Neutral Citation Number: [2020] EWHC 686 (Ch)

Case No: HC-2017-001469

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 24 March 2020

Before :

ADAM JOHNSON QC SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

Kenneth Davies	**Claimant**
- and -	
(1) Stephen Ford	
(2) Richard Monks	
(3) Greenbox Recycling Kent Limited	**Defendants**

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- -

Ben Shaw (instructed by **Dentons UK and Middle East LLP**) for the **Claimant**
John Brisby QC and Alexander Cook (instructed by **Cripps LLP**) for the **Second and Third Defendants**
The First Defendant appeared in person

Hearing dates: 11-18 November 2019

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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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Adam Johnson QC:

INDEX

Introduction and Outline

1. Greenbox Recycling Ltd ("*GBR*") was incorporated on 1 March 2010 by the Claimant, Mr Kenneth Davies ("*Mr Davies*"). Mr Davies' position is that he intended GBR to take over an existing skip hire and waste recycling business (referred to in the Particulars of Claim as "*the Business*") operating from premises near Ashford, Kent (the "*Ashford Site*"), and run at the time through a company called Skip It (Kent) Ltd ("*SIK*"). Mr Davies' case is that *the Business* was transferred from SIK to GBR in about November 2010.

2. The First and Second Defendants, Mr Stephen Ford ("*Mr Ford*") and Mr Richard Monks ("*Mr Monks*") were directors of GBR. Mr Ford was appointed on 28 September 2010, and Mr Monks on 30 November 2010. By late November 2010, Mr Ford and Mr Monks were also each 10% shareholders in GBR. Mr Davies held the remaining 80% of GBR's issued share capital. Additionally, Mr Davies says that both Mr Monks and Mr Ford were parties to contracts of employment entered into with GBR. Mr Davies' case is that this overall structure reflected his intention to entrust Mr Ford and Mr Monks with the growth and development of the waste management business at the Ashford Site, while he stepped back from any day-to-day involvement because of various personal difficulties which had affected him during 2010, and moved abroad.

3. The present claims arise because, in circumstances I will describe further below, another company was incorporated by Mr Ford and Mr Monks on 7 January 2011, this time called Greenbox Recycling (Kent) Ltd ("*GBRK*") Mr Ford and Mr Monks were both directors and shareholders of GBRK on incorporation, although Mr Ford resigned as a director after only a few days, on 15 January 2011, and later sold his shares to Mr Monks at some point in 2013.

4. The gist of the claims now advanced against Mr Ford and Mr Monks is that they diverted *the Business*, which was intended to be operated through GBR, to GBRK, and that such diversion involved them in breaches of contract and breaches of the duties they owed as directors of GBR.

5. Only Mr Monks has participated in the proceedings. Mr Ford failed to file any Acknowledgement of Service, and in consequence Mr Davies issued an application for judgment in default against him, which was adjourned to be dealt with at the

present trial. Mr Ford thereafter played no role in the action until the first day of trial, when he made an application for permission to serve a Defence. I refused that application, and Mr Davies now seeks judgment in default against Mr Ford under his application. I will return to Mr Ford's position below.

6. As to Mr Monks, his position (broadly) is that the decision to incorporate GBRK in early 2011 was a response to the state *GBR* was in at the time. He says that the waste management business formerly carried on at the Ashford Site was never in fact transferred to it, and so it never had ownership of *the Business*; he says that although he became a director, he never became bound by any contract of employment with GBR; he says that by early 2011 GBR was insolvent (or close to insolvency) and for various reasons was not able to trade lawfully; and he says that in the circumstances he and Mr Ford were concerned about potential personal liabilities to which they might be exposed because of the physical state of the Ashford Site. Mr Monks also says that GBR had effectively been abandoned by Mr Davies, who had misled him (Mr Monks) in various ways, including by saying he was terminally ill and by failing to disclose that he (Mr Davies) was the subject of proceedings under the Directors Disqualification Act, which resulted in him being disqualified as a director for a period of 11 years with effect from 8 October 2010. In short, Mr Monks says that he and Mr Ford were justified in doing what they did in early 2011, and in reality had no choice about it given the situation they were left in by Mr Davies.

7. After GBRK had been operating for several months, GBR was struck off the register and dissolved on 18 October 2011. It is common ground that, at the time, neither Mr Ford nor Mr Monks had taken steps to resign as directors of GBR. In the period since then, GBRK has grown to be a successful business (its accounts for 2018 show that for the six months between 1 July and 31 December 2018, it had turnover of £3,592,689 and made profits before tax of £364,329). Mr Monks' position is that this is the result of the hard work he and others have put in, and of the capital they have invested.

8. In the meantime, Mr Davies says that although he continued to feel aggrieved about the way he had been treated, he was not in a position to do anything about it because he lacked the necessary funds to do so. Much later, in 2016, he says that position was remedied, and he then petitioned for the restoration of GBR to the register under ss 1029 and 1032 Companies Act 2006 ("*CA 2006*"), and for its winding-up on the just and equitable ground under s 122(1)(g) Insolvency Act 1986 ("*IA 1986*"). On 23 January 2017, Ms Deputy Registrar Jones made the Orders sought, restoring GBR to the register but immediately placing it in compulsory liquidation. Joint Liquidators were appointed on 15 March 2017, and on 22 May 2017, the Liquidators initiated the present proceedings. On 25 July 2017, the Liquidators assigned GBR's claims against Mr Ford, Mr Monks and GBRK to Mr Davies, and Mr Davies was later substituted as Claimant.

9. The proceedings have been bifurcated, and by Order dated 26 February 2019, the following are the issues for determination at the present (liability) trial (together with Mr Davies' application for judgment in default against Mr Ford):

> *"(1) Whether [Mr Monks] has acted in breach of duty or in breach of contract;*

(2) whether [GBRK] is fixed with the relevant knowledge to ground a claim in knowing receipt;

(3) whether the business conducted by [GBRK] is derived from [GBR];

(4) whether [Mr Monks] is in principle entitled to an equitable allowance;

(5) whether [Mr Davies'] equitable claims are barred by [Mr Davies'] lack of clean hands or laches;

(6) whether the Defendant [presumably Mr Monks] should be relieved from liability pursuant to s. 1157 Companies Act 2006.

For the avoidance of doubt, the quantum of any equitable or proprietary interest in the Business (as defined in the Particulars of Claim) to which [Mr Davies] may be entitled if he elects for equitable relief shall be the subject of the trial of quantum, not liability."

10. As will appear below, the factual background is complex, and involves many disputed issues of fact. Thus, many points of detail arise, which I will have to deal with. It is useful at this stage, however, both in order to provide a framework for the remainder of this Judgment, and also to reflect the way in which the issues above were developed in the parties' submissions, to try and identify the main points of principle which I will need to resolve. As I see it, these are as follows:

    i) What was the scope of the contractual and fiduciary duties owed by Mr Monks in late 2010 and early 2011, in light of the position of GBR at the time, and was he in breach of those duties in taking the steps he took in relation to GBRK?

    ii) Given that the Claim Form was issued only on 22 May 2017, more than six years after the incorporation of GBRK on 7 January 2011, are any or all claims against Mr Monks in any event time-barred? More particularly in that regard:

        a. Do such claims fall within Limitation Act 1980 ("*LA 1980*"), subsections 21(1)(a) and (b), which disapply the usual 6 year limitation period in respect of certain claims against trustees (and company directors)?

        b. Given the restoration of GBR to the Register of Companies in January 2017, and given that Mr Monks had not resigned as a director of GBR *before* it was dissolved, can Mr Davies rely on the deeming provision in CA section 1032(1) to say that Mr Monks is to be treated as having been a director of GBR (and therefore, as having owed it continuing duties) during the period of GBR's dissolution (i.e. between October 2011 and January 2017), and indeed as owing it duties up to the present day?

iii) If he is in breach of duty, is Mr Monks entitled to relief under CA 2006 s. 1157?

iv) Is GBRK fixed with relevant knowledge to ground a claim against it in knowing receipt, and in any event are claims against GBRK time-barred?

v) Independently of any limitation issue, is Mr Davies barred by laches from pursuing claims against Mr Monks and/or GBRK?

vi) Is Mr Davies barred from claiming relief because he fails to come to the Court with clean hands?

vii) If it is correct that Mr Monks owes continuing fiduciary duties to GBR even today, with the effect that all unauthorised benefits flowing from any breach of such duties are held on trust for GBR, is Mr Davies entitled to assert a proprietary remedy in respect of such benefits – and therefore to say that, since the benefits in question are effectively the business and assets presently in the name of GBRK, such business and assets are held on constructive trust for him, such that no further trial in the proceedings is needed?

viii) If Mr Davies is in principle entitled to claim an account of profits, should Mr Monks in principle be entitled to claim an equitable allowance?

ix) Is Mr Davies entitled to judgment in default against Mr Ford?

The Witnesses

11. I should make some comments about the witnesses who gave evidence orally and were cross-examined.

Claimant's Witnesses

12. Mr Davies was the only witness who gave evidence in support of his case.

13. I did not find him an impressive or entirely reliable witness. As will appear, he is a man with a somewhat chequered history. At times in giving his evidence, I found him obtuse and evasive, and unwilling to accept straightforward points which were obviously correct, but which did not support his position. I have in mind two examples in particular, namely the evidence he gave in relation to his medical condition (see below at [77]), and the evidence he gave in relation to the certain finance agreements entered into, and signed by him, in November and December 2010, at a point when he had been disqualified from acting as a director (see [140]).

14. At the same time, however, it seems to me that the broad contours of the story told by Mr Davies, as to events occurring in relation to the Ashford Site in 2010, were plausible, even if his evidence was unreliable on points of detail. I also think that Mr Davies was entirely genuine in expressing a sense of grievance at the way in which Mr Monks had acted in relation to the events described below. In other words, whatever his own shortcomings, Mr Davies really did feel that Mr Monks had acted wrongly and unfairly.

15. Overall, I feel I must treat Mr Davies' evidence with caution, and test it carefully against the (somewhat limited) documentary record, but I do not discount it entirely.

Defendants' Witnesses

16. A number of witnesses gave evidence on the Defendants' side.

17. Mr Monks: Mr Monks is an ambitious and clever man, with a strong entrepreneurial instinct. At the time of the events relevant in this case, he already had a track record of success in the waste management industry. One of the other witnesses, Mr Smith, described that industry as competitive and aggressive, and I am sure that is correct. I think it fair to say that Mr Monks is a competitive and, at times, aggressive personality.

18. I am afraid to say, however, that rather like Mr Davies, I found Mr Monks to be obtuse and evasive in giving his evidence, including in relation to a number of important points. These are detailed below, but I mention here by way of example his claimed ignorance of the matters addressed in the Heads of Terms document (discussed below at [86-89]), and his attempt in his evidence to distance himself from any knowledge of matters concerning ownership of the Ashford Site, which he said he was not concerned with in his capacity as a director of GBR, which was not the owner of the Site (see [157]-[158] below).

19. Overall, I have determined that I must treat Mr Monks' evidence generally with a high degree of caution, and on a number of points I specifically reject the evidence he gave.

20. Mr Paul Taylor: Mr Taylor is a Waste Management, Planning and Environmental Consultant. He gave evidence about the state of the Ashford Site in early 2011 and the efforts made to clear it of waste. I found Mr Taylor to be a careful and measured witness, and an honest one.

21. Mr David Austin Smith: Mr Smith is an accountant practising at Nash Harvey, a firm of accountants in Kent. He gave evidence on a number of topics, including the background to the decision to incorporate GBRK, and accounting matters relating to GBRK's early operating period in 2011. Like Mr Taylor, I found Mr Smith to be a careful, honest and measured witness.

22. Mr Richard Graham Lloyd: Mr Lloyd is now an (indirect) shareholder in GBRK, but at the material time was employed by another waste management business in Kent, known as Countrystyle. He gave evidence as to the state of the Ashford Site in early 2011, and as to a quotation said to have been given by Countrystyle in respect of the costs of clearing the Site. On some points I found Mr Lloyd lacking in objectivity and rather too inclined to say things which favoured Mr Monks' position, but I think Mr Lloyd was essentially honest in the way he gave his evidence.

23. Mr Jamie Houston: Mr Houston is Sales Director for Countrystyle Recycling Limited. He gave evidence on behalf of Countrystyle in relation to the same quotation already mentioned above, said to have been provided by Mr Lloyd to GBRK in early 2011. I found Mr Houston's evidence of little utility, since he had no direct knowledge of events at the relevant time, but I found him to be an honest witness and accept his evidence.

24. Mr Clyde Chapman: At the relevant time, in early 2011, Mr Chapman was general manager of a company called Chapman's Recycling Limited. That company was also said to have given a quotation to GBRK for the costs of moving waste from the Ashford Site. I also found Mr Chapman to be an honest witness.

Background

The Ashford Site: prior to 2008

25. Mr Davies' case is that a business of some type – corresponding it seems to *the Business* - was carried on at the Ashford Site from about 2003 onwards. Precisely how it was structured historically, however, remains obscure despite extensive cross-examination on the topic. This reflects a theme running through Mr Davies' case, which is that his various business operations were run with a high degree of informality – indeed, one might say, with a complete disregard for any necessary formality – all of which makes it difficult to identify with any real clarity what the state of *the Business* was at any given point in time. Thus, Mr Davies was cross-examined at some length about whether, in periods prior to late 2007 or early 2008, when on his case *the Business* at the Site was transferred to SIK, it was run through a company called Ashford Recycling Centre Limited ("*ARCL*"), or another company, which at the time was called Skip It Property Investments Ltd ("*SIPI*"). Ultimately, this was used as the basis for a submission by Mr Monks that in either case, there cannot have been a valid transfer of *the Business* from either ARCL or SIPI to SIK, because at the time of the alleged transfer both companies were insolvent, and there was no evidence of any value having been paid by SIK to anyone in respect of any existing goodwill.

26. In my view, there are two answers to this submission for present purposes. The first is that, although ARCL was wound up on a creditor's petition on 26 September 2007, and although SIPI was also later struck off (although not placed into liquidation), no claim has ever brought either by the liquidators of ARCL or by anyone on behalf of SIPI, seeking to challenge or unwind any transfer of *the Business* to SIK. I therefore take the view that I am entitled to assume that something corresponding to *the Business* was being conducted by SIK from the Ashford Site from late 2007 or early 2008 onwards. This is borne out by a number of documents, including a letter written by SIK's accountants, Spurling Cannon, to Lloyds TSB dated 24 September 2010 (in the context of GBR's application for a factoring agreement: see below at [93]), in which they said that SIK's annual turnover "*historically has been in the region of £1,000,000*.".

27. The second point is that the real focus of attention in this case must be what duties were owed by Monks and Mr Ford *to GBR* in late 2010 and early 2011, and on whether those duties were breached given the circumstances existing at the time. Certainly some background is necessary, but the question of what precisely was transferred to SIK by which other company in late 2007 or 2008 is not determinative of either issue.

28. In any event, the liquidation of ARCL is relevant for another reason, which is that the Directors Disqualification proceedings, which eventually resulted in Mr Davies giving disqualification undertakings in October 2010, flowed out of the collapse of ARCL. A letter produced from the Insolvency Service shows the Official Receiver indicating

an intention as early as 19 August 2008 to apply for a disqualification order to be made against Mr Davies, arising out of his directorship of ARCL. A number of serious concerns were expressed in the letter, including that Mr Davies had permitted ARCL to continue to trade whilst insolvent, from between about October 2005 and September 2007; and also that, from July 2003 to April 2005, Mr Davies had acted as a director of ARCL and/or in the promotion and management of ARCL whilst an undischarged bankrupt.

The Ashford Site

29. Notwithstanding the Directors Disqualification proceedings, it is clear that a number of companies, all associated with Mr Davies, continued to operate from the Ashford Site. In 2009 and early 2010, the main companies were SIPI and SIK, already mentioned above, and Nero Capital Ltd ("*Nero*"). Mr Davies was ultimately the controlling shareholder of all these companies, through a holding company called KAD Capital Limited.

30. I will say more about the roles of these companies below. For now it is sufficient to note that SIPI was the owner of the Ashford Site, which was held subject to a mortgage in favour of Barclays Bank. SIPI was also the holder of a waste management licence ("*WML*"), issued by the Environmental Agency, and required for the recycling, storage, treatment and disposal of waste. SIPI had been the holder of a WML since 25 February 2008. It was also the holder of an an HGV operator's licence (referred to as an "*O Licence*"), issued by the Transport Commissioner and required for the operation of any vehicle over 3.5 tonnes.

31. Mr Ford had worked at the Ashford Site with Mr Davies since 2003. He was principally responsible for operations, i.e. the transportation and recycling of waste materials. Since 2005, he had been a director of SIK, and was appointed company secretary in 2007.

The Greenbox Recycling Brand

32. Mr Davies' evidence is that the idea for the "*Green Box Recycling*" brand first occurred to him in about 2008, as part of an exercise to expand his business interests into the Medway area. He wanted to focus more on recycling, and to develop a cleaner image. He felt that that was where the industry was going.

33. In February 2010, Mr Davies procured registration of an internet domain name, "*greenboxrecycling.co.uk*". The domain name was registered to Mr Davies personally, rather than in the name of any of the companies operating from the Ashford Site. Shortly afterwards, on 1 March 2010, GBR was incorporated, and at about the same time a new logo was developed by a design agency, Joop. It is not clear who owned the logo or any design elements attaching thereto. In April 2010 SIPI changed its name to Greenbox Assets Ltd ("*GAL*").

Mr Davies' Difficulties

34. It is apparent that, from at least early 2010 onwards, Mr Davies encountered a number of significant difficulties, both personal and professional, aside from the

Directors Disqualification proceedings arising out of the liquidation of ARCL, already mentioned above.

35. On 26 March 2010, the O Licence held by the company then known as SIPI (subsequently GAL) was revoked, as a result of a breach of conditions and failure to fulfil certain undertakings. Another O Licence, held by a separate company, Skip It Haulage Ltd ("*Haulage*"), was revoked at the same time. Some time before that, on 7 January 2009, an application made by SIK for an interim O Licence had also been refused. All three of these decisions were appealed together, and it seems the revocations in respect of SIPI (GAL) and Haulage were suspended pending the outcome of the appeals. Nonetheless, the revocations presented an important problem, because the O Licences were necessary for the operation of larger vehicles and so for the bulk transportation of waste.

36. As to the state of the Ashford Site itself, an Environment Agency Compliance Assessment Report following an inspection on 18 February 2010 identified a number of serious problems. The following extract gives a sufficient flavour:

> "*There was a large amount of unsorted waste within the tipping area. This has resulted in incoming waste being tipped on top of unsorted waste. It is apparent that the tipping area located under a temporary scaffold structure is being used as an additional storage area for unsorted waste materials. There was such a large quantity of unsorted waste material it was spilling outside the temporary structure, the western side of the building and the front of the building next to the end of the trommel.*
>
> *…*
>
> *Sheeting missing from the western side of the building permitting the escape of dust, noise and litter and allowing the ingress of water …*
>
> *Waste also seemed to be stored and treated beneath a temporary scaffold structure. This is not a building as per the terms of your permit and the waste within it should be removed within 3 weeks of the date of the accompanying letter … .*"

37. At around this time, Mr Davies says he was diagnosed with a condition known as "*Barrett's oesophagus*." He has not produced a document containing a final diagnosis to that effect, but he has produced a Reporting Form from a Consultant, Mr Nounou, dated 24 June 2010, indicating Barrett's oesophagus as an initial diagnosis and suggesting treatment subject to further tests being conducted. I am prepared to proceed on the basis that there was a diagnosis of Barrett's oesophagus at some point after 24 June 2010. I will come back to the significance of this point below.

38. Mr Davies' evidence is that he suffered other personal setbacks at around this time. His father died in April 2010, and at some point he separated from his wife. Although Mr Davies' evidence is that there was then at least a partial reconciliation, divorce proceedings were later commenced in September 2015 and a decree absolute was granted in December 2016.

GAL, SIK and Nero

39. I come back to the inter-relationship of the companies operating from the Ashford Site.

40. I have already mentioned above the role of SIPI (renamed GAL in April 2010): it was the owner of the Site, and held both a WML and an O Licence, although the latter had been revoked and its status was uncertain.

41. According to Mr Davies' evidence, Nero owned substantially all of the assets used in the business operating from the Ashford Site – i.e., the plant and waste sorting equipment necessary for the operation of a waste management business.

42. Mr Davies' evidence was to the effect that none of the equipment held by Nero was leased or subject to finance or HP arrangements. His position was that he had personally paid for the equipment in question – which he described as such things as "*skips, roll-ons, weighbridges*" – and had made them available to Nero. He said that although a number of assets were held subject to financing arrangements, all financing agreements were with SIK, not Nero. Against this is the fact that the Nero's Abbreviated Accounts for the period to 31 December 2009 show a figure for "*Creditors: amounts, falling due after more than one year*" of £172,191, which in an earlier set of draft accounts for the same period (at note 7) was explained as referable to "*Hire purchase contracts*". The draft accounts also identify an amount of £59,240 as referable to "*Hire purchase contracts*" under Note 6, "*Creditors: amounts falling due within one year*", although the overall figure given for such creditors (£637,877) is higher than that in the filed, Abbreviated Accounts (£572,284).

43. Other documents, however, show SIK, not Nero, being the counterparty to various hire purchase and other financing agreements, with two finance houses, namely Finance & Leasing (London) Ltd ("*Finance & Leasing*"), and Close Asset Finance ("*CAF*"). As to Finance & Leasing, the documents include two hire purchase agreements between Finance & Leasing and SIK dated 21 January 2010 and 30 March 2010 (relating respectively to a Volvo tractor with registration GN05 CGX and a Kobelco Mk IV Excavator); and also certain later letters to SIK in January 2011 relating to the termination of various finance agreements, which I will need to come back to. As to CAF, three letters have been produced from CAF to SIK dated 8 October 2010, containing indicative settlement figures under three separate lease agreements, all of which appear to have been in existence for some period prior to October 2010.

44. More generally as to SIK, Mr Davies in his witness statement for trial described this company as having the "*trade and goodwill*" of the business operating from the Ashford Site. In other words, according to Mr Davies, SIK was the trading company which operated as the interface with customers and which generated the income used to service the requirements of *the Business* generally, including the Barclays mortgage and payments under the relevant HP and other finance agreements. In generating income, SIK made use of the Ashford Site (owned by GAL), and of the assets (whether owned outright or subject to HP or other financing arrangements), and took advantage of the WML and the O Licences (held by GAL and Haulage). Mr Davies' evidence was that the income produced by SIK was used both to service the mortgage

on the Ashford Site in favour of Barclays, and also to service payments under the various outstanding HP and finance agreements.

45. Before moving on, I should make a further point about the general nature of the waste management business. Happily, this was common ground among the parties. It is that it is not a business characterised by customer loyalty. There are few long-term contract arrangements. Certainly, SIK did not have any long-term customer contracts, but instead relied on ad hoc work, although according to Mr Davies some customers used SIK's services on a repeat basis. Mr Monks' evidence, which was not challenged and which I accept on this point, was that a good customer base is only achievable if a company has a good reputation, including for regulatory compliance and good customer service. Or as he put it more graphically, "*You're only as good as your last skip*."

46. In any event, the idea that the description above represented the basic structure of the companies at the Ashford Site is broadly consistent with two further documents. The first is a Guarantee and Debenture in favour of Barclays entered into by SIK (and others) on 16 July 2007, secured by both fixed and floating charges. The Guarantee and Debenture Documents themselves have not been produced, but detailed information is contained in a Companies House Form 395, which described the fixed charge as extending over "*all the Chargor's [i.e., SIK's] goodwill and share capital for the time being*", and over "*all trade debts now or in the future owing to the Chargor*." The floating charge was described as extending over "*all the Chargor's Assets which are not effectively charged by the fixed charges detailed above.*" The Form 395 gives a definition of "*Assets*" which is very broad: "*'Assets' means all the Chargor's undertaking, property, assets, rights and revenues, whatever and wherever in the world, present and future, and includes each or any of them*."

47. Further, the Chargor (SIK) agreed that it would not, without Barclays' prior written consent, "*sell, transfer, part with or dispose of any of the Floating Charge Assets except by way of sale in the ordinary course of business.*"

48. These arrangements seem to me to reflect an understanding that although GAL was owner of the Ashford Site, income for *the Business* was generated by SIK.

49. The second document is an Information Memorandum, produced by a firm of solicitors, Vertex Law, in May 2010 as part of a plan Mr Davies had developed at the time to exit from the Ashford Site and focus his time on property development opportunities, including in the Medway area.

50. The transaction proposed was to involve a sale of the goodwill of SIK, a sale of the assets held or owned by Nero, and the making available of a lease of the Ashford Site by GAL. In giving an overview, the Information Memorandum said:

> *"[SIK] operates the Business and owns the goodwill. Nero owns the assets used in the Business and the Facility is owned by Skip It Property Investments Ltd [i.e., GAL]."*

51. At paragraph 3.1, the Memorandum gave financial results for the "*Skip It Business*" for a three year period, including actual figures to 31 December 2008 (turnover of

£1,123,631 and gross profit of £321,895), and draft figures for the period to 31 December 2009 (turnover of £991,292 and gross profit of £236,783).

52. Schedule 1 listed the assets to be sold by Nero, which included such items as "*Skip loader*", two "*RoRo*" (roll-on, roll-off) vehicles, a trommel (a piece of equipment used for sorting waste), and a large number of wheelie bins. To add to the confusion, Schedule 1 includes the Volvo tractor (registration no. GN05 CGX) mentioned above, which was the subject of a hire purchase agreement entered into *with SIK* (not Nero) on 21 January 2010.

53. The Information Memorandum gave a net value for these items, taken from the draft accounts for Nero for the year ended 31 December 2009, of £578,638. This figure was stated to be net of HP liabilities as at the year-end of £231,431, which by the time of the Information Memorandum had reduced to £204,000 (see para. 3.3.1). The figure of £231,431 is consistent with the overall total stated as referable to hire purchase contracts in Nero's draft accounts (see above at [42]: £172,191 + £59,240 = £231,431).

54. Pausing there, and to summarise the position as regards the assets used in *the Business*, as with much else involving Mr Davies the detail is obscure and confusing. What can be said with certainty that *some* equipment was held by SIK, subject to hire purchase and other financing agreements entered into by SIK with Finance & Leasing and CAF. Although it appears that other items of equipment were owned by Nero outright, it is also true to say that Nero accounted for hire purchase liabilities in its accounts. At least some of those liabilities, however, appear to have related to financing arrangements entered into by SIK.

55. Coming back to the Information Memorandum, Schedule 2 gave details of percentage turnover by customer during 2008 and 2009. It identified a number of well-known construction companies as customers, including Persimmon Plc, Bellway Homes and Berkeley Homes. Schedule 3 gave brief details of 10 members of staff.

56. What was not apparent from the Information Memorandum, however, was the informality, and indeed the confusion, which surrounded the arrangements at the Ashford Site. It seems true to say, for example, that none of the arrangements concerning the operations at the Ashford Site were formalised (in the sense that SIK had no formal lease from GAL of the Ashford Site nor any formal licence or permission to make use of the assets owned by Nero, whether under hire purchase agreements or otherwise), and that the accounting treatment of the arrangements was somewhat opaque.

57. The latter (accounting treatment) point generated some interest from one of the potential bidders who came forward, a company called Thanet Waste. They instructed a firm of accountants, Magee Gammon, to conduct due diligence, and on 2 June 2010 Mr Antony Tutt of Magee Gammon wrote to Mr Davies with a series of queries. These included, under the heading "*Accounts Matters*", queries about the fact that the accounts provided showed "*No HP interest charge. No depreciation charge. No rental charge*".

58. Mr Davies forwarded this exchange on to his accountants, Spurling Cannon. In an email response to Mr Davies dated 4 June 2010, Mr Jon Spurling said the following in relation to the queries mentioned above:

> *"In terms of the accounts – there is no depreciation, interest or hire charge included within the accounts for Skip It Property Investments [i.e., GAL]. It has always been suggested to do this, so it is on a commercial basis with SIK, but is (sic.) has not happened. However, the overall position of the companies when looked at as a whole, will remain the same."*

59. When Mr Davies was cross-examined about these exchanges, he said that his understanding was that "*what Jon [Spurling] was doing was an adjustment on an annual basis for vehicle rental, property rental, et cetera et cetera, and it was done at the end of the year in the accounts*". By this, Mr Davies seemed to be saying that Spurling Cannon made an accounting adjustment at the year end, to reflect sums paid during the year by SIK from its income, which were treated as rental payments for the use by SIK of the Ashford Site, and for use of the assets necessary for the treatment of waste at the Site.

60. If that was Mr Davies' understanding, it was obviously wrong in light of Mr Spurling's email, which said that although the intention had been to regularise matters in accounting terms, that had not happened. When later asked what did happen in practice, as regards the mortgage payments due to Barclays, Mr Davies said that these were paid by SIK, i.e., the trading company which generated income. Mr Brisby QC challenged that proposition, on the basis that such payments were not shown in SIK's accounts, and neither were bank statements available showing relevant debits. It seems to me it is a perfectly logical explanation, however, and I accept it. The picture which emerges, consistent with so much else relating to Mr Davies' activities, is that matters were dealt with entirely informally. In practice, that involved any necessary payments being made from the income generated by SIK. This state of affairs was not properly reflected in the accounts, which is why Mr Spurling said it rested "*on a commercial basis with SIK*." But it seems clear that the mortgage payments and indeed the payments due to finance companies in respect of certain of the assets used at the Site were being serviced by someone, and it is entirely logical to suppose that the relevant someone was SIK.

61. Such accounting issues were not the only irregularities affecting *the Business*. I have already mentioned above the revocation of the O Licences held by GAL and Haulage, and the appeal against revocation. Additionally, Mr Taylor's evidence was that in 2008 the regulatory framework relating to waste management licences had changed, so that it was no longer possible for the holder of a WML effectively to sub-contract the operation of a waste management business to someone else. The position on this point was further clarified by the Environmental Permitting (England & Wales) Regulations 2010 (SI 2010/675) ("*the 2010 Regulations*"), which came into force on 6 April 2010. The 2010 Regulations abolished waste management licences in favour of "*environmental permits*", and established a scheme for the issuing of such permits to persons acting as the "*operator*" of a "*regulated facility*" (see Reg. 13), "*operator*" in this context meaning the person having "*control over the operation of the regulated facility*" (see Reg. 7). This must have given rise at least to some doubt about the appropriateness of the arrangements at the Ashford Site, under which SIK was the

trading or operating company, but GAL the owner of the Site and the holder of the Licence.

Prospective Sale of the Business at the Ashford Site

62. I come back to the prospective sale of the Business based at the Ashford Site, as proposed in the Information Memorandum described above. In addition to Thanet Waste, this also engaged interest from another potential bidder, Countrystyle.

63. As already mentioned, the Information Memorandum gave financial results for the "*Skip It Business*", including draft figures for the period to 31 December 2009 (turnover of £991,292 and gross profit of £236,783). In September 2010, when final, abbreviated accounts came to be filed for SIK for the year to 31 December 2009, they showed it with net liabilities of £13,441, and therefore insolvent as at the balance sheet date. Accounts for GAL and for Nero for the same period, also signed by Mr Davies in September 2010, showed net losses of £25,500 and £12,192 respectively.

64. Mr Davies had no explanation for the apparent discrepancy between the figures in the Information Memorandum and those in the filed accounts. Mr Brisby QC suggested that the figures had been manipulated to present an inaccurately positive picture to potential purchasers. I must acknowledge the unexplained and therefore unsatisfactory discrepancy, but beyond that do not think I can make any finding on this point. Mr Davies was represented by professional advisers at the time, namely Mr Butler-Gallie of Vertex Law Mr Spurling from Spurling Cannon, and the evidence is that at least one of the bidders, Thanet Waste, conducted its own due diligence on the proposed sale, and did not raise any specific concern about the turnover or profitability figures put forward. I do not feel I can properly test the admitted discrepancy and reach any reliable conclusion about why and how it arose. In any event I do not think it is necessary for me to do so.

65. I should deal with one other matter of detail concerning Thanet Waste which arose during the trial. This is that in his Witness Statement, one of the points made by Mr Lloyd was that he remembered being told by Spencer Ray of Thanet Waste, at some point in late 2010 or early 2011, that he (Spencer Ray) had put in a sham offer for Mr Davies' business on behalf of Thanet Waste, in order to try a stimulate a higher offer from the alternative bidder, Countrystyle. Mr Lloyd's position is that Spencer Ray gave him the information during a job interview. Leaving aside the inherent implausibility of that idea, scant details are given of the allegation, and on the face of it, it seems inconsistent with the email exchanges above, which show Thanet Waste engaged in a due diligence process and acting entirely in the manner of a legitimate commercial bidder. I therefore discount Mr Lloyd's evidence on this topic.

66. In any event, what is clear is that the discussions with both Thanet Waste and Countrystyle ran into the sand in the summer of 2010. Neither put forward an offer that Mr Davies was content with, although in an email dated 3 August 2010, Mr Ray of Thanet Waste referred to a figure of £1.85m, and in an email dated 16 August 2010 to Mr Tutt of Magee Gammon (Thanet Waste's accountants), Mr Davies said that the Board of Countrystyle had approved a purchase for £1.5m.

67. Apparently unhappy with the offers made, in the same email of 16 August, Mr Davies referred to a different plan. He said:

> *"I am now in a position of appointing a GM/Sales Director to run/grow the business, he is a well known party in the Kent region & has successfully built a similar business. ... The remit will be to grow the business and exit in 3 to 5 years with a target of £5m T/O & then exit – so numbers will be very different at that stage & probably outside the reach of TW."*

68. It is thus clear that by this stage, Mr Davies had determined to abandon his plans for sale, and instead had determined to build up the operations at the Ashford Site and look to sell at some future stage, when the operations had grown in scale. For this purpose, as will appear below, Mr Davies wished to make further use of the new brand he had developed – Greenbox Recycling – and make use of the new company he had incorporated back in March 2010 but which so far had not traded, namely GBR.

69. At some point during this period, it also appears that Mr Davies resolved to move abroad. The precise motivations behind this are somewhat unclear, but seem to have been associated with the personal difficulties affecting Mr Davies at the time, including the pending Directors Disqualification proceedings.

Mr Monks becomes involved

70. There is no doubt that the "*well known party in the Kent region*", referred to in Mr Davies' email of 16 August, was Mr Monks. Mr Monks had previously developed a successful business through two companies, Any Waste Solution Ltd ("*Any Waste*"), and Any Waste Recycling Ltd ("*AWRL*"), which had been sold to a private equity firm in 2008 for some £8.6m. Mr Monks had then spent some time travelling and pursuing other interests, including buying and selling high value cars, but his restrictive covenants had recently expired and he was free to return to work in the waste management and recycling area. Stuart Butler-Gaillie of Vertex Law had acted on the sale of Mr Monks' businesses. He had also been involved in the prospective sale of *the Business* at the Ashford Site, and he put Mr Monks in contact with Mr Davies.

71. There was disagreement between Mr Monks and Mr Davies about when precisely they first met. Mr Davies' pleaded case is that it was at around the beginning of August 2010, but in his witness statement for trial he referred to having a total of "*four to six conversations initially*", and mentioned in particular a meeting in late August 2010 at the International Hotel, Ashford, at which the idea of Mr Monks joining *the Business* was discussed for the first time. Mr Monks' evidence is that their first meeting was in around "*September or October*", and that it cannot have taken place in August, because he was in Spain then on holiday.

72. I do not think the point is material for present purposes, but in my judgment the most likely explanation is that there were some initial exchanges by telephone in early-to-mid August 2010 (perhaps via Mr Butler-Gaillie as intermediary), followed by a more detailed discussion in person at the Ashford International Hotel, in about late August 2010, also attended by Mr Butler-Gaillie.

73. In any event, the precise timing is rather less important than what was discussed. In Mr Monks' account of this first meeting with Mr Davies, he says that as he understood

it, he was being approached on the basis that he would take on a sales consultancy role for a business referred to simply as "*Greenbox*". He says that SIK was not mentioned, nor the possibility of a transfer of any existing business (be it *the Business* or otherwise) from SIK to the newly incorporated GBR. Thus, he says that although he understood that "*Greenbox*" was a new business, he was told it would be receiving financial input, and knowing nothing of the complicated situation among the various businesses at the Ashford Site, he assumed that all the correct licences and authorisations were in place so that "*Greenbox*" could trade. Mr Monks says that he was offered a directorship of "*Greenbox*" at this stage, but turned it down.

74. Furthermore, Mr Monks says that Mr Davies told him that the reason he wanted to step back from the business at the Ashford Site was because he believed he had a serious illness, "*Mr Davies told me he had cancer and implied the illness was terminal.*" Relatedly, Mr Monks says he was *not* told at the time that Mr Davies had been, or was about to be, disqualified as a director as a result of the pending proceedings arising out of the liquidation of ARCL.

75. Mr Davies' account of this first meeting in his witness statement is much more compressed. He does not deal at all with the question of his illness, or his Directors Disqualification proceedings. Instead, he says that the point he remembers most clearly is discussing with Mr Monks the branding idea he had developed – i.e., the Greenbox brand. Mr Davies' pleaded case, however, is that he never told Mr Monks that he was terminally ill, whether at the meeting at the Ashford Hotel or subsequently (Reply at para. 6.2), but that he did disclose his disqualification proceedings to Mr Monks after their initial meeting, at some point in around September 2010 (Reply at paras 4 and 6.2).

76. Pausing there, it seems to me entirely likely that Mr Monks was told little if anything in this first meeting about the precise configuration of the businesses operating at the Ashford Site, such as who the owner of the Site was and which company held the WML. Mr Davies accepted as much in his oral evidence. Such matters of detail would have been unusual for an initial discussion. But there must have been discussion of at least some aspects of *the Business* shortly thereafter, and in any event before 2 September 2010, because they are reflected in the Heads of Terms document I will refer to below (see at [82]).

77. As to what Mr Monks was told about Mr Davies' illness, however, it seems to me very likely that Mr Davies did tell Mr Monks, either at their initial meeting in the Ashford International Hotel or shortly thereafter, that he was suffering from a serious illness and that it was potentially life-threatening. I say that for the following reasons:

    i) I found Mr Davies to be unnecessarily obtuse in his unwillingness to accept the point that Barrett's oesophagus is not, strictly speaking, a form of cancer. Mr Brisby put to him in cross-examination an information sheet produced by Macmillan Cancer Support. They obviously speak with authority on this important topic. Their information sheet says in terms: "*Barrett's oesophagus is not a cancer. However, over time the cells can become more abnormal. Sometimes this develops into a cancer …*".

ii) Notwithstanding that, Mr Brisby had the following exchange with Mr Davies, whose answers to my mind demonstrate a marked unwillingness to accept the obvious:

"*Q. Will you accept from me that you were not suffering from cancer?*

A No.

Q Have you subsequently been diagnosed with cancer, properly so-called?

A No, they are monitoring the condition because it is progressive. It will happen. It may not happen."

iii) No doubt Mr Davies was distressed at his diagnosis at the time, but it seems to me that these answers are consistent with a tendency to mischaracterise it and perhaps to overstate its seriousness. The same conclusion is supported by the contents of the Handover Note (referred to further below at [94]), in which Mr Davies talks about safeguarding Mr Ford's position in the event of his (Mr Davies') death, which he says "*given my present state of health is a distinct possibility.*"

iv) Mr Davies accepted in his oral evidence that he had told Mr Ford, Mr Ford's mother, and maybe "*a few other people*" about his diagnosis. He also accepted that he had told Mr Monks has was ill, at some time probably around September 2010.

v) Mr Monks' account of his conversation with Mr Davies on this topic was not challenged in cross-examination, and in fact Mr Monks was not cross-examined about what Mr Davies told him about his health at all.

vi) Looking at this evidence in the round, in my view it is highly likely that when discussing his illness with Mr Monks – which he accepts he did – Mr Davies exaggerated its seriousness and its potential implications, in particular because at the time it suited him to do so, in order to engage Mr Monks' interest and sympathy.

78. Equally, it seems to me implausible to think that Mr Davies volunteered information to Mr Monks about his disqualification proceedings at this early stage, or indeed subsequently. Mr Davies' evidence on this point was sketchy and unconvincing. As already noted, despite the assertion in the Reply at paras 4 and 6.2 (see above), the question of when Mr Davies told Mr Monks of his Directors Disqualification proceedings was not dealt with at all in his witness statement for trial. In his oral evidence, he said that although there would have been a discussion he could not remember when, but also sought to marginalise the point by saying that the issue of his disqualification was "*not material to the theft of the business*". I also note that, in Mr Davies' initial letter before action, sent in November 2012, his impending disqualification was not cited as a reason for his wishing to exit *the Business* in September 2010. Again, looking at this evidence in the round, it seems to me very unlikely that Mr Davies made early (and voluntary) disclosure of his disqualification proceedings to Mr Monks. Given Mr Davies' character, it is much more natural to

suppose that he would have tried to keep such information to himself, even if there was a risk that it would at some point be leaked by Mr Ford, who knew about it, or come to be known by Mr Monks from other sources.

79. I will need to return below to the circumstances in which Mr Monks says he in fact did come to learn of Mr Davies' disqualification proceedings. It is a separate question, of course, whether any earlier failure to disclose them was really a matter of serious concern to Mr Monks. I will have to return to that issue as well.

80. Finally as to the initial meeting between Mr Monks and Mr Davies, I should comment on Mr Davies' recollection that a point of particular interest was the brand name he had developed. As he accepted in giving evidence orally, Mr Monks thought the brand name, "*Greenbox Recycling*" was "*a very good name*." He accepted also that it was not something he had come up with. He went on to observe, "*I wouldn't say I particularly liked it*", but this seems doubtful, because not only was the company he and Mr Ford incorporated in January 2011 called Greenbox Recycling (Kent) Limited, but the shares in GBRK are now held by a company called Caja Verde Ltd (which as Mr Monks pointed out, "*is Spanish for 'Greenbox', if you like conversion*"), and the shareholders in Caja Verde Ltd include another company, Boite Verte Ltd.

81. It seems to me that the upshot of this initial meeting between Mr Monks and Mr Davies was that Mr Monks' interest in Mr Davies' proposed new brand and venture had been engaged. Mr Davies' intention was to seek to build out *the Business* operating at the Ashford Site, with a view to resurrecting at some future stage the plan to sell it which had failed to come to fruition through the Summer of 2010. Given his background and previous success, Mr Monks had an important role to play in helping to drive sales and grow turnover. The precise nature of that role had yet to be worked out, however.

The Heads of Terms

82. That interpretation is borne out by subsequent events.

83. On 2 September 2010, Mr Butler-Gaillie sent to Mr Davies "*a first draft heads as per our conversation last week*." In his covering email he said: "*Please ensure that this gets seen by Jon and any other tax advisers for comments before we issue to Richard and Paul*." "*Jon*" was a reference to Mr Spurling of Spurling Cannon, and "*Richard and Paul*" were obviously Mr Monks and Mr Ford respectively.

84. The Heads of Terms document attached (the "*HoT*") is important, in that it gives an indication of Mr Davies' intentions and his vision for the future.

85. The HoT is headed "*SUBJECT TO CONTRACT*", and "*Proposed creation of new trading company under the name Greenbox Recycling Limited ('Greenbox') and off-shore holding company ('BVI Co') and terms of management of Greenbox and allotment of share options in BVI Co*." It sets out a proposed new structure for the companies operating from the Ashford Site, and a plan for the development of the business operating from the Site. The main features relevant for present purposes were as follows:

i) The existing corporate structure, with KAD Capital as holding company owning all the issued shares in SIK, was to be replaced with a new structure under which an offshore holding company, "*BVI Co*.", was to be holder of the entire issued share capital of KAD Capital.

ii) The trading business of SIK was to be transferred to GBR "*for nominal consideration*", and GBR would become the "*new trading company of the KAD Capital/BVI Co group of companies*". GBR was to undergo a "*rebranding and capital investment exercise.*" This was to be facilitated by a proposed new factoring arrangement to be entered into by GBR ("*[GBR] will seek to secure confidential invoice discounting facilities from HSBC …* .") More particularly:

> *"KD, RM and PF shall agree the terms of the capital investment in [GBR] subject to the availability of the above CID [i.e., Confidential Invoice Discounting Facility] or other banking facilities. The intention of the parties subject to suitable funding is for the business to be rebranded and for the replacement of the 3x18 tonne lorries, the 1x7½ tonne lorry and the 32 tonne RoRo. The replacement programme will be subject to available funding and cash needs of the business."*

iii) As to the assets presently used by SIK, "*The vehicles, plant and equipment used by SIK shall continue to be owned by [Nero]. Nero shall notify all HP or lease purchase companies of the change of operator/user of such vehicles, plant and equipment as required …* ."

iv) As to shareholdings, the idea was that Mr Davies would be the majority shareholder in the BVI Co, but that Mr Ford and Mr Monks would be given a combination of shares and share options (in the case of Mr Ford), and share options (in the case of Mr Monks), which over time and contingent on the achievement of certain "*key performance indicators ('KPIs')*", would give each of them a 10% shareholding in the BVI Co.

v) In the case of Mr Ford, the KPIs included such matters as the improvement of recycling rates and the weekly verification of vehicle maintenance checklists. In the case of Mr Monks, whose role was described as "*sales consultant*", the KPIs were all concerned with improving turnover. The ultimate target was £5m turnover for the GBR financial year ended 31 December 2015. The HoT stipulated a deemed turnover for the 2010 financial year of £1m.

vi) In addition to his share options, Mr Monks was to be paid an annual consultancy fee of £40,000 plus VAT, on the basis of a 3 day per week commitment.

vii) The HoT document stated expressly that they were "*not exhaustive and are not legally binding*", and were "*subject to the entering into of formal binding legal agreements*", a number of which were then set out, including constitutional documents for the proposed BVI Co and a business sale and purchase agreement between SIK and GBR.

86. An email dated 13 September 2010 shows the HoT document being sent to Mr Monks. Mr Monks, in his witness statement for trial, said he did not recall this email or its attachment. He said in particular that the reference to VAT being charged on his consultancy fee would have struck a chord with him, because he was not personally VAT registered.

87. That may be so, but on its face the document seems intended to reflect and summarise the outcome of discussions which had already taken place between the affected parties, including Mr Monks. It is entirely logical to suppose that a document of that type would have been sent to, and received by, Mr Monks at around this time.

88. That conclusion is also supported by the fact that the HoT document reflects matters which, on his own evidence, Mr Monks accepts he discussed with Mr Davies. I have in mind in particular the reference in the extract at [85(ii)] above to GBR seeking to secure confidential invoice discounting facilities, and subject to that the parties intending to undertake a rebranding exercise and to replace certain vehicles. In the course of his cross-examination, Mr Monks accepted that he had a history of using factoring arrangements in his previous venture as a way of improving cash flow, and had discussed the idea with Mr Davies. If it is right (as I hold it is) that the HoT reflects Mr Monks' own suggestion to make use of a factoring arrangement, that reinforces the conclusion that the document was one which was sent to him and which he saw.

89. I therefore hold that the email was sent and received, and that Mr Monks saw it. It follows that in my judgment, and whatever the precise chronology of events sitting behind it, by at latest 13 September 2010 Mr Monks was aware of the then current structure of the operations at the Ashford Site as described in the HoT, including the fact that Nero was the owner at least some of the assets used in the business, and that there was intended to be a transfer of goodwill from SIK to GBR. In Mr Monks' favour, I agree that although the HoT is not a document having contractual force, it also evidences an understanding that, subject to the proposed factoring agreement being put in place, the parties intended to have discussions about further capital investment in GBR.

Disqualification Undertakings

90. At around this time, the disqualification proceedings against Mr Davies were coming to a head. On 15 September 2010, he gave a Disqualification Undertaking, recording that he would not act as a director for a period of 11 years. In the Undertaking, Mr Davies accepted a number of serious deficiencies in his past conduct, including that he caused ARCL to "*continue to trade whilst loss-making and insolvent at the risk and to the ultimate detriment of its general body of creditors"*; and that he had "*failed to maintain and/or preserve adequate accounting records*", or alternatively had failed to deliver them up to the Official Receiver when requested.

91. Mr Davies' period of disqualification began on 8 October 2010. Perhaps in anticipation of that, and in any event very shortly before he gave his Undertaking, on 12 September 2010 he signed accounts for SIK, GAL and Nero for the year to December 2009 (already mentioned above at [63]); and on 24 September 2010, he resigned as a director of GBR.

The Intended Handover

92. Mr Davies' evidence was that a bank account in the name of GBR was opened at HSBC in about September 2010.

93. At about the same time, the plan to put in place a factoring agreement was actioned. On 18 September, Mr Davies submitted to Lloyds TSB Commercial Finance a completed Proposal Form for a factoring arrangement. This was in the name of "*Greenbox Recycling T/a Go Green*". It identified some £103,098.22 as presently owing by customers, and gave a turnover figure for the last full year of £1,164,425. It suggested a projected turnover figure for the next 12 months of £1.6m. It gave details of the HSBC account with a credit balance of £10,984.

94. On 30 September, Mr Davies provided Mr Ford with a document on the letterhead of KAD Capital Investments, headed "*Hand-over notes & instructions for Paul Ford (as discussed on 28 Sept 2010*)" (the "*Handover Note*"). I note in passing that 28 September 2010 is the date when Mr Ford was appointed a director of GBR. It is also in September 2010 that Mr Davies says he relocated from Kent to Suffolk, apparently as a prelude to his later moving abroad. It makes sense to think the Mr Davies would have provided some handover information to Mr Ford to coincide with that event.

95. The Handover Note contains some important indications of the position reached between the various protagonists. The introductory section says the following, relevant to the question of Mr Davies' state of health:

> *"I accept that you will not probably appreciate written words on a piece of paper and you will safely place behind your chair, in that large 'filing cabinet' in the tea room but the following is meant to assist you as well as safeguard your position in the event of my death. A copy of this document is attached to my Will … ."*

96. As regards GAL and the position of the Barclays mortgage on the Ashford Site, the Handover Note recorded that Mr Ford was to be the director of GAL, and then said:

> *"The mortgage needs to be paid to Barclays on the 22nd of each month in cleared funds from the trading company (GBR). A reduction in the total amount, in the region of £30,000, needs to be made next year as i have discussed with Janine Finney at Barclays. Also she needs cash flow forecast by the end of December …*
>
> *I have asked Richard to prepare the cash flow, as he is familiar with his sales expectations …*
>
> *Richard is to have no role in this company [i.e., GAL]. he is not being appointed as Director … "*

97. As regards the new trading company, GBR, the Handover Note said as follows:

> "*As you know, it is all set up to run from 1st November. The factoring agreement will be in place with Lloyds and Richard is already involved. He is to be MD and drive sales. The same rules apply to him*

as they do to you, in that anything that needs to be bought, with a value over 1,000, has to be emailed to me with the following exceptions, as I already know of the planned purchases. The replacement RoRo vehicle; the shovel for the yard; the replacement 360 for the yard [various further items are then also mentioned] …

The money that is owed to skip it from account customers (approx. 114,000) will be used by GBR during Nov, Dec and possibly Jan. thereafter the money is to be paid back into the skip it account at HSBC. With access to the factoring & this money, GBR will have access to over 200,000 which is more than enough to keep GBR going, until the volume that Richard is bringing in & the normal trade picking up in March 2011. Skip it kent; I have already discussed with SC [Spurling Cannon] – will be left as a dormant non-trading company for the short to medium term. SC will then deal with it is say 6 to 12 months time.

Richard is to prepare each month initially, & email me, a sales report (leads & awarded work), a cash reconciliation report, a year on year cash flow showing actual against anticipated. I anticipate & have already discussed with him that we would all meet in Dubai every 3 to 6 months. That can be determined later."

98. As to Nero and KAD Capital, the Handover Note said:

> *"You need to do nothing with these companies. You are Company secretary only. As you know Nero owns & holds all the assets but will be 'used' by GBR, and both John at Spurling Cannon & Kingsfords, have a copy of the assets list, as both have been involved in the preparation of documents that safeguard the relationships between the companies as we move forward. Nothing is to be disposed of from either of these companies without my specific written consent."*

99. Then, under the heading "*General & any other bits*", the Handover Note said as follows:

> "*We agreed that you, Richard & myself, will only each take out 3000/month (750 per week) from GBR. This can be looked at when we meet in Dubai next year …*
>
> *All cash received for scrap metal & cash bins will be put into a fund and not used – it will be split 3 ways in Dubai – i know Richard expects a great deal of cash to come in which is very different to that experienced by us to date.*
>
> *I will prepare & lodge with Spurling Cannon the share transfer forms for the transfer 10% in GBR for both to you and Richard, as agreed …*
>
> *I leave with you & the Director Resignation forms duly completed & signed for each company to be forwarded to Companies House.*

The transfer of the trade from Skip It Kent to KAD C, has been documented as well as the right for GBR to occupy the land at Ashford & the day to day use by GBR of the assets owned by [Nero]. All are separate legal agreements that i have had prepared and i have signed. I retain these Agreements and a copy of them also sits with the Will

Hope all goes well & i have covered everything in these notes to you. I will have the mobile but as the call charges will be expensive i think email is the best medium to use. Richard is more that capable of using it if you feel uncomfortable."

100. The basic structure of what was intended therefore seems tolerably clear:

i) GAL was to be left as owner of the Ashford Site, subject to the Barclays mortgage, which was to be reduced during 2011 but in any event serviced by payments each month to come from the income produced by GBR. Mr Ford was left as the sole director of GAL.

ii) GBR would take over the trading operations at the Ashford Site (the reference to the "*transfer of the trade from [SIK] to KAD C*" is somewhat obscure, but I note that the HoT document refers to GBR as the "*new trading company of the KAD Capital …group*").

iii) Also as to GBR, both Mr Ford and Mr Monks were to become minority shareholders. It would fund the acquisition of certain new vehicles and equipment. It would have the benefit of the new factoring agreement, and it would also have the benefit of funds from SIK for a period of about three months, which would be enough to keep it going. Thereafter, SIK would be allowed to become dormant and (presumably) dissolved. GBR would seek to build its turnover, with the assistance of Mr Monks who had a proven track record in that area.

iv) Meanwhile, Nero would continue to hold the assets which had previously been used by SIK (and would now be used by GBR) in the business conducted from the Ashford Site. (This of course must be read subject to the points made above as regards ownership of the assets used in *the Business*, and as regards the relevant hire purchase and other finance arrangements).

v) Mr Davies was to relocate abroad. Mr Monks was to email a number of progress reports each month. As to remuneration, for the time being Mr Davies, Mr Monks and Mr Ford were each to receive £3,000 per month (£750 per week) from GBR. There was to be a meetings in Dubai every 3-6 months, and at one of those meetings cash income was to be divided up between them. Mr Davies was to be contactable by mobile or, perhaps more conveniently, by email, if needed.

101. Mr Monks' position in his evidence was that he never saw the Handover Note at the time. It is true that the Note was addressed to Mr Ford only, and so I accept Mr Monks' evidence on this point. That is not to say, however, that he must have been completely ignorant of the matters reflected in the Handover Note, and it seems to me

he must have been aware at least at a general level of the plans referenced in the Handover Note, some of which related directly to him.

No Formalities Completed

102. Unfortunately, the assurance given to Mr Ford in the Handover Note that the arrangements between the various companies had already been formalised by means of "*separate legal agreements*" was not true. Although it is true that a factoring agreement had been entered into (see above), and although it certainly seems to have been the intention to formalise the hitherto informal arrangements which had underpinned the Ashford Site business, there is no evidence of any final form agreements ever being entered into. No copies of such documents have been produced. Like so much else associated with Mr Davies, it seems that the formalities were never properly attended to.

103. Thus, although the HoT contemplated a formal transfer of SIK's trading business to GBR, no formal agreement recording such transfer was ever entered into. This perhaps explains why, in an email to Mr Davies dated 1 December 2010, Mr Spurling of Spurling Cannon was able to say: "*If [SIK's] goodwill was sold, the money would initially end up in [SIK]*" This reference to a prospective sale of goodwill suggests that, as far as Spurling Cannon were aware, no such sale had yet taken place. That is consistent with the idea that no formal transfer document had been entered into. Further and in any event, there is no evidence that, to the extent required under the terms of the Debenture with Barclays, Barclays' written consent was ever provided for the proposed transfer of goodwill to GBR.

104. As noted above, the May 2010 Information Memorandum referred to SIK having 10 employees. It was clear from Mr Davies' cross-examination on this topic that the formalities necessary under TUPE to effect a transfer of any relevant contracts of employment from SIK to GBR were never undertaken by him. In fact, there is some doubt as to whether the employees were engaged under contracts of employment at all at the time: Mr Monks' evidence is that he recalls the employees being paid cash in hand when he was first introduced to them, and that there was no provision for relevant taxation, including National Insurance. He says that is consistent with the fact that SIK was eventually wound up on the petition of HMRC on 15 July 2011.

105. In a similar vein, it is part of Mr Davies' case that Mr Monks was engaged under an employment contract with GBR. In saying that, Mr Davies relies on a copy of the proposed employment contract signed by him on behalf of GBR and dated 30 September 2010. Mr Monks, when cross examined, denied having seen this document, and certainly denied having been an employee of GBR. The document is not signed by Mr Monks and no covering email has been produced or covering letter evidencing the fact that it was sent to him.

106. The parties have produced a further email, however, dated 12 November 2010, attaching a copy of the same document (now headed "*Consultancy Agreement*"), but with proposed amendments shown in track changes. The 12 November 2010 email is sent on behalf of Amanda Glover, a solicitor at Kingsfords Solicitors, who at the time were acting for Mr Davies. It appears to be sent to Mr Davies, and the mark-up (which is dated 25 October 2010) refers to the changes as "*AJG track changes*".

There is nothing to indicate that this revised agreement was sent to Mr Monks, even if he saw an earlier draft. I will comment further on this below.

107. A proposed employment contract to be entered into by Mr Ford has also been produced, again signed by Mr Davies on behalf of GBR but not by Mr Ford himself. Once more, however, no covering email or letter has been provided showing that it was in fact sent to Mr Ford.

108. Finally, although the documents produced by the parties include a Licence to Occupy the Ashford Site in favour of GBR, this is in the form of a draft only. It seems it was sent by email to Mr Davies only (at the "info@skipitkent.co.uk" email address) on 21 December 2010, again by Amanda Glover of Kingsfords (Mr Monks confirmed in evidence that he did not know who Amanda Glover was). Important information is missing, including the licence fee, although Mr Davies when cross-examined said that since the licence fee was intended to cover the Barclays mortgage, a sum equal to the required monthly mortgage payments would have been logical. That seems to me to be correct, and I accept Mr Davies' account as evidence of what was intended, although it was not formalised.

109. Similarly, although the Licence lists in a Schedule a number of assets which Mr Davies described as being owned by Nero, Nero itself is not identified as a party to the Licence and no licence fee is stipulated. Again, however, I accept Mr Davies' evidence here as to what was intended: there was to be a licence designed to formalise an arrangement under which GBR was permitted to use the relevant assets, subject to payment of a fee which would at least cover any hire purchase or other finance charges. It was not, however, finalised and executed.

Steps to Implement the New Structure

110. Despite the failure to document and formalise the intended position, it is clear that some steps were nonetheless taken in practice to implement the new structure Mr Davies had devised.

111. Amongst other things, in order to take up his consultancy role, Mr Monks began to attend at the Ashford Site. His written evidence was that he made a visit to the Ashford Site in around October 2010, and when cross-examined he accepted that he visited the Ashford Site a total of 10 times in the period before he was eventually appointed a director of GBR on 30 November 2010.

112. Mr Monks' evidence was that his instant reaction on first visiting the Ashford Site was that it was a mess, with a huge amount of waste being stored there. In his witness statement, he identified a number of issues, including that the building at the Ashford Site contained asbestos, and that the vehicles and plant and machinery there were in poor condition. Nonetheless, he said that such matters were not of real concern to him, because of his limited consultancy role.

113. This evidence obviously supports the view that Mr Monks was well aware of the physical state of the Ashford Site, and of the apparently poor state of repair of at least some of the plant and machinery stored there, before he took the decision to become a director of GBR.

114. Also on the topic of matters that Mr Monks was or was not aware of, one of his particular complaints is that he was not told, at least initially, that the relevant WML for the Ashford Site was held not by GBR but by GAL. On 12 November 2010, however, as part of the initiative to get GBR up and running, Mr Davies sent Mr Monks an email attaching a number of what he called "*standard docs*." These included "*Waste Management licence.pdf.*" Mr Monks accepted in cross-examination that this email had been sent to him.

115. As to the attachment described as "*Waste Management licence.pdf*", it was put to Mr Monks in cross-examination that the provision of a copy of the WML under cover of the email of 12 November was inconsistent with the idea that Mr Davies had sought to hide the fact that GAL was the licence holder. The WML in fact identifies SIPI as the licence holder: this of course is the same company as GAL, before its change of name in April 2010. Having been shown the WML, Mr Monks had the following exchange with Mr Davies' counsel, Mr Shaw:

> "*Q. So, there was no attempt by Mr Davies to hide the fact that Greenbox, GBR, did not itself have a waste management licence, that's correct, isn't it?*
>
> *A. But this says Skip It Property Limited, that is what I was sent. You just – this is what I was sent. It doesn't say 'GAL', does it, GAL? Which wasn't associated with Greenbox. So, this licence doesn't say GAL on it, as you have just said to me. You said GAL at the beginning. It just says Skip It."*

116. Mr Shaw submitted that that was an evasive answer. I agree. There was no attempt by Mr Davies to disguise the fact that the relevant WML was held by a company other than GBR. He provided a copy of a document showing clearly that that was the case. Mr Monks' failure to accept as much straightforwardly was deliberately obtuse, and typical of the way in which he approached his evidence as a whole. It therefore seems to me that Mr Monks was aware before his decision to become a director of GBR that it did not itself hold a WML, or if he was not aware, was indifferent to whether GBR itself held a WML or not.

117. Another example of Mr Monks' lack of care in giving his evidence came shortly afterwards. This was in the context of the efforts being undertaken to commence trading via GBR. In his Witness Statement, Mr Davies said that the intention was "*for the trade to change over around 1 November 2010.*"

118. The documents support the view that GBR became active at around this time, and these include standard form letters dated 16 November 2010, both on the face of it signed by Mr Monks. The first is a letter telling existing customers that GBR had acquired the business of SIK, and announcing that Mr Monks had joined the new enterprise and was to lead the Sales team (the "*Change of Ownership Letter*"). The second is a letter to existing customers of SIK, informing them that from 1 November 2010 invoices raised by GBR were subject to a factoring arrangement with Lloyds TSB, and so payments would need to be made to Lloyds TSB (the "*Factoring Letter*").

119. In his Witness Statement for trial, Mr Monks said he did not remember seeing or signing either letter. Although he appeared to accept that the signature on the Change of Ownership Letter was his, he took issue with the signature on the Factoring Letter: he said that the signature on the Factoring Letter was "*markedly different*" to the one on the Change of Ownership Letter, and went on: "*I am quite particular when signing documents and would not usually sign my signature so that it went over other words on the page, like the signature on this document does*."

120. When cross-examined, however, Mr Monks adopted entirely the opposite position. He was shown the Factoring Letter first, and accepted that the signature on it was his. When then shown the Change of Ownership Letter, he said he had not seen it before and did not believe it was his signature. When questioned further, he persisted in his answer and said that: " *... basically they are the wrong way round. I think in my witness statement it is the wrong way round.*"

121. This shows an attitude to the giving of evidence which is certainly not careful, and might fairly be described as cavalier. Mr Monks' answers are again typical of someone who seems unwilling to accept the obvious, and willing to change his story when he believes it suits his purposes to do so. In my judgment, I should treat both letters as bearing Mr Monks' signature.

122. These letters obviously support the view that view that, notwithstanding the failure to complete the relevant formalities already mentioned above, at least some customers were in practice told to deal with GBR not SIK, and GBR thus commenced operations. Other evidence supports the same view.

123. Mr Monks, for example, accepts that at some point in November 2010 he attended a meeting with Mr Davies and Mr Nick Farrell of Persimmon Homes (who was a personal friend of Mr Davies). That must have been in his capacity as a representative of GBR. Mr Monks also accepts that he had meeting with a number of his own contacts to update them on his new position with GBR, and that he encouraged such contacts to "*use [GBR] for skip collection*." Further, he accepts that Mr Davies arranged for the production of a new letterhead and stationery.

124. Mr Davies' evidence is that all the customer data from SIK was transferred to GBR's new "*Quickbooks*" accounting software system. No documentation has been produced in relation to this allegation, but that is perhaps not surprising given that the relevant events are somewhat historic, and it is consistent with the other matters mentioned above that in practice an effort was made to transfer customer data across to GBR. I therefore accept Mr Davies' evidence on this point.

125. Mr Davies' evidence is also that work on a new website for GBR was started in about October 2010, and the website went live on 16 December 2010. It is common ground that the website was registered in Mr Davies' personal name and not in the name of GBR. Nonetheless, it would have been a point of reference for customers and potential customers (albeit, as maters turned out, for a relatively short period).

126. At the same time, there is some evidence of customer dissatisfaction, or at least dissatisfaction with the service provided historically by SIK. In an email from Selectaskip dated 4 November 2010, for example, they said: *"[p]lease can I reiterate that we do not want Skip It to deliver any of our skips."* That gave the impression

that, far from being a loyal customer, they had had unhappy experiences with SIK in the past, and wanted to be assured they were not dealing with them in the future.

127. As to employees, I have mentioned above Mr Davies' admitted failure to take any steps as required by TUPE, but notwithstanding that on 18 November 2010 he sent an email to Mr Monks, attaching "*Employment agreements as discussed*", relating to the 10 employees previously employed by SIK (including Mr Ford). The email went on: "*You will need to print 2 copies of each, Employees to sign both and return one copy with personal details sheet that is attached at the back.*" There is no evidence to suggest that these documents were in fact circulated or signed, but what is clear from the email is that it was for Mr Monks to make sure they were. If they were not, then on the face of it that is not something he can complain about.

128. Consistent with the idea that GBR was active and trading by November 2010, its bank account at HSBC shows both:

    i) funds being received under the factoring agreement with Lloyds, beginning on 17 November 2010; and

    ii) from 10 November, funds being received by GBR *from SIK*, presumably under the arrangement described in the Handover Note designed to provide GBR with working capital while its own trading position was built up (see above at [97]: "*The money that is owed to skip it from account customers (approx. 114,000) will be used by GBR during Nov, Dec and possibly Jan. thereafter the money is to be paid back into the skip it account at HSBC. With access to the factoring & this money, GBR will have access to over 200,000 which is more than enough to keep GBR going, until the volume that Richard is bringing in & the normal trade picking up in March 2011.")* I note in relation to this that one of the documents produced is an aged debtor report dated 31 October 2010, which shows SIK as at that date being owed over £170,000.

Barclays

129. There is an issue between the parties as to what Barclays were told of the intended transfer of business from SIK to GBR. I have already mentioned above that no evidence has been produced of any written consent provided by Barclays, to the extent required under their Debenture.

130. Mr Davies, when cross-examined, said that they were fully aware of what was happening, because he had a good relationship with them and kept them fully informed. Thus, although no formal written consent had been produced, Barclays can have had no objection to the proposed transfer of the trading operations at the Ashford Site from SIK to GBR.

131. In challenging this case, Mr Brisby QC in cross-examination relied on an email sent by Mr Davies to Janine Finney at Barclays dated 8 November 2010. This was sent from an SIK email address, and enclosed a balance sheet for SIK for the year to December 2010 (one can see from the email exchange that a profit and loss account had already been provided). In his email Mr Davies referred to having engaged the services of Mr Monks, and said Mr Monks was now fully on board and that his efforts were starting to bear fruit with an increase in sales in October. The email, however,

makes no reference to the plan to shift the trading aspects of the Ashford Site business from SIK to GBR. Mr Brisby said that Mr Davies was thus deliberately trying to mislead Barclays.

132. I will come back to the position of Barclays below. It is certainly true to say that no documentation has been produced which shows that Barclays were told of the proposed transfer of the trading operations at the Ashford Site to GBR, and that the 8 November 2010 email makes no reference to it. Equally, the email exchanges on 8 November 2010 make no reference to the GAL mortgage account being in arrears at that stage, which is one of the allegations made against Mr Davies by Mr Monks. One would have expected to see some reference to the account being overdrawn, if in fact it was.

O Licences

133. The appeals by GAL and Haulage, against the determinations against them to revoke their O Licences, came to a conclusion on 22 November 2010, when the Upper Tribunal, Administrative Appeals Chamber, Traffic Commissioner Appeals, published its decision. This dealt also with the appeal by SIK against the earlier decision of 7 January 2009 refusing its application for an interim licence.

134. In summary the appeals by Haulage and GAL were dismissed, with the consequence that the original order revoking their O licences was to come into effect on as from 2359 hours on 22 December 2010. The appeal by SIK was allowed, but only on terms that SIK's application be remitted for re-hearing. In dismissing the appeals on behalf of Haulage and GAL, the Upper Tribunal endorsed a number of highly critical findings made by the Deputy Traffic Commissioner. These included, as regards both companies, a finding that "*some or all of the in house PMI forms are not credible, that is to say they are false documents*." As regards GAL, the Deputy Traffic Commissioner said that he was presented with a "*bad case*", referring again to the false PMI sheets; the failure to use drivers' cards, despite being told that they were needed; the failure of Mr Davies to exercise any proper management control over Mr Ford; and the uncooperative and evasive attitude of Mr Davies in relation to the arrangements for an interview. His overall conclusion was that he could not trust Mr Ford or Mr Davies to operate in accordance with the undertakings and conditions on the operator's licence. He therefore held that GAL's fitness to hold an O Licence was forfeit and that it should therefore be revoked.

135. Similar conclusions were expressed in relation to Haulage. The appeal by SIK was allowed on what the Tribunal itself described as a technical point. This was as follows. In his decisions dealing with Haulage and GAL, the Deputy Traffic Commissioner had made certain findings against Mr Davies and Mr Ford personally, including that they had "*forfeit their good repute*", and these findings had then been used as the basis for denying SIK's application. On appeal it was held that the Deputy Traffic Commissioner had had no jurisdiction to make findings against Mr Ford and Mr Davies personally, and that being the only basis for the decision against SIK, that decision had to fall away.

136. In cross-examination, Mr Davies explained that no further action was taken in response to these findings – i.e., SIK did not in fact make any further application. Instead, an application was made in the name of GBR in mid-December 2010. The

application document itself has not been produced, but there is a covering letter, on the letterhead of GBR, dated 15 December 2010. It is unsigned. A copy of a cheque for the fee of £250 has also been produced, payable to the Vehicle and Operator Services Agency in Leeds ("*VOSA*"). It is signed by Mr Ford.

137. This has proved to be controversial, and I will need to say more about it below.

New Equipment

138. Mr Davies explains in his witness statement for trial that on around 24 November 2010, he took Mr Monks to meet CAF in order to discuss the acquisition of certain additional items of equipment which Mr Monks wished to have available, in particular "*a Ro-Ro vehicle, which he had identified, and a front loading Shovel (Terex) that again he identified*." He goes on to say: "*New plant and equipment was identified and eventually purchased by GBR.*"

139. The idea that Mr Monks was pressing for the acquisition of new equipment is supported by the HoT document, mentioned above (see [85(ii)]), which referred to *"[t]he intention of the parties"* involving *"replacement of the 3x18 tonne lorries, the 1x7½ tonne lorry and the 32 tonne RoRo."* It is also consistent with the Handover Note (see [97] above), in which, when discussing GBR, Mr Davies referred to certain "*planned purchases*" which he already knew of, including "*[t]he replacement RoRo vehicle; the shovel for the yard; the replacement 360 for the yard."*

140. Whether or not Mr Monks attended the meeting with CAF, it is certainly true that new plant and equipment was acquired, but the documentary evidence suggests that in fact it was acquired in the name of SIK, rather than GBR. The relevant documents are (1) an Asset Purchase Agreement entered into between SIK and CAF in relation to a Scania Hooklift, signed by Mr Davies on 23 November 2010; and (2) an Asset Purchase Agreement entered into between SIK and CAF in relation to a Terex machine (i.e., the "*shovel for the yard*"), signed by Mr Davies on 8 December 2010. As Mr Brisby pointed out, Mr Davies had by that stage been disqualified as a director. Mr Davies was cross-examined as to the second of these documents, and sought to suggest that he had in fact signed the Agreement at some point in September, and date was inserted at some later point, perhaps because delivery of the Terex was held up. That seems to me to be a contrived and untruthful answer, and I reject it.

141. In any event, the fact remains that the two Agreements refer to SIK and not GBR. Mr Brisby sought to rely on this fact as evidence that there had been no transfer of any business or goodwill to GBR by this stage, in late November or early December 2010. I will come back to this point below.

Mr Monks' Directorship

142. It is common ground that Mr Monks became a director of GBR on 30 November 2010. Mr Monks' evidence is that this followed a further meeting he had with Mr Davies on 29 November, when Mr Davies approached him and asked him to take up a directorship. According to Mr Monks, this was put to him again on the basis of Mr Davies' failing health, and was accompanied by an assurance that there would be further investment in the operations at the Ashford Site. He says Mr Davies offered him a 10% shareholding in GBR as an incentive.

143. Mr Monks accepted the offer of a directorship. His description of his motivations for doing so is rather counterintuitive. He says that he was becoming concerned at the state of the yard at the Ashford Site, and concerned about the possible reputational impact of his being associated with Mr Davies and Mr Ford. He says he was beginning to become concerned that his reputation may be on the line, and that he could see that the Ashford Site had many issues and could not be resolved without significant investment. Nonetheless, he says he was assured by Mr Davies that there would be a cash investment in GBR ("*Mr Davies said that he was due a VAT refund and that he had money overseas*"). Consequently, although *"[w]ith the benefit of hindsight, I should have seen the warning signs and walked away*", Mr Monks instead decided to become a director and shareholder. This was because:

> *" ... it would allow me the opportunity to investigate the affairs of [GBR] further, and determine what, if any, risk I had exposed myself to by agreeing to become a consultant associated with it."*

144. This all strikes me as counterintuitive because if an important part of Mr Monks' thinking at the time was to seek to limit his exposure to potentially unknown problems and risks, it would have made more sense to investigate the affairs of GBR further *before* taking up the offer of a directorship. It seems to me much more likely that Mr Monks, an astute businessman possessing a strong entrepreneurial instinct, already knew enough to have formed the view that GBR (or the Ashford Site) had potential for development, and wished to be part of that development. Indeed, he said as much in his witness statement:

> *" ... I felt that the offer might still be a good one due to my experience in the waste management industry – I would have more control over [GBR] and, at the time, I thought [GBR] had the potential to be a successful business with the right investment and management."*

145. In the course of cross-examination, Mr Monks also accepted that : "*On initial discussions, I thought there may have been an opportunity, yes, for the future.*"

<u>December 2010</u>

146. At about this point there is a very material divergence in the accounts given by Mr Monks and by Mr Davies.

147. Mr Monks' case is that, exercising his new powers as director, he undertook inquiries into the operations of GBR and for the first time a number of matters of serious concern came to his attention, principally as a result of discussions with Mr Ford. These are said to have included, most importantly:

i) the fact that the vehicles, plant and machinery at the Ashford Site were not owned, or leased by, GBR, so that GBR was using them without permission of the relevant owner or finance company;

ii) the fact that GBR did not have its own O Licence;

iii) the fact that the Ashford Site was not owned by GBR and that the mortgage had fallen into arrears, and that Barclays had informed Mr Ford they intended to repossess the Site; and

iv) the fact that Mr Davies had recently been disqualified as a director.

148. Mr Monks says that he confronted Mr Davies about these matters at a meeting in Esher in the second or third week of December 2010, when Mr Davies gave him various assurances, including that an application for an O Licence had been made by GBR and in the meantime an interim O Licence was in place. Mr Monks says that Mr Davies dismissed the idea of his disqualification as "*hearsay*" and nothing to worry about. He says that Mr Davies gave him an assurance that there would be further, and significant, investment in the operations at the Ashford Site.

149. Mr Monks says he then reported back on the meeting to Mr Ford, who told him that in fact, although an application for an O Licence had been made by GBR, that had been done in his (i.e., Mr Monks') name, but without his knowledge or consent, and his signature had been forged.

150. Mr Monks says that he then telephoned Mr Davies, but Mr Davies hung up on him. When Mr Monks returned to the Ashford Site the next morning he was informed by Mr Ford that the safe had been emptied of the £20,000 cash stored in it. Because the safe had been opened using a key, Mr Monks did not think the police would be interested, and so the incident was not reported. His evidence is that only Mr Ford and Mr Davies had keys to the safe. Mr Monks says that he tried calling Mr Davies but did not get a response, and was told by Mr Ford, who had spoken to Mr Davies' wife, that he had left the country for the Middle East.

151. This detailed account is denied in its entirety by Mr Davies. He says there was no meeting at the Costa Coffee in Esher, and no subsequent telephone call in which he hung up on Mr Monks. He denies taking £20,000 from the safe at the Site, as Mr Monks alleges. He accepts that he went abroad, which was always his plan, but says that did not happen until early 2011.

152. I will need to come back to this fundamental difference of recollection between Mr Monks and Mr Davies about the events of December 2010, but before doing so it is convenient to consider the remaining aspects of the overall story as gleaned from the evidence, including the decision to incorporate GBRK in early 2011 and the commencement of its trading activities.

<u>Year-end 2010</u>

153. There was much controversy between the parties as to the physical state of the Ashford Site in late 2010. I have mentioned above the Report from the Environment Agency in February 2010. There is no contemporaneous documentation dating from the year-end 2010, but there are Environment Agency Reports in early 2011, which paint a very negative picture of the state of the Site, and this is borne out by the evidence of the witnesses:

i) Mr Monks' evidence in his Witness Statement is that when he saw the Ashford Site in October, it was in a mess, with a huge amounts of waste being stored there.

ii) An Environment Agency Compliance Assessment Report after a visit on 21 January 2011 said: "*There is a great deal of work to be carried out on the site in order to bring this site into compliance with the permit conditions and a site improvement plan has been discussed …*". A number of breaches of condition were noted, including: "*The tipping area under the temporary scaffold structure is being used as an additional storage area for unsorted waste materials. This temporary scaffold structure is not a building and in future should not be used as such … .*"

iii) The evidence of Mr Smith, Mr Monks' accountant, is that when he visited the Site in January 2011, "*it was apparent that there was an enormous amount of waste*" there.

iv) The evidence of Mr Taylor, Mr Monks' environmental consultant, was that when he first visited the Ashford Site on 17 January 2001, he was "*horrified*." I think Mr Brisby is correct to suggest that Mr Taylor is a careful person who chooses his words carefully, and so I place particular weight on his observation.

154. I discount the suggestion made by Mr Davies in cross-examination that there must have been a significant build-up of waste in the period after he stepped away from the day-to-day operations at the Ashford Site in the autumn of 2010. In light of the state of the Ashford Site in February 2010, and the amount of waste material which it is clear was there in January 2011, it is much more likely that no serious effort had been made to clear the Ashford Site and that further waste had simply accumulated in the meantime so that it was a significant problem by the year-end 2010.

155. Other aspects of the operations at the Ashford Site are also relevant. One important point is the state of the mortgage account with Barclays, in light of Mr Monks' evidence that he spoke to Mr Ford on several occasions who told him that:

> *"The Ashford Site was not owned by [GBR], and the mortgage had fallen into arrears. I was not, and could not, be privy to any communications about this, and was informed by Mr Ford that Barclays Bank, the mortgage lender, had stated that it intended to repossess the Site."*

156. In Mr Monks' Written Opening, the point was put on the basis that arrears on the mortgage must have been developing for some time; and in his Written Closing, it was said that arrears must have built up before 1 November 2010, when (on Mr Davies' case) GBR began trading. In any event, Mr Monks' position was that this was not a matter for him: the mortgagor was GAL, not GBR, and any failure to make the mortgage payments was a problem for GAL and its directors (Mr Ford only by this stage, Mr Davies having resigned), and was not relevant to the question of the duties owed by Mr Monks to GBR. In his Witness Statement, Mr Monks summarised the position in late 2010 as follows:

> *"[GBR] did not hold a tenancy to occupy the Site, which was subject to a mortgage and was, according to Mr Ford, about to be repossessed. I know that Barclays had a meeting with Mr Ford in late December 2010 at the Site. Mr Ford informed me that Barclays would be appointing receivers because GAL did not have the funds to pay the mortgage. This eventually happened in June [2011]*."

157. Overall, I find Mr Monks' position on this important topic less than compelling. For one thing, there is no documentary evidence suggesting that the mortgage account was in arrears as at 1 November 2010 or at any earlier date. I have already mentioned that Mr Davies' email exchanges with Ms Finney of Barclays on 8 November 2010 make no mention of the account being in arrears, which one would have expected, if it had been. Moreover, whatever his other shortcomings, Mr Davies had every interest in ensuring that the mortgage payments were kept up-to-date. He no doubt recognised – as is obvious - the importance of ownership of the Ashford Site, whoever was operating *the Business*. The available evidence shows that SIK had funds flowing in from customers (see the aged debts report mentioned at [128(ii)] above), and there seems no good reason why such funds could not have been used to service the ongoing £5,000 per month mortgage payments to Barclays by GBR, which is what Mr Davies says was agreed.

158. Second, I find Mr Monks' suggestion that the Barclays mortgage was not something he was really concerned with a disingenuous one. It is true that the owner of the Ashford Site was GAL not GBR, but as director of GBR he must have been concerned about GBR's ability to continue to operate from the Ashford Site, and can thus be expected to have taken a close interest in what was happening. I find it difficult to think that between them Mr Ford and Mr Monks compartmentalised the affairs of GBR and GAL to such an extent that Mr Monks took an interest in the former only but not the latter. Most important of all is the fact that, under the arrangements in place since about the beginning of November 2010, it was for GBR as the trading company operating from the Ashford Site to service the mortgage payments. Mr Monks says that GBR had no obligation to do so, but it seems to me entirely logical to suppose that is exactly what was intended (whether the relevant structures were formalised or not.) That is reflected expressly in the Handover Note (see above at [96]), and more importantly is referenced by Mr Monks himself in his email to Mr Davies dated 10 March 2011 (forming part of a chain of emails I will come back to, exchanged after Mr Davies came to be concerned about operations at the Ashford Site). In Mr Monks' email of 10 March 2011, he said the following:

> "*The only agreement between [GBR] and [GAL] were lease payments for the yard of 5k per month which has been done.*
>
> *This has been paid directly to Barclays Bank Since the first payment was stolen from a bank account via the Internet banking system without Authorisation of the Directors*."

159. The reference to lease payments "*for the yard*" having been done is most puzzling, because GBR's HSBC bank statements for November and December 2010 contain no reference to mortgage payments of £5,000 per month being made to Barclays.

160. I must mention another oddity in connection with the Ashford Site at the year-end 2010, although again this emerges from some later evidence, namely a letter dated 17 March 2011 from a property consultancy, GVA. The letter is addressed to the directors of GAL, and GVA refer to having been given instructions to place the freehold interest of the Ashford Site on the market. In the letter they describe having undertaken a marketing strategy during early-to-mid March 2011, which had generated a considerable amount of interest (from some 25 parties), despite certain limiting factors. Importantly for present purposes, among such factors identified in the letter is the following:

> "*A lease has been granted by the company [i.e., GAL] to a recently incorporated tenant company trading as a waste transfer operator. The lease is for a term of seven years (less one day) from 1st December 2010. Under the terms of the lease the tenant also has rights to renew at the end of the fixed term ….*
>
> *We are informed that although the lease has been entered into without the consent of the charge holder it nonetheless constitutes a legal interest in the land*."

161. It seems clear that the reference to "*a recently incorporated tenant company trading as a waste transfer operator"* is a reference to GBRK, which was incorporated (as I shall mention below) on 7 January 2010. The oddity is that the GVA letter apparently refers to it having entered into a lease of the Ashford Site from 1 December 2010, several weeks before it was incorporated.

162. When asked about the GVA letter in cross-examination, Mr Monks denied having seen it ("*I wasn't a director of [GAL], so I wouldn't have seen this letter.*") When asked about the lease referred to in the letter, he said:

> "*A. Have you got a copy of the lease?*
>
> *Q. No, there is no lease between GAL and [GBRK] in the disclosure.*
>
> *A. Then I can't discuss this with you. I am not a director of [GAL]. I can't discuss this with you.*
>
> *…*
>
> *A. I can't comment on what GVA have put into a document to a company that I don't run. I can't comment*."

163. Mr Monks was thus able to offer no explanation for the apparent reference in the GVA letter to GBRK having taken a seven year lease of the Ashford Site from 1 December 2010.

164. Mr Monks' evidence on this point again strikes me as surprising and evasive. Once more, he seeks to hide behind the fact that he was not a director of GAL, but for the reasons already given above it seems to me quite unrealistic to think that he had no knowledge of GAL's activities and specifically its actions in connection with the

Ashford Site. On the contrary, it seems to me highly likely that Mr Monks took a close interest in them.

165. Turning to a different topic, I should mention a further point concerning payments due under the finance and HP agreements which existed with CAF and Finance & Leasing. Statements on GBR's HSBC bank account show payments being made to those two companies in December 2010. On 29 December, however, two payments were made to Finance & Leasing under standing orders (for £1,202 and £1,309.44), but then immediately reversed. On 30 December, a further payment was made under a standing order for £1,545.68, but again immediately reversed.

166. The account statements give no express reason for the reversals, but it is clear looking at the account that it became overdrawn as a result of a number of debits on 29 December 2010, including the two mentioned above (the closing balance on 29 December was a debit balance of £5,794.09). The position was soon reversed, however, and by close of business on 30 December, after receipt of some £6,500 under the Lloyds TSB factoring agreement, the balance was a credit balance of £3,174.65.

167. Nonetheless, the effect was serious, because as I will mention below, on 10 January 2011, Finance & Leasing sent seven Notices of Termination to SIK, each citing a different Hire Purchase or Lease Agreement, bringing those Agreements to an end.

168. Finally, as regards this point in the chronology, it is relevant to mention the following three points:

i) Mr Davies had an exchange by email with Mr Spurling of Spurling Cannon on 14 December 2010, writing from the "*info@skipitinkent.co.uk*" email account. Mr Davies asked Mr Spurling whether he had received certain signed documentation and that the share register (presumably for GBR) had been updated. Mr Spurling responded to say yes.

ii) Between 10 and 16 December 2010, Mr Davies, writing again from the "*info@skipitinkent.co.uk*" email account, was in correspondence with a Mr Simon Hunt about the proposed website for GBR, which was not yet live. In an email to "*Ken*" dated 10 December, Mr Hunt asked for access to the "*greenboxrecycling.co.uk domain name*", which of course was registered to Mr Davies personally. On 13 December, Mr Hunt said that "*Richard is on my case about it*"; and then finally on 16 December 2010 he confirmed that the site was live, and the response on the same day, presumably again from "*Ken*" was "*Looks good – I will leave you to complete the links.*"

iii) I note again (see [108] above) that on 22 December 2010, Amanda Glover of Kingsfords Solicitors sent to the "*info@skipitinkent.co.uk*" email account a copy of the proposed draft Licence in respect of the Ashford Site.

<u>Incorporation of GBRK</u>

169. Early 2011 is a critical point in the chronology. Mr Monks' evidence is that, given the state of GBR and of the Ashford Site more generally, and given that *the Business* had been abandoned by Mr Davies who (on Mr Monks' account) had fled to the Middle

East having stolen £20,000 from the safe at the Ashford Site, he determined together with Mr Ford that GBR could not continue to trade. His pleaded case is that he came to that decision at around Christmas 2010, and took the view that that the only viable option was to take steps to "*discharge GBR of its liabilities.*"

170. In early January 2011, Mr Monks and Mr Ford attended probably two meetings with Mr Smith of Nash Harvey, Accountants. Mr Monks' evidence is that they explained their predicament to him, and sought his advice. Mr Monks' view was that "*it was obvious [GBR] had no business and anything it was purporting to do was illegal*."

171. Mr Smith's evidence is also that he was told that Mr Ford and Mr Monks believed "*that Mr Davies had absconded overseas, and stolen money*." He said he was told that Barclays had informed Mr Monks and Mr Ford that the mortgage on the Ashford Site had not been paid. He said Mr Monks confirmed that the Site was going to be repossessed, and that Barclays intended to appoint an LPA Receiver. Mr Smith's evidence in his Statement is that "*without the [Ashford] Site, [GBR] was not viable as a waste management company*.". He was also told, according to his evidence, that GBR was having operating issues, due to the fact that some of the finance agreements for vehicles and plant used by GBR were in arrears. It is clear from his cross-examination, however, that Mr Smith was not shown GBR's bank statements.

172. An important part of Mr Smith's logic was that incorporation of a new company would enable Mr Ford and Mr Monks to draw a line under what he considered to be a very unclear situation as regards GBR. He said:

> "*You know, whether it is right or wrong, one of the biggest things about limited liability is the ability to actually start again, and that liability does not carry on to the directors.*
>
> *At this point, when they came to me, they were worried about their own positions. They were worried about the positions of – if they were going to take this forwards, how that would work.*
>
> *One of the issues was that because – with the current invoice discounting company, which I believe was Lloyds, were asking Mr Monks to give personal guarantees. I said I don't think I would give personal guarantees for a company where you are not – you know, you really don't know what is going on, and I would give that advice today.*"

173. Mr Smith gave consideration to whether it might be necessary to appoint an insolvency practitioner, but decided that was not necessary:

> " *... because there was so little in the company, from what I understand about its ownership of assets, what it had been trading and whatever, there was no – I took the idea – the issue that there was no need to do that.*"

174. Mr Smith amplified his thinking in the following way:

THE DEPUTY JUDGE: Did you give any thought, therefore, to Mr Monks' position or indeed Mr Ford's position as a director?

A. I did. As I say, from the point of view of this isn't a situation that is new to us, and it is not a situation that has not happened subsequently, in certain circumstances we would then say: look, this is a situation where you need to bring in an insolvency practitioner because, whether it is an insolvent liquidation or a solvent liquidation, this is a situation where it is very complex, there are lots of assets, there are lots of potential items with value and goodwill, and you can't just be seen to take that business for nothing.

THE DEPUTY JUDGE: Mm-hm.

A. But, in this situation, from all of the information that I have been given, there wasn't anything. There was nothing there. There was no licences, there was no, you know, what we perceive to be a business is that -- that's trading is it's a business that's -- yes, it has a bank account; yes, it has a pay as you earn scheme, if it has employees. It has VAT registration, it is up and running. This company had none of that. It had a bank account, from what I understand, but it didn't, as far as I know, have a pay as you earn scheme. It didn't have a VAT registration, it didn't have any assets in its name, from what I was told. It didn't have the licences. So, I was like: well, I don't actually know what the problem is going to be by starting a new business, especially when the problem was it was very much in the moment at the time. They came to me as directors of a company where they put their name to a situation where there was a lot of potential fall-out from the amount of waste that was in there. Richard had only just come out of his – effectively come out of his restrictive covenants from the sale of Any Waste, and he wanted to get back into some business. When he sold Any Waste, from what he told me, he didn't want to go back into the waste business, but this opportunity had arisen, in that he had been asked to be a consultant, and I think he got involved in it and I don't think he felt he could walk away from it because he put his name to it at that time. So, my concerns about whether or not we should get insolvency practitioners in to give them advice about doing a proper liquidation was very much on the basis that, from what I was told, there was nothing there to effectively liquidate, because there was no assets."

175. Mr Monks gave instructions for the incorporation of a new company on 7 January 2011, and the company was immediately incorporated on the same day by Nash Harvey. That company was GBRK. Mr Monks in his Witness Statement describes the rationale for the incorporation of GBRK in the following way:

> *"[GBRK] was a new business, incorporated for the purpose of clearing the waste at the site. This meant it was able to distance itself from the reputation Mr Davies had left behind … ."*

176. If by this Mr Monks intended to give the impression that GBRK was to have the limited purpose of clearing the Ashford Site and doing no more, I note that is at variance with the impression given by Mr Smith, that the intention was to incorporate a new entity which could take over the operations at the Ashford Site (i.e., "*I don't actually know what the problem is going to be by starting a new business"*). This proved to be what happened, as we shall see.

Termination of the Finance & Leasing Agreements

177. I have mentioned above the Notices of Termination sent by Finance & Leasing to SIK on 10 January 2011. These were preceded, on 6 January 2011, by a letter from Neil Rodhouse at Finance & Leasing, addressed to Mr Davies at an address in Esher, Surrey (presumably his home address), and copied to a further address in Suffolk. It is not clear whether Mr Davies was contactable at either address at the time, and indeed as I note below, it appears that by 10 January 2011 at the latest, he was abroad. In his letter, Mr Rodhouse said "*I have been trying to call you in the last few days because since Christmas there have been a number of unpaid standing order payments*". The letter also went on: "*In addition to this matters have come to light that we need to discuss with you as a matter of extreme urgency*".

178. I infer that there was no contact from Mr Davies as requested, in light of the fact that the Notices of Termination were sent a few days later. Three of them relied on the failure to make the required contractual payments as giving grounds for termination of the contracts in question: the payments in question correspond to the reversed amounts set out above at [165]. One other relies on current arrears of £541.25 under a further agreement, but there is no record of that in GBR's HSBC account statements. As to the remaining three Notices, they cite as the reason for termination the failure to maintain the required contractual payments under "*other agreements*", and the termination of those agreements.

179. Mr Monks' case on this issue was very confused. His Amended Defence stated that there were "*significant arrears*" in relation to the equipment used by SIK. That was plainly not the case in respect of the four hire purchase agreements under which payments had been reversed or missed, because under three of them the only arrears identified in the letters of termination were those arising from the fact that the December 2010 payments were reversed, and the sum under the fourth (£541.25) was relatively small in any event.

180. In his Witness Statement, Mr Monks said that *"[a]s soon as the hire purchase companies were informed by Mr Ford that [SIK] was no longer trading, and Mr Davies (the personal guarantor under the agreements) was no longer in the country, the agreements were terminated*." That may be closer to the substance of it, and seems consistent with the inquiry made by Mr Rodhouse in his letter of 6 January 2011. What is not clear, however, is whether any attempt was made by GBR to catch-up with the missed instalments, or to give any assurance to Finance & Leasing about GBR and its ability to pay, in the absence of any contact with Mr Davies. When cross-examined, Mr Monks' evidence was difficult to follow. He referred to a "*document that was signed in September*", and to a sum of *"£98,000 that was remortgaged in November.*" He also referred to "*the bigger picture*", and said: "*It wasn't a thing that I went into. I – there was historic things in place that I inherited, and I did the best I could to sort the situation out*." The position is therefore unclear.

181. What is clear is that shortly afterwards, Mr Monks' new company, GBRK, itself entered into agreements with London & Finance in respect of the same equipment, as I will explain below.

Further contact from Mr Davies

182. A few days after the incorporation of GBRK, on 10 January 2011, Mr Davies sent an email to Mr Monks headed "*Contact details*", the first part of which reads as follows (my emphasis added):

> "*By the time you get this I shall be overseas. I have sent you some packages; one an envelope & the other two contain vehicle files.*
>
> *There will be one more, once I have received it, or I may have to email it, depending on time.*
>
> *I am assuming that my help is no longer needed as no messages have been left on the old number & I have not had any emails; I will monitor that periodically but in reality that will be once a month but all calls should go to the office in any event*
>
> *This will be the only email address that I will be monitoring, so the monthly information we agreed upon can be sent at your convenience … I will not be back in the UK any time soon.*
>
> *…*
>
> *I will need money in the account so that I can 'live' until payments start to flow to me at the end of February …*
>
> *…*
>
> *The mortgage payment has to be in the account for 20 of each month."*

183. Nothing in this email suggests knowledge on the part of Mr Davies in relation to the matters of pressing concern which at the time were apparently exercising Mr Monks and Mr Ford in relation to GBR, meaning in particular the implications of the Barclays mortgage being in arrears and of the payments to London & Finance having been missed over the Christmas period.

184. It is also apparent that in writing this email, Mr Davies was wholly ignorant of the incorporation of GBRK on 7 January 2011, and of the decision that Mr Monks and Mr Ford had apparently come to, that GBR had no business and could not trade.

185. On the contrary, Mr Davies' email suggests he was still operating on the assumption that the arrangements reflected in the HoT and in the Handover Note document were in operation, and that he was to receive regular updates and regular payments from GBR. The email is also consistent with the idea that Mr Davies had received no communication from Mr Monks or Mr Ford – no messages had been left on the "*old number*", and he says he had received no emails. As noted above, however (see [168]) it appears that others had been communicating with Mr Davies via the

"*info@skipitinkent.co.uk*" email account in the period between 10 December 2010 and 22 December 2010.

186. Mr Monks did not respond to Mr Davies' email for another month, until 10 February 2011. I will come back to his later exchange with Mr Davies below.

Clearing the Ashford Site

187. It is instructive to look at what happened when GBRK began conducting operations at the Ashford Site, from early 2011 onwards.

188. Although there is confusion on many points, on one point the evidence is absolutely clear, which is that the Ashford Site was in a totally unacceptable state physically, and efforts needed to be undertaken to get it under control.

189. A number of documents have been produced concerning inspections conducted by the Environment Agency in early 2011. These show not only that efforts were being made to improve the physical state of the Ashford Site and to address obvious licence breaches, but also that Mr Monks was intimately involved in those efforts. Thus, a Report following a visit on 21 January 2011 said the following:

> *Bev Hodgkins and Mark Spear arrived on site at 1030 hours and met with Richard Monks and Stephen Paul Ford. Ken Davies is no longer responsible for any waste activities taking place on site. Bev Hodgkins has been advised that he has been struck off the Companies House Register of Directors for 11 years, evidence of this still needs to be received by the Agency.*
>
> *Paul Ford is a director of [GAL], the permit holder … . He is also a Director of Green Box Recycling with Richard Monks. This company is now responsible for all waste activities taking place on site …*
>
> *Since taking over the responsibilities of the site, financial investments have been put in place by Richard Monks and repairs to the trammel (sic.) have been carried out ….*
>
> *There is a great deal of work to be carried out on site in order to bring the site into compliance with the permit conditions and a site improvement plan has been discussed on site with Richard Monks …*
>
> *…*
>
> *Richard Monks and Bev Hodgkins agreed that in order to see a visual difference on site they would endeavour to remove the majority of treated waste material from inside the building to a suitably permitted site."*

190. A further Report following a visit on 4 February 2011 also refers to Mr Monks' involvement. It is clear he was taking a leading role, although at the time the WML was held by GAL, and Mr Monks was not a director of GAL. The assumption must have been that the existing problems could be dealt with and regularised, as long as

there was a plan in place to do so and evidence that it was being implemented. Thus, the Report following this visit said:

> "*Bev Hodgkins and Mark Spear arrived on site at 1030 hours and met with Richard Monks.*
>
> *Since our last visit on the 21st January, as agreed the majority of the waste operations have been focused on the inside of the building and not outside. It was agreed that the before the waste materials under the temporary scaffold structure could be treated room needed to be made inside the building.*
>
> *…*
>
> *The improvement works agreed so far, by Richard Monks and Bev Hodgkins on the 21st January have been accomplished in the timescale agreed which was by 4th February, today*."

191. The Environment Agency sent a letter dated 22 February addressed to Mr Monks and Mr Paul Hope (presumably, Ford), at an address for GAL in Ramsgate, Kent (which Mr Monks described as the address for "*the accountants*"). This set out a proposed Site Improvement Plan ("*SIP*"), including timescales for various steps to be taken. When cross-examined, Mr Monks denied having seen this letter, although it was also copied to GAL at the address of the Ashford Site. He said:

> *" … I did not see this letter and it was dealt with by the directors at GAL. I am sorry, I haven't seen it, and that's my answer to the question."*

192. I am afraid I think this was yet a further evasive answer by Mr Monks, and another example of him seeking to distance himself from matters which he was obviously involved in. Not only was the letter addressed to him by name (albeit at the Ramsgate address "*for the accountants*"), and not only did it refer to matters said to have been agreed both with Mr Monks and Mr Ford during the Agency's earlier visits *("[a] verbal agreement was reached between my officers and yourselves …*"), but also (1) it was cc'd to the address of the Ashford Site, (2) a later Report of 1 March 2011 referred to it having been hand delivered to the Ashford Site and given to Mr "*Paul Hope*" (presumably Ford), and (3) when Mr Taylor, the environmental consultant engaged by Mr Monks, came to write his own letter to the Environment Agency on 1 March 2011 he began it by saying:

> *"Further to our meeting today with my Client, Richard Monks, I am pleased to confirm his instructions to act as his agent with regard to both the variation and transfer of the Environmental Permit and in resolving the compliance issues detailed in your letter of 22nd February 2011"* (emphasis added).

193. In these circumstances, it seems to entirely obvious that Mr Monks did see the letter of 22nd February, and that he gave an untruthful answer in cross-examination when he said he did not.

194. It is clear from Mr Taylor's letter of 1 March 2011 that his instructions from Mr Monks were "*with regard to both the variation and transfer of the Environmental Permit and in resolving the compliance issues detailed in your letter of 22 February 2011*" (emphasis added).

195. Up until that point, the WML (in fact by then, *Environmental Permit*) had of course been held by GAL. The process of "*variation and transfer*" was completed in April 2011, and was confirmed in a Notice of Transfer dated 26 April 2011 published by the Environment Agency, confirming GBRK as the new permit holder. In an email dated 21 June 2011 to Mr Monks, the Environment Agency confirmed that the transfer was carried out with the authorisation of the directors of the respective companies (i.e., GAL as original Permit holder, and GBRK as transferee).

The Costs of Clearing the Ashford Site

196. It is clear from the above that a great deal of work was done in the early part of 2011 to clear the Ashford Site and to improve the conditions there. Mr Monks' evidence is that the clearance work was in effect undertaken by GBRK, and that the cost (or at least part of it) re-charged to GBR, and some met by Mr Monks personally.

197. This assertion gave rise to a number of lines of cross examination. One concerned the clearance costs said to have been charged back to GBR by GBRK. Those costs were said to have amounted to £291,135.88, and to be reflected in three invoices raised by GBRK 2011. Two are dated 16 February 2011 and are for relatively small amounts: £4,173.88 and £2,362 respectively (including VAT). The third is dated 22 February 2011 and is for a much larger amount: £285,000 including VAT.

198. The authenticity of these invoices was challenged by Mr Davies. The gist of his challenge was that the invoices had been fabricated, in order to disguise the misappropriation of funds transferred from GBR's bank account during early 2011. As to this, an analysis of GBR's HSBC bank statements shows that during January and February 2011, a total of some £170,685.88 was transferred from GBR to GBRK.

199. It is true that the three invoices raised by GBRK have a number of unusual features. For one thing, they are in an unusual format compared to other GBRK invoices produced on disclosure (i.e., they are in standard Sage template form). For another, Mr Smith's evidence was that the invoices, although existing in hard copy, were never posed to GBRK's Sage accounting system. Moreover, they each quote an incorrect VAT registration number for GBRK (900274856, not the actual number which is 107505049). Finally, as regards the first two invoices, it is true to say – as Mr Shaw pointed out in his cross-examination of Mr Monks – that when amounts corresponding to the sums shown in those invoices were paid from GBR's HSBC account on 16 and 18 February 2011 respectively, the payments left the account with a nil (or practically nil) balance.

200. I accept that these oddities give rise to a question about the invoices, but Mr Smith in his evidence gave a possible explanation. He thought the invoices had probably been raised by a former employee of Nash Harvey who was responsible for GBRK's bookkeeping at the beginning of 2011. The invoices were discovered in Nash Harvey's paper files, but no electronic copies had been kept. Mr Smith's surmise was that the invoices had perhaps been created by the relevant employee in an effort to try

and regularise GBRK's accounting records in early 2011. He said when cross-examined:

> "*I think the issue is – I think at the time we went in in February 2011 to start setting up the accounting systems, it was in such a mess that the person concerned … may well have done anything at that point to try to have a starting point to actually create some accounting records*."

201. Mr Smith accepted that he did not know what had happened, and that he was essentially speculating; but it seems to me this is an entirely plausible explanation nonetheless, and one that cannot be discounted.

202. Moreover, it seems beyond doubt that work was done, at considerable expense, to clear the Ashford Site in early 2011. In those circumstances, I think Mr Brisby is right to say there would have been no real need to forge or backdate documents, and that the most that can be said is that at the time the invoices were raised, GBRK may not already have incurred the costs in question with third party contractors.

203. Looking at matters in the round, I therefore do not consider that Mr Davies' allegation, that the invoices were fabricated on Mr Monks' instruction, is made out. That is not necessarily to say, however, that this was a proper and appropriate use of GBR's funds at the time, which is a point I will come back to below.

204. For now though I turn to the next of Mr Davies' challenges concerning the costs of clearing the Ashford Site. This concerned a document headed "*Green Box Recycling Kent Limited – Opening Balance Sheet 1/2/11*". Mr Smith's evidence is that this was created by him, with input from Mr Monks, for the purpose of being presented to HSBC. According to Mr Smith, they were keen to support Mr Monks in relation to GBRK, but wished to have a rough indication of the opening position of GBRK. Among the "*Current Liabilities*", the document shows a figure for "*Directors' Loans*" of £261,000. In cross-examination, it was put both to Mr Monks and Mr Smith that this document must have been backdated, because the figure of £261,000 corresponds almost exactly to the total shown in the "*Directors Loan*" section of GBRK's Sage records for 2011, but the Sage records do not record any expenditure being incurred by Mr Monks on behalf of GBRK (and therefore creating a credit balance on the account) until September 2011. Consequently, it was suggested that the Opening Balance document must have been created at some point long after 1 February 2011, its stated date of creation.

205. I reject that submission, and accept Mr Smith's explanation given during the course of his cross-examination, which is summarised in the following passage:

> *"We went through – I think on the back page of that there is a sort of a breakdown of the assets, on that statement, I think, and I think we went through what was basically the situation, of what we believed the assets were worth, and what HP was on it.*
>
> *We went through what he said that he had paid out, or was due to pay out. We went through what he believed he was going to have to pay for various costs of clearance, et cetera, and that became the balancing figure."*

206. When presented with the figure from the Sage records, Mr Smith was emphatic:

> *"That is a total coincidence. I can categorically say that. It is a total coincidence."*

207. It seems to me entirely logical to suppose that HSBC would have required preparation of an opening balance at about this time, and inherently probable that the exercise would have involved a rough assessment of costs incurred and expected costs, to be covered at least initially by means of a director's loan. I found Mr Smith's account coherent and persuasive and I accept it, and consequently reject any assertion that the Opening Balance document was backdated. I accept the proposition that the overlap in the two sets of figures was a coincidence. In any event, as Mr Smith also explained, the final year-end amount owing to Mr Monks on his Director's Loan account, after adjustment for matters such as dividends declared but not paid, was not £261,000 but £310,000.

208. Relatedly, Mr Monks was also questioned about the fact that in his Witness Statement for trial, the account given was that the waste at the Ashford Site was cleared by local companies; whereas in his account given to the Official Receiver, after the restoration of GBR to the register and its winding-up, he said that the waste was removed by a company called Docklands Waste Management, and he paid their bill personally. Granted, there is an inconsistency here, but I am prepared to believe it is the result of an oversimplification in the answer given by Mr Monks to the Official Receiver, or perhaps limited memory at the time of the relevant details. GBRK's Sage records do show payments being made to Docklands Waste Management in March and April 2011, some of which are quite substantial (there is a payment of £56,615.33 on 31 March 2011, and another for £27,917.57 on 15 April.) There are also a substantial number of payments made in the period from 1 January to 15 March, in respect of waste disposal activities. The total for the period, according to a table prepared by Mr Shaw, is £140,057.19.

209. Looking at the position overall, it seems to me that although the details are somewhat obscure, and many of the original documents are not available, there can be no real doubt that substantial sums were in fact expended on clearing the existing waste from the Ashford Site during early 2011, and that some of Mr Monks' own funds (as well as GBR's funds) were used for this purpose.

210. Finally under this heading, I must deal with Mr Davies' case that certain quotations relied on by Mr Monks, all dating from early 2011 and dealing with the prospective costs of clearing the Ashford Site, were not genuine documents.

211. There are three such invoices. The first two are both dated 1 February 2011 and are from Countrystyle and Chapman's Recycling respectively. The Countrystyle quotation is for a figure of £298,000 plus VAT; and the Chapman's quotation is for a figure of £250,000 plus VAT. The third quotation, from a company called Easy Load, is dated 2 February 2011 and is for a figure of £285,000.

212. At trial, Mr Lloyd and Mr Houston gave evidence in support of the genuineness of the Countrystyle quote. Mr Chapman gave evidence as to the quotation from Chapman's Recycling. A witness statement was served from a Mr Lee, director of Easy Load Limited, but in the event Mr Lee did not appear and was not cross-examined.

213. Mr Davies' case in challenging these documents rested mainly on the documents themselves having certain unusual features and on perceived inconsistencies in the evidence.

214. In relation to the Countrystyle quote, for example, (1) no original document was produced, and instead Mr Monks himself said that a copy of the quote had been pinned to a notice board in GBRK's offices for a number of years; (2) the quote includes some odd language (for example, Mr Lloyd says to Mr Monks, "*I must say that the liability you have inherited is really quite astonishing*"); (3) the quote is addressed to "*Green Box Recycling*", but an entry said to have been made contemporaneously in Mr Lloyd's Notebook referred to "*Greenbox Recycling (Kent)*" (which Mr Shaw said was consistent with the idea that both documents had been fabricated recently with a view to bolstering GBRK's position); and (4) although the quotation is dated in early February 2011, later, internal Countrystyle emails in March 2011 express surprise at the news that "*Greenbox Recycling*" had opened a "*transfer station in Ashford*" (which Mr Shaw said was inconsistent with the idea that Mr Lloyd had visited the Ashford Site over a month before).

215. Some similar points were made in relation to the Chapman's quote, but the main challenge was based on the fact that the Chapman's business was placed into liquidation in April 2016, and so there was no good reason why Mr Chapman should still be in possession of documents relating to that business. Mr Chapman's explanation was that the document was not an original but a copy; and that his mother, who was involved in the business, was something of a hoarder of documents, who had kept and had been able to locate the copy, notwithstanding the liquidation.

216. I have come to the view that I should treat the quotation documents as genuine. I do not regard any of the points of challenge made as sufficiently clear to enable me to conclude otherwise. I take the point that it seems rather unusual to think that a copy of the Countrystyle quote was kept pinned to a board (or perhaps some other surface) in GBRK's offices for so long; or to think that Mr Chapman's mother was able to locate a copy of the quotation he had given some years before. But it is not entirely implausible to think so. Anyone who has worked in an office environment will know it is not at all unusual for old documents to be kept and left unsorted for long periods, in some cases for years. Looked at in the round, it seems to me that Mr Davies' challenge is largely based on the implausibility of the documents being available at all. But to my mind, it is equally – if not more - implausible that Mr Monks would have been able to persuade (in effect) four different people to make false witness statements on his behalf, and three of them to come to Court and be cross-examined. Even if I discount Mr Lee's evidence entirely, it still seems to me that the conclusion I am asked to come to overall is sufficiently implausible that I should not accept it in the absence of very clear evidence to the contrary. In my assessment, there is no sufficiently clear evidence in this case.

<u>O Licence for GBRK</u>

217. As noted above, an application for a new O Licence was made in the name of GBR on or around 15 December 2010, and Mr Monks' position is that he was told by Mr Ford at some point just before Christmas 2010 that the application had been submitted in his name, using his signature but without his knowledge or consent. In cross-

examination, it was put to Mr Davies that he had forged Mr Monks' signature, which he denied.

218. I have come to the conclusion that the allegation of forgery by Mr Monks is not made out. Its genesis is an assertion made by Mr Ford, but he did not give evidence or appear at the trial. None of the documents produced has Mr Monks' signature (or anything purporting to be Mr Monks' signature) on it. Beyond that, the forgery case seems to be put on the basis of deductive reasoning. It is said that the application form (or perhaps the covering letter) cannot have been signed by Mr Ford (although he signed the cheque), because he was in bad odour with the Traffic Commissioner, in light of his involvement with GAL and Haulage, whose licences had been revoked. It is said that Mr Davies cannot have signed any such document in his own name, because he had been disqualified as a director. Therefore he must have signed in Mr Monks' name without telling him.

219. In my view this is all rather too speculative to substantiate a finding of forgery against Mr Davies, in particular in the absence of any document actually bearing the signature said to have been forged, and in the absence of any direct evidence on the point from Mr Ford.

220. To complete the story of the O Licence application, I must mention a further hearing which took place before the Deputy Traffic Commissioner on 25 February 2011. This is significant because Mr Monks appeared at that hearing, and the Traffic Commissioner was persuaded to continue the application originally made in the name of GBR in the name of *GBRK*.

221. A transcript of the hearing has been produced. Unfortunately, this is not a complete record because parts of the recording were inaudible. At the beginning of the hearing, however, there was some discussion as to which party was making the application. The Deputy Traffic Commissioner said:

> *"We were then contacted or I assume Leeds were contacted and told that the licence application form had stated the wrong company registration number and rather than saying you have got to make a new application in a new company's name and registration, somewhat unusually allowed this to proceed and said we could now proceed on the basis that it is an application by [GBRK]."*

222. The application was allowed to proceed in that manner.

223. In his live evidence, Mr Monks said that the Deputy Transport Commissioner had accepted that his signature had been forged on the original application, but that is not shown in any part of the exchanges which have been transcribed, and so Mr Monks' evidence on this point does not persuade me to take any different view of the forgery issue already analysed above.

224. Much of the rest of the transcript is taken up with the consideration of Mr Ford's role in the business of GBRK. In light of Mr Ford's history, the Deputy Traffic Commissioner was very concerned about him having any role in the management of transport operations. The Deputy Traffic Commissioner said:

> *"If Mr Ford had still been a Director of this company … and had attended today … and if he has an active part in your company … my questions and concerns would have been that with all this background what assurances can I have now that it is not all going to happen again."*

225. Fortunately, by this stage Mr Ford had already resigned his short-lived directorship of GBRK; and Mr Monks gave assurances to the Deputy Traffic Commissioner that he would be in charge of transport operations, with Mr Ford focused on management of the yard and recycling. The Commissioner accepted these assurances and granted GBRK an O Licence with effect from 10 March 2011, for (at that stage) 8 motor vehicles and 2 trailers. This was subject to a condition that Mr Ford would not be involved in managing the transport aspects of the business.

226. When cross-examined as to these events, and as to why he had chosen to take out the new O Licence in the name of GBRK and not GBR, Mr Monks gave the following, rather telling response:

> "*So, in everything that I had gone through in them four months, hardly heard from the guy that owns the company, the other guy is virtually nothing to do with it, what you would like me to do is be the patron saint of Ashford: is that what you are telling me? Absolutely ridiculous."*

227. This seems to me to be significant because it is consistent with Mr Monks feeling a sense of entitlement, in light of the difficulties encountered at the Ashford Site, to act in a manner which suited his own purposes.

228. Finally under this heading, I asked Mr Monks what had happened regarding the transport of waste in the period between the year-end 2010 (when the original O Licences expired), and the time when the new O Licence was granted following the hearing mentioned above. Again, he gave a telling answer, consistent with the same sense of entitlement and a willingness to cut corners if it suited his own purposes to do so:

> "*Right, so in that period, just by luck, in that period where I technically shouldn't have been operating the vehicles, I bought and sold cars and trucks at another company I owned called Benchmark, and I was lucky enough to have a set of trade plates. So, getting around the conditions of HGVs – I could put the trade plates and have subcontractors using the vehicles because there was no interim in place, so I was a little bit – should we say, 'stretched the rules' to help me participate in what I was doing.*"

<u>Plant and Machinery</u>

229. In January 2011, GBRK entered into novation agreements with the relevant finance houses, in respect of the plant and vehicles used at the Ashford Site held subject to HP and other agreements. Among the documents produced in the action are a series of 7 "*Memoranda of Transfer*", entered into between Finance & Leasing, GBRK, and SIK on 14 January 2011, under which GBRK took over responsibility for the 7 agreements

which had been terminated by Finance & Leasing on 10 January 2011. (Mr Ford signed on behalf of SIK.) Also produced is a copy of a "*Novation Agreement*" with CAF, dated 9 February 2011, under which GBRK took over responsibility for the finance arrangements entered into with SIK on 10 December 2010, in relation to the Terex machine.

230. In any event, it seems to be common ground that GBRK took over the hire purchase and finance agreements for most if not all of the equipment previously used in *the Business*. A document headed "*Greenbox Recycling (Kent) Ltd, Accounts 31.12.2011, Fixed Assets – Acquired from Old Co*", lists 16 items (or categories), 7 of which are assets subject to finance arrangements taken over from "*Old Co*." Others, including various skips and roll-on containers, were acquired free of finance.

231. Mr Monks' evidence is that the finance agreements could not be novated to GBR because Mr Davies was the personal guarantor and was too closely linked to GBR, as the majority shareholder and former (disqualified) director, and GBR could not get approval for credit because of its low income and did not have available capital investment. I will come back to these points further below.

Lease of the Ashford Site

232. I have already referred above to a letter dated 17 March 2011 from the property consultancy, GVA, concerning sale of the freehold interest of the Ashford Site. That was in the context of the reference in the letter to a lease of the Ashford Site, apparently granted to GBRK with effect from 1 December 2010 (or more probably, granted later after its incorporation and backdated).

233. The letter goes on to list a number of written offers received from potential buyers for the Site, including one from John Hawkins of "*Benchmark Realty Limited (Kent Property Investor)*" of some £527,000. The letter also refers to the intended appointment of Joint Administrators over GAL (or of receivers over the Ashford Site) prior to completion.

234. Mr Monks' written evidence was that GBRK did not know what was happening with the Ashford Site and its repossession until he had a conversation with Mr Hawkins of Benchmark, at some point when Mr Hawkins was visiting the Ashford Site in his capacity as prospective purchaser. Mr Monks' evidence is as follows:

> *"I had never met Mr Hawkins before, and he asked me what I was doing at the Site. I explained that I intended to start a new business, although I did not have a tenancy to use the Site so did not know if my new business would trade from there. At that time, I had no idea of what would happen to the Site, and [GBRK] could not afford to buy it.*
>
> *Mr Hawkins asked me if I would be interested in leasing the Site from him for an annual rent of £60,000, or £5,000 per month. I told Mr Hawkins that [GBRK] would be interested in leasing the Site, and he agreed to allow [GBRK] to trade from the Site from the beginning of April 2011."*

235. Benchmark went on to acquire the Site, and in June 2011 entered into a written Lease for period of 7 years. The tenant was not GBRK, but Mr Monks himself. Among the matters affecting the property described in the Agreement for Lease was "*the Existing Lease*", defined to mean: "*the lease of the Property dated 1 December 2010 between (1) [GAL] and (2) [GBRK.]*" The "*Term Commencement Date*" stipulated was "*1st December 2010*."

236. When faced with this information in cross-examination, Mr Monks said that he had overlooked the 1 December date, and had overlooked the other terms referred to. He said his practice in dealing with such documents was to look at the front page, to see how much was being charged, and then to sign on the back page.

237. Much later, in 2016, GBRK acquired the freehold of the Ashford Site from Benchmark, with funding provided in part by HSBC, and the remainder from investors or possibly from trading profits.

Further Correspondence between Mr Davies and Mr Monks

238. I have mentioned above Mr Davies' email to Mr Monks of 10 January 2011. No immediate response was sent. Mr Monks' email in reply is dated 10 February 2011. It is certainly true to say that Mr Monks in that email expresses extreme dissatisfaction at the state of *the Business*. At one point he says to Mr Davies he is "*disgusted and disappointed with your actions towards your company and your employees*." He also makes a number of threats. He refers to a potential investigation by HM Custom & Excise which "*will uncover the full extent of your illegal behaviour*", and says that "*records and paperwork have been given to the relevant authorities*". He concludes his email by saying:

> "*There are various people that would like to speak to you with regard to outstanding monies, and personal guarantees that you have signed. As of yet, I have not passed this e-mail address to anyone. Once I have received your reply to the above I will decide what actions to take regarding the release of your personal email address to those wishing to contact you*."

239. No mention is made in the email of the incorporation of GBRK, or of the steps already underway to allow it to commence operations at the Site, including the steps being undertaken – in part making use of GBR's funds – to clear the Site.

240. Further emails were exchanged on 27 February (Davies to Monks), 7 March (Monks to Davies), and it seems that by 10 March Mr Davies had finally become aware from his own inquiries of GBRK's incorporation. In a further email of that date, he asked:

> *" ... I wish clarification from you of the specific purpose & intent of the company that was formed on the 7th January 2011 ... called [GBRK] with you as Director and shareholder."*

241. I have already mentioned above Mr Monks' response (see above at [158]): it Mr Monks' email also dated 10 March 2011 in which he refers to the agreement to pay the Barclays mortgage, "*which has been done*." In dealing with Mr Davies' inquiry concerning GBRK, Mr Monks said:

"As regards to [GBRK]. You are not a director or a share Holder. No questions need to be answered regarding this company."

Dissolution of GBR

242. GBR was struck off the Register of Companies on 18 October 2011, under the power contained in section 1000 CA 2006. This is the power conferred on the Registrar to strike off a company which is apparently defunct and no longer trading. The effect of publication in the Gazette of the notice of striking off was that GBR was dissolved as of the same date, 18 October 2011 (see CA 2006, section 1000(6)).

Pre-Action correspondence

243. Mr Davies instructed his solicitors, Kingsfords, to send letters before action to Mr Monks, Mr Ford and GBRK on 19 November 2012. A response was sent by Vertex Law, acting on behalf of GBRK, on 8 February 2013, denying any liability, and saying that no letter before action had in fact been received by Mr Monks.

244. Thereafter, as I understand it, there were no further communications between the parties until Mr Davies made his application to restore GBR to the Register.

Restoration of GBR

245. That application was made, under CA section 1029, on 13 December 2016. Simultaneously a Petition was presented for GBR's winding-up on the just and equitable ground. GBR was restored to the Register by Order dated 23 January 2017, and on the same date also ordered to be wound-up. So far as restoration is concerned, the Order provided simply:

"(1) [GBR] be restored to the Register of Companies under s. 1031(1) of the [CA 2006].

(2) An office copy of this Order be delivered to the Registrar of Companies and pursuant to s. 1032(1) CA 2006, [GBR] be deemed to have continued in existence as if its name had not been struck off."

Mr Monks and GBRK

246. In this section, I will consider the position of the two active defendants, Mr Monks and GBRK. I will deal separately below with the position of Mr Ford, and Mr Davies' application against him for judgment in default.

Framework

247. Based on the parties' submissions, I would propose to address the position of Mr Monks and GBRK by reference to the following questions:

i) Was Mr Monks in breach of contract in taking the steps he took which led to the establishment of GBRK and in trading from the Ashford Site via GBRK?

ii) Was Mr Monks in breach of the duties he owed as a director of GBR in taking the steps he took which led to the establishment of GBRK and in trading from

the Ashford Site via GBRK? Is Mr Monks entitled to say that GBR was insolvent and unable to trade in early 2011, and if so and if it was (or was close to insolvent), how does that affect the analysis?

iii) Are any or all of the claims advanced by Mr Davies against Mr Monks time-barred?

iv) Should Mr Monks be entitled to claim relief under CA 2006, section 1157?

v) Is GBRK fixed with relevant knowledge to ground a claim in knowing receipt, and are claims against GBRK time-barred?

vi) Are Mr Davies' equitable claims in any event barred by laches?

vii) Is Mr Davies prevented from claiming equitable relief because he does not come to the Court with clean hands?

viii) Is Mr Davies entitled to an immediate declaration that the business of GBRK is held on trust for him?

ix) Should Mr Monks be entitled to claim an equitable allowance?

248. I will consider these questions in turn.

Was Mr Monks in breach of contract?

249. I can deal with this point briefly.

250. Mr Davies' case is that Mr Monks was engaged under the terms of a written contract of employment with GBR. Mr Davies points to the signed terms referred to at [105] above, and while accepting that they were not signed by Mr Monks, says that he was engaged on those written terms through a subsequent course of dealing.

251. I cannot accept that submission. As paragraphs [105]-[106] above illustrate, no finally settled written terms were ever agreed with Mr Monks. There is no clear evidence that the proposed terms were ever in fact sent to Mr Monks on or around 30 September 2010 (the date shown on the copy signed by Mr Davies). In any event, the evidence is that the drafting remained in a state of flux as late as 12 November 2010, when Amanda Glover of Kingsfords proposed further amendments. In these circumstances, and given the uncertainty in the documentary record, I do not think it possible to say that Mr Monks was ever engaged on the terms of a written employment or consultancy agreement which was the subject of final consensus between the parties. It seems to me much more likely that this was yet a further aspect of the intended formalisation of arrangements for the Ashford Site which was not carried through.

Was Mr Monks in breach of his duties as a director of GBR?

Legal Framework

252. Mr Davies' pleaded case, in his Particulars of Claim at paragraphs 20 and 41, was put broadly, and relies on CA 2006 ss 171, 172, 174 and 175. I think it fair to say that at

trial, however, the case coalesced around the duties under ss 172 and 175, and in particular s. 175. It was common ground, as I understood it, that both section 172 and section 175 are fiduciary in character.

253. Section 172 CA is headed "*Duty to promote success of the company*", and provides as follows:

> *(2) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of the members as a whole, and in doing so must have regard (among other matters) to –*
>
> *a. the likely consequences of any decision in the long term,*
>
> *b. the interests of the company's employees,*
>
> *c. the need to foster the company's business relationships with suppliers, customers and others,*
>
> *d. the impact of the company's operations on the community and the environment,*
>
> *e. the desirability of the company maintaining a reputation for high standards of business conduct, and*
>
> *f. the need to act fairly as between members of the company.*
>
> *(3) …*
>
> *(4) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."*

254. Section 175 CA 2006 is headed "*Duty to avoid conflicts of interest*", and provides as follows:

> *(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or may possibly conflict, with the interests of the company.*
>
> *(2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity.)*
>
> *(3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.*
>
> *(4) The duty is not infringed –*

> *a. If the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or*
>
> *b. If the matter has been authorised by the directors.*
>
> *…*
>
> *(7) Any reference in this section to a conflict of interest includes a conflict of interest and duty, and a conflict of duties."*

255. It is appropriate to add some brief commentary on the operation of these two sections.

256. First, as to s.172, it is necessary to emphasise sub-section 172(3), since this formed an important part of Mr Brisby's submissions. Sub-section 172(3) is a recognition of the common-law rule that, in circumstances where a company is insolvent or of doubtful solvency, it is incumbent on the directors to take account of the interest of creditors: see *BTI 2014 LLC* v. *Sequana SA* [2019] BCC 631, at [137]-[180], citing *West Mercia Safetywear Ltd* v *Dodd* [1988] BCLC 250. David Richards LJ in the *BTI* case summarised the position as follows, at [143]:

> "*This court's decision in the West Mercia Safetywear Ltd case [1988] BCLC 250 establishes two propositions. First, the shareholders of an insolvent company cannot ratify the acts of directors taken in disregard of the interests of creditors, and, as a necessary corollary, it is incumbent on the directors of an insolvent company to have regard to those interests. Second, the rationale is that, because of the company's insolvency, its assets are in a practical sense the assets of the creditors, pending its liquidation or return to solvency*."

257. Second, as to section 175, this reflects an equitable rule of great antiquity and authority. In *Bhullar* v. *Bhullar* [2003] BCC 711, Jonathan Parker J. summarised it as follows, at [27]:

> " *… The relevant rule, which Lord Cranworth LC in Aberdeen Railway Co. v. Blaikie described as being 'of universal application', and which Lord Herschell in Bray v. Ford [1896] AC 44 at 52 described as 'inflexible', is that (to use Lord Cranworth's formulation) no fiduciary 'shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect*"'.

258. It also bears emphasis that a fiduciary must not profit from his position of trust, even if that profit could not have been made by his principal: *Keech* v. *Sandford* (1726) Sel Cas 61 (cited recently by the Supreme Court in *FHR European Ventures LLP* v. *Cedar Capital Partners LLC* [2015] AC 150 at [8]). The stringency of the rule in the context of the duties owed by company directors is reflected expressly in sub-section 175(3): "*This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity)"* (emphasis added).

259. Finally, on the no conflict duty, it has been held that "*the key question in every case is whether, in the particular circumstances, there is a real sensible possibility of conflict*" (see *Commonwealth Oil Gas Co Ltd* v. *Baxter* [2009] SLT 11233 at para. 78, per Lord Nimmo Smith, and *Re Bhullar Bros. Ltd* [2003] BCC 711 at para. 30, per Jonathan Parker LJ.) The corresponding language in CA 2006 s. 175 is that in sub-section 175(4)(a): "*This duty is not infringed … if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest*."

Breach of Duty: the Parties' Positions in Summary

260. Mr Davies' position is simple, and is put broadly. He says that in siphoning off to GBRK *the Business* at the Ashford Site which was intended to be run through GBR, Mr Monks was obviously in breach of his duties as a director of GBR. He was obviously not acting in good faith in a manner designed to promote the success of GBR, and by incorporating GBRK he placed himself in a position of hopeless and irreconcilable conflict.

261. Mr Monks' position is broadly as follows:

i) He says that the case against him is put essentially as a business diversion case, but that one cannot assume that GBR had any business at all – whether corresponding to *the Business* or not – in late 2010 or early 2011. He says that Mr Davies' case is that *the Business* was transferred to GBR from SIK, but (a) there is no evidence that the formalities to effect the relevant transfer were ever completed; (b) SIK was insolvent at the time, and any transfer of valuable assets from SIK for no consideration would have been unlawful and a fraud on SIK's creditors; and in any event (c) under the terms of the Barclays Debenture, Barclays had a security interest over SIK's goodwill, trade debts and other property including intellectual property, and any transfer of such property without consent of Barclays must have been subject to Barclays' proprietary interest, and moreover any use of such property would likely have amounted to an event of default entitling Barclays to take possession and sell the property in question – and consequently, all such property was in reality worthless in GBR's hands, even if it was transferred.

ii) Other matters suggest that there was nothing of any value in GBR to divert. For example, it did not own the Ashford Site; it did not have a WML or Environmental Permit; it did not have an O Licence; it did not own or even lease any of the assets needed to operate a waste management business. Neither were any proper or effective arrangements in place to enable GBR to occupy the Ashford Site or to make use of the assets owned (or leased) by SIK or Nero. In fact, matters were worse than that, because the Ashford Site was a mess and likely to be repossessed by Barclays and sold; and by the end of December 2010 various of the asset finance agreements in SIK's name were in default and the relevant assets liable to be repossessed.

iii) In these circumstances, says Mr Monks, GBR was not in a position to trade at the end of 2010 or in early 2011. In fact, continuing to trade might well have exposed the directors to wrongful trading claims under s. 214 IA 1986. GBR was insolvent or close to insolvency, and therefore the interests of its creditors were paramount. The state of GBR meant that, in taking the steps he did

which led to the establishment of GBRK and in operating at the Ashford Site via GBRK, Mr Monks was not in breach of any duty to avoid a conflict of interests. The duty in s. 175 CA does not apply if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest, and that was the position here. Because GBR was not in a position where it was able to trade, it must follow that it was not in a position where it could exploit any property, information or business opportunity coming its way; and consequently there was no "*real sensible possibility of conflict*" if Mr Monks did so.

Breach of duty: State of the Ashford Site

262. It is convenient to start with an assessment of the position of GBR in late 2010. As noted above, the evidence is somewhat fragmented, but it is possible to summarise the position as follows.

i) Site: GBR did not own the Ashford Site. The intention had been for a formal licence to occupy to be entered into, but that had not happened. At the same time, however, as had been the case with SIK, there was an informal arrangement in place under which GBR was entitled to make use of the Ashford Site premises, in return for servicing the mortgage payments to Barclays of £5,000 per month. The position as regards the mortgage account is somewhat unclear, but it seems likely that the account was *not* in arrears at the beginning of November 2010, and that the expectation (and indeed agreement) was that GBR would continue to make the required mortgage payments on an ongoing basis. At the same time, however, there is some doubt as to what Barclays had been told about the change in arrangements which meant that SIK would no longer be the trading company operating from the Site. In any event, towards the year-end Barclays were signalling their interest in repossessing the Site with a view to marketing it for sale.

ii) WML: GBR did not have a WML. At the time the relevant WML was held by GAL. Although historically it had been lawful for the occupier of a site to authorise another party to conduct waste management operations, the law had changed on that point in 2008. Consequently, any arrangement under which GAL subcontracted waste management operations to GBR was irregular and probably unlawful. In any event, the Ashford Site was in a poor state physically, and very likely GAL was in breach of a number of the conditions of its WML, aside from the issue as to the identity of the operator. The regulatory position needed to be updated to reflect the new 2010 Regulations, and the WML replaced with an Environmental Permit.

iii) Goodwill: It had been intended to effect a formal transfer of goodwill from SIK to GBR, but again no steps had been taken to implement any such transfer. Customer information had been provided informally, but in my view, (1) there must be real doubt whether that amounted to an effective transfer of goodwill from SIK, and (2) even if it did, it is unlikely to have had any real value.

iv) I make the first point principally because of the terms of the Barclays Debenture, and because no evidence has been produced showing written

consent by Barclays to any transfer. As noted above, Mr Monks also advanced a case based on the alleged insolvency of SIK at the time of transfer, but there I agree with Mr Davies that no such case was ever pleaded by Mr Monks, and that consequently there is no sufficiently particularised case on the evidence addressing the question of SIK's solvency for these purposes.

v) I make the second point (i.e., that any goodwill is likely to have had no real value) in light of the evidence as to the nature of the waste management industry generally ("*You're only as good as your last skip*"). That seems to me entirely credible and in any event was unchallenged.

vi) To summarise, therefore, on the question of goodwill, in my view I should proceed on the basis that there was no effective transfer of any valuable goodwill from SIK to GBR. GBR possibly developed some goodwill of its own, but that is also likely to have been of limited value, given both the short time for which it had been operating and the fickle and competitive nature of the waste management industry generally.

vii) Website: There was a website which could be used to advertise the Greenbox brand, but the relevant domain name was registered to Mr Davies personally and was not owned by GBR. Likewise, there is no evidence that GBR itself owned any design rights associated with the "*Greenbox*" name or brand.

viii) Vehicles, Plant & Equipment: GBR had no vehicles, plant and equipment of its own. Certain of the assets in use at the Ashford Site were owned outright by Nero. The position is unclear, but Nero may also have held some assets under hire purchase and finance agreements. SIK certainly did, and indeed some agreements had been entered into by SIK as late as November and December 2010, at a point after Mr Davies' disqualification as a director, and after the change in operations at the Ashford Site which led to GBR becoming the trading company.

ix) The intention had been for the previously informal arrangements to be formalised by means of a written licence, but this was never executed. Despite that, GBR had in practice taken over responsibility for paying the relevant finance and HP charges. Consistent with that, GBR's bank statements for December 2010 show a series of payments being made to CAF and Finance & Leasing. However, it appears that the finance houses had not been informed of the intended change of user.

x) In any event, certain payments due to London Finance & Leasing were missed over the Christmas holiday period in 2010-2011, and this, together with the change in overall arrangements at the Ashford Site including Mr Davies relocation abroad, gave rise to the risk of termination of the finance arrangements.

xi) O Licence: Haulage and GAL had lost their appeal in relation to their O Licences, and consequently those licences had been revoked with effect from 2359 hours on 22 December 2010. SIK's appeal had succeeded, but only in the sense that it was given permission to renew its application at a remitted hearing before the Traffic Commissioner. No application was made. Instead,

an application had been made in the name of GBR, but without Mr Monks' knowledge. That application was still to be heard, however.

xii) Employees: Approximately 10 people were working at the Ashford Site, including Mr Ford, but none of them had employment contracts in place with GBR (although Mr Monks had been provided with copies), and they were being paid at least partly (and perhaps entirely) in cash.

xiii) Income: GBR had a bank account at HSBC, which had been opened in September, and had the benefit of a factoring agreement with Lloyds TSB. As from mid-November 2010, income was flowing into the HSBC account under the factoring agreement. In addition, GBR had the benefit – at least in the short-term – of funds from the SIK bank account, which were intended to assist cash-flow until (in particular) Mr Monks' efforts to drive sales began to bear fruit. As to the latter point, as I understood it one of Mr Monks' arguments in his Closing was that the inclusion within the terms of the Barclays' fixed and floating charges of "*trade debts*" meant that GBR could not safely make use of funds provided to it by SIK, because they represented the proceeds of debts which were subject to Barclays' security interest. If that was the point, I disagree with it. It seems to me that the arrangement under which SIK made funds available for a limited period was more in the nature of an interest free loan to GBR, to aid cash flow. Under the Debenture SIK was prohibited to "*sell, transfer, part with or dispose of any Floating Charge Assets except by way of sale in the ordinary course of business*". To my mind, that language does not inhibit its ability to make a loan to a related company with funds derived from customer receipts.

263. Overall, the picture is a messy one. The state of the operations at the Ashford Site was shambolic. The question of the discharge by Mr Monks of his duties as a director must be looked at in light of that overall assessment.

264. Before moving on, I must deal with Mr Monks' submission that GBR was insolvent in late 2010/early 2011. This was disputed by Mr Davies, on the basis that the evidence relied on by Mr Monks was equivocal and unconvincing.

265. On this point I prefer Mr Davies' case. I do not feel able to conclude that GBR was insolvent:

i) There is no clear evidence of GBR having substantial creditors. By the end of December 2010, it had had only a short trading life. Mr Smith in his Witness Statement, giving the background to the decision to incorporate GBRK, said that GBR "*was too new to have generated any significant creditors*." Mr Monks in his oral evidence was able to identify only three creditors, with debts amounting (taken at their highest) to approximately £56,000. On the other hand, in the questionnaire completed by Mr Monks in GBR's liquidation, he confirmed that GBR had no creditors.

ii) Mr Monks said that GBR had an enormous potential liability in terms of the waste left at the Ashford Site, but this point was not developed in detail, and I am not satisfied that any such liability was a liability of GBR, rather than a liability of GAL, as the holder of the WML.

iii) In any event, as already noted above, there is evidence of income flowing into the GBR HSBC bank account in late 2010 from the Lloyds TSB factoring agreement, and it had use of some funds from SIK – probably by way of loan – for several months, expressly with a view to assisting cash flow, while its own business was built up by Mr Monks. It is true that the HSBC account went into overdraft over the Christmas period in 2010, but the position was quickly rectified.

iv) Mr Monks argued that the expenses involved in running a waste management business are significant, and in aid of that referred to the first two months of GBRK's Sage accounts, which indicate expenditure of some £161,525.24; and to GBRK's opening balance (see above at [204]), which but for the balancing item attributable to Mr Monks' directors' loan would have shown a shortfall of £261,000. Again, however, such figures are of limited utility in assessing the solvency or otherwise of GBR at any given point in time (no precise date is specified). Aside from other matters, it is apparent that much of this early expenditure was in connection with clearing the Ashford Site, which happened as a priority exercise in the early part of 2011. I will come back to this below, but for now simply note that it is not obvious to me why the same clearance exercise could not – if necessary with the agreement of the Environment Agency – have been conducted over a longer period, if that was what was required to manage GBR's cash flow successfully.

266. Overall in my view, this evidence is too sketchy to justify the conclusion that GBR was insolvent in late 2010, or even that it was of doubtful solvency. Notwithstanding that, I will consider below the impact on Mr Monks' fiduciary duties of the opposite conclusion.

Breach of duty: Discussion and Conclusion

267. In my view, the focus in the case as it has developed, on whether something corresponding to *the Business* was transferred to GBR, has led to a misplaced emphasis, in determining whether Mr Monks was in breach of duty, on the question of what existing corporate assets GBR had, and whether they had been misapplied. To a large extent Mr Monks' case has been to say – GBR had no corporate assets, and therefore nothing to divert, and therefore there was no breach of duty.

268. That is a misplaced emphasis because the real focus should be on the duties owed by Mr Monks, by reason of his status as a director of GBR, and whether he was in breach of them. Although a company director may certainly breach his duties to the company by misappropriating its existing assets, that is not a pre-requisite. He may also breach his duties on other ways, not at all dependent on the misapplication of pre-existing corporate assets, for example by putting himself in a position of conflict and thereby making an unauthorised profit.

269. A good example is *Re Bhullar Bros. Ltd* [2003] EWCA Civ. 424, [2003] BCC 711. In that case, a company owned an investment property which was used as a bowling hall. Two directors of the company came to know that a plot of land next to the investment property was for sale, and they acquired it using another company which they owned and controlled called Silvercrest. They said that there was no breach of fiduciary duty in doing so because the company itself has shown no interest in

acquiring the plot of land at the relevant time, and accordingly had not been deprived of any "*maturing business opportunity*". This argument was rejected and the Court of Appeal affirmed the declaration made by the judge at first instance that Silvercrest held the plot of land on trust for the company. It was not necessary, in determining that there had been a breach of duty, to show that the company had some pre-existing interest in the opportunity in question. Jonathan Parker LJ said as follows:

> *"[27]. I agree with Mr Berragan that the concept of a conflict between fiduciary duty and personal interest presupposes an existing fiduciary duty. But it does not follow that it is a pre-requisite of the accountability of a fiduciary that there should have been some improper dealing with the property 'belonging' to the party to whom the fiduciary duty is owed, that is to say with trust property …*
>
> *[28]. In a case such as the present, where a fiduciary has exploited a commercial opportunity for his own benefit, the relevant question, in my judgement, is not whether the party to whom the duty is owed (the company, in the instant case) had some kind of beneficial interest in the opportunity; in my judgement that would be too formalistic and restricted an approach. Rather, the question is simply whether the fiduciary's exploitation of the opportunity is such as to attract the application of the rule.*"

270. I note two further points at this stage. First, *Bhullar Bros. Ltd* also neatly illustrates the point that even in cases *not* involving the misapplication of pre-existing corporate property, the appropriate remedy may nonetheless be a proprietary one. Thus, in *Bhullar Bros. Ltd* itself, a constructive trust was identified as the appropriate remedy, reflecting the equitable rule that where a fiduciary acquires a benefit in breach of duty, he is to be treated as having acquired the benefit on behalf of his principal, so that it is beneficially owned by the principal (see *FHR Ventures LLP* v. *Mankarious* [2014] UKSC 45, [2015] AC 250, per Lord Neuberger at [7].) Second, the distinction between breaches of duty involving the misapplication of *pre-existing* corporate property, and those *not* involving pre-existing corporate property, *is* relevant to the question of limitation. That is because of the structure of the Limitation Act 1980, section 21. Under section 21(1)(b) the usual, six year limitation period does not applywhere the claim is one to recover pre-existing trust property (corporate property in the present context); but it does apply to other breaches of duty unless (see section 21(1)(a)) there is fraud.

271. In light of these comments, in my judgment the proper approach to assessing whether Mr Monks was in breach of duty – and leaving aside for the moment the question of limitation – involves one asking not only whether pre-existing corporate assets of GBR were misapplied, but also, more pertinently, whether his *actions* were wrongful.

272. As will be readily apparent from the narrative above, the factual background is somewhat confused, and despite my best efforts to decode the evidence, a number of gaps and omissions remain. Notwithstanding that, a number of points are clear, and in terms of *what Mr Monks did*, they include the following:

    i) He caused the incorporation of GBRK, with the intention that it would trade as a waste management business from the Ashford Site.

ii) With that in mind, Mr Monks caused efforts to be made to clear the Ashford Site of waste.

iii) Mr Monks recharged at least part of the cost of clearing the Ashford Site to GBR, even though GBR itself would not have use of the Ashford Site once cleared.

iv) Mr Monks engaged in a process which involved the WML (later Environmental Permit) previously held by GAL being transferred to his new company, GBRK. This was tied to the issue of clearing the Ashford Site. Once the transfer was complete, it gave GBRK regulatory authority to conduct a waste management business from the Ashford Site.

v) Mr Monks acquired, via GBRK and later directly in his own name, a lease of the Ashford Site. The detail of this is obscure. It seems that GBRK entered into a lease with GAL at some point in early 2011 which was backdated to 1 December 2010; but more significantly, Mr Monks acquired a leasehold interest in his own name in June 2011 from Benchmark.

vi) Mr Monks caused GBRK, early in 2010, to enter into new hire purchase and lease agreements in respect of the equipment previously held by SIK, and which had been used by SIK in operating *the Business* at the Ashford Site. It appears he also caused the transfer to GBRK of certain assets previously owned by Nero, but again used by SIK in *the Business*.

vii) He took over GBR's O Licence application, which the Traffic Commissioner was persuaded to treat as an application in the name of GBRK, and procured the issue of a new O Licence in the name of GBRK, to be used in the course of the new waste management business to be conducted by GBRK from the Ashford Site.

273. In my judgment, and leaving aside for the moment any modification to the orthodox position which might be said to arise from GBR being insolvent or of doubtful solvency, each of these steps on the face of it involved Mr Monks in a breach of the duties he owed as a director and fiduciary.

274. It is convenient to start with section 175, which in any event was the main focus of Mr Davies' case. It seems to me that each of the steps identified above involved a breach by Mr Monks of his duty under CA 2006 section 175. I say that because they each occurred, as Mr Monks well knew, in circumstances where the intention had been that *GBR*, not *GBRK*, would operate a waste management business from the Ashford Site. Indeed, Mr Monks had been engaged – initially as a consultant, but latterly as a director – with the remit of building up that business. GBR therefore had its own, one might say equal and opposite, interest in the matters identified above – i.e., in regularising the position at the Ashford Site by clearing it of waste and obtaining an environmental permit which would allow waste management activities to be carried out; in regularising the terms on which the Ashford Site was occupied by entering into a lease or licence; in regularising the position as regards the use of the plant and machinery necessary to permit a waste management business to be conducted; and on obtaining the appropriate licence or licences to permit waste to be transported.

275. Consequently, in taking the steps identified above, all of which were in the interests of GBRK, Mr Monks was in an obvious position of conflict given his countervailing interest both as a director of, and shareholder in, GBR, which was looking to develop exactly the same trading business, operating from the same premises, as GBRK.

276. At a number of points in developing his case, Mr Monks made the point that GBR was not itself in a position to exploit the opportunities presented to GBRK; for example, he suggested that the financing companies would not enter into new agreements with GBR because it was a bad credit risk and there was concern about Mr Davies given his relocation abroad; and he said that the Traffic Commissioner would not grant an O Licence to any business associated with Mr Ford (although in the latter case the difficulty was avoided by the simple expedient of Mr Monks giving certain assurances about excluding Mr Ford from involvement in any transport-related activities).

277. Even if taken at face value, however, such points do not help Mr Monks. It is no answer to a claim for breach of duty for a trustee to say that the opportunity he has exploited was not one which could ever have been taken up by the beneficiary. That is an entirely conventional analysis which, as Mr Shaw pointed out, has been the law for at least 300 years, since the trustee in *Keech* v. *Sandford* was held in breach of duty for taking a new lease in his own name, even though the landlord had refused to renew the lease in the name of the infant beneficiary. As Lord King LC commented:

> "*This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that the rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to the cestui que use…* ."

278. This same point finds expression in CA 2006 section 175(3), which says that the no conflict rule applies in particular the exploitation of any property, information or opportunity, and that:

> *" … it is immaterial whether the company could take advantage of the property, information or opportunity."*

279. Thus, in this case it seems to me immaterial, even if true, to say that GBR may not itself have been in a position to:

i) obtain a WML or environmental permit;

ii) take a lease of the Ashford Site;

iii) enter into hire purchase or other financing arrangements in respect of the plant and equipment previously leased to SIK;

iv) obtain an O Licence;

v) continue or renew the factoring agreement with Lloyds TSB,

with a view to operating *the Business* (or at least, a business) from the Ashford Site.

280. I then come to the question whether any of these conclusions are affected if one assumes that, in late 2010 or early 2011, GBR was insolvent or close to insolvency.

281. I have already mentioned above the comments made by David Richards LJ in the *BTI 2014 LLC* case, to the effect that directors of an insolvent company must have regard to the interests of creditors. Here, Mr Monks relies on that principle to argue that his duty under CA 2006 section 175 was not engaged.

282. The argument is most usefully summarised in Mr Monks' Written Closing, at paragraph 54, as follows (footnotes are omitted):

> *"A director's duty to avoid conflicts of interest is not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest: s175(4)(a) of the CA 2006. Directors of an insolvent company have a duty to the company to act in the interests of creditors. It follows that the only situations that can reasonably be regarded as likely to give rise to a conflict of interest are where the directors act in a manner conflicting with the interests of creditors, and not that of members. Where trading would be wrongful within the meaning of s. 214 of the IA86, it is submitted that the company has no interest in trading and/or that the directors cannot be subject to duties which require them to cause the company to continue to trade."*

283. I will deal with the point first as a matter of principle, and then by reference to the authorities Mr Monks relied upon.

284. The logic of the argument, stripped down, is that where a company is insolvent and not able to trade, and is therefore incapable of exploiting any business opportunity presented to it, there is no conflict in a director seeking for himself to exploit that same opportunity.

285. With respect, it seems to me that that cannot possibly be correct, because if it were it would cut across one of the most basic principles of fiduciary law, namely that a fiduciary cannot escape liability by saying that the benefit acquired in breach of duty was not one the principal could have acquired or exploited. See again *Keech* v. *Sandford* (mentioned above), where the trustee was in breach even though the beneficiary was "*the only person of all mankind who might not have the lease*." And see again the express terms of CA 2006 section 175(2), stating that the "*no conflict*" duty:

> " *... applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity)*" (emphasis added).

286. To my mind, Mr Monks' argument, if correct, would drive a coach and horses through this language, which could not be clearer. Inability to take advantage of any relevant property, information or opportunity is immaterial to the assessment of whether the duty is owed; and to my mind it can make no difference to that analysis to say – and this seems to me to be the nub of Mr Monks' case – that the reason for the inability is the insolvency of the company.

287. As to section 175(4)(a), and the question whether the situation is one which can reasonably be regarded as likely to give rise to a conflict of interest, it seems to me that obviously it can. The conflict arises because of the tension between (1) Mr Monks' directorship of, and ownership interest in, GBRK, on the one hand, and (2) on the other, his *status* as a director of GBR, which gave rise to duties owed to GBR, and which required him to avoid any situation in which he had a countervailing interest – whether or not GBR was itself capable of taking advantage of any relevant property, information or opportunity which might present itself. Thus, it seems to me that Mr Monks was tied in, and in the circumstances unable to take advantage for his own benefit of the situation at the Ashford Site which emerged in late 2010 and early 2011. He might think that unfair, but it is an entirely conventional analysis, and a consequence of the fiduciary obligations he undertook, and which exist for well-established policy reasons, essentially as a deterrent: see, e.g., *Murad & Anor*. v. *Al-Saraj & Anr* [2005] EWCA Civ. 959, per Arden LJ at [74].

288. Mr Monks' argument, if it were right, would cut directly across that well established policy, and moreover would do so in a situation – namely that of an insolvent or near insolvent company – where arguably the need for protection is greater. In any event, it would lead – as Mr Shaw pointed out – to the anomaly that a director who diverted a business opportunity from a solvent company would be liable to account, but a director who diverted the same opportunity from an insolvent company would not. That cannot be correct.

289. That deals with Mr Monks' argument as a matter of principle, but is any different conclusion supported by reference to the authorities he relied on? There were three such authorities, two from New Zealand and one English authority, and I will now deal with them in turn,

290. *Sojourner* v. *Robb* [2007] NZCA 493 is a decision of the New Zealand Court of Appeal. In that case, the directors of a company called Aeromarine 1, which found itself in financial difficulty, responded by transferring its undertaking and the bulk of its assets to a so-called "*phoenix company*", Aeromarine 2, and later placed the distressed company in liquidation. Disappointed creditors of Aeromarine 1 sued, alleging breach of the duty of good-faith which the directors owed under section 131 of the New Zealand Companies Act 1993 (the "*New Zealand Act*"). The court said that a restructuring involving a transfer of assets to a "*phoenix*" company will almost inevitably involve some element of conflict of interest, which "*will be most obvious where those who own and control the distressed company are also behind the phoenix company*": see at [26]. At the same time, section 141 of the New Zealand Act contained a particular provision allowing for the avoidance of transactions entered into by the company in which a director of the company was interested. By section 141(1), such a transaction could be avoided by the company at any time before the expiration of three months after disclosure of the transaction to all shareholders; but then section 141(2) provided: "*A transaction cannot be avoided if the company receives fair value under it*."

291. On the face of it, this appeared to present something of a conundrum. On the one hand, the particular provisions in section 141 of the New Zealand Act appeared to permit a sale at fair value, even if it was by means of a transaction in which a director had an interest. On the other hand, application of the full scope of the traditional fiduciary duties owed by company directors would not end with asking whether full

value was paid. Even if it were, the directors (and Aeromarine 2) might still be thought accountable for any profits they made: see at paragraph [27]. At [30] the Court said:

> *"Under the ordinary equitable principles which apply in self-dealing cases, the fairness of the consideration is no answer to a later claim for an account of profits … But if s 141(2) has the consequence in this case that the transaction between Aeromarine 1 and Areomarine 2 could not be avoided, it would be anomalous to allow a related claim to be advanced against Mr and Mrs Robb (and perhaps Aeromarine 2) for an account of profits."*

292. The Court of Appeal thought that the proper approach was that the liability of the directors should depend upon whether the sale to Aeromarine 2 was for fair value or not. If it was, there would be no claim for breach of duty, and no claim for an account of profits. On the facts, the court determined that fair value had not been paid, and so the Judge's original conclusion was upheld.

293. To my mind, this was a case dealing very specifically with the statutory regime under the New Zealand Act. The court was seeking to address a potentially anomalous outcome, arising from the tension which apparently existed between the full scope of the directors' fiduciary duties on the one hand, and on the other, the apparently reduced scope signalled by the particular provisions of section 141 of the New Zealand Act. In seeking to square the circle, the Court determined that the provisions of the Act should be given precedence. There is nothing at all surprising in that conclusion. But to my mind, it does not justify any wider principle or any derogation in other circumstances from the usual scope of a director's fiduciary duty.

294. The further New Zealand case relied on is *Peace & Glory Ltd* v. *Samsa* [2009] NZCA 396, also a decision of the New Zealand Court of Appeal. There, a company with a sole director and shareholder was involved in the redevelopment of a property which it had acquired with the benefit of a mortgage from ASB Bank. The redevelopment exercise took longer than anticipated and became more expensive. Faced with a number of unattractive alternatives, which included inviting the mortgagee bank to sell by way of mortgage sale, or endeavouring to sell the property on the open market, the director/shareholder took what he regarded as the least unattractive option and bought the property himself for what he considered an appropriate price, taking on additional debt to do so. The trial judge held that the sale was at fair value (see the Court of Appeal judgement at paragraph [26]), but there was then an appeal on the basis that the director, by his actions, had caused the company to incur a debt (i.e., sales tax, referred to as "*GST*") which at the time he knew it could not pay, contrary to the "*Duty in relation to obligations*" owed by him under section 136 of the New Zealand Act: see the decision at [43]. The appeal failed. The nub of the court's reasoning appears to have been that the director acted honestly in doing what he did (see at [73]), and it was not established that the tax position it would have been any better even if he had acted differently (see at [70]-[75]). In any event, the case is not directly concerned with the scope of the conflict duty owed by company directors, either under New Zealand law or English law. It seems, in light of the earlier decision in *Sojourner* v. *Robb*, that the no conflict duty was not engaged given the operation of section 141 of the New Zealand Act, at least in a case where (as the Judge held) full value had been paid. The case was instead concerned with whether, having regard to

another specific provision under the New Zealand Companies Act, a director had improperly exposed the company to an additional liability. On the facts, the decision was that he had not. Although of general interest, nothing in the decision to my mind addresses the question but I have to resolve in this case, under section 175 of the English CA 2006.

295. That said, Mr Monks' argument seems to rest principally on a passage at paragraph 28 of the judgment in the *Sojourner* case, where the New Zealand Court of Appeal said:

> *"In practice the courts have not applied rigorously the self-dealing rules in this context. Instead the focus has been on whether the restructuring caused loss to the company with the counterfactual being an immediate liquidation."*

296. The Court then went on to refer to the judgment of Hoffmann J in *Re Welfab Engineers Ltd* [1990] BCLC 833, which I will now turn to.

297. That case involved a misfeasance summons brought by liquidators against the former directors of an engineering company. At a point when the company was in serious financial difficulty, they sought and procured offers for the sale of the company's premises and/or business. Ultimately, the choice was between two offers. The first was for £125,000, for the premises alone. The second was for sale of the premises, equipment and work in progress, but for a lower figure, namely £110,000. They accepted the second offer, which had the effect of preserving the business and the jobs of the employees, including themselves.

298. Hoffmann J held at p. 836d that the defendant directors had never really considered the possibility of accepting any deal which would not either allow the company to continue in business or involve the sale of the business as a going concern. In other words, they did not regard it as their function to act as informal liquidators on the winding up of the business itself. The liquidators argued that this involved a breach of duty, because having undertaken the task of realising the assets of the company, the directors should have done so to the best advantage of creditors (see at p. 837g).

299. Hoffmann J did not think that the directors duty extended as far as being required themselves to realise the assets of the company to the best advantage of creditors. They were entitled to take the view that, if the business could not be saved, its liquidation was not a task which they were required to undertake: see at p.837h. That was the role of a liquidator or possibly a receiver. Consequently, in judging the propriety of the respondents' actions, they were to be compared with the alternatives of receivership or liquidation, not on the basis that the respondents should have undertaken the task of liquidating the company themselves. The liquidators accepted that, if the directors had decided to invite the appointment of a receiver, the chances of the creditors having done any better would have been minimal overall, and consequently the misfeasance claim was not made out. Moreover, Hoffmann J thought that even if the respondents were under the duty as alleged, a proper comparison of the two offers, once one factored into the higher offer certain imponderables and other matters, showed that there was not a great deal between them: see at page 837f.

300. It therefore seems to me that, on proper analysis, this case tells one little or nothing about the circumstances in which the duty to avoid a conflict of interest either arises or is commuted. It is really about whether directors of a company are ever subject to a duty themselves to act as informal liquidators. Entirely understandably, Hoffmann J thought not. In my view, nothing in the case invites a departure from the general no conflict rule applicable to fiduciaries, or invites any gloss on the statutory test in section 175 CA 2006.

301. I therefore remain of the view that Mr Monks' was in breach of his duty under CA 2006 section 175.

302. Against that background, I can return briefly to the position under CA 2006 section 172 (duty to promote the success of the company).

303. Looking once again at the matters described at [272] above, it seems obvious that none of them can be said to have been likely to promote the success of GBR; they are all concerned with promoting the success of GBRK. It follows from my analysis above that, whether GBR was solvent or insolvent, Mr Monks was prevented by his "*no conflict*" duty from doing so. I therefore do not think he can say that he discharged his duty under section 172 in good faith. In any event, as to the question of Mr Monks' good faith, I incorporate the conclusions as to his honesty at [349] below.

Are Mr Davies' Claims Time-Barred?

304. I now turn to the question whether any or all of Mr Davies' claims are time-barred, having regard to the terms of the Limitation Act 1980 ("*LA 1980*"), section 21.

Overview

305. Section 21 is headed "*Time limit for actions in respect of trust property*", and provides as follows:

> *"(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 cause 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 property until the interest fell into possession."

306. In this case, the starting point must be that Mr Davies' actions, brought in the right of GBR, are subject to a six year limitation period under section 21(3) LA 1980. The Claim Form was issued on 22 May 2017. Accordingly, unless an exception applies, claims in respect of events taking place before 22 May 2011 are statute barred.

307. I should make one point immediately, which is that Mr Davies claim arising from Mr Monks' breach of duty in personally taking a leasehold interest in the Ashford Site on or about 23 June 2011, is not on any view time-barred. This occurred after 22 May 2011 and within six years of the issue of the Claim Form.

308. Earlier events, however, fall to be treated differently. Some comments about the legal framework are necessary before turning to the detail of Mr Davies' claims in this case.

Legal Framework

309. The operation of section 21 LA 1980 in cases involving breach of duty by company directors is not entirely straightforward. Some confusion can arise given the distinction made in section 21(1) between cases involving the misapplication of trust property on the one hand (covered by section 21(1)(b)), and cases involving fraudulent breach of trust on the other (covered by section 21(1)(a)). How are these rules to be applied in the case of company directors?

310. *Burnden Holdings (UK) Limited v. Fielding* [2018] 2 WLR 885 affirms the orthodox position that directors of an English company are to be regarded for all purposes connected with section 21 as trustees. That is because they are entrusted with stewardship of the company's property and owe fiduciary duties to the company in respect of that stewardship: see per Lord Briggs at [11].

311. This basic proposition was then applied in construing section 21(1)(b), in a case where on the assumed facts, directors of the claimant company had improperly diverted its shareholding in a trading subsidiary called Vital to another company, BHUH, in which they were majority shareholders and directors. They took the point that, since they had not personally received the diverted shareholding, section 21(1)(b) had no application: the relevant trust property had never been in their possession, and neither had it been received by them or converted to the use. But that argument was rejected by the Supreme Court. Lord Briggs said as follows, at [22]:

"In the present case, (of course only on the assumed facts), the defendant directors converted the company's shareholding in Vital when they procured or participated in the unlawful distribution of it to BHUH. It was a conversion because, if the distribution was unlawful, it was a taking of the company's property in defiance of the company's rights of ownership of it. It was a conversion of the shareholding to their own use because of the economic benefit which they stood to derive from being the majority shareholders in the company to which the distribution was made. By the time of that conversion the defendants had previously received the property because, as directors

of the claimant company, they had been its fiduciary stewards from the outset."

312. *Burnden* was thus a case involving a misapplication of *pre-existing* company property: that was property the directors had "*previously received*", and they converted it to their use when it was diverted to the separate company, BHUH, in which they had a majority stake and therefore an economic interest. That was enough for the section to be engaged, even though the relevant property was not transferred to the defaulting directors personally.

313. It follows that in cases involving the misapplication *pre-existing corporate assets*, the usual six year limitation period will be disapplied.

314. But what of the case of the company director who diverts a maturing business opportunity for his own benefit? Such a case may result in a proprietary remedy, as illustrated by the *Bhullar Bros*. case already discussed above. Another good example is the case where an agent receives a bribe or secret commission in breach of duty. The Supreme Court has held that in such cases the benefit accruing to the agent is to be treated as having been acquired on behalf of his principal, so that the benefit is owned by the principal who has a proprietary as well as a personal remedy against the agent: see *FHR European Ventures LLP and others* v. *Cedar Capital Partners LLC* [2014] UKSC 250, [2015] AC 250.

315. But do such cases involve any misapplication of "*trust property*", such that they fall within LA 1980, section 21(1)(b)? The authorities support the view that the answer is no.

316. In *Gwembe Valley Development Co Ltd v. Koshy (No. 3)* [2004] 1 BCLC 131, the defendant was the managing director of a joint-venture company in Zambia (Gwembe). He arranged finance for the company in US dollars through another company which he controlled and was able in the process to make a very large undisclosed profit on currency transactions for his own benefit. The joint-venture company subsequently sued the defendant and sought a declaration that the defendant was liable as constructive trustee of the money he had received. In giving the judgement of the Court of Appeal, Mummery LJ said that LA 1980 section 21(1)(b) had no application because the action was not one to recover trust property in the possession of the defendant as trustee. Trust property meant pre-existing trust property, and on the facts there had been no misapplication of pre-existing corporate assets. The imposition of a constructive trust was a remedial device, which arose a response to the receipt by him of his undisclosed profit in breach of duty. It followed that the claim against the defendant was statute barred, absent a showing of fraud under LA 1980 section 21(1)(a), but on the facts a showing the fraud was made out.

317. The logic of that decision was later affirmed and applied by the Court of Appeal in *First Subsea Limited (formerly BSW Limited)* v. *Balltec Ltd and others* [2017] EWCA Civ. 186, [2018] Ch 25. The breaches of duty there consisted of a company director preparing (and in one case making) bids for contracts in competition with the claimant through a new rival company formed for the purpose. As in *Gwembe*, there was no misapplication of pre-existing assets of the claimant, and so LA 1980 section 21(1)(b) was not engaged. The appellant argued that, consequently, section 21(1)(a) could not be engaged either: he said that section 21 as a whole applied only in cases involving

the misapplication of pre-existing trust property, and not where a constructive trust arose in response to a breach of duty. LA 1980 section 21(1)(a) required there to be a "*fraud or fraudulent breach of trust to which the trustee was party or privy*", and that must mean a fraud in relation to pre-existing trust property. Relying on comments made in a later Court of Appeal decision by Carnwath LJ, namely *Halton International Inc* v. *Guernroy Ltd* [2006] WLR 1241, the appellant argued that the Court of Appeal in *Gwembe* had been wrong to say otherwise.

318. The Court of Appeal in *First Subsea* rejected that argument, and said it was not a pre-requisite to the application of section 21(1)(a) that there be a misapplication of pre-existing trust (or corporate) property. Section 21(1)(a) was concerned with fraudulent breaches of duty by a trustee, and a company director as an office holder expressly subject to fiduciary duties (or as it is sometimes said, a "*class 1 fiduciary*") was a trustee for these purposes. That was not to be confused with the fact that a breach of such duties might sometimes result in the same person becoming a constructive trustee (or "*class 2 fiduciary*") in respect of any benefits received in breach of duty. Patten LJ explained the distinction at [59] and [62] of his judgment:

> *"[59]. The provisions of section 21(1)(b) in respect of the property of the company have no application to cases like the Gwembe case where there is no misappropriation or receipt of pre-existing company property but only a breach of duty which gives rise to a constructive trust over (for example) the secret profit. This is because in such cases the director is not a trustee virtute officii in respect of the profit. He has no proprietary relationship with what he acquires other than as the recipient of the proceeds of his breach of duty. He is not therefore in terms of section 21(1)(b) in possession of trust property. But he is at all times a class 1 fiduciary and trustee in respect of the company and its assets so that a breach of his duty towards the company remains a breach of trust within the meaning of section 21 even if it does not involve the misappropriation of company property.*
>
> …
>
> *[62]. … The criticism of the decision in the Gwembe case proceeds on the premise that Mr Koshy was not liable under section 21(1)(b) because the only trust property he obtained was not company property but a secret profit subject to a constructive trust. Therefore, so the argument goes, it would be wrong in principle for the same breach to attract the provisions of section 21(1)(a). But that seems to me to confuse what the two subsections are dealing with. Mr Koshy was only ever a trustee of the secret profit by virtue of the constructive trust imposed as a result of his fraud. But he was not in breach of that trust. The class 2 constructive trust, as Lord Hoffmann explained in the Paragon case, imposed no duties on him nor did it make him a fiduciary. He was a fiduciary by reason of his office as a director and the fraud which he committed was a breach of those duties; not of the class 2 constructive trust."*

319. The upshot as it seems to me is as follows. In cases involving a misapplication of pre-existing corporate assets by a company director, LA 1980 section 21(1)(b) will apply,

and relevant claims will not be subject to the usual six year limitation period. However, in cases involving other breaches of fiduciary duty by a company director, relevant claims will be subject to the usual limitation period, and will therefore be time-barred after six years unless there is fraud. For these purposes, *pre-existing* corporate property does not include benefits such as bribes or maturing business opportunities.

320. As to the latter point, I note the observation made by Mr Davies in his Skeleton Argument at paragraph 76, relying on *Ultraframe (UK) Ltd* v. *Fielding* [2005] EWHC 1638, that a maturing business opportunity is treated as property belonging in equity to the company. However, that proposition does not seem to me to be supported by the decisions of the Court of Appeal in either the *Gwembe* case or the *First Subsea* case, and it seems to me that at [1489] of *Ultraframe*, when he referred to a business opportunity counting as the "*company's property if it is property which the fiduciary has acquired for his own benefit*", Lewison J. must have been referring to the position arising *after* the fiduciary has taken advantage of the opportunity for his own purposes, and not before.

321. I must therefore address two questions having regard to the facts of this case: do any of Mr Davies' claims involve a misapplication of pre-existing corporate property of GBR, and in any event were any breaches of duty fraudulent?

Limitation: Discussion and Conclusions

322. Looking back at [272] above, in my judgment item (iii), i.e., the use of GBR's funds in order to help clear the Ashford Site, in circumstances where Mr Monks was in an obvious position of conflict and where that would benefit GBRK, involved a misapplication of pre-existing corporate property by Mr Monks, and falls within the scope of LA 1980 section 21(1)(b).

323. As I understand it, Mr Monks' case on this point is that the use of GBR's funds in this way was justified – indeed required – because it was discharging GBR's own regulatory liability. But to my mind it is unclear that the regulatory liability attaching to the Ashford Site was *GBR's* liability – after all, it had been in operation only for several weeks, and the relevant WML was held by another company, GAL. Mr Monks is the fiduciary, and the burden rests on him to show that the expenditure was justified. In my judgment he has not done so, even on the basis that the challenged invoices are genuine, or at any rate has not done so sufficiently clearly to avoid a finding of breach of duty in respect of it.

324. Applying the logic of *Burnden Holdings*, those funds were property of GBR that Mr Monks had previously received, because he was a director of GBR and therefore custodian of its property. No sufficiently clear case has been made out that the funds were paid away for good reason. The funds were converted to Mr Monks' own use, in the sense that they were paid in order to produce a benefit for GBRK, in which he was majority shareholder, the benefit being the clearing of waste from the Ashford Site in a manner which would enable GBRK to obtain a new Environmental Permit and begin to trade free of any regulatory restrictions or liabilities. That had economic value for Mr Monks personally. I do not think that analysis is at all affected by the assumption that some of the same costs were covered by Mr Monks personally.

325. I do not however consider that any of the other matters identified above in paragraph [272] of this Judgment involved any misapplication by Mr Monks of pre-existing corporate property of GBR. In particular, I do not consider that there was any misapplication or misappropriation of GBR's goodwill. For the reasons already explained above at [262(iii)], it seems to me unlikely that GBR had goodwill of any real value at the time. It is much more likely that GBRK, when it began trading, did so from a standing start but with the benefit of Mr Monks' own contacts. To put it another way, I do not think that Mr Monks' interest in GBR was with a view to diverting its goodwill; his interest was in the Ashford Site and other available infrastructure, as a platform for building up his own business using his own energies and no doubt considerable business development skills.

326. It follows, as regards the other breaches of duty identified in [272] above, that they will be time-barred unless fraudulent. I need to address two preliminary questions on the question of fraud topic, before turning to the facts.

327. First, Mr Brisby took a pleading point. Relying on the observations of Lord Millett in *Three Rivers District Council* v. *Bank of England (No. 3)* [2003] 2 AC 1 at [84], Mr Brisby said that Mr Monks' allegation of fraud was not sufficiently particularised. He criticised Mr Davies for putting forward a case which suggested " *... that there should be some automatic dishonesty associated with the argument that Mr Monks held corporate property*."

328. With respect, I think this is to mischaracterise Mr Davies' case. This is put succinctly in his own Written Closing at [77], as follows:

> "*In this case, s 21(1)(a) LA 1980 applies because Mr Monks is guilty of fraud; he has dishonestly placed himself in a position of conflict and has taken for the benefit of GBR Kent (and, thereby, indirectly himself) the business conducted at the Ashford Premises*."

329. To my mind that reflects the pleaded case, which is summarised both in paragraph 32 of the Particulars of Claim, and in paragraph 16 of the Reply. Paragraph 16 of the Reply is in response to paragraph 26 of the Amended Defence, in which Mr Monks set out his case that by the end of December 2010, GBR was not viable and could not trade, having been abandoned by Mr Davies (see paragraph 24) who had fled the country and was uncontactable. This was then used, at paragraphs 28-29 of the Amended Defence, as the basis for justifying the incorporation of GBRK and the commencement of its trading activity. Against that backdrop, paragraph 16 of the Reply set out a general denial of Mr Monks' case in his paragraph 26, and went on at paragraph 16.1 as follows:

> "*As pleaded in the Particulars of Claim, Mr Ford and Mr Monks implemented a wholly improper scheme pursuant to which they secretly misappropriated the Business from [GBR] and transferred it to [GBRK] for the purpose of excluding [GBR] and Mr Davies from the profits and income generated by the Business*."

330. Paragraph 16.2 then provided as follows:

> *"Further or alternatively, if (which is denied), [GBR] could not in fact trade or if (which is further denied) Mr Ford and Mr Monks genuinely concluded that [GBR] could not trade, this did not and could not justify, as a matter of fact or law, their actions in transferring the Business to their own company, [GBRK]. Instead, as directors of [GBR], Mr Ford's and Mr Monks' duties required them to petition for the winding up of [GBR] or, alternatively, take other steps to place [GBR] in a formal insolvency process."*

331. In my view, none of this amounts to an allegation that there was anything automatically dishonest in what Mr Monks did. Rather, as I read it, it is an allegation that Mr Monks' stated motivation for doing what he did (i.e., that he felt he had no option given what Mr Davies had left him with) was a false one; that in fact, he was really motivated by an improper purpose (namely, to benefit himself); and, consistently with that, that he sought to hide what he was doing from Mr Davies and acted in secret. Moreover, even if *the Business* was not viable, the allegation is that the honest discharge of Mr Monks' duties required him to step away from it and petition for GBR's winding-up, and not to do what he did and take up the opportunity of trading from the Ashford Site himself.

332. It seems to me that that is a properly pleaded case, and moreover it is the case that was put squarely to Mr Monks during trial. Consequently, I reject Mr Brisby's criticism.

333. As to my second preliminary point, it is useful to ask: what amounts to fraud for these purposes?

334. A useful starting point is the dictum of Millett LJ in *Armitage* v. *Nurse* [1998] Ch 241, 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 it is contrary to the interests of the beneficiaries or being recklessly indifferent as to whether it is contrary to their interests or not.*" He went on:

> *"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 their interests then he is acting dishonestly. It does not matter whether he stands, or thinks he stands, to gain personally from his actions. A trustee who acts with the intention of benefiting persons who are not the objects of the trust is not the less dishonest because he does not intend to benefit himself."*

335. In *First Subsea* v. *Balltec* [2018] Ch 25, Patten LJ put essentially the same point pithily, as follows at [64]:

> "*For a breach of trust to be fraudulent it is not enough to show that it was deliberate. There must be an absence of honesty or good faith. This can include being reckless as to the consequences of the actions complained of.*"

336. It follows that the touchstone for identifying a fraudulent breach of trust is dishonesty. *Ivey* v. *Genting Casinos (UK) Ltd* [2017] UKSC 67, [2017] 3 WLR 1212, contains a

detailed discussion of the meaning of dishonesty, both in the civil and criminal law. The nub of the discussion concerned the relevance of the Defendant's subjective mental state. At paragraph 62, Lord Hughes JSC, delivering the judgement of the Court, referred to the following dictum of Lord Hoffmann in *Barlow Clowes International Ltd* v. *Eurotrust International Ltd* [2006] 1 WLR 1476 as correctly summarising the requirement for dishonesty in cases of accessory liability for breach of trust:

> *"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 the 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 the correct state of the law and their Lordships agree."*

337. Summarising the position overall, Lord Hughes then said the following at [74]:

> *"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."*

338. Against that background, I turn to consider the case against Mr Monks. I have come to the conclusion that, in taking the steps identified at [272] above, he was acting dishonestly (and therefore fraudulently), and that consequently Mr Davies' claim against him based on those grounds is not time-barred. I say that essentially because, in my judgment, Mr Monks' actions in late 2010 were not inspired as an honest response to the situation he found himself in, but instead by a dishonest desire to take over for himself the opportunity which presented itself to trade from the Ashford Site.

339. I have already mentioned above a number of instances in which it seems to me that Mr Monks gave implausible and unreliable evidence, and in expressing my conclusion I am influenced by the general manner in which he gave his evidence. But I rely in particular on two points.

340. First, the wholly mysterious and inherently suspicious background to the steps taken to market the Ashford Site for sale, which resulted in GBRK, and later Mr Monks himself, coming to obtain leasehold interests in the Ashford Site. As already noted above at [157]-[158], I find Mr Monks' suggestion that the situation vis-a-vis the Ashford Site was not a matter for him, because GAL was the mortgagor not GBR, to be entirely unconvincing. He must have been concerned about the position at the Ashford Site, and must have been in regular contact with Mr Ford about it (as well as in relation to other matters). It is clear to my mind that an arrangement existed under

which GBR was intended to pay the mortgage each month, and that Mr Monks knew full well about that arrangement, not least because it is expressly referred to in his email to Mr Davies of 11 March 2011, in which he told Mr Davies (wrongly) that the mortgage payments had been made when he must have known that they had not been. I add to that Mr Monks' entirely unconvincing attempt to distance himself from the GVA letter concerning marketing of the Ashford Site, which he said he had not seen, but which it seems to me he must have been aware of; and his failure to explain in any convincing way the reference in that letter to GBRK having taken a lease of the Ashford Site on 1 December 2010, which it seems to me is entirely consistent with the idea that at the front of Mr Monks' mind was a personal interest in securing access to the Ashford Site for GBRK, which he knew would be critical to its success. Of a piece with this was the effort then made by Mr Monks in his evidence to distance himself from the question of engagement with the Environment Agency, by reference specifically to the letter of 22 February 2011 ("*I did not see this letter and it was dealt with by the directors of GAL*.") The remaining director of GAL was Mr Ford, who by this stage had already resigned his (short-lived) directorship of GBRK, and must therefore have been relying on Mr Monks in relation to any matters of principle.

341. Second, I come back to the account summarised at [147]-[151] above, of the exchanges Mr Monks says he had with Mr Davies in December 2010, leading to Mr Davies' alleged theft of £20,000 from the safe at the Ashford Site, and his subsequent alleged abandonment of GBR and flight to the Middle East.

342. Although I am prepared to accept that parts of this story are true – for example, I am prepared to believe that at some point in late 2010 Mr Monks found out for the first time that Mr Davies had been disqualified as a director, and that there was a problem with the O Licences needed for managing operations at the Ashford Site, and that Mr Davies probably did commit to the idea of further investment in *the Business* over time – I reject the contention that Mr Davies had stolen £20,000 from the safe at the Ashford Site, and more importantly, I reject the contention that he completely abandoned GBR at this time and was uncontactable.

343. As to the alleged theft, the evidence supporting Mr Monks' allegation is sketchy in the extreme. In cross-examination, he was forced to accept that he did not know whether the safe contained £20,000 in the first place. He also admitted that Mr Ford could have taken the money. As already noted, the matter was not referred to the police, and there is no document or other objectively verifiable piece of evidence which supports the account given. It rests entirely on Mr Monks' own alleged recollection, and I have already concluded that I must treat his evidence with caution, unless corroborated by other, independent sources.

344. As to Mr Davies' alleged flight and abandonment of GBR, I find this implausible and also inconsistent with the available documentary evidence, limited though that is. I find it implausible because, although he was no longer a director of GBR, it is entirely natural to think that Mr Davies would take a continuing interest in its welfare. The documentary evidence supports that. The scheme described in the Handover Note suggests not only that Mr Davies expected regular updates, but also that he was contactable. The idea that he had abandoned *the Business* entirely and fled the jurisdiction is also inconsistent with the email exchanges he had in relation to GBR with a number of recipients in December 2010, including with Mr Hunt in relation to the GBR website in the period up to and including 16 December 2010. Most

importantly of all, it is inconsistent with the email he sent to Mr Monks on 10 January 2011, set out at [182] above, in which he said:

> "*I am assuming that my help is no longer needed as no messages have been left on the old number & I have not had any emails*."

345. This was despite the matters of pressing concern said to have been occupying both Mr Ford and Mr Monks in the period up to 7 January 2011, which caused them to instruct Mr Smith to incorporate GBRK.

346. In my judgment, the reason for this is not that Mr Monks was unable to contact Mr Davies, or thought he had no reasonable prospect of being able to do so, but that he wished to disguise from him what his own plans were. That interpretation is borne out by the fact that he did not respond immediately to Mr Davies on 10 January 2010 and explain what was going on. 10 January 2010 was the very day Finance & Leasing served notices terminating the hire purchase and leasing agreements with SIK. Quite apart from other matters, that is something that an honest person in Mr Monks' position would have wanted to explain to Mr Davies. Nor did he say anything else about the problems affecting GBR and the Ashford Site more generally. That seems to me to suggest a dishonest motive, or at the least, a degree of recklessness as regards the interests of GBR, in light of Mr Monks' countervailing interest in developing the possibility of trading from the Ashford Site for his own benefit.

347. In my judgment, the same conclusion is reinforced by Mr Monks' later exchanges with Mr Davies in February and March 2011 (see [238]-[241] above). Mr Monks' threatening response to Mr Davies dated 10 February 2011 seems to me to have been calculated to dissuade Mr Davies from making any further inquiries. It is significant that it makes no reference to the incorporation of GBRK, or to explain the background to that incorporation and the perceived justification for it. That would have been the honest, and perhaps even the usual, thing to do. Likewise, when Mr Monks came on 10 March 2011 to respond to Mr Davies' specific inquiry about GBRK, which Mr Davies had by then found out about, Mr Monks' response was again evasive:

> "*You are not a director or a share Holder. No questions need to be answered regarding this company*."

348. That again seems to me consistent with an intention to disguise from Mr Davies what had happened, and the reasons for it. When asked about his 10 March 2011 email in cross-examination, Mr Monks said that he took the childish stance that he would not talk to Mr Davies because "*I wouldn't get anywhere*." I am quite prepared to accept that Mr Monks was highly frustrated by the situation at the Ashford Site, and annoyed with Mr Davies. But still, I do not think that is the real reason why he refused to engage and explain. In my judgment, Mr Monks was well aware that what he proposed to do was, in all the circumstances, questionable, and he did not wish to reveal his plans because knew they would be liable to challenge. He was willing to take a chance that, with Mr Davies abroad, and if he could be kept at arms-length, he would get away with it.

349. Coming back then to the test for dishonesty in *Ivey* v. *Genting* case, my conclusion is that Mr Monks' subjective intention was a dishonest one. Even if that is wrong,

however, and he felt justified in doing what he did, still I would conclude that his conduct was dishonest when viewed objectively. In this regard, it is possible that Mr Monks set the bar too high. He is not to be assessed by reference to the standards of the "*patron Saint of Ashford*" (see [226] above), but only by the standards of ordinary decent people. I think an ordinary decent person would regard what he did as dishonest.

350. I should make it clear before leaving this issue that in expressing my conclusion, I mean no criticism at all of Mr Smith, Mr Monks' accountant. It seems to me that he was given an entirely sanitised version of events by Mr Monks. He was not shown GBR's bank statements, and so can have had only a vague idea as to its financial position and prospects. I do not think he can have had a full picture of the background to the actions being taken by Barclays in relation to the Ashford Site; certainly it does not appear to have been explained to him that GBR had its own agreement to make the required mortgage payments to Barclays. He must also have been given the impression that Mr Davies had abandoned GBR and could not be contacted, but in my judgment that was wrong and indeed untrue. Overall, therefore, it seems to me very likely, and I so hold, that in the meetings with him, Mr Monks told Mr Smith only what he wanted him to hear, and painted a picture of GBR's position overall designed to reinforce the conclusion that he was free to take whatever steps he wanted in relation to the Ashford Site. For those reasons, I do not think Mr Smith is to be criticised; and likewise, I do not think it is open to Mr Monks to hide behind Mr Smith in order to seek to justify the steps he took.

Can Mr Monks claim relief under CA 2006 section 1157?

351. Mr Monks seeks to rely on CA 2006 s.1157, which empowers the Court in proceedings against a company officer to grant relief if it appears that the person is or may be liable, but has acted "*honestly and reasonably*." In light of my conclusion that Mr Monks acted dishonestly, in my judgment no relief under section 1157 can be given.

Is GBRK fixed with relevant knowledge and are any claims against GBRK time-barred?

352. I can deal with this issue briefly. The question of knowledge, for the purposes of a knowing receipt claim, is put on the basis that as managing director of GBRK at all material times, Mr Monks' knowledge is to be attributed to it. That proposition was not disputed by Mr Monks, and seems to me to be obviously correct, and I accept it.

353. As to time-bar, it was also common ground that Mr Davies' claim against GBRK in knowing receipt is not a claim against a "*trustee*" for the purposes of LA 1980, section 21(1)(a) or (b). Accordingly, Mr Davies' claims against GBRK are subject to a six-year limitation period: see *Williams* v. *Central Bank of Nigeria* [2014] AC 1189.

354. The practical effect of this, in terms of remedies, will have to be addressed in further submissions (and if necessary at the further trial) in light of the other findings made in this judgment. On any view, however, it follows that any claim by Mr Davies against GBRK relating to the leasehold interest in the Ashford Site taken out by Mr Monks in June 2011 is *not* time-barred.

Are Mr Davies' claims against Mr Monks in any event barred by Laches?

355. Mr Monks says that Mr Davies' claims are in any event barred by delay, acquiescence or laches. In saying that he relies on the delay occurring between February 2013 and the date in late 2016 when Mr Davies petitioned to restore GBR to the Register of Companies. At its heart, the argument is put on the basis that, in the meantime, while Mr Davies sat on his hands and did nothing, Mr Monks was building up the business of GBRK, and in doing so was investing his own time, expertise, business contacts and money. Thus, it is said, Mr Davies waited to see whether Mr Monks would make a success of GBRK, and only then stepped in to assert his claims. It is said it would be unfair and unconscionable to allow him to do so, and now to claim a remedy (still less to claim that GBRK's current business is held on trust for him), given that he has employed none of his own capital, and has undertaken no risk of his own, in contributing to the success that GBRK has achieved.

356. For his part, Mr Davies says that there can be no real question of acquiescence. He says that he signalled his intention to make a claim at the latest by the time of his letters before action in November 2012, and even before that, it must have been clear from his email exchanges with Mr Monks in the Spring of 2011 that he objected to the steps Mr Monks had taken. He therefore says that Mr Monks, in building up the business of GBRK, cannot realistically have relied on any implied representation that he had a free hand to do as he liked. Moreover, Mr Davies says there were good reasons why he did not take action sooner. Principally, he relies on the fact that he did not have the funds available to mount a claim. He says that once the funds were collected together, he took action.

357. I have been referred to a number of authorities dealing with the doctrine of laches in the context of equitable claims in a commercial context: see in particular *Clegg* v. *Edmondson* (1857) 8 De G M&G 787; *Patel* v. *Shah* [2005] EWCA Civ. 157 (at [14]-[34]); and *Excalibur Ventures LLC* v. *Texas Keystone Inc*. [2013] EWHC 2767 (Comm) (at [1458]-[1468]).

358. In *Patel* v. *Shah*, Mummery LJ quoted with approval the following passage from the judgment of Aldous LJ in *Frawley* v. *Neill* [2000] CP Reports 20, where Aldous LJ said:

> *"In my view, the more modern approach should not require an enquiry as to whether the circumstances can be fitted within the confines of a preconceived formula derived from earlier cases. The enquiry should require a broad approach, directed to ascertaining whether it would in all the circumstances be unconscionable for a party to be permitted to assert his beneficial right."*

359. It seems to me that is the question I should seek to address in this case.

360. It is certainly true that a strong case for denying a remedy would arise in a commercial context if it were clear that the claimant had cynically waited to see whether there was value in pursuing his claim, and had in the meantime allowed the defendant to expend time, energy and money, and undertake commercial risks. That was so in the *Excalibur Ventures* case itself: see the judgment of Christopher Clarke LJ at [1465], where he said that the Claimant had waited to see whether oil was discovered; and at [1467] where he characterised that as *"[s]peculative delay*."

361. I have come to the view that the delay in this case cannot be characterised in the same way, and that Mr Davies is not barred by laches from pursuing his equitable claims. I say that for the following reasons:

i) It does seem to me to be an important point, although not in itself determinative, that Mr Davies had made his position clear in correspondence by, at the latest, November 2012. Mr Monks must have known by then, if not well before then, that he was exposed to the possibility of a claim arising at some stage in the future out of the actions he had taken in late 2010 and early 2011.

ii) It is true that there was no response to the letter from Vertex Law sent on behalf of GBRK in February 2013. However, I do not think that Mr Monks can have considered he was out of the woods from that point onwards. He must be taken to have accepted that there was a continuing risk of a claim materialising, albeit one which he no doubt hoped would diminish over time.

iii) I think the point also needs to be looked at in light of my overall findings as to Mr Monks' motivations and conduct. It seems to me fair to describe Mr Monks as a risk-taker. He was opportunistic and took a risk when he incorporated GBRK in early 2011. He was presented with a situation which he thought he could turn to his advantage. That meant, in part, keeping Mr Davies at bay and hoping he would go away. But there was always a risk that he would return, and Mr Monks pressed ahead with the development of GBRK's business in full knowledge of that risk. The fact that he was willing to do so suggests to me that it is not unconscionable (all other things being equal) to permit Mr Davies to hold him to account, now that the risk has materialised.

iv) Although the period of inactivity between February 2013 and November 2016 is a long one, it is not excessive, and I am not persuaded that Mr Monks must have considered that the risk to which he was exposed – arising, as I have held, out of his own dishonest actions – had entirely dissolved at any point during that period.

v) Although it is difficult to test it, given Mr Davies' failure to produce any banking records, I do attach some weight in this analysis to his explanation that in part the reason for the delay was that it took time to accumulate the funds needed to pursue his claims. Mr Davies was cross-examined about certain aspects of his lifestyle, including the fact that he drives a Porsche; but I have seen nothing which suggests that he has a lavish lifestyle and he did not strike me when giving evidence as a man of significant means. Although one might normally expect a degree of candour in terms of financial disclosure from someone claiming impecuniosity as a reason for not pursuing a claim in a timely manner, I think I also need to make an allowance in my overall assessment for that fact that Mr Davies' only obvious source of income before 2011 seems to have been *the Business*, which he says was taken from him by Mr Monks. It does seem to me likely that it took time for him to build up his financial resources, after his move abroad.

vi) I also bear in mind the costs of litigation of this type, which are considerable and not easily affordable to anyone of even above-average income, without

some effort and (very likely) delay. In this case, Mr Davies' costs budget totals £477,978, and he has had to provide security for costs of £186,000.

362. Taking all those matters together, it does not seem to me it would be unconscionable for Mr Davies to be permitted to assert his beneficial rights. In reaching that conclusion, I also bear in mind my conclusions below on the questions (1) whether Mr Davies is entitled to an immediate declaration that the whole of GBRK's business is held on constructive trust for him, and (2) whether Mr Monks is in principle entitled to claim an equitable allowance.

363. In summary, I reject Mr Monks' arguments based on delay, acquiescence or laches.

Is Mr Davies prevented from claiming equitable relief because he comes with unclean hands?

364. It is said that Mr Davies does not come to the court with clean hands. Part of the difficulty in assessing Mr Monks' case on this point is that so many complaints are made about Mr Davies' conduct and behaviour. In Mr Monks' Written Opening, however, the following four matters are identified as being of particular concern, and it seems to me appropriate therefore to focus on them:

i) The deliberate lies told by Mr Davies to Mr Monks as to the reasons why he wished him to act as a director of GBR.

ii) Mr Davies' failure to capitalise GBR as agreed.

iii) Mr Davies' deliberate failure to alert Mr Monks to the regulatory and financial difficulties faced by GBR, which would have the almost certain effect of causing Mr Monks to incur a criminal and or civil liability if he became involved in running it.

iv) Mr Davies' theft from GBR and flight to the Middle East.

365. As to these assertions, Mr Davies has a number of detailed points of response, but he also makes one overarching point. This is that he sues as assignee of *GBR's* claims. Thus, he sues *in the right of GBR*. GBR is the victim of the breaches of duty committed by Mr Monks and Mr Ford as directors of that company. Mr Davies argues that accordingly, he is in exactly the same position as the GBR Liquidators would have been if they had continued the proceedings through to trial.

366. It seems to me that this analysis is obviously correct. In assessing the question of clean hands, therefore, it is not a question of weighing up the relevant equities as between Mr Davies personally and Mr Monks/GBRK. It is a question of assessing whether there are any equities that Mr Monks/GBRK can assert *against GBR* so as to lead to a denial of relief.

367. As to the test to be applied, the parties are agreed that the proper approach is that set out in *RBS* v. *Highland Financial Partnerships* [2013] EWCA Civ. 328, where it was said (at [159], my emphasis added):

> "*It was common ground that the scope of the application of the 'unclean hands' doctrine is limited. To paraphrase the words of Lord Chief Baron Eyre in Dering v. Earl of Winchelsea the misconduct or*

impropriety of the claimant must have 'an immediate and necessary relation to the equity sued for'. … Ultimately in each case it is a matter of assessment by the judge, who has to examine all the relevant factors in the case before him to see if the misconduct of the claimant is sufficient to warrant a refusal of the relief sought."

368. Applying this test, it seems to me that, even if one assumes they are all true, the matters said to constitute a lack of clean hands are not sufficient to warrant refusal of the relief sought by Mr Davies, *suing in the right of GBR*. The equity sued for is GBR's entitlement to equitable relief arising from (essentially) Mr Monks' deliberate and dishonest decision to place himself in a position of conflict, in order to take advantage on his own account of the opportunity to exploit the Ashford Site which had presented itself. In other words, the equity sued for is relief arising from breach by Mr Monks of his duties as a director. The four grounds he relies on are all concerned either with things says he was told in order to persuade him to become a director, or deficiencies in the conduct of someone else (Mr Davies) who at the relevant time was the majority shareholder. In my judgment, all those matters are too remote to have "*an immediate and necessary relation to the equity sued for*." None of them are directly related to the actions undertaken by Mr Monks which constitute his own default. None of them to my mind can be said to justify or excuse the decisions which he took, and which constituted a breach of his own duty. The same is true of other matters upon which Mr Davies was cross examined but which do not feature in the list of items in Mr Monks' Written Opening, in particular the fact of Mr Davies' historic bankruptcy or the fact that he may have taken steps in late 2010 which infringed his Disqualification Undertaking.

369. In any event, in my view the significance of at least some of the matters in Mr Monks' Opening is exaggerated, and I have found that others are not true. Taking them in turn:

    i) I am prepared to accept that Mr Davies said to Mr Monks that he was suffering from a terminal illness, and that he persisted in that position up until at least the point when Mr Monks agreed to become a director of GBR. I am also prepared to accept that Mr Monks was not aware, at the time he agreed to become a director of GBR, that Mr Davies had been disqualified as a director for a period of 11 years. But I do not think that either factor was a material one in persuading Mr Monks to take on his role as a director of GBR. It seems to me much more likely that he did so because he saw an opportunity opening up for himself which he thought he could exploit. Mr Monks is an entrepreneurial and competitive character. It seems to me entirely natural to think that that would have provided his real motivation. In my view, he would not have been particularly swayed, in assessing his own personal interests, by Mr Davies' claimed medical condition, and would not have been unduly troubled to find out later on that Mr Davies had been disqualified as a director, even for such a long period. On the latter point, it emerged during the course of his cross-examination that Mr Monks himself has a conviction for fly-tipping. Also relevant is the evidence he gave that he was willing to bend the rules to allow haulage operations to continue from the Ashford Site in early 2011, without any O Licence in place. To summarise, Mr Monks is an ambitious, intelligent and opportunistic individual, who is willing to cut

corners if it suits him to do so. In the circumstances, I think the first of the points relied on by Mr Monks is exaggerated.

ii) The second point is Mr Davies' failure to capitalise GBR. Here, I think it likely that some form of an understanding *had* developed that further capital would be provided. The HoT document says as much. What is not clear, however, is the nature of that understanding and whether it ever developed into anything tangible. Mr Monks' case in his Written Opening is put on the basis of an *agreement*. But elsewhere he denies (in my view correctly) that the HOT document had contractual effect. Again, therefore, I think there is an element of exaggeration in this complaint and some inconsistency with other parts of Mr Monks' case.

iii) The third ground of complaint is the deliberate failure to alert Mr Monks to the regulatory and financial difficulties facing GBR. It seems to me that this is also exaggerated, at least in the following respects: (1) in my view Mr Monks did know, before he became a director of GBR, that the relevant WML was held by SIPI/GAL, not GBR, or if he did not know that he was indifferent to it (see [115] above); (2) in my view Mr Monks knew, before he became a director of GBR, that the plant and machinery used in *the Business* were owned not by GBR but by other parties (the HoT refers to Nero, although it is clear that some were held by SIK) - and again, if he did not know he was indifferent to the detail of such arrangements; and (3) Mr Monks certainly did know about the physical state of the Ashford Site, which on his own evidence he had visited a number of times before taking up his directorship, and he must have been aware therefore of the risk of regulatory liabilities arising in relation to it.

iv) The fourth ground relates to Mr Monks' case that Mr Davies stole cash from the safe at the Ashford Site and then fled to the Middle East. I have already dealt with that case above and have rejected it.

370. For all these reasons, I reject Mr Monks' assertion that Mr Davies should be denied relief because of a lack of clean hands.

<u>Is Mr Davies entitled to claim that the current business of GBRK is held on constructive trust for him?</u>

371. GBR was struck off the Register of Companies on 18 October 2011, under the power contained in section 1000 CA 2006. This is the power conferred on the Registrar to strike off a company which is apparently defunct and no longer trading. The effect of publication in the Gazette of the notice of striking off was that GBR was dissolved as of the same date, 18 October 2011 (see CA 2006, section 1000(6)). Under CA 2006 section 1012 all property and rights vested in a company that has been struck off and dissolved are deemed to be *bona vacantia* and vest in the Crown.

372. In certain circumstances, however, a company which has been struck off and dissolved can be restored to the register. The CA 2006 provides two mechanisms. The first, under section 1024, allows a former director or former member to apply to the Registrar to restore the company to the Register. This procedure is called

administrative restoration. Section 1029 allows for an application to be made to the Court rather than the Registrar, by a wider category of potentially interested parties.

373. As I understand it, the application in this case was made under section 1029 on 13 December 2016, and simultaneously a Petition presented for GBR's winding-up on the just and equitable ground. GBR was restored to the Register by Order dated 23 January 2017, and on the same date also ordered to be wound-up.

374. Where a company is restored under section 1029, the effect is described in section 1032, as follows (my emphasis added):

> *"(1) The general effect of an order by the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register.*
>
> *...*
>
> *(3) The court may give such directions and makes such provisions as seem just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register."*

375. Section 1028 has the same effect in cases of administrative restoration.

376. Mr Davies argues that the effect of section 1032 in this case is that Mr Monks and Mr Ford, who had not resigned as directors of GBR at the time of its dissolution, are deemed to have continued in post as directors during the period of dissolution, or at least until 13 December 2016 (the date of presentation of Mr Davies' winding-up Petition and technically therefore the date on which it entered into compulsory liquidation). That, says Mr Davies, must be the consequence of the company being deemed "*to have continued in existence*."

377. As I understood it, this argument was relied on by Mr Davies for two inter-related purposes. First, as an antidote to Mr Monks' assertion that his claims were time-barred. And second, as a platform for arguing that the whole of GBRK's current business was held on constructive trust for Mr Davies. I have already dealt with the question of time-bar above, but the second (constructive trust) point, remains.

378. The logic of this point is as follows. Although a claimant company in a business diversion case may often seek a proprietary remedy, i.e. a declaration that the defendant director or his corporate vehicle holds a business on constructive trust, that may be difficult in a situation where there is a substantial delay between the breach of duty and the time when a proprietary remedy is sought. That is because the claimant must be able to trace its property into the defendant's current business in order to assert its proprietary remedy (see *Ultraframe (UK) Ltd* v. *Fielding* [2005] EWHC 1638, at [1461]ff), and the longer the period between the original breach and the time when the remedy is claimed, the more difficult that is likely to be.

379. The problem will usually arise, said Mr Davies, because the errant director, in order to exploit a maturing business opportunity, will resign; and that will or may have an impact on his duties continuing: see, for example, *IDC* v. *Cooley* [1972] 1 WLR 443.

But that problem does not occur here. The effect of the deeming provision is that Mr Monks and Mr Ford continued as directors and therefore have committed *continuing* breaches of duty. Consequently, as Mr Shaw put it graphically in his Skeleton Argument, "*Each time [GBRK] fulfils a customer's order, Mr Monks commits a further breach of duty to GBR*." In other words, each new breach of duty by Mr Monks gives rise to a new proprietary claim in respect of any benefits received, which Mr Davies can assert against GBRK since it is fixed with knowledge of Mr Monks' breach of duty. For that reason, GBR does not need to trace into GBRK's hands the assets and property diverted from it back in 2010, prior to GBR's dissolution; instead, all of GBRK's current business and assets are held on constructive trust for Mr Davies.

380. Is this then the effect of the deeming provision in section 1032(1)?

381. The operation of the current ss. 1028 and 1032, and their statutory predecessors, has been considered in a number of cases. Most recently, Cockerill J. conducted an exhaustive review of the authorities in *Bridgehouse (Bradford No.2)* v. *BAE Systems PLC* [2019] EWHC 1768 (Comm).

382. In many cases, the effect of the deeming provision has been to validate acts undertaken in relation to the company on the mistaken assumption it was still in existence, when in fact it had been struck off. In *Tynan's Ltd* v. *Craven* [1952] 2 QB 100, for example, a case under section 353(6) of the Companies Act 1946, at a point after the company have been struck off the register and dissolved, an application was made in its name for a new lease of commercial premises. By the time the application was heard the company had been restored to the register by an order under section 353(6), but the landlord contended that the application was a nullity. The Court of Appeal held by a majority that the effect of the deeming provision in section 353(6) was to validate retrospectively all acts done in the name or on behalf of the company during the period between dissolution and restoration, as if it had been in existence. Other cases follow a similar pattern: for recent examples see *Joddrell* v. *Peakstone Ltd* [2013] 1 WLR 784 (a case under section CA 2006 s.1032, in which the service of proceedings on a company during the period of its dissolution was held to have been validated following its restoration); and *Hounslow Badminton Association* v. *Registrar of Companies* [2013] EWHC 261 (Ch) (a case under CA 2006 section 1028, in which Vos J. (as he then was) held that the restoration of a company under the machinery in section 1024 had the effect that a charge purportedly granted by the company during the period of its dissolution was deemed to have been duly delivered on 9 November 2011, during such period of dissolution.) Vos J said:

> *"When a decision is taken either by the Registrar or by the court, in my judgment it matters not which, to restore the company to the Registrar (sic.), the authorities make clear that the effect of sections 1028(1) and 1032(1) is very extensive indeed. Everything that would have happened, had the company continued in existence, is effectively deemed to have happened."*

383. Other cases, however, show that there are limits to the effects of the deeming provisions. A particular question has involved the effect of restoration, and of the deeming provisions, on the status of contracts which in one way or the other are said to have come to an end as a result of the striking off and dissolution of the company.

384. In *Contract Facilities Ltd* v. *Rees & Ors* [2002] EWHC 2939 (QB), a decision of HHJ Weeks (sitting as a deputy Judge of the High Court), a company which had been struck off purported to enter into an agreement with the defendants to purchase some nursing homes. The fact that the company had been dissolved was discovered shortly before the date set for completion of the purchase. The company failed to complete and the defendants indicated they regarded the contract is void. The company was later restored to the register, and commenced proceedings against the defendant for specific performance, alternatively damages for breach of contract. HHJ Weeks held that the contract had been validly terminated during the period of dissolution, and this conclusion was not affected by the later restoration of the company to the register. The judge said the following paragraphs 76–7 (emphasis added):

> *"I do not, however, think that the statute requires me to go further and disregard either supervening events or collateral matters which may accompany non-existence ...*
>
> *In the present case the contract was, in my judgment, lawfully terminated before [the company] was restored to the register. The restoration to the register resurrects the company, but I do not think that it can also resurrect a contract that has come to an end. Nor do I think that the statute requires me to assume more than that [the company] was in existence. Specifically it does not require me to assume against all the evidence that [the company] could perform a contract under which it was required to pay over £1 million. If the dissolved company had a lease which was forfeited under a proviso for re-entry if the lessee, being a company, was dissolved, then it may be that the forfeiture would be invalidated. But if the lessee was unable to pay its rent because it was dissolved, and the lease was forfeited for non-payment of rent, then subject to any question of relief, I do not think that section 653 requires the forfeiture to be treated as invalid."*

385. In *Bridgehouse* v. *BAE Systems* itself, Cockerill J. held that the termination of a contract under a bespoke termination provision, in light of dissolution of the co-contracting party, remained effective notwithstanding the later restoration of the co-contracting party to the Register.

386. Turning back to the issue which arises in the present case, however, it does not seem to me that any of these cases is really in point. I say that because, in one way or another, they are all concerned with the effectiveness or validity of acts undertaken *vis-à-vis the company*, which are called into question by reasons of its striking off. As HHJ Weeks pointed out in the *Contract Facilities* case, in the passages outlined above, that is the real focus of the deeming provision: *"Nor do I think that the statute requires me to assume more than that [the company] was in existence*".

387. In the present situation, we are not concerned with the question of the existence or non-existence of the company (GBR) as such. Nor are we concerned with the validity and effectiveness, as against the company, of acts undertaken in relation to it. Instead, we are concerned with the position of (and indeed liability of) other parties who, although officers of the company, are separate legal persons. The liability of such persons is not obviously a matter falling within the scope of the deeming provision in s. 1032(1).

388. I am fortified in that view by the fact that, if correct, Mr Davies' argument would lead to anomalous and unnecessary consequences. As to the relevance of such matters, I note that Bennion on Statutory Interpretation, at paragraph 17.28 (referred to by Cockerill J. in *Bridgehouse*) says as follows:

> *"The intention of a deeming provision, in laying down a hypothesis, is that the hypothesis should be carried as far as necessary to achieve the legislative purpose, but no further.*
>
> *Whenever an Act sets up some fiction the courts are astute to limit the scope of its artificial effect. They are particularly concerned to ensure that it does not create harm in ways outside the intended purview of the Act."*

389. In *Inland Revenue Commissioners* v. *Metrolands (Property Finance) Ltd* [1981] 1 WLR 637 at 646, Nourse J said:

> *"When considering the extent to which a deeming provision should be applied, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. It will not always be clear what those purposes are. If the application of the provision would lead to an unjust, anomalous or absurd result then, unless its application would clearly be within the purposes of the fiction, it should not be applied. If, on the other hand, its application would not lead to any such result then, unless that would clearly be outside the purposes of the fiction, it should be applied."*

390. Against that background, I note the following points.

391. First, as Mr Brisby pointed out in his Written Closing, it is well established that the duties of a director are linked to his ability to exercise his statutory powers: see, eg., *In Plus Group Ltd & Ors* v. *Pyke* [2003] B.C.C 332. If that is right, it makes little sense to construe the section in a manner which automatically (and retrospectively) deems a person as having been subject to those duties during a period when he was not able to exercise the corresponding powers, because they relate to the management and administration of a company which was dissolved and did not exist.

392. Second, there is a question of policy. The duties, and in particular fiduciary duties, owed by directors are onerous ones. A person who is a fiduciary will need to organise his or her affairs in a way which takes proper account of the duties owed to the relevant principal or beneficiary. For that purpose, it is important for there to be certainty – for an individual to know at any given time whether he or she is subject to fiduciary obligations or not. Construing the deeming provision as Mr Davies suggests would create uncertainty. A person who had been a director of a dissolved company and who thought his responsibilities had ended would later find, upon restoration of the company, that in fact he had continued to be a fiduciary all along. That would be a very undesirable outcome. In practical terms it would mean that, rather like Schrödinger's cat, such a person would occupy two states simultaneously – i.e, at one and the same time he would be both a fiduciary and not a fiduciary. Such duality has a place in the world of quantum physics, but not in this context.

393. Third, it seems to me that the rather crude result Mr Davies contends for is extreme and unnecessary. It is justified in part on the basis that, unless the deeming provision has the stated effect, it would be open to a director who has abused his fiduciary position to escape liability by the expedient of "*killing*" his principal, i.e. by causing the company to be struck off and dissolved. But I do not think that result follows, and certainly not on the facts of this case. I have already concluded that Mr Davies' claims are not time-barred, and that he is not precluded from bringing them, and so there is no question of anyone escaping liability. Moreover, and perhaps more pertinently, it does not seem to me to follow from the fact that a company is dissolved that a former director is thereby absolved from all ongoing responsibility in relation to his former status. I note here CA 2006 section 170(2), which provides expressly:

> "*A person who ceases to be a director continues to be subject –*
>
> *a. to the duty in section 175 (duty to avoid conflicts of interest) as regards the exploitation of any property, information or opportunity of which he became aware at a time when he was a director; and*
>
> *b. to the duty in section 176 (duty not to accept benefits from third parties) as regards things done or omitted by him before he ceased to be a director.*
>
> *To that extent those duties apply to a former director as to a director, subject to any necessary adaptations*."

394. Fourthly, and finally, it seems to me that if in any given case the circumstances require the deemed effect of restoration to be broadened, so as to embrace the position of former directors specifically, that can easily be achieved by the Registrar or the Court giving a direction under section 1028(3) or section 1032(3) (as the case may be). The text of these subsections is effectively identical. Subsection 1032(3), set out above, empowers to the Court to give such directions and make such provision as seems just for placing the company "*and all other persons*" in the same position (as nearly as may be) as if the company had not been dissolved or struck off. That language is broad enough to enable a direction to be given in relation to former directors, if in the circumstances that seems just.

395. For all those reasons, I am not persuaded by Mr Davies' argument that Mr Monks and Mr Ford were (and are) subject to continuing duties even today by means of the deeming provision in CA 2006 section 1032(1). Consequently, I do not consider that the question of what remedy follows from the breaches of duty I have identified can be answered as easily as Mr Davies would perhaps wish, by saying that the whole of GBRK's current business is held on constructive trust for him. Issues therefore remain which will have to be addressed at a further trial, concerning the form of relief to be awarded and its extent. That gives rise to some further difficult issues as to the scope of a fiduciary's liability to account, in a case where an opportunity has been diverted and a new business built up but with the benefit of the errant fiduciary's efforts and capital investment.

<u>Should Mr Monks in any event be entitled to claim an equitable allowance?</u>

396. It is conventional that where an account is ordered, the Court may permit the fiduciary to claim an equitable allowance: see *Boardman* v. *Phipps* [1967] 2 AC 46. But it is said by Mr Davies that the present case is very far removed from *Boardman* v. *Phipps*, because there the trustees acted innocently and in good faith, whereas here Mr Monks acted in bad faith and (as I have found) dishonestly, and so should not be entitled to claim any allowance at all. Moreover, an equitable allowance is restricted to cases where it cannot have the effect of encouraging fiduciaries to put themselves in positions of conflict: *Guinness plc* v. *Saunders* [1990] AC 663 at pp. 700-701, per Lord Goff. It would be outrageous, says Mr Davies, for Mr Monks to be granted an equitable allowance, because this would be to reward Mr Monks for his improper conduct and to encourage other directors to divert business.

397. I do not think there is any blanket rule that a dishonest fiduciary can never claim an equitable allowance. The evaluation must depend on the circumstances of the case, and Mr Monks was able to point to at least one authority where an equitable allowance was permitted even where the breach of duty by the fiduciary was fraudulent.

398. The case is *Murad* v. *Al-Saraj* [2005] EWCA Civ 959. There the fiduciary, a partner in a joint-venture for the development and operation of a hotel, had failed to disclose to his joint-venture partners a secret commission made by him when the hotel was originally acquired. He was ordered to provide an account of profits, but argued that the account should not be for *all* profits made by him, but instead only for the difference between the profit share he had in fact agreed with his fellow venturers, and that which he likely would have agreed had he made a full disclosure of his commission.

399. The case was therefore principally concerned with the *scope* of the liability to account, and whether in principle it extended to *all* profits made, or whether the liability could be reduced or commuted, to take account of what would likely have happened had the breach of duty not occurred. By majority, the Court of Appeal said that the fiduciary was liable for all profits: that was because of the nature of the remedy, which was intended to result in disgorgement of all unauthorised benefits received falling within the scope of the relevant duty. Given the nature of the remedy, there was no scope for superimposing on it a causation-type analysis, which would be relevant in the context of a claim for compensation, but was not relevant in the context of a claim designed to strip the fiduciary of his unauthorised gain: see per Arden LJ at [60]-[87], and per Jonathan Parker LJ at [108]-[111].

400. All that said, and notwithstanding the express findings of dishonesty made against the Defendant by the trial Judge (see at [4] and [46]), Arden LJ said expressly at [88] that it would be open to the Defendant to apply to the court for an allowance for his services and disbursements, and indeed the Order made by the trial Judge had made an allowance for his remuneration for managing the hotel. Arden LJ referred at [88] to the grant of an allowance being discretionary. I think it follows that the conclusion that the Defendant was dishonest is a factor to be taken into account in exercising that discretion, but is not determinative.

401. What of the present case? I express no final conclusion about it since it is more properly as issue for the further trial in these proceedings, but there is undoubtedly evidence supporting the view that the efforts and capital investments made by Mr

Monks since early 2011 have contributed to the growth and success of GBRK. In those circumstances, I take the view that Mr Monks should *in principle* be entitled to claim an equitable allowance (see the list of issues in the Order of 26 February 2019 at item (4)). I say nothing more about the scope and extent of that allowance which, given the division of issues in the case, I was not addressed on. It seems to me that the sort of allowance I have in mind does not fall foul of the limitation identified by Lord Goff in *Guinness* v. *Saunders*: it does not have the effect of relaxing the scope of the duties owed by a fiduciary or of encouraging a breach of such duties to say that, in the case of a breach, unauthorised benefits should be disgorged but subject to some allowance for the efforts made by the fiduciary in contributing to the development or growth of those benefits.

402. I also express my overall conclusion tentatively since, as certain other dicta in *Murad* v. *Al-Saraj* illustrate, the question of how properly to approach a claim for an account of profits, in a case where a fiduciary wrongfully takes over a business, can be a difficult and sensitive one. That is because the errant fiduciary is liable to account for unauthorised profits falling within the scope and ambit of his duty. But as Arden LJ pointed out (see at [85]):

> " *… that is a procedure to ensure the restitution of profits which ought to have been made for the beneficiary and not a procedure for the forefeiture of profits to which the defaulting trustee was always entitled on his own account*."

403. Jonathan Parker LJ made a similar point, by reference to the decision of the High Court of Australia in *Warman International Limited* v. *Dwyer* [1994-1995] 182 CLR 546. In that case the defendants, in breach of fiduciary duty to the claimant company, set up a competing business. The High Court cited the observation of Upjohn J. in *In Re Jarvis decd* [1958] 1 WLR 815, at 821, that in dealing with a business "*the principles applying are quite different from those in the case of specific assets, such as a renewed lease.*" On that basis, the High Court held the defendants liable to account to the claimant company for profits made by the new business, but only during the first two years of operation.

404. At [115] and [116] of his Judgment in *Murad* v. *Al-Saraj*, Jonathan Parker LJ thought that result explicable on the basis that the case was really about the misappropriation of corporate property (i.e, the claimant company's goodwill), and this had a limited shelf-life:

> " *… there will in all probability come a time when it can safely be said that any future profits of the new business will be attributable not to the goodwill misappropriated from the claimant company when the business was set up but rather to the defendants' own efforts in carrying on that business."*

405. Alternatively, if better analysed as a case about breach of the "*no conflict*" rule, Jonathan Parker LJ thought there would still be a limitation on the scope of the account ordered, given the nature of the benefits involved – i.e, profits flowing from operation of a business:

> *"Even if, contrary to my reading of its judgment, the court is applying the 'no conflict' rule as opposed to the 'no profit' rule, the conclusion which it reaches is in my judgment entirely consistent with the 'no conflict' rule in that it is merely recognising that an order for an account of all the profits of the new business over an indefinite period would in all probability include profits which are not tainted in any way by the position of conflict in which the defendants placed themselves: that is to say profits which, to adopt the expression in Lewin on Trusts quoted earlier … are not within the scope and ambit of the relevant fiduciary duty and hence not within the scope of the 'no conflict' rule. In Warman itself, the court concluded that the appropriate cut-off point was the expiry of two years after the commencement of the new business."*

406. Given the limited nature of the issues in this trial, I was not addressed on such matters, or on how in practical terms they might be addressed. I therefore make no further comment in relation to them, beyond offering them up as a further reason why I have expressed my conclusion on the equitable allowance question somewhat tentatively. It seems to me that the question of the proper scope of any equitable allowance may well be linked to the question of the proper scope of any account, and that the two will probably need to be examined further together before any definitive conclusion can be expressed.

Position of Mr Ford

407. Finally, I must deal with the position of Mr Ford, mentioned briefly above. Although he had played no previous part in the proceedings, he issued an Application Notice on 8 November 2019, seeking permission to file a Defence. He appeared on the first day of trial and sought to intervene in the action.

408. Mr Ford's Application was supported by a Witness Statement, also dated 8 November 2019. The gist of the points made there was that, although he had been aware of the proceedings since at least September 2017, he had been given an assurance by Mr Monks at about that time that Mr Monks would take care of things for him. He had recently heard that the matter was not resolved and was going ahead, which alarmed him and caused him to take action. Mr Monks, in a Witness Statement served in response, said he had not told Mr Ford that he would deal with the proceedings on his behalf.

409. Mr Davies resisted Mr Ford's application, as did Mr Monks. As already mentioned above, Mr Davies had some while ago issued an application for judgement in default against Mr Ford, following his failure to file an Acknowledgment of Service, which was adjourned to be dealt with at the present trial. Both Mr Davies and Mr monks said it was far too late for Mr Ford now to seek to file a Defence and participate in the proceedings, and that it would cause significant unfairness and disruption to allow him to do so. That is because Mr Ford had not engaged in any of the pre-trial steps which the active participants had had to comply with, and had not (for example) served any evidence or participated in the disclosure exercise. The trial had been scheduled with a tight timetable, and costs budgeting had been organised on the basis that Mr Ford was not an active participant. It would be unfair now to allow him to intervene, not least because (in Mr Davies' case) it would be unfair to have to conduct

a cross-examination without access to any documents which Mr Ford might have, and which would have been produced had he been required in an orderly way to provide disclosure.

410. I decided to refuse Mr Ford's application, effectively because his default was a serious one and it seemed to me he had given no proper justification for it. Evidence from Mr Davies' solicitors, Dentons, showed Mr Ford being served with a copy of the Claim Form under cover of a letter dated 22 August 2017. Mr Ford himself exhibited a copy of that letter, and so although he said it had been sent to his father's address, there seems little doubt that he saw it at the time (evidence from Dentons showed it also being sent to another address in Woodchurch, Kent). Mr Ford also exhibited a copy of a further letter from Dentons dated 17 September 2018, this time enclosing the application for judgment in default against him. Again, there is no doubt that Mr Ford received this letter, because his own handwritten note on it recorded him as having spoken to Dentons on about 20 September 2018. They told him to obtain legal advice.

411. In short, it is clear that Mr Ford had been on notice of the proceedings for a substantial period of time. Even if he was given some assurance by Mr Monks in late 2017 that matters would be taken care of, the fact remains that Mr Ford did nothing thereafter to try to protect his position, despite being served with the application for default judgment in September 2018 (approximately one year prior to commencement of the present trial). In those circumstances, it seemed to me quite clear that Mr Ford had no real justification for seeking to intervene at such a late stage, and that any question of residual unfairness to him was more than outweighed by the disruption to the trial process and the unfairness to the other parties that would follow from permitting him to serve a defence.

412. Mr Davies did not, however, invite me to enter judgement immediately against Mr Ford, but instead to assess the position only in light of my findings in relation to Mr Monks. Mr Brisby QC, Mr Monks' counsel, supported that approach, and said that the position vis-à-vis Mr Ford should be looked at in light of any defences available to Mr Monks (e.g., limitation) which were available to Mr Ford as well. That seemed to me an entirely sensible approach, and I agreed to follow it.

413. On that basis, it follows from my findings above that Mr Davies should now be entitled to enter default judgement against Mr Ford. I will so order.

Overall Conclusion and Summary

414. My overall conclusion is that Mr Davies is entitled to judgment against the Defendants in respect of the matters reserved for resolution at this trial, to the extent identified above. I should be grateful if counsel could confer with a view to agreeing a suitable form of Order reflecting the terms of this Judgment, if possible.