Neutral Citation Number: [2017] EWHC 657 (Ch)

Case No: 2879 of 2014

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2017

Redacted Version

Before :

THE HON MRS JUSTICE ASPLIN DBE

- -

IN THE MATTER OF TPD INVESTMENTS LIMITED
AND IN THE MATTER OF SECTION 994 OF THE COMPANIES ACT 2006

Between :

(1) DESTINY INVESTMENTS (1993) LTD
(2) PROPERTY AND BUILDING CORPORATION LTD

Petitioners

- and -

(1) TH HOLDINGS LTD
(formerly TONSTATE (HOTELS) LTD)
(2) TPD INVESTMENTS LTD
(3) MR ARTHUR MATYAS
(4) DR EDWARD WOJAKOVSKI
(5) MR NORMAN SMITH
(6) MRS RAY ROBERTSON

Respondents

Case No: HC-2015-000744

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Between :

(1) TH HOLDINGS LTD
(formerly TONSTATE (HOTELS) LTD)
(2) TPD INVESTMENTS LTD

Claimant

- and -

(1) DESTINY INVESTMENTS (1993) LTD
(2) PROPERTY AND BUILDING CORPORATION LTD

Defendants

- -
- -

Orlando Fraser QC and Paul Greenwood (instructed by **Rosenblatt**) for the **Petitioners and Defendants in Claim No: HC-2015-000744**
Michael Todd QC and **Andrew Blake** (instructed by **Rosling King LLP**) for the **First and Second Respondents and Claimants in Claim No: HC-2015-000744**
Max Mallin QC (instructed by **Fladgate LLP**) for the **Third Respondent**
Catherine Newman QC and Maxim Cardew (instructed by **Covington & Burling LLP**) for the **Fourth Respondent**

Hearing dates: 31st January, 1st, 2nd, 3rd, 6th, 7th, 8th, 9th, 13th, 15th, 20th, 23rd and 24th February 2017

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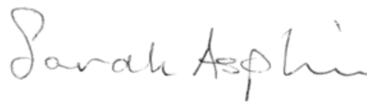
Approved Judgment

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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THE HON MRS JUSTICE ASPLIN DBE

MRS JUSTICE ASPLIN :

Background

1. The dispute in these matters arises from the acquisition and management of three hotels in England and Wales. They are the Hilton London Metropole and the Hilton Birmingham Metropole both of which were acquired in 2006, for £436.5 million, to which I shall refer together as "the Metropole Hotels" and the "Cardiff Hilton" which was acquired in July 2007, for £33.93 million which together with the Metropole Hotels I shall refer to as "the Hotels".

2. Negotiations for the purchase of the Metropole Hotels on behalf of the Tonstate group of companies were almost complete in the summer of 2006. By early September, the Bank of Scotland (the "Bank") had agreed in principle to loan a substantial sum to fund the acquisition and to provide a further facility for capital expenditure on improvements. Other investors or partners were sought. Contact was made with Dr Avie Ovadia of the First Petitioner, Destiny Investments (1993) Ltd ("Destiny"). In turn, he contacted the Second Petitioner, Property and Building Corporation Ltd ("PBC"). On 3 October 2006, a Memorandum of Understanding was signed on behalf of Destiny, PBC and Tonstate Group Ltd (the "First Memorandum"). The Second Respondent, TPD Investments Ltd, ("TPD") the vehicle used for the joint venture to acquire and manage the Metropole Hotels was incorporated on 14 November 2006 and is owned by the Petitioners and T H Holdings Ltd (formerly Tonstate Hotels Ltd) ("Tonstate"), the First Respondent. The purchase of the Metropole Hotels and business was completed on 28 November 2006 and the bank facilities were finalised the following day. The purchaser and borrower was Tonstate Metropole Hotels Ltd, a company incorporated on 7 August 2006 which became a subsidiary of TPD ("TMHL").

3. Upon the purchase of the Cardiff Hilton in July 2007 contributions to the purchase price were made by the Petitioners in the same proportions as had applied in relation to the purchase of the Metropole Hotels. Tonstate (Hotels) Cardiff Limited was incorporated as the special purpose vehicle for the acquisition and borrowed from the Bank to finance the purchase. It owned the Cardiff Hilton through two subsidiaries namely: Hotel Innovations (Cardiff) Limited and Summerhill Properties Limited. Tonstate (Hotels) Cardiff Limited became known as Summerhill Cardiff Limited and was a wholly owned subsidiary of TPD.

4. A further memorandum of understanding was entered into on 30 December 2009 by which it was agreed amongst other things that the terms of the First Memorandum would apply equally to the acquisition and business of the Cardiff Hilton, which would be treated as part of the original project (the "Supplementary Memorandum"). Another memorandum was entered into on the same day which amongst other things concerned the structure of the finance for the acquisition of the Metropole Hotels to which I shall refer in more detail below (the "Second Memorandum").

5. The Bank having indicated in February 2013 that it would not refinance the Metropole Hotels project when the facilities expired in 2014, Dr Wojakovski and Mrs Ray Robertson, respectively, the Fourth and Sixth Respondents, both of whom were

directors of TPD and Tonstate, sought a re-financing package. Mrs Robertson also negotiated an agreement with the Bank in relation to the Cardiff Hilton, which was in financial difficulty. An agreement was reached on 7 August 2013 that Tonstate would purchase the Cardiff Hilton, off market, for £13 million in full and final settlement of all obligations relating to the loan made by the Bank in relation to the Cardiff Hilton, the liabilities under which were in the region of £40m (the "Cardiff Loan") and the derivative product which had been entered into in relation to the interest payments under the Cardiff Loan (the "Cardiff SWAP"). In the meantime, TPD agreed that Tonstate could purchase Summerhill Cardiff Ltd for £1 and also agreed to buy the benefit of the original shareholder loans made by TPD to Summerhill Cardiff Ltd for £1. On 30 August 2013, the transaction with the Bank was formally executed and security over the Cardiff Hilton released. It is not in dispute that Tonstate arranged to have the Cardiff Hilton transferred into its own ownership at the end of October 2013 without the approval or knowledge of the Petitioners, and for no, or nominal, consideration (the "Cardiff Transfer").

6. Thereafter, in March 2014, TPD's bank borrowing which had been used to finance the purchase of the Metropole Hotels was re-financed (the "March 2014 Refinancing"). At around the same time, on 13 and 18 March 2014, the Respondents caused TPD to issue a total of 213 shares to Tonstate, increasing Tonstate's shareholding in TPD to 87.22%, and diluting the Petitioners' shareholding to 6.39% each ("the March 2014 Dilution"). The Petitioners' agreement was not obtained in relation to either the March 2014 Refinancing or the March 2014 Dilution.

Present state of the claims

7. At the commencement of the trial there were two sets of proceedings before the Court. The first was an unfair prejudice petition commenced under section 994 of the Companies Act 2006, brought by Destiny and PBC in respect of the affairs of TPD and in particular, in relation to the Cardiff Transfer, the 2014 Refinancing, the 2014 Dilution and what has become known as "Loan D" to which I shall refer below (the "Unfair Prejudice Proceedings"). Destiny and PBC seek an order that their equity shareholder loans are repaid with interest and that their shares are bought at a value and on terms to be determined or other relief to reverse the effects of the unfair prejudice. The second set of proceedings was a Part 7 claim commenced against Destiny and PBC, by TPD and Tonstate alleging breaches of a "Deed of Mutual Undertaking" dated 30 December 2013 ("the Part 7 Claim").

8. The Part 7 Claim was compromised in the first few days of the trial.

9. In addition, various aspects of the Unfair Prejudice Proceedings have been abandoned and/or are the subject of concessions. The claim against Mr Norman Smith, the Fifth Respondent and a director of TPD, was settled by a Tomlin Order dated 5 December 2016. The claim against Mrs Ray Robertson who was also a director of TPD was also the subject of a Tomlin Order made on the morning of the first day of the trial.

10. Further concessions were also made by letter and orally on the first day of the trial. First, TPD and Tonstate together with the Third and Fourth Respondents, Mr Matyas and Dr Wojakovski, both of whom are directors of TPD and Tonstate, concede that the Petitioners are entitled to have their shares purchased by Tonstate at a fair value to be agreed or determined in such manner as the Court may direct on the basis that:

Destiny and PBC each hold 20% of the issued shares in the capital of TPD; there should be no discount for a minority holding; and it was TPD, rather than Tonstate, which bought the shares in Summerhill Cardiff Limited from the Bank. The concessions are made on the basis of the following admissions:

(1) The First Memorandum gave rise to non-contractual but legitimate expectations on the part of the Petitioners that they would play a role in all significant decisions regarding the Company, the terms of which were to be worked out in a formal agreement but never were;

(2) The Supplemental Memorandum extended the expectations arising from the First Memorandum to the acquisition of the Cardiff Hilton, save as expressly provided otherwise;

(3) The Second Memorandum provided that the sum of £5 million, which had been deposited by the Tonstate Group with the Bank as security for the acquisition of the Cardiff Hilton, would be assigned to TPD. This statement gave rise to a legitimate and reasonable expectation in the Petitioners that the £5 million would be transferred to TPD, but it was not;

(4) At a board meeting on 10th March 2014, the directors considered a draft Costs Allocation Deed (the "CAD") which provided for the allocation of the costs of the March 2014 Refinancing as between TPD and Tonstate and their conversion to equity. The First and Second Memoranda gave rise to a legitimate and reasonable expectation in the Petitioners that they would be invited to participate in any decision to convert debt to equity but they were not consulted and the CAD was executed on 13th March 2014;

(5) At the same board meeting on 10th March 2014, Tonstate proposed that it should provide new finance to TPD of up to £10 million to meet a shortfall in what was due to Lloyds Bank and convert some of the debt owed to it by TPD to equity and thereby improve the debt/equity ratios on TPD's balance sheet. This proposal was part of the refinancing which completed on 14th March 2014. It resulted in the dilution of which the Petitioners complain and which the Third and Fourth Respondents accept should be reversed for the purposes of the share purchase order (the "March 2014 Dilution").

11. The Third and Fourth Respondents further concede, that:-

(1) Following the Bank's decision not to extend facilities beyond July 2014, Tonstate did not give the Petitioners the financial and transactional information which they needed to make an informed decision whether to invest further in TPD, as the Petitioners complained in a letter dated 21st August 2013. Such information would have been material to a decision whether to invest further at that time;

(2) At a board meeting of TPD held on 21st August 2013 and attended by Mr Matyas, Dr Wojakovski and Mrs Robertson, it was unanimously agreed that it was in the best interests of TPD to sell the Cardiff Hilton and the shares in Summerhill Cardiff Limited to Tonstate (Hotels) Limited and the Board approved doing so. The First and Second Memoranda together with the

Supplemental Memorandum gave rise to a legitimate and reasonable expectation in the Petitioners that they would be consulted about such a decision but they were not.

(3) At a board meeting of TPD on 10th March 2014 the Directors considered three options for the future of TPD given the Bank's decision (of which the Petitioners were aware) not to extend facilities beyond July 2014. These three options were important strategic decisions for TPD's future survival. The First and Second Memoranda together with the Supplemental Memorandum gave rise to a legitimate and reasonable expectation in the Petitioners that they would be invited to participate in such a decision, but they were not consulted.

12. However, the concessions were made on the basis that each of Mr Matyas and Dr Wojakovski: does not concede that any acts or omissions on his part were a breach of his fiduciary or other duties to TPD or a misuse of any fiduciary power which he had, by virtue of being a director of TPD; at all times acted in what he in good faith believed to be the best interests of TPD; and did not believe that any of the Memoranda were legally binding.

13. Further, the Petitioners' claim based on derivative products entered into by TPD in order to "fix" the interest rates upon the loans relating to the purchase of the Metropole Hotels (the "Metropole Swaps claims") was not pursued.

14. In the circumstances, therefore, it is not disputed that the Petitioners have been unfairly prejudiced by the conduct of TPD's affairs within the terms of section 994 Companies Act 2006. In such circumstances, pursuant to section 996 Companies Act 2006 the court "may make such order as it thinks fit for giving relief in respect of the matters complained of".

15. In summary, the only issues which remain to be determined relate to:

(1) The effect and purpose of a tranche of borrowing from the Bank referred to as Loan D; the Petitioners' knowledge of it and security for its repayment; whether Loan D and the security were deliberately concealed from the Petitioners by the Respondents including Dr Wojakovski and Mr Matyas and whether the Petitioners were misled; whether the arrangements in relation to Loan D caused the Petitioners unfair prejudice; whether as a result of the repayment of Loan D and/or the omission to transfer £5m to TPD, Tonstate has received more than it was entitled to; whether there should be any adjustment to the fair value of the Petitioners' shares in respect of Loan D and/or the omission to transfer the £5m; and whether the security for it was given in breach of fiduciary duty by Mr Matyas and Dr Wojakovski;

(2) Whether the percentage of shares attributable to the Petitioners should be increased because of matters which have been conceded, the effect of Loan D and the omission in relation to the £5m;

(3) The fair value of the shares;

(4) The form of order which should be made; and

(5) Whether an order should be made that, in addition to TPD, Mr Matyas and/or Dr Wojakovski should be primarily or secondarily liable to purchase the Petitioners' shares.

16. In the light of the nature of the project, a significant factor in determining the fair value of the shares is the valuation of the Hotels. In the early stages of the trial, the property valuation experts, Mr Tim Stoyle FRICS on behalf of Tonstate and TPD, Sir James Devitt MRICS on behalf of Mr Matyas and Dr Wojakovski and Mr Ian Elliot MRICS on behalf of Destiny and PBC agreed the market value of the London Metropole and the Birmingham Metropole as at 31 January 2017 at [redacted] and [redacted] respectively.

Witnesses

17. Mr Gershon Mauer is the Vice President, Accounting, of PBC. He joined PBC in February 2007. Nevertheless, his witness statement contains many assertions about the events in 2006 and for the most part amounts to a commentary on documents and a statement of Mr Mauer's opinion. At times, I found him to be evasive and he was prone to repeat the Petitioners' case rather than answer the questions put to him. He went as far as to accept that he considered his role to be to give evidence to support his employer's case. As a result, I treat his evidence with some caution.

18. Mrs Segi Eitan is the Chief Executive Officer of PBC. She gave evidence with the assistance of an interpreter. Although a straightforward witness for the most part, at times I found her unhelpful and an unsatisfactory witness. Rather than answer challenging questions she tended to repeat a formula and became angry and animated. Unfortunately, as a result, I also treat some of her evidence with a degree of caution.

19. Dr Arie Ovadia is a director of Destiny and a minority shareholder in Destiny Holdings Ltd which owns the entire share capital of Destiny. He is an investor and business and finance consultant for major Israeli companies and holds directorships in more than twenty companies in which he also fulfils an advisory role. Unfortunately, I found Dr Ovadia to be an unsatisfactory witness. Not only did he repeat what became a mantra rather than answer questions in cross examination, he also changed his account of central events on a number of occasions and gave evidence which was contrary to his witness statement. He also accepted that in a number of instances, he had not set out the entirety of relevant events in his witness statement and accepted that he had included references to prestigious posts which he no longer held. As a result, I also treat Dr Ovadia's evidence with caution.

20. Mr Abraham Roichman is a director and the general manager of Destiny and a 90% shareholder in Destiny Holdings Ltd which owns the entire share capital of Destiny. I found him to be a careful witness.

21. Unfortunately, Dr Wojakovski was taken ill in June 2016 and was unable to take part in the previous trial which was adjourned or in these proceedings. Notice has been given by Tonstate and TPD under CPR rule 3.1(2)(a), and by Dr Wojakovski Tonstate and TPD under CPR rule 32.5(1)(b), that they intend to rely on his written evidence as hearsay. Although Mr Matyas provided a witness statement for the purposes of these proceedings, in the event he was not called as a witness.

22. Mr Chris West and Mr Michael Weaver gave expert evidence. Mr West, a chartered accountant and partner of Grant Thornton LLP was instructed on behalf of Destiny and PBC. Unfortunately, I did not find his evidence of great assistance. In cross examination, he accepted that in relation to numerous issues he had merely followed instructions as to items and matters to be included in his reports, had carried out the necessary calculations and had not considered the issues independently. He was also prone to deliver speeches and argument. Mr Michael Weaver is also a chartered accountant and a managing director of Duff & Phelps Ltd, a provider of valuation and finance advisory services. He was instructed on behalf of the Respondents. I found him to be a careful witness who sought to assist the court.

Relevant Legal Framework

23. There is no dispute as to the relevant legal framework which applies in relation to unfair prejudice. Section 994 Companies Act 2006 provides as follows:

> "A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or some part of its members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."

If the above circumstances are established, the court "may make such order as it thinks fit for giving relief in respect of the matters complained of": section 996 (1) Companies Act 2006.

24. In *Grace v Biagioli, Titanium Electrode Products Ltd, Re* [2006] B.C.C. 85, at [61] Patten L.J. summarised the principles underlying the unfair prejudice remedy as follows:

> "From Lord Hoffmann's speech [in O'Neill v Phillips] one can deduce the following principles:
>
> (1) The concept of unfairness, although objective in its focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually take the form of the articles of association and any collateral agreements between shareholders which identify their rights and obligations as members of the company. Both are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable;
>
> (2) It follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use

> Lord Hoffmann's words, 'consist in a breach of the rules or in using rules in a manner which equity would regard as contrary to good faith': see p.1099A; the conduct need not therefore be unlawful, but it must be inequitable;
>
> (3) Although it is impossible to provide an exhaustive definition of the circumstances in which the application of equitable principles would render it unjust for a party to insist on his strict legal rights, those principles are to be applied according to settled and established equitable rules and not by reference to some indefinite notion of fairness;
>
> (4) To be unfair, the conduct complained of need not be such as would have justified the making of a winding-up order on just and equitable grounds as formerly required under s.210 of the Companies Act 1948;
>
> (5) A useful test is always to ask whether the exercise of the power or rights in question would involve a breach of an agreement or understanding between the parties which it would be unfair to allow a member to ignore. Such agreements do not have to be contractually binding in order to found the equity;
>
> (6) It is not enough merely to show that the relationship between the parties has irretrievably broken down. There is no right of unilateral withdrawal for a shareholder when trust and confidence between shareholders no longer exist. It is, however, different if that breakdown in relations then causes the majority to exclude the petitioner from the management of the company or otherwise to cause him prejudice in his capacity as a shareholder."

Although there is some overlap, it is also important to have regard to the relevant principles summarised by Arden LJ in *Re Tobian Properties Ltd, Maidment v Attwood* [2012] EWCA Civ 998, [2013] B.C.C. 98, as follows:

> "21. The key phrase in s.994(1), 'unfairly prejudicial', comprises two elements, unfairness and prejudice but both of these must be understood in the context of company law. The concept of fairness inherent in this phrase is flexible and open-textured but it is not unbounded. The courts must act on a principled basis even though the concept is to be approached flexibly. They cannot decide whether to grant or refuse relief from unfair prejudice on the basis of palm-tree justice. The impact of the context was explained by Lord Hoffmann in O'Neill v Phillips [1999] 1 W.L.R. 1092; [1999] B.C.C. 600 … So far as material to this case, Lord Hoffmann held:
>
> > 'Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others ('it's

> not cricket') it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.
>
> In the case of s.459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.
>
> The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.'

…

28. The dominant characteristic of the unfair prejudice remedy, both in statute and case law, is its adaptability. This enables the courts to produce a just remedy where minority shareholders can show wrongdoing that prejudices their interests. It also makes the unfair prejudice remedy important as a means of encouraging proper corporate behaviour in the management of smaller companies and building up the confidence of investors in them. This policy aim is as important today as it has always been since the original version of what is now the unfair prejudice remedy was introduced in the Companies Act 1947."

Outstanding Issues:

Loan D and its effect on the fair value of the shares

25. The Petitioners contend that there is compelling evidence that Loan D involved: the Respondents deliberately misleading the Petitioners as to the amount of lending the Bank was prepared to provide for the project; the Respondents secretly diverting £10m of the offered Bank lending to themselves in order to fund their own

obligations under the First Memorandum; the Petitioners thus being misled into contributing 67.2% of the equity capital in return for a shareholding of 40%, rather than contributing 55% in accordance with the negotiated, agreed capital ratio; the Respondents secretly charging the joint venture's assets as security for their £10m borrowing from the Bank, for Tonstate's purposes and benefit, and in breach of fiduciary duty; and the Respondents therefore secretly reducing the extent of the commercial risk to which they were exposed; the Respondents thereafter, in 2009, causing TPD to repay the £10m on Tonstate's behalf, without telling the Petitioners the truth about the origins of that loan.

26. On the contrary, the Respondents contend that the position in relation to Loan D was adopted not for the benefit of Tonstate but to help TPD by reducing its borrowing from the Bank, and render it less likely that it would breach its covenants in the future; that TPD granted security over its assets in relation to the lending, because the Bank demanded it in order to secure its profit share; that the Petitioners cannot complain about Loan D because they discovered it in September 2009, but took no action then, or subsequently, until these proceedings; and no loss was caused to TPD as a result of the treatment of Loan D because (a) Tonstate and TPD received the funds they required, and were indebted to the same extent; and (b) the source of Tonstate's funding for its equity contribution is none of the Petitioners' business.

Credibility, inference, deceit and dishonesty

27. Before turning to the evidence in relation to Loan D, I must address the written and oral submissions made on behalf of the Petitioners about the credibility of Dr Wojakovski's evidence and the way in which the issues of inference and adverse inference are dealt with in their written closing. Mr Fraser QC on behalf of the Petitioners made clear that the criticisms of Dr Wojakovski do not relate to his inability to attend to be cross examined but are intended to go to his credibility generally. He says that I should be cautious about accepting the evidence in his witness statement unless it is corroborated by contemporaneous documentary evidence.

28. In this regard, Mr Fraser took me to solicitor correspondence in which it was denied that £12m odd from TPD's own funds had been used for Tonstate Group's own purposes and Responses to the Petitioners' Request for Further Information dated 24 May 2016 to which the Statement of Truth was signed by Dr Wojakovski, to the same effect. However, it is now conceded that £5.5m of TPD's own funds was used in that way.

29. He also drew my attention to a letter dated 11 September 2013 from Tonstate to the Petitioners and signed by Dr Wojakovski and Mr Matyas in which it was stated that negotiations with the Bank in relation to Cardiff Hilton were ongoing despite the fact that the deal had been completed and a Deed of Subscription and Release was executed on 30 August 2013. He also relies upon the way in which the return of the £5m deposit was dealt with and the suggestion that it had been swept up in the payment to the Bank, a position which is contrary to the Respondents' present case. Mr Fraser points out that at all material times, Dr Wojakovski was a majority shareholder and a director of all the relevant companies and was a signatory to the accounts. He submits therefore, that Dr Wojakovski is a dubious witness of truth.

30. Mr Fraser also urges me to draw an adverse inference from the fact that Mr Matyas's evidence was withdrawn at the last moment and he did not submit to cross examination. In this regard, he drew my attention to *Wisniewski v Central Manchester Health Authority* [1998] LL R (Med) 223 per Brooke LJ at 240 where he held:

> "From this line of authority I derive the following principles in the context of the present case:
>
> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfied the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

31. Mr Todd QC on behalf of Tonstate and TPD on the other hand urges me to accept Dr Wojakovski's evidence and points out that he was the only person involved in obtaining finance for the project. He also points out: that Dr Wojakovski sought to adjourn the trial so that it could take place when he would be well enough to attend; the Petitioners opposed the application; and in fact, it was refused by Henry Carr J in December last year. In the circumstances, therefore, he submits that it lies ill in the Petitioners' mouths to attack the credibility of the witness.

32. Mr Mallin QC (who took silk whilst these proceedings were on foot) submitted on behalf of Mr Matyas that the issues to which Mr Matyas's evidence went, namely those surrounding the Metropole Swaps, were compromised before Mr Matyas was due to give evidence and it was for that reason that his evidence was unnecessary and he was not called as a witness. He says that it was not for him to come to justify himself as the Petitioners put it.

33. Mr Mallin also pointed out that although it is pleaded at paragraph 37B of the Amended Points of Claim that monies were loaned or invested in the project on the basis of a "false understanding" given to the Petitioners "by Tonstate" and that Loan D was "deliberately concealed", no particulars are given of each alleged act or words relied upon and in each case, the identity of their author. It is merely pleaded that it may be inferred from the facts that the directors of Tonstate "therefore acted in breach of their fiduciary duties." The lack of particularity is noted in Tonstate's Amended Points of Defence which are adopted by Mr Matyas for that purpose. Mr

Mallin asks, therefore, what there was for Mr Matyas to give evidence about? He also drew attention to the references in the Petitioners' written closings to what is described as the "element of deception" and the analogy drawn to property obtained by deceit. He submits that such an approach is impermissible given that neither fraud, dishonesty, deception nor deceit is pleaded.

34. Miss Newman QC on behalf of Dr Wojakovski submits that having accepted that no adverse inference should be drawn from Dr Wojakovski's absence from the trial, Mr Fraser nevertheless seeks to call Dr Wojakovski a liar in his absence. She points out that this is wholly inappropriate in the light of the concessions made and accepted and the more limited scope of these proceedings as a result. Miss Newman made clear that she had recalibrated her cross examination in the light of the concessions and did not cover matters which she would otherwise have done if Dr Wojakovski's character had been in issue. Nevertheless, she says that Mr Fraser wishes to go over ground which is no longer relevant and, for the most part, is not pleaded. In relation to the treatment of the £5.5m for example, she points out that dishonesty was not alleged in relation to the Cardiff transaction at a hearing before Henderson J as he then was in July of last year when the Petitioners were seeking direction in respect of the sale of the Metropole Hotels in order to protect their position; the question of the treatment of the £5.5m is not an issue for determination by this court; the response to the Request for Further Information came at a time when all of the Respondents were jointly represented and Mrs Robertson had been dealing with disclosure and there is no basis upon which to determine that Dr Wojakovski had acted dishonestly rather than having made a mistake.

Conclusion:

35. In my judgment, it is important, first, not to lose sight of the fact that although reference is made in the pleadings to deliberate concealment and a false understanding this is not a claim in fraud, deceit or dishonesty and that the pleadings fall far short of what would be necessary were such matters in dispute. It is also important to bear in mind that as a result of the concessions, but for the issues surrounding Loan D and the Petitioners' desire in relation to the claim for relief against Dr Wojakovski and Mr Matyas personally to obtain findings in relation to their conduct, the trial became a "remedies" hearing in relation to which conduct is irrelevant. I agree with Messrs Todd and Mallin and with Miss Newman therefore, that it is not appropriate to bandy about accusations of dishonesty or to seek in closing to recast the trial as if the concessions had not been made and accepted.

36. Also, I do not consider that I am in a position to draw any inferences from the matters to which Mr Fraser referred me in relation to Dr Wojakovski's reliability as a witness of truth. Although the documentation to which he referred me reveals an inconsistency in approach, the matters were not tested before me. In the light of the fact that Dr Wojakovski applied for an adjournment of the trial in order to be able to attend once he is recovered, an adjournment which was opposed by the Petitioners and ultimately refused, I draw no adverse inference from his failure to make himself available for cross examination and I do not understand that I am being asked to do so, at least directly. It is appropriate, however, to give due consideration to the weight to be given to Dr Wojakovski's evidence in the light of

the fact that it has not been tested in cross examination and I do so on an issue by issue basis when weighed against the documentary and other oral evidence.

37. Further, having considered the principles referred to in *Wisniewski v Central Manchester Health Authority,* I do not consider that it is appropriate to draw any adverse inference from the decision not to tender Mr Matyas for cross examination. He is a very elderly person whose witness statement was concerned with the Metropole Swaps claim which the Petitioners abandoned. Accordingly, I am satisfied with the reason given for his failure to give evidence. I also agree with Mr Mallin that it is not for Mr Matyas to tender himself for cross examination in order to "justify himself" or give the Petitioners an opportunity to seek to undermine him. The only issue upon which he might have given evidence but which was not included in his witness statement was the memorandum of 18 October 2006 to which I refer below. In that memorandum he suggested to Dr Wojakovski that there should be a separate £10m facility loaned to the Tonstate Group in respect of Loan D and used the phrase "due to a special reason." In the light of the fact that Dr Wojakovski dealt with the financial arrangements including the Loan D issues in his witness statement, I do not consider Mr Matyas' failure to address the "special reason" comment upon which the Petitioners place much weight to be an omission upon which an adverse inference should be based.

Loan D – the facts in more detail

38. As I have already mentioned, in 2006, the Tonstate Group through Mr Matyas and his son-in-law, Dr Wojakovski had an opportunity to purchase the Metropole Hotels. Dr Wojakovski had written to Mr Ian Robertson, the Managing Director of Corporate Banking at the Bank on 22 June 2006 to give an update on the project. He made reference to the numerous conversations and the correspondence he had already sent to Mr Robertson and stated that the long term loan which would be required would be up to £400m with a separate capex facility to be determined once Dr Wojakovski was satisfied about it.

39. Further, in a letter of 11 August 2006, from Mr David Salisbury, Area Director Corporate Banking Real Estate, Bank of Scotland to Dr Wojakovski, the proposal for funding of £410m was rejected and it was stated that after analysis the Bank was unable to increase the £377m package on offer. However, under cover of a letter of 1 September 2006 from Mr Salisbury to Dr Wojakovski, the Bank set out its revised outline terms and conditions for £410m of Senior Debt and Capex Facilities to be advanced to TMHL, then known as Tonstate Hotels Ltd, to facilitate the purchase. The proposed Senior Debt comprised: Loan A in the sum of £220m; Loan B in the sum of £90m; Loan C in the sum of £67m; Loan D in the sum of £13m; and a Capex Facility (capital expenditure) in the maximum sum of £20m. Loans A, B and C totalled £377m as before. Hedging was required in relation to each loan, together with a first legal charge over all properties. It was also a condition precedent that "equity/subordinated investor debt of £40m" was subscribed in full, an ongoing condition that the Bank would be entitled to an exit fee to be realised by a profit share of 35% and that Tonstate Group Ltd would provide an interest shortfall guarantee.

40. In August 2006, Dr Ovadia of Destiny had been approached to invest in the Metropole Hotels and understood that a capital injection of between £60 and 70

million would be necessary. In his written evidence Dr Ovadia stated that the deal was presented as being "fully packaged" both in the sense that it had been fully negotiated with the owners of the Metropole Hotels and that the financing element was already arranged. Dr Ovadia appreciated at that stage that the Tonstate Group intended to provide around 45% of the equity injection and was looking for 55% from Destiny and/or others. In the light of the amount of capital required, Dr Ovadia introduced the opportunity to PBC.

41. Dr Wojakovski stated in his written evidence that Dr Ovadia was told that the finance was in place in the form of a £377 million loan, that the Bank had a profit share of 35% and that the Tonstate Group would require at least a 60% share and could offer 40% for investors. In a note of the proposal dated 6 September 2006, which was originally handwritten, the source of which is not clear, someone on behalf of one of PBC/Destiny noted a 1/3 versus 2/3 split in equity, 1/3 going to Tonstate and bank funds of £400m being available.

42. It is not in dispute that the negotiations between the Tonstate Group and PBC/Destiny were conducted, for the most part, on behalf of PBC/Destiny by PBC and that Mrs Segi Eitan was directly involved. She recalls that she met with Mr Even-Ari on behalf of Tonstate at some time towards the end of 2006. In her witness statement, she stated that she was given a few documents including an excel spreadsheet setting out projections of income and costs for the Metropole Hotels but that she could not remember what was given to her when. The spreadsheet also contained figures for the total cost of the acquisition of £439.935m, which when taken together with a Capex figure of £23m amounted to a total finance cost of £462,935,000, total bank finance of £400m, a 35% share for the bank of £67m and total cash required of £62.935m, split into 55% being £34,614,250 from an investor and 45% being £28,320,750 from the Tonstate Group. She accepted that otherwise she carried out little or no due diligence.

43. Mrs Eitan also recalls that the negotiations were difficult and although she wanted a greater stake in TPD, Dr Wojakovski required a 60% share for Tonstate on the basis that the ground work for the project had already been done. In cross examination, she described it as a "take it or leave it" situation. Mrs Eitan states in her written evidence that the compromise which was reached was that although Tonstate would be the majority shareholder, decisions other than those relating to ongoing operations would be unanimous. Her evidence accords with that of Mr Roichman who stated in cross examination that he allowed PBC to lead the negotiations and that although he was not happy he agreed to the 60%: 20%: 20% split.

44. After lengthy negotiation, the First Memorandum was signed on 3 October 2006 on behalf of Tonstate Group Ltd, PBC and Destiny. It was executed in Hebrew and translated into English thereafter. Amongst other things, it was agreed that the ownership and business of the Metropole Hotels would be purchased through an English joint venture company incorporated for the purpose (TPD); TPD would be owned beneficially by the parties as to 20% by each of Destiny and PBC, and 60% by the Tonstate Group; the venture was estimated to cost in total "around £463m", including the costs of acquisition, of renovation, and various expenses and which was described as "the maximum expenditure"; the parties would finance the equity capital in the sum of "around £63m" by way of loans, of which Destiny and PBC

would each pay 27.5% and the Tonstate Group would pay 45%; any loans made to TPD by the "partners" would bear interest at 6% per annum, to be paid quarterly; and a "Detailed Agreement" would be entered into by the parties within 30 days. In relation to the financing arrangements, it was expressly provided as follows:

""Bank Funding and Complementary funding":	A "non recourse" loan in the sum of around 400 million GBP (henceforth: "Funding Sum") which will be financed, partially through bank funding and partially through complementary funding, detailed as follows. The loans agreements' terms will include "Grace" instructions, for payments at the fund's expense, for a period of at least 5 years after the loan has been given. Bank of Scotland (Henceforth: "BOS"), which accompanies the project and will provide the funding, has given its consent in principle for the project acquisition terms and for the funding at the aforementioned terms and the detailed terms as follows. In any case, the parties agree that the signing of the project acquisition contract will only occur after final arrangement with the bank according to the aforementioned principles. The rest of the loans' terms, for the funding, will be resolved by Tonstate with coordination with PBC and Destiny. In the framework of the complementary funding terms, the BOS will have the right to receive 35% of the capital gain that will generate from selling the project or from receiving refinance for the project (but not from constant gains- the new company will be allowed to use those for other needs), (as detailed in Appendix B)."

In cross examination, Mrs Eitan stated that the Spreadsheet had formed one of the appendices to the First Memorandum.

45. Further, KPMG produced a draft due diligence report update dated 11 October 2006 in relation to the transaction. It was stated to have been based upon the Bank's outline term sheet of 1 September 2006 and included reference to Loan A, B, C and D.

46. On 18 October 2006, by means of a Share Sale and Purchase Agreement made with Aro Participation Limited, Tonstate bought all the issued shares in Metropole Hotels (Holdings) Limited ("MHHL") which was (and remains) the beneficial owner of the Metropole Hotels. Dr Wojakovski, Mr Matyas and the Fifth and Sixth Respondents, Mrs Robertson and Mr Norman Smith (together referred to as the "Directors") are the current directors of MHHL. Tonstate Metropole Hotels Ltd was incorporated for the purposes of the acquisition and its current directors are the Directors. It became a wholly owned subsidiary of TPD.

47. The same day, 18 October 2006, Mr Matyas sent a memo to Dr Wojakovski in the following terms:

> "RE: BANK OF SCOTLAND LOAN TERMS FOR METROPOLES
>
> Regarding the Senior Term Loan D, £13 Million, I would suggest the following:
>
> 1. Reduce to £10 Million and have separate facility for the Tonstate Group but not Tonstate (Hotels) Ltd. This is due to a special reason whereby Tonstate Group will re-invest this £10 Million in Tonstate (Hotels).
>
> 2. The £3 Million balance to be used for capex facility which will increase from £20 Million to £23 Million as agreed with Hilton."

In a letter of the following day from Dr Wojakovski to Mr Salisbury of the Bank, Dr Wojakovski referred to "two further changes" he would like to "reflect in the facility." The changes were described in the following way:

> "1. Loan D £13 Million to be reduced to £10 Million and be provided as a separate facility to and guaranteed by Tonstate Group and not Tonstate Hotels. I have explained the reason for this as I would like to show a stronger Tonstate Hotels to start off with by transferring the £10 Million from the Tonstate Group Tonstate (Hotels) account.
>
> 2. The balance of £3 Million to be transferred to bring the capex facility to £23 Million as this amount was agreed with Hilton."

48. Thereafter, on 24 and 25 October 2006, Dr Wojakovski and Mr Matyas hosted Mrs Eitan and Mr Danckner of PBC and Mr Roichman and Dr Ovadia of Destiny on a visit to the London Metropole and the Cardiff Hilton.

49. By a letter of 30 October 2006, from Dr Wojakovski on behalf of Tonstate Group Ltd to Mr Salisbury of the Bank, Dr Wojakovski stated that:

> "... the documentation should be adjusted so that £10 Million out of the facility is drawn to Tonstate Group. Therefore, the facility to Tonstate Hotels should be reduced accordingly.
>
> To be more clear, what I mean is that the paperwork must show this exactly (eg Tonstate Hotels therefore has a debt of £10 Million less)."

50. In an undated letter from Donna Griffin, Director, Corporate Banking Real Estate at the Bank to Dr Wojakovski which is date stamped "received 6 November 2006", Ms Griffin states:

> "Further to your letter of the 30 October 2006 regarding tranche D of the proposed lending for Tonstate (Hotels) Ltd I am willing to allow the transfer of the funding to Tonstate Group Ltd subject to a guarantee from Tonstate Hotels Ltd (backed by a second charge) being put in place in favour of the Group to secure the debt.
>
> In respect of the apportionment of the debt, given that Tranche D is going to be lent by the Bank of Scotland only and tranches A, B and C will be from the syndicate against a pre agreed formula for the Capex which is in line with our credit sanction it will not be possible at this stage to increase the Capex line and we will therefore retain the Tranche D lending at £13m …"

51. On 10 November 2006, Dr Wojakovski's personal assistant sent an email on his behalf to Mr Salisbury at the Bank which was copied to the lawyers involved in the transaction who included a Mr Scott Swankie. Amongst other things, Dr Wojakovski commented that it was agreed that the professional teams "should come to a solution how to document what we agree between us and especially with regard to what I need to ensure the business performs." He also made two additional points amongst others, as follows:

> "2. I have repeatedly explained the reasoning and logic for the £10 Million facility to TGL. This also benefits the Metropoles as it makes them £10 Million less owned.
>
> I understand we want to keep your 35% share confidential and I am sure our lawyers can find a solution how to do this… "

52. On 13 November 2006, Donna Griffin at the Bank wrote to Dr Wojakovski in relation to a discussion she had had about the transfer of the £10m facility to Tonstate Group. She stated:

> "...
>
> As I mentioned, the new borrowing needs to be in a Newco due to the existing security in Tonstate Group Ltd and the bank's requirement to get clear security. As outlined in previous letters, the borrowing in Newco will be subject to a guarantee from Tonstate (Hotels) Ltd supported by a second charge.

> With respect to your request for the transferred borrowing to be from Tranche A, unfortunately, we cannot achieve this as the transferred borrowing needs to be attached to the lending in the Bank of Scotland's name only which as you are aware is only the D strip. Any other alternative alters the bank's security net and is not covered by our existing credit sanction.
>
> However, one solution is for Tranche D to be transferred to Newco and a paid loan coupon to be taken from Tonstate (Hotels) Ltd to Newco in respect of the borrowing. . . ."

It is not in dispute that the reference to lending in the Bank's name only was a reference to the intention to syndicate all but the Loan D tranche of the financing package.

53. In an email of 23 November 2006 from Mr Swankie to a number of lawyers at DLA Piper copied to Dr Wojakovski, Mr Swankie stated:

> "... The second charge is in favour of Tonstate Ten Limited and they are then assigning this to HBOS. I understand that it is important for your client that HBOS is not seen as being directly involved in relation to the £10m loan..."

54. On the same day, Dr Wojakovski's personal assistant had emailed Mr Salisbury at the Bank on his behalf. In it, he referred to an email between lawyers which stated that there had been a move from the £410m term sheet to a senior facility of £397m and as a result £3m of the original funding had got lost. Dr Wojakovski's email stated that the £3m should still be in the facility and should be "joined somewhere else in line with the £410million facility as agreed ..."

55. Shortly before the transaction was completed, on 26 November 2006, Dr Wojakovski's personal assistant emailed Mr Swankie, Mr Salisbury and others on his behalf. In the email, Dr Wojakovski noted that the loan documentation was syndication documentation, that he had given the Bank exclusivity on the deal from the outset and that he valued and believed in the relationship with the Bank. He went on to state that he could not be expected to preserve his loyalty to the Bank and to be "put under pressure to put the business in one basket" and then in the event of a problem, the Bank be willing to let others "cause problems."

56. Thereafter, on 28 November 2006, the purchase of the Metropole Hotels and business was completed and the loan facilities in relation to the purchase were agreed with the Bank. There were four separate facilities: Loan A in the sum of £220m; Loan B in the sum of £90m; Loan C in the sum of £67m; and the Capex Facility which amounted to £20m. Each of Loans A, B and C was for a term of seven years. By a facility letter of the same date, from the Bank to Tonstate Ten Ltd, a company incorporated for the purpose ("Tonstate Ten") the Bank offered a term loan of £13m to Tonstate Ten. It was stated that:

> "The Borrower [Tonstate Ten] may only use the initial Advance of £10,000,000 under the Term Loan to on-lend to Tonstate Metropole Hotels Limited to help Tonstate Metropole

> Hotels Limited fund the purchase of the entire issued share capital of the Target and may only use subsequent Advances ... to on-lend ... for further expenditure ... and fees not yet agreed in relation to said acquisition and extra parking rights and to fund interest payments under this letter."

Tonstate Ten gave a charge over all its property in favour of the Bank and agreed that the Bank should have an "exit fee" equal to 35% of any relevant profits arising on the sale of the Metropole Hotels. It is not in dispute that the borrowing was secured on the Metropole Hotels and was given in the first instance to Tonstate Ten and then assigned to the Bank. In the meantime, on 1 November 2006, the first contribution by the Petitioners of £3.25m each was requested and sent thereafter. In addition, on 15 November 2006, Mr Matyas wrote to the Petitioners asking that they provide £22,614,250, the remainder of the sum of £34,614,250, which they did.

57. On 29 November 2006, a letter was sent on behalf of the Tonstate Group to Mr Even-Ari for onward transmission to Destiny and PBC, which was signed by both Dr Wojakovski and Mr Matyas. For the most part, it was concerned with the swap transactions in relation to the tranches of the bank borrowing known as Loans A, B and C. The swap transactions are no longer in dispute. However, in the letter, reference is made to having "fixed the £377m" and to an "adjusted cashflow" having been enclosed. The adjusted cashflow is an amended form of the Spreadsheet which once again records "total Bank Finance" at £400m.

58. In his written evidence, Dr Wojakovski states that Loan D was the riskiest tranche of funding, contained the Bank's profit share and was not intended to be syndicated. He also states that it contained a provision that the initial loan would be £11m plus a £2m provision for interest roll up because the forecasts did not generate sufficient income to allow interest on it to be paid. In addition, he states that Tonstate was concerned that the bank borrowing might be too much for the business which might struggle with its banking covenants. It was for that reason that Loan D was removed from the package and lent to Tonstate Ten and then injected into the Project as a shareholder loan along with the other monies injected by the Tonstate Group. He goes on to say that the security over the Metropole Hotels was put in place because of the Bank's exit fee which remained linked to Loan D although it was a profit share on the whole transaction.

59. In cross examination, Dr Ovadia stated that he did not think about the tranches of the loan facility, that he was not troubled by the Tonstate Group having borrowed the money and injected into the project as equity but that he did object to Tonstate's loan having been secured upon the Metropole Hotels. Mrs Eitan stated that at the time she knew of three layers of loan and thought that the 35% profit share applied to all the bank lending. She denied all knowledge of Loan D, however, and stated that she did not understand the reference in the First Memorandum to "supplementary finance" and the Bank's right to receive 35% of capital profits within the framework of that financing as a reference to Loan D. She, like Dr Ovadia, stated that her real problem with Loan D was the fact that it was secured on the Metropole Hotels.

60. Mrs Eitan says that she did not become aware of Loan D until the end of 2009 when the Second Memorandum was entered into. Prior to that, on 23 and 24 September 2009, at Mrs Eitan's request and direction Mr Gershon Mauer and Mr Ronny Hyman of PBC visited Tonstate's offices in London to inspect the accounting documents central to the project, copies of which had not been provided, and to meet those responsible for keeping them.

61. Mr Hyman did not give evidence and according to Mrs Eitan is no longer in the employment of PBC. Mr Mauer on the other hand was cross examined at length about his visit. He accepted that the visit was cordial, that he and Mr Hyman were given access to the documents which they had requested and that members of Tonstate's management team, including Mr Henry Benn, an accountant, attended when required and answered questions. However, Messrs Mauer and Hyman were not permitted to take copies of the documents to which they were given access and were required to sign a confidentiality agreement.

62. At the end of the first day of the inspection, Messrs Mauer and Hyman wrote a letter to Dr Wojakovski setting out the topics for the following day's meeting. It contained four headings and a total of twenty items for discussion. One of the headings was "Facility agreement" under which there were seven discussion items. The third discussion item under the heading "Accounting issues" was "Bank Loans – information of 13m pounds additional borrowing." Mr Mauer confirmed in cross examination that he had reviewed the Facility Agreement on the first day of his inspection. He also stated that he did not know what the reference to £13m additional borrowing was. His written evidence was that the issue had arisen because he had noticed a lower figure in Tonstate's shareholder loan account than that recorded in the most recent management reports. Mr Benn had told him that it was because Tonstate had been paying interest on a "private" loan which Tonstate had been "forced" to take at the same time as the Facility Agreement was executed. The shareholder loan account had been debited to compensate TPD and in exchange for doing so, Tonstate was not paid interest on its own shareholder loan when Destiny and PBC were paid interest in June 2009. Although the letter containing the discussion points to be dealt with on the second day of the visit was addressed to Dr Wojakovski, Mr Mauer stated that he only spoke to Mr Benn about the loan and did not raise the issue with Dr Wojakovski himself. Mr Mauer also maintained that he had only become aware of Loan D on disclosure in these proceedings in 2014.

63. At the end of the two day inspection, Messrs Mauer and Hyman signed a "Confidentiality and Acknowledgement Note" which listed the documents they had received to review "amongst other general files and correspondence which were available for … inspection." The list included "Tonstate Metropole Hotels Facilities Agreement (master facility)" and "Deed of Priorities Tonstate Ten (Group) to secure the Bank's obligation" (the "Deed of Priorities"). Mr Mauer wrote "WASNT REVIEWED" in manuscript alongside certain documents on the list including the Deed of Priorities. He also inserted "GENERALLY" in the phrase, "I have received to review …" However, he accepted that he had reviewed the Facilities Agreement and had discussed it, that it had been his choice what to review and that he had not complained about a lack of time during the visit.

64. It is not disputed that the Facilities Agreement contains a comprehensive definitions section which includes definitions of "Tonstate Ten Loan", "Tonstate Ten Loan Agreement" and "Tonstate Ten Security" in which reference is made to a £13million term loan facility and to second ranking charges over the Metropole Hotels granted in favour of Tonstate Ten and subject to the relevant Deed of Priority. In cross examination, Mr Mauer stated that he did not see the relevant definitions at the time. In relation to the Deed of Priorities, he accepted that he had seen it but stated that he did not understand its significance.

65. On 25 September 2009, the day after the inspection had taken place, Mr Hyman emailed Dr Wojakovski stating that he and Mr Mauer were "satisfied from the way you and your team are carrying and managing the business information." In cross examination, Mr Mauer accepted that he had been satisfied. On his return to Israel, on 29 September 2009 a report of the visit was produced. Amongst other things it is recorded that the financing agreements were discussed and it is stated that:

> "We received the required material, mainly the financing agreements, the collateral provided in their regard and the hedging agreement relating to interest. We were also given the TPD trial balance sheet, various details required requested regarding investments in property, loans received, cash balances and various P&L items, all as set forth below.
>
> In general, on all matters relating to the receipt of the material and to the business and accounting management, our impression is most definitely favourable. We found that the local staff is proficient with the material and that operates very professionally both in commercial and financial term, and we found no incidents of deviations."

Thereafter, "points of principle" were set out, the first of which appeared under the heading "Financing Agreements" in which it was recorded that the two financing agreements had been reviewed and four detailed points were noted. Under the heading, "Differences in Partner Equity" the following was recorded:

> "…
>
> Metropol - According to the accounting department, Tonstate's balance amounts to £28.7M instead of £29.3M according to the accounting between the parties – i.e. a deficit of ~ £600K. According to Henry, this relates to interest for the £10M loan that Tonstate was forced to take (as part of the £377M loan for acquiring the hotels). The interest is paid from the TPD bank account and charged to the Tonstate account (i.e. not included in TPD financing expenses). We believe this poses a problem and the said interest should be paid from the Tonstate account. On the other hand, according to Henry, Tonstate did not withdraw owners' interest in 2009 under the £500K distribution to PBC and Destiny."

In fact, Mr Mauer accepted in cross examination that Mr Henry Benn had told him that the £10m loan was within the framework of the borrowing from the Bank. He also accepted that he had spent one or two hours looking at the Facilities Agreements and had raised a specific query relating to one of the definitions.

66. By a letter of 22 September 2009, from Donna Griffin of the Bank to Dr Wojakovski, Ms Griffin had confirmed the adjustments to the terms of the facilities on the repayment of Loan D. She confirmed that the exit fee would be reduced to 19.99%, the headline facilities for Loan D and Loan C would be reduced and the interest rates would be reduced from 5% above LIBOR to 3% above LIBOR. Thereafter, by an email of 30 November 2009, Mr Henry Benn informed the Bank that Loan D was being repaid that day. In fact, £9.5m was repaid together with £500,000 of Loan C and the remainder of Loan D was repaid in 2014.

67. The Second Memorandum was entered into on 30 December 2009, negotiations having been conducted on behalf of the Petitioners by PBC. The relevant parts are as follows:

> "1. The financing agreement made between Metropole and the HBOS Bank (hereinafter: "The Bank") is a total sum of 377 million Pounds Sterling, divided into 3 separate tiers, loans A, B and C. Loan A, at a total sum of 220 million Pounds Sterling, loan B at a total sum of 90 million Pounds Sterling, and loan C at a total sum of 67 million Pounds Sterling. Additionally, as part of the credit line offered to the Tonstate Group, Tonstate received a sum of 10 million Pounds Sterling (loan D) in return for providing the Bank with a 35% share of the profits at the time of sale (over a sum of 450 million Pounds Sterling). The aforementioned was part of the original financing transaction made with the Bank.
>
> 2. After a lengthy negotiation, Tonstate and the Bank reached an agreement that upon the repayment of loan D, at a sum of 10 million Pounds Sterling, the Bank would agree to scale back its share of the profits from 35% to 19.99%, and, in addition, the overall weighted interest calculated for all loans (A, B and C), which was at a total annual sum of 23,443, 932 Pounds Sterling, would be reduced to an annual sum of 23,063,332.3 Pounds Sterling – meaning: saving the Company a total of 380,600 Pounds Sterling.
>
> 3. In light of the agreement with the Bank: the Company will allocate 10 million Pounds Sterling received as part of the CAPEX loans (which were not actually used in light of the current partial and calculated use of Company working capital for the execution of some of the renovation works the Company undertook to execute in its original agreement with Hilton. Tonstate believes

that using this sum does not constitute a violation of the original agreement with Hilton) for the following:

(a) The repayment of 9.5 million Pounds Sterling of loan D after loan D is transferred from Tonstate to the Company by assignment, in a manner leaving the Company with an obligation of only 0.5 million Pounds Sterling in loan D, and

(b) An additional 0.5 million will be used to repay loan C so that loan C is at a sum of only 66.5 million Pounds Sterling.

4. As agreed with the Bank, after the execution of the above – the Bank's share in the profits will be reduced from 35% to only 19.99% and the sum of annual interest paid for loans A, B and C will be significantly reduced as specified above.

5. Tonstate Group, who provided the Bank with a cash deposit at an amount of 5 million Pounds Sterling in a separate deposit account as collateral for the Cardiff transaction – will assign this deposit in favour of the Company so that this deposit is owned by the Company and credited to it.

6. As a result of the previously mentioned, Tonstate will be credited by the Company with an extra 5 million Pounds Sterling compared to the other partners (10 million Pounds Sterling for loan D minus the 5 million Pounds Sterling in the cash deposit for Cardiff). Therefore, it is hereby agreed that Destiny and Property and Building shall be entitled to withdraw from the Company a sum matching the ratio of capital (55-45%) at a total sum of 6,111,111 Pounds Sterling (3,055,555 Pounds Sterling each).

7. Tonstate will act to ensure the Company executes said fund transfer in favour of Destiny and Property and Building in instalments as follows:

- 2 million Pounds Sterling (1 million Pounds Sterling each) at the end of 2009

- 2 million Pounds Sterling (1 million Pounds Sterling each) at the end of March 2010, and

- 2,111,111 million Pounds Sterling (1,055,555 million Pounds Sterling each) at the end of June 2010.

> 8. Destiny and Property and Building will be credited with interest payments at a rate of 6% as agreed up to the actual distribution of funds."

68. In the meantime, the Cardiff Hilton had been purchased on 6 July 2007. However, it was not until the same day as the Second Memorandum was signed, 30 December 2009, that the parties entered into the Supplementary Memorandum relating to the Cardiff Hilton which was headed "First Supplement to Memorandum of Understanding of October 03, 2006". It contained six preambles setting out the history of the Metropole Hotels venture and the purchase of the Cardiff Hilton, including a recital that Tonstate Group Ltd held 20% of TPD shares in trust for PBC and 20% for Destiny. The preambles were stated to be an inseparable part of the Cardiff Hilton Memorandum and it also provided at clause 2 that the provisions contained in the First Memorandum "will also apply respectively to the Hilton Cardiff Project". The remainder of the Supplementary Memorandum was as follows:

> "3. The expected cost of the Hilton Cardiff Project was estimated to be at a total sum (expenses included) of approx. 35.2 million Pounds Sterling. In actuality, approx. 34.5 million Pounds Sterling have been spent to date, 29 million Pounds Sterling of which were financed with a loan received from the HBOS Bank.
>
> 4. The parties declare that the sums provided thus far by the owners as an owner's loan to TPD in relation to the purchase of the Hilton Cardiff Project, do not match the agreement made in the Main Memorandum, and that Tonstate will act to settle the accounts between them in accordance with their portions in the equity, as specified in the Main Memorandum.
>
> 5. Other than the above, the remaining provision of the Memorandum of Understanding will remain valid and with no changes made to them."

Knowledge

69. Despite the express reference to Loan D and the Bank's 35% profit share in paragraph 1 of the Second Memorandum and Mr Mauer's acceptance that he knew that the profit share was in the original financing package, as I have already mentioned, Mr Mauer's evidence was that he did not appreciate the existence of Loan D until disclosure in this action in 2014. In the circumstances, I am unable to accept his evidence in that regard. It seems to me that on the balance of probabilities, given his discussion with Mr Benn during the inspection of documents in London in September 2009, his query in relation to £13m additional borrowing set out in the letter to Dr Wojakovski of 23 September 2009, Mr Mauer's acceptance that Mr Benn had told him that the £10m was within the framework of the borrowing from the Bank and the note in relation to it in his report of 29 September 2009 under the heading "Differences in Partner Equity" which he discussed with Mrs Eitan, Mr Mauer was aware of the existence of an additional loan of £13m/10m in September 2009, albeit that he may not have been aware of the "Loan D" label at that stage.

70. Further, in the light of those matters, in my judgment, it is more likely than not that when viewing the Second Memorandum in December 2009, Mr Mauer understood the reference to Loan D being the sum of £10m received by Tonstate "in return for providing the Bank with 35% of the profits . . .", in paragraph 1 to be a reference to the "private" loan he had discussed with Mr Benn in London. It is not suggested that he thought that there were two additional "private" loans. Furthermore, the figure of £10m and the fact that it formed part of the original credit line is referred to in the Second Memorandum and it forms the very subject matter of that document.

71. In addition, it seems to me that as a result of her discussions with Mr Mauer and her consideration of his Report dated 29 September 2009, on the balance of probabilities, Mrs Eitan was also aware of the existence of the £13m/£10m private loan, the way in which it had been treated for accounting purposes and the fact that it was part of the framework of the original credit line by late September/early October 2009. I am unable to accept her evidence to the contrary.

72. She stated in cross examination that she did not become aware of Loan D from Mr Mauer on his return. She accepted that she had seen his Report and discussed it but was careful to differentiate between knowledge of the "private loan" to which he referred and knowledge of "Loan D". When pressed about whether she had known that Loan D was within the framework of the financing agreements, Mrs Eitan became evasive and said that she could not remember and that in fact, it was using the Metropole Hotels as collateral which was the problem. Mrs Eitan also accepted that TPD benefitted from the repayment of Loan D in 2009 because the rates of interest payable on the other tranches of the loan from the Bank was reduced and the percentage of the Bank's profit share was reduced from 35%. She also accepted that PBC had had to purchase pounds sterling in order to fund the equity injection into TPD and had not hedged against currency exchange rate changes. In addition, she accepted that as a result of a fall in the value of pounds sterling, PBC had lost around £9m and that she had sought to recover as much of this as possible from TPD.

73. In my judgment, when seeking to distinguish carefully between the "private loan" and "Loan D" Mrs Eitan was attempting to make a distinction without much foundation. Although she may not have attributed the "Loan D" label to the private finance, it seems to me that on the balance of probabilities she was fully aware of it in late September 2009.

74. At one stage, in cross examination, Mrs Eitan maintained that despite the content and purpose of the Second Memorandum and the references in it to Loan D, and Loan D having been part of the framework of the financing, she, like Mr Mauer, had not known about Loan D until disclosure in this action. Given the matters to which I have already referred and the content of the Second Memorandum which was signed by Mrs Eitan on behalf of PBC and which is not suggested to have come as a surprise to her, I am unable to accept her evidence in this regard. In my judgment, on the balance of probabilities, Mrs Eitan was aware that the "private loan" was "Loan D" by 30 December 2009 at the very latest. Her suggestion for the first time in cross examination that the Respondents had hurried to repay Loan D and to sign the Second Memorandum in order to continue to conceal the borrowing,

is unsupported by any other evidence and in part is inconsistent with the content of the Second Memorandum itself and I reject it.

75. The conclusion that PBC, in the sense of Mr Mauer and Mrs Eitan, was aware of Loan D by 30 December 2009 at the very latest is consistent with Mr Roichman's evidence in cross examination. He stated that after the execution of the Second Memorandum, he had asked about Loan D which was specifically mentioned. He stated that either Mrs Eitan or Mr Mauer had told him that the additional £10m loan had been discovered in September 2009.

76. Mr Roichman also stated that it was his idea to seek an increase in the Petitioners' shareholding in TPD as part of the remedy for unfair prejudice. He says that if he had known the true situation about the borrowing he would have wanted to have been the majority shareholder in TPD and that the matter turned upon the use of the Metropole Hotels as security for Loan D. He said that despite the fact that Loan D was paid back in 2009 (but for £0.5m) and the risk in relation to the security did not eventuate, it was all about risk and that he had not appreciated the position in relation to security for Loan D until disclosure in this action.

77. To reiterate, it seems to me therefore, that both PBC and Destiny were fully aware of Loan D by the time that the Second Memorandum was signed at the end of December 2009 and that PBC may well have been aware of it after the visit to London in September of that year, even if it was not aware of the "Loan D" label.

Submissions in relation to concealment and unfair prejudice

78. Mr Fraser submits that Loan D's existence and what he describes as its deliberate diversion from TPD was kept from Destiny and PBC. He says that the concealment and deliberate diversion can be inferred from the fact that no one at Destiny or PBC was informed of the willingness of the Bank to lend £410m instead of £400m, the existence of Loan D or that it was secured upon the Metropole Hotels. In particular, he drew attention to: the content of the Spreadsheet and the amended version in which there are references to a loan of £377m and a total of £400m; Mr Matyas' memo of 18 October 2006 in which he referred to a "special reason" in relation to the £10m and suggested that the additional £3m was added back to the Capex facility, Mr Fraser says, in order to make the lending appear to total the £400m figure borrowing; the fact that the 18 October 2006 memo makes no reference to reducing strain on TPD's banking covenants, which is the reason put forward by Dr Wojakovski; the fact that the Bank had been willing to lend and Dr Wojakovski had pressed it to lend £410m to TMHL; the fact that the concern about strain on the banking covenants was not raised with the Petitioners; the failure to tell Ms Eitan and others when they visited two of the Hotels in October 2006; and Dr Wojakovski's insistence in his letter of 30 October 2006 that the documentation be adjusted to omit the £10m loan.

79. He also submits that Dr Wojakovski nevertheless asked for the same capital contributions despite knowing that they would amount to at least 65% if not 67.2% of the equity capital whilst the Tonstate Group would be contributing only 35%. He also draws attention to the fact that TMHL was not strengthened because of the charge taken over the Metropole Hotels; that in his email to Mr Salisbury of 23 November 2006, Dr Wojakovski was still referring to an overall facility of £410m; and that Mr Swankie's email of 23 November 2006 to the effect that he understood that it was

important to Tonstate that the Bank was not seen as being directly involved in relation to the £10m loan is consistent with it being necessary to keep the diversion of Loan D confidential.

80. Mr Todd highlighted that it is accepted by all that the deal was fully packaged, the Petitioners were happy to leave the details of the finance package to Dr Wojakovski, that it was always represented that the bank borrowing would be £400m and that the shareholding would be on a 60:40 basis. A greater shareholding was never on offer. He submits that Dr Wojakovski created the parameters for what was on offer and therefore, there is no question of a diversion of an opportunity in relation to the borrowing or an increase in the shareholding which was on offer. He also points out that at no stage were Dr Wojakovski and Mr Matyas asked about whether and, if so, on what basis Tonstate was to be funded in respect of its equity contribution and that they were under no obligation to reveal it. He says that the £10m loan was never a joint venture asset at all. The obligor in relation to Loan D was Tonstate Ten Ltd and the sum was loaned onwards to TPD. Although the interest was paid on behalf of Tonstate it was debited to Tonstate's shareholder loan account and the loan was repaid in 2009. He says that Dr Wojakovski should not be penalised for having obtained all the funding from one source.

81. He also submits that Mrs Eitan accepted in cross examination that she appreciated that the 35% exit fee related to the loan as a whole but had only been secured against Loan D. She also accepted that if the Bank had insisted on collateral security for the exit fee as a condition of all tranches of the loan facility maybe she would not have objected but she did not think about it. It was Dr Wojakovski's evidence that the security remained in place because of the exit fee. Mr Todd submits that the way in which Loan D was dealt with was manifestly to the benefit of TPD because it increased its headroom in meeting interest payments, the amount upon which interest was payable having been reduced; it increased the prospects of TPD complying with its banking covenants as a result; and Mrs Eitan accepted that the repayment of Loan D was to TPD's advantage because it enabled it to negotiate a significant decrease in the Bank's profit share and in annual interest payments.

82. He submits that the First Memorandum referred to £400m and therefore, there was no breach of its terms; the security given over the Metropole Hotels provided no advantage to the Respondents because it was required because of the exit fee and, in any event, was never called upon; Loan D was repaid as long ago as 2009 and there is nothing to disgorge.

83. He also says that Mr Fraser's submission that all that was known at the end of 2009 was the label "Loan D" is incorrect and not consistent with the evidence. He submits that the Petitioners should have made further enquiries at the time of the Second Memorandum had they wished to do so. Instead they dealt with the Loan D issue in the manner set out in the Second Memorandum and accept that there was no detrimental financial impact on them as a result of Loan D. He says that they cannot now seek to raise a different and unpleaded claim as a result of which they seek to increase their notional shareholding.

84. In addition, Miss Newman on behalf of Dr Wojakovski points out that it is not pleaded that the figures in the Spreadsheet were pre-contractual representations or that they were relied upon by the Petitioners and that there is nothing to support an express

assertion that only £377m was available from the Bank. She also points out that the letter of 29 November 2006 was concerned with hedging and not the structure of the loans at all. She questions, therefore, how this can be an example of concealment of a loan to Tonstate Ten. She also says that the Petitioners were not informed about the loan because it was none of their business and emphasises that the negotiations between the Tonstate Group on the one hand and Destiny and PBC on the other were at arm's length and there was no duty to disclose what might be available by way of finance.

Conclusion in relation to concealment and unfair prejudice

85. I have already decided that PBC and Destiny were fully aware of Loan D by the end of 2009 and had had information about it from late September 2009. It is not in dispute that they had not been informed of its existence in 2006 or of the way in which security was to be dealt with. Furthermore, it is not in dispute that the figure of "around £400m" borrowing was referred to in the First Memorandum and appeared both in the Schedule in its original form and as amended.

86. However, in my judgment, no question of concealment arises. I agree with Messrs Todd and Mallin and Miss Newman that in these circumstances, matters are only concealed if there is an obligation to reveal them. It is not disputed that the transaction or opportunity was put to Destiny and PBC in an arm's length negotiation on the basis that it was "fully packaged" and a "done deal". It was presented on that basis. Both Mrs Eitan and Mr Roichman accepted that it was "take it or leave it". The contributions which were set out in the First Memorandum were required on the basis of figures which were not described as precise but were expressly stated to be "around" £400m and £63m. The Tonstate Group was willing to agree the shareholding percentages and the interest upon shareholder loans on the basis of those contributions. It is not in dispute that the Tonstate Group and Dr Wojakovski, in particular, had conducted all the negotiations for the loan facilities and little or no due diligence was carried out on behalf of Destiny and PBC.

87. Although the Spreadsheet in its original and amended version contained reference to borrowing of £400m it is not suggested that the figures amounted to pre-contractual representations and it seems to me that such a suggestion could not survive the use of "around" in relation to each of the figures throughout the First Memorandum itself. In fact, in August 2006 when negotiations with Destiny and thereafter, PBC commenced, the figure had been correct.

88. In any event, all of the witnesses accepted that they were not concerned about Tonstate having borrowed for the purposes of its own equity contribution into the project and it seems to me that Dr Wojakovski was entitled to obtain that funding from whatever source he chose. It is suggested, nevertheless, at least indirectly, that the opportunity to obtain a further £10m funding for Tonstate itself was misappropriated. In my judgment, such a contention cannot survive the undisputed evidence that the deal was fully packaged. Furthermore, in my judgment, neither the "special reason" memorandum of 18 October 2006, nor the way in which the documentation was dealt with subsequently, can form sufficient basis for such a contention. As I have already mentioned, I consider that the Petitioners seek to place a great deal more weight upon the use of the phrase "special reason" than it is able to bear. If one reads the memorandum itself, the "special reason" is expressly described

in the same sentence. It is the intention that the £10m would be reinvested by the Tonstate Group in Tonstate. This is precisely how it is described in Dr Wojakovski's letter to the Bank of the following day. Dr Wokakovski goes on to refer to the fact that he had already explained to the Bank that he would "like to show a stronger Tonstate Hotels to start off with". The way in which the Bank required the security to be dealt with had not been mentioned at that stage. In my judgment therefore, there is no inference in relation to concealment to be drawn from the use of the phrase or the expressed intention.

89. Furthermore, in my judgment, in the light of the fact that Dr Wojakovski was conducting all of the negotiations in relation to the finance structure and had presented a fully packaged deal to Destiny and PBC, concealment cannot be inferred from the fact that he did not discuss his intentions with them or convey any concern about reducing strain on Tonstate's banking covenants. Furthermore, in my judgment, it follows that once it was decided that the £10m would not be borrowed by Tonstate itself, it was inevitable that Dr Wojakovski would be concerned to correct the draft documentation. It seems to me that it is a considerable and unwarranted leap from the content of his letter of 30 October 2006 to Mr Salisbury to a conclusion that he was trying to conceal Loan D from the Petitioners. I also consider it an unwarranted leap to conclude that because Dr Wojakovski continued to refer to a facility of £410m which was the total sum to be advanced, he was concealing from the Petitioners the opportunity to borrow more. Lastly, in this regard, I agree that if there were an obligation upon the Tonstate Group to reveal the potential for additional funding and if there were other evidence to support concealment, the reference in Mr Swankie's email of 23 November 2006 might be construed to support such a contention. However, in the absence of further evidence, its true meaning remains unclear. In any event, in the light of the fact that I have decided that there was no obligation upon the Tonstate Group to reveal Loan D and that the other evidence does not support the contention, it is not necessary to decide.

90. Further, the Petitioners do not allege that any loss was suffered as a result of the way in which Loan D itself was dealt with. I agree with Mr Todd that in fact, not only did they benefit in the period from 2006 to 2009 from the reduced interest payments which would otherwise have been due from Tonstate had the monies been loaned directly, but they also benefitted from the terms which were negotiated on the repayment of the majority of Loan D in late 2009 which were recorded in the Second Memorandum.

91. It is also clear, however, that the Petitioners were not informed of the way in which the security for Loan D was to be dealt with and it is that of which they now complain. In my judgment, the position is slightly different in this regard. It seems to me that the Petitioners would have been entitled to have been informed about a charge over the Metropole Hotels which was purely for the purposes of securing a private loan to Tonstate and to have complained. However, I agree with Mr Todd that the evidence reveals that it was the Bank which imposed the structure in relation to security for its own reasons having decided to attach the 35% profit share which was a central part of the bank financing package, to the un-syndicated Loan D. Mrs Eitan accepted that although she did not think about it at the time, if the Bank had insisted on collateral security for the 35% exit fee as a condition of Loans A, B and C, "maybe she would not have objected." In the circumstances, therefore, it seems to me that the

Petitioners cannot complain about the security either. If I am wrong about that, it is not suggested that any loss or prejudice was suffered as a result and the security has long since been discharged.

92. It also follows that I do not consider that there was any breach of fiduciary duty on the part of either Dr Wojakovski or Mr Matyas in relation to the treatment of Loan D and the security relating to it. I accept Dr Wojakovski's evidence that he acted at all times in the best interests of TPD and Tonstate and in his treatment of Loan D intended to reduce the strain on banking covenants.

93. It follows, in my judgment, that the way in which Loan D and the security in relation to it was dealt with (the latter at the insistence of the Bank) did not give rise to a breach of the terms of the Memoranda which governed the relationship between the parties or any understanding between them, or was otherwise unconscionable or inequitable, nor did it involve a breach of fiduciary duty. Accordingly, no unfair prejudice arose. It follows therefore, that there is no need to make an order for relief in relation to these matters.

Increase in share percentage?

94. In the light of my decision in relation to Loan D, it follows that it is no longer relevant in that context to consider whether relief for unfair prejudice should be granted by increasing the notional share percentage in TPD to which the Petitioners are entitled. However, the issue remains relevant in relation to the treatment of the Cardiff Transfer, the 2014 Refinancing and the 2014 Dilution. I also go on to consider it in case I am wrong about Loan D.

95. Mr Fraser submits that the unfair prejudice in relation to Loan D should be dealt with by treating the Petitioners as notionally having had a higher equity stake in the project. He referred me to the judgment of Arden LJ in *Re Tobian Properties Ltd* (supra) at [24] where she noted that if the court finds that unfair prejudice has occurred, it has a wide power to fashion appropriate relief and at [28] where she noted the adaptability of the remedy and the policy aim of using it in order to encourage proper corporate behaviour. In his written closing, he also referred to the well known passage in the judgment of Oliver LJ in *Re Bird Precision Bellows Ltd* [1986] Ch 658 at 669 at which reference was made to the very wide discretion conferred on the court "to do what is considered to be fair and equitable in all the circumstances of the cases, in order to put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders. . .".

96. Mr Fraser submits that in relation to the Loan D issue, it would be fair to adjust the notional shareholdings to reflect the original 15% premium (being the difference between the 55% invested and the 40% shareholding) by reference to the actual capital ratios that were contributed. It is submitted that as the 55% capital contribution led to a 40% shareholding, a 67.2% capital contribution ratio should result in the court valuing the Petitioners' shareholding on a 52.2% notional overall basis. In other words, the Petitioners should be awarded an additional 12.2% of the relevant Net Asset Value ("NAV"). Mr Fraser went as far as to submit that the position was analogous with the deliberate concealment by a fiduciary which would entitle a beneficiary to have a profit disgorged.

97. He takes the same position in relation to the £5m in relation to the Cardiff Hilton to which I refer below. He submits that it would be fair and equitable in those circumstances, if the Court were to award the Petitioners a higher share of the Cardiff Hilton's value. In his 1st Report Mr West says that as a result of the overpayment acknowledged in the Supplemental Memorandum, PBC and Destiny in fact each paid 31.3% of the total contribution required to purchase the Cardiff Hilton, as opposed to the agreed 27.5% each. He continues:

> "The Petitioners' position is therefore that, as a matter of fairness, the valuation of their interest in the TPD Group should reflect this excess contribution to the Cardiff Hilton purchase, from which Tonstate benefitted. This will be a matter for the Court in due course, but in my opinion a reasonable and fair way to reflect this complaint would be to adopt the same approach as I have adopted as regards Loan D, and increase the notional size of the Petitioners' stake in the Cardiff Hilton appropriately."

He concludes that the effect of the overpayment is to increase the notional size of the Petitioners' stake in the Cardiff Hilton by 3.8% each. As I have already mentioned, he accepted in cross examination that he had adopted this approach and carried out the necessary calculations on instructions only.

98. Mr Todd, whose submissions Miss Newman adopts, points out that the case for a notional increase in shareholding is not pleaded and is advanced solely by Mr West on instructions. Previously, it had been claimed that as a result of Loan D, the Petitioners should have had to contribute less to the venture. However, they adduced no evidence to show that they would have been better off had they done so and instructed Mr West to carry out his calculations instead.

99. Mr Todd says that the proposal is both wrong and unprincipled: the function of section 996 is to enable the Court to "*make such order as it thinks fit for giving relief in respect of the matters complained of*", not to rewrite the relationship between the parties so as to confer on them more than that which was ever agreed to. He also reminded me that PBC had invested in GBP and had suffered as a result of currency fluctuations against which it was not hedged and had sought compensation from Tonstate and the Tonstate Group in the form of a larger return on the investment which had been refused. He also drew attention to the fact that Mr Roichman admitted that it was his idea to ask for more shares in these proceedings because of Loan D, in conjunction with Mr Mauer. Mr Todd submits that despite having suffered no adverse consequences as a result of Loan D, having benefitted from reduced loan covenants throughout the duration of the investment and better lending terms achieved upon repayment of Loan D, Mr Roichman invites the Court to exercise its discretion under section 996 to punish Tonstate which is not the purpose of proceedings of this nature but an abuse of process: *Re Astec (BSR) plc* [1998] 2 BCLC 556 591a-592d Jonathan Parker J (as he then was).

100. Mr Mallin, with whom Miss Newman also agrees, points out that Loan D makes no difference to the NAV whatsoever. He submits that the suggested notional increase in the shareholding leads to an enormous transfer of value to the Petitioners in circumstances in which Mr Weaver concludes that there was no financial prejudice suffered as a result of Loan D at all.

101. In relation to the Cardiff Hilton, Mr Todd submits that it was acknowledged at the time that the Petitioners had paid more than was required as their contribution in relation to the acquisition of the Cardiff Hilton and that it was dealt with in the Supplemental Memorandum and expressly agreed that Tonstate would settle the accounts in accordance with the equity percentages set out in the first Memorandum. It is also conceded that that did not take place but that is no reason to change the bargain. Further, the Respondents submit that the increase in shareholding which is sought in relation to the Cardiff Hilton translates into a further 14.8% of the equity based on the real final costs of the Cardiff Hilton purchase of £33.93m which once again would amount to an unwarranted transfer of value, contrary to the original bargain and once it is clear that there is a profit in which to share.

Conclusion – increase in share percentage

102. It is quite clear that the remedies available to the Court under section 996 Companies Act 2006 are both flexible and adaptable and should be fashioned to put right and cure for the future the unfair prejudice which has been suffered. In my judgment, even if I had found that there was unfair prejudice in relation to Loan D and the security in relation to it, I would not have decided that it would be fair and equitable and necessary to put right the unfair prejudice to treat the Petitioners as if they had had a greater percentage interest in TPD and the project in the first place. I would not have done so for three reasons: first, to do so would be contrary to the parties' original bargain which was a "take it or leave it" deal. That is not to say that an increase in notional shareholding could never be an appropriate remedy but merely that it is not so in this case; secondly, to do so would be contrary to the way in which the matter was agreed to be dealt with under the Second Memorandum. In my judgment, it would be neither fair nor equitable to fashion a remedy which was contrary to the way in which the parties themselves had agreed to deal with the issue at an earlier stage; and thirdly, in the circumstances of this case, such a remedy would lead to a considerable transfer of value to the Petitioners now that it is clear that the project has to some extent been a success. It seems to me that such a remedy is not fair and equitable but would allow the Petitioners to take an opportunistic advantage.

103. In my judgment, the position is no different in relation to the Cardiff Hilton. Once again, to adjust the percentages would be contrary to the way in which the parties agreed to deal with the Petitioners' over-contribution in the Supplemental Memorandum and would allow the Petitioners to change their position once they were certain of an increase in the value of the property. I do not consider such a proposal to be fair and equitable in all the circumstances, or one which cures the unfair prejudice for the future.

Fair Value

104. First, it is important to note that on instruction, the share valuation experts appear to have adopted a slightly different definition of "fair value" for the purposes of valuing the shares in TPD. Mr Weaver has applied the International Financial Reporting Standard 13: Fair Value Measurement in which "fair value" is defined as:

> "The price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date."

He adopted a net asset value approach which calculates the Fair Value of a company by reference to the Fair Value of its assets minus the Fair Value of its liabilities. Mr West on the other hand has applied the IVSC standard under which "Fair Value" is defined as:

> "... the estimated price for the transfer of an asset or liability between identified knowledgeable and willing parties that reflects the respective interests of those parties."

In their First Joint Report of 1 June 2016, the experts also agreed that the IVSC's observation is that the definition of Fair Value under the IFRS is generally consistent with Market Value as defined by the IVSC as:

> "the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion."

105. In fact, the practical difference between the different definitions used by the experts is revealed in Mr West's approach to the specific adjustments referred to below. In summary, Mr West says that as a result of the definition he has used, he must consider the position of the actual parties and as a result, for example, he says that the fees which would be incurred on the sale of the Metropole Hotels should not be deducted from the NAV. Mr Weaver on the other hand, considers such costs must be taken into account when determining the value of TPD's assets and he stated in cross examination that he could not see a practical difference whichever definition was applied.

106. Much of the remainder of the divergence in the share valuation evidence was caused by the differing approaches adopted by the experts to the lack of a full set of audited accounts for each of the subsidiary companies and of consolidated audited group accounts. Mr Weaver relied upon the figures available and Mr West sought to reconstruct a balance sheet, in part, on the basis of instructions as to its content. On the evening immediately before the share valuation experts were intended to be cross examined, audited accounts were produced. After some delay, it was possible for the experts to agree the draft consolidated balance sheet for the TPD group as at 31 December 2016 which provided the correct starting point for the analysis of the group's NAV. Having taken into account the Metropole Hotels valuation at they agreed a starting point for the NAV of TPD at However, their opinions differ in relation to a number of matters, both as to whether certain adjustments should be made and the extent of such adjustments. Mr West's approach leads to a NAV of and Mr Weaver's to . Each of the disputed adjustments is considered below.

107. In their written closing submissions on behalf of the Petitioners, Messrs Fraser and Greenwood submit that Mr West's is the correct approach because it enables the valuer to take account of the identity and situation of the actual parties to the contemplated transaction. They also stress that the court retains a wide freedom to disregard the views of the experts and apply the court's view of what is fair and sensible in the circumstances.

108. In this regard, Mr Todd on behalf of TPD and Tonstate took me to *Wann & Ors v Birkinshaw & Anr* [2017] EWCA Civ 84. The appeal concerned the valuation of shares in a private company pursuant to a purchase order made in unfair prejudice proceedings under which the Respondents were required to purchase the Petitioner's shares at a "fair value". At [37] David Richards LJ (with whom Patten LJ agreed) stated:

> "It would be possible to provide in an order that the value of a company's share capital was to be valued not by reference to its market value but by reference to some other yardstick, but it would need clear words to do so. It is, I consider, impossible to read the Order as referring to anything other than the market value of the company's share capital. That is the clear effect of the second assumption in paragraph 2 of the Order, that the respondent and the appellants "are respectively a willing seller and willing purchasers operating at arms' length". In any event, in the absence of a clear indication to the contrary, the "value" of a marketable asset, in this case the shares of a company, can refer only to the price that would be received for it on a sale. It follows that I cannot agree with the Judge when he said that the instruction to the expert "to ascertain the price which a buyer with knowledge of all material facts would pay to the existing shareholders for 100% of the issued share capital" was not part of the Order or "reflected anywhere in his order whatsoever". On the contrary, it was in my view an essential part of the exercise required by paragraph 2 of the Order."

109. He also referred me to *Attwood v Maidment, In the matter of Annacott Holdings Ltd* [2013] EWCA Civ 119 which was an appeal from certain of the directions given for the valuation of shares, the Respondent, Mr Maidment having been ordered to purchase the shares of the Petitioner, Mr Attwood having been successful in an unfair prejudice petition. The shareholding had effectively been 50:50 and the petition succeeded primarily on the ground that Mr Maidment as sole director had procured the company to transfer its entire portfolio of properties to himself at an undervalue. One of the directions which was appealed was that there should be no deduction for the costs of selling the properties. Arden LJ (with whom Elias and Black LJJ agreed) stated at [3(iv)] that she considered that the deduction of the selling costs of the actual sales should have been ordered and would not result in a windfall to Mr Maidment. She stated at [4] that she bore in mind that: "... valuation directions concern the ascertainment of fair value. This calls for an evaluation of a number of factors, including the history of the events in issue in the litigation (*Re Bird Precision Bellows Ltd* [1986] Ch 658). . . " At [25] she went on to hold:

> "In my judgment, there should be some allowance for the selling costs to reflect the fact that the company could never have realised any value from the properties without paying these costs. . . "

The selling costs had been calculated on the basis of 1.5% of the proceeds of sale and there was no appeal against the rate. I was also reminded of the passage in the judgment of Oliver LJ in *In re Bird Precision Ltd* [1986] 1 Ch as to the "very wide

discretion to do what is considered fair and equitable in all the circumstances of the case in order to put right and cure for the future the unfair prejudice" which included the manner in which an interest in a company should be valued.

110. In response, Mr Fraser points out that neither *Re Cumana Ltd* [1986] BCLC 430 nor *Sethi v Patel & Scitec Group Ltd* [2010] EWHC 1830 (Ch) (to which I shall refer in more detail below) are referred to in the *Annacott* decision which he says should be confined to its facts. It was concerned with shares in a company the very business of which was the buying and selling of properties.

111. In my judgment, it is appropriate to consider the differences in approach adopted by the Messrs West and Weaver in the context of the specific items in their calculation of the appropriate NAV for TPD rather than in the abstract. I now turn to the specific adjustments.

Specific Adjustments

(i) Banking Refinancing Fee - £2.1m + (ii) Inclusion of the SWAP liabilities of £6.7m

112. The sum of £2.1m is recorded as an asset both in the audited accounts as at 30 September 2016 and the unaudited accounts as at 31 December 2016. In the former it is offset against the amount of the outstanding loans of £418m and in the latter, it is dealt with separately. It is not in dispute that the amount was incurred to secure financing. In Mr West's opinion it is likely that in any future refinancing any remaining balance will be written off. He accepted that it is written off over the life the loan itself, that a willing buyer would not pay for it and it could not be sold. However, he stated that it was appropriate to take it into account between the parties in this case because it was an asset which had been paid for and relied in this regard upon the IVSC definition of "fair value". Mr Weaver on the other hand described the figure as just that. He stated that it was an accounting entry which was being written off, the benefit having been acquired when the fee was paid. He said that it was worth nothing in an acquisition and a willing buyer would not pay anything for it because it would not confer any economic benefit on the buyer as it creates no future cash flows to equity holders.

113. Mr West has also included the figure of £6.7m in his NAV and points out that the amount is likely to have been derived from an estimate for the cost of breaking the swaps given by Aareal Bank which came with a disclaimer. Mr Weaver on the other hand considers that a market participant would pay less for the equity of a business committed to pay interest under the swaps at a rate which is substantially higher than actual interest rates. He points to the fair value of the liability recognised on the balance sheet and noted in the consolidated TPD accounts, audited by KPMG. The figure of £6.7m is the liability updated to 31 December 2016 which is also included in the balance sheet. In fact, Mr West accepted that a market participant would pay less for such a company by reference to the swap liability.

114. Mr Fraser submits that Mr Weaver's approach to these two items in inconsistent. He says that he has failed to take the £2.1m into account on the basis that it is merely a book entry for which a market participant would pay nothing but has included the £6.7m contingent liability under the swap. He also points out that Mr West takes account of the full £2.1m as at 31 December 2016 on the basis that both Petitioners

and Respondents invested in the refinancing of the business in 2014, it is treated as an intangible asset of the business in the audited accounts and there is no reason to remove it. In relation to the £6.7m Mr Mallin submitted that it was clearly a liability because TPD is locked into a swap under which it is paying a higher rate of interest than it would otherwise. He pointed out that Mr West accepted that one would pay more for a company without such an obligation and the difference would be the break costs on the swap. That cost is represented in the accounts by the £6.7m figure. He submits therefore, that the £6.7m is the measure of the negative impact of the swap on the value of TPD and cannot be compared with the figure of £2.1m which is purely a book entry.

115. In this regard, I prefer Mr Weaver's approach. It seems to me that the £2.1m amount has been paid and as a matter of accounting is being written off over time. As both experts agreed, a willing buyer would not pay for it. In the circumstances and from the perspective of these parties, in my judgment, when arriving at a fair value for the shares and the NAV of TPD, the figure ought not to be taken into account. Further, in my judgment it is relatively obvious both that a market participant would pay less for the shares in TPD as a result of the SWAP liability and that it is real liability which affects the value of TPD. It appears in the financial statements audited by KPMG. I do not consider that the fact that it must, by its very definition, amount to an estimate, leads to the conclusion that it should be treated as Mr West suggests. In the circumstances, therefore, I see no reason not to take account of that liability when determining the fair value of TPD as between the parties.

(ii) 1% estimated sale commission [redacted] and (iv) Estimated prepayment fees of £7.967m on TPD Group bank loans

116. The estimated 1% sales commission on a sale of the Metropole Hotels was put forward on behalf of the Respondents and is not supported by evidence. It is calculated on the basis of a sale at a price of [redacted] Mr Weaver considers that typically there are transaction fees in relation to the sale of assets and has been advised the sales are ongoing. The sale which had reached the stage of non-binding heads of terms has fallen through and the Metropole Hotels are being actively marketed. In his written observations, Mr West notes that the sale has fallen through and notes that the purchase of the shares will not necessarily result in an event which would lead to a sale commission being charged. In cross examination he accepted that the only way of realising the price of the Petitioners' shares was to sell the Hotels and that if one is looking at market value of the shares, one is, in fact, buying the Hotels.

117. The figure of £7.967m was provided by the Respondents to Mr Weaver as an estimate of the fees which would be incurred potentially if the TPD Group loans were repaid early. In fact, the actual figures are now available. If the senior and mezzanine debt is repaid to Aareal Bank and Venn Partners respectively before 15 March 2017, penalties of 1.5% and 3% being £4,373,984 and £3,025,166 respectively (a total of £7,399.150) would be incurred. If repayment is made after that date and before 15 March 2018, no penalty would be incurred on the Venn Partners borrowing and a penalty of £2,915,989 being 1% would be incurred in relation to the Aareal Bank borrowing. Exit fees would also be incurred in relation to the two mezzanine and one "toggle" loan from Venn Partners. If they had been repaid before 15 March 2017, the total exit fees would have been £8,034,122 and if they are repaid in the year to 15 March 2018, the exit fees will total £3,970,961. In fact, that is a slight over

simplification because the exit fee on the uncapitalised mezzanine loan accrues at 3 month LIBOR which amounts to approximately £105,000 per quarter at current rates. However, the figure of £604,972 has been included to reach the total figure of £3,970,961. It represents a projected amount that will accrue from 25 October 2016 to 15 March 2018 if 3 month LIBOR remains static and in any event, will be less if the loans were repaid before 15 March 2018.

118. Mr West's view is that it is not clear that the requirement that the Respondents purchase the Petitioners' shares would result in the payment of prepayment fees. Mr Weaver on the other hand considers that the sale of the Metropole Hotels is ongoing, that such fees would be incurred on refinancing the existing debt upon the sale and that a market participant would take such fees into account. Mr West accepted that that would be the case but reiterated that he had taken into account the position between the actual parties and had not been asked to consider a hypothetical buyer and seller.

119. Mr Fraser submits that it would be wrong in principle to take account of fees which will only be incurred if the Metropole Hotels are sold. He says that the Respondents' impecuniosity is irrelevant and therefore it is of no relevance whether the Hotels have to be sold or not and therefore, whether the fees are incurred. He says that it is purely a matter for the Respondents. He relies upon a passage in the judgment of Lawton LJ in *Re Cumana Ltd* [1986] BCLC 430 in which he considered whether an order for purchase of shares, unfair prejudice having been established, should have included an "escape clause" to enable the court to order alternative relief should the Respondent be unable to raise the money to purchase the Petitioner's shares. Lawton LJ held at 436h – 437b:

> "One further submission made on Mr Bolton's behalf must be considered. He said in evidence that he could not, out of his own resources, find the money to buy Mr Lewis's shares. The judge seems to have envisaged that he might have to sell his own shares or raise money in some other way to buy out Mr Lewis. The evidence from the expert witnesses was that the sale of shares in Cumana might be difficult. All this led counsel for Mr Bolton to submit that the judge should have made an order containing what he called an 'escape clause', that is to say a provision which would enable the court to make some other order if, despite Mr Bolton's best endeavours, he was unable to raise the money to purchase Mr Lewis's shares at the price fixed. Despite the initial attractiveness of this submission, it is wrong in principle. What the judge was deciding was the amount of the compensation which Mr Bolton should pay Mr Lewis for the wrong he had done him: see *Scottish Co-operative Wholesale Society Ltd v Meyer [1958] 3 All ER 66 at 89*, [1959] AC 324 at 369, per Lord Denning. The fact that a wrongdoer is impecunious is no reason why judgment should not be given against him for the amount of compensation due to his victim. What Mr Lewis should do to get money out of Mr Bolton, claiming, as he still does, that he is impecunious, is a matter for him to decide, not the court."

Mr Fraser also submits that the fees may never be incurred in any event, the sale has fallen through and the Metropole Hotels are being remarketed and the fees themselves are unsubstantiated.

120. Mr Todd and Mr Mallin, whose submissions are adopted by Miss Newman, however, submit that the fees are an inherent part of determining the fair value of the shares which in turn requires the determination of the fair market value of the underlying assets, being the Metropole Hotels. They rely upon the decisions in *Annacott* and *Wann* for the proposition that the "fair value' is the market value on a sale upon which the fees would be incurred. As I have already mentioned, Mr Fraser on the other hand points out that no reference was made in *Annacott* to the *Cumana* decision and that *Annacott* should be distinguished on the basis that the underlying business itself was concerned with the sale and purchase of properties.

121. Mr Mallin also submitted that the early redemption fees do not depend upon the sale of the Metropole Hotels in any event. The change of control provisions would be likely to be triggered even if there were only a sale of the shares. He also submits that if he is wrong about the fees being taken into account between a willing seller and buyer, they must still be taken into account as contingent liabilities in the light of the reality that the Metropole Hotels will be sold.

122. I agree with Mr Mallin and Mr Todd. It seems to me that it is artificial to seek to separate out the sale of the shares from the sale of the Metropole Hotels. Although it is not inevitable that the Metropole Hotels will be sold they are being marketed at present and there is an order made by consent which governs the conduct of that sale. In any event, there is no dispute that in order to value the shares, it is also necessary to determine the value of the underlying assets. It seems to me that as David Richards LJ put it in the *Wann* decision, ". . . the "value" of a marketable asset, ... can refer only to the price that would be received for it on a sale." In fact, there was no dispute between the experts that on the sale of the Metropole Hotels the fees would be taken into account.

123. Allowance should be made, therefore, for the selling costs and consequential fees to reflect the fact that TPD could never have realised any value from the Hotels without paying them. Such an approach is consistent with the nature of the project from the beginning and the expectations of the parties. It was envisaged that if all went well, the Hotels would be sold. In my judgment, the question under consideration in *Re Cumana Ltd* was different as were the circumstances. It was concerned with the provision of an "escape clause" to enable the respondent time to sell his own shares in order to be able to meet the amount of compensation due to the petitioner. The proposed sale in that case did not relate to the asset at the heart of the joint venture. The position in this case is closer although not identical with that considered in the *Annacott* decision.

124. In relation to the estimated sale commission it is now accepted that the appropriate percentage in relation to the gross proceeds of sale up to [redacted] is 0.375% instead of 1%. It seems to me that that percentage should be applied and taken into account. In relation to the estimated pre-payment fees, in my judgment it would be fair to take into account the penalty of £2.9m odd in relation to the Aareal Bank loan and a sum in relation to the Venn Partners mezzanine and toggle loans which reflect exit fees calculated at the current rate of 3 month LIBOR for the period from 25 October 2016

to September 2017 which assumes that the loans will be repaid in approximately six months from judgment.

(iii) Interest on £12.9m withdrawn from TPD by Tonstate

125. Mr West has included interest on the sum of £12.9m in the calculation of his NAV. The figure of £3.78m was arrived at by applying an interest rate of: 7.492% from September 2010 until 14 March 2014 based upon the Loan C interest rate of 3% + LIBOR and the Bank of Scotland Swap rate of 4.492%; and 11% + LIBOR from 14 March 2014 to date based on the £20m loan in a TPD subsidiary, Annie Property Ltd. Mr West's rationale is that had the £12.9m not been withdrawn it would have been used to pay down the most expensive borrowing first. Mr Weaver on the other hand considers that the fact that £12.9m was withdrawn does not affect what a market participant would pay for TPD.

126. In cross examination, Mr West accepted that he had been instructed to include an interest figure and to use 11% + LIBOR in respect of the Annie Loan. He also accepted that the accounting documents for TPD throughout the period from 2010 to date showed considerable cash reserves which were as much as £36m in 2016 and that despite the cash reserves loans had not been paid down. In addition, he accepted that Loan C contained a clause which prevented a borrower from re-borrowing anything repaid and that had a sum been repaid the swap which related to the borrowing would have had to have been re-negotiated and a break fee would have been incurred and that the same was true in relation to the Annie Loan. He accepted that the swap break costs would be a disincentive to repayment of the loans and that at least in the period from 2008 to 2012 there was a lack of liquidity which would have made credit hard to come by. Eventually after lengthy cross examination he stated that the Annie Loan and Loan C should be disregarded and that the shareholders' return of 6% should be applied or what could have been earned on the monies.

127. Mr Weaver's opinion is that the fact that the monies were withdrawn would not affect what a market participant would pay for TPD today. However, he agrees that TPD should have the benefit of interest on the sums withdrawn at a rate determined by the court.

128. Mr Fraser submits that account should be taken of the full sum of £3.78m and if not the 6% interest rate should be applied because the Respondents should be treated as having reduced their shareholder loan pro tanto during the relevant period and thus should be treated as entitled to correspondingly less interest than has accrued at the rate of 6%, thus notionally increasing the NAV by that amount. Mr Mallin submits that this is no more convincing than the argument in relation to the rates for the Annie Loan. He points out that the undisputed documentation reveals considerable cash balances throughout the relevant period and therefore, the shareholder loans could have been reduced in the same way as the commercial lending but were not. He submits that a deposit rate based on base rate plus 1% would be fairest.

129. In my judgment, there is no reasonable basis for the approach adopted by Mr West upon the instruction of the Petitioners and his approach was unhelpful. In the light of the terms of both Loan C and the Annie Loan, the cash reserves throughout the relevant period and the likelihood of incurring break costs on swaps were the loans to have been paid down, it is unlikely that the course suggested by Mr West would have

been adopted. I also agree that there is no good reason for applying the rate of 6% for the reasons set out in Mr Mallin's submissions. In all the circumstances, therefore, it seems most fair to me that account should be taken of a sum in respect of interest on the £12.9m at an appropriate deposit rate and I accept Mr Mallin's submission that base rate plus 1% should be applied.

(iv) Reversal of £5m and removal of interest of £2.1m from Tonstate Loan account

130. There is no dispute that the Respondents failed to make the payment of £5m to TPD pursuant to the Second Memorandum. However, it is the Respondents' case that the evidence shows that there was a corresponding decrease in Tonstate's shareholder loan balance such that if the NAV of TPD is increased by £5m, the shareholder loan balance should be increased correspondingly. The difficulty arises here because the Petitioners refuse to accept the validity of the documentation concerning movements in the shareholder loan accounts and draw attention to the fact that there were no ledgers or other underlying documentation in this regard. This matter is not pleaded.

131. As to the expert evidence, Mr West's position was that he had been instructed to put these items in and that he had no personal knowledge of them. It seemed also that he was offering no expert opinion in relation to them. Mr Weaver on the other hand had been told that the Tonstate shareholder loan was reduced in the year ended March 2010 in the sum of £10m. If that is correct, he says that if £5m were now injected into TPD by Tonstate, the consequence would be that the Tonstate Shareholder loan would increase by £5m and therefore the impact on the NAV would be nil. However, if the sums due to Tonstate under their shareholder loan were reduced without any corresponding cash withdrawal, the reduction should be offset against the £5m not paid.

132. Mr Mauer's evidence in cross examination in relation to the £10m debit to the shareholder loan account was as follows:

> "Q. But in fact it is the case, isn't it, that 10 million was debited to Tonstate's account against its shareholder loan, wasn't it?
>
> A. That's my understanding, yes.
>
> Q. So in essence the 10 million was repaid, wasn't it?
>
> A. The 10 million loan, all right, the liability was assigned, yes to TPD, so it became a liability of TPD. In exchange, TPD charged Tonstate's loan account by this amount.
>
> Q. By 10 million?
>
> A. Yes, and after that, yes TPD repaid this loan by drawing a new loan out of the capex facility.

> Q. So in fact Tonstate's liability was fully discharged in respect of this 10 million, wasn't it, by a debit to its loan account?
>
> A. I mean the debit of their loan account reflects the significance of this transaction. They assigned a liability to TPD, so they were charged for it in their loan account."

The Respondents also place reliance upon the following extracts from contemporaneous documents:

(a) The quarterly cash statements sent to the Petitioners which include, for example, in the statement for the period 1 January to 31 March 2011, a reference to "*Capital repayment in Jun 09 & Dec 09*" of £10,089,000;

(b) An email from Mr Mauer to Tonstate's accountant/bookkeeper Mr Henry Benn of 18 May 2010 in which he states that:

> "Regarding item 1, I see now that Tonstate account was charged by 10 m' GBP. I assume that this entry is for the assignment of the 10m' capex loan. Additionally, Tonstate agreed to assign the 5m' Cardiff deposit to TPD. Was this deposit actually transferred to TPD?"

(c) Mr Mauer's email to Mr Benn on 2 June 2010 in which he states that:

> "In our last conversation you told me several times that the deposit was **not** transferred to TPD and that's the reason why Tonstate account was debited by 10m' (instead of 5 m' net)";

(d) Mr Mauer's email to Mr Hyman, Mr Levy and Mrs Eitan of PBC of 2 June 2010 in which he states that:

> "As you can see, now Henry is playing with us.
>
> In the conversation with me, he said several times that the deposit has not been transferred which is consistent with the fact that he charged Tonstate 10m";

and

(e) the Petitioners' disclosure of:

(i) A document entitled "*Repayment of equity capital – thousands of GBP 31.3.2011*", which includes an entry of £-10m in Tonstate's shareholder loan account in respect of "*Conversion of loan*"; and

(ii) A document entitled "*London hotels – TPD 06/06/2011*", which includes an entry of £-10m in Tonstate's shareholder loan account in respect of "*Assignment of loan*".

133. Mr Mallin also points out that the figures appear in accounts which have been audited by KPMG and he referred me to a letter from KPMG to HMRC of 3 September 2010

which sets out an analysis of loans in Tonstate and its subsidiaries, including in particular, loans from Destiny, PBC and Tonstate to the Tonstate Group. The movements in the shareholder loan accounts then appear in the audited accounts for the period to 31 March 2010. The adjusted figure for 2009 was £29.534m. If increased by 6% the figure as at 31 March 2010 would be £31.306m. However, the audited accounts show a figure of £19.895m. Mr Mallin submits that the reduction reveals the £10m and a small balance due to Tonstate, accounted for separately in Tonstate.

134. Mr Fraser submits nevertheless that the Petitioners' suspicions were aroused in relation to the £5m when it was originally asserted, pleaded and explained in witness evidence that it had been "swept up" when the Cardiff Facilities Agreement and the Cardiff Swaps were discharged in August 2015 but the Deed of Subscription and Release made no reference to it. He points out that the present position adopted by the Respondents is contrary to the "swept up" defence. He also points out that Mr Weaver accepted in cross examination that he was not asked to look at or verify the Tonstate current shareholder balance or its movements over time. Mr Fraser also took me to a cash statement of account for the period 1 July 2010 to 30 September 2010 which records a "capital repayment in June 09 and Dec 09" of £6.889m rather than the £10m figure. He says, therefore, that the figures are unreliable.

135. In my judgment, despite the numerous changes in tack by the Respondents in this regard, there is no reason to doubt the figures audited by KPMG and it would be wrong to do so. When those figures are put together with the statements which were sent quarterly and Mr Mauer's evidence, it seems to me that account should not be taken of the Petitioners' refusal to accept the figures. In the light of the evidence as a whole, in my judgment, the failure to pay the £5m should be dealt with on the basis of a £10m reduction in the Tonstate shareholder loan account.

(v) Cardiff Hotel adjustment

136. In this regard, Mr West was instructed to include in the NAV the difference between the agreed valuation of the Cardiff Hilton of £22.5m and its value at the time of the restructuring in 2013. He has therefore, included a figure of £9.5m in the NAV being the entirety of the increase in its value over the period. In cross examination, Mr West stated that he had been instructed to take that position. Mr Weaver on the other hand took the latest NAV of minus £9.225m, deducted the book value of the hotel of £12.579m and added the new hotel value of £22.5m. He arrives at a figure of £0.7m to which he added the £5.5m loan provided by TPD which was written off when the Cardiff Hilton was removed from TPD. His final total, therefore, is £6.196m.

137. In this regard, Mr Fraser submits that the Respondents did not produce the documents which would have enabled Mr West to produce the relevant balance sheet and there is no audited balance sheet for SCL. He submits that these failures must have been deliberate and that in the circumstances, it is appropriate to adopt the full increase in value of the Cardiff Hilton rather than place reliance upon the figures produced by the Respondents.

138. Mr Mallin submits that, in fact, there was a large amount of documentation relating to the financial performance of SCL which was available to both Mr West and Mr Weaver. Mr Weaver decided in his professional judgment to make use of the documentation whereas Mr West accepted in cross examination that he had not paid

much attention to the financial performance of SCL because of his instructions just to take the difference in value. He offered no professional opinion on the matter having merely carried out the arithmetic required as a result of his instructions. As a result, Mr Mallin goes as far as to submit that Mr West did not seek to assist the court and was even seeking to mislead it. Mr Mallin submits that, in any event, the underlying figures for SCL are simple. He says that the profit and loss figures comes largely in "packaged" form from Hilton and that the liabilities are essentially inter-company and bank and are known quantities. He also points out that the way in which Mr Weaver arrived at his positive figure of £0.72m is uncontroversial and accepted by Mr West. Mr Weaver then "reinstated" the £5.5 million loan provided by TPD which had been written off when the Cardiff Hilton was removed from TPD. This is a movement against the interests of Respondents. The result of this adjustment is to increase the NAV of TPD. There is no corresponding increase in SCL's liabilities because the debt was never written off in SCL's books. The result is that the NAV of TPD should be increased by £6.2 million to reflect the Cardiff Hilton reversal.

139. He also submits that to make an adjustment for the entirety of the gross increase in value of the Cardiff Hilton is to provide the Petitioners with a windfall because it allows TPD (and hence the Petitioners) to take the benefit of a profit without any of the risk that the result might have been a loss and at no cost to TPD. Mr Mallin says that there is no expert support for this approach, Mr West having acted on instructions alone. He says that the true position is that: before the deal with the Bank, SCL had a large negative impact upon the NAV of TPD, its value being about £11 million against liabilities of about £31 million; after the deal, the NAV of the Cardiff Hilton was at best zero because £13 million had been paid for an asset valued between £11 and £12 million; and therefore, from an economic point of view, TPD was indifferent as to whether it owned an asset for which it had to pay the full amount of (or somewhat more than) its economic value. In those circumstances, it is submitted that the reversal effect advanced by Mr Weaver is, if anything, significantly beneficial to the Petitioners but, in any event, should be preferred to their unrealistic and unsupported approach.

140. In the circumstances, I prefer the approach adopted by Mr Weaver. It does not seem to me that Mr West was, in fact, offering an expert opinion in this regard and was merely relaying his instructions. He did not suggest that the approach adopted by Mr Weaver was illogical in any way. Furthermore, Mr West's figure assumes that TPD should take the entirety of the profit in relation to the Cardiff Hilton over the period in question without any allowance for risk or costs. It seems to me that that does not remedy the unfair prejudice suffered but, in fact, would afford the Petitioners a windfall and penalise the Respondents which is not consistent with a remedy under section 996.

Conclusion – fair value

141. The conclusions I have reached should be applied to the framework which was agreed by Mr West and Mr Weaver once the audited accounts were made available to them. It is conceded that simple rather than compound interest should be awarded. If there are any additional issues which arise once the calculations have been carried out, they should be dealt with by way of further submissions on paper.

Terms of the Purchase Order

142. Mr Fraser reminds me that an order under section 996 is intended to compensate for the prejudice which has occurred. He submits, therefore, that the Petitioners are entitled to an immediate and clean break from the Respondents and the project itself and should not be further prejudiced by having to wait until the Metropole Hotels are sold to be paid the balance of their loan accounts and the fair value of their shares. He points out that a sale may never be completed. In this regard he referred me to *Sethi v Patel and Scitec Group Limited* [2010] EWHC 1830 (Ch) in which unfair prejudice had been conceded and one of the remaining issues was whether the obligation to purchase shares should be dependent upon the purchaser having the means to do so. At [34] Newey J referred to passages from the judgment of Lawton LJ in *Re Cumana Ltd* (supra) to which both he and I have been referred. He then stated at [36] that it was of no significance that there was no decision that Mr Patel had committed a "wrong" in circumstances in which it had been conceded that there was unfair prejudice, declined to distinguish *Re Cumana Ltd* and also declined to include an "escape clause" in the order.

143. Mr Todd on behalf of TDP and Tonstate, however, emphasised that it had been accepted in solicitors' open correspondence as late as 18 January 2017, that a sale of the Metropole Hotels would be necessary in order to facilitate the purchase of the shares and the repayment of the balances on the loan accounts. He also pointed to the order made by Henderson J (as he then was) by consent on 10 November 2015 which contains detailed directions in relation to the marketing and sale. In addition, at the hearing on 21 July 2016, counsel for the Petitioners stated that it was common ground that the proceeds of sale of the Metropole Hotels would be the source of the payment to be made to the Petitioners and the same position was acknowledged in the witness statement of 6 July 2016, sworn on behalf of the Petitioners by their solicitor in support of an application for interim protective relief. That position was acknowledged by Henderson J in his judgment of 21 July 2016 in relation to that application. He stated: "... it is, if not common ground, then I think generally accepted at any rate, that the source of the payments to be made to the petitioners will indeed be the proceeds of sale of the hotels. There is no other obvious source of money available for that purpose."

144. Mr Todd submits that such an approach is also consistent with the venture itself and that pending repayment, the shareholder loans will continue to attract 6% interest. He also drew my attention to the decision at first instance in *Re Cumana Ltd, Re A Company (No 002612 of 1984)* [1986] BCC 99 in which in the light of the existence of negotiations for sale Vinelott J, (who was not criticised on appeal) had allowed a six month period for the purchase of the shares and had stated that he would entertain an application for a further extension. Mr Todd says and Mr Mallin on behalf of Mr Matyas agrees that a similar approach should be adopted here, that the order could be made in private to avoid affecting the sale and that I should allow a period of [redacted] [redacted] for the purchase of the shares and that an interim protective order could be made over until sale of the hotels.

145. In reply Mr Fraser emphasised that there is no evidence that the Respondents cannot afford to purchase the shares unless the net proceeds of sale of the Metropole Hotels are available and submitted that if the Respondents were given [redacted] or longer to complete the purchase order, the Petitioners should be given an option to purchase the

Metropole Hotels at [redacted] within [redacted] and that otherwise they should share in any increase in value on a sale over [redacted].

Conclusion

146. In my judgment, a fair conclusion in this matter would allow Tonstate and TPD [redacted] in which to purchase the Petitioners' shares and to repay the balances on the shareholder loans and they should be given the opportunity to make an application for an extension of time if appropriate. It seems to me that such a period will give the opportunity to market the only underlying assets being the Metropole Hotels, or otherwise to arrange to buy the Petitioners out. Such an order is also consistent with the nature of and expectations as to the original project. It was always intended that the underlying assets be sold in order to realise the parties' investments and that in the meantime, 6% per annum would be payable on the shareholder loan accounts. Such an order is also consistent with the understanding of the parties until now. Not only was interim relief sought and obtained on the basis that the proceeds of sale of the Metropole Hotels would be the source of the funds to buy out the Petitioners, but it was reiterated in their solicitors' correspondence as late as January of this year.

147. I have also considered the further submissions which Mr Fraser made in reply in closing. In my judgment, despite the fact that the jurisdiction of the court under section 996 Companies Act 2006 is both wide and flexible, it would go too far and would not be fair and equitable in this case, either in effect, to grant the Petitioners an option to purchase the Metropole Hotels for [redacted] within [redacted] or to enable them to share in any increased value over [redacted]. It seems to me that despite the fact that they have sought an order for the purchase of their shares valued at an agreed date they now seek rather opportunistically potentially to profit further and beyond the ambit of the original project. Their shares are to be valued without a discount and therefore, it seems to me, that it is necessary to take care to avoid a situation in which they profit from the unfair prejudice from which they have suffered, rather than have it remedied. In my judgment, both submissions were a matter of commercial negotiation and ought to be confined to those realms.

Liability of Mr Matyas and Dr Wojakovski

148. The Petitioners contend that the Directors were "architects" of the conduct complained of and were so closely connected to and implicated in the unfairly prejudicial conduct that it would be just in the exercise of the court's discretion to grant relief against them whether jointly and severally with TPD and Tonstate or as a secondary fall back liability. Relief of this kind was considered by Sales J as he then was in *F & C Alternative Investments (Holdings) v Barthelemy (No 2)* [2011] EWHC 1731; [2012] Ch 613 at [1096]:

> "What is the relevant test of attribution of responsibility beyond the narrow class of case where an agency relationship exists? In my judgment, the test is whether the defendant in a section 994 claim is so connected to the unfairly prejudicial conduct in question that it would be just, in the context of the statutory regime contained in sections 994 to 996, to grant a remedy against that defendant in relation to that conduct. The standard of justice to be applied reflects the requirements of fair

> commercial dealing inherent in the statutory regime. This is to state the test at a high level of abstraction. In practice, everything will depend upon the facts of a particular case and the court's assessment whether what was done involved unfairness in which the relevant defendant was sufficiently implicated to warrant relief being granted against him."

He went on at [1100] to find that the partner in question, "Holdings", was "in reality a cipher for the F&C group" and concluded that he had no hesitation in making it liable under section 994: see [1099]. It was also recognised by Vos J as he then was, in *Apex Global Management v FI Call Ltd* [2013] EWHC 1652 (Ch) that as a matter of law, such relief could be granted "in an appropriate case". However, he was not concerned with the exercise of the remedy itself on that occasion. Having reviewed the authorities, he stated at [125]:

> "In my judgment, these authorities all speak with one voice. They show that sections 994-6 provide a wide and flexible remedy where the affairs of the company have been conducted in a manner that is unfairly prejudicial to the interests of some or all of its members. A section 994 petition is appropriate where, for whatever reasons, the trust and confidence of the parties to a quasi-partnership has broken down. Relief can be granted to remedy wrongs done to the company, and in such a situation the alleged wrongdoers must be made parties to the petition. Non-members of a company who are alleged to have been responsible for such conduct can be joined as respondents, and, in an appropriate case, such non-members can be made primarily or secondarily liable to buy the petitioners' shares. Artificial limitations should not be introduced to reduce the effective nature of the remedy introduced by sections 994-6."

149. Mr Fraser submits that both Mr Matyas and Dr Wojakovski were sufficiently implicated in all of the admitted unfair prejudice and that they benefitted from the Cardiff Transfer because they were the majority shareholders in the company to which the Cardiff Hilton was transferred. He also says that they were at the heart of what he describes as the Loan D diversion and concealment. He points out that it has not been possible to test Dr Wojakovski's assertion that the Loan D arrangement was entered into in the best interests of TPD but he points to the fact that they did benefit from the arrangement as owners of Tonstate.

150. He also submits that the fact that it is conceded that the First, Second and Supplemental Memoranda gave rise to legitimate expectations but fall short of accepting that these had legal consequences is unattractive in the light of the express provision in the Second Memorandum that the provisions of the First would remain valid. He also points out that there is no evidence before the court to support the contention that the Petitioners have no financial resources other than the proceeds of the Metropole Hotels from which to satisfy any order.

151. Mr Mallin on behalf of Mr Matyas on the other hand submits that any shortfall in the amount available from the sale of the Metropole Hotels will have arisen from a fall in the market rather than any culpable conduct of either Mr Matyas or Dr Wojakovski. He says therefore, that they should not be required to indemnify the Petitioners against

the market and that there was no legitimate expectation that Mr Matyas would underwrite their investment. He points out that it has already been conceded that their shares should be purchased without a discount to reflect their minority holding, even though he submits that their conduct has not affected the value of the shares and therefore, they will recover more than they would have done in the real world. In this regard, he referred me to a passage in the judgment of Hart J in *Re Regional Airports Ltd* [1999] 2 BCLC 30 at 53, where the learned judge was considering the appropriate valuation for shares to be purchased as a remedy for unfair prejudice. He noted:

> "… Fairness requires me to consider not only the circumstances which have led me to decide that such a sale should be ordered, but also what the position of the petitioners and respondents would respectively have been had those circumstances never obtained. As to that it is important to appreciate that the informal understanding which existed in this case at the outset never amounted to a cast iron commitment on the part of anyone actually to achieve a realisation of the value of the investment at the end of the five year period or at all. Still less was there commitment by any one individual that, if such realisation was not achieved, he would dig into his own private pocket to compensate a fellow shareholder. There is a real sense in which the petitioners have gained a valuable right as against the respondents which they would not have enjoyed but for the maladroit and ill-motivated management of the company's affairs in December 1997. The wrong thus done to them turns out to confer an uncovenanted advantage on them. To give them the benefit not only of that right but also of the application of a set of optimistic assumptions about the future would be to run the risk of over-compensating them and unjustly penalising the respondents with whom the risks will remain."

152. Mr Mallin points out that in this case, the Petitioners have wanted to withdraw from the project for a considerable time and are not being forced out of the business in the manner which is more usual in cases of this kind. Furthermore, he submits that the conduct which has been conceded has not caused any net financial loss to TPD and thereby, to the value of the Petitioners' shares and any prejudice caused by the 2014 Dilution has already been remedied.

153. Mr Mallin also submits that Mr Fraser is wrong to contend that "connectedness" is the main factor when determining whether there should be personal liability on the part of Mr Matyas or Dr Wojakovski for that matter. He points out that in the passage relied upon from the *F&C Alternative Investments* case, Sales J was addressing another issue, namely responsibility for those who are not agents. In any event, Mr Mallin submits that connectedness is only the first hurdle or the entry requirement before considering the relevant factors when determining the appropriate remedy for the unfair prejudice. He urges me to look at the matter in the round, to avoid overcompensating the Petitioners and to take account of whether there is any causal connection in this case between any shortfall in the monies available from the sale of the Metropole Hotels and the conduct of Mr Matyas.

154. He reminds me that this is not a case in which deceit or dishonesty has been pleaded and that the Petitioners seek to pile inference upon inference. He notes that in their written closing, the Petitioners seek to make a case against Mr Matyas, based upon the

fact that he shared an office with Dr Wojakovski, was his father in law and that they were co-owners and directors of the companies in question and ask the court to infer numerous matters including that prior to 1 September 2006, it was known both to Mr Matyas and Dr Wojakovski that the Bank intended to increase its offer of funding to £410m. From this it is suggested that it is also proper to infer that Mr Matyas was aware at the meeting with Dr Ovadia and others on 30 August 2006 that the Bank was actually offering £410m and that he withheld that information from Dr Ovadia. Mr Mallin says not only is the approach impermissible on the basis of the pleadings, it is also tenuous in the extreme. He also points out that the same is true in relation to the "special reason" memorandum which is described by Mr Fraser as revealing all. Mr Mallin says it merely states what in fact happened and reveals nothing.

155. Miss Newman on the other hand says that the "special reason" memo together with his involvement in hedging shows that Mr Matyas was aware of the finance structure and that therefore, there is no reason to distinguish between them, or to single out Dr Wojakovski, particularly as it is not disputed that Mrs Robertson was also heavily involved in the decision making in relation to Cardiff. She points out that the only allegation of breach of fiduciary duty relates to the circumstances surrounding Loan D and that otherwise there is no scope for findings about the roles of the individual directors in the conceded instances of unfair prejudice. She says that the facilities were available because of the good relationship between the Tonstate Group and the Bank and that all the relevant decisions including those in relation to Cardiff were taken by the board as a whole.

156. Miss Newman also points out that in relation to personal liability, the Petitioners seek to focus on what would have happened had the concessions not been made. The various concessions in relation to unfair prejudice lead to an unwinding of various transactions and the Petitioners cannot proceed as if that were not the case and have to accept that there is no remaining financial loss. She submits that: the court cannot proceed as if the concessions had not been made and it is for the Petitioners to show why the unravelling is not good enough; the Petitioners chose to proceed with the trial on the basis of the concessions, part of which was an express statement that Dr Wojakovski and Mr Matyas had acted in good faith and in what they believed to be the best interests of the company.

157. She also pointed to the authorities in relation to personal liability which she submits are difficult to analyse and at the end of the day are fact sensitive, the remedy is very flexible and the court must do what is just to put right the wrong done. She submits that unlike in the *F&C Alternative Investments* case, it cannot be said that Tonstate and TPD were mere ciphers for the Tonstate Group and Dr Wojakovski and Mr Matyas or that practical benefits had flowed to Dr Wojakovski. She says, that in this case, the Petitioners should receive financial compensation from the sale of the Metropole Hotels which was what was always contemplated. The Petitioners should not be insulated from any shortfall caused by a fall in the market. It was always anticipated that their capital was at risk and to provide such an insulation would go beyond what is necessary to remedy the injustice caused by the unfair prejudice.

Conclusion

158. It seems to me that an analysis of the cases in relation personal liability in relation to unfair prejudice leads to the conclusion that they are highly fact sensitive. In my

judgment, in order to contemplate such an order it is necessary, as Sales J put it, that the defendant in question is so connected to the unfair prejudice in question that it would be just in the context of the statutory regime to grant a remedy against him. I agree with Mr Mallin that merely being connected with the acts complained of cannot be enough. If that were the case, personal liability would be imposed in most cases because a company acts through its board of directors. As a matter of logic, more is necessary. In some circumstances, no doubt, relevant factors would be whether the company in question had been a mere cipher for the individual and whether that individual had benefitted, for example, from the diversion of the company's business or had otherwise benefitted from the unfairly prejudicial conduct.

159. In this case, I have not found Dr Wojakovski and Mr Matyas to have been in breach of fiduciary duty in relation to Loan D. I found that the Tonstate Group was entitled to deal with Loan D in the way it did and that no unfair prejudice arose. Therefore, there is no conduct in that regard which would weigh in the balance in relation to personal liability. It is not necessary therefore, to determine whether they were both equally aware of the way in which the finance was structured. If it had been necessary, I would have decided that in the light of the "special reason" memo of 18 October 2006, it is more likely than not that both Dr Wojakovski and Mr Matyas were aware of the structure and were involved in it.

160. In any event, in the light of my findings, it is only their involvement in the Cardiff Transfer, the 2014 Dilution and the 2014 Refinancing which can be weighed in the balance. In this regard, as Miss Newman points out, although unfair prejudice was conceded, it was expressly maintained that both gentlemen had acted in good faith. I am not in a position to decide otherwise. As I have already mentioned, I do not consider that involvement in the decision as a member of the Board of directors is a sufficient reason for personal liability without more. In relation to the Cardiff Transfer I take account of the fact that the Cardiff Hilton itself was transferred to a company in the ownership of the gentlemen.

161. Overall, in my judgment, in the circumstances of this case, there are insufficient factors to render it just to impose personal liability whether primary or secondary upon Dr Wojakovski and Mr Matyas. I also take into account in that regard, the fact that the project itself was always a speculative one and that it was intended that the Hotels would be sold. It seems to me that it would over compensate the Petitioners if they were insulated from the effects of the market by requiring Mr Matyas and/or Dr Wojakovski, in effect, to underwrite their investment. They are already receiving the fair value of their shares without a discount.

162. It will be necessary to consider the detailed terms of the order which flow from my decision with some precision. I am happy to consider any further issues which arise in that regard, either on paper or at a consequential hearing.

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