Neutral Citation Number: [2025] EWHC 253 (Comm)

Case No: CC-2024-BHM-000021

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
CIRCUIT COMMERCIAL COURT (KB)

Birmingham Civil Justice Centre
The Priory Courts, 33, Bull Street, Birmingham B4 6DS

Date: 7 February 2025

Before :

HHJ WORSTER
(sitting as a Judge of the High Court)

- -

Between :

Angel Alberto Buenano Gonzales	**Claimant**
- and -	
Canouan Development Corporation Limited	**Defendant**

- -
- -

William Harman (instructed by **Brown Rudnick LLP**) for the **Claimant**
Tom Cornell of **Debevoise & Plimpton LLP** for the **Defendant**

Hearing dates: 3 and 4 December 2024

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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.

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HHJ WORSTER

HHJ WORSTER :

Introduction

1. In 2000, the Claimant ("Mr Buenano") visited Canouan, a small island in the Caribbean archipelago of Saint Vincent and the Grenadines. He thought that it was a beautiful place, and from that time on he took many holidays there. In 2006 he purchased a three bedroomed villa on the island known as "Golf Villa 3" ("GV3") for $3.5 million. The villa had just been built, and was part of an exclusive luxury development next to a golf course overlooking Carenage Bay. It is described as having spectacular views across the ocean and direct access to the beach. In 2009 Mr Buenano purchased another villa in the same development (Golf Villa 9) for $5.145M. It had a guest cottage and an even better view.

2. Mr Buenano's purchase of GV3 was undertaken through companies he owned and controlled, so that GV3 was held in the name of Faven Haven Limited, a special purchase vehicle incorporated for the purpose ("the SPV"), and the SPV was wholly owned by Villamia Limited ("the Company").

3. In 2015, Mr Buenano agreed to sell GV3 to the Defendant ("CDC"). CDC was a company owned and controlled by Andrea Pignataro. He too was a regular visitor to Canouan. Mr Buenano and Mr Pignataro agreed a sale for $3.5M paid in instalments, with a side letter providing for an adjustment of the price in certain circumstances. Mr Buenano's case is that in 2017 the terms of the side letter were triggered and that CDC owes him $750,000, subject to the amendments relating to quantum discussed below. CDC denies the claim (see paragraph 58 below) which in large part turns on the interpretation of the side letter.

4. Mr Buenano did not find out about the transaction which he says triggered the terms of the side letter until the December of 2020. He tried to find out more, and to make contact with Mr Pignataro. Mr Pignataro did not want to meet him. There was some correspondence in which CDC described Mr Buenano's claim as "baseless", followed by some further requests for information in the first half of 2022. In the end, Mr Buenano made a *Norwich Pharmacal* application for disclosure from a firm of solicitors which had been involved in the 2017 transaction, and with that information issued a claim in April 2023.

5. In June 2023, Mr Buenano made an application for summary judgment. That was heard and dismissed on 16 October 2023.

6. I heard the trial over two days. I had some relatively brief oral evidence called by the Claimant. Firstly from Mr Buenano, and secondly from Achille Pastor-Ris, another resident of Canouan who has been involved in the development of the island and with a company called Canouan Resorts Development Limited ("CRDL") for many years. CDC called no factual evidence. It had served a witness statement on exchange, but it was apparent that (amongst other things) the maker had no direct knowledge of the facts stated, and it was struck out at the Pre Trial Review. I gave permission for CDC to serve a statement which complied with the requirements of PD57AC, but no such statement was provided.

7. The market value of GV3 in 2017 was in issue, and the parties instructed Gineille Felix as a single joint expert to provide that valuation evidence. CDC did not agree with Ms Felix's evidence, and permission was given for her to be called for the purpose of cross-examination. She gave evidence by video-link from Barbados. In addition there were a substantial number of documents before the court, a handful of which are referred to in this judgment.

The 2015 agreement

8. Mr Buenano got to know Mr Pignataro in about 2013. Mr Pignataro owned Golf Villa 4. In the course of their discussion Mr Buenano told Mr Pignataro of some financial difficulties he was having which had caused him some "liquidity problems" and which had led him to consider selling GV3. Mr Pignataro was interested in buying, and they discussed a price. Mr Pignataro proposed $4.2 million and Mr Buenano agreed.

9. On 28 August 2015 Mr Pignataro sent Mr Buenano an email:

> *Hi Angel*
> *I hope you are well.*
> *I just came back from holiday and I want to follow up on our conversation on GV3.*
> *As I mentioned we are making progress with our discussions with hotel management companies and it is apparent that there will be substantial investment required for each golf villas to become "branded" residences (Mandarin or Ritz Carlton). The estimated per villa cost will be material ($400k-700k) depending on the current maintenance and fit out conditions for each property.*
> *I would like therefore to propose the following:*
> *- On signature of the SPA USD$1m as you have requested*
> *- 1y after signature: USD$750k*
> *- 2y after signature: USD$750k*
> *- 3y after signature : USD$1m. (So total consideration of $USD 3.5m to take into account the mandatory investment that will be required by the new hotel operators)*
> *- Title will be transferred on signature and all the expenses going forward will be buyer's responsibilities (but at closing the villa must have zero balance due for past expenses)*
> *- A side letter will be executed to confirm that if the villa is sold during the 3y period after signature an additional consideration of 30% of the difference between the sale price and the purchase price (defined as $ 3.5m plus any expenses incurred during the period) will be paid to you*
> *On the basis of the above we can close within the next 2 weeks*
> *Please let me know if you would like to move forward and of course let's keep all this strictly confidential*

10. Both parties rely upon this email. CDC's case is that it shows that the parties were contemplating a rise in the value of GV3 as a result of the further investment in the villa and the development of the local hotel, which had been closed for some time. Mr

Buenano agrees with that. He draws attention to the fact that Mr Pignataro negotiated a reduction in the price.

11. Mr Buenano's evidence is that this is the first time that a mechanism for the payment of an additional consideration was mentioned. Given that it is part of the proposal put by Mr Pignataro in the context of negotiating a reduction in the selling price, I have no doubt that that is right. Mr Buenano's evidence is that the two men did not discuss the price adjustment clause directly, other than in the email exchanges I refer to in this judgment. That evidence was not challenged.

12. Mr Buenano responded to the email of 28 August 2015 on 31 August 2015:

> *Reading your proposal I have some concerns, mainly because of the possible requirements from the new management company to bring the Villas up to their standards, which I agree and also I will honor my initial commitment of USD$250k to participate in the Consortium.*
> *I understand how intricate everything has been and I do appreciate your time in trying to find a fair proposal.*

He then proposed an adjustment to the instalments of the $3.5 million, and ended in this way:

> *All the rest of your proposal will remain the same.*
> *As you one day will know, at 75 years, you don't want to commit at long term. My philosophy has change. Nevertheless, I'm very confident that Canouan is going on the right direction.*

13. CDC refer to that last sentence as further evidence that the parties contemplated a rise in the value of GV3. Mr Harman points to the fact that Mr Buenano agreed to Mr Pignataro's formula for the "additional consideration". On 4 September 2015 Mr Pignataro responded, making counter proposals for the instalments, and on 6 September 2015 Mr Buenano sent an email agreeing to those counter-proposals.

14. The mechanics of the sale involved transferring the shareholding of the Company to CDC. On 24 September 2015, Mr Pignataro's lawyers sent a draft share purchase agreement to Mr Buenano's lawyers, together with a draft of the side letter. The side letter was signed on or about 14 October 2015, and the Share Purchase Agreement ("the 2015 SPA") was completed in November 2015. Both were in the terms of the drafts.

15. The terms of the 2015 SPA form part of the admissible background for the purposes of the construction of the side letter. Mr Cornell placed some emphasis on the fact that one of the covenants given by Mr Buenano in the 2015 SPA provides that, in the event of a breach of his warranties or obligations, Mr. Buenano agreed to indemnify CDC for an amount equal to the amount by which the value of GV3 is less than the value would have been if there had been no breach of the warranties or obligations; see clause 11.1. He submits that any such valuation exercise would be by reference to the open market value of GV3, and that the parties contemplated the possibility of such a valuation in these circumstances.

16. It is the side letter which is the key document in this case. It is made between the parties to this litigation: Mr Buenano is defined as the Seller and CDC as the Buyer. Section 1 is headed "Background". It refers to the 2015 SPA and at clause 1.2 to the purchase price of $3.5 million payable in instalments as set out in the SPA. At clause 1.5, it says this:

> *The Seller and Buyer also wish to agree certain arrangements between them to apply if the property is disposed of by the Buyer during the three year period following completion.*

Mr Harman's submission was that "disposed of" is a broad term, and an indication that the subsequent use of the word "sale" in the side letter is to be construed broadly.

17. Section 3 is headed **Adjustment to Purchase Price**

> *3.1 The Purchase Price payable pursuant to the SPA may be adjusted following Completion if during the three year period following Completion the Buyer sells the Company, the SPV or the Property and the amount of any adjustment (if any) will be calculated as specified in subclause 3.2 below.*
>
> *3.2 If the amount paid to the Buyer upon completion of the sale (the **Sale Price**) exceeds the sum the Purchase Price plus any and all fees, costs and expenses of whatever nature relating to the Company, SPV and Property (the **Transaction Price**) the Purchase Price shall be increased by a sum equal to 30 per cent. of the amount by which the Sale Price exceeds the Transaction Price.*
>
> *3.3 If the condition in subclause 3.2 is satisfied, the Buyer shall make a payment to the Seller of a sum equal to 30 per cent. of the difference between the Sale Price and the Transaction Price within 10 Business Days of completion of the sale.*

The applicable law is English law.

18. Mr Cornell draws attention to some drafting errors on the face of the document, which he submits shows that it was drafted in a hurry.

(i) The heading includes a reference to ***CEC HOLDINGS T LIMITED***. CEC Holdings is another company in which Mr Pignataro is involved, and which he established in 2014 to enable a consortium of investors to provide funding for the development of Canouan. It plays no part in the events relevant to this matter.

(ii) Clause 1.1 refers to the SPA "*dated on or about the date hereof*" when the side letter gives no date.

(iii) The agreement concludes with this:

> ***AS WITNESS** this amendment agreement has been signed by the parties … on the date stated at the beginning of this amendment agreement.*

> Again, there is no date, and the document calls itself a "Side Letter Agreement" and not an "amendment agreement".

The 2017 transaction

19. For the purposes of setting out the history of this part of the case, I use the neutral term "transaction". Mr Buenano's case is that the transaction in 2017 was a sale within the ordinary meaning of that word and within the meaning of the term "sale" in clause 3 of the side letter. CDC's case is that it was neither a sale for the purposes of clause 3, nor was it a "sale" at all. CDC characterise the transaction as an intra group transfer which was not at market value; see the Defence at paragraph 12(a)(b).

20. There is no direct witness evidence from CDC about the events of 2017, and whilst much is apparent from the documents, some important issues are left unexplained.

21. The starting point is to identify the parties to the relevant transactions. I have already referred to Mr Pignataro, his interest in the development of Canouan, and his involvement in CEC Holdings Limited and CDC. However, it was a Mr Saladino who started the development of Canouan in 1990 or thereabouts. He and his family controlled a company called Canouan Resorts Development Limited ("CRDL"). This is the company Mr Pastor-Ris works for. Mr Saladino died in 2024.

22. The Defence in this case appears to suggest that CRDL was part of the Canouan group of companies. The term "Canouan group" is defined at paragraph 3(b) of the Defence, and at paragraph 12(b) it is pleaded that in 2017 CRDL was "seeking to exit its shareholding in the Canouan group". The definition of "group" is not the Companies Act definition; the term is used in a looser and less technical way. The evidence I have is that neither Mr Pignataro nor any of the companies which he owned or controlled had any interest in or control over CRDL. Mr Pastor-Ris has been the CEO of CRDL since 1998, its President since 2002, its sole director since 2017, and a minority shareholder since 2009. His unchallenged evidence is that neither Mr Pignataro, nor any of his companies, have ever been shareholders, officeholders or controllers of CRDL, and that they have never had any interest in it; see paragraph 11 of his witness statement. What is meant by the use of the term "group" is that, for a time, CRDL was involved with Mr Pignataro and his companies in certain projects relating to the development of Canouan.

23. The evidence here can be briefly summarised. In about 2008, CRDL entered into a working arrangement with a Dermot Desmond to continue development on Canouan. That work was to be undertaken primarily through a company called CRD Holding Limited ("CRDH"). Initially CRDH was owned 50/50 by CRDL and Mr Desmond. In 2015 Mr Pignataro bought out Mr Desmond's interest in CRDH. Mr Pastor-Ris describes this as a "tri-partite deal" by which Mr Pignataro and CRDL would each buy out some of Mr Desmond's interest. To do that, a further company was incorporated called CDCH Limited ("CDCH") as a vehicle for Mr Pignataro and CRDL's "joint venture" (as Mr Pastor-Ris puts it). A lengthy explanation is unnecessary (the diagram annexed to the Defence and incorporated into Counsel's skeleton arguments is the most helpful explanation) but the key point is that by 2017:

(i) CDCH was owned as to 84.375% by CDC (Mr Pignataro's company), and 15.625% by CRDL (Mr Saladino's company); and

(ii) CRDH was owned as to 75% by CDCH and 25% by CRDL.

That is the connection between these parties, and which forms part of the backdrop to the events set out below.

24. By 2017 Mr Pignataro and Mr Saladino had fallen out, and CRDL brought proceedings in the Chancery Division (HC-2017-000774). On 6 September 2017 CRDL entered into a global settlement with Mr Pignataro and his companies. The purpose was to remove CRDL from CDCH and settle a debt of about $50 million under various contracts owed by Mr Pignataro and his companies to CRDL. At a high level, that was to be done by the making of a payment of $40 million to CRDL, and by CRDL transferring its interest in CRDH to Mr Pignataro; see Mr Pastor-Ris's unchallenged evidence at paragraph 58 of his witness statement.

25. The transaction involving GV3 which Mr Buenano says triggered the price adjustment clause in the side letter was part of this global settlement. GV3 was a part of one of the four bundles of assets which were to be transferred to CRDL pursuant to this global settlement. Mr Harman took the court through a small number of the documents to show the general nature of these arrangements. I do not understand his analysis of the position to be controversial. The ownership of the Company (and so the SPV and GV3) was part of what was described as "bundle 3". There is a "Transaction Overview" of Bundle 3 at page 909 of Trial Bundle E ("E/909"). This envisages the transfer of the Golf Villas (of which there were three) from CDC to CDCH for "$18M and issuance of a transferable loan note by CDCH". That involved the purchase of the Company by CDCH, and then a transfer by CDCH to CRDL (the Saladino company) in exchange for the write off of an equivalent part of the global debt.

26. At the heart of CDC's case is the assertion that the sum "allotted" (to use Mr Cornell's word) to GV3 of $6 million was not GV3's market value. There is no direct evidence of that, but Mr Cornell can point to the following:

(i) the three villas in question (Golf Villas 4, 1 and 3) were all different, and had been acquired for different sums at different times. Mr Cornell summarises the position in Annex A to his written opening:

Property	**Lot area**	**Bedrooms**	**sq ft**	**Purchased for**
Golf Villa 4	1 acre	4	3,661	$5.5M on 25.10.13
Golf Villa 1	1 acre	4	3,477	$4M on 5.3.14
Golf Villa 3	1 acre	3	3,229	$3.5M on 28.9.15

(ii) they were all given the same value of $6 million for the purposes of this transaction. That may have been $18 million divided by three.

27. Mr Harman took me to some of the documents disclosed by CDC to see how that sum of $6M was regarded by those who were acting for Mr Pignataro and CDC at the

time. Mr Pignataro's advisors were concerned about the tax consequences of the transaction. Firstly, there was a concern about stamp duty and local taxes, which they resolved. Secondly, and of greater relevance to this issue, there was some detailed consideration of the Capital Gains Tax consequences of the transfer of the Golf Villas.

28. On 18 August 2015 Mr Woods (the solicitor acting for Mr Pignataro) emailed a Mr Fitzpatrick, who worked for Mr Pignataro's company ION Group; see E/1385. He copied in Joanna Kelly, a Director of CDC. Mr Woods begins with this:

> *Cormac*
> *We are working on finalising the transaction with Canouan Resorts Development Limited that will in part involve the transfer of the three existing golf villas to CRDL.*

Having referred to matters which are not now relevant, he says this:

> *The consideration for transferring each of the* [companies holding the Golf Villas] *is proposed at the price of $6M each. This will give rise to a capital gain at* [CDC] *as it is in excess of the book value of each of the companies. Can you please review and confirm the status of the losses in [CDC] to assess whether or not there are sufficient losses in CDC to shelter any gain.*
> *If there are insufficient losses we will look at transferring the companies to* [a custodian] *at book value prior to completing the sale to CRDL.*

29. Mr Fitzpatrick's response later that day is at E/1391. He says this to the suggested transfer at book value:

> *This would not result in any difference as we would still need to apply market value rules if both parties were connected, so assuming these are actually valued at $6M each, applying a lower book value would not give rise to a lesser tax liability.*

On 21 August 2017, Joanne Kelly responds by giving details of the ownership of the companies which hold the Golf Villas. She does not say that $6M is not the actual value of GV3.

30. Then on 22 August 2017 Mr Pignataro sends an email to Mr Fitzpatrick; see E/1417. The Subject is *RE:CDCL – Golf Villas*. It is a short email:

> *So what is the … answer can we use the cdcl losses to offset the 6m capital gain. (diff between purchase price and sale price)*

Mr Fitzpatrick replies shortly afterwards; see E/1416. The email is copied to Mr Woods and Ms Kelly. Mr Fitzpatrick says that based on the last filing, there are minimal losses in CDCL which would be available to shelter a capital gain. At some point shortly after that, Mr Fitzpatrick spoke to Mr Pignataro. During that conversation they concluded that there should be sufficient loss in CDCL to shelter a gain of up to $6.2M; see Mr Fitzpatrick's email at E/1472.

31. On 23 August 2017 Mr Woods emailed Mr Pignataro, Mr Woods, Ms Kelly and Mr Fitzpatrick. He says this:

> *Andrea/Cormac*
>
> *GV1 – acquired for $4m in March 2014*
> *GV3 – acquired for $3.5m in November 2015 …*
> *GV4 – acquired for $5.5M in October 2013*
>
> *The sale price to CRDL is $6m for each property ($18m total)*

Mr Pignataro replies the next day:

> *So 13m purchase price and 18m sale price. We can then book in cdcl losses 5.8m from 18.8 to 13.8m, and identify dd net receivables in cdch for 13.8m.*

32. These exchanges suggest that Mr Pignataro and his advisors saw the transaction as the "sale" of the Golf Villas at a "sale price" of $6M each. Despite the problems there appeared to be with finding a loss to shelter the gains, no one suggested that the $6M figure was not the actual value of the properties in question.

33. Matters then proceeded in the following way. On 6 September 2017, Mr Pignataro, Ms Kelly and Mr Woods as Directors of CDC signed a Board Resolution approving the sale of the three companies which owned the SPVs and thus the Golf Villas to CDCH. The resolution refers to a "purchase price of $6,000,000 each". The consideration is a loan note issued by CDCH to CDC for $18 million. The Sale and Purchase Agreement between CDCH (as Buyer) and CDC (as Seller) in respect of the Company (Villamia Ltd) was then executed. Clause 3 provides that:

> *The consideration for the Shares shall be is said to be $6,000,000 and will be satisfied by the issuance of a loan note by the Buyer to the Seller.*

CDCH then entered into an agreement to sell the shares in the Company to CRDL. Once again, the consideration is said to be $6,000,000 which is to be satisfied by the signing and completion of the documents set out in clause 4 of that agreement. These are the documents which give effect to the global settlement, and by which the debt to CRDL is satisfied. It is plain that these two agreements were entered into back to back, and were part of global settlement of the dispute between Mr Pignataro and his companies, and CRDL. Notwithstanding the terms of these agreements, it is CDC's case that the open market value of GV3 at that point was not $6M, but a lesser sum.

34. CDC's case is that it is inconceivable that when making their agreement, the parties contemplated that GV3 would be transferred out of CDC on what is referred to as an "intra-group" basis, or that such a transfer would trigger the clause. Mr Cornell submits that Mr Buenano would not have agreed to such a clause because it gave CDC the opportunity to avoid the uplift mechanism by transferring GV3 to an associated company at an undervalue. CDC's case is that in these circumstances, the court should depart from a literal approach and interpret the side letter to reflect what the parties must be taken to have intended in relation to these unforeseen circumstances. CDC's case is that the clause would not be without some effect, but

that the parties must have intended that the base figure for the 30% uplift was to be the open market value of GV3 at the date of the subsequent sale, rather than the notional $6M figure.

Expert evidence

35. The market value of GV3 in 2017 is of relevance in two ways. Firstly, on CDC's case, it allows for the calculation of any uplift payable to Mr Buenano. Secondly, it has a potential relevance to the wider question of whether or not the 2017 transaction was a sale for the purposes of clause 3 of the side letter. By the order made on 2 May 2024, the parties were given permission to adduce evidence from a single joint expert in property valuation with specific expertise in valuing properties on Canouan Island, alternatively St Vincent and the Grenadines, and who was able to value the freehold title of GV3 as at 6 September 2017. On 29 July 2024, the parties instructed Gineille Felix MSC, MRICS, a Senior Valuation Surveyor with BCQS International. Ms Felix worked from offices in Barbados, but BCQS undertake property and development consultancy work throughout the Caribbean, and in her evidence she confirmed that she had undertaken valuation work in the wider region. Having been jointly instructed, she proceeded to prepare a valuation in accordance with the RICS Valuation – Global Standards, which incorporate the International Valuation Standards ("IVS"). The valuation report complied with PS1 of the RICS Red Book.

36. Ms Felix produced a valuation report dated 4 October 2024 which complies with the relevant requirements of the Civil Procedure Rules. She adopted a market approach to the valuation. She found limited comparables for GV3 within the information about sales on Canouan, St Vincent and the Grenadines and so, in accordance with the IVS, she extended her research to other islands in the Caribbean with a relatively similar supply of luxury villas and tourism. She sets out that comparable evidence in the table at paragraph 5.2.3 of her report at C/68 and having considered it and made due allowance for size, age, specification, condition and location, together with market conditions, she provides a market value of US $5,800,000.

37. Both parties raised a number of written questions of Ms Felix separately on 11 October 2024. Ms Felix answered both separately on 25 October 2024. The Defendant was not satisfied with Ms Felix's written evidence, and the parties agreed that she should attend trial for the purposes of cross examination. She did so by video link. In general terms Ms Felix gave her evidence clearly and carefully. There was nothing to suggest that she was anything other than an appropriately qualified and independent expert. For example, when it was put to her that the lack of evidence affects the quality of the report, she agreed. The note I made whilst she was giving her evidence was "fair and balanced".

38. Mr Cornell provides a helpful summary of the points he makes in relation to the reliability of the valuation evidence in his written opening at paragraph 23. The first point is that, if the expert's evidence is correct, the value of GV3 increased from $3.5M to $5.8M in the period from 2015 to 2017. He submits that such a steep rise is implausible. He submits that sales were "sluggish" in that period and the rise in prices which both Mr Pignataro and Mr Buenano anticipated did not occur. Nor did Mr Pignataro make the investment in the improvement of the villa he told Mr Buenano he intended to make.

39. The reference to a "sluggish" market comes from a document called the "Robb report". The Robb report was written by a journalist in 2022. Whilst it is in the bundle, I do not give any weight to the views it gives about the market at the relevant time. The author is not (so far as I am aware) a professionally qualified property valuer, and the parties have instructed an expert to deal with this issue. It is her evidence which I am assessing. Mr Cornell put to Ms Felix that the market was slow in 2017 and had been for many years. Her response was "not entirely". She explained that there was not enough evidence to give a conclusive answer but that she was aware that there were issues in getting to the island which were sorted in 2008. It seemed like there was interest and appeal, but there was not enough evidence "to say yes to your question".

40. In the course of his questions, Mr Harman clarified with Ms Felix that she had not been asked to consider market conditions in 2015, and that her valuation reflected the market in 2017. Her principal evidence about that is set out in section 4 of her report. It refers to the expectation that economic activity will continue to improve and that direct flights from New York were about to start. She agreed that there was a mood of recovery and that if none of that were true in 2015, that would make the market more favourable in 2017 than it was in 2015. I also heard evidence that the hotel resort local to the Golf Villas had been shut for a number of years in 2015. Mr Harman suggested that could be bad for property values. Ms Felix's reply again demonstrated the fairness and caution which marked her evidence. It was that if it was part of the hotel, then yes. Mr Harman asked whether that would also be the case if the property was close to the hotel and its amenities. Ms Felix was prepared to agree to that. There was similarly qualified agreement to questions about whether the poor management of the hotel and a funding crisis for the company behind it would have an effect on the market in 2015, and whether serious infrastructure issues would also have their effect. There was evidence of fact before me called by the Claimant, to support the factual basis for Mr Harman's questions.

41. The way in which Ms Felix dealt with these questions from both sides gave me confidence in her evidence. Mr Cornell sought to challenge what she said. Her response was not to dismiss points with merit out of hand, but to provide cautious agreement. Mr Harman was asking questions designed to bolster her evidence. She did not simply accept the points he was making. She dealt with them on their merits. She was, as I say, "fair and balanced".

42. The factual evidence I had was that Mr Buenano was under pressure to sell, to the extent that he took a reduced offer from the one Mr Pignataro was initially minded to make. Mr Pignataro was, no doubt, a good negotiator, and appreciated the opportunity the position presented. The potential for these factors to have a depressing effect on the 2015 price are obvious. Mr Harman explored whether the price paid in 2015 might be held back by these "other factors". Ms Felix agreed that the price in 2015 might be reduced if the seller had liquidity problems and needed to sell, if the purchaser knew of those problems and was a tough negotiator, and if the seller thought that the buyer would have to spend money on the property.

43. All that supports the proposition that $3.5m for GV3 in 2015 was low. That appeared to be Ms Felix's view. In answer to Mr Cornell's questions, she said that she thought

that $3.5M in 2015 was a bit low, given that meant the property had not increased in value since 2006, and the comparable evidence she had. As she put it: "something just does not add up"; see transcript Day 1 - page 120-121.

44. I also had evidence from Mr Pastor-Ris about the fortunes of Canouan at the material time. He was called as a witness of fact, and gave evidence about the changes in the position on the island from 2015 to 2017. His evidence was that 2017 was a totally different year to 2015. In particular, the local resort hotel went from being closed and in financial difficulty, to having a much improved prospect, including his part in bringing in the Mandarin to manage a brand new hotel. He agreed that he was not a valuer, but (as he put it) he had sold virtually everything in Canouan in the last 25 years. He thought $6M in 2017 was a fair price. The key evidence on value here is that of Ms Felix, but it is of note that there is no basis for a challenge to that evidence in the approach of those advising CDC on tax matters in 2017, or in the evidence given by Mr Pastor-Ris. No one seems to have thought that $6M was not in line with the market value of GV3 in 2017.

45. Mr Cornell also cross examined Ms Felix in some detail about what she took into account in reaching her opinion, and what she did not, and the weight that she gave certain factors. It is unnecessary to go into the detail of her evidence on this aspect. It was apparent that she had approached the matter appropriately. Questioned about the lack of direct comparables being something of a problem, she readily agreed. Indeed, it was she who had raised the issue early on with the parties, expressing her concerns that it may not be possible to reach a view. Questioned about a number of properties which she had only recently considered, she pointed out that the details had only been supplied by the Defendant days before she dealt with them, despite her requests for any further information. Mr Cornell suggested that there were flaws in her reasoning (in addition to the point I deal with above). In particular he pointed to the evidence relating to Golf Villa 17, which was bigger, and sold for less. She explained why that evidence did not alter her view. Having listened to her evidence, I was satisfied that the criticisms of her approach were without merit.

46. In the course of her evidence (both written and oral) Ms Felix explains the basis for her valuation. It involves the use of properties which are not from Canouan and St Vincent and the Grenadines. But that is justified, and in line with the professional guidance. Due weight is given to that matter, the point is flagged, and only properties which do bear on the value of GV3 are considered. Ms Felix was well aware of the potential problems with that approach, and (as I have found) exercised great care and the appropriate caution. At section 5.2 she sets that out. She considers the relevant properties, noting matters of similarity and difference and the evidence of their value. The values give a range of between $1,620 and $2,074 per square foot. She then compares GV3 with particular properties and concludes that the value of GV3 at the material time was $5.8M, or approximately $1,800 per square foot.

47. I accept Ms Felix's evidence as to the market value of GV3 in 2017. I am also satisfied that the difference between the price paid for GV3 in 2015 and 2017 was a consequence of the 2015 price being below market value, rather than the 2017 price being above it.

48. I was unclear as to how the matter would proceed if I had rejected Ms Felix's evidence, for the Defendant's case relies upon there being an assessment of the market value of GV3 in 2017. Mr Cornell submitted that the Court could give directions for further evidence to be obtained on the issue. It is academic, but it could only be in the most exceptional circumstances that a court would take such a course.

Interpretation - Legal principles

49. The principles are well settled, and whilst I was taken to a good number of authorities, I limit myself to three of the authorities in the joint bundle. Firstly, both Mr Harman and Mr Cornell relied upon the judgment of Lord Neuberger in *Arnold v Britton* [2015] UKSC 36 at [15]-[23].

> *[15] When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd para 14. And it does so by focussing on the meaning of the relevant words, ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.*

50. Lord Neuberger then proceeds to identify seven factors. The first, second and sixth of these seven factors have a particular relevance to the facts of this case:

> *[17] First, the reliance placed in some cases on commercial common sense and surrounding circumstance ... should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.*
>
> *[18] Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the*

drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

[22] Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is Aberdeen City Council v Stewart Milne Group Ltd [2011] UKSC 56, where the court concluded that "any ... approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract (see paras 17 and 22).

51. Mr Harman relies in particular upon the language of the side letter. Mr Cornell submits that this is a case where the sixth of Lord Neuberger's seven factors comes into play. He relies upon two cases in particular. The first is the decision of the Supreme Court in *Aberdeen CC v Stewart Milne*, and the second is the judgment of Carr J (as she then was) in *Munich Re Capital Ltd v Ascot Corporate Name Limited* [2019] EWHC 2768 (Comm).

52. In *Aberdeen CC v Stewart Milne Group Ltd*, Aberdeen sold some land to Stewart Milne for £365,000, subject to a profit share in circumstances which included Stewart Milne "*disposing either by selling or by granting a lease of the whole or part of the Subjects.*" Stewart Milne sold the property to another group company for a sum which was significantly less than the open market value of the land, and which (after the deduction of allowable costs) avoided a profit for the purposes of the profit share agreement with Aberdeen.

53. Aberdeen brought a claim. Lord Hope gave the judgment of the majority in the Supreme Court. He considered the clause in question, and the other terms of the parties' agreement, and concluded as follows:

[22] ... It seems to me that the position here is quite straightforward. The context shows that the intention of the parties must be taken to have been that the base figure for the calculation of the uplift was to be the open market value of the subjects at the date of the event that triggered the obligation. In other words, it can be assumed that this is what the parties would have said if they had been asked about it at the time when the missives were entered into. The fact that this makes good commercial sense is simply a makeweight. The words of the contract itself tell us that this must be taken to have been what they had in mind when they entered into it. The only question is whether effect can be given to this unspoken intention without undue violence to the words they actually used in their agreement. For the reasons I have given, I would hold that the words which they used do not prevent its being given effect in the way I have indicated.

54. Lord Clarke agreed in the result:

[32] In this regard I entirely agree with Lord Hope's conclusions at para 22 above. As he puts it, the context shows that the parties must be taken to have intended

that the base figure for the calculation of the uplift was to be the open market value of the subjects at the date of the event that triggered the obligation. In other words, it can be assumed that this is what the parties would have said if they had been asked about it at the time when the missives were entered into. The parties expressly agreed that in the case of a buy out or lease the profit would be arrived at by reference to market value. Rather like counsel for the respondent bank in Rainy Sky, Mr Craig Connal QC was not able to advance any commercially sensible argument as to why the parties would have agreed a different approach in the event of an on sale. I have no doubt that he would have done so if he had been able to think of one. As Lord Hope says at para 17, on the appellants' approach, it would be open to them to avoid the provisions relating to the open market value of a lease by selling the subjects to an associate company at an undervalue and arranging for the lease to be entered into by that company. The parties could not sensibly have intended such a result.

[33] Lord Hope says at para 20 that there would be no difficulty in implying a term to the effect that, in the event of a sale which was not at arm's length in the open market, an open market valuation should be used to arrive at the base figure for the calculation of the profit share. I agree. If the officious bystander had been asked whether such a term should be implied, he or she would have said "of course". Put another way, such a term is necessary to make the contract work or to give it business efficacy. I would prefer to resolve this appeal by holding that such a term should be implied rather than by a process of interpretation. The result is of course the same.

55. The *Munich Re* case is an example of the application of the approach in *Aberdeen*. As Mrs Justice Carr says at [45] the meaning of a clause is usually most obviously to be gleaned from the language of the provision. On a purely literal meaning, the operative clause in the agreement in that case (a re-insurance policy) was clear. However:

[51] [it fell] ... to be construed in circumstances not (objectively) envisaged at the time that the parties entered into the Reinsurance Policy. As the structure and express wording of the Reinsurance Policy indicate, it was always (objectively) contemplated that the two policy periods would mirror each other at all times. Munich Re's original position that upon extension of the Insurance Policy there had been an automatic symbiotic extension of the Reinsurance Policy graphically illustrates as much.

[54] ... the exercise of construction is therefore to consider how the Reinsurance Policy is to be construed in circumstances where, contrary to the original (objective) expectation of the parties, there has been an extension of the Insurance Policy period but not (for whatever reason) an extension of the Reinsurance Policy period.

[55] It is a question of contractual interpretation in changed factual circumstances. The task of the court is to decide, in the light of the agreement that the parties made, what they must have been taken to have intended in relation to the events which have arisen which they did not contemplate, namely an extension

> *to the Project Period in the Insurance Policy but no corresponding extension to the Project Period in the Reinsurance Policy.*

56. In assessing the parties' objective intentions at the time the agreement was entered into, Mrs Justice Carr considered the commercial context of the Re-Insurance Policy, and the specific terms and circumstances of that policy as at the time of its inception. She concluded that despite the literal meaning of the words used in the agreement, as a matter of objective contractual construction, a reasonable person in the position of the parties at the time of the Reinsurance Policy would have understood that if the Project Period in the Insurance Policy was extended, then there should be a corresponding extension of the Re-Insurance Policy.

Discussion

57. I deal with the issues in stages. Mr Buenano's case begins with the proposition that the price adjustment clause was triggered by the sale by CDC to CRDL via the back to back agreements involving CDCH. Mr Harman submits that the sale to CDCH was sufficient to trigger the clause, but that the Court should not look simply at the sale to CDCH, but also to the reality or substance of the transaction, which was to affect a sale to CRDL. The terms of the side letter are clear, and cover the 2017 transaction. There is nothing in the context which would indicate that it is not covered – it is a sale for value. Moreover, there is nothing in the terms of the agreement or the admissible surrounding circumstances from which the court can discern some other intention (clearly or at all).

58. CDC's case is that the Court should limit itself to a consideration of the transaction between CDC and CDCH, for the terms of clause 3 refer only to a sale by CDC. Its case in summary is that the 2017 transaction could not have been contemplated by the parties – this was an intra group transaction rather than the sort of sale on the open market the parties must have had in mind. In those circumstances, the court approaches the situation much as it did in *Aberdeen*, and provides for an uplift which reflects the open market value of GV3 as at September 2017.

59. Mr Cornell submits that there is no direct evidence that when the parties made their agreement, they actually contemplated a sale other than at arm's length on the open market. In answer to questions put in cross-examination Mr Buenano agreed that if the property was sold to an independent party and the price had increased, he would get a share. The parties to the agreement both expected prices to rise. Mr Buenano confirmed that his discussions with Mr Pignataro were about price, and that they then communicated by email, the relevant terms of which are referred to above. Mr Cornell accepts that the agreement itself makes no reference to the sale being at arm's length or to an independent party, but submits that the omission makes sense, because neither party gave any thought to the issue.

60. The second submission (or group of submissions) is that transfer to CDCH was not at arm's length. CDC and CDCH are said to be "related parties" because of their ownership. They shared employees and advisors, and could not be said to be unrelated or independent. Further, the transfer was not at market value: $6M was the sum "allotted" to GV3. In those unforeseen circumstances, the Court should look beyond a literalistic approach.

61. I start with the language of the side letter read with the 2017 SPA. It is to be read in its context, but I begin with the ordinary and natural meaning of the words the parties chose to use. The side letter refers to a sale. That is not a complex term. That is what took place in the transaction between CDC and CDCH. Property passed for a consideration.

62. There is some assistance to be found as to the parties' objective intentions in the preamble to the side letter at clause 1.5. The parties say in terms that they are considering what should happen if there is a "disposal" within 3 years. There is no carve out for "intra group transfers" or anything similar, nor requirements that the disposal be between independent persons or at market value, even though both parties were businessmen who operated through sophisticated corporate structures, and were assisted by lawyers. The fact that in their discussions the parties to the side letter may not have considered every possible type of sale at the time they entered the agreement, does not alter the fact that they chose the word "sale" as the trigger for the further payment, without any expressed limitation. The ordinary meaning of the language considered in the context of the side letter is apt to include a sale for value to a related party. I agree with Mr Harman, that the use of the word "disposal" suggests a broad interpretation of the word "sale".

63. In terms of context, whilst the sale by CDC might be characterised as a transfer to a related company, in reality, it formed part of the transfer of the property out of the control of the companies controlled by or associated with Mr Pignataro. It is not the result of a company re-organisation or an accounting exercise. Nor is it the sort of transaction considered in *Aberdeen*. It is the consequence of the transactions I have outlined above, and is in substance, a sale.

64. The price is consistent with that interpretation. Mr Cornell submitted that the figure of $6M was "allotted", but the Defendant has called no evidence as to how that price was arrived at, despite the opportunity to do so. The value of a property is often said to be what someone will pay for it (or words to that effect). It may be that it was $18M divided by three, and that GV3 is to be seen as part of a package of assets. But the evidence I have from the time supports the conclusion that this was a price which represented the value of the property to the parties to the sale at the material time. This is not a case where the price was nominal, or apparently manipulated. It was the price which the parties to the transaction agreed upon, and which was then used for the back to back sale to CRDL.

65. It is also apparent that Defendant used $6M for the purposes of the CGT calculation and regarded it as the villa's market value for that purpose; see the emails referred to in paragraphs [27]-[32] above. There is further support for my views on the value given for this property in the evidence of the joint expert, to the effect that $6M was in fact very close to the open market value of the property at the time. The value given is entirely consistent with this being the sort of "sale" which the parties would have intended to be caught by the terms of their side letter.

66. There were powerful factors in both the *Aberdeen* and *Munich Re* cases which persuaded the court to depart from the literal meaning of the language and take the approach it did. In *Aberdeen*, it was apparent that the Defendant was (to use the

inelegant shorthand I adopted in argument) "pulling a fast one", and that the parties could not have intended their agreement to work in the way the Defendant suggested. In *Munich Re*, the structure of the insurance and re-insurance arrangements was such that the court could safely conclude that the words of the agreement did not express the parties' intentions. There is nothing comparable in this case. Why should a sale to a related party at value not be a sale for the purposes of the side letter? There is nothing absurd in the interpretation; it makes commercial sense.

67. Mr Cornell's argument is in effect, an application of the rationale in *Aberdeen*, but in reverse. In *Aberdeen* the literal terms of the agreement were manipulated by one party to its considerable benefit, in circumstances where it was plain that that could not have been the parties' intention. Here, the argument is to the effect that not applying *Aberdeen* would, in theory, have left it open to CDC to do something similar. Consequently, I should approach the question of interpretation in the same way; in other words on the basis that these are factual circumstances outside those which the parties can properly be taken to have contemplated. The difficulty with that argument, is that CDC did not effect that sort of transaction. It may not have been a sale on the open market, but there is nothing in the language or the admissible background which suggests that the parties would not have seen this sort of transaction as anything other than a "sale" for the purposes of their agreement.

68. The drafting errors in the side letter are of no real significance. They do not alter the effect of the side letter, or go to the issues I have to determine. The mechanism adopted in the side letter is clear and makes commercial sense. There are definitions of sale price and transaction price so that the calculation of a further payment is clear. The terms are considered and provide certainty. The errors do not take away from that, and do not lessen the weight to be given to the language.

69. My conclusion at the first stage of the discussion of the issues in this case, is that the sale by CDC to CDCH was a sale for the purposes of the side letter and triggered the liability to make further payment calculated by reference to the price achieved of $6M. The claim succeeds on that basis.

70. Even if there were some doubt as to that, this is not a case of an event which subsequently occurs which was **plainly** (my emphasis) not intended or contemplated by the parties, such that Lord Neuberger's sixth factor comes into play.

71. Mr Harman also submitted that the notion of a mechanism which required a valuation to be undertaken ran contrary to the terms of the side letter. He pointed to the requirement that the further payment be made within 10 days, and submitted that this gave no time for a valuation to be undertaken. Mr Cornell submitted that the 2017 SPA included terms which provided for a valuation exercise to be undertaken where there were breaches of warranty. That exercise would not be identical to the one he proposed, but it showed that the parties would contemplate such a course. The absence of any reference to the need for a valuation in the side letter might cut against Mr Cornell's point, but neither line of argument took the matter very much further. Mr Harman also submitted that the approach the Defendant put forward led to unnecessary complexity. I agree. In the event, it is not a major point, but it does underscore the fact that the application of the words of the side letter provide a certain and workable result.

72. The second stage of the discussion considers the situation had I concluded that the sale by CDC plainly fell outside the contemplation of the parties, and the approach in *Aberdeen* were to be adopted. Here the court needs to be clear as to the parties' intentions before it can give effect to them. If those intentions are not clear, then the court cannot give effect to them, and returns to the literal interpretation.

73. In *Aberdeen* the position was said to be "straightforward"; see Lord Hope at [22]. In *Munich Re* at [51] Mrs Justice Carr noted that:

> *As the structure and express wording of the Reinsurance Policy indicate, it was always (objectively) contemplated that the two policy periods would mirror each other at all times. Munich Re's original position that upon extension of the Insurance Policy there had been an automatic symbiotic extension of the Reinsurance Policy graphically illustrates as much.*

There is no material in this case which is remotely similar to that in quality or effect. If the parties' intention is not to be gleaned from the language of the side letter, it is not possible to say with any certainty what that intention would have been. Consequently, CDC's argument fails at this stage also.

74. The third stage of the discussion is to consider the position if CDC had succeeded at the second stage and the court was able to find that the further payment be calculated by reference to the market value at sale, rather than the sale price. It will be apparent that I was sufficiently impressed by the evidence of the single joint expert to accept her evidence on valuation. In consequence, even if CDC reached this point, it would still be liable for a further payment in a sum only a little less than the sum claimed.

75. The Defendant's alternative case is that the court should imply a term into the side letter to the effect that the uplift mechanism operates by reference to the market value of GV3. This reflects the approach of Lord Clarke in *Aberdeen*. Given the views I express above as to the express term, it follows that there is no need to imply the term contended for. It is neither so obvious that it goes without saying, nor required to give the agreement commercial effect. On my findings, such a term would be contrary to the express terms of the side letter and the objective intention of the parties.

Quantum

76. At paragraph 14 of the Defence, CDC contends if it is liable to make payment pursuant to clause 3.1 of the side letter, it is entitled to adjust the price to take account of the fees, costs and expenses incurred by CDC relating to the Company, SPV and the Property. The total of sum fees between 25 September 2015 and 6 September 2017 was pleaded as USD 476,840. The statement of truth is signed by a partner in the firm of solicitors representing the Defendant. Mr Buenano took no issue with the principle of such an adjustment in the Reply, but required CDC to prove that it had incurred these fees, costs and expenses.

77. CDC re-amended the Defence on 6 November 2024, and at paragraph 14(c) repeated that it was entitled to adjust the purchase price. The sum sought was increased to USD 532,995.83. An Annex was appended to the pleading which was said to give the

descriptions of the individual fees, costs and expenses incurred and paid by the "Canouan Group" relating to the Company, SPV and the Property between 25 September 2015 and 6 September 2017. The biggest item in the Annex is 366,667 euros for legal services for 2017.

78. Mr Buenano responded to this new case at paragraph 17.6 of the Re-amended Reply dated 17 November 2024. His pleaded case was that there were multiple discrepancies in the amounts claimed in the Annex and the documents disclosed by CDC in support, and that Clause 3.2 of the side letter provided for an adjustment for fees costs and expenses incurred by CDC, not the "Canouan Group". Mr Buenano was prepared to admit that a total of USD 124,253.86 should be taken into account in adjusting the price, which reduced the claim to $712,723.84, but denied the other claims. A schedule was annexed setting out what was admitted and what was denied.

79. Two claims were dealt with specifically. Firstly, it was denied that charges for cable television and telephone could be fees costs and expenses for the purposes of clause 3.2. These were personal living expenses. Secondly, and more importantly, the claim for legal services was disputed on a number of bases.

    (i) The invoice CDC had disclosed in support of the legal services claim at E/1898 raised a number of questions:

        (a) It was dated 16 October 2017, but the metadata indicated that it was created on 28 August 2019.

        (b) It was raised by ION Trading UK Limited (a company beneficially owned by Mr Pignataro). ION's business was in the sale and development of software, and it was not registered with the Solicitor's Regulation Authority.

        (c) It was for "legal and accountancy services for the 2017 period" and provided no detail of the work done or what it related to.

    (ii) CDC had not pleaded nor disclosed any terms of engagement or any other document which indicated that it had paid or was liable to pay the invoice, nor that ION had sought payment.

    (iii) It was "wholly implausible" that CDC (or even the Canouan Group) could have incurred this level of costs in connection with the sale.

    Mr Buenano also contended for an implied term to the effect that any such costs, fees and expenses should be reasonable in amount.

80. Mr Buenano made a Part 18 request for further information about the legal fees CDC sought to deduct from the price, which accompanied the Re-Amended Reply, and wrote to CDC's solicitors asking for an explanation about the metadata; see D/135.

81. The reply is dated 2 December 2024; see D/160. CDC's solicitors had made inquiries about the metadata request, but their client was unable to provide any further information as to who created the Invoice, when it was created, and whether there

have been any modifications. The only information available was an email from someone at ION to Mr Woods (who is said to have provided the legal services) saying – *Please find attached your latest invoice.*

82. As to the Part 18 Request, CDC said this:

> *… (based on historical practice of the ION Group and Canouan group companies) that ION Trading UK Limited provided legal services to CDC in 2017. Such services were provided by Mr Ashley Woods, a qualified lawyer. However, as he is no longer employed or associated with the Canouan group or the ION Group, and despite having made internal enquiries, our client does not have information on (i) whether any other individuals were engaged in providing the legal services and when, (ii) what the terms of any engagement for the provision of legal services by Mr Woods (or any other individuals) were, and (iii) documentary records of any such engagements.*

Paragraph 4 sets out the revised position as to the legal fees:

> *Our client considers that it is reasonable to assume that 10% of the legal fees invoiced (i.e., USD 40,115.02) were incurred towards legal services relating to the 2017 transfer of the Property.*

83. Mr Harman submits that:

(i) CDC has no idea what it is claiming for. There is nothing to indicate that there is a basis for the claim, and no information as to what Mr Woods did;

(ii) having signed a statement of truth in support of a very large adjustment, CDC's case now is that it is reasonable to assume that 10% of what had been claimed related to the 2017 transfer of the property;

(iii) "guesswork is not proof". There is no evidence to support a claim for legal fees in any sum. These are matters which are within CDC's knowledge;

(iv) the invoice attached to the email of 16 October 2017 at D/163 is different to the invoice CDC disclosed at E/1898. The layout, date and amount of the invoices tally, but the two documents are not the same. E/1898 is for "Legal and accounting services for the 2017 period", whereas the invoice at D/163 is for "Legal and accounting services for the period ending 30th September 2017"; and

(v) the information provided by the letter of 2 December 2024 in response to the Part 18 request is not verified by a statement of truth, and no witness statement has been provided to deal with these issues.

84. Mr Cornell was in difficulty in maintaining CDC's case on the deduction for legal fees. There is no evidence that CDC has incurred them. Given the wholly unsatisfactory way in which CDC's case on this matter has been presented, the fact that it was on notice that proof was required, and the lack of any or any reliable documentary or witness evidence to support its position, I make no adjustment in

relation to the legal fees. If legal fees in the sums claimed had been paid by CDC, I would expect that there would be a record of that in the company's accounts, and that it would be a relatively simple trail to follow. The lack of any evidence of that sort leads me to conclude that the probability is that CDC never paid for the work. I also agree with the Claimant's contention that the cable TV and telephone expenses are not costs and expenses for the purposes of clause 3.2.

Costs

85. In addition to the sums due pursuant to the side letter, Mr Buenano also seeks a direction that the costs he recovers in these proceedings should include the pre-action costs of obtaining the *Norwich Pharmacal* order made in order to obtain the information necessary for him to bring the claim. I was taken to the requests for information made by Mr Buenano of CDC in correspondence. The first formal written request was made on 24 January 2022. The response two days later was to the effect that the claim was "baseless". CDC said in terms at E/2113:

> *We have no evidence of a sale of Golf Villa 03 as described in your letter. If you have any such evidence, you should produce it to us.*

86. A further request was made in April 2022 and rejected. An application was then made for a *Norwich Pharmacal* order. The Respondent solicitors were neutral, and an order was subsequently granted by the court. Mr Harman's submission was to the effect that CDC's attitude to what were reasonable requests was unreasonable. It made things more difficult than they needed to be, and added unnecessarily to Mr Buenano's costs.

87. I have not heard the parties' submissions on costs, and it may be that there are matters of which I am not yet aware which might affect the exercise of my discretion. My provisional view on the basis of what I know of the case thus far, is that costs would follow the event. If they do, then I would be mined to direct that Mr Buenano's costs should include the costs of the *Norwich Pharmacal* application.

Conclusion

88. There will be judgment for Mr Buenano in the sum of $712,723.84. I invite the parties to consider the ancillary orders as to costs and interest and to agree a minute of order. If there are any matters which cannot be agreed, I will hear submissions on handing down.