a Malaysian company; and Bisha Sdn Bhd ("**Bisha**"), a Malaysian company;

ii) Mr NM Amin and Mr PM Amin (9.99%) through Shanta Holdings Sdn Bhd ("**Shanta**");

iii) Mr Yogen Patel (8.16%) through Subh Investment Corporation ("**Subh**") and Labh Investment Corporation ("**Labh**"), both BVI companies;

iv) Girish (25.29%) through Sawit Sinar Sdn Bhd ("**Sawit Sinar**"), a Malaysian subsidiary of Pacific Rim; Hambros; Pacific Rim; and Bisha;

v) Suresh (25.29%) through Sawit Sinar; Prudential Investment Ltd ("**Prudential**"); and Anglo Dutch Investment Ltd ("**Anglo Dutch**"), a BVI company; and

vi) Mr Arulananthan (3.74%).

771. On 2 May 2003 Suresh wrote to Girish, Mr NM Amin, Mr PM Amin and Mr Yogen Patel setting out the shareholders' equity in Aumkar as shown in the draft

financial statements for the year ended 31 December 2002. The figure given was RM 138m which equated to about RM 4.54 a share. I was told by Mr Stewart that the Malaysian Ringgit roughly equated to about 6 per £1 sterling. On this basis the value of Aumkar was about £23m.

772. On 30 June 2003 the AGM of Aumkar took place in Tawau, Sabah. The minutes record that Rajnikant told shareholders that he was prepared to support the company for between three and five years, Mr Yogen Patel informed members that his family's desire was to exit from the company and he was pitching the price for his shareholding at somewhere near the balance sheet level. Mr NM Amin stated that his family had made its position clear to Girish.

773. On 1 September 2004 Prashant and his wife were appointed as directors of Rajpat although Prashant's evidence was that he had no active role in managing the company. At the end of 2004 Rajnikant, Suresh and Girish purchased the shares of Mr Yogen Patel and Mr Arulananthan. S&B's updated fraud chronology which was Annex 3 to its closing submissions (the "**Fraud Chronology**") recorded that the price paid was RM 2.05 per share. Following these acquisitions the Continuing Partners held shares in Aumkar in the following percentages through the following companies:

i) Rajnikant (31.29%) through Bedford, Rajpat and Bisha;

ii) Mr NM Amin and Mr PM Amin (9.99%) through Shanta;

iii) Girish (29.36%) through Sawit Sinar, Hambros, Pacific Rim and Bisha; and

iv) Suresh (29.36%) through Sawit Sinar, Prudential, Anglo Dutch and Bisha.

The Fochem Offer

774. It is clear that Rajnikant tried to persuade the Amin family to sell their shares in Aumkar for RM 2.05 and that he was unable to do so. By fax dated 12 December 2014 Mr NM Amin wrote to Rajnikant indicating that he was not prepared to accept a revised offer of RM 2.05 per share plus an additional 10 cents (which

Rajnikant had offered "unofficially") and he referred to Suresh's letter dated 2 May 2003. He stated that he might be prepared to sell at RM 2.75 per share.

775. However, shortly afterwards the Aumkar shareholders received an external offer for their shares. By letter dated 10 January 2005 Mr Heinz Fochem made an offer to all shareholders to purchase their shares at RM 2.05 per share either for cash or for a mixture of ordinary and preference shares in a new investment company. Prashant accepted that Mr Fochem was a friend of Suresh and that Suresh had traded with him.

776. On 20 January 2005 a majority of the board of directors issued a circular recommending to shareholders that they accept the offer and gave notice of an extraordinary general meeting to be held on 21 February 2005. The minutes of the meeting record that at the meeting 90.01% of the shareholders voted in favour of accepting the offer and 9.99% voted against doing so. In substance, Rajnikant, Girish and Suresh voted through their corporate vehicles to accept the offer and Mr NM Amin voted through Shanta against it.

777. S&B relied upon the minutes in support of their general defence of illegality. However, there was an important addendum to the minutes signed by Girish as chairman of the extraordinary general meeting. It recorded that shortly after the meeting Mr NM Amin confirmed to Girish in front of two of the other proxy holders that Shanta accepted the offer.

GUC

778. According to the transcript of the Shanta Proceedings (below) on 14 February 2005 a company called Golden Uni-Consortium Sdn Bhd ("**GUC**") was incorporated and on 23 April 2005 Mr Fochem became a director. On 17 May 2005 ten of the registered shareholders entered into agreements to sell their shares to GUC in exchange for ordinary and preference shares in GUC.

779. For example, Sawit Sinar sold 2,582,925 ordinary shares in Aumkar (8.47%) to GUC for 258,293 ordinary shares and 5,165,850 preference shares in GUC. Bedford sold 6,447,817 ordinary shares in Aumkar (21.14%) for 644,782 ordinary shares and 12,895,634 preference shares in GUC and Rajpat sold

2,710,100 ordinary shares in Aumkar (8.9%) for 271,010 ordinary shares and 5,420,200 preference shares in GUC. Prashant's wife, Tejal Jasani, signed the sale agreement on behalf of Rajpat. It was a condition precedent of each sale that GUC had completed the purchase of Shanta's shares on or before 30 June 2005 (although this date could be extended by agreement).

The GUC Claim

780. On 26 May 2005 GUC issued an Originating Summons seeking an order under section 180 of the Singapore Companies Act 1965 (as amended). Section 180(1) provided that where the holders of more than 90% of the shares in a company had approved an offer to purchase their shares, the purchaser could give notice requiring any dissenting shareholders to transfer their shares within two months after the approval of the offer whereupon the purchaser was entitled to acquire the shares unless the dissenting shareholder applied to court within a month and the court ordered otherwise. Section 180(3) also permitted the dissenting shareholder to give three months' notice requiring the purchaser to acquire its shares.

781. There is no evidence that GUC served a notice under section 180(1) before 22 June 2005 and on that date the court dismissed GUC's first application (although there was no evidence before me explaining why it did so). Nevertheless, on 29 June 2005 Rajpat, Bedford, Sawit Sinar, Prudential, Hambros, Bisha, Pacific Rim, Anglo Dutch, Labh and Subh all transferred their shares in Aumkar to GUC and the directors approved the transfers: see the affidavit of Mr Nokiah sworn on 13 May 2009. The transfers themselves were not in evidence.

782. Under cover of a letter dated 30 June 2005 J Marimattu & Partners ("**Marimuttu**"), who were acting for GUC, gave notice to Shanta that on 29 June 2005 27,453,515 shares in Aumkar had been transferred to GUC and that Shanta had three months within which to give notice requiring GUC to acquire its shares. In the covering letter they stated that GUC was ready, willing and able to acquire the shares and that the time for completion had been extended to 30 July 2005. They also stated that they had been instructed to apply to the High Court within seven days.

783. By Originating Summons dated 4 July 2005(the "**GUC Claim**") GUC applied to the High Court of Sabah and Sarawak again and by order dated 27 July 2005 the Court declared that it was entitled to purchase Shanta's shares by making a cash payment of RM 2.05 per share. On 21 September 2005 GUC applied to enforce the order and the Court refused a stay. By order dated 28 November 2006 the court ordered Shanta to execute a transfer of its shares and lodge it with GUC's solicitors together with the original share certificates. The order also provided that upon Shanta doing so, GUC should pay Shanta the sum of RM 6,245,294.25 in cash.

784. By faxed letter dated 7 December 2006 the directors of Aumkar (who included Suresh and Girish) wrote to the CIMB Bank (formerly the Bumiputra-Commerce Bank Berhad) with instructions to issue a bankers draft for RM 6,245,294.25 in favour of Shanta and debit Aumkar's current account. The letter followed a telephone conversation between Suresh and the bank and both the bankers draft and the share transfer were in evidence.

785. There was clear evidence that Rajnikant, Girish and Suresh paid for these shares through the companies which they controlled. By email dated 5 December 2006 Suresh wrote to Girish enclosing a schedule setting out the amount payable by each of them. The schedule did not specify which company each partner used to purchase the shares. But in September 2005 and in anticipation of acquiring the shares, Rajnikant and Girish had transferred funds from their personal bank accounts in New York and London and Girish and Suresh had instructed Invesco to redeem investments held by Deutsche Bank and Citigroup.

Fax dated 27 June 2007

786. On 7 February 2007 the Court of Appeal dismissed an appeal in the GUC Claim: see [2007] 7 MLJ 513. By letter dated 7 May 2007 Marimuttu wrote to Suresh informing him that Shanta had made an application for permission to appeal to the Federal Court in Kuching. On 25 June 2007 the Federal Court granted permission to appeal and by fax dated 27 June 2007 Suresh wrote to Rajnikant, Girish and Yashwant stating as follows:

> "As informed and discussed with members on 26th June 2007, wish to inform you the Federal Court in Malaysia has granted leave to appeal the Civil Appeal made by M/s Shanta Holdings Sdn Bhd in respect of their shares sold to M/s Golden Uni Consortium Sdn Bhd. Having considered the situation and as discussed with yourselves the 30,500,000 ordinary shares of M/s Aumkar Plantations Sdn Bhd in the name of M/s Golden Uni Consortium Sdn Bhd will have to be transferred and the proposal is as follows:….."

787. Suresh's proposal was that GUC should transfer the same number of ordinary shares in Aumkar back to each of the partners as they had held before the original sale to GUC (less a tranche to be transferred to a new foundation). He then continued as follows:

> "Thus if all members are agreeable, kindly arrange to incorporate a new offshore vehicle on an urgent basis and let me have the name, registration and other details of the new company which will be acquiring each member block of the shares by 30th June 2007. Thereafter will arrange to prepare:- a) A Sale & Purchase Agreement for the share transfer between M/s Golden Uni Consortium Sdn Bhd and the newly independent incorporated corporation b) A new share transfer Form 32A to be prepared and signed to effect the transfer before 15th July 2007."

788. On 3 July 2007 Fine Sun issued a share certificate for two $1 shares. The name of the holder stated on the share certificate was Mr DP Patel and the address given for him was his personal address in Ode in India. The written resolutions of the sole director, Madam Chee Wee Sea, stated that the date of incorporation of the company was 9 May 2007.

789. By email dated 3 July 2007 Prashant wrote to Girish providing details of the companies for the share purchase agreements. He stated that 10% was to be transferred to Rajpat and that the signatory would be Tejal. He also stated that 20% was to be transferred to Agrocorp and that he would supply details of the signatory (which he later did).

790. Under cover of a letter dated 6 July 2007 Girish wrote to OCRA (Seychelles) Ltd ("**OCRA**"), a company formation agent in the Seychelles enclosing an application form for the acquisition of a new company (which became Barrington). In the letter he stated that he and Mrs PD Patel, his mother, would

be the directors and that she would be the shareholder. Under cover of a letter dated 23 July 2007 OCRA sent him the company documents and stated that the post-incorporation procedures had now been completed. The register of directors shows that on 11 July 2007 Girish and Mrs PD Patel were appointed as directors.

The Share Sale Agreement

791. By a share sale agreement which bears the date 15 May 2007 GUC agreed to sell 30,500,000 ordinary shares of RM 1.00 each to Fine Sun, Aryan Investments Ltd ("**Aryan**") (an English company), Rajpat, Barrington and Agrocorp for a total price of RM 62,525,000. Following the share sale agreement the shares in Aumkar were held by the following companies (which had paid the following prices for them):

i) *Fine Sun*: 9,150,000 (RM 18,757,500);

ii) *Aryan*: 3,050,000 (RM 6,252,500);

iii) *Rajpat*: 3,050,000 (RM 6,252,500);

iv) *Barrington*: 9,150,000 (RM 18,757,500); and

v) *Agrocorp*: 6,100,000 (RM 12,505,000).

792. Clause 1 provided that the consideration could be paid in RM or US dollars or partly in one currency or the other and at the election of GUC directly to the companies listed in Schedule 1 Part 2 which were: Rajpat, Bedford, Prudential, Bisha, Hambros, Pacific Rim, Anglo Dutch and GUC itself. I will refer to them as the "**Former Shareholders**" and those companies and the consideration which they were to receive matched the proposal in Suresh's fax dated 27 June 2007.

The Minutes dated 22 June 2007

793. Minutes of a board meeting were prepared and signed by Mr Vanialingam bearing the date 22 June 2007. They purported to record that the board of directors resolved to approve the transfers of shares to Fine Sun, Aryan, Rajpat,

Barrington and Agrocorp whom I will call for convenience the "**New Shareholders**". The attendance list for the meeting was signed by both Rajnikant and Suresh.

794. By memo dated 19 November 2007 Suresh wrote to Rajnikant and Girish enclosing what he described in the covering email as a "schedule of partnership account" for amounts due to or from individual partners as at 30 September 2007 in relation to the purchase of shares in Aumkar.

795. The accompanying schedule set out a list of the shareholdings as at 31 December 2004 and a reconciliation of the balance owed to or by each of the three Continuing Partners after the acquisition of Shanta's shares. Suresh's reconciliation showed that Rajnikant was owed RM 255,677.85 of which Girish owed him RM 139,114.95 and Suresh owed him RM 116,562.90.

796. By email dated 27 August 2008 Girish wrote to Rajnikant stating that he was transferring the sum of £571,140 to Bedford's account in Singapore and that this sum included the equivalent of RM 139,114.95 (above) due in accordance with Suresh's email dated 27 August 2008. By email dated 28 August 2008 he confirmed to Suresh that he had sent this sum. By faxed letter dated 29 August 2008 Suresh also stated:

> "The account of RM 139,114.94 paid by yourself directly to Mr R.D. Patel pertains to the amount due to him for your portion of purchase shares of M/s Shanta Holdings Sdn Bhd in 2006. Mr S.D. Patel's memorandum dated 19 November 2006 will clarify the amount paid by yourself."

797. I find that the share sale agreement and the minutes of the board meeting were backdated and that the agreement was not executed and the board meeting did not take place until after Suresh had been told that Shanta's application for permission to appeal to the Federal Court had been successful and he had circulated the proposal in his fax dated 27 June 2007. I find that on the balance of probabilities the agreement and the minutes were signed no earlier than 6 July 2007 when Girish applied to purchase Barrington and would have been able to supply its name to Cannings Connolly, the firm of solicitors who prepared the agreement.

798. I also find on a balance of probabilities that the New Shareholders did not pay the purchase price to GUC or the Former Shareholders. S&B was not able to adduce any documentary evidence of payment and the inference which I draw from the accounting exercise which Suresh carried out in November 2007 is that the sale by the Former Shareholders to GUC and the sale by GUC to the New Shareholders did not involve any money changing hands. This is because it was only necessary for Suresh to reconcile the sums paid to buy the shares of Mr Yogen Patel and Mr Arulananthan at the end of 2004 and then the shares of Shanta in December 2006 and he confirmed this in his fax dated 28 August 2008.

The GUC Appeal

799. On 24 January 2008 the Federal Court allowed Shanta's appeal in the GUC Claim: see [2008] 2 MLJ 609. The court held that no notice had been served by GUC under section 180(1): see [10]. It also held that GUC had no right to acquire Shanta's shares under section 180(3) unless or until Shanta as the dissenting shareholder had served a notice requiring GUC to acquire its shares: see [13]. (Before the Court of Appeal GUC had succeeded in arguing that a without prejudice offer by Shanta's solicitors to sell its shares for RM 5.50 per share amounted to notice under section 180(3). But this argument failed before the Federal Court: see [16] to [19].)

GUC's Voluntary Liquidation

800. In his evidence in the Shanta Conspiracy Claim (below) Mr NM Amin produced documents to show that on 4 February 2008 GUC was put into members' voluntary liquidation and that it was later dissolved. Prashant accepted in evidence that GUC was deliberately put into liquidation over the Chinese New Year because people would otherwise be busy and it would go unnoticed.

The New York Meeting

801. On 15 and 16 November 2008 a meeting took place at which Rajnikant, Girish, Suresh, Yashwant and Prashant were present together with a number of other members of the family including Chirag. Prashant's evidence was that the

minutes were circulated and that Girish made amendments to them. They suggest that there was already tension in the family and that Rajnikant told the family members present that all back-dated claims for salaries and fees had to cease and all members had to claim and pay salaries and fees on a current basis.

802. The minutes do not suggest that anyone proposed to terminate the partnership at that stage. Indeed, they record that Aumkar recorded its largest profit and it was resolved to buy additional land for the mill. However, by email dated 18 December 2008 Rajnikant wrote to Yashwant, Girish and Suresh expressing his disappointment about recent exchanges between family members and stating that he would like to liquidate his holdings. He expressed no dissatisfaction, however, with the way in which Girish had run Barrowfen.

Aumkar: 2007 to 2014

803. Girish's evidence in the schedule in GP2 was that Aryan held one third of its shares for each of the three Continuing Partners and that they each owned 33.33% of Aumkar. This evidence is consistent with the reconciliation set out in the schedule to Suresh's memorandum dated 19 November 2007 (which made no reference to Yashwant owning any shares in Aumkar).

804. In the draft letter to Haridass dated 11 September 2012 (above), however, Suresh stated that Rajnikant, Girish each held 30% of Aumkar and its subsidiaries and that Yashwant held 10%. When the draft letter was put to Suresh, he accepted that Girish was a 30% partner and that it was agreed by all three brothers at the New York meeting that Yashwant would become a 10% partner. When the draft letter was put to Prashant too, he accepted that Girish was the beneficial owner of 30% of Aumkar or that his uncles treated Girish as the beneficial owner of 30% of Aumkar.

805. Finally, Suresh also accepted that after the sale to GUC had taken place Rajnikant, Girish and he had directed that their shares be put into personal vehicles. It was also his evidence that Fine Sun was his vehicle, Barrington was Girish's vehicle and Rajpat and Agrocorp were Rajnikant's vehicles. I accept this evidence and I find that after July 2007 Barrington was Girish's personal vehicle for holding 30% of the shares in Aumkar and that his brothers and

Prashant considered or treated him as the ultimate beneficial owner of those shares.

The Shanta Petition

806. In the GUC Claim the trial judge and the Court of Appeal both reached the conclusion that RM 2.05 per share was a fair price for Shanta's shares: see [2007] 2 MLJ 513 at [25]. On 4 September 2008 Shanta issued a petition against Aumkar, Rajnikant, Girish, Suresh, Mr Vanialingam and Mr Nokiah seeking to wind up Aumkar. Shanta claimed that the sale of shares by the Former Shareholders to GUC and the purchase by the New Shareholders of the shares from GUC was "a fraudulent and fictitious scheme" to remove Shanta from membership of Aumkar. I will refer to the petition and the subsequent proceedings as the "**Shanta Petition**".

807. On 13 August 2009 Mr Nokiah made an affidavit in answer to the petition. He stated that he was a director of Aumkar and he gave the following evidence in paragraphs 14 to 16:

> "Accordingly, the Petitioner has no basis whatsoever to contend or allege that the change of ownership is a fraudulent and fictitious scheme or schemes to remove the Petitioner from membership in the 1st Respondent. Furthermore, the Petitioner's allegations in paragraph 24 of the Petition that the action of all the Respondents, in the disposal of 90.01% shareholdings to Golden Uni-Consortium Sdn Bhd is not true. It was the Shareholders of 1st Respondent who took the action to sell their shares and the 2nd, 3rd, 4th and 5th Respondents acted only as Proxy on behalf of various shareholders at the EGM on 21.02.2005 to vote at the meeting in accordance with their instructions….
>
> …As outlined in paragraph 5 of the Petition, none of the 2nd to 6th Respondents above are shareholders of 1st Respondent. Moreover, I am advised by my fellow Directors none of the Respondents are either a Shareholders or Director of Golden-Uni Consortium Sdn Bhd."

808. On 14 August 2009 Rajnikant and Suresh both swore affidavits in answer to the Petition confirming the contents of Mr Nokiah's affidavit and also stating that they had ceased to be directors of Aumkar on 1 January 2008. On 14 August

2009 Girish also swore an affidavit confirming the contents of Mr Nokiah's affidavit and stating that he was still a director of Aumkar.

809. On 27 October 2009 the High Court dismissed the Shanta Petition. One of the grounds which the court gave was that the sale by the majority shareholders to GUC was not oppressive in itself and that the Federal Court had set aside the original High Court decision. The decision was affirmed by the Court of Appeal and permission to appeal was refused by the Federal Court.

810. Suresh did not accept in cross-examination that he and his brothers controlled Aumkar but pretended to the Malaysian court that they did not. He also stated that he and Rajnikant chose to retire as directors so that Aumkar remained "neutral and independent". He did not accept that this was a sham and that the directors did what they were told. Nor did he accept that this conduct was shameful, a term which Prashant used to describe it in draft email dated 14 October 2013 (below).

811. Suresh later accepted, however, that Aumkar was being run on a nominee basis. He said that Mr Nokiah was very experienced and had been with the family for many years. But he accepted that he was acting as a nominee and took his instructions from the Continuing Partners.

The Kuala Lumpur Meeting

812. On 14 June 2011 a second meeting took place between the Continuing Partners at which Prashant was also present. By email dated 28 June 2011 Prashant wrote to Yaswant, Girish and Suresh stating that two of the major points agreed at the meeting were that a buyer would be found for the Malaysian assets and that the London properties would be liquidated. Suresh accepted that relations between Girish and him were very strained by this time because of Girish's claim relating to the washout invoices.

813. By letter dated 3 August 2011 Suresh wrote to Girish asking him to agree the statement of account for the year ended 31 December 2009 and to bring the partnership to an end. This was followed by Girish's letter dated 5 August 2011 in which he raised a number of issues (including the washout invoices) which

required resolution before dissolution could take place. He also criticised Suresh's behaviour at the meeting in Kuala Lumpur.

814. By email also dated 5 August 2011 Girish sent Rajnikant, Suresh and Yashwant details of the two valuers who had been recommended by the auditors. By email dated 15 August 2011 Prashant replied asking Girish whether he intended to buy out the other partners or sell the properties to a third party. He then stated: "I have no objections to either and merely seek an exit to these investments."

The London Meeting on 17 April 2012

815. On 17 April 2012 Yashwant met with Rajnikant and Girish at the Tower Hotel in London. It is clear from his follow up email dated 22 April 2012 that his purpose was to try and broker a resolution of the outstanding issues between the Continuing Partners. Rajnikant's minutes show that he was concerned about Aumkar continuing being run "on a proxy basis" (i.e. through nominees) and that the plantations should be put up for sale.

816. Barrowfen was also one of the outstanding issues and Rajnikant's minutes record that he proposed that Girish should approach Mr NM Amin and Mr PR Amin to settle the amount due to them on the capital reduction. In his email dated 22 April 2012 Yashwant recorded that Girish told him that the Tooting Property had been valued and that he was willing to take it over. Ms Hilliard suggested to Girish that he failed to provide or show Yashwant the valuation report dated 12 April 2012. I attach little significance to this in circumstances where Yashwant was trying to mediate an overall solution.

The Shanta Conspiracy Claim

817. On 20 March 2013 Shanta issued an Amended Writ of Summons against Aumkar, Rajnikant, Girish and Suresh. Shanta also joined Mr Vanialingam Tharumalingam (who had been a director of Aumkar), Lin Kui Mee, Mg Mee Kam and Mr Fochem (who had been directors of GUC) and GUC itself. I will refer to this claim and the subsequent proceedings as the "**Shanta Conspiracy Claim**".

818. In the Amended Statement of Claim Shanta claimed that the GUC Claim had been brought in bad faith, maliciously and for the purpose of compelling Shanta to sell its shares in Aumkar at an undervalue. Shanta alleged that the Defendants were liable for the tort of abuse of process and for conspiracy to defraud and claimed the difference between the market value of the shares and the price which GUC paid for them and also exemplary damages. It quantified the difference in value of the shares as RM 4,604,647.

819. By email dated 24 July 2013 Suresh wrote to Prashant copying Rajnikant, Yashwant, Girish and Chirag indicating that an application to strike out the claim had been made. He also referred to an offer for Aumkar which Girish had rejected because it was too low. I have set out part of this email in the main body of the judgment. Suresh accepted in cross-examination that the Shanta Conspiracy Claim was a serious problem and that the relationship between himself and Girish was now so poor that they were not on speaking terms.

820. By email dated 22 August 2013 Girish wrote to Mr Pandu and Ms Teh, two long-standing employees of the Patel family, who were statutory directors of Aumkar complaining about the lack of information which he had received from the "shadow directors". Prashant took exception to this request and by email dated 23 August 2013 (the same date on which he wrote to Girish asking to be appointed a director of Barrowfen) he wrote to Girish as follows:

> "To what purpose does your below email serve when you're perfectly aware both of them have never questioned any of our requests to sign on any dotted line, save for their obligations under corporations law? The resident decision makers of Aumkar and all its subsidiaries are my father, Valakaka, Chirag and myself. Your request for documentation on this transaction was well receive [sic] through email of Yashwantkaka and was being duly attended to.
>
> Both Pandu and Teh have dedicated more than half their lives in service to our group of companies. The latter also selflessly volunteered her daughter to act as a director of Golden Uni in our ill thought scheme to remove NM Amin as a shareholder of Aumkar. Has it been overlooked that Teh's daughter breached her fiduciary duties in following our instructions to resolute [sic] share transfers where cash considerations never took place, but Teh herself is now placed under a microscope to justify a similar nominee instruction issued by us to sign on a dotted line?"

Draft Email dated 4 October 2013

821. By email dated 30 September 2013 Prashant wrote to Girish stating that he had been asked to state his claim in relation to the washout invoices and that it was frivolous and vexatious. He also stated that since "we have now migrated to watchdogs" he was proposing to put Barrington on the HMRC watchlist. Girish denied complaining to any watchdog but relations had deteriorated sufficiently between Prashant and Girish for Prashant to discuss approaching Girish's wife and family.

822. On or shortly before 4 October 2013 Prashant prepared a very detailed narrative of events which he intended to send to Nina, Vanisha and Kiraj. He circulated it in draft to Yashwant and Suresh stating that the plan was for Ilesh to hand the email over in person when he went to London. In the event, Ilesh did not visit London or hand over the email and Prashant did not send it until May 2018.

823. I set out the background to the draft email and the key parts of it in my judgment dated 5 February 2021: see [2020] EWHC 200 (Ch) at [19] to [23]. For ease of reference I set them out again here. I begin with the passage describing the removal of Mr NM Amin from Aumkar and then set out Prashant's comments in relation to the Kuala Lumpur meeting:

> "In order to remove him forcefully, a scheme was designed to pretend to sell the entire company to a European consortium. NM Amin's shares were 9.99% of the entire company. Section 180 of the Malaysian Corporations Act states that if there's a buyer for 100% of the company and over 90% accept the offer, then any remainder are forced to accept the offer. The scheme was put into place under a company called Golden Uni Corporation with Sureshkaka's friend Hienz [sic] Fochem from Germany used as the Consortium leader. As you require local Directors for any Malaysian company, we asked Auntie Teh (our longstanding staff member from Penang) to lend her daughter's name as a Director. The final Director was an admin clerk from our company secretary's office in Tawau. All 3 people were mere nominees for us and perfectly innocent parties that had no clue as to the scheme being put in place. As NM Amin continued to refuse transfer of his shares at $2.05, Golden Uni litigated him to force the transfer under Section 180. The high court of Tawau allowed our case. The Court of Appeal upheld our case and finally NM Amin had no choice but to sell. He was duly paid at $2.05. He then appealed to the Federal Court (highest in

Malaysia) and in a surprise decision, the Federal Court overturned the verdicts of both the High Court and Court of Appeal. They overturned the case on a technicality that a notice form was not given.

This placed the entire company in limbo as you had a shareholder that was forced to sell his shares, but subsequently a Court decision that overturned his requirement to sell the shares in the first place. The extent of this litigation took nearly 4 years from 2005 to 2008. However now, we faced a difficult situation as we had 'sold' our shares (the 90.01%) to a fictitious European Consortium. As the Directors of Golden Uni, (the 3 innocent people) could now potentially face legal action, we rapidly transferred the shares (prior to Federal Court decision) to a new set of 5 companies in tax haven companies like the BVI and Seychelles, and 1 Malaysian company that my father has operated for years. After the transfer, Golden Uni was placed into liquidation during Chinese New Year when everything would be low key. This was about the time when I started contributing significantly to our Malaysian business taking on management of our palm oil mill.

We now had a company that we wholly owned but could not disclose in public that we were the real owners behind the tax haven sheltered holding companies. NM Amin then started a new set of litigation to force the wind up of Aumkar and outlined to the Judge that it was a scheme to remove him and the original owners are still the current owners. To reassure the Judge, my father, Girishkaka, and Sureshkaka all had to falsely swear on oath that they were not the owners of Aumkar. As our documentation was concise and on the anomaly that it was curious why a 'restored' shareholder would want to wind up his own company, the Judge dismissed the case. NM Amin appealed to the Court of Appeal and subsequently to the Federal Court. Both courts luckily dismissed his appeals. This took another 4 years from 2008 to 2012.

Now, NM Amin has started a new action demanding a public trial of the events to show that it was a scheme to remove him and that he is owed damages. He named Aumkar, my father, Girishkaka, Sureshkaka, Hienz [sic], the clerk in the Tawau office and Teh's daughter in the suit. It is so shameful that we have caused innocent people to be placed on trial who know absolutely nothing about what went on."

"At our KL meeting in 2011, everyone agreed that we would put Aumkar for sale due to the ongoing litigation and problems obtaining financing. I also informed Girishkaka that I wanted to exit our share investment in the London properties as I had no involvement managing it and we wanted our money for other purposes in Australia."

824. Prashant also complained that Girish viewed everything as a conspiracy and had "intimidated our nominee Directors of our subsidiary companies". He dealt next with Aum Commodities and Makita and Barrowfen. In a passage which I did not quote in my earlier judgment he described the negotiations in 2011:

> "Back in 2011, I informed Girishkaka firmly that I do not want to be part of an investment in London as I have no intention of living there. I also informed that we wanted our investment money back as we wish to utilise the funds in Sydney especially with Ilesh setting up his medical practise [sic]. Girishkaka confirmed that a valuation on the companies would be performed and that he would buy us out. 2 years later, he refuses to provide us the valuation report nor any further details on when we will be bought out. This is just completely unfair…"
>
> "….If there is so much mistrust and no agreement can be made to buy each other's shares, then the only thing to do is to place all the companies into liquidation and let an independent liquidator sell the assets and distribute the funds. This bottomless pit of bickering is something I can no longer take and I now have every intention to force the liquidation of all companies via the Courts if no agreement can be reached."

825. Prashant gave evidence that he was the source of the information dealing with Aumkar in the draft email and that he had read the court bundles relating to the litigation in the East Malaysia office. He also described the email as "me just brain dumping all the emotions that I had at the time" and as "a cry for help". I deal with Suresh's response separately. But I accept that the draft email was an honest attempt by Prashant to frame and explain the family dispute as he saw it in October 2013.

826. Prashant did not accept that the GUC Claim was a scheme to defraud the Amin family. Nevertheless, he accepted that he was frustrated in 2013 because he wanted to be a director but he kept being told that he could not:

> "Q So you were being told by Girish, by Suresh and by your father that this couldn't be done? A No. I was not told by my father. It was Suresh telling me, no, we don't want to make any changes right now. Let's, you know, wait for these suits to finish. Q And then you say this: "To reassure the judge my father, Girishkaka and Sureshkaka all had to falsely swear on oath that they were not the owners of Aumkar"? A Yes. I said that because I read their statements which referred to another statement where it was said that they were not shareholders of the company, and

> of course in 2013 with -- I mean, I interpreted that as wrong. Q So you knew that they were not disclosing they were the beneficial owners of the company. That was your complaint in the first part? A Yes. Q And you knew also that they had stated that they were not shareholders, so you knew that what was being hidden was the beneficial ownership of the company. That was your whole complaint. A Yes it was. Yes. Q Then you say this: "As our documentation was concise and on the anomaly that it was curious why a 'restored' shareholder would want to wind up his own company, the judge dismissed the case". That took another four years to go through the appeals, and then you refer to what is being shameful, namely Aumkar, Girishkaka and Sureshkaka, Heinz, the clerk in the Tawau office and Teh's daughter", and you say: "It's so shameful that we have caused innocent people to be placed on trial who know absolutely nothing about what went on", yes? A Yes. That's what I said."

827. Prashant also accepted that in the draft email he made no complaint about Girish's failure to provide him with information about Barrowfen and the development of the business. He also accepted that he definitely told Girish at the Kuala Lumpur meeting that he did not want to be part of the investment in London and that is what he believed at the time.

Suresh's Response

828. Prashant's evidence in his witness statement was that immediately after he had circulated the draft email, Suresh called him at his office from his own office to explain that he (Prashant) had misunderstood the situation, that there was no fictitious sale and that he (Suresh) and his brothers had not lied on oath. In his own witness statement Suresh gave evidence to the same effect.

829. Mr Stewart took Prashant to a number of documents which suggested that this account could not be true. On 4 October 2013 at 6 pm New York time Yashwant was the first to comment on the draft email. It was clear from his response that he was content for the draft email to be sent and Prashant accepted this in cross-examination. On 7 October 2013 Suresh forwarded the draft to Chirag without comment and on the same day Ilesh forwarded to Prashant an email which he had received from Kiraj explaining the difficulties in arranging a meeting the following week. By email dated 8 October 2013 Ilesh wrote to Prashant stating: "Looks like Girish kaka has got to him already and told him what to say." Suresh

forwarded this on to Yashwant the same day. Finally, by email dated 14 October 2013 Ilesh replied to Kiraj expressing his disappointment that they would be unable to meet (after circulating a draft to Prashant and his uncles).

830. In the event Ilesh was unable to meet Kiraj or his mother and sister in London and the draft was never sent or handed to them. But none of the emails to which I have referred suggested that any of the recipients considered it to be wrong or inaccurate. Moreover, on 13 May 2018 Prashant finally sent the email to Kiraj without any correction or modification. On the basis of these documents Mr Stewart suggested to Prashant that his evidence about the conversation with Suresh was a "brazen lie" and that he was lying to the court quite deliberately.

831. Given the significance placed on this email by S&B and Girish both before and during the trial, I set out my findings in relation to both the draft and the underlying facts in some detail:

i) Suresh and Prashant did not really dispute the fact that the Fochem offer was not an offer by an independent third party or that GUC was controlled by the Patel brothers. I find that Rajnikant, Suresh and Girish orchestrated the Fochem offer for the purpose of buying out Shanta and that they ultimately controlled GUC.

ii) I accept Suresh's evidence that the affidavits which Rajnikant, Girish and he made in the Shanta Petition were literally true in that none of them were registered as shareholders of Aumkar. However, I reject his evidence that this was not a pretence and that he and his brothers did not control Aumkar. He later accepted that he and his brothers controlled Aumkar through nominee directors and, if it is necessary to do so, I find as a fact that they did so.

iii) I accept the description of the Shanta Petition which Mr Stewart put to Prashant and which Prashant accepted in cross-examination. I find that Rajnikant, Girish and Suresh all made affidavits swearing that they were not the owners of Aumkar in order to mislead the court and disguise the fact that they were the ultimate beneficial owners of the company. I also

accept that Prashant considered this conduct to be shameful and that he had good reasons for believing that it was.

iv) I have already found that that Rajnikant, Suresh and Girish backdated the share sale agreement and the minutes of the meeting dated 22 June 2007 to give the impression that the sale by GUC to the New Shareholders had taken place before GUC had notice that Shanta had been granted permission to appeal. I am not, however, prepared to accept that the GUC Claim itself was a scheme to defraud the Amin family. I set out my findings in relation to the Shanta Conspiracy Claim below. But Prashant did not accept this when he was cross-examined about his draft email and I do not accept it either.

v) In particular, the GUC acquisition involved the sale by the Former Shareholders of their shares in Aumkar for the issue of ordinary and preference shares in GUC. S&B called no expert evidence to satisfy me that such an offer would not have triggered the right to acquire the Amins' shares under section 180 even if it had been known that Rajnikant, Girish and Suresh ultimately controlled GUC. Moreover, S&B did not challenge the addendum to the minutes of the EGM on 21 February 2005 and Prashant's evidence was that Mr Amin told the Court of Appeal that he wanted to sell his shares (and the issue was the price).

vi) I also accept Prashant's statement in his email dated 23 August 2013 (which was not challenged) that no cash consideration was paid for the transfer of shares to the New Shareholders. This confirms the findings which I have made on the underlying documents (above).

vii) Given these findings, I have considered carefully whether I should also find that Prashant and Suresh deliberately misled this court by making up a story about a conversation between them once Prashant had circulated the draft. I am not satisfied that they did. Although I had specific concerns about Prashant's evidence (which I address elsewhere), for the most part I found him a convincing witness and I accept his evidence on this issue.

viii) Mr Stewart was not able to point to any email in which Suresh approved the draft or to it being sent to Girish's family and I consider it more probable than not that Suresh told Prashant not to send it either on 4 October 2013 itself or, more probably, a few days later. I also consider it likely that Suresh found the contents of the draft unpalatable and difficult to accept and that he did not agree with it. Taking a cynical view, it is also likely that Suresh considered its contents to be incendiary and that it would be a hostage to fortune to let it fall into Girish's hands. Whatever the explanation I find on a balance of probabilities that Suresh told Prashant not to send it (as they both gave evidence that he did).

ix) Finally, on 23 October 2013 Suresh sent a detailed eight page letter to Girish summarising their ongoing differences and requesting him to "expedite the matter to dissolute all partnership before December 2013". Moreover, he sent copies to all members of the family. It is highly unlikely that Suresh would have chosen to send such a detailed letter to Girish if he had approved Prashant's draft and much more likely that he chose to write to Girish himself in different terms.

832. By email dated 21 November 2013 Girish wrote to Mr Nokiah, Mr Pandu and Ms Teh advising them to take legal advice about their duties. He followed this up with a second email enclosing a letter on Barrington's notepaper requesting detailed information from them about Aumkar and its operations. This was the same day as the letter in which he acknowledged (or purported to acknowledge) Suresh's resignation. By email dated 25 November 2013 Prashant replied stating that they were acting on his instructions and complaining that this was an attempt by Girish to intimidate them.

833. Girish also relied on a letter dated 2 December 2013 in which he wrote to Fansway Secretarial Services Ltd in Hong Kong complaining about his resignation and the appointment of Suresh as a director of Aryan. In the letter he stated that he had not been informed about a directors' meeting to approve these appointments. Mr Stewart put this letter to Prashant on the basis that Suresh had submitted a letter of resignation without Girish's authority.

Prashant's evidence was that there was no resignation but that when he was up for re-election at the AGM, Girish was not re-elected.

The Aumkar Dividend

834. On 6 August 2014 the board of directors of Aumkar passed a resolution declaring an interim dividend of RM 1.00 per share. Under cover of a letter dated 10 August 2014 Mr Nokiah sent Girish the dividend voucher and asked him for details of the bank account into which the dividend should be paid. The voucher showed that Barrington was entitled to a dividend of RM 9.15m and Prashant accepted that this equated to £1.75m. He also accepted that Mr Nokiah was taking instructions from him and, indeed, on 19 August 2014 Prashant was appointed to be a director of Aumkar.

Mr NM Amin's Email dated 12 December 2014

835. By email dated 12 December 2014 Mr NM Amin wrote to Yashwant (who copied the email to Rajnikant and Suresh). Mr Amin referred to their meeting at a family wedding on 14 June 2014 at which Yashwant had attempted to broker a settlement of the Shanta Conspiracy Claim and suggested that any negotiations should be dealt with through lawyers. He also complained that he had not been paid for Seaco's shares in Barrowfen.

The Seychelles Claim

836. On 9 September 2011 Mrs PD Patel died. Under a will dated 18 June 1986 Yashwant was named as the sole executor and beneficiary of her estate and in 2012 Yashwant obtained a grant of probate. Although Girish controlled Barrington and it held his interest in Aumkar, Mrs PD Patel had been registered as the sole shareholder of its 100,000 issued $1 shares.

837. On 15 October 2014 Girish commenced proceedings in the Supreme Court of the Seychelles in the name of Barrington and in his own name against OCRA and Yashwant. Girish claimed that he was entitled to be registered as the sole shareholder of Barrowfen and that OCRA, as its registered agent, had failed to give effect to that entitlement. On 29 October 2014 he also issued an interim

application for an injunction to restrain OCRA from recognising Yashwant as its shareholder. I will refer to this claim and the subsequent proceedings as the "**Seychelles Claim**".

838. In support of his case Girish produced a stock transfer form and a letter bearing the date 3 January 2011 and signed by Mrs PD Patel in which she purported to resign as a director and transfer her shares to Girish. He also produced a resolution bearing the date 3 January 2011 which he had signed and which purported to approve the cancellation of the share certificate issued to Mrs PD Patel, the issue of a share certificate to him and the acceptance of Mrs PD Patel's resignation. He also produced a letter bearing the date 5 March 2011 and signed by Yashwant.

839. In 2015 Barrington commenced proceedings in the High Court of Sabah and Sarawak for an order to compel Aumkar to pay the dividend of RM 9.15m into a Swiss bank account. Yashwant applied to intervene in those proceedings and on 26 October 2015 he swore an affidavit in support of that application. He gave evidence that on 17 August 2012 probate had been granted to him by the Winchester District Registry and resealed by the Seychelles Supreme Court. He also gave evidence that Girish had produced a new will dated 23 June 2005 (the "**2005 Will**") in which Mrs PD Patel had made him her sole executor and beneficiary. He claimed that this will had been forged and that the stock transfer form, resolution and letters upon which Girish relied in the Seychelles Claim had also been forged.

840. On 9 June 2017 Girish filed an Amended Plaint in the Seychelles Proceedings (which is the form of originating process in that jurisdiction). On 6 July 2017 Yashwant's application to dismiss the claim on various grounds was heard by Govinden J. It is clear from his judgment that Girish had now abandoned reliance on the resolution dated 3 January 2011 and was asking the court to recognise his entitlement to be registered as a shareholder on the basis that Mrs PD Patel held the shares on trust for him and as his nominee.

841. In his judgment dated 20 October 2017 Govinden J dismissed the claim on the basis that Girish had not provided any documents or evidence to establish the

existence of a trust: see [52]. But in any event he held that the Court did not recognise a beneficial owner for the purposes of the registration of shares: see [58]. It followed that Yashwant was entitled to the shares in Barrington as the sole beneficiary of Mrs PD Patel's estate.

Yashwant's Correspondence with Aumkar

842. Yashwant exhibited two letters dated 23 February 2015 and 20 July 2015 to his affidavit sworn on 21 October 2015. The first was a letter from him to Aumkar and the second was a letter signed by Mr Nokiah on behalf of Aumkar to him. Neither of these letters was put in evidence but Prashant was taken to drafts of these letters and he confirmed their contents. He also confirmed that the affidavit was prepared on his instructions and that both letters had been deliberately backdated to give the impression that Yashwant had challenged Girish's right to control Barrowfen earlier than was in fact the case.

843. Prashant was also taken to an email dated 2 September 2015 in which Mr Ramesh Gopal, a partner in the firm Rajes Hisham Rahim & Gopal, wrote to him in the following terms:

> "…please find soft copies of the next round of correspondences between Yashwant and Aumkar for your kind perusal and further action. As before please ensure that the dates of these letters correspond with how they were supposedly sent out to the relevant party in Q."

844. Finally, Mr Stewart took Prashant to his own affidavit in answer to an application made by Barrington for summary judgment and sworn on 1 April 2016. He suggested to Prashant that he was "creating a story" and that he was prepared to fabricate documents to achieve his ends. Prashant accepted that the documents had been backdated but he denied that he fabricated a story. He also tried to excuse this conduct because the letters reflected discussions which had taken place at the time and because all that he intended to do was to maintain the status quo until the Seychelles Claim had been determined. At the end of his cross-examination on this issue Prashant was close to tears and made a lengthy statement to the court which began as follows:

> "My Lord, I regret this. I sincerely do, and in hindsight, I would have done things very differently, in terms of not using this letter because I already had the knowledge of what was going on. I mean, I don't know why I used a letter. All I needed to do was simply state that Yashwant has corresponded to me in this manner. I sincerely regret what has been done in -- for this. But there was no intent to deceive the courts. We were simply asking for status quo. All we wanted was the Seychelles proceedings to conclude and then for this dividend to be released to whoever the owner was declared as by the Seychelles court. It had never even occurred to me once that I was -- this suit was to apply pressure on Girish in any way, shape or form, when I know that he was substantially wealthy."

845. I accept Prashant's evidence on this issue and I am satisfied that his regret was genuine. Nevertheless, the back-dating of Yashwant's correspondence with Aumkar cast considerable doubt on Prashant's credibility as a witness in court proceedings and as a consequence I treated his evidence on key issues with care. It also demonstrated the depth of feeling between Prashant and Girish in the key period before the administration and satisfied me that in assessing Barrowfen's case on causation I had to look at all of the evidence in the round.

The Probate Claim

846. In 2015 Girish had also commenced proceedings in the High Court to prove the 2005 Will. Yashwant defended those proceedings as the executor and sole beneficiary of the earlier will. The claim was heard in November and December 2016 and in his judgment dated 16 February 2017 Mr Andrew Simonds QC found that Girish had forged the 2005 Will and dismissed the claim: see [2017] EWHC 133 (Ch). I will refer to this claim and the subsequent proceedings as the "**Probate Claim**".

847. Ms Hilliard placed some reliance upon the expert evidence and the findings made by the judge. Mr Radley gave expert evidence on behalf of Yashwant that Mrs PD Patel's signature was genuine but did not date from 2005 and that electrostatic detection apparatus ("**ESDA**") showed the impression of another signature on the will. This was consistent with Yashwant's case that Girish had used a pre-signed sheet of paper which was one of a number of sheets which Mrs PD Patel had signed at the same time: see the judgment at [78] to [83]. In

these proceedings Girish used the same modus operandi in relation to the Suresh Resignation Letter and the Trustee Resignation Documents.

848. The judge also attached some importance to the fact that Girish had originally instructed Dr Audrey Giles but produced no report from her and she did not give evidence: see his judgment at [87]. In the present case, Girish originally instructed Dr Giles. But he did not call her to give evidence and neither he nor S&B challenged any of the expert evidence upon which Barrowfen relied. Again, there is a parallel with the Probate Claim.

849. The judge accepted Mr Radley's evidence. He also rejected the evidence of Girish and three witnesses: Mrs Ranjanbala Patel ("**Ranjanbala**") and Mrs Saryubala Patel ("**Jayshree**"), who claimed to have witnessed the 2005 Will; and Mrs Nirja Jain ("**Nirja**"), who claimed to have typed it up. He also considered it striking that there was nothing to corroborate the existence of the 2005 Will and, in particular, no electronic footprint (e.g. the metadata from Girish's office computer): see [107].

The Private Prosecution: Information and Indictment

850. On 26 July 2016 Prashant and Suresh laid an information before the Westminster Magistrates Court alleging thirteen offences of fraud, forgery and associated offences. Girish was committed to the Crown Court to stand trial on a number of counts of forgery, fraud, using a false instrument, perverting the course of justice and destroying a valuable security. Counts 1 to 4 related to the Suresh Resignation Letter, Counts 4 to 8 related to the removal of entries from the Register, Counts 9 to 11 related to the Trustee Resignation Documents and Counts 12 to 14 related to the 2005 Will. Count 15 related to the incorporation of Barrowfen II. I will refer to the prosecution as the "**Private Prosecution**".

The Committal Application

851. On 28 March 2017 Yashwant applied to commit Girish and the three witnesses, Ranjanbala, Jayshree and Nirja for contempt. The application was heard by Mr Justice Marcus Smith and Girish admitted to the court that the Probate Claim was fraudulent and the three witnesses all admitted that they gave false evidence

knowing it to be false. The judge found Girish guilty of contempt and sentenced him to 12 months' imprisonment.

852. Mr Justice Marcus Smith also recorded that S&B had represented both Girish and the three witnesses from the issue of the application until 27 July 2017 when the court made an order directing S&B to file a letter confirming that the three witnesses had been given advice in relation to conflicts. He stated that "obvious and serious concerns" were expressed at that hearing about the continued joint representation of all of the Defendants: see [50] and [51].

853. On 19 September 2017 the three witnesses instructed IBB Solicitors, a new firm, to represent them and on 2 October 2017 they wrote to Yashwant's solicitors indicating that they intended to admit the allegations against them. The judge found that they were entitled to a very substantial discount on any penalty because they admitted their contempt as soon as they were separately represented. Their decision to admit the allegations also forced Girish's hand and on 3 October 2017 S&B wrote to Yashwant's solicitors "conceding the principal allegations" even though Girish had served evidence on 29 September 2017 asserting that the 2005 Will was genuine: see [53] to [56]. Ms Hilliard relied on S&B's failure to recognise that there was an obvious conflict of interest and the critical comments of the judge.

The Shanta Conspiracy Judgment

854. On 20 December 2017 Judge Paramaguru dismissed the Shanta Conspiracy Claim with costs. He held that the cause of action for the tort of abuse of process was misconceived and he also dismissed the conspiracy claim. In his judgment he made the following findings:

> "[43] Shanta had pleaded that GUC and the Patel brothers had wanted to remove Shanta as a minority shareholder of Aumkar and that they wanted to acquire its shares at below market value. As correctly pointed out by counsel for the defendants, even if the object of the 2005 action was to remove Shanta as a minority shareholder, it is something that is allowed by section 180(3) of the Companies Act 1965.
>
> [44] As for the fair market value of the minority shares, the High Court and the Court of Appeal addressed the issue and did not

> find that it was unfair. The Federal Court set aside the decision only on the issue related to the notice period given to the minority shareholder. In any event, I find it difficult to conclude that the mere act of attempting to purchase something at below market value without anything more can amount to an unlawful act that attracts liability under the tort of conspiracy to defraud or injure. Therefore, Shanta has not proved that the act of pursuing the action by GUC was unlawful in any way.
>
> [45] Shanta had also pleaded that the entire exercise of acquisition of the majority shares was a sham perpetrated by the Patel brothers and that the 8th Defendant [Mr Fochem] was a fictitious person and that it was a conspiracy to compel Shanta to give up its Aumkar shares. I find no evidence to support this allegation for the following reasons.
>
> [46] Shanta's witnesses as I said earlier had merely echoed the pleaded case of Shanta without any proof to support this allegation. In fact, during cross-examination, PW1 [Mr N Amin] admitted that the 8th defendant [Mr Fochem] was an international vegetable trader whom he had met in person. As for PW2 [Mr P Amin], he refrained during cross-examination from stating that the 8th defendant was a fictitious person. To sum up, Shanta failed to produce any evidence of conspiracy between the Patel brothers and the 7th defendant in respect of the alleged sham sale."

Aumkar: 2017 to 2020

855. After the judgment of Govinden J on 20 October 2017 Yashwant's position as the legal and beneficial owner of Barrington and the ultimate beneficial owner of Girish's 30% share of Aumkar became secure. Both Prashant and Suresh gave evidence that after the judgment Yashwant agreed to give 12.5% of his shares to each of them (leaving Rajnikant and Prashant owing 42.5% between them, Suresh owning 42.5% and Yashwant owning 15%). Mr Stewart asked Suresh why he and Prashant had received these gifts from Yashwant:

> "Q. Why, please, if Yashwant was the sole legal and beneficial owner of Barrington, should you and Prashant receive the lion's portion of those shares? A. It is not -- you know, that we received the lion portions of the shares. What Yashwant wanted to do was to, you know, make a gift to us, you know, of equal -- equally to both my elder brother and myself, because he's sort of in a different profession and he says that he's happy, you know, to make the gift to us, and that's how it was agreed, you know, to pass the share on to us, my Lord. Q. When was your agreement and understanding that -- this isn't a small sum of money, is it?

> It's worth over £10 million. It's something you would be paying attention to, Suresh? A. Right. So that's what I was saying to you, that it was basically -- it was this -- this thing. So that's how the 12.5% came to me and 12.5% went to Prashant. Q. Why do you get £10 million? A. It was Yashwant's wish. Q. Why did Yashwant want to give you £10 million? Did he not say? A. That is something he will be able to tell my Lord, you know. Because he wanted to give a gift to us, you know, so we accepted it. Q. Were you aware that Yashwant had manufactured evidence in the form of a letter of 25 February 2013 in order -- sorry? A. No, I'm not aware, my Lord. Q. Mr Suresh Patel, you, Yashwant and Prashant decided, didn't you, that you were going to seek to obtain what you knew was Girish's shares in Barrington and then divide the spoils between the three of you? A. My Lord, as I said earlier, it was the Seychelles, you know, jurisdiction and the courts decided, you know, how do you call, to transfer the shares into Yashwant by a legal, what do you call, sort of, you know, arrangement. And as a result of which Yashwant became -- and subsequently Yashwant decided to, you know, give us 12.5% each as a gift, and that was what it was, my Lord. And it was all done through solicitors and it was all done through this thing. It is not something that we have just, what do you call, you know, saying it for the sake of saying it, my Lord. Q. Do you think what you did was right, Suresh? A. I -- I mean, I think that at the end of the day, because Yashwant is the rightful owner and he passed on the shares to us as a gift, I think that, you know, was his wish. Q. But you were aware that Yashwant wasn't the rightful owner, didn't you? He could take no better title than your mother, and you knew that your mother wasn't the beneficial owner? A. No, my Lord. I did not know, what do you call, that my mother was the shareholder of Barrington. As I said earlier to you, Girish has never, ever told me that, and, you know, I have never basically this thing. I think the, the legal, what do you call, case that was fought in Seychelles was between Girish and Yashwant, and basically I think, you know, the court ruled in favour of Yashwant as far as I know. Because of, what do you call, you know, the way that Girish has presented his case or whatever it was. And that is what it is."

856. I am satisfied that Yaswhant, Suresh and Prashant agreed to deny Girish his 30% interest in Aumkar by relying on the fact that he had registered the shares in Barrington in Mrs PD Patel's name and that once Yashwant had successfully defended the Seychelles Claim, they shared out Girish's interest in Aumkar between themselves.

857. Mr Stewart also suggested to Prashant (and Prashant accepted) that this was an "undocumented arrangement". This suggestion echoed the phrase which S&B

used to describe the without prejudice negotiations between Prashant and Kiraj which S&B had pleaded in the Amended Defence. Mr Stewart briefly explored those negotiations with Prashant. But I consider them no further in this judgment because I have already held that they were privileged and struck out the relevant paragraphs: see [2021] EWHC 200 (Ch).

858. Following the settlement agreement dated 6 March 2019 the shareholders in Barrowfen (i.e. Suresh and Prashant) transferred their shares to Asian Agri (see above). Those transfers were dated 6 May 2019 and at about the same time the New Shareholders also transferred their shares in Aumkar to Asian Agri. By email dated 2 April 2019 Prashant wrote to Yashwant attaching confirmation that he had been allocated 5% of the equity in Barrowfen Properties and that it would now be transferred to Asian Agri by the issue of new shares in that company.

859. Finally, I was taken to a draft declaration addressed to IATL attached to an email dated 30 April 2019 which showed that Suresh owned 47.50% of Asian Agri, Prashant owned 29.96%, Yashwant owned 5.00% and Rothschild Trust (Singapore) Ltd ("**Rothschild**") owned 17.54%. My understanding was that Rothschild held those shares on trust for Prashant and his family. The outcome of the family dispute was, therefore, that Asian Agri became the owner of both Barrowfen and Aumkar and that Suresh, Prashant and Rothschild (on behalf of a family trust) became the ultimate beneficial owners of 95% of its shares.

The Private Prosecution: Stay Application

860. By letter dated 17 September 2020 Edmonds Marshall McMahon ("**EMM**"), who were acting for Prashant in the Private Prosecution, wrote to Shearman Bowen & Co ("**SB&Co**"), who were acting for Girish, stating that he had never been arraigned on Count 15 and that the prosecution did not propose to seek a trial on that count. EMM also addressed a number of disclosure issues which SB&Co had raised.

861. On 24 February 2021 His Honour Judge Dight CBE heard an application to stay the Private Prosecution and under cover of an email dated 13 May 2021 (and after the trial of this action had taken place) Kiraj sent me a copy of the judge's

approved judgment together with a letter dated May 2021 which he had sent to the DPP referring it to him to for review. In the judgment he dismissed the application for a stay but expressed misgivings about the continuing prosecution. I am grateful to Kiraj for providing me with the approved judgment but rather than attempt to summarise it myself I set out extensively the judge's own summary from his letter to the DPP:

> "I recently heard an application for a stay of the prosecution for abuse (under both of the traditional limbs). The defendant's principal position was that the prosecution should be stayed under the second limb, on the grounds that it was not fair to try the defendant. I came to the conclusion that the grounds for an abuse were not made out but that because I had misgivings about the prosecution (for the reasons which I gave in a lengthy oral judgment) the appropriate course was to refer this case to your office to review. I attach a copy of the transcript of my ruling.
>
> The private prosecution was brought by Prashant Patel against his paternal uncle Girish Patel following the breakdown of relations between various members of a relatively extended family which has business interests in many parts of the world. As a result of the breakdown the family sought to disentangle the ownership of their various business interests which in turn spawned hard-fought litigation in a number of jurisdictions, including England & Wales, New South Wales, Malaysia and other offshore jurisdictions. There is ongoing litigation in the Chancery Division as I write.
>
> The essence of the prosecution case is that between 2013 and 2015 the defendant engaged in a course of fraudulent conduct to enable him to take control of a family company called Barrowfen Properties Ltd which owns a valuable property in South London. There are currently 14 counts on the Indictment involving allegations of forgery, using forged or false documents, associated fraud, perjury and perverting the course of justice. The allegations of perjury and perverting the course of justice relate to the defendant's role in proceedings which he brought in the Chancery Division of the High Court to prove a will relating to his late mother: he had forged her signature on the will. After losing at trial the defendant was tried on contempt charges in the High Court and sentenced to, I believe, 12 months in custody. In the private prosecution he has pleaded guilty to forgery of his mother's will and perverting the course of justice.
>
> The basis of the stay application before me was a series of allegations that the private prosecutor had repeatedly and deliberately failed properly to comply with his duty of disclosure demonstrating, among other things, that he had, and has, no

proper regard for his duties as a private prosecutor. The private prosecutor denies this.

The trial of this case (which is estimated to take approximately 6 weeks) has been delayed for a number of reasons, including the fact that the defendant was at one time a serving prisoner following sentence in the High Court, that he subsequently suffered mental health issues (leading to consideration of whether he had capacity and was fit to plead), that he had then serious physical health problems which meant that he was not fit to prepare for or attend trial. I have taken it out of the list more than once, most recently due to the pandemic which has limited the capacity of the Crown Court to try cases.

Although I dismissed the application for a stay I formed the view that it was right to refer it to your office for review on the grounds that I had concerns about the failure to give disclosure, about whether the criminal process was being manipulated by the private prosecutor for a collateral purpose relating to the ongoing litigation and whether the prosecution was in the public interest."

Appendix 3

PROCEDURAL CHRONOLOGY

Statements of Case

862. On 12 September 2018 the Claim Form was issued together with the Particulars of Claim (which had originally been served in draft on 4 October 2017). In relation to the Administration Claim, Barrowfen alleged breach of fiduciary duty, unlawful means conspiracy and dishonest assistance against S&B in implementing a scheme to put the company into administration to enable Girish to purchase the Tooting Property at an undervalue.

863. On 26 November 2018 S&B served its Defence. On 21 February 2019 Girish served his Defence and on 2 May 2019 Barrowfen served its Reply. Girish's Defence was signed by counsel, Mr James Stuart, and he had clearly had the benefit of legal advice in its preparation. It was served without prejudice to his contention that the claim should be stayed pending the determination of the Private Prosecution. Girish also relied on the privilege against self-incrimination in answer to the key allegations. As I have found, Girish was entitled to rely on the privilege in these proceedings.

CCMC

864. On 17 October 2019 the CCMC took place before Deputy Master Linwood. He settled the Disclosure Review Document and the issues for disclosure, he gave permission to the parties to reply on the expert reports of Mr Rodé, Dr Giles and Mr Radley together with the joint report of Dr Giles and Mr Radley (which had already been exchanged). He also gave permission to each party to call an expert chartered surveyor (but refused permission for expert evidence from an insolvency practitioner). On 12 May 2020 Master Clark extended the time limits in the original order.

Disclosure

865. On 9 June 2020 Barrowfen and S&B exchanged lists of documents. Barrowfen's Disclosure certificate was dated 9 April 2020 and S&B's Disclosure Certificate

was dated 8 April 2020. On 22 June 2020 Girish served a Disclosure Certificate which disclosed only 30 documents. I reviewed the history of his disclosure in my judgment on the Iniquity Application (below). On 13 October 2020 (and following the Iniquity Application) S&B filed a revised Disclosure Certificate.

The Particulars of Claim: Strike Out

866. On 12 February 2020 Barrowfen served draft Amended Particulars of Claim. They now included an allegation that S&B had made a fraudulent misrepresentation at the meeting on 9 December 2015. They continued to allege that the purpose of the administration was to enable Girish to purchase the Tooting Property at an undervalue. On 25 March 2020 Barrowfen served a revised draft of the Amended Particulars of Claim removing the allegation that the purpose of the administration was to enable Girish to purchase the Tooting Property at an undervalue (although Barrowfen continued to allege that the purpose was to enable Girish to keep control of Barrowfen and to buy the property for less than Prashant and Suresh would have been prepared to pay and at the price payable on a distressed sale).

867. S&B applied to strike out the allegations of dishonesty and, in particular, the allegation of deceit. On 6 April 2020 Mr Justice Birss (as he then was) heard the application and on 14 May 2020 he dismissed the application: see [2020] EWHC 1145 (Ch). He considered, however, that Barrowfen needed to amend further: see [80] and [81]. On 27 May 2020 Barrowfen served a second revised draft of the Amended Particulars of Claim. S&B resisted these amendments but on 6 July 2020 Birss J gave permission to serve the Amended Particulars of Claim. He also gave permission to the Defendants to serve their amended Defences following the hearing of the Iniquity Application (below).

The Iniquity Application

868. On 15 and 16 September 2020 I heard Barrowfen's application to challenge the Defendants' right to withhold production of privileged documents under the "iniquity exception" (the "**Iniquity Application**"): see [2020] EWHC 2536 (Ch). I upheld the challenge and ordered disclosure. I also accepted that Girish had committed a number of breaches of his disclosure obligations and in my

Order dated 16 September 2020 I ordered both for Girish and S&B to serve revised Disclosure Certificates and Extended Disclosure Lists dealing with the privileged documents. I set out the procedural background in some detail in my reserved judgment: see [1] to [10]. See also my judgment on Girish's application for an extension of time: [2020] EWHC 3112 (Ch).

Further Amendments

869. On 6 July 2020 Barrowfen served Amended Particulars of Claim pursuant to the Order of Mr Justice Birss. On 11 September 2020 Barrowfen served Further Information of the Amended Particulars of Claim in answer to a Request dated 24 July 2020 and on 3 November 2020 Barrowfen served Re-Amended Particulars of Claim. The principal amendments related to the particulars of loss (and Barrowfen withdrew its original claim for loss of the developer's profit on the Tooting Property).

870. On 24 November 2020 S&B served its Amended Defence. S&B alleged that the Patel family businesses involved "repeated conspiracies to defraud, to money launder and to pervert the course of justice". In particular, S&B alleged that there was an "undocumented arrangement" between Prashant, Barrowfen and Girish to fix S&B with liability and that this was a conspiracy to pervert the course of justice. These allegations were summarised under the heading "The Deliberately Concealed Matters". On 9 December 2020 Barrowfen served its Amended Reply pleading that these allegations were vexatious and without merit.

The Pre-Trial Review

871. On 20 January 2021 I heard the PTR. Barrowfen had applied to strike out the the Deliberately Concealed Matters and I gave directions for the hearing of that application as a matter of urgency. I dismissed an application by Girish for the reimbursement of his costs and an application for an extension of time and I gave directions for trial and settled the issues for expert evidence. On 27 January 2021 Girish served a 74 page witness statement (Girish 9). There was no objection to it and on 5 February 2021 I gave permission for him to rely on it.

The Defence: Strike Out

872. On 1 and 2 February 2021 I heard the application to strike out the Deliberately Concealed Matters and on 5 February 2020 I handed down a reserved judgment striking out the relevant paragraphs both on the grounds that there was no real prospect of success and on the basis that no permission had been given for these amendments: see [2021] EWHC 200 (Ch). On 5 February 2021 I also heard disclosure applications by both Girish and S&B. I adjourned Girish's application generally and ordered specific disclosure of limited categories of documents on S&B's application.

Final Directions

873. On 25 and 26 February 2021 the parties and I attended a rehearsal for trial to ensure that all parties and, in particular, Girish were capable of participating in a fully remote trial. I gave final directions for trial and dealt with a number of other matters (including costs) which were contained in the composite Order dated 26 February 2021.

Further Applications

874. On 8 March 2021 I heard a further application for disclosure by S&B and subject to one issue, I made no order on the application. I had by that time permitted Prashant to be recalled for further cross-examination: see [2021] EWHC 689 (Ch). On 15 March 2021, however, I allowed a late application by S&B for permission to re-amend the Defence in order to take the point of law that Barrowfen should give credit for the amount of any profit which it has made on the Revised Development Scheme: see [2021] EWHC 690 (Ch). In doing so, I had to revisit the procedural history relating to expert evidence: see [10] and [11].

875. I gave permission to S&B to amend on terms that Barrowfen should be permitted to serve and rely on a further expert report from Mr Alford and to make further amendments to deal the costs of funding the development. I also made it clear that Barrowfen could adduce further evidence on that issue (if it

became necessary). On 22 March 2021 Barrowfen served Re-Re-Amended Particulars of Claim.