Neutral Citation Number: [2023] EWHC 321 (Ch)

Claim No: BL-2020-000735

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

Rolls Building
Fetter Lane
London, EC4A 1NL

16 February 2023

Before :

MRS JUSTICE BACON

- -

Between :

(1) SAY CHONG LIM
(by his litigation friend **TEKQUINN LIM)**
(2) CITY SUCCESS INVESTMENTS LIMITED
(a company incorporated pursuant to the laws of the British Virgin Islands)
(3) GREENACRE CAPITAL (HYSON HOUSE) LIMITED
(4) LAPLAND LIMITED

Claimants

- and -

(1) CHEE KONG ONG
(2) GREENACRE CAPITAL LIMITED
(3) GREENACRE CAPITAL PARTNERS LIMITED
(4) GREENACRE PROPERTIES LIMITED
(5) GREENACRE CAPITAL (180 ILDERTON) LIMITED
(6) GREENACRE CAPITAL (CGW) LIMITED (in liquidation)

Defendants

- -
- -

James Bailey KC and James Goodwin (instructed by **Withers LLP**) for the **Claimants**
The **First Defendant** appeared in person and on behalf of the **Second, Fourth and Fifth Defendants**
The **Third and Sixth Defendants** did not appear and were not represented

Hearing dates: 15–17, 21 November, 2 December 2022

- -

Approved Judgment

This judgment was handed down remotely at 1pm on 16 February 2023 by circulation to the parties or their representatives by email and by release to the National Archives.

MRS JUSTICE BACON:

INTRODUCTION

1. This is the trial of fraud and other claims brought by Mr Say Chong Lim ("**Mr Lim**") and companies associated with him, against Mr Chee Kong Ong ("**Mr Ong**") (who is referred to in many of the contemporaneous documents by his Anglicised name of "**Francis**") and companies under Mr Ong's control. The claims relate to various investments that Mr Lim made in property projects identified and managed by Mr Ong and his companies between August 2012 and April 2019. In essence, the claimants' case is that Mr Ong did not apply Mr Lim's funds for the various purposes intended, has not given the claimants the ownership interests in projects to which they were entitled, and has failed to account and/or provide information in relation to projects in which Mr Lim invested.

2. The claimants were represented throughout these proceedings by Mr Bailey KC and Mr Goodwin, instructed by Withers. Mr Ong was initially represented by Cardium Law, as well as by both leading and junior counsel. For around a month in April–May 2021 that legal team was replaced by Chan Neil & Co. Thereafter and until October 2022 the defendants were represented by Ince & Co, with leading counsel appearing for the defendants at hearings in October and November 2021. On 7 October 2022 Ince & Co came off the record and were not replaced.

3. At the trial, therefore, Mr Ong appeared as a litigant in person. It was, moreover, quickly apparent that he was not able to follow much of what was going on. At the outset of the trial he indicated that he would be using the electronic bundles that had been sent to him, which he proposed to read on his iPad. By the end of the first day of the trial it had become clear that he was not in fact able to do so. The claimants therefore provided him with a hard copy set of the most important of the trial bundles. Mr Ong was not, however, able to navigate those either. One of the claimants' solicitors therefore sat with Mr Ong at the trial to find the relevant documents for him from the bundles, where they were available in the hard copy set. While Mr Ong made both written and oral opening and closing submissions to the court, those submissions were very brief and of very little assistance to the court.

4. The trial was originally set down for three weeks. In the event, however, it occupied less than four days of court time (with a hearing of less than an hour on Day 4, and half a day on Day 5). That was partly a result of the brevity of Mr Ong's submissions. More importantly, however, Mr Ong and the second and fourth defendants were debarred from defending the claim at the outset of the trial, as a result of a succession of unless orders made between July and October 2022. For this and other reasons (which are discussed below) no witnesses were called to give evidence for either the claimants or the defendants.

5. The claimants nevertheless relied, with the court's permission, on affidavit and witness evidence from Mr Lim and two other factual witnesses, Mr Parimal Patel, an accountant who assisted Mr Lim, and Mr Henry Gould, a former employee of the fourth defendant. The claimants also relied on an expert report provided by Mr Gavin Pearson of Quantuma Advisory Limited ("**the Quantuma report**").

6. The defendants had adduced witness evidence from Mr Ong, as well as from Mr Arnold Hersheson, a director of or consultant to various of Mr Ong's companies, and Mr Naynesh Desai, a solicitor who assisted Mr Ong at various times with some of the transactions that are the subject of these proceedings. Mr Ong was invited to call evidence on the points on which the defendants were not debarred, but chose not to do so. The defendants' witness evidence was therefore strictly speaking not in evidence before me. I have, however, referred to it to a limited extent to set out the ambit of the dispute between the parties, and to explain – where relevant – what the defendants' position was prior to the debarring order. For completeness I should note that by the time the trial commenced, Mr Hersheson was seriously ill in hospital, and he very sadly died on or around 23 November 2022.

THE PARTIES

The Claimants

7. Mr Lim is a Malaysian businessman, who at the time of the trial was 82 years old. For the reasons explained further below, he acts in these proceedings by his litigation friend, his son Tekquinn Lim. He invested into the projects managed by Mr Ong through various corporate vehicles, including in particular the second claimant ("**CSI**") and another company that is not a claimant, Brilliant Vanguard Limited ("**BVL**"). Both of those companies are incorporated in the British Virgin Islands and are controlled by Mr Lim.

8. The third claimant ("**Hyson House**") is an SPV which was incorporated to purchase and let out student accommodation in Nottingham. Its original shareholder was the second defendant, and until February 2020 Mr Ong acted as the *de facto* and then *de jure* director of the company. Shortly after incorporation of the company, however, 80% of the shares were transferred to BVL, and in February 2020 Mr Lim appointed Tekquinn Lim and a professional director Mr Murphy of Andco Corporate Services to the board of directors, alongside Mr Ong, such that Mr Lim now (effectively) controls Hyson House.

9. The fourth claimant ("**Lapland**") is an Isle of Man SPV incorporated to purchase and develop two residential blocks of flats in Derby, referred to as the "**Lapland project**". Its sole shareholder is CSI, and its directors are Mr Murphy and other employees of Andco.

The Defendants

10. Mr Ong is also a Malaysian businessman, who was 67 years old at the time of the trial. He is a director of all of the other defendants, which are all companies within the Greenacre group.

11. The second defendant ("**GCL**") operates as the holding company of the Greenacre group. Mr Ong is the chairman of GCL, and owns 50% of its shareholding, with his wife owning the remaining 50%. Since incorporation GCL has had various directors, but since April 2021 Mr Ong has been its sole director.

12. The third defendant ("**GCPL**") is a company set up to provide funding to property development projects in Kent, Bath and London, referred to as the "**GCPL projects**". The projects were set up as four SPVs: Greenacre (Thanet) Limited ("**Thanet**"),

Greenacre (Twerton Park) Limited ("**Twerton Park**"), Greenacre (Twerton High Street) Limited ("**Twerton High Street**") and Imperial Lords View Limited ("**Lords View**").

13. GCPL is and has at all material times been wholly owned by GCL, but it is common ground that Mr Lim's company CSI is entitled to 50% of its shares. The original directors of GCPL were Mr Ong and a Greenacre employee, but from March 2019 to January 2020 Mr Ong was the sole director. Since January 2020 Mr Murphy has been added as an additional director, to represent Mr Lim's interest in the company.

14. Twerton Park and Twerton High Street are also wholly owned by GCL; and Thanet is owned 50% by GCL and 50% by a third party, Project Ten. Lords View was owned 50% by GCL and 50% by another third party, but was put into liquidation and was then dissolved in December 2020. Mr Lim does not have any representation on the boards of directors of any of these SPVs, and as discussed below their beneficial ownership is in issue in these proceedings.

15. The fourth defendant ("**GPL**") is a wholly owned subsidiary of GCL, and carried out development work in relation to various projects including the Lapland project. Various Greenacre employees have in the past been directors, but since March 2020 Mr Ong has been its sole director.

16. The fifth defendant ("**GC180**") is the SPV for the development of properties in Bermondsey (the "**Bermondsey project**"). It is a wholly owned subsidiary of GCL. Various Greenacre employees have in the past been directors, but since January 2020 Mr Ong has been its sole director.

17. The sixth defendant ("**CGW**") is the SPV for the development and letting of student accommodation in Cheltenham, Gloucester and Worcester. Again, it is a wholly owned subsidiary of GCL. Various Greenacre employees have in the past been directors, but since March 2020 Mr Ong has been its sole director. CGW is now, however, in compulsory liquidation pursuant to a winding-up order made in August 2022, with the Official Receiver as the liquidator. The Official Receiver reported to the court on 9 November 2022 indicating that Mr Ong had not responded to attempts to contact him, had failed to surrender to the liquidation, and that it currently held no books or records for the company. By an order made on 7 November 2022, the claimants were given leave to continue their claims against CGW. The Official Receiver did not, however, actively participate in the proceedings.

18. Two further development projects are relevant to these proceedings, although their SPVs are not parties to the proceedings. They are the "**Dublin project**" concerning a development in Dublin, Ireland, and the "**Cooks Road project**" concerning a development in Newham, London. These are included alongside the Bermondsey project in the information claims made by Mr Lim, but are not the subject of any other relief sought by the claimants.

FACTUAL BACKGROUND

19. The claims concern Mr Lim's investment in a series of property development and letting projects managed by Mr Ong in different areas of England and Ireland. The chronology

of the contemporaneous documentation relating to these projects was set out in 11 trial bundles spanning, between them, some 3974 pages of documents.

20. The relevant facts relating to each of the claims will be set out in more detail below. This section provides an overview of the transactions that have given rise to these proceedings.

Early 2010s: Cooks Road and Dublin

21. Mr Lim started to invest in real estate projects in the UK from around 2010, using his corporate vehicles CSI and BVL. He was introduced to Mr Ong in or around 2010. It is common ground that the relationship between the two developed to be one of trust and confidence, and that the parties entered into investment agreements without (in most cases) formal written contracts.

22. Mr Lim and Mr Ong's early collaboration was carried out with a company called BMOR Limited, with investments made as a mixture of loans and equity. It is common ground that these early investments were profitable to both parties, and the BMOR investments are not the subject of these proceedings.

23. The first of the disputed projects, for the purposes of these proceedings, was the Cooks Road project, in which Mr Lim invested £964,000 over the course of August 2012 to December 2017, and the Dublin project, in which Mr Lim invested over €338,000 between March 2013 and December 2017 (with a partial repayment of €250,000 having been made in January 2019, leaving a balance of over €88,000 plus interest). These two projects are the subject of the information claims, on the basis that Mr Lim knows very little about what has become of his investments.

2016–2017: GCPL projects, Hyson House, Bermondsey and Lapland

24. Mr Ong started to discuss the GCPL projects with Mr Lim in 2016. From December 2016 through to February 2018 Mr Lim invested (it is common ground) a total of £3,573,500 into the three projects. The GCPL shareholders' agreement was negotiated throughout 2017 and was eventually backdated to November 2017, but an executed copy of the agreement was not provided to Mr Lim until October 2018.

25. Around the same time as the initial discussions on the GCPL projects, Mr Ong introduced the Hyson House project to Mr Lim. It is common ground that Mr Lim invested £1.66m into the project in September and October 2016 by way of loans and equity, with the intention that the loan element would be repaid once a bank loan had been procured.

26. In December 2016 Mr Lim also agreed to lend £1.5m to GC180 for the Bermondsey project. This, alongside the Cooks Road and Dublin projects, is the subject of an information claim. Mr Lim understands that planning permission has been granted and part of the property sold, and has received £612,000 as an "interim" distribution of profits, but otherwise knows very little about how his investment has been used.

27. In May and October 2017 Mr Lim loaned a total of over £3.5m to Lapland, just under £3m of which was to be used to purchase the Lapland properties in Derby, with the remaining £500,738 to be used as capital for development costs, including planning permission. The properties were purchased in June 2017, but Lapland did not have a bank account until August 2019. GPL therefore received and paid out all sums on Lapland's

behalf until then. The questions of GPL's accounting for the sums received for the Lapland project, as well as its entitlement to remuneration for managing the purchase and letting of the properties, are in issue in these proceedings.

2018–2019: Hyson House loan, CGW

28. In August 2018, Hyson House (whose *de facto* director was Mr Ong) obtained a loan facility from a private bank, Arbuthnot Latham & Co ("**ALB**"), for the sum of £1.7m. The loan was drawn down in December 2018.

29. It is common ground that the loan funds were not used to repay Mr Lim's loan investment to Hyson House. Instead they were almost immediately paid out to GCL (£1.29m), GPL (£300,000) and Mr Ong himself (£70,000). Mr Ong says that this was authorised by Mr Lim. The claimants' case is that Mr Lim was not told that the loan had been agreed or drawn down, did not authorise the payments out of the loan funds, and in fact continued to believe (for most of 2019) that the loan facility had not yet been secured by Hyson House. The claimants therefore bring claims against Mr Ong for fraudulent breach of his director's duties, and against Mr Ong, GCL and GPL for knowing receipt of the ALB loan funds. The claimants also say that GCL failed to account to Hyson house in respect of rental income received by GCL for Hyson House.

30. The last of Mr Lim's investments, for the purposes of these proceedings, was a transfer of £1.2m in April 2019 to GCL as an equity investment in the acquisition of the CGW properties, said by Mr Ong to be urgently required because one of the investors had withdrawn from the project. According to Mr Ong, the properties were purpose-built student accommodation, and the intention was for the properties to be upgraded and let from September 2019 for the 2019/20 academic year.

31. The claimants say that none of that funding was in fact used to purchase the properties. The properties were not in fact acquired until December 2019, and the claimants' case is that by then all of Mr Lim's investment had been disbursed for other purposes.

2020: commencement of proceedings

32. The relationship between the parties started to unravel with the discovery by Mr Patel, in mid-2019, that charges had been registered against Hyson House at Companies House in December 2018, suggesting that the ALB loan had been drawn down. Mr Ong was asked about this in meetings in June, July and August 2019, at which he said that this was a mistake which he would get rectified.

33. In December 2019, however, Mr Patel received Hyson House accounting records which confirmed that the £1.7m loan from ALB had in fact been drawn down, and in February 2020 Mr Patel obtained a copy of the ALB facility letter.

34. Mr Lim took steps to protect his position by appointing Mr Murphy as an additional director of GCPL, and subsequently appointing Tekquinn Lim and Mr Murphy as directors of Hyson House. On 13 May 2020 these proceedings were commenced with an *ex parte* application for a worldwide freezing order against the first four defendants. The order was granted by Zacaroli J on 14 May 2020, and the claim form was filed on 21 May 2020.

35. Following various amendments, the final version of the particulars of claim relied upon by the claimants is the re-re-re-amended particulars of the claim. The defendants have filed a joint defence, which was amended only once.

THE CLAIMS

36. The claims are brought primarily in relation to the specific projects that are the subject of these proceedings. They are as follows.

37. **Hyson House claims.** Hyson House makes claims:

    i) As against Mr Ong for fraudulent breach of his director's duties, by transferring the ALB loan monies to himself, GCL and GPL without authorisation and contrary to the interests of Hyson House;

    ii) As against Mr Ong, GCL and GPL for knowing receipt of those monies; and

    iii) As against GCL, for failure to account for the rental monies received for Hyson House between January 2017 and January 2020.

38. **CGW claims.** Mr Lim claims that his transfer of funds to GCL was held on a *Quistclose* trust, which was breached by failing to apply the monies for the specified purpose of investment in the CGW properties; and that Mr Ong dishonestly assisted GCL's breach of trust. Accordingly Mr Lim advances:

    i) A claim against GCL and Mr Ong for breach of trust and dishonest assistance; and

    ii) In the alternative, a debt claim against CGW for the principal sum loaned plus interest. That claim is admitted by CGW. In view of the liquidation of the company, however, that claim is unlikely to have any practical value.

39. **Lapland claims.** Lapland brings a claim against GPL for an account of the monies received on its behalf, namely £500,738 of development capital and gross rents of £413,709.

40. **GCPL claims.** CSI claims declaratory relief in relation to and specific performance of the GCPL shareholders' agreement, in particular:

    i) Declarations that GCL has at all material times held on constructive trust for GCPL GCL's 50% shareholding in Thanet and GCL's rights to receive any sums under the Thanet shareholders' agreement;

    ii) Declarations that the GCPL shareholders' agreement contained express or implied terms requiring Mr Ong, GCPL and GCL to ensure that CSI obtained 50% of the share capital of GCPL, and that GCPL owned the GCPL SPVs (or the relevant proportions of the shareholdings, where there were other investors) and would receive the relevant profits generated by those SPVs;

    iii) Declarations as to the waterfall for distributions of profits under the GCPL shareholders' agreement; and

iv) Specific performance of the obligations in (ii) above.

41. **Information claims.** In relation to the Cooks Road, Dublin and Bermondsey projects, Mr Lim brings information claims against Mr Ong and (in respect of Bermondsey only) GC180 which is the SPV for that development. In essence Mr Ong seeks documents, accounts and narrative explanations as to the use of his investment funds, the development and/or sale of the properties (as relevant) and the income and expenditure of the projects.

42. **Unlawful means conspiracy claims.** The conspiracy claims pursued are brought by Hyson House and Lapland, and allege a conspiracy between Mr Ong and his companies GCL and GPL, to cause loss to those claimants through unlawful and (in the case of Hyson House) fraudulent means, by diverting the financial resources ultimately derived from Mr Lim to provide financial support to Mr Ong, GCL and GPL.

43. In terms of financial significance, the most important claims are the GCPL claims in relation to the Thanet project, for which the sale of the land in question is close to completion. The expected proceeds of that sale to be paid to GCL are in the region of £8m, which the claimants say should (if the GCPL claims are successful) be beneficially owned by GCPL, and should result in the payment of over £7.5m to CSI.

PROCEDURAL ISSUES

The debarring of Mr Ong, GCL and GPL

The unless orders and consequent debarring orders

44. During the course of preparation for the trial in 2022, various unless orders were made, all carrying the sanction of debarring the relevant defendants from defending the proceedings, and the striking-out of their defences. These included orders dated 6 July and 1 September 2022 requiring Mr Ong, GCL and GPL to provide bank details and bank statements.

45. Mr Ong remained in breach of both orders. Accordingly, at the pre-trial review on 13 October 2022, Mr Ong's defence was struck out and he was debarred from defending the proceedings. A further unless order was made providing for Mr Ong, GCL and GPL to pay the costs ordered at the 1 September 2022 hearing, again with the sanction of debarring and striking-out of the defences.

46. Those costs remained unpaid. Accordingly, following submissions at the start of the trial, I ordered that Mr Ong, GCL and GPL were all debarred from defending the proceedings, and their defences were to be struck out.

47. That left two questions to be decided: the extent of the participation at trial of the debarred defendants, and the participation of the non-debarred defendants.

Debarred defendants

48. As to the participation of the debarred defendants, it is established that the debarring of a defendant will not mean that default judgment can be given on the claim. Rather, the court is still required to exercise its judicial function, and satisfy itself that the claimant

is entitled to judgment on the claim: see the comments of Edwin Johnson QC (sitting as a deputy judge) in *Times Travel v Pakistan International Airlines* [2019] EWHC 3732 (Ch), §55(5).

49. Furthermore, the striking-out of a defence does not mean that the defence is to be ignored for the purposes of the trial. Rather as the Court of Appeal made clear in *Theverajah v Riordan* [2015] EWCA Civ 41, §33, the defence may remain relevant for the purposes of understanding the statements of case and the ambit of the dispute – particularly as to any admissions made by the defendant. To that extent, the court also retains a discretion to allow the debarred defendant to participate in the trial.

50. Applying those principles in the present case, Mr Bailey KC, for the claimants, submitted that Mr Ong, GCL and GPL should not be permitted to cross-examine the claimants' factual and expert witnesses or make submissions in relation to the claims against them, save for the purposes of assisting the court to understand the ambit of the parties' dispute. Mr Ong was invited to make submissions on this issue, but did not have any comments to make. My debarring order therefore included the terms sought by Mr Bailey.

Non-debarred defendants

51. The position of two of the non-debarred defendants is straightforward.

52. CGW is in liquidation, as set out above, and the Official Receiver has chosen not to participate in these proceedings. Moreover the only claim pursued against CGW itself, namely the debt claim pleaded as an alternative to the constructive trust claim against GCL and Mr Ong in relation to the CGW properties (§38(ii) above), is admitted by CGW in any event.

53. The only claim against GC180 is an information claim. The claimants accepted that GC180 was permitted to defend that claim, and it was not in dispute that Mr Ong would be able to make submissions on behalf of GC180 for that purpose, call any relevant evidence, and (in so far as relevant) cross-examine the claimants' witnesses on that issue. Leaving aside the evidence of Mr Lim (which I consider below), the only evidence on this point in the witness statements was a single paragraph in Mr Ong's witness statement, and two paragraphs of Mr Patel's witness statement. Mr Ong confirmed that he did not wish to rely on that part of his evidence, nor did he wish to cross-examine Mr Patel on this point. Mr Ong could nevertheless have made oral and/or written submissions on the GC180 information claims, but chose not to do so.

54. The position of GCPL is more difficult. As I have already observed, the GCPL claims are in financial terms the most significant claims in these proceedings, and the claimants' position is denied by the defendants. The effect of the debarring order is that Mr Ong cannot make submissions about (or advance evidence on, or cross-examine the claimants' witnesses on) the GCPL claims in his personal capacity. GCPL itself, however, is not debarred from defending the claims. Accordingly, my debarring order did not strike out the defence to the GCPL claims in so far as it represented the defence of GCPL.

55. That nevertheless left the question of whether Mr Ong could represent GCPL at trial for the purposes of making submissions on this point. Mr Bailey contended that Mr Ong did not have authority to represent GCPL. Mr Ong confirmed that he did not seek to call any evidence on behalf of GCPL, nor did he wish to cross-examine the claimants' witnesses

on the GCPL claims. He nevertheless submitted that he should be permitted to make oral and written submissions to the court during the trial as to the substance of the GCPL claims.

56. It was agreed that I would not determine this point at the outset of the trial, but would leave this for closing submissions, and would therefore proceed to hear Mr Ong *de bene esse* during the trial as to any submissions that he wished to make on this issue, both on the procedural question of his entitlement to represent GCPL and the substantive issues raised by the GCPL claims.

57. Having considered the submissions of both parties on this point, it is in my judgment clear that Mr Ong cannot represent GCPL at this trial.

58. CPR r. 39.6 provides that a company may be represented at trial by an employee, if the employee has been authorised by the company to appear at trial on its behalf *and* the court gives permission. As the Court of Appeal explained in *Watson v Bluemoor Properties* [2002] EWCA Civ 1875, §12, that rule deliberately introduced a greater measure of flexibility into the ability of companies to choose their representative, allowing a company to authorise an employee to do so, whether or not that employee is a director. Nevertheless, the requirement remains that the relevant employee must be authorised by the company in question. It is not open to the court to permit someone to represent the company who is not so authorised.

59. In the present case, the two directors of GCPL are Mr Ong and (since January 2020) Mr Murphy. The GCPL shareholders' agreement provides, in clause 2.1:

> "The affairs of the Company will be managed by the board of directors unless changed by a unanimous Directors' Resolution … Two (2) directors shall constitute a quorum for the transaction of any business at any meeting of the board of directors. At all meetings of the board of directors, every motion to be carried must receive a majority of the votes cast, subject to the provisions of subclauses 2.5 and 2.6. Unless otherwise agreed, board meetings will be held at the head office of the Company."

60. Mr Ong confirmed on the first day of the hearing that he was not aware of any board resolution which authorised him to act for GCPL. Nor are the claimants aware of any means by which Mr Ong has been authorised to represent GCPL in these proceedings. That remained the position by the end of the trial: Mr Ong did not produce anything suggesting that he was authorised to represent GCPL. While he contended that, as a director, he should be entitled to represent the company, that is not enough where (as in the present case) the company has multiple directors, and where the provisions of the shareholders' agreement preclude a single director from acting unilaterally on behalf of the company.

61. Mr Ong also pointed to the fact that both Cardium Law and Ince & Co had previously represented GCPL without any objection from the claimants. I do not have any details of the basis on which GCPL's former legal representatives took their instructions. In any event, however, a solicitor gives an implied warranty of authorisation to act, which does not engage the requirements of r. 39.6.

62. For completeness, I note that there is a separate question as to the status of GCPL's pleaded case, in circumstances where a joint defence was filed by all six defendants, with the statement of truth signed by Mr Ong. Mr Bailey accepted that if he had now sought to strike out that defence in so far as it set out the position of GCPL, on the basis that it was produced without authorisation from the company, the question of whether such an application was barred by *laches* would arise. The claimants have not, however, brought any such application, so this question does not arise and the trial has proceeded on the basis (as set out above) that GCPL's defence is not struck out.

63. The formal position is, therefore, that while GCPL's defence stands, Mr Ong is not authorised to represent the company at the trial for the purposes of r. 39.6. Formally, therefore, GCPL was unrepresented at the trial. For the reasons given above, however, I permitted Mr Ong to make any submission that he wished to make in relation to GCPL. Having done so, my discussion of the GCPL claims below takes into account those submissions *de bene esse*. For the reasons set out below, those submissions do not make any difference to my conclusions on the GCPL claims.

The witness evidence

64. For the reasons explained above, no witnesses were called for the defendants. The claimants did, however, rely on their witness evidence. The claimants' main witness was Mr Lim himself. When these proceedings commenced in 2020, there was no doubt as to Mr Lim's capacity to give evidence, and he did so by way of a lengthy witness statement for the purposes of the initial application for a freezing order, which was later sworn as an affidavit. By the time he came to give evidence for the trial, however, he was suffering from memory problems. His trial witness statement dated 27 May 2022 therefore made clear where he no longer recalled a matter that was set out in his 2020 affidavit.

65. Until around the time of the pre-trial review in October it was, nevertheless, anticipated that Mr Lim would be able to give evidence at the trial, albeit that some adjustments might have to be made in light of his age and health conditions. Unfortunately, by the time of the pre-trial review, it was apparent that Mr Lim's health had during the course of this year deteriorated to such an extent that he no longer had capacity to conduct this litigation. His son Tekquinn Lim was therefore appointed as his litigation friend a few weeks before the trial commenced. On that basis, with the consent of Mr Ong, I made an order pursuant to CPR r. 32.5(1) at the outset of the trial that the claimants could rely on the affidavit and witness statement of Mr Lim without calling Mr Lim to give oral evidence.

66. The claimants' other witnesses, namely Mr Patel, Mr Gould, and Mr Pearson of Quantuma, were all ready to attend the trial and give evidence if required. Mr Ong confirmed, however, that he did not wish to cross-examine any of those witnesses on the issues on which the defendants were not debarred. Subject to one issue on which Mr Pearson provided a short corrective addendum to his report, during the course of the trial, I did not have any questions for the witnesses. I therefore ordered pursuant to CPR r. 32.5(1) that, as with Mr Lim, the claimants could rely on the witness statements of their remaining factual witnesses, and the expert report of Mr Pearson, without calling the witnesses to give oral evidence.

Further injunction

67. Finally, by way of procedural matters, on 23 November 2022, after the parties' opening submissions had concluded, the claimants made an urgent application for an injunction in relation to the proceeds of the Thanet project. The reason for doing so was that on 21 November 2022 Mr Ong had revealed that the sale of the land owned by the Thanet SPV was due to complete that week.

68. The proceeds of sale were already frozen as part of the terms of the worldwide freezing order granted by Zacaroli J in May 2020 (and subsequently continued and extended). The claimants were, however, concerned that this would not prevent Mr Ong from dissipating those proceeds if they fell into his hands. The claimants therefore sought an order that would have the effect of securing GCL's share of the sale proceeds in the hands of Thanet's solicitors. The order was not opposed by Mr Ong (in his capacity as a director of Thanet), but Thanet did not offer an undertaking to the court due to concerns expressed by two of the other directors of the company, Mr and Mrs Piper. The fourth and final director of Thanet was Mr Hersheson, who as I have noted died around the time the claimants' application was brought.

69. In those circumstances I made the order sought on an interim basis. At the return date on 9 December 2022, the order was continued for six months, until 9 June 2023.

THE CLAIMS

Hyson House claims

70. The Hyson House claims arise out of Mr Lim's investment in Hyson House in Nottingham, and the ALB loan procured by Hyson House, purportedly for the purpose of repaying Mr Lim's initial investment. The facts giving rise to the claims are mostly admitted by the defendants. To the extent denied, the claimants' position is amply supported by the extensive contemporaneous documentary record. The claims break down into two issues:

    i) The transfer of the ALB loan monies, in relation to which claims of breach of director's duties are brought by Hyson House against Mr Ong, and claims of knowing receipt are brought against Mr Ong, GCL and GPL; and

    ii) Hyson House's claim for failure to account for rental monies received by GCL.

The ALB loan

71. The company was incorporated in July 2016, initially with GCL as its sole shareholder, with the purpose of purchasing Hyson House. In September and October 2016 Mr Lim invested (though BVL) around £1.6m in the company, and Mr Ong invested (through GCL) around £415,000. Mr Lim's contribution was then reflected in the transfer of 80 shares out of a total of 100 to BVL, in September 2017, giving Mr Lim (indirectly) an 80% shareholding in the company. The Hyson House property was then purchased in October 2016.

72. Mr Lim and Mr Ong's contributions to Hyson House were treated as part loan (£1m from BVL, £250,000 from GCL) on which interest would be payable, with the remainder

treated as advances in return for the parties' respective equity stakes in the company. The intention was that the loans would be refinanced by bank lending.

73. On incorporation of the company, the directors were Mr Gould and Mr Glen Tomkins, then both employees of Greenacre. It is, however, common ground that the controlling mind and *de facto* director of Hyson House, from the outset, was Mr Ong; and on 1 May 2019 he formally replaced Mr Gould and Mr Tomkins and became the company's sole director. That remained the position until February 2020 when, as described above, Mr Lim lost trust in Mr Ong and appointed Tekquinn Lim and Mr Murphy as additional directors.

74. On 28 August 2018 Hyson House obtained a loan offer from ALB offering an advance of £1.7m. That was accepted by Mr Tomkins on behalf of Hyson House on 5 September 2018. Mr Lim was not told of the offer or its acceptance. Rather, Mr Tomkins told him in an email of 12 October 2018 that "We are looking to raise £1.7m" from ALB. It appears, however, from contemporaneous emails that Mr Tomkins still understood that the loan would be used to repay the shareholder loans. That was also the position communicated by Mr Ong to Mr Lim in (among other things) a meeting with Mr Patel on 5 November 2018, as evidenced by an email report of that meeting sent by Mr Patel to both Mr Lim and Mr Ong the next day.

75. On 7 December 2018 BVL approved the subordination deed required by the bank as a condition of the loan (albeit that Mr Lim still didn't know that the loan had been agreed by ALB). The loan transaction then completed on around 11 December 2018, with the funds being transferred to Hyson House on 13 December 2018, amounting (after deduction of fees) to £1.64m. Immediately thereafter, Hyson House started to transfer the funds to GCL, GPL and Mr Ong. The transfers are recorded in the Quantuma report. In summary, 32 transfers were made to GCL and GPL, starting on 13 December 2018 and going through to 19 February 2019, totalling £1,289,500 (to GCL) and £300,000 (to GPL). Later, in June and July 2019, payments totalling £70,000 were made to accounts associated with Mr Ong, recorded as loans to Mr Ong for another property project.

76. Throughout that period both GCL and GPL were insolvent, as is apparent from their company filings. It is apparent that the expenditure of both companies during the period was entirely financed by the ALB funds that were siphoned off from Hyson House. Mr Gould gave evidence for the claimants on this point. He was, at the time, employed by the Greenacre group as a chartered surveyor, and was one of the directors of Hyson House until May 2019. His evidence was that cashflow was a constant problem in the Greenacre group, but that "we had a pretty good 'liquidity event' in the business at around the time of the ALB refinance, by which I mean we suddenly had money to pay bills that had been unpaid for a long time. I have since put it together … that what probably happened was Francis was using those funds for Greenacre's working capital."

77. There is no suggestion in any of the material before me that the use of the ALB loan monies to finance Mr Ong's other companies (and Mr Ong himself) was in the interests of Hyson House. Quite the contrary: the transfers of the funds out to GCL, GPL and Mr Ong were on their face clear breaches of Mr Ong's duties as a *de facto* and subsequently *de jure* director of Hyson House, pursuant to ss. 171–177 of the Companies Act, and in particular:

i) The duty in s. 171 for a director to exercise their powers only for the purposes for which they are conferred;

ii) The duty in s. 172 for a director to act in the way they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole;

iii) The duty in s. 174 for a director to exercise reasonable care, skill and diligence; and

iv) The duty in s. 175 to avoid conflicts of interest.

78. GCL, GPL and Mr Ong likewise received and retained the transfers from Hyson House with the knowledge (in the companies' case, Mr Ong's knowledge imputed to them) that the funds were Hyson House property, subject to Mr Ong's fiduciary duties as a (*de facto* or *de jure*) director, and were transferred in breach of those duties.

79. The defendants' sole pleaded defence was that Mr Lim knew and agreed that the funds received from ALB would not be used to repay the shareholder loans, but would be deployed as loans to Mr Ong and his companies.

80. That part of the defence has been struck out, but in any event I have no hesitation in rejecting it. Two versions of the story have been put forward; neither finds any support in the evidence before me.

81. The first version of the story, in the defence, is that on 12 December 2018 Mr Ong telephoned Mr Lim, and in the course of that telephone conversation they agreed that Mr Lim would lend Mr Ong and his companies the sum otherwise intended to be repaid from the Hyson House loan monies.

82. Mr Lim's mobile phone log, however, reveals no call on that date. No telephone records from Mr Ong were adduced, the reason given being that two of Mr Ong's mobile phones had been stolen. There is therefore no record of a 12 December 2018 call having taken place.

83. The second version of the story, in Mr Ong's witness statement, is that the agreement was made in person at a meeting between him and Mr Lim in Kuala Lumpur in October 2018.

84. The problem with that version of the story is that Mr Lim was in Australia from 26 September to 30 November 2018. That appears from his flight booking receipts as well as the Australian immigration records. I also note that Mr Lim had a doctor's appointment in Perth on 23 October, and he emailed Mr Tomkins on 29 October saying "Greetings from Perth". The materials before the court disclose no evidence whatsoever supporting the claim that Mr Lim had a meeting with Mr Ong in Kuala Lumpur at the end of October (or indeed at any time during October or November 2018).

85. More generally, Mr Lim in his witness statement emphatically denies that he agreed that the loan funds should be drawn down and used to support Mr Ong's other companies. His account is supported by the contemporaneous evidence, which shows Mr Lim repeatedly asking Mr Ong to complete the refinancing of the Hyson House loans. The

evidence includes a WhatsApp message from Mr Lim to Mr Ong on 9 January 2019, in which Mr Lim said "hope we can get the Hyson House refinancing money soon"; a text message from Mr Lim to Mr Patel on 5 February 2019 saying "I spoke to Francis two days ago. He said the refinancing for Hyson House should come through anytime now. Pl let me know if you have any news"; and a WhatsApp message from Mr Lim to Mr Ong on 30 March 2019, asking "Can we give Hyson House a mighty push to complete the refinancing". All of this is flatly inconsistent with the claim that Mr Lim knew that the ALB loan had come in and had been disbursed to Mr Ong's other companies.

86. It is also apparent from the evidence that Mr Ong sought to conceal the fact of the loan drawdown from Mr Lim. In particular, Mr Ong sent an email to Mr Tomkins on 12 December 2018 saying "I do not want office knows about it other than you and me". Mr Patel's evidence was that when he discovered, in mid-2019, that charges had been registered against Hyson House, he asked Mr Ong about this on three successive occasions in June, July and August 2019, and that on each of those occasions Mr Ong claimed that it was a mistake which would be rectified.

87. When on 11 December 2019 the Greenacre group financial controller informed Mr Patel that the ALB loan had been drawn down, Mr Lim emailed his company auditors a day later saying "This has come as a total shock to me as I have been told by Francis Ong that this loan is not as yet drawn due to me been classified as a PEP. … I am now worried where these funds have gone and that we are in breach of the bank's facility."

88. The evidence admits of no other conclusion than that Mr Ong dishonestly misrepresented to Mr Lim throughout 2019 that the ALB loan had not been drawn down, and that Mr Lim did not discover that this had in fact occurred until 11/12 December 2019. Mr Ong's representations were (quite obviously) an attempt to conceal from Mr Lim his misuse of the funds, and his claims in these proceedings that the use of the loan for Mr Ong's other companies was authorised by Mr Lim is blatantly untruthful.

89. The claims of fraudulent breach of Mr Ong's director's duties and knowing receipt of the funds by Mr Ong, GCL and GPL are therefore in my judgment established. Hyson House is entitled to equitable compensation from Mr Ong for his breaches of fiduciary duty in relation to the ALB loan monies. Hyson House is also entitled to restitution by reason of knowing receipt against each of GCL, GPL and Mr Ong, in the amount of the sums received by them as identified in the Quantuma report; although of course Hyson House will not be entitled to double recovery in respect of these claims.

Hyson House rental payments

90. The second part of the Hyson House claims concerns rental payments received for Hyson House. Hyson House did not have a bank account on incorporation, and its bank account was not opened until October 2018. Before that date, Hyson House's rental income was paid into GCL's bank account.

91. The Quantuma report identifies rents received by GCL from January 2017 until January 2020, in the sum of £392,810. The claimants' case is that those sums have not been paid to Hyson House, and the Quantuma report states that the rental sums are recorded in GCL's accounting records as intercompany loans from Hyson House. (The statutory accounts describe an intercompany balance being owed *to* GCL by Hyson House, but

that is inconsistent with GCL's accounting records and other documentation, and is therefore assumed by Mr Pearson – correctly in my judgment – to be an error.)

92. While, from an accounting perspective, GCL appears to have listed these sums as intercompany loans, there is no evidence before me that Mr Lim agreed that the rents from Hyson House could be treated as loans to GCL. What appears to have happened is that GCL simply retained the rental payments and used them for its own purposes, without being authorised to do so by either Hyson House or Mr Lim.

93. Hyson House's claim in respect of these payments seeks an order that GCL account in equity to Hyson House for the rental income retained by it, and an order for payment of the sums found to be due. By the time of the trial, however, the claimants simply sought an order for payment of the rental sums, on the basis that there was no doubt as to the amount of the rental sums due in the present case.

94. I am satisfied that Hyson House is entitled to such an order in the present case. There is not, on the material before me (including the defence and the defendants' witness evidence, which I refer to for the purposes of identifying the ambit of the dispute between the parties: see §49 above), any dispute as to Hyson House's entitlement to the rental sums that were paid to GCL. Unlike the position taken by the defendants in relation to the Lapland claims, which I will discuss below, there is no suggestion that GCL was entitled to withhold any of the rental sums received by it on the basis of management or other fees. The defence appears to admit that the rental monies were not paid to Hyson House.

95. It follows that immediate payment may be ordered: *Snell's Equity* (34th ed, 2020), §20-022 (citing *Target Holdings v Redferns* [1996] AC 421). In the same passage, *Snell* notes that where by reason of the accounting party's misconduct the balance of the account is greater than the funds actually held, the accounting party will be required to make good the difference with their own funds. GCL's liability to pay the rental sums to Hyson House will therefore remain whether or not those funds have been dissipated by it for other purposes.

CGW claims

96. The CGW claims arise out of the loan of £1.2m from Mr Lim to GCL in April 2019, for the purposes of acquisition of the CGW properties. Mr Lim's claim in debt against CGW is admitted by CGW, but that admission is unlikely to have practical value given CGW's liquidation: see §38.ii) above. The claimants' primary claim is therefore the claim by Mr Lim against GCL for breach of trust, and against Mr Ong for dishonest assistance in that breach of trust.

Breach of trust

97. The trust in question, the claimants say, was a *Quistclose* trust requiring GCL to hold the loan funds advanced by Mr Lim for the specific purpose agreed. The relevant principles are as stated by Lords Millett and Hoffmann in *Twinsectra v Yardley* [2002] UKHL 12, referring to Lord Wilberforce in *Barclays Bank v Quistclose Investments* [1970] AC 56, and are not disputed. For present purposes, it suffices to say that a *Quistclose* trust will arise where money is transferred to be held on trust subject to a power for the transferee to apply it for a stated purpose. The beneficial interest of the transferor will remain unless

and until the money is applied in accordance with that power: see *Lewin on Trusts* (20th ed, 2020), §9-046.

98. The *Quistclose* trust claim was set out in the re-re-re-amended particulars of claim, amended pursuant to my order at the pre-trial review on 13 October 2022. That order gave the defendants permission to file and serve a re-amended defence pleading to the claimants' amendments on that issue (among others), as well as further witness evidence on that issue. No re-amended defence or further evidence was served by the defendants. The defendants have therefore not set out any case on this issue.

99. The contemporaneous documents before me, however, make clear that the £1.2m sum was indeed transferred for the specific purpose of investing in the CGW property portfolio. The sum was transferred by Mr Lim following a request made by Mr Ong on or around 29 April 2019. An email of that date from the Greenacre group financial controller, Mr Starling, sent Mr Lim the relevant bank details "as per your agreement with Francis", and said that "I shall leave Francis to sort out the paper work for you". That was followed by a letter from Mr Ong to Mr Lim dated 16 May 2019, in which Mr Ong wrote that:

> "I refer to our recent conversation and as requested I am writing to confirm the purpose of the £1.2 million that you have transferred to us.
>
> These funds represent a part equity investment in the acquisition of four purpose-built student accommodation properties in Cheltenham, Worcester and Gloucester – collectively known as the CGW Portfolio.
>
> The properties provide a total of 302 beds which will be substantially upgraded ready to let for the 2019/2020 academic year intake in September."

100. The amended defence, while not specifically pleading to the *Quistclose* trust aspect of the claimants' case, acknowledges that the monies were transferred by Mr Lim "to finance the portfolio acquisition".

101. The remaining question is therefore whether the funds were used for that purpose. It is common ground that the CGW properties were purchased in December 2019. That does not, however, mean that Mr Lim's funds were used for that acquisition, because by that time GCL had already spent more than the £1.2m it received from Mr Lim on other expenditure. As the Quantuma report sets out:

    i) On 29 April 2019, GCL held cash of £428,000 in its account.

    ii) Shortly thereafter, Mr Lim invested £1.2m via a payment to GCL. Three other investments totalling £520,000 were made at the same time. The funds were all held in GCL's main bank account and were not ringfenced in any way.

    iii) The next major cash receipt (of over £100,000) was received by GCL on 16 August 2019. Between 29 April and 16 August 2019 GCL spent a total of over £1.8m. While the Quantuma report identifies £580,231 of that spending (i.e. 32%) as being for the general purposes of CGW, that expenditure was not specifically on the acquisition of the CGW properties and could not have been, since the properties were not purchased until many months later in December 2019. The remaining 68%

of the expenditure in the period to mid-August 2019 was for purposes which the Quantuma report classified as being not related to CGW at all.

iv) The three properties in question were eventually purchased by CGW in December 2019 for £8.5m. During November 2019, CGW had borrowed an additional £7.6m from third-party lenders. That, the Quantuma report noted, was consistent with an assessment that the funds invested by Mr Lim and other parties in April and early May 2019 were not primarily used by or for CGW itself.

102. It is apparent from this analysis that Mr Lim's £1.2m was mixed with other funds and mainly used for the purposes of GCL's general spending over the following months.

103. If GCL wished to assert that some or all of Mr Lim's investment was in fact used (eventually) for the purposes of the acquisition of the CGW properties, that would require factual or expert evidence explaining that, of which there is none. Nor have any contemporaneous records or accounting documents been produced by GCL to show the use of any of these funds for the property acquisitions. This is therefore a paradigm case where GCL's conduct – in mixing the funds and failing to keep any records or provide any other evidence as to their disbursement – has deprived both the claimants and the court of evidence as to the use of the funds, such that the court is entitled to make assumptions against GCL: see the comments of Lord Millett NPJ in *Libertarian Investments v Hall* [2014] 1 HKC 368 (CFA), 17 ITELR 1, §174.

104. The appropriate assumption in this case, on the facts set out above and the absence of any contrary evidence from GCL, is that none of Mr Lim's investment was used for the intended purposes. GCL is therefore in breach of trust in failing to apply the £1.2m investment for the specified purposes.

Dishonest assistance

105. A claim for dishonest assistance in a breach of trust requires the claimant to establish that (1) there is a trust; (2) there is a breach of trust by the trustee; (3) the defendant induced or assisted that breach of trust; and (4) the defendant did so dishonestly. The requirement of dishonesty is an objective requirement that the defendant did not act as an honest person would in the circumstances: *Royal Brunei Airlines v Tan* [1995] 2 AC 378; *Ivey v Genting Casinos* [2017] UKSC 67, §62.

106. It follows from my conclusions above that the first two of these requirements are satisfied. The third requirement is likewise plainly satisfied: at all material times, Francis was both a director and the controlling mind of GCL. He therefore both induced and assisted in GCL's breach of trust. As for the requirement of dishonesty, Mr Ong must have known that Mr Lim's investment was being used for purposes other than those set out in his 16 May 2019 letter to Mr Lim. He has, conspicuously, adduced no evidence whatsoever in respect of these claims. I therefore have no hesitation in concluding that he was not acting as an honest person would in the circumstances.

107. Mr Ong is therefore liable for dishonest assistance in a breach of trust in respect of the CGW claims.

Lapland claims

108. The Lapland claims concern the financing and purchase of the Lapland properties in Derby. The £3m loaned by Mr Lim to Lapland for the purchase of the properties is not in dispute. Rather, the claim concerns £500,738 which was provided by Mr Lim (through CSI) to GPL as development capital, and the rental income received by GPL on behalf of Lapland for the period from May 2017 until December 2019, after which it appears that rental income was paid directly to Lapland.

109. Lapland contends that GPL has failed to account for either the development capital advanced by CSI or the rental income received by GPL; that the evidence in these proceedings fails to establish the expenditure claimed to have been incurred by GPL; and that GPL should now pay to Lapland both the original development capital loaned by Mr Lim and the gross rental sums due during the period from May 2017 to December 2019.

110. While GPL's defence has been struck out, it is appropriate to have regard to it to understand the scope of the dispute between the parties. In that regard, GPL admits that it is an accounting party as regards Lapland, and therefore agrees to the taking of an account and an order for payment of such sums as may found to be due. The amount provided by CSI is also undisputed, save for a negligible discrepancy (the defence pleads a figure of £500,717). The dispute is confined to the expenditure which GPL claims was incurred in relation to the development and management of the properties.

111. In that regard, it is not disputed that it is for the accounting party to justify the costs claimed to have been incurred. The accounting party must be prepared to document each item, and presumptions may be made against them if they have not kept proper records: *Snell* §20-018 (with further references). Before addressing whether GPL has done so in these proceedings, it is necessary to comment on the agreement between the parties as to GPL's role in the project, and the attempts by Lapland to obtain the relevant accounting information before these proceedings commenced.

The Lapland investment and management agreements

112. Lapland was incorporated in May 2017 and the Lapland properties (52 residential flats in Derby) were purchased in June 2017. The terms of the agreement between Mr Lim and Mr Ong as to the investment in and profits from the Lapland project were confirmed in an email from Mr Lim to Mr Ong on 30 October 2017. In particular, Mr Lim noted that:

    i) Mr Lim and Mr Ong would be the only shareholders in the project. All funds loaned by them to the project would attract an interest rate of 15% per annum.

    ii) Mr Lim's current shareholding was 100%, because he had provided all of the funding so far. Mr Ong, however, had an option to purchase up to 50% of the shares in Lapland.

    iii) Notwithstanding the funding provided by Mr Lim, he and Mr Ong would share equally any profit made, i.e. on a 50/50 basis.

113. GPL had by then already agreed to act on behalf of Lapland as managing and letting agents for the properties, as well as project managing the redevelopment of the properties.

An email from Mr Tomkins to Mr Murphy (one of the directors of Lapland) on 13 July 2017 set out the proposed management terms as follows:

> "Greenacre would act as project manager for Lapland and incur all of the costs of development etc, then bill Lapland on a periodic basis to recover those costs.
>
> Further, we would also act as Lapland's letting agent and collect rents on Lapland's behalf. In discussion with Perry Patel of Silver Levene he is happy for Greenacre to apply those rents to defray the costs but obviously for the accounting the rents are income of Lapland and the costs will accrue to Lapland."

114. Mr Murphy's reply did not expressly accept the terms proposed, but noted that:

> "As we are required to maintain the books and records of Lapland Limited, please let us have a management report each month including copies of all rent invoices issued, rents received, and invoices against which rental receipts might be offset."

115. GPL proceeded to act as Lapland's project manager and letting agent, essentially as proposed.

116. It was at one stage envisaged that the terms of the Lapland management agreement would be put formally in writing, and at the end of November 2018 a draft management agreement was sent by Mr Tomkins to Mr Murphy. That draft included a fee of £5,000 per month payable by Lapland to GPL. Mr Lim's evidence was that he discussed the matter with Mr Murphy and rejected the suggestion that a management fee should be payable to GPL, on the basis that he had already agreed that GPL would receive 50% of the profit on the Lapland project despite having made no investment in the development. His view was that the management fee was an attempt to profit twice from the arrangement. There is, however, no evidence that either Mr Murphy (on behalf of Lapland) or Mr Lim ever responded to the draft, whether rejecting the proposal or otherwise. What appears to have happened is that the matter simply fell away and was not discussed further.

117. Instead, the focus of the correspondence between the parties shifted to the provision by GPL of management accounts, which by late 2018 had become a matter of considerable concern to the directors of Lapland. On 14 November 2018 Mr Murphy emailed Mr Tomkins complaining that the directors of Lapland were being "kept in the dark about the company's activity and cashflows". A note of a telephone meeting on 22 November 2018 made similar comments:

> "The call was organised as JM had expressed dissatisfaction with the quality of Greenacre's reporting to the Directors of Lapland Limited, and concern that rental income due to Lapland Limited is being paid to Greenacre, banked by Greenacre (into their own account) and expended by Greenacre without the involvement or knowledge of Lapland's directors. From a regulatory and governance viewpoint this is unacceptable."

118. Lapland's concerns continued to be raised in correspondence during 2019, including an email from Mr Murphy to Mr Ong on 2 March 2019 saying that Lapland was still unable to see what rental income was being collected, nor could it control payments out that were being made by GPL. The question of a contract to formalise GPL's engagement by Lapland resurfaced in emails between the parties during July and August 2019, but did not bear fruit.

119. Once Lapland opened its own bank account in August 2019, it requested that the balance of the Lapland funds held by GPL should be transferred to it. By the end of November 2019 that still had not occurred; nor had Lapland received a proper set of financial reports for the Lapland project.

The development capital

120. A formal request for an account was eventually made, through solicitors, in January 2020. GPL's pleaded position, prior to the debarring order, was that it had satisfactorily provided that account, and that the development capital sums were expended on costs incurred for the purposes of the Lapland project.

121. For the purposes of these proceedings, Mr Pearson/Quantuma obtained the GPL loan account for Lapland, which includes £509,823 of expenses that are said to be costs incurred by GPL on behalf of Lapland. GPL commissioned an independent review of that loan account by the accountancy and business advisory firm Baker Tilly, which provided a report dated 31 July 2020, but with no supporting documentation.

122. The Baker Tilly report concluded that the development capital funds had been correctly accounted for in the loan account. In particular, Baker Tilly said that they had reviewed supporting invoices for sums paid amounting to £444,162, the narrative on which supported the contention that the costs incurred related to the Lapland project. Although more than half of those costs could not directly be reconciled to payments in the bank statements, Baker Tilly were apparently satisfied that the remaining sum represented payments which had been made, such as by combining multiple invoices. There were also, according to Baker Tilly, invoices amounting to around £69,000 which were unpaid and disputed.

123. The Baker Tilly report was reviewed in the Quantuma report. The Quantuma report confirms the payments which Baker Tilly had traced directly to the GPL and GCL bank statements. The major problem the Quantuma report identifies, however, is that absent any supporting documentation Mr Pearson cannot confirm whether any of the costs referred to by Baker Tilly (whether reconcilable with the banking records or not) have correctly been attributed to Lapland.

124. Furthermore, even leaving aside the debarring of GPL, the Baker Tilly report is not adduced as expert evidence by the defendants in these proceedings. Nor have the defendants provided any other specific evidence as to the development costs incurred by GPL, or the accounts relating to those development costs. Mr Ong's only evidence, in his witness statement, is an assertion that during the relevant period Mr Lim was in contact with Mr Gould and Mr Hersheson and could have obtained whatever information he needed from them; and could still ask Mr Hersheson following the departure of Mr Gould. As I have noted, Mr Hersheson died on or around 23 November 2022. His

evidence, however, had said that he was not involved in the financial operations of Lapland or GPL, so could not comment on the matter.

125. The position, in summary, is therefore that none of the witness evidence provides any explanation of the costs said to be attributable to the Lapland project. The only document purporting to establish those costs is a report which is not adduced as expert evidence, which was unaccompanied by any supporting material (such as invoices or narrative explanations of payments), and whose conclusions cannot therefore be verified by the claimants or their expert.

126. In those circumstances I do not consider that GPL has met its burden of proving the development costs claimed to have been incurred on behalf of the Lapland project. Lapland is accordingly entitled to claim repayment of the £500,738 development capital sum retained by GPL.

Rental income

127. As with the accounts relating to the expenditure on development costs, from the outset of the project Lapland sought information from GPL as to the rental income receipts and related expenditure by GPL.

128. For the purposes of these proceedings Mr Pearson/Quantuma obtained from GPL a schedule setting out the gross rental income for Lapland received by GPL between May 2017 and December 2019 (£413,709), costs deducted by the property management companies engaged by GPL (£139,729), withheld rental sums (£24,273), and the net sums received by GPL (£249,708). The Baker Tilly report identifies further costs purportedly attributable to Lapland and paid by GPL/GCL, including around £61,000 of overheads. In addition, the defence pleaded that GPL was entitled to a reasonable fee for its services, and that £5000 was a reasonable fee in that regard.

129. The Quantuma report confirms that the net sums set out in the schedule correspond to the rental receipts shown in the relevant bank statements. As with the development costs, however, the problem lies with the lack of supporting documentation: without any such documentation, Mr Pearson states that he is unable to confirm whether the deductions by the property management companies were in fact properly made. Likewise Mr Pearson is unable to comment on whether the purported additional overheads are properly attributable to Lapland.

130. Three issues therefore arise for determination: (i) whether GPL is, in principle, liable to account to Lapland for the net rental sums actually received by it, or should the gross rental figures shown on the schedule be taken as the starting point; (ii) whether the starting point figure (gross or net) should be reduced to reflect any additional costs said to be incurred by GPL/GCL in relation to Lapland; and (iii) GPL's entitlement to deduct any further sums by way of management fees.

131. Gross or net rental sums. As to the first question, Mr Bailey said that the position was the same as with the development costs that could not be proven by GPL: that it is for an accounting party to justify costs charged to the account, and that absent satisfactory evidence thereof the accounting party must make good the difference between what was received and what should have been received with money from its own pocket. He also submitted that GPL was in any event not permitted to charge to the account the costs of

rental collection by third party property management companies, but was under an obligation to provide that service to Lapland.

132. That submission, in my judgment fails to acknowledge the distinction between a claim for a general account of the administration of a fund, in the common form, and accounts on the footing of a wilful default by the accounting party. In the former case, as *Snell* makes clear at §§20-014 and 20-019, the account is based on the property which the fiduciary has *actually received* in their accountable capacity, and the question is what has become of that. An accounting exercise on the footing of wilful default on the part of the trustee, by contrast, permits the account to be surcharged which items which it is said the trustee would have received but for their misconduct: *Snell* §§20-023–20-025.

133. The claimants' case is pleaded on the basis of a common account. The re-re-re-amended particulars of claim states that Lapland is entitled to and claims an account of "the monies received by GPL on Lapland's behalf". No claim to an account on the footing of wilful default is pleaded (and, as *Snell* points out at §20-026, a claim to an account on that basis must be specifically pleaded and proven). The starting point in the accounting exercise must, therefore, be the sums actually received by GPL by way of rental income, i.e. the net figure of £249,708 following deduction by the third party managing agents of their fees. It is not open to the claimants to say that GPL should have collected a larger figure.

134. It follows that the question of whether GPL was entitled to subcontract the management of the Lapland properties to managing agents, and to permit those agents to withhold management fees from the rental sums transferred to GPL, does not arise.

135. Additional costs incurred by GPL. The second question is whether the net receipts by GPL should be reduced to reflect additional costs said to be incurred by GPL in the management of the Lapland properties. The short answer is that the evidence before me does not come close to establishing that any additional costs were incurred on behalf of the Lapland project. The position is the same as for the development costs, addressed above: the issue is not addressed in the defendants' witness statements, and the Baker Tilly report is not adduced as expert evidence and is devoid of supporting material.

136. Management fees. The final question arising in relation to the rental income is whether GPL itself is entitled to charge management fees in relation to the Lapland project.

137. The effect of the debarring order is that GPL is taken to admit the allegation in the re-re-re-amended particulars of claim that the management agreement did not include a term providing for GPL to receive management fees. In any event, however, I consider the allegation to be established by the evidence before me. Mr Lim's evidence was that the arrangement between the parties was that GPL would be remunerated for its management role through the 50% profit share which Mr Lim had agreed would accrue to Mr Ong. As with the other projects in which Mr Lim and Mr Ong had collaborated, Mr Lim said that no separate management fee was payable to GPL.

138. That is in my view consistent with the contemporaneous correspondence between the parties. By the time Mr Lim sent his email of 30 October 2017 setting out the terms of the investment (including the profit share), GPL had agreed to act as both the project manager and letting agent for the Lapland project. Those services represented Mr Ong's contribution to the project, since he had not contributed any investment funds. The assumption by GPL of that role must, therefore, have been the basis on which the parties

agreed that Mr Ong would retain 50% of the profits from the project. There was no suggestion in the 13 July 2017 email (setting out the proposed management terms) that GPL would be separately remunerated for its management functions.

139. Had the agreement between the parties not determined the remuneration to be obtained by GPL for its management services, it would have been necessary to determine a reasonable charge for those services pursuant s. 15(1) of the Supply of Goods and Services Act 1982. On the basis of my findings above, however, that provision is not engaged.

140. Conclusion. It follows that Lapland is entitled to claim payment of the net rental sums received by GPL (i.e. £249,709), without deduction of any further costs or management fees.

GCPL claims

141. The GCPL claims arise out of the GCPL property development projects in Kent (Thanet), Bath (Twerton Park and Twerton High Street) and London (Lords View). As noted above, in financial terms the GCPL claims are the most important in these proceedings, because the Thanet project is close to completion and is expected to generate considerable profits for GCL, which is the 50% shareholder of the Thanet SPV, alongside Project Ten.

142. There is no dispute that CSI is entitled to 50% of the shares in GCPL. The disputed question is the ultimate beneficial ownership of the funds received from the GCPL SPVs, in particular the Thanet project. The claimants' contention, in essence, is that GCL is holding its shareholding in Thanet and any sums received from that company on trust for GCPL, on the basis that under the GCPL shareholders' agreement it was agreed that GCPL would own the SPVs for the property development projects. In turn, the claimants say that Mr Lim's company CSI is entitled to receive the majority of the sums flowing to GCPL from the Thanet project pursuant to the distribution waterfall set out in the shareholders' agreement.

143. The relevant legal principles as to the construction of contracts are (unsurprisingly) not disputed by the defendants. I refer to them as relevant in determining the issues in dispute between the parties. Those issues are: (i) the agreed corporate structure for GCPL and the GCPL projects; (ii) the interpretation of the waterfall clause under the GCPL shareholders' agreement; and (iii) the contributions made by the parties to the GCPL projects.

The agreed corporate structure

144. Mr Bailey fairly accepted that when the GCPL investment opportunity was initially presented to Mr Lim in 2016, it was not suggested that Mr Lim should obtain an equity interest in GCPL (or the GCPL projects). At that point the proposal was that Mr Lim would come in as an investor, receiving a priority return on his investment and a share of profits on completion of the projects; and that the SPVs for the GCPL projects would remain owned by GCL, or GCL alongside third party partners.

145. Mr Lim's evidence was that he was not interested in investing unless he was a shareholder in the projects. Mr Ong, according to him, initially resisted that suggestion, but eventually agreed because Mr Lim refused to invest on any other terms. That evidence is supported

by the contemporaneous correspondence. Mr Lim's position was expressed, in particular, in an email to Mr Ong on 20 April 2017, commenting that "Going by past experience, I do not feel comfortable with a totally unsecured loan arrangement". Mr Tomkins responded proposing that while the projects would be owned by GCL, Mr Lim would obtain a charge over GCL's shares in the SPVs. That was evidently not satisfactory for Mr Lim, who held a further discussion by telephone with Mr Ong on 20 April 2017. The outcome of that was an agreement recorded in an email from Mr Lim to Mr Ong later that day:

> "1. Out of the approximately GBP4 million you and I will each contribute to the project, 30% will be treated as equity and 70% as bridging loan earning 7% interest per annum.
>
> 2. The profit from the 3 projects will be shared 50% to Greenacre, 25% to you and 25% to me with priority profits to you and me based on Internal rate of Return per annum of 15%. Once Greenacre has also collected the same amount, any additional profit would be split again between Greenacre and us 50%, 25%, 25%.
>
> 3. Greenacre will not charge the project any management fees.
>
> 4. The assets from each of the 3 projects, will be owned by a local company which in turn is to be owned by you 50% and me 50% or our respective personal companies.
>
> Thank you for offering to treat our full contribution of about GBP4 million each as bridging loan earning 7% interest p.a. as well as 25% (yours) and 25% (mine) share of profits. However David feels if we do it this way, we cannot own the assets. That being the case, I feel it is better that we own the assets and sacrifice earning extra interest."

146. Mr Ong replied on the same day "Noted and understood. … I do look forward to a successful and profitable partnership."

147. There were then further discussions between the parties as to the drafting of the GCPL shareholders' agreement. Contemporaneous email correspondence and notes marked up on corporate structure charts confirmed the intention that CSI and GCL should each own 50% of GCPL, and that GCPL (rather than GCL) should own the shareholdings in the SPVs set up for the GCPL projects. The new proposed corporate structure was recorded in a corporate structure chart dated 25 July 2017.

148. Behind the scenes, it is apparent that GCL was not in a position to contribute the intended 50% of the investment required to GCPL. That was not, however, disclosed to Mr Lim, as an internal email from Mr Tomkins to Mr Ong made clear:

> "He [Mr Lim] started going on about how much has Greenacre put in if we are 50/50 and why is the document all about how much City [CSI] owes. I just bluffed my way through that one and he didn't seem too bothered."

149. Further drafts of the shareholders' agreement were circulated, with (in particular) a revised draft sent on 11 August 2017. Mr Lim released his signature page for the GCPL

shareholders' agreement on 18 September 2017. Thereafter he repeatedly requested an executed copy of the agreement.

150. An executed copy of the agreement was finally sent to Mr Lim by Mr Tomkins on 16 October 2018, albeit backdated to 30 November 2017. It appears, however, that between Mr Lim's signature of the agreement and the executed copy being sent to him Mr Tomkins had made some amendments to the agreement. These included (in particular) the removal of GCL as a party, and its replacement with Mr Ong. The cover email from Mr Tomkins noted a number of points, including the following:

> "You will note that the Agreement is dated 30 November 2017 and is between Francis and City Success Investments Ltd, both intended to be 50/50 shareholders in GCPL with 100 shares each. Currently the entire authorised capital of 100 £1 shares is issued to Greenacre Capital Ltd. At clause 9.1 100 shares are supposed to be issued to City Success on completion of the agreement – that wording is from when the agreement was between GCL and City Success so does not refer to shares being issued or transferred to Francis. I suppose GCL can transfer its shares to Francis while GCPL issues new shares to City Success.
>
> You will further note in recital 2 that the business of the company is the ownership and funding of Greenacre (Thanet) Ltd (as to 50% only – the remainder being with our joint venture party), Greenacre (Twerton Park) Ltd and Greenacre Capital (Twerton High St) Ltd (together the Bath project), and 50% of Imperial Green Lords View Ltd, the St Johns Wood development of penthouse apartments in which the remaining 50% is held by our joint venture partner. I thought that there was a clause in there that expressed that these shareholding interests would be transferred by GCL to GCPL on completion of the agreement, but I can't see it although I guess it is implied.
>
> …
>
> On the face of it this should be a simple matter of GCL transferring shares in GCPL to Francis, GCPL increasing its authorised capital to 200 and issuing 100 shares to City Success, and GCL transferring the shares in the subsidiaries noted to GCPL. What date should these transfers take place and can they be transferred at par? What documentation do you envisage will be required?"

151. The executed agreement recorded the parties to the agreement as being GCPL, Mr Ong, CSI and GPL. It set out the corporate structure as follows:

> "**RECITALS**
>
> 1. WHEREAS the Company [GCPL] is a company incorporated in England & Wales under Company Number 10150212 of 22 Woodstock Street, London W1C 2AR. The authorised capital of the Company consists of two hundred ordinary shares, of which the following are issued as fully paid.
>
> Mr Ong Chee Kong: 100
> City Success Investments Ltd: 100

> Total Ordinary Shares Issued: 200
>
> 2. The sole business of the Company is ownership of the following companies in the proportions noted, and the funding of the business of those companies:
>
> Greenacre (Thanet) Ltd (company number 10152972) – 50%
> Greenacre (Twerton Park) Ltd (company number 10156417) – 100%
> Greenacre (Twerton High St) Ltd (company number 10339687) – 100%
> Imperial Green Lords View Ltd (company number 09905457) – 50%
>
> 3. The Shareholders agree to provide funding to the Company on a 50/50 basis.
>
> …
>
> **FINANCING – SHAREHOLDER CONTRIBUTIONS AND PROFIT DISTRIBUTION**
>
> 9.1. On completion of this agreement 100 ordinary shares in the company will be issued to City Success Investments Ltd."

152. The agreement went on to set out provisions as to the shareholder funding required, and the distribution of profits, which I will discuss further below.

153. Mr Ong's position (which I have taken into account on the basis set out at §63 above) was that contrary to the wording of recital 2 to the shareholders' agreement, the agreement was not that GCPL would own the SPVs. Rather, he said that the agreement was that Mr Lim would invest in the GCPL projects by way of loans (or at least primarily loans), and would then receive 50% of the profits flowing to GCPL under the agreement. He said that the shareholders' agreement was unworkable and badly drafted by Mr Tomkins, did not reflect the agreement between the parties, and that he (Mr Ong) had signed the document without reading or understanding it.

154. While it is well-established that pre-contractual negotiations cannot in themselves be used to draw inferences about what a contract means, a written agreement must be construed as a whole, having regard to the background knowledge available to the parties at the time of the contract: Popplewell J in *Lukoil Asia Pacific v Ocean Tankers ("The Ocean Neptune")* [2018] EWHC 163 (Comm), [2018] 1 Lloyd's Rep 654, §8. Pre-contractual negotiations may also give rise to an estoppel by convention, preventing one or other party from resiling from the basis on which the transaction proceeded: Lord Toulson in *Prime Sight v Lavarello* [2013] UKPC 22, [2014] AC 436, §29. The factual background may also be relevant in determining whether a term should be implied into the contract, as being necessary to give business efficacy to the contract, since the factors to be taken into account in that regard will include the surrounding circumstances known to both parties at the time of the contract: *Marks and Spencer v BNP Paribas* [2015] UKSC 72, [2016] AC 742, §27.

155. It is common ground that the GCPL shareholders' agreement is in several respects badly drafted. It is therefore necessary to consider it in the light of, among other things, the background facts known to the parties and the commercial implications of the agreement.

Having regard to those matters, the correct construction of the agreement is in my judgment as follows:

i) It is common ground that GCL is a necessary party to the agreement, and Mr Ong accepts that in that regard the written agreement did not correctly reflect the agreement between the parties.

ii) It was an express term of the agreement that 100 shares in GCPL should be issued and transferred to CSI, such that CSI would own 50% of the issued share capital in GCPL: recital 1 and clause 9.1. This is also common ground between the parties.

iii) It was an express term of the agreement that CSI and Mr Ong were to fund GCPL on a 50/50 basis: recital 3.

iv) It was an express term of the agreement that GCPL would own the SPVs in the proportions set out in recital 2, i.e. 50% of Thanet, 100% of Twerton Park and Twerton High Street, and 50% of Lords View.

v) GCL was still (by the time the executed agreement was sent to Mr Lim) the shareholder of the SPVs. Accordingly, to give the contract business efficacy, it was an implied term of the agreement that GCL would transfer its shareholding interests in the SPVs to GCPL, so as to bring about the ownership structure set out in recital 2. The need for such an implied term was, indeed, expressly acknowledged in the cover letter from Mr Tomkins.

156. I do not accept Mr Ong's contention that Mr Lim's investment was by way of loans (or primarily loans) which did not carry with it ownership of the SPVs. That contention is fundamentally inconsistent with recital 2 of the agreement; and I consider that recital 2 is in turn consistent with the background facts and an objective understanding of the parties' intentions. None of the evidence before me supports Mr Ong's suggestion that Mr Lim ever agreed to invest in GCPL without obtaining shareholdings in the SPVs.

157. The claimants' position is that, if the findings set out above are made, then GCL's shareholding in the GCPL SPVs, and the rights to receive sums from those SPVs, are held by GCPL on constructive trusts for the benefit of GCPL.

158. A constructive trust arises where the circumstances are such that it would be unconscionable for the owner of property to assert a beneficial interest in the property and thereby deny the beneficial interest of another: *Paragon Finance v Thakerar* [1999] 1 All ER 400, p. 409. The trust arises from the date of the circumstances which give rise to it: *Westdeutsche Landesbank v Islington* [1996] AC 669, p. 714. In the circumstances set out above, I agree that it would be unconscionable for GCL to assert any beneficial interest in its shareholdings in the SPVs and its rights to receive any funds flowing from those SPVs, in particular the Thanet project. Accordingly, constructive trusts arose with the effect that GCPL is the beneficial owner of GCL's shareholdings in the GCPL SPVs and the rights to receive sums from those SPVs, including in particular the proceeds of sale under the Thanet SPV. I will hear further submissions as to the date on which the constructive trusts arose, for the purposes of the order in these proceedings.

159. The claimants also seek specific performance of (i) the obligation to issue 100 shares in GCPL to CSI, such that CSI owns 50% of the issued share capital in GCPL; and (ii) the

obligation to transfer to GCPL the shareholdings currently held by GCL in the SPVs. It follows from my findings above that the claimants are entitled to orders to that effect.

The waterfall

160. The provisions as to the waterfall of distributions to be made to the shareholders were set out in clause 9.8 of the shareholders' agreement:

> "9.8 Distributions will be made in accordance with the following waterfall (in descending order):
>
> (a) firstly, to the shareholders, an amount equal to 10% per annum of Shareholder funds from the date of introduction of the funds which shall accrue daily at the end of every calendar year (the 'preferred return')
>
> (b) Secondly, to the shareholders, an amount which equates to 50% of each of the shareholders funds provided to the Company and invested by the Company in the Subsidiaries as the Subsidiaries return the invested sums to the Company. Nevertheless, the shareholders will continue to enjoy the benefits, unchanged as listed under this clause, even when their contributions (capital, equity or loans) are no longer required and have been returned.
>
> (c) Thirdly, to the shareholders, in proportion to the amount of shareholders funds of 50% each provided to the Company by the shareholders (even after the funds have been returned), up to:
>
> i) £3,152,880 received from Greenacre (Thanet) Ltd and,
> ii) £3,250,000 received in total from Greenacre (Twerton Park) Ltd and Greenacre Capital (Twerton High St) Ltd
> iii) £1,374,907 from Imperial Green Lords View Ltd
>
> (in each case, this is the 'priority return'. Any shortfall from any subsidiary will be compensated from funds in a more successful or profitable subsidiary)
>
> (d) Fourthly, to Greenacre Properties Ltd, up to the equivalent of the amounts paid to the shareholders under clause 9.8(c) (in each case, the 'catchup')
>
> (e) Fifthly, in respect of any remaining profits:
>
> i) 50% to the shareholders, in proportion to the 50% each of shareholders funds provided to the Company by the shareholders and
> ii) 50% to Greenacre Properties Ltd. Any fees payable to Greenacre Properties Ltd from the Subsidiaries will be treated as 'advances of account payments' to be offset against the amounts due to Greenacre Properties Ltd under this clause 9.8."

161. Mr Ong was undoubtedly correct to describe this provision as convoluted. It is badly drafted, and it repeatedly assumes that the shareholders in GCPL had indeed contributed funding to the company on a 50/50 basis, whereas the reality (as Mr Ong and GCL well knew, by the time that the executed contract was sent to Mr Lim) was that neither Mr Ong nor GCL had contributed anything remotely equivalent to the funding provided by

CSI, and indeed CSI was not yet a shareholder. The references to the "50% each of shareholders funds" must therefore be construed in that context.

162. I do not, however, accept Mr Ong's protestations that he did not and does not understand the effect of the waterfall provisions. Once clause 9.8(a) is interpreted in a way that gives effect to the reality of the unequal contributions by the parties, the effect of the clause is clear and is as follows:

    i) Clause 9.8(a) provides for interest to be paid to CSI and Mr Ong at a rate of 10% (compounded annually) on their contributions to GCPL. That is, in fact, essentially agreed in Mr Ong's witness statement.

    ii) Clause 9.8(b) provides for the repayment of CSI and Mr Ong's investments in GCPL, and emphasises (for the avoidance of doubt) that the benefits under the remainder of the clause will continue to accrue to CSI and Mr Ong even once those investments have been fully repaid.

    iii) Clause 9.8(c) provides for the payment to CSI and Mr Ong of a total of £7,777,787 split between them, in proportion to the funds provided by each of them to GCPL.

    iv) Clause 9.8(d) provides for a "catchup-up" payment to GPL of up to the same total amount (in so far as that remains available).

    v) Clause 9.8(e) provides that any remaining profits are to be split with 50% going to GPL and 50% going to CSI and Mr Ong, in proportion to the funds provided by each of the latter to GCPL.

163. Nothing in the evidence before me suggests any different construction of the contractual provisions.

Contributions by CSI and Mr Ong

164. It is common ground that CSI contributed £3,573,500 to GCPL. The claimants' pleaded case is that Mr Ong/GCL contributed only £231,360 to GCPL. Mr Ong and GCL are debarred from denying that figure. The defence had, however, pleaded that Mr Ong and/or GCL's investment in the GCPL projects was at least £1,651,695.

165. The defendants' figure was not (even before the debarring order) supported by any witness evidence on the part of the defendants. The best evidence before the court is therefore the Quantuma report, which considers in detail the transactions between the various companies, the figures recorded in the intercompany loan accounts, and the declarations in the statutory accounts filed for GCL, GPL and GCPL.

166. On the basis of that information, the overall position recorded in the Quantuma report is that GCL or Mr Ong made an initial investment of £231,360 in the GCPL projects, and GCL bore a further £41,728 of costs prior to May 2018. That latter contribution by GCL was not, however, recorded in GCPL's accounts as being part of Mr Ong's investment in the GCPL projects.

167. The Quantuma report also records £1,372,259 of subsequent intercompany transfers from GCL or GPL to the GCPL projects. Of that sum, £873,491 is identified as being directly attributable to funding provided by Mr Lim (including the Hyson House funds and the

CGW loan). The remaining £498,768 cannot be directly traced to specific investments made by Mr Lim for other purposes. The Quantuma report comments, however, that this figure came from bank accounts where funds from a number of sources had been intermingled, and that those intermingled funds included around £2.8m of funds drawn from Hyson House, Mr Lim's investment in CGW, and funds recycled from one of Mr Lim's initial investments in GCPL. On that basis the Quantuma report concludes that "it is unclear whether any net investment at all in the GCPL Projects can be attributed to Francis/GCL".

168. In those circumstances Mr Bailey submits, and I agree, that the distributions under clause 9.8 should be calculated on the basis of initial investments by the parties in the proportions of 3,573,500:231,360 (i.e. 94:6). There is simply no reliable evidence before me to suggest that any further sums were invested by either Mr Ong or GCL from their own funds, rather than from funds recycled from one or other of Mr Lim's investments that are the subject of the present proceedings.

169. It follows that any funds received by GCL (or GCPL, after the transfer of shares in the SPVs to GCPL following my findings above) are to be distributed under clause 9.8 on the basis of those proportions. If distributable profits are obtained by GCL prior to the transfer of the SPV shares to GCPL, those profits are to be held by GCL on trust for GCPL and are thereafter to be distributed on that basis.

Information claims

170. The information claims are bought by Mr Lim against Mr Ong personally in respect of the Bermondsey, Dublin and Cooks Road projects. In relation to the Bermondsey project, the information claim is also brought against GC180 (the fifth defendant), which is the SPV for that development.

171. The pleaded claims are that in relation to all of Mr Lim's investments in Mr Ong's property development projects, there was a personal contract between Mr Lim and Mr Ong. That contract included an agreement that Mr Ong would keep Mr Lim informed as to the progress of each of the projects from time to time, and particularly upon request by Mr Lim, and that Mr Ong would procure or use reasonable endeavours to procure that the relevant SPV also provided information to Mr Lim and/or any corporate entity through which Mr Lim invested. The claimants also plead a similar duty on the part of the relevant SPVs.

172. The amended defence pleads a bare denial of those claims. While Mr Ong is (as set out above) debarred from defending those claims, GC180 is permitted to defend the information claim regarding Bermondsey. Mr Ong did not, however, make any submissions about the Bermondsey claim (or indeed any of the other information claims) in either his written or oral submissions for the hearing, and did not call any witnesses to give evidence on behalf of GC180 in relation to the Bermondsey claim.

173. The only evidence before me is, therefore, that of Mr Lim. His evidence is rather vague, but I am satisfied that it is sufficient to support the claim of a personal obligation owed by Mr Ong to provide information to Mr Lim about the ongoing projects in which Mr Lim had invested. I am not, however, satisfied that there is enough evidential material before me to find that GC180 also (and separately) owed an obligation to provide Mr Lim with information about the Bermondsey project.

174. As to the claimed breaches of the information obligation, the pleaded breaches are (in light of the debarring of Mr Ong) taken to be admitted. In any event, however, it is apparent from the evidence of both Mr Lim and Mr Pearson, in the Quantuma report, that very little information, and no proper accounting information, has been provided by Mr Ong in relation to any of the three projects, notwithstanding requests by Mr Lim.

175. The claimants are therefore entitled to an order requiring Mr Ong to provide further information about the three projects. I will hear further argument as to the precise terms of that order.

Unlawful means conspiracy claims

176. The claimants' case is that there was a combination or agreement between Mr Ong, GCL and GPL to cause loss or damage to the claimants by unlawful means. On my findings above, the only impact of the conspiracy claims concerns the attribution of liability for the Hyson House and Lapland claims.

177. The pleaded unlawful actions in relation to those two claims consist of Mr Ong's misrepresentations to ALB and Mr Lim as to the purpose of the ALB loan for Hyson House, the breach of his director's duties by transferring the ALB loan monies to himself, GCL and GPL, the knowing receipt of the ALB loan funds by Mr Ong, GCL and GPL, Mr Ong's representations to Mr Lim during 2019 that the loan monies had not yet been drawn down, and GPL's failure to account to Lapland for monies received on its behalf. The claimants say that it is possible to infer from those matters the existence of an agreement or combination between Mr Ong, GCL and GPL to use Mr Lim's resources to financially support each of them and the Greenacre group of companies as a whole.

178. In order to establish a claim in unlawful means conspiracy, it is necessary to show that the claimant has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure the claimant by unlawful means, whether or not it was the predominant purpose of the defendant to do so: *Kuwait Oil Tanker v Al Bader* [2000] 2 All ER (Comm) 271, §108.

179. A defendant will be held to have intended loss to a claimant where that was the necessary corollary of the defendant's purpose, in other words where the loss to the claimant is the obverse side of the coin from gain to the defendant: see the comments of Lord Nicholls in *OBG v Allan* [2007] UKHL 21, [2008] 1 AC 1, §167.

180. The first question that arises from the present conspiracy claims is whether a conspiracy can be found on the basis of a combination between a defendant and a company or companies of which that defendant is the sole controller, bearing in mind that in the present case there is no doubt that Mr Ong was the controlling mind of both GCL and GPL.

181. The position on that is not entirely clear, as noted at §§2-019–2-021 of Grant & Mumford (eds), *Civil Fraud: Law, Practice and Procedure* (2018 and 1st supplement 2022). Both Gloster J in *Barclay Pharmaceuticals v Waypharm* [2012] EWHC 306 (Comm), §§220–9 and Barling J in *Twentieth Century Fox v Harris* [2014] EWHC 1568 (Ch), §150 held that such a conspiracy could arise. More recently, however, in *Raja v McMillan* [2021] EWCA Civ 1103, §§56–9 Nugee LJ commented that the point was "one of some

difficulty" and considered that it was right for the judge to have declined to strike out the pleaded conspiracy claim on this basis. He observed, in particular, that while it was not obvious that a requisite combination would arise simply where a person uses his company to commit an unlawful act, the same might not be true where a director procures the actions of two separate corporate entities as part of an overall scheme (§§56 and 60).

182. In the present case I do not need to decide the point, because even assuming that a director can in principle be found to have conspired with a company or companies under that director's sole control, it must still be shown on the facts that there was a conspiracy, and that the pleaded unlawful acts were carried out pursuant to that conspiracy. While proof of a conspiracy does not require an express agreement, there must at least be evidence that the relevant entities have deliberately combined, or were acting in concert, to achieve a common end: *Kuwait Oil Tanker*, §111.

183. One situation where a combination between a director and companies under that director's sole control might arise on the facts is a case where a scheme is implemented by the combined actions of several companies, as procured by the director of those companies. In effect, that is what was described in both *Barclay Pharmaceuticals* (referring at §226 to the corporate machinery of the various companies being used to damage the claimant) and *Twentieth Century Fox* (where the finding at §150 was that the controlling mind of the corporate defendants had arranged for them to participate and assist in the overall scheme described). That is also the situation which Nugee LJ considered, in *Raja v McMillan*, might quite arguably give rise to a conspiracy.

184. In the present case, no such allegation is made. Rather, the claimants contend that a conspiracy can be inferred from the sole fact that each of the various acts relied upon for the conspiracy claim involved the use of Mr Lim's resources to support Mr Ong and his various companies.

185. I have found above that the Hyson House loan monies were diverted to finance the ongoing expenditure of GCL and GPL, as well as some of Mr Lim's own expenses; and that GPL retained monies which should have been paid to Lapland. But the fact that acts involving different legal entities turn on the same type of wrongdoing does not inexorably mean that those acts were carried out pursuant to a combination between those entities. If the concept of a conspiracy is to be meaningful, something more is required to distinguish a case involving genuine combined or concerted action, and a case in which a director has simply acted in a similar way on behalf of a number of controlled companies.

186. The claimants do not, however, explain – whether in their pleaded case or their evidence – how the defendants' actions in relation to the Hyson House and Lapland projects are said to have been carried out pursuant to a combination or concerted action between the relevant defendants, as opposed to simply being the result of decisions taken by Mr Ong from time to time either on his own behalf or on behalf of one or other of his companies, as the case might be.

187. I do not, therefore, consider that the unlawful means conspiracy claim has been established in the present case.

CONCLUSION

188. For the reasons set out above, my conclusions are as follows.

189. **Hyson House claims.** The claims of fraudulent breach of Mr Ong's director's duties and knowing receipt of funds by Mr Ong, GCL and GPL are established. Hyson House is entitled to equitable compensation from Mr Ong for his breaches of fiduciary duty in relation to the ALB monies. Hyson House is also entitled to restitution by reason of knowing receipt against each of Mr Ong, GCL and GPL in the amount of the sums received by them. Hyson House is also entitled to an immediate order for payment by GCL of the rental sums received by it from January 2017 to January 2020.

190. **CGW claims.** GCL is in breach of trust for failing to apply Mr Lim's investment for the specified purposes, and Mr Ong is liable for dishonest assistance in that breach of trust.

191. **Lapland claims.** Lapland is entitled to claim repayment of the £500,738 development capital sum, and the net rental sum of £249,709 received by GPL.

192. **GCPL claims.** The correct construction of the GCPL shareholders' agreement is as set out at §155 above. GCL holds its shareholdings in the GCPL SPVs and the rights to receive monies from those SPVs on constructive trusts for the benefit of GCPL. The claimants are also entitled to orders for specific performance of the obligation to issue 50% of the share capital of GCPL to CSI, and the obligation to transfer to GCPL the shareholdings currently held by GCL in the GCPL SPVs. The correct construction of the waterfall for distribution of profits is as set out at §162 above, and any profits received by GCL (or GCPL, after the transfer of shares in the SPVs) are to be distributed on the basis of that waterfall, calculated on the basis of initial investments by the parties in the proportions of 3,573,500:23,360 (i.e. 94:6).

193. **Information claims.** The claimants are entitled to an order requiring Mr Ong (but not GC180) to provide further information about the Bermondsey, Dublin and Cooks Road projects.

194. **Unlawful means conspiracy claims.** I reject these claims.

195. I will hear further submissions on the date on which the GCPL constructive trusts arose, and on any interest to be added to the sums which I have ordered to be paid.