Neutral Citation Number: [2019] EWHC 1507 (Ch)

Case No: HC 2017 000808 and 000904

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13/06/2019

Before :

HIS HONOUR JUDGE HACON
(Sitting as a Deputy High Court Judge)

- -

Between :

(1) JOHN ANTHONY POPELY **(2) ANDREW POPELY**	**Claimants**
- and -	
(1) RONALD ANTHONY POPELY **(2) COSMOS TRUST LIMITED** **(3) CASTERBRIDGE PROPERTIES LIMITED**	**Defendants**

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- -

Timothy Evans (instructed by **Drukker Solicitors**) for the **Claimants**
Christopher Boardman (instructed by **Charles Russell Speechlys LLP**) for the **Defendants**

Hearing dates: 22-26 October 2018

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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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HIS HONOUR JUDGE HACON

Judge Hacon :

Introduction

1. These actions are the product of a long and complex dispute between John Henry Popely ('**John Snr**') and his younger brother Ronald Albert Popely ('**Ronald**'). It has been pursued for about 20 years, involving actions in this jurisdiction, in St Vincent and the Grenadines ('**St Vincent**'), France, Ireland and in Gibraltar.

2. The present joined claims began as an action brought by John Snr in August 2001. He alleged that Ronald had defrauded him of assets arising out of a business offering time shares in holiday properties in the Turkish Republic of Northern Cyprus ('**Northern Cyprus**') and at Hever in Kent.

3. The Third Defendant ('**Casterbridge**') is a company registered initially in the British Virgin Islands, later in St Vincent and currently in Nevis. Casterbridge was set up to play a role in the marketing of the timeshare business. The shares in Casterbridge were owned 70% by Ronald and 30% by John Snr. Each of the brothers subsequently assigned their interest to trusts set up for the benefit of their respective families, in the case of Ronald the **Mars Trust** and in the case of John Snr the **Blue Ridge Trust**. The trustee for both trusts is St Vincent Trust Service Ltd ('**SVTS**').

4. After the first English claim was started in 2001, Ronald challenged the validity of service, so John Snr started a second action in 2003. Ronald then challenged the jurisdiction of the English courts. On 11 November 2003 Evans-Lombe J ruled that there had been valid service and that the English courts had jurisdiction in both actions.

5. In January 2005 John Snr's son and the Second Defendant in the present proceedings ('**Andrew**') brought proceedings in St Vincent on behalf of the beneficiaries under the Blue Ridge Trust

6. On 25 September 2005 a bankruptcy order was made against John Snr. His causes of action became vested in his trustee for bankruptcy which sold the causes of action to SVTS. SVTS applied to the court to discontinue the proceedings. In response, John Snr's family, the beneficiaries under the Blue Ridge Trust sought to be substituted as claimant in order to pursue the claims on behalf of Casterbridge.

7. On 6 March 2007 by the Order of Master Moncaster six members of John Snr's family were substituted for John Snr as claimants in the 2001 and 2003 proceedings so far as they concerned the timeshare business in North Cyprus; SVTS and Casterbridge were joined as defendants. The Master also stayed the claims pending the outcome of the proceedings in St Vincent. Towards the end of his judgment Master Moncaster said:

> "Therefore, in this unhappy dispute, in this unhappy family, very little progress I am afraid is being made because although, as I said, I think twice already, that what seems to me to be required is for the substantive issues to be decided between the two brothers or their respective trusts and companies."

8. Madame Justice Thom gave judgment in the St Vincent proceedings in 2012. There was an appeal which was compromised on 2 February 2015 on terms which included

the substitution of Cosmos Trust Ltd ('**Cosmos**'), the Second Defendant in the present proceedings, for SVTS as trustee for Blue Ridge Trust.

9. On 16 August 2016 the present claimants, i.e. John Snr's sons **John Jnr** and his younger brother Andrew, applied to continue the 2001 and 2003 actions against Ronald in their names. They claimed a cause of action derived from John Snr via Cosmos. Cosmos was substituted for SVTS as a defendant; Casterbridge remained a defendant because the assets of Casterbridge were at stake. Permission to do all of this was given by an Order of Deputy Master Lloyd dated 24 April 2017. 2017 claim numbers were allotted to the consolidated action.

10. In short, this is a double derivative action. The claimants say that Ronald transferred Casterbridge's assets to the benefit of himself or his family and thereby, both fraudulently and in breach of his fiduciary duty to Casterbridge, deprived the beneficiaries under the Blue Ridge Trust of their entitlement to 30% of those assets.

Background

11. John Snr and Ronald worked together in a transport business in the 1950s. Ronald developed other enterprises and in 1990, for tax reasons, he went to live in Cyprus. He returned to the UK in 1992.

12. Between 1992 and 1994 Ronald developed a golf club at Hever in Kent. He set up Hever Golf Club plc. Membership of the golf club was secured by individuals buying shares in the company. In 1994 Ronald began the development of a hotel nearby, the Hever Hotel, using another company, Hever Golf & Country Club Ltd as the vehicle. This company was later renamed Monoman Ltd ('**Monoman**'). Monoman acquired Hever Hotel and the surrounding estate, selling apartments in the hotel together with membership of the golf club.

The Longbeach Resort

13. During his time in Cyprus Ronald came across a property in Famagusta, Northern Cyprus, consisting of a house and six part-finished bungalows. The land was leased by Mr Mehmet Ozbada from the Northern Cyprus government.

14. On 7 April 1994 a written agreement ('**the Ozbada Agreement**') was entered into by Mr Ozbada, Ronald, and a Northern Cypriot company indirectly owned by Ronald, Onel Ltd ('**Onel**'). As part of the Ozbada Agreement a new Northern Cypriot company was created, Long Beach Club Limited ('**Longbeach Cyprus**'), which would own a new resort to be developed on the land ('**the Longbeach Resort**').

15. Otherwise the material terms of the Ozbada Agreement were (1) the shareholding of Longbeach Cyprus would be 75% to Onel and 25% to Mr Ozbada, (2) Mr Ozbada would receive 17.5% of Onel's holding company, Mockford Investments Ltd which was 100% owned by Ronald and (3) Mr Ozbada's lease of the property occupied by Long Beach Resort would be assigned to Longbeach Cyprus.

16. Plans were made to develop the property into a 42 bungalow resort with a bar/restaurant area and a swimming pool. Work was carried out between 1995 and 1997.

17. In 1997 Ronald instructed Hutchinson & Co Trust Company ('**Hutchinson**') to set up a time-share scheme for the Longbeach Resort. Hutchinson advised that marketing such a scheme would be difficult under Northern Cypriot law but that a Gibraltar company could be set up through which this could be done. In August 1997 Ronald instructed an incorporation agent in Gibraltar, Millenium Services Ltd ('**Millenium**') to set up Long Beach Country Club Ltd ('**Longbeach Gibraltar**'). The shares in in Longbeach Gibraltar were held by Millenium on trust for Ronald as beneficial owner.

18. Following various rights and share issues between 1995 and 1997, 98.875% of the shares in Longbeach Cyprus came to be held by HTC Nominees, a subsidiary of Hutchinson ('**HTC**').

The Agreement

19. The claimants say that in the Autumn of 1997 Ronald and John Snr orally agreed that the assets of the Longbeach and Hever Resorts would be split between Ronald and John Snr, two thirds and one third respectively, or alternatively that those proportions of the assets would be held by their respective families. Future assets would be split the same way.

20. Ronald accepts that there was an agreement but denies that the terms were as the claimants allege. He asserts that it went no further than an agreement to set up an offshore company which would deal in timeshare weeks at the two resorts. The shares of the company to be split, 70% being held by a trust for the benefit of Ronald's family, 30% to be held by a trust for the benefit of John Snr's family.

Casterbridge

21. In 1997 Casterbridge was set up as an offshore company which was to buy timeshare weeks at the Hever and Longbeach Resorts and sell them to another company, Hever Worldwide Properties plc ('**HWWP**'), which would market the timeshare weeks to the public.

22. Casterbridge was registered in the British Virgin Islands and bought off the shelf on the instructions of Hutchinson in November 1997. The shares in Casterbridge were held by local registration agents, Trident Trust Company (BVI) Ltd ('**Trident**') as nominee for Ronald and John Snr in the proportions 70% and 30% respectively.

23. There was a written agreement dated 11 November 1997 between Longbeach Cyprus and Longbeach Gibraltar. The first recital recorded that Longbeach Cyprus was the owner of the Longbeach Resort. It was agreed that rights of occupation of the Longbeach Resort ('**Occupation Rights**') would be sold by Longbeach Cyprus to Longbeach Gibraltar at a price to be agreed between them from time to time.

24. An invoice dated 1 December 1997 indicates that Longbeach Cyprus sold to Longbeach Gibraltar 2005 weeks of occupation of apartments at the Longbeach Resort for £3,676,480. Another invoice of the same dates states that for the same amount of money, Longbeach Gibraltar sold the 2005 weeks to Casterbridge together with '**Vendor Rights**' at the Longbeach Resort and 150 weeks at other resorts. Vendor Rights were defined in paragraph 15(b)(ii) of the Amended Consolidated Particulars of Claim to be:

> "the rights to manage the resort including by way of commercial exploitation of its restaurants and bars, to be paid all the maintenance fees payable in respect of sold occupation rights, and to re-sell any recovered occupation rights."

25. The distinction between Occupation Rights and Vendor Rights was sometimes blurred. It was not made clear how Longbeach Gibraltar acquired ownership of the Vendor Rights sold on 1 December 1997. One possibility is that Occupation Rights sold under the agreement of 11 November 1997 by implication included Vendor Rights for the relevant weeks. In the end it did not matter so far as these proceedings are concerned.

26. Also on 1 December 1997 Casterbridge made its first sale to HWWP of occupation weeks at the Longbeach Resort and at Hever for a total of £988,000.

Migration of Casterbridge and establishment of BRT and Mars Trust

27. On 5 March 1998 a company registered in St Vincent, Corporate Directors Limited ('**Corporate Directors**'), became the sole director of Casterbridge. This was arranged, at the instigation of Ronald, by Bryan Jeeves ('**Mr Jeeves**'), the President of SVTS. Although SVTS was a St Vincent company, it was run by Mr Jeeves from Vaduz, Liechtenstein.

28. On 19 March 1998 Blue Ridge Trust and Mars Trust were formed in St Vincent and registered in St Vincent shortly afterwards. The trustee in both cases was SVTS.

29. On 24 March 1998, 70 of the 100 shares in Casterbridge were assigned to Mars Trust and the other 30 shares to Blue Ridge Trust. On 3 April 1998 the registration of Casterbridge was moved from the British Virgin Islands to St Vincent.

30. By undated documents stated to take effect from 30 July 1998, signed on behalf of Casterbridge and Longbeach Gibraltar, Casterbridge was stated to succeed Longbeach Gibraltar with regard to the rights and obligations in the sale of Occupation Rights in the Longbeach Resort. No express mention was made of Vendor Rights.

31. On 31 July 1998 Hutchinson sent a fax to Ronald stating that in accordance with his instructions the shares in Longbeach Gibraltar had been assigned to Casterbridge. Attached was a minute dated 28 November 1997 of a resolution of the sole director of Longbeach Gibraltar, Millenium, that the shares of Longbeach Gibraltar should be assigned to Casterbridge. Among the papers in court there was also a share certificate dated 28 November 1997 certifying Casterbridge to be the owner of all 100 shares in Longbeach Gibraltar. The authenticity of the share certificate and the date of the transfer of the shares was in dispute. It took place some time between 28 November 1997 and 31 July 1998.

32. On 2 October 1998 a trustee resolution was drawn up. The parties involved were Longbeach Gibraltar and Mars Trust. SVTS signed as trustee of Mars Trust. Ronald is stated to have signed both in his capacity as shareholder of Longbeach Gibraltar and also as having power of attorney for Longbeach Gibraltar. The first was not true: by this date the shares in Longbeach Gibraltar were owned by Casterbridge. In any event, the resolution stated that all funds received by Longbeach Gibraltar for the sale of occupation weeks at the Longbeach Resort were to be accepted as trust funds for Mars Trust, with effect from 30 July 1998.

33. Oddly, on the same day, 2 October 1998, a fax was sent on behalf of Casterbridge to the incorporation agents in Gibraltar, Millenium, requesting Millenium to 'cancel' Longbeach Gibraltar with immediate effect.

34. The effect of winding up Longbeach Gibraltar would be to short-circuit the sequence of sales of Occupation Rights (and possibly Vendor Rights) and thus the flow of funds in the opposite direction. Under the proposed new arrangement, the rights would be sold by Longbeach Cyprus directly to Casterbridge (rather than via Longbeach Gibraltar) and by Casterbridge to HWWP. HWWP would continue to market the rights to the public.

Transfer of Casterbridge's rights to Pono

35. However, by March 1999 the sale of weeks at the Longbeach Resort was taking a different path. Two invoices dated 18 March 1999 record sales of weeks at Hever and the Long Beach Resort by Casterbridge to Pono Finance Ltd ('**Pono**'). This was another St Vincent company set up by Mr Jeeves. It was beneficially owned by Ronald. The total sum invoiced to Pono was either £2,414,200 or $2,414,200. There was a dispute about the currency intended.

36. By an undated document said to take effect from 12 April 1999, signed on behalf of Casterbridge and Pono, Pono was stated to succeed Casterbridge as 'vendor' of the Longbeach Resort. All rights and obligations in Resort Scheme Documentation were transferred from Casterbridge to Pono.

Winding Up Petitions

37. The UK Department of Trade and Industry ('**DTI**') had started an inquiry into the activities of HWWP and related companies in July 1998. The inquiry continued through 1999 into 2000. In August 2000 the DTI took action to stop the timeshare operation at Hever and the Longbeach Resort. It presented winding up petitions against HWWP and Casterbridge.

Attempts to liquidate Casterbridge

38. On 2 October 2000 there was a meeting of the shareholders of Casterbridge at SVTS's offices in Vaduz. SVTS represented Mars Trust and Alex Jeeves represented Blue Ridge Trust. The minutes stated that Casterbridge had a net surplus of assets due to the shareholders of £548,097.69. They also stated that payment had been made to Ayton Ltd ('**Ayton**') in the sum of £279,000. Ayton was a company set up by John Snr. £238,997.69 had been paid to Mars Trust. The minutes state that the trustees agreed to ask the settlors and beneficiaries of both trusts as to how the funds be adjusted. The minutes record the shareholders' instructions to liquidate the company.

39. However, Casterbridge was not liquidated.

Transfer of rights from Pono to RMI

40. By a document dated 6 October 2000, with effect from that date RMI (Gibraltar) Ltd ('**RMI**') succeeded Pono as 'vendor' at the Longbeach Resort. All rights and obligations in the Resort Scheme Documentation were transferred to RMI.

Transfer of rights from RMI to Mydex and Holidayowner.com

41. By a written agreement dated 15 June 2001 unsold weeks at the Longbeach Resort were sold by RMI to Mydex LLC, a Nevada company, and the Vendor Rights were sold to holidayowner.com, a St Vincent company.

The witnesses

42. On behalf of the claimants I heard evidence from John Snr and from Mark Agombar who is a supplier of litigation software and who had advised both John Snr and Ronald since 1998 and knew something of their business affairs. On behalf of the defendants evidence was given by Ronald, Peter Hutchinson who is a chartered accountant and who advised Ronald, Stephen Dickson who was business partner of John Snr's from 1991 to 1995 and finally from Trevor Slack, an accountant who gave expert evidence regarding financial transactions relevant to the dispute.

43. Mr Evans submitted that with the notable exception of Mr Hutchinson, the quality of evidence from all the witnesses was poor. By implication, Mr Evans conceded that John Snr was not a satisfactory witness. He was right to do so. John Snr has given evidence over the years in the various actions related to this one and he has not been consistent in his account of the facts. Some of the inconsistencies were both relevant and striking.

44. Ronald was sometime inconsistent with the documentary evidence, though on the whole he appeared to be more reliable than his brother. However, it was my impression that Ronald wished to recollect and interpret the facts in a way that would not concede an inch to the claimants.

45. Mr Agombar's main priority was to commit himself as little as possible. Some of his answers were shown to be unreliable. Mr Dickson's evidence was not central to the main issues. Mr Hutchinson and Mr Slack were good witnesses.

46. Save where the facts were agreed, in this judgment I have relied only on the documentary evidence and to some limited extent on the expert evidence of Mr Slack.

The claims

47. Mr Boardman divided the pleaded claims into three, a division which was adopted at trial. Mr Boardman complained, with reason, that during the trial the claims remained in a state of evolution. I will say something about the ways in which Mr Evans developed his case, but I must decide whether the pleaded claims have been proved. Any other course would be unfair to the defendants who necessarily prepared their evidence and arguments to meet that pleaded case.

48. All three pleaded claims had two features in common. First, that at all material times Ronald was a *de facto* director of Casterbridge which gave rise to a fiduciary duty to the company equivalent to that of a *de jure* director. Secondly, that the acts complained of were done in fraudulent breach of Ronald's fiduciary duty.

49. I will consider below both whether the acts complained of were done by Ronald in the capacity of *de jure* director of Casterbridge and whether they were done fraudulently. Before doing so, it is necessary to bring some precision to what the alleged acts were.

The cash claim

50. The cash claim was pleaded as follows:

> "*24. During the course of 1998 and 1999, the 1st Defendant fraudulently and in breach of his fiduciary duty to Casterbridge took for the benefit of Mars Trust or himself, or some other entity or entities controlled by him, all the available cash in Casterbridge, amounting to not less than £4,194,397. Of that sum, the 1st Defendant caused £3,676,480 to be paid by Casterbridge to the credit of Mars Trust in the pretence that (1) Casterbridge had become indebted to Long Beach Gibraltar in that amount on 1 December 1997 (2) Long Beach Gibraltar was wholly owned by the 1st Defendant, rather [than] Casterbridge (3) the 1st Defendant was entitled to assign and had assigned that debt to Mars Trust (4) the diversion by the 1st Defendant of £3,676,480 of Casterbridge's money to the credit of Mars Trust was a proper application of that money, by way of discharge of its supposed debt to Long Beach Gibraltar. In addition the 1st Defendant:*
>
> - *caused a further £238,997 of Casterbridge's money to be diverted to the credit of Mars Trust*
>
> - *used a further £279,000 of Casterbridge's money to pay a private debt of his owed to [John Snr].*"

51. In brief, the acts alleged were that Ronald had caused Casterbridge to pay out three sums, totalling at least £4,194,397. The three sums were:

    (i) £3,676,480 paid to the credit of Mars Trust;

    (ii) £238,997 'diverted' to the credit of Mars Trust; and

    (iii) £279,000 used to pay off a private debt owed by Ronald to John Snr (thus effectively being a payment by Casterbridge to Ronald).

<u>The first head of the cash claim</u>

52. The sum of £3,676,480 in the first head of the cash claim came from the invoice dated 1 December 1997 raised by Longbeach Gibraltar to Casterbridge. The invoice stated:

> "For: 2005 Weeks at Long Beach as fully described
>
> 100 Weeks at Passage House UK as fully described
>
> 25 Weeks at Vera Beach Spain as fully described
>
> 25 Weeks at Peablo Canerio, Spain as fully described
>
> To include the assignment of the Vendor rights at Long Beach TRNC

For the sum of £3,676,480"

53. Below the figure of £3,676,480 is written in manuscript "4200/Mars Trust Loan Account".

54. Casterbridge was set up to be part of the marketing operation for weeks at the Longbeach Resort, among other places. Casterbridge did not own those weeks, they had to be bought from Longbeach Gibraltar. The acquisition of 2005 weeks at the Longbeach Resort, weeks elsewhere (and apparently also Vendor Rights) created a debt of £3,676,480 owed to Longbeach Gibraltar.

55. In his expert's report Mr Slack stated that in his opinion the sum of £3,676,480 paid by Casterbridge for the occupation rights was paid at fair value. Mr Slack maintained this in cross-examination, as clarified in re-examination. I accept that evidence.

56. Mr Evans first argued that although £3,676,480 was properly transferred to Longbeach Gibraltar, in effect the sum remained with Casterbridge because Longbeach Gibraltar was wholly owned by Casterbridge. He continued: Longbeach Gibraltar owed nothing to Longbeach Cyprus for the transfer of occupation rights from Longbeach Cyprus to Longbeach Gibraltar because the assets should have been Longbeach Gibraltar's in the first place.

57. There were problems with this argument. One was whether by 1 December 1997 Casterbridge owned Longbeach Gibraltar (see above). I will assume in the claimants' favour that it did and that the share certificate dated 28 November 1997 evidencing Casterbridge's ownership of all 100 shares in Longbeach Gibraltar is genuine.

58. On that assumption, on 1 December 2017 £3,676,480 was transferred by Casterbridge to a company which it wholly owned. However, the sum was to pay for rights. Longbeach Gibraltar had to have acquired those rights from Longbeach Cyprus and to have paid for them pursuant to the agreement of 11 November 2017 and the other invoice of 1 December 2017 (see above). In effect, rights and the same amount of money passed, in opposite directions, through both Casterbridge and Longbeach Gibraltar. The money did not become an asset of Longbeach Gibraltar and thus an asset indirectly owned by Casterbridge.

59. Moreover, on any view Mr Evans' argument did not explain how the £3,676,480 was said to have been paid by Casterbridge to Mars Trust.

60. In closing Mr Evans amended his argument regarding the first head of the cash claim. He said part of the £3,676,480 wrongly paid by Casterbridge to Mars Trust came about in March 1999. Ronald's evidence was that because of the DTI investigation into HWWP and Casterbridge, he agreed with Mr Jeeves that unsold weeks at Hever and Longbeach Resort should be sold. There was an invoice dated 18 March 1999 raised by Casterbridge to Pono for the sale of 210 weeks at Hever and 1,370 weeks at Longbeach Resort. The total sum invoiced was about either $2.4m (then equivalent to about £1.5m) or £2.4m. It was common ground that dollar signs had been added in manuscript but in dispute as to whether this had been wrongly done. Mr Evans said it did not matter, so I will assume the sum invoiced was the equivalent of about £1.5m.

61. Mr Evans argued that Ronald had caused £1.5m to be transferred from Casterbridge to Pono and then from Pono to Mars Trust. This was therefore the main constituent of the first head of the cash claim.

62. There were difficulties with this argument as well. First, it was not pleaded and although the subject of some evidence was not part of the case which the defendants came to court to meet. Secondly, there was no evidence that £1.5m, or whatever the correct sum was, had been paid by Casterbridge to Pono. Mr Evans met this by saying that the sum had been paid directly by Pono to Mars Trust. But I was shown no evidence of that either.

63. Later during his closing argument Mr Evans abandoned the figure of £3,676,480 altogether. I was shown a ledger of payments in and out of Casterbridge's bank account. Mr Evans drew my attention to a payment of £574,000 by Casterbridge to Mars Trust on 30 June 1998 and another payment of £960,000 on 3 August 1998. There were payments of sums in the opposite direction. Mr Evans also showed me two ledgers prepared by Mr Slack. These were for Casterbridge in relation to an account for Mars Trust for 1998 and for 1999. Mr Evans relied on these as evidence of further payments by Casterbridge to Mars Trust.

64. Mr Evans' final position was that the first head of the claimants' cash claim amounted to the payments by Casterbridge to Mars Trust minus the payments made in the opposite direction, whatever that balance came to.

65. The most obvious problem with this submission was that it was not clear that the balance was in Casterbridge's favour. Mr Slack in his report suggested that Casterbridge retained a liability to Mars of about £450,000. He was not challenged on that figure.

66. I am not sure why there should have been a steady exchange of funds between Casterbridge and Mars Trust. There was no commercial relationship between the two. Ronald was asked briefly in cross-examination about two of the payments. He said that they were to pay down loans, but this was taken no further.

67. As I have said, the claimants did not plead their cash claim based on the sums shown in the ledgers. Consequently, the reason for the payments back and forth was not explored in the witness statements and Mr Slack was not in a position to give reasons for any of the payments. They were only touched on in cross-examination. The very considerable evidence in relation to the first head of the cash claim was directed to whether Casterbridge justifiably owed £3,676,480 to Gibraltar, whether that sum was paid to Mars Trust and if so, whether it was wrongly paid. By the time of Mr Evans' closing speech that all fell away.

68. Casterbridge undoubtedly paid sums of money to Mars Trust but there was only sketchy evidence as to why this was done. Payments flowed in both directions and it was not established that the sums paid by Casterbridge exceeded the debts owed by Casterbridge to Mars. I am not satisfied on the evidence I was shown that any sum was improperly paid by Casterbridge to Mars under the first head of the cash claim, as finally advanced.

<u>The second head of the cash claim</u>

69. Mr Evans' closing argument under the second head of the cash claim, the payment by Casterbridge of £238,997 to Mars Trust, became wrapped up in the final argument on the first head of the cash claim, i.e. the balance of payments as between Casterbridge and Mars Trust taken from the ledgers and Mr Slack's report. I reject this head of the claim for the reasons I have given.

The third head of the cash claim

70. The Casterbridge payment ledgers showed that a total of £279,000 was paid to Ayton in three payments: £211,000, £28,000 and £40,000 on 25 May, 3 August and 2 December 1998 respectively. The last payment of £40,000 is shown not to have come from Casterbridge but from Mars Trust and therefore falls away. Like the second head of the cash claim, the figure of £279,000 corresponds with the sums identified in the minutes of the shareholders of Casterbridge on 2 October 2000 (see above).

71. Over the years John Snr has given evidence about the payment of £279,000 by Casterbridge to Ayton. He has not been at all consistent. I will give one example. John Snr filed a witness statement dated 8 June 2003 in one of the earlier related proceedings in this jurisdiction, *John Henry Popely v Ayton Limited*, Claim No. HC 02 C 03375. In his statement John Snr explained that Ayton was a company set up at his instigation and originally controlled by him. The sole shareholder was Corporate Directors. At paragraph 23 John Snr said this:

> "The main source of funds into the bank account of Ayton Ltd is the sum of £239,000 from Casterbridge Ltd, and £40,000 from Mars Trust. Casterbridge Ltd is a company owned by the Mars Trust (a trust set up for my brother Ron Popely) and the Blue Ridge Trust. I had disposed of hotel rights to Casterbridge Ltd, and the £239,000 I received was payment for those rights. The £40,000 received from Mars Trust was a payment made by the Mars Trust on behalf of Casterbridge, as payment to me by Casterbridge for those hotel rights."

72. John Snr was asked in cross-examination about his earlier evidence, which indicated nothing improper in the payments or that they had anything to do with satisfying a private debt of Ronald's. John Snr said that when he made the earlier statement he was on medication and was confused into thinking that he had owned hotel rights.

73. I am unable to accept the reliability of any of the claimants' evidence in respect of the payment of £279,000 and I do not accept that this sum was improperly paid to meet a private debt of Ronald's.

Other matters to be established

74. Even if I had accepted that payments were made by Casterbridge to Mars Trust as alleged in the three heads of the cash claim, for reasons other than sound commercial reasons, the claimants still had to prove (a) that Ronald caused the payments to be made, (b) that he owed a fiduciary duty to Casterbridge as a *de facto* director, (c) that he caused the payments to be made in breach of his fiduciary duty and (d) that he did so fraudulently.

Whether the payments were caused by Ronald

75. Corporate Directors was the only director of Casterbridge. In effect this was in the person of Mr Jeeves. Mr Evans accepted that Corporate Directors, by Mr Jeeves, signed the relevant documents on behalf of Casterbridge. Mr Evans argued that this was always done at the instigation of Ronald. He relied in particular on notes made by Mr Jeeves of a meeting held at his office in Vaduz on 16 March 1998. Also attending were Ronald and Michael Harris, a solicitor and friend of John Snr. In cross-examination Ronald challenged the authenticity of these notes but this was no more than an assertion. I will assume that they are genuine. Mr Evans argued that they show that Mr Jeeves was being given instructions by Ronald and was intending to act on them.

76. They are consistent with that interpretation. But the matters noted for action, such as they were, were not necessarily instructions dictated by Ronald. More importantly, these notes do not refer to proposed payments to Mars Trust.

77. I must reach a view on the causation of payments by Casterbridge to Mars Trust. The totality of the evidence suggests that when any act was carried out by a company over which Ronald had control or influence, generally Ronald caused that act to happen. The evidence specifically regarding the payments is lacking. But on the balance of probabilities I find that where payments were made by Casterbridge to Mars Trust, they were caused by Ronald.

Whether Ronald was a *de facto* director of Casterbridge

The law

78. The modern concept of a *de facto* director grew out of a 19th century principle that a person whose appointment as a director was defective, but who acted as if properly appointed, could not rely on the invalidity of his appointment to escape his responsibilities as director (see *Carlyle Capital Corporation Ltd v Conway* Royal Court of Guernsey, Judgment 38/2017 of HH Hazel Marshall QC, Lieutenant Bailiff, unrep., at [717]). Since the 1980s a person may be a *de facto* director even absent an attempt to appoint him as a director *de jure*.

79. The law on *de facto* directors was considered by the Supreme Court in *Revenue and Customs Commissioners v Holland* [2010] UKSC 51; [2010] 1 WLR 2793 and further reviewed by the Court of Appeal in *Smithton Ltd v Naggar* [2014] EWCA Civ 939; [2015] 1 WLR 189. In *Smithton* Arden LJ (with whom Elias and Tomlinson LJJ agreed) referred to the judgments of their Lordships in *Holland*, and having referred also to earlier authorities drew together the following principles:

> "[33] Lord Collins JSC sensibly held that there was no one definitive test for a de facto director. The question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director. However, a number of points arise out of Holland's case and the previous cases which are of general practical importance in determining who is a de facto director. I note these points in the following paragraphs.
>
> [34] The concepts of shadow director and de facto [director] are different but there is some overlap.

> [35] A person may be de facto director even if there was no invalid appointment. The question is whether he has assumed responsibility to act as a director.
>
> [36] To answer that question, the court may have to determine in what capacity the director was acting (as in Holland's case).
>
> [37] The court will in general also have to determine the corporate governance structure of the company so as to decide in relation to the company's business whether the defendant's acts were directorial in nature.
>
> [38] The court is required to look at what the director actually did and not any job title actually given to him.
>
> [39] A defendant does not avoid liability if he shows that he in good faith thought he was not acting as a director. The question whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief.
>
> [40] The court must look at the cumulative effect of the activities relied on. The court should look at all the circumstances 'in the round' (per Jonathan Parker J in *Secretary of State for Trade and Industry v Jones* [1999] BCC 336).
>
> [41] It is also important to look at the acts in their context. A single act might lead to liability in an exceptional case.
>
> [42] Relevant factors include: (i) whether the company considered him to be a director and held him out as such; (ii) whether third parties considered that he was a director.
>
> [43] The fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision.
>
> [44] Acts outside the period when he is said to have been a de facto director may throw light on whether he was a de facto director in the relevant period.
>
> [45] In my judgment, the question whether a director is a de facto or shadow director is a question of fact and degree."

80. In *Carlyle* (cited above) one of the issues was an allegation of *de facto* directorship. Although the question arose under the law of Guernsey, HH Hazel Marshall QC took the view (at [714]-[716]) that the English authorities provided useful assistance as to *de facto* directorship in the context of the 1994 Companies Law of Guernsey. In a very thorough analysis she referred, among other authorities, to the judgment of the Supreme Court in *Holland*, that of Millett J in *In re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 and of Arden LJ in *Smithton*. She emphasised that it is necessary to be precise about the matters alleged to render someone a *de facto* director:

> "[731] … the entire Supreme Court [in *Holland*] plainly felt it right to reject, as an acceptable basis for the imposition of liability, an impressionistic 'broad brush' argument that Mr Holland was 'really' a director of the subject company,

> in the sense that he was its directing mind in a generalised way. All members tested the position by a principled legal analysis of the corporate structures which had been set up, and the position, authority and pertinent acts of the defendant which were claimed to have made him a *de facto* director."

81. Judge Marshall QC also expanded on Arden LJ's paragraph [37] in *Smithton* (quoted above):

> "[725] … the qualification noted by Millett J in *Hydrodan* remains; the test requires the finding of actual 'directorial' acts on the part of the defendant and merely being involved in the management of the company, or exercising a degree of influence over it decision making, is not in itself enough, although in the former case it may become enough if there is no other person involved in the management of the company in practice.
>
> …
>
> "[736] … the relevant act within the subject company must be an act required to be done by someone with the capacity of a director. If the defendant could have carried out the acts in question in some other capacity, either because they were not acts which only a director could carry out (*Hydrodan*) or because the defendant enjoyed some other capacity in which he could properly do them (*Holland*), then the defendant is not a *de facto* director."

82. A submission made on behalf of Ronald was that the allegations made against him are correctly analysed as allegations that he acted as a shadow director, not as a *de facto* director. It was argued that since the concepts of *de facto* director and shadow director are distinct, the relevant acts cannot have been those of a *de facto* director.

83. Unlike '*de facto* director', 'shadow director' is defined in the Companies Act 2006 in section 251. I need only quote s.251(1):

> "*(1) In the Companies Acts 'shadow director', in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act.*"

84. The relationship between the two concepts was discussed by Lewison J (as he then was) in *In Re Mea Corp Ltd* [2006] EWHC 1846 (Ch). The following passage from that judgment was approved by the Court of Appeal in *Smithton* (at [32]):

> "[88] It has been suggested, notably by Millett J. in *Re Hydrodan (Corby) Ltd* that the two concepts of *de facto* director and shadow director are mutually exclusive. In *Re Kaytech International Plc* [[1999] 2 BCLC 351] at p.402 Robert Walker L.J. said that while this is so in most cases the two concepts do have in common:
>
> > "that an individual who was not a *de jure* director is alleged to have exercised real influence (otherwise than as a professional adviser) in the corporate governance of a company. Sometimes that influence may be concealed and sometimes it may be open. Sometimes it may be something of a mixture, as the facts of the present case show."

> [89] Now that Morritt L.J. has explained that the role of a shadow director does not necessarily extend over the whole range of the company's activities, it seems to me that there is no conceptual difficulty in concluding that a person can be both a shadow director and a *de facto* director simultaneously. He may, for example, assume the functions of a director as regards one part of the company's activities (say, marketing) and give directions to the board as regards another (say, manufacturing and finance). In each case, it is necessary to examine the facts, bearing in mind that, as Morritt L.J. explained, the purpose of the legislation is to 'identify those, other than professional advisers, with real influence in the corporate affairs of the company.'"

85. I take from those paragraphs firstly, that the concepts of *de facto* and shadow director are distinct, but they have the common characteristic of persons who exercise real influence, other than as a professional adviser, over the corporate governance of a company. Secondly, an individual can be simultaneously both a *de facto* and shadow director of a company. The capacity in which he acts will depend on the nature of the act. It follows that the question of whether an individual is acting as a *de facto* director must be considered in relation to each of the acts in question, as opposed to considering whether that individual qualifies as a *de facto* director overall.

86. In *Carlyle* Judge Marshall QC discussed whether an act done as a shadow director of a company can at the same time qualify as an act done as *de facto* director of the company:

> "[743] … liability as a *de facto* director of a company applies because the office of a 'director' in company law has been held, by judicial interpretation of that term (in English law but with Guernsey law reasonably following suit), to extend to a person who acts as a director or a company in actual fact, even though not as of right. However, liability as a shadow director is not the result of judicial interpretation, but of legislative enactment. It is therefore confined to cases stipulated by the enactment.
>
> [744] It consequently seems to me, that it is only if the concept of *de facto* directorship itself could be extended to include the shadow directorship situation that this would enable a finding of liability for breach of fiduciary duty or of duty of skill and care to be made against a shadow director. …
>
> …
>
> [746] … It seems to me that the terms of the Companies Laws … treat the concept of shadow directorship and the situation giving rise to it as being a separate and distinct concept in its own right. The legislature has then prescribed the situations in which the situation of a person falling within that concept is to be taken to impose a director's liabilities or duties … . That being the case, it seems to me that the legislature has to be taken to have intended those situations to be exhaustive with regard to shadow directorship, and that in enacting those express provisions it was implicitly ruling that the term 'director' did not, itself, extend to them. The consequence is that the legislation seems to me to have ruled out any permissible judicial extension of the principles of *de facto* directorship to include shadow directorship."

87. I find this persuasive. Judge Marshall was concerned with the Guernsey Company Laws, but they are derived from UK Companies Acts and neither counsel in the present case drew my attention to any distinction that was relevant to these proceedings. It would follow that where an act of an individual is an act done in his capacity as a shadow director, that act cannot also be done in in the capacity of a *de facto* director.

88. So that my understanding of the law derived from the foregoing authorities is clear, I will state the principles which I take to be relevant to this case. They are:

    (1) The overall question to be answered when determining whether an individual is a *de facto* director of a company is whether the individual was part of the corporate governing structure of the company and whether he assumed a role in the company which imposed on him the fiduciary duties of a director (*Holland* at [94] and *Smithton* at [26] and [33]).

    (2) This is a question of fact and degree, to be assessed objectively by reference to all the relevant evidence (*Smithton* at [35]-[45]).

    (3) Merely being involved in the management of the company or exercising a degree of influence over its decision making is not in itself enough.

    (4) An act will qualify as an act done in the capacity of a *de facto* director if the corporate governance of the company requires that an act of that nature can be done only by someone having the capacity of a *de jure* director.

    (5) In general, the corporate governance of the company will have to be investigated in order to know whether the act in issue was directorial in nature.

    (6) If the individual enjoyed some other capacity in which he could properly have done the act, it will not have been done as a *de facto* director.

    (7) It is possible for an individual to be simultaneously a *de facto* director and a shadow director of a company. The capacity in which he acts in relation to the company will depend on the nature of the act.

    (8) An act cannot be simultaneously carried out both in the capacity of a shadow director and a *de facto* director.

    (9) An act which takes the form of directions or instructions to *de jure* directors will be an act done in the capacity of shadow director.

This case

89. Corporate Directors was the sole *de jure* director of Casterbridge. Mr Jeeves had direct responsibility for deciding whether any payments were to be made by Casterbridge. The claimants' case was that he took all the decisions to pay Mars Trust on the instructions of Ronald and I have found, on the balance of probabilities, that such payments were caused by Ronald.

90. Mr Evans submitted that causing such payments was done in Ronald's capacity as *de facto* director. He pointed out, as was common ground, that Ronald was the signatory

for Casterbridge's bank account. I do not see that this helps the claimants' case. The signatory for a company's bank account need not be a director.

91. Mr Evans went on to submit more generally that it was not credible that Mr Jeeves would have authorised any payments by Casterbridge except on the instructions of Ronald. I have accepted this on the balance of probabilities, but it does not follow that such instructions were given in Ronald's capacity as a *de facto* director. I do not believe they were.

92. First, the facts surrounding the payments by Casterbridge to Mars Trust were not uncovered. It was incumbent on the claimants to advance evidence from which it became possible to characterise the nature of each of those payments.

93. Secondly, the corporate governance of Casterbridge was not investigated. It is possible that there was a distinction between categories of payment, some directorial in nature whereas other, more routine payments, did not require the authority of a director. If so, there was no way of telling where the line was drawn, always assuming there was a line.

94. Thirdly, the claimants' case was that Ronald caused Mr Jeeves to authorise the payments to Mars Trust. If so, these were acts of a shadow director. They cannot therefore have been done in the capacity of a *de facto* director.

95. I find that Ronald did not cause any payments to be made by Casterbridge to Mars Trust in the capacity of *de facto* director.

Whether the payments were caused in breach of fiduciary duty

96. It follows that the payments cannot have been caused in breach of any duty held by Ronald as *de facto* director of Casterbridge.

Fraud

The law

97. As was common ground, the claim in this action would be barred under the Limitation Act 1980 but for s.21 which provides, so far as is relevant:

> *21 (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action –*
>
> *(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or*
>
> *(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.*
>
> *…*
>
> *(3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust,*

> *not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.*
>
> *For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.*
>
> …

98. In his judgment of 18 January 2007 Master Moncaster accepted that s.21 would apply to the reconstitution of the action, then between John Snr and Ronald, into its present double derivative form. He decided that that the claim was one for fraudulent breach of trust and therefore not time barred. There can be no doubt that the claimants are required to prove fraud.

99. Mr Evans submitted that any breach of fiduciary duty of a company necessarily constitutes a fraud on the company. I do not accept that. Dishonesty on the part of the fiduciary is required. In *Armitage v Nurse* [1998] Ch 241 Millett LJ (with whom Hutchison and Hurst LJJ agreed) said (at p.260):

> "Two questions have been argued. The first is whether section 21(1)(a) is limited to cases of fraud or fraudulent breach of trust properly so called, that is to say to cases involving dishonesty. The judge held that it is. In my judgment, he was plainly right for the reasons which he gave. I have explained the meaning of the word 'fraud' in a trustee exemption clause, and there is no reason to ascribe a different meaning to the word where it appears in section 21(1)(a) of the Limitation Act 1980. Moreover, the meaning of the subsection is not free from authority. Its predecessor, section 26 of the Limitation Act 1939 , was held to 'mean what it says' and to be limited to cases where fraud was an ingredient of the wrong: see *Beaman v. A.R.T.S. Ltd.* [1949] 1 K.B. 550, 558, *per* Lord Greene M.R."

100. Millett LJ accepted counsel's formulation of dishonesty (at p.251), that it:

> '… connotes at the minimum an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the company or being recklessly indifferent whether it is contrary to their interests or not.'

101. He added:

> "It is the duty of a trustee to manage the trust property and deal with it in the interests of the beneficiaries. If he acts in a way which he does not honestly believe is in the interests of the beneficiaries then he is acting dishonestly."

102. More recently the Supreme Court discussed dishonesty in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67; [2018] AC 391. The context was different, criminal cheating at cards, but the Court looked at general principles. Lord Hughes said:

> "[62] Dishonesty is by no means confined to the criminal law. Civil actions may also frequently raise the question whether an action was honest or dishonest. The liability of an accessory to a breach of trust is, for example, not strict, as the liability of the trustee is, but (absent an exoneration clause) is fault-based. Negligence is not sufficient. Nothing less than dishonest assistance will suffice. Successive cases at the highest level have decided that the test of dishonesty is objective. After some hesitation in *Twinsectra Ltd v Yardley* [2002] 2 AC 164, the law is settled on the objective test set out by Lord Nicholls of Birkenhead in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378: see *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476, *Abou-Rahmah v Abacha* [2007] Bus LR 220 and *Starglade Properties Ltd v Nash* [2011] Lloyd's Rep FC 102. The test now clearly established was explained thus in the *Barlow Clowes* case [2006] 1 WLR 1476, para 10 by Lord Hoffmann, who had been a party also to the *Twinsectra* case:
>
> > 'Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree.'

103. Lord Hughes expanded (at [74]) on the two-stage test taken from *Barlow Clowes*:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

This case

104. Here I will assume, contrary to my findings above, that Ronald caused the payments by Casterbridge to Mars Trust in breach of his fiduciary duty as *de facto* director. The question of fraud seems to me to be a short point.

105. The facts surrounding the payments to Mars Trust, under the first and second heads of the cash claim, were left unexplored. It is impossible to reach any view as to Ronald's knowledge or belief as to those facts. Even less is it possible to take an objective view as to whether his conduct in causing the payments to happen would have been dishonest by the standards of ordinary decent people. Fraud was not established.

106. Turning to the third head of the cash claim, I have explained above why I find John Snr's evidence to be particularly unreliable. Nothing remotely close to fraud was established.

The Vendor Rights claim

107. The Vendor Rights Claim was pleaded as follows:

> "*26. By letter dated 4 January 2005 from P R Campbell & Co. to Hutchinson & Co. Trust Company Limited (then holding not less than 99.88% of the share capital of Long Beach Cyprus as trustee), the 1st Defendant caused Casterbridge to re-assert its entitlement to manage the Long Beach Resort in exercise of its 'Vendor rights', and thereafter caused Casterbridge to exploit those rights from January 2005 until, on a date unknown to the Claimants but in or before 2011 the 1st Defendant fraudulently and in breach of his fiduciary duty to Casterbridge caused it to transfer or terminate its 'Vendor rights' to or in favour of an entity beneficially owned by him or members of his family, for no consideration.*"

108. As I have mentioned, although Vendor Rights were distinctly defined in the Particulars of Claim, in the evidence sometimes they were apparently elided with Occupation Rights. In closing Mr Evans said that Vendor Rights turned out to be the right to sell Occupation Rights, among other things. I am not sure that was invariably the intended meaning of the two terms in many of the documents I was shown but it is not necessary for me to resolve the distinction in each case, or at all.

109. Also in his closing speech, Mr Evans relied on a 'Declaration of Settlement and Discharge of Liabilities' dated 14 November 2013. It records the completion of an assignment of Long Beach Cyprus's lease to a North Cypriot company called DMG Yatirim Ltd, made on 26 March 2013. The payment for the assignment was €677,889.20. Mr Evans said that it was Long Beach Cyprus's profit from the Long Beach Resort and that the €677,000 should have been paid to Casterbridge. This became the claimants' argument in support of the Vendor Rights claim as finally advanced.

110. Contrary to the pleaded case it involved neither the transfer nor termination of any rights by Casterbridge, nor was it an allegation that any such rights went to Ronald or his family.

111. Even taking the allegation on its merits, no reason was advanced to explain why Long Beach Cyprus was under an obligation to pay Casterbridge the €677,000. I do not believe that it was. For that reason alone I would reject the Vendor Rights claim. The claim further fails because neither fraud nor a breach of fiduciary duty have been established, for reasons discussed above.

The Profits Claim

112. This was the pleaded profits claim:

> "*27. In further breach of his fiduciary duty to Casterbridge, the 1st Defendant has fraudulently taken for himself or for the benefit of members of his family or of Mars Trust or some other entity or entities controlled or beneficially owned by him or them:*

> *i* *all the profits made by Casterbridge (being or including the profits of its exploitation since January 2005 of the 'Vendor rights' applicable to the Long Beach Resort and estimated by the BRT beneficiaries to have been some £400,000 a year)*
>
> *ii* *the value of Casterbridge's 'Vendor rights' in respect of Long Beach Resort when transferred or terminated as above.*"

113. Mr Evans accepted that there was no evidence of any profit having been made by Casterbridge since January 2005. He submitted that the defendants were nevertheless entitled to an account of profits to explore whether there had been any profit.

114. In cross-examination John Snr accepted that Casterbridge ceased to trade in 1999 and this is consistent with its accounts going only so far as the end of 1999. The only subsequent Casterbridge document shown to me was dated 7 March 2005. It recorded the assignment of Casterbridge's Vendor Rights to RMI as of 6 October 2000. This was stated to be for good and valuable consideration although the nature of the consideration was left unstated.

115. If there were an account of profits, there seems to be no prospect of the claimants' proving any profit made by Casterbridge since January 2005. With regard to the assignment of 6 October 2000, if the consideration for the sale of the Vendor Rights to RMI was of significant value, there was no evidence that it was paid to Ronald, his family or the Mars Trust.

116. As with the claimants' other two claims, the profits claim fails in any event because neither breach of fiduciary duty nor fraud were established. I reject the claim.

Conclusion

117. I do not doubt that John Snr and his family firmly hold the belief that in the Autumn of 1997 John Snr and Ronald agreed to split the assets of the Longbeach and Hever Resorts and that in breach of the agreement Ronald arranged matters so that he and his family retained all the assets to themselves. The truth or falsity of that belief could not be decided once a claim for breach of contract became time barred. The allegation against Ronald developed into the present double derivative action for fraud and breach of fiduciary duty. For the reasons I have given, none of the three parts of the claim has been made out. The claim is dismissed.